JUDICIAL COMPENSATION AND BENEFITS COMMISSION

COMMISSION D'EXAMEN DE LA RÉMUNÉRATION DES JUGES

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

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

VOLUME 1

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

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VOLUME 1

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

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

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

Good morning everybody.

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

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

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

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

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

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

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

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

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

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

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

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

des présentations et réponses à ces audiences.

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

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

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

COMMISSIONER BLOODWORTH: Thank you, Mr. Chair.

Bienvenu et bonjour.

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

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

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

MR. RUPAR: I will, thank you.

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

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

THE CHAIRPESON: Mr. Griffin.

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

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

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

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

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

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

Louise?

MS. MEAGHER: Thank you, Mr. Chairman.

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

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

Me BIENVENU: Monsieur le Président, bonjour.

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

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

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

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

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

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

I am in your hands.

THE CHAIRPESON: Perhaps you can do that right now.

MR. BIENVENU: Very well.

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

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

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

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

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

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

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

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

THE CHAIRPESON: Thank you.

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

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

MR. RUPAR: Thank you, Mr. Chair and Commissioners.

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

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

section in our Public Law group.

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

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

Me NUSS: Bonjour, Monsieur le Président, bonjour Madame la Commissaire, Monsieur le Commissaire.

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

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

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

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

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

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

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

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

Thank you again.

Maître Bienvenu, c'est à vous la parole.

MR. BIENVENU: Merci, Monsieur le Président.

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

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

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

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

JUDICIARY):

Members of the Commission, it is an honour to appear before you today on behalf of the federally appointed Judiciary.

As Counsel to the Association and Council, our mandate has been from the outset of this process, and it remains today, to cooperate with the Government and the Commission with a view to assisting the Commission in formulating recommendations to the Government, as it is your mandate to do under the *Judges Act* and the applicable constitutional principles.

In this regard, I wish to take this opportunity to thank Mr. Rupar, Ms. Turley, Mr. Shannon and their colleagues for their cooperation in this process, right from our first preparatory meeting with Government, in February 2015, through to this day.

And having mentioned, and truly I would like to echo Ms. Bloodworth and express personally and on behalf of our clients, our very best wishes to Ann for a prompt and complete recovery.

Mr. Chair, you've mentioned in your Opening Remarks the fact that the parties have filed extensive written submissions.

I do not propose to go over the ground

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

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

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

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

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

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

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

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

On substance, there is the salary

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

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

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

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

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

Starting then with the Commission's mandate.

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

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

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

Of course you must conduct your own inquiry.

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

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

I turn to process.

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

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

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

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

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

And that of course is correct.

But the question is, is it advisable?

And is it the preferable course?

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

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

quote the words of the Supreme Court:

> *"… cast a dim light on all involved."*

That's at paragraph 12 of *Bodner*.

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

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

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

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

The Block Commission considered it, and I quote:

> *"… entirely appropriate and arguably imperative that the Commission serve as the guardian of the Quadrennial Commission process, and actively safeguard these Constitutional requirements of*

independence, objectivity and effectiveness."

And other Commissions, without even seeing the need to justify it, acted in the same manner by providing guidance to the parties, either by way of formal recommendations or simply through insightful reasons.

Now, in the present Commission cycle, the process issues that arise can be categorised under two headings: issues relating to the constitution of the Commission and, (alas), renewed attempts to re-litigate settled issues in breach of the principle of continuity.

On the first subject, the constitution of the Commission, there are two issues.

First is the issue of the Government's initial nominee to the Commission which relates to the requirement of independence and impartiality required of Commission Members.

Second is the issue of the delayed appointment of the Commission Members by reason of the impending election.

And please allow me to address in turn.

Let me say first that the only reason

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

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

And it reads as follows:

> *"While the Government remains of the view that its initial nominee is an eminently qualified and appropriate nominee, further efforts to reconcile our different perspectives on this point would not be productive. In any event, our initial nominee has asked that his name be withdraw from consideration as the Government's nominee and the Government respects his decision."*

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

Now what is the legal position on this?

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

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

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

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

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

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

matter of the Quadrennial Commission.

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

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

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

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

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

And quite apart from the appearance of

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

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

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

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

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

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

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

> *"…neither adjudicative interest arbitration nor judicial decision making."*

That is at paragraph 14 of *Bodner.*

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

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

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

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

actual integrity, nor to his commitment to act impartially.

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

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

And let me close on this topic by saying this.

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

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

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

The Commission has seen references in

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

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

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

Now, our point here is a simple one.

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

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

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

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

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

And those Guidelines are reproduced under Tab D.

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

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

> *"… that cannot be deferred within the meaning of the same Guidelines."*

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

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

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

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

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

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

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

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

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

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

communities, and even states.

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

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

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

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

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

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

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

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

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

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

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

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

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

income that was higher than the 75th percentile.

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

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

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

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

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

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

the Government of Canada: "Enough is enough!"

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

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

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

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

And why do I do this?

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

increase.

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

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

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

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

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

Now, as the Commission knows, three

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

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

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

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

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

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

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

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

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

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

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

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

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

judicial independence within the matrix of competing government priorities.

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

> *"…the Commission must consider the economic and social priorities of the Government's mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which is why Commissions must make their recommendations on the basis of 'objective criteria, not political expediencies.'"*

That's at paragraph 57 of the Block Report.

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

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

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

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

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

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

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

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

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

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

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

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

> *"…consideration of general trends"*

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

The Commission should be very wary of this approach.

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

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

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

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

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

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

Now, the Government advances in its

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

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

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

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

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

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

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

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

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

I quote from the Courtois Report:

> *"… individuals of outstanding character and ability."*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What credibility would the comparison have?

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

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

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

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

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

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

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

considering the DM-3 comparator.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether we call these “parameters”, “filters” or “exclusions:, the underlying notion is that there needs to be as accurate as possible, a comparison between the income date for the self-employed population being sampled, and the pool of outstanding candidates that would be considered suitable for a judicial appointment.

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

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

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

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

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

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

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

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

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

to self-employed lawyers income data.

And let me address first the 75th percentile.

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

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

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

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

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

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

In contrast, Ms. Haydon relies on her

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

> *"…bottom target where the goal is the attraction of exceptional or outstanding individuals."*

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

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

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

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

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

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

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

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

I turn to the age range of 44 to 56.

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

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

Again, a focus on continuity.

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

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

age range.

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

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

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

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

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

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

The McLellan Commission adjusted it to

$60,000.

Drouin applied 50, McLellan adjusted it to 60.

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

Now, why is this filter important?

The figures speak for themselves.

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

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

Mr. Pannu calls income exclusion, and I quote:

> *"An unusual approach that distorts the results."*

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

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

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

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

By her measure, 100,000 is reasonable.

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

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

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

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

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

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

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

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

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

Now, Mr. Chairman, Members of the

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

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

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

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

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

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

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

Ms. Haydon's approach is to use

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

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

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

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

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

But the bigger is this.

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

We respond by asking what exactly is problematic about that?

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

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

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

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

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

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

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

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

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

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

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

We don't know.

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

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

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

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

and we do not think that disability should be included.

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

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

> *"… revised his approach in May 2012, and valued the disability benefit as part of the judicial annuity."*

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

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

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

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

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

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

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

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

Briefly, general economic conditions.

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

And what we would emphasise is the need for the Commission to adopt the long view, because your recommendation will apply until April 1st, 2020.

And to be sure, there is a lot of discussion presently in the Government budgetary planning of deficits, but it is also the case that the Minister of Finance insists that this deficit is an investment, and that is something that the Commission should consider.

The Commission should also consider what the Minister of Finance said in a speech in Toronto on April 8th, 2016, and you'll find that at Tab J of our Condensed Book.

And there he said -- and he's repeated that on many tribunes -- he said that Canada, and I quote:

> *"… has a very manageable debt position."*

He added that:

> *"Canada's debt to gross domestic product ratio is low, and that this combined with low interest rates means that we can make the necessary investments to strengthen our economy with confidence, in a*

responsible way."

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

I come to an important topic.

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

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

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

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

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

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

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

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

And that is so because it is automatic and because its rate does not depend on the Government. So, it is vitally important for financial security and judicial independence.

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

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

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

evidence that would justify a breach of that contract?

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

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

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

"… lightly tampered with."

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

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

Mr. Hyatt is a prolific labour

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

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

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

Now why the difference?

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

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

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

The Government has not dealt with this

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

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

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

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

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

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

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

of salary recommendations by the Government.

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

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

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

I see that we have company.

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

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

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

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

path it is inviting you to tread.

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

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

But I've said enough on this.

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

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

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

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

And as a result, the process lost all credibility.

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

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

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

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

And that bring me to advancing two propositions.

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chair. Thank you,

Members of the Commission.

LE MEMBRE PRÉSIDENT: Merci, Maître Bienvenu. Thank you, Maître Bienvenu.

Thank you for your remarks.

I think your remarks are directly connected with your submission.

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

Thank you very much.

We will now take our break.

Thank you very much.

See you in ten minutes.

--RECESSED AT 11H25 A.M.

--RESUMED AT 11H40 A.M.

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

MS. MEAGHER: Yes, thank you, Mr. Chairman.

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

THE CHAIRPESON: Thank you, Louise.

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

day.

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

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

Me NUSS: Non. Je ne pense pas.

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

LE MEMBRE PRÉSIDENT: Voyez ça comme un compliment!

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

THE CHAIRPESON: Maître Christopher Rupar et Maître Kirk Shannon, please excuse-me for my mistake.

MR. RUPAR: Thank you, Mr. Chair.

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

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

And as my friend, Mr. Bienvenu, put it

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

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

And knowledge and context is a theme that I think we will be coming back to as I make my remarks, because much of what we talk about is context. Context in which the Judiciary is situated, both in the private sector and with the public sector.

--SUBMISSIONS BY THE GOVERNMENT OF CANADA:

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

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

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

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

And at that point in our position, is

that there isn't much to add on that.

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

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

The Government has been involved in making changes.

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

There have been statutory changes with respect to the process.

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

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

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

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

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

The role of the Commission is unique.

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

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

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

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

The process of the Commission was laid

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I believe there was a commentary that, you know, the 50 percent percentile that we should be looking at is at a race to the bottom, was the phrase that stuck in my mind.

And it's not a race to the bottom.

And it may very well be that there are only 21 percent of the Bar which would make an outstanding candidate for the Judiciary.

But the point is this.

That 21 percent is spread throughout the entire spectrum of the Bar. And this is not our position -- It is our position, but it's not something we came up with.

It's not something new.

This is what Commission after Commission after Commission has said. And perhaps it was put best by the Block Commission. This is at paragraph 116, and it's at Tab 14 of our material or condensed book.

I won't ask you to turn that up. I will just read it to you.

And what the Block Commission said was this:

> *"The issue is not how to attract the highest earners; the issue is*

how to attract outstanding candidates."

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

"It is not responsible to match salary level of Judiciary to the highest earners of the largest urban centers."

At page 36 of that same report it was said:

"No segment of the profession has a monopoly on outstanding candidates."

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

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

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

Adequate earnings do not necessarily mean the highest earners.

Meeting that test does not necessarily

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

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

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

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

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

And this is Mr. Scott testifying before the Legal Affairs Committee in the late 1990's. And I am at the left-hand side of page 34, the second paragraph down, after Mr. Scott, if you're with me on that.

And what Mr. Scott testified was this:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Newell at paragraph 16 said this:

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

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

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

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

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

full basis for your recommendations.

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

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

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

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

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

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

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

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

and the percentile they used.

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

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

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

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

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

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

And that's what I brought to you earlier.

We have to have that broad spectrum of

representation in the Judiciary.

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

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

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

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

> *"In the February 2016 survey, private sector economists revised down the average outlook for real GDP and GDP inflation for 2016 compared to the November 2015 Update."*

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

In the next paragraph:

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

And then the second last paragraph on this page:

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

And in the final paragraph:

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

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

And "challenging" is the word that has

been used by the Finance Minister with respect to Canada. And there are budget deficits that have come on in the last two years which are significant.

And this, of course, is a contextual factor that by statute, the Commission will be looking at under the first criterion.

Now, if I can turn to the second criterion which is financial security and independence.

And what I'd like to do is take you -- after telling you I won't take you to the book very often -- I am going to take you back to the book one more time to Tab 2, which is the *PEI Reference* case.

And what I'd like to take you to is paragraph 193 of that case. Again, this is as context.

What the Court said there is as follows:

> *"I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, so thereby ensure public confidence in the*

administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or legislature or to receive benefits from one of the litigants."

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

I am starting at the second paragraph:

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

So, there is those two elements that

the Commission will be balancing.

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

We should also look at who makes up the Judiciary.

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

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

So, what does that mean?

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

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

Yes, it should be included, but it has

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

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

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

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

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

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

In the provinces, it's similar.

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

And when we look beyond that, when we

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

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

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

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

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

Perhaps we should look at that for a moment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sector.

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

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

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

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

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

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

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

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

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

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

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

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

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

would be without the age filter.

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

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

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

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

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

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

one particular year.

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

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

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

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

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

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

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

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

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

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

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

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

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

lawyers."

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

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

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

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

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

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

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

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

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

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

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

That was at paragraph 67 of that decision.

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

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

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

do so.

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

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

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

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

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

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

And this is at Tab 13 of our material.

And this is what the McLellan

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

> *"We have been adverted to the precedential value of the previous Commissions. It is proper that we state that we did not consider ourselves to be bound by previous decisions, including those of the Drouin Commission. We were, and are, of the view that it would be counter-productive to fix judicial salaries as having a pre-determined relationship to other salaries, whether those of senior civil servants or senior legal practitioners. Those considerations represent dynamics at work in our society and they change constantly. We believe the approach was to consider these and other factors in light of the most current information and to make recommendations accordingly. Were it otherwise, there would be no need to address this subject every*

four years, as contemplated by the Judges Act.”

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

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

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

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

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

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

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

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

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

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

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

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

In our submission there hasn't been.

If we go back to Mr. Scott's

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

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

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

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

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

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

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

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

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

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

I would also add this.

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

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

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

Both parties, quite frankly, principal

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

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

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

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

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

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

So, there is an incremental increase

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

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

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

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

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

And we just simply suggest that that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This will give us firm numbers and

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

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

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

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

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

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

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

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

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

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

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

I am cognisant of the time, Mr. Chair,

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

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

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

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

THE CHAIRPESON: What we can do is to stop for lunch and when we come back, you continue your presentation.

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

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

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

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

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

Thank you very much.

-- LUNCHEON RECESS 12H45 P.M.

-- UPON RESUMING AT 13H30 P.M.

THE CHAIRPESON: Welcome to this afternoon session.

Monsieur Rupar, à vous la parole.

MR. RUPAR: Thank you, Mr. Chair.

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

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

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

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

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

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

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

Now, the MPs have moved on from that.

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

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

buying power.

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

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

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

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

More of a technical matter.

Then at 1.3, the statement says this:

> *"The index is used for an*

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

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

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

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

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

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

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

THE CHAIRPESON: Thank you very much, Mr. Rupar.

So we will pass to Mr. Nuss.

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

MR. NUSS: Merci, Monsieur le Président, Honourable Commissioners.

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

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

---SUBMISSIONS BY CANADIAN APPELLATE JUDGES:

My submission will follow the following pattern.

I will first go into the difference between 2008 and now, that is the Block Commission and the present situation.

I will then go into the Government's Reply to the submission made before this Commission, and I will, after that, go into some of the substance of the submission that we have made to you.

And will then talk about the question of the process, the question of the non-implementation of the recommendation of the Levitt Commission.

For me, I would be tempted to say that it's déjà vue.

I've been coming before Commissions now for a numbers of occasions.

I was with Chief Justice Robert when we made a submission before the McLellan Commission.

I accompanied Roger Tassé when he made the submission before the Block Commission, and I was even there before signing requests made in 1996, and then the request made before the Drouin Commission.

But to say "déjà vue" would be wrong.

In 2008 there had never been a

recommendation made on the merits by any of the Commissions.

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

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

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

So, that was the start of it.

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

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

Before the Drouin Commission, you have

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

And we know that the only entity that can make the request is the Government of Canada.

So here, the Government of Canada had the statement by the Drouin Commission; 'We have a compelling report, it's an important question, but we want to do more studies and we'd be prepared to do it.'

However, the Government never made that request to the Drouin Commission, and so there were no further studies.

Before the McLellan Commission, we have the statement that if the McLellan Commission was drawing up the system, it would probably grant, probably, grant a differential.

And in the very last line we read on that paragraph that it asks the Government, or suggest to the Government that it study bringing down legislation to effect a differential. And why did it do that?

Because it considered it had no jurisdiction.

The essence of the McLellan Report on this issue was the differential important and probably

one which we would grant if we were dealing with it on the merits, we cannot deal with on the merits because we consider that they *Judges Act* does not allow us to do that. That was the crux of that report.

So, coming to 2008, we had no decision on the merits, on this request which had been made over the years to a number of Commissions.

And a very detailed report was submitted to the Government by the Block Commission, in which it lays out the fact that this is the first time that a decision will be made on the merits.

And indeed, there was a decision, and it granted the request for a differential.

And not only did it grant the request for the differential, it did it on the basis of a very thorough and compelling and a very comprehensive analysis of all the arguments that were submitted.

While we know why the Government did not consider that recommendation, it didn't consider any of the recommendations made by the Block Commission because of the financial crisis, it didn't go into the merits of any of them, saying that if we were in a position, we would grant or we would not grant.

Coming before the Levitt Commission four years later, there was a request that all the

recommendations of the Block Commission be adopted by the Levitt Commission.

And specifically, there was a request that the differential of three percent be granted to Appeal Court Judges.

The Government in its Reply said very little about that, one or two paragraphs, not going into any of the substances, not going into any of the reasons set out in the Block Report as to why a differential was warranted.

Instead, as I say, it limited itself to a very laconic reply.

It is to be noted that no other entity contested that request of a differential for three percent. No judge, no institution, no other body said: 'Oh. Hold on a second. You're being requested to grant three percent. Do not do it for the following reasons.'

So that when we had before the Levitt Commission, the report which basically said 'We agree that a differential should be granted, and we set it at three percent.' that was the situation until the Government's response saying: 'No. We are not going to follow this recommendation."

And what the Government did was it

repeated all the arguments that had been previously presented to all the Commissions having to deal with this matter, starting at Drouin Commission to McLellan and to the Block Commission. And repeating and saying: 'Now, I am the one to judge it, so I will not grant it. I will not go along with it.'

So, there has been a significant change between then and now.

Before this Commission, you only have the Government opposing it, plus you have Justice Campbell, and you have the Superior Court Judges of Ontario who reiterate what they said before the Block Commission.

And all those matters were dealt with by the Block Commission in great details.

So, what has changed?

What has changed is that since 2008, there are two recommendations made by two separate Commissions, which distinguished members of Canadian society sat, and which recommended that the differential be granted to the Appeal Court Judges.

In the first instance in the Block Commission, in spite of some 18 submissions which contested that request and which were dealt with completely.

So, what you have is today decisions or recommendations.

You have, if you will, a precedence and an analysis made on the issues on the merits, saying why the Appellate Judges should get the differential. That's one.

You have no Judge of the Appeal Court, of any Appeal Court contesting the request presently made before you. Not one.

You did have a Judge of an Appeal Court contesting and submitting a submission before the Block Commission and before the McLellan Commission, but that was dealt with and it was dismissed.

But the fact is that today there is no Judge of any Appeal Court that has filed a contestation, so that the essential changes that we have are, we have two instances, the two most recent instances of recommendations being made.

I move to the Government Reply to the submission before you.

And I submit that it really goes on a faulty and incomplete reading of what occurred up until now.

You have in paragraph 115 of what they call a reply to various other submissions.

And the very first line in 115 is:

> *"The Government submits that nothing has changed since the Quadrennial Commission that warrants an increase in Appellate Judges."*

Well, I've just shown you.

I've just made the demonstration that there is, there has been a fundamental change, and that is a decision, an analysis and a study made by previous Commissions saying that a differential should be granted. And that is a fundamental change.

Then the Reply goes into what it describes as the recommendations made by previous Commissions. And I suggest that it is incomplete.

For instance, on the McLellan Commission, it takes one paragraph but omits the paragraph that deals with the Commission's view that were it called upon to set up a system of salaries, it would probably grant the differential.

It also admits the fact that the report mentioned the Government should be considering that with respect to future legislation.

In paragraph 117 we read:

> *"The Block Commission and the*

Levitt Commission did not accept the argument that a salary differential between trial and appellate judges was necessary to ensure financial security of appellate judges, or to attract outstanding candidates."

This, to put it bluntly and with respect, is a strawman. It wasn't argued that that's the reason for giving a differential.

And to say that it wasn't proven or demonstrated is really fighting against a nonexistent argument.

The reasons for the giving of the differential is a different role, a different function of the Appeal Court, and its place in the hierarchy in the Canadian judicial system.

And it never was argued that it was necessary for financial security or to attract candidates to the Appeal Courts.

So, as you go on in this Reply, a very short Reply, the Government says that it maintains its longstanding position.

Well, that's true, except it seems to me that the Government to maintain its longstanding

position was required in this instance, to come forward and demonstrate either that there has been a change since 2008, or that what has been decided or recommended in 2008 by the Block Commission and then repeated by the Levitt Commission, is manifestly wrong, and that it is so wrong that it should be more or less set aside and decided anew. That, it did not do.

Nowhere in the Government's Reply do we see a demonstration of why the reasoning set out in the Block Commission, and it's a very lengthy reasoning, as you have noted, no doubt, it is in any instance wrong.

Every aspect of the contestation was studied and was analysed, and in a very thorough and with respect, convincing manner dealt with.

At the very end of the submission we have the elements which they say should be taken into account.

The first point is all these elements were submitted before the Block Commission.

I don't know if in oral submissions they were submitted to the Levitt Commission, but in the written matters they were not submitted to the Levitt Commission.

One could assume that if they were not

submitted, that the Government at that stage going before the Levitt Commission, did not rely upon them.

The first one is the lack of consensus of approximately 1,100 trial court judges.

With great respect, that is not a consideration to be taken into account as to whether the differential is adequate or not. This is a question of principle.

Other people may disagree with it, but the question is: what is the correct principle?

And if it is a correct principle, then whether 1,100 have other views or have differing views, or different nuances is really not important.

You will sometimes not get consensus. You certainly won't get unanimity on almost any question. And this to me is not a pertinent question before this Commission.

To the real risk of negatively affecting the goodwill and collegiality among trial and appellate judges, it never has been explained what that means.

In what way, where is the demonstration of the goodwill and collegiality?

In the period after the Block Commission came down with its recommendation and when

the Levitt Commission came down, there was no controversy. There was no wrangling, there was no uproar: 'Oh! What happened here? Block Commission granted three percent. We can't go on or we won't talk to you. We won't sit at the same dining table.' Or what have you.

And let's not forget that the Levitt Commission's recommendation was basically in force until the Reply of the Government, some eight or nine months later.

And again, there's nothing that has come forward to show that this created any kind of animosity or wrangling amongst the judges.

But that would be a wrong measure anyway.

Because if in principle it's correct, if other people might not agree with it, then that's a fact of life. But it doesn't detract from the propriety and the appropriateness of the decision.

The fact that trial court judges sometimes perform appellate functions, that was dealt with in detail by the Block Commission, that it occurs so rarely that it should not be taken into account. And same thing goes for number 4.

With respect to number 5, the fact

that trial judges bear sole responsibility for decisions whereas appellate court judges sit in panel and thus share workload and responsibility, it's a very hard one to follow.

What do we say about the Supreme Court Judges?

There are nine of them that share the responsibility.

Should their salaries be diminished, should they be in any way affected negatively because they share the workload among nine?

And is it really less work?

With great respect, I don't think that that can at all be demonstrated.

The fact that three people are working on a matter does not mean that any one of them is working less than if they were called upon to be sitting alone.

They are all working together and the process of the rendering of a decision in Appeal involves the interaction of three judges, admittedly, but it is not a factor to be taken into account with respect to what an adequate differential would be.

So, when we look at this summary, if you will, at 122, with respect, what strikes us is that

this is number one, a repetition of what was said on previous occasions before Commissions which dealt with the matter.

And that on the substance of it, on the validity of it, that it doesn't meet the tests which are required as to being in any way persuasive for negating the request for a differential.

It should be noted that the appellate judges, even after all those years, did not get exactly what they wanted.

Going back to the Drouin Commission, the conclusion was, while we're the Appellate Court between the Trial Court and the Supreme Court, and therefore a differential midway between the salary of a Trial Court Judge and that of the Supreme Court Judge would be in order.

We know that the Drouin Commission, for reasons which it stated, did not deal with the question on the merits and therefore didn't discuss that.

But coming before the McLellan Commission, the Appeal Court Judges reduced their request, and the reasoning was this: It's not accurate to say that the distinction or the difference between the Appeal Court and the Supreme Court is equal to the

difference between the Trial Court and the Appeal Court.

The difference between the Supreme Court and the Appeal Court is greater in our judicial system than that which exists between the Appeal Court and the Trial Court, and therefore, they ask for a differential of 6.7 percent.

And that is approximately one-third of the difference between a Trial Court Judge's salary and a Supreme Court Judge's salary. I am talking about the puisne level.

And it was considered that this was an appropriate measuring of the place of the Appeal Court in the hierarchy, in the Canadian judicial hierarchy in comparison with the Supreme Court, and in comparison with the Trial Court.

And that was what was presented to the Block Commission, but the decision that came down or the recommendation that came down was that the differential was warranted and justified, but in all the circumstances it would be three percent.

So, basically a little bit less than one-half of what the Appeal Court Judges were requesting.

But the Appeal Court Judges accepted

it. They didn't dispute it. They went through the system, they made the arguments and the body that had to decide that, the Commission, came down with their recommendation and there was no reason for the Appeal Court Judges to quarrel with that or in any way try to contest that.

I open with that reaction of the Appeal Court Judges because the Government has throughout acted in an opposite way, directly opposite way, because the situation that we have been faced with is that the Government makes its representations to an independent Commission set up for the purpose of deciding the adequacy of the salaries of the Judiciary.

It has all the opportunity to bring witnesses, to present evidence, and it avails itself of its right to make its representations *in extenso*. And it did that before the Block Commission.

And yet when the recommendation comes down, it puts on its hat in the framework of a response and says: "The recommendation is not accepted."

And why is it not accepted?

Because one, two, three, four, five, six -- basically, what I said before the Commission is the reason why I am not going to accept what the Commission recommends.

Now, with great respect, it seems to me that that is not following the process; it is not following what *Bodner* tells us.

If the decision, or the recommendation of a Commission is at the very heart of the functions of the Commission, is at the very core of its raison d'être, then the Government has to come up with something which has to fit a standard of control like manifestly absurd or unreasonable.

It's not a case where the Government invokes a reason which is in its field of competence, for instance, the financial crisis that occurred in 2008 and 2009.

One might disagree with the Government's assessments, but certainly it was an area which was fundamentally in the knowledge of the Government, something which came up after the Block Commission's report was submitted, and which was based on a factual basis which existed and on compelling reasons.

But that's far different from a situation where a Commission set up to decide adequacy after weighing, carefully weighing all the factors, comes out with a recommendation which it was set up to consider and to make.

If on the very cores matters which this Commission is called upon to make, the Government, not only after making its representations and getting a rejection, but comes back and says: 'Well, I made that. I pleaded it. I lost. But I didn't really lose because I am going to not follow that recommendation', then the very purpose and integrity of the Commission is attacked.

And that is the great danger which occurs, in my view, when the Government took the position that it took after the Levitt Report.

I am not quarrelling with the position they took after the Block Report because it seems, in my view, to come within the framework of what the *Bodner* decision said.

But what happened after Levitt was not within the framework of what was said.

And I suspect, and I hope I am wrong, that what the Government's Reply Submission today says: 'Look. This is what we did before Block. This is what we said. This is what we said before Levitt.'

And this was our response and they didn't get it, and we're repeating the same thing before this Commission and no matter what you do, they're not going to get it. I sincerely hope that

that is not the case.

But even if that is in their mind or someone's mind, this Commission is independent. This Commission owes nothing to the Government.

And this Commission must do what is right on the basis of what is presented before it, the material that is presented before it, and on the basis of a principle.

So, with great respect, I ask you to take that into consideration, and even though the response of the Government, two or three pages, more than, I might say, the reply to the Levitt Commission, to consider on the basis of the principles which Mr. Bienvenu came out with with respect to process.

If it's complete, if it follows the line, continuity of other Commissions have done, then absent compelling evidence that it's wrong, you should not change it.

But I am prepared to go on, as I will now, with what our submission is as to why it is a proper recommendation and it is a proper request.

A word about perhaps what might be considered the brevity of the submission put before your Commission. And we have to look at the historical context.

For a number of instances, going back, we can go back to the Scott Commission, but certainly the Quadrennial Commission, the Drouin Commission, the McLellan Commission and the Block Commission, the Appeal Judges had the time to prepare in some detail because the dates were set out and the request was set down in more elaborate form.

Certainly you will see from the submission made to the Block Commission, which is produced as an annex to the request we're putting before you, you will see the great detail and the research that was carried out.

And the Block Commission, as we know, recommended the differential.

Before the Levitt Commission it was not necessary for the Appeal Court Judges to make a separate representation, because the Association of Superior Court Judges presented a submission saying all the recommendations should be adopted.

So, coming before this Commission, we are eight years later where basically Appeal Court Judges have not been studying, researching the matter, and when at the end of February the Superior Court Judges Association announced that they were going to take a neutral position, neither for nor against the

question of the differential.

What was put together here was put together, basically, in eleven days.

And you will understand that the type of research and canvassing that went on previously could not be done.

But the principles are the same which were involved previously, and the soundness of the arguments are the same.

So, if we come down to the submission, it is basically centered on the different functions of an Appeal Court as compared to a Trial Court, and its different place in the hierarchy.

And it's trite to say the Supreme Court is the highest Court, and after that, are the Appeal Courts throughout the country and then come the Trial Courts, and then come the Courts appointed by the provincial authorities, going right down to the Justice of the Peace, but there is a definite hierarchy, and the hierarchy sometimes gets involved in one court, having to consider the soundness of a decision of a lower court.

Appeal Courts consider the soundness of a decision by a Trial Court, not vice versa. Trial Courts don't modify judgements of Appeal Courts; they

don't overturn judgements of Appeal Courts. The opposite is the pace.

So, this notion is set out in full in the two latest Commission reports.

You'll have it in the Levitt Commission Report at paragraph 64:

> *"Appellate Judges must not only state the law, they must also correct legal errors made in courts of first instance. Moreover, Appellate decisions have a greater sense of finality than those of Trial decisions. These decisions can be overturned only by the Supreme Court of Canada, a Court which in recent years has fewer than 100 cases annually. Furthermore, Appellate Court decisions are consistently applied by lower courts and are considered to be more persuasive jurisprudence than Trial Court judgements."*

This capsulates what was said in more detail in the Block Commission Report.

And I beg your indulgence if I read

these paragraphs which are to me crucial.

At paragraph 154:

> *"The impact of Appellate work therefore extends far beyond the individual litigants in a particular case. Appeal decisions are binding not only on the parties but on all future cases, unless the Appeal decision is overturned at the Supreme Court. Appeal reasons must therefore be drafted in the awareness that they are unlikely to benefit from further review for error. In addition to being binding law within the province, the decisions of Provincial and Territorial Courts of Appeal have considerable persuasive value in other Canadian jurisdictions. This expands the likely audience for decisions of Courts of Appeal and illustrates the breath of impact of such decisions."*

That was paragraph 155.

And finally on this point, paragraph

156:

"The advent of the Charter as affected the role of Courts at all levels but is imposed on Appeal Courts in particular, an expanded role in the interpretation and development of the law. When one combines the function with the fact that very decisions of Provincial Courts of Appeal are appealed to the Supreme Court of Canada, it becomes clear that Provincial Courts of Appeal play a central role in the settlement and development of the law. This includes the role the public courts play in hearing references on constitutional questions, questions which may be particularly complex and controversial. In fact, Courts of Appeal have been responsible for the settling the law nationwide in several keys areas in the past two decades, including the question of same sex marriage and on langue

rights."

And it's to be noted that the references, the laws providing for references provide for references in the provinces to the Appeal Courts, not to the Trial Court, and then of course, federally to the Supreme Court of Canada.

So this function which is in the role of the Appeal Court is one which places it number 2 on the hierarchy, and which warrants a differential.

In considering the differential, we went also to other jurisdictions. It's not as if something untoward is being requested. In Canada there are differential at all other levels, from Magistrates Court going up to the Superior Court.

Even on the courts themselves, you have a differential between puisne judges and chief justices.

At the inception, after Confederation, there were differences; there was differentials in a number of provinces which existed until 1920.

It was in 1920 that you had the same salary given to the Trial Court Judge and to the Appeal Court Judge, as far as the federal appointments are concerned.

But in England, they had the same

salary for Trial Court and Appeal Court from about the mid-nineteenth century until about 1970, when they set up a Commission to study the question of wages.

And the Commission came back with a recommendation that there should be a differential granted to Appellate Judges, and they put it on the basis because an appointment to the Court of Appeal is a promotion. It's an elevation. It's a higher responsibility, and recognition should be given to that higher responsibility by granting a modest increase of a proportionally modest increase called a differential.

And so a differential was granted.

But in England is it was six percent or so, and that has been maintained up to the present day.

In the United States, in the federal system there's a differential between Trial Court and the Appeal Court and of course, between the Appeal Court and Supreme Court.

On all State Courts in the United States of America you have differential at all levels: Trial Court, sometimes Intermediate Appeal Court and even the final Appeal Court, or in some States this is called the Supreme Court in the States, there is a differential.

And the same applies in other jurisdictions with common-law, for instance in New Zealand.

So, the excerpts that we recited from the report of the Commission which you will find in the document which is filed as an appendix to the Brief, at page 13.

At page 19 talking about the Lord Justices of Appeal.

They talk about:

> *"A differential should be created for the Lord Justices of Appeal in relation to the puisne judges, notwithstanding their interchangeability, in order to create a clear promotion step."*

And that was really the second step with respect to the differentials in the United Kingdom.

In Ireland they have interchangeability.

And perhaps I ran ahead of myself, because the first instance was in -- you'll find at page 12 of our brief, the Lord Justices of Appeal for England and Whales, a differential was granted, but

they didn't deal with Ireland or Scotland. That came the following year, and that was the excerpt which I just read.

So in the result, you had a differential of 7.14 percent.

So it's not because for over a hundred years they didn't have any differential in England that that prevented first, the Advisory Board and then the Parliament to enact legislation which on the question of principle, on the question of the appropriateness and on the question of recognising the hierarchy and the promotion that the differential was granted.

We should also remember that when appointments are made to the Supreme Court of Canada, they are made generally from judges who are sitting in the Court of Appeal.

In the last forty years or so, in the records that we've examined, there has been no appointment from a Trial Court. There have been three appointments from advocates practising in the courts, but who are not sitting on any court.

But aside from those three, every nomination has come from a judge who is sitting in a Court of Appeal.

So there again, it is obvious that the

Government has looked upon it and public looks upon it as being a preparation for the Supreme Court of Canada, and that the functions performed on the Appeal Court -- and this is the crucial part -- our functions similar to those performed in the Supreme Court of Canada, and are valuable in the process of determining whether a person should be appointed.

Now, does the Government consider Trial Judges and Appeal Court Judges really being the same level?

We have a rather striking demonstration, a very recent one that that is not the case.

The Government, Parliament came down with a law respecting financial disclosure, amendments to the proceeds of crime, money laundering and terrorist financing, maybe that's a little, at first sight, remote from what we're considering, but it's not remote in this sense.

That a number of persons were considered to be politically exposed domestic persons. What does that mean?

That means that the Government and Parliament decided that these persons should come under the possibility of surveillance by financial

institutions with which they do business. They and their families.

And so you have the list of persons who fall into that category and starts off with the Governor General. This is Bill C-31. So it's very recent indeed.

And it goes on with members of the Senate, deputy minister, our equivalent rank, ambassador, military officer with a rank of general or above, president of a corporation, head of a government agency, judge of an appellate court in a province, the Federal Court of Appeal or the Supreme Court of Canada.

So there you see an illustration of the difference status, the different stature of an Appeal Court Judge as opposed to the Trial Court Judge.

And I used the word "opposed", I think incorrectly.

I don't want to leave the impression that Appeal Court Judges are opposed to Trial Court Judges, but they are differently categorised, if you will, and obviously exposed to pressures which Trial Court Judges are not, according to this Bill C-31, which was adopted by Parliament.

So, to say everybody is in the same boat and there should be no distinctions on the salary

is not a correct assessment.

On the exact numbers of persons appointed since 1979 to the Supreme Court of Canada, there were 30 appointments and 27 came from Trial Courts and 3 came from private practice, the most recent one from Québec.

I come now to the submission to the Block Commission, and that is Schedule A to the submission put before you.

Now basically, I should not be having to do this.

In my submission, once you've had a recommendation based on a full examination of the issue, on not one occasion but on two occasions, if the Government wants to change that, it's the Government who should come forward and present you with compelling evidence which would justify a modification. That has not occurred here.

You have no demonstration, no presentation of anything which would, in my respectful submission, allow for a modification of what was decided by the Block Commission and the Levitt Commission.

However, from an excess of prudence, I will go over what was presented to the Block

Commission, and very very rapidly, I might say, and submit to you that all these factors applied today, have in no way been diminished, nothing has diminished in the eight years before this was fully canvassed which would warrant straying or differing with respect to the recommendation for a Commission.

Some parts of it dealt with some matters which have since been dropped by the Government, and I won't go into those. I will just go into the merits of the request.

So, on the question of the hierarchy, as I mentioned, we know that in Canada we have this hierarchy where the Supreme Court is at the top and the Appellate comes next, so that what you have is an historical anachronism.

And this is developed in the argument and is dealt with in the report of the Block Commission saying, whatever may have been the situation in 1920, and 30 and 40, the fact is that in Canada we have separate Courts of Appeal which performed separate functions, and therefore we have to examine the separate function to see what the places in the hierarchy, and if warranted, to grant a differential.

Also, one should consider what happens in any other endeavour, whether it be industry or

whether it be Government.

Persons who are promoted within a structure, government structure, receive a higher salary. And that is throughout, I might say, the human activity.

It would be too strong for me to say this is the only example of human activity where a promotion and elevation is not accompanied by an increase in salary, because I haven't made the research worldwide, but I might say it very well might be the case, and it should not continue to be the case.

Before the McLellan Commission, as we were arguing, one of the Commissioners, Madame Chambers, during the course of discourse, said: *"I think…"* And this is at page 10 of the brief to the Block Commission.

> *"I think the majority, the vast majority of a public, of people of Canada, are absolutely convinced that there is a differential remuneration between Trial Court Judges and Appellate Court Judges."*

And I think that was a correct assessment.

I think that anybody who would be

asked, knowing what the position is of the Appeal Court Judge or Appellate Court, and that of a Trial Court Judge, would think that there is a higher salary.

I've dealt with the question of what happened in England.

I can bring you up to date on what were the salaries in England and Whales, back in 2008 and what they are today. That's at page 14.

Then it was 165,900 £(pounds) for the highest Court. I am sorry, for the High Court. And today it's 177. The Court of Appeal it's now 202 as opposed to 188, and the Supreme Court or House of Lords is 213 today as opposed to 198.

But the important thing is that the differential, the percentages are the same.

Then it was 13.8 between the High Court and the Appeal Court, and between the Court of Appeal and the House of Lords, 19.7.

In the United States the salaries are higher, but the differential of 6.47 is the same.

So, we can see the continuation of what was granted in these jurisdictions, going up to the present day.

The question of what was called divisiveness, was dealt with extensively in the report

of Madame Watt, because that was raised, the divisiveness.

But I mentioned earlier, there's absolutely no empirical evidence to show that there is divisiveness, or that there would be any kind of disturbance occasioned by the granting of the differential.

So we come to the criteria which has to be applied here, and that's in Section 26 of the Act, is it necessary for an adequate salary? And it was demonstrated that if the Judges in Appeal are not getting what they should be getting because of their functions, because of their place in the hierarchy, then it's not an adequate salary, and that it should be granted.

And it comes within that criterion, and it comes also within the criteria of subparagraph (d), and the other objective criteria that the Commission considers relevant.

Before I conclude I will consult with my observer friends, if the Court gives me one minute.

--(A short pause)

MR. NUSS: That was a wise decision on my part because it was pointed out to me that I made a mistake when I talked about appointments to the Supreme

Court. I said it was "Trial Court".

Of course, the number of 30 is to the Supreme Court of Canada, and 27 came from the Appeal Court and not the Trial Court. The other three came from practice on the street.

And with that, I conclude my oral submission with the request that the submission by Appellate Judges for a three percent differential be granted.

Thank you.

LE MEMBRE PRÉSIDENT: Merci, Maître Nuss.

I am sure that the question period could give us some opportunity to come back on some of your points.

I propose to take a break for a good coffee, be back in maximum fifteen minutes, quarter to three, with the Reply from the Judiciary.

See you in fifteen minutes.

--RECESSED AT 2H35 P.M.

--UPON RESUMING AT 2H50 P.M.

THE CHAIRPESON: Maître Bienvenu, à vous la parole.

Me BIENVENU: Merci. In the very early days of my career, I had a case in which I was

junioring for Mr. Yves Fortier who has had some involvement historically in this Commission process, and the other party was represented by Maître Joseph Nuss.

And I have to say that of the many opponents that I have faced, one of the ones who has had the most lasting impression on me was Maître Joe Nuss.

And I want to say that after all of his years on the Court of Appeal, I've listened to him today with no less admiration than I had when he was on the other side, a long time ago.

--REPLY SUBMISSIONS BY THE JUDICIARY:

In Reply to the submission of my friend, Mr. Rupar, I would like to start by the example that he gave of a Government initiative that was reactive to a concern raised by the Judiciary.

And the example was: The shortening of the time period for the Minister to issue his or her response to a Commission report, I might add that as part of that same initiative, the Government imposed on the Minister to introduce implementing legislation with alacrity, after issuing the response.

That is true, and we have acknowledged in our submission that initiative and the fact that

from our perspective, this was an improvement to this process.

Early in his remarks, Mr. Rupar said that what divides the parties appearing before you as to what would be an adequate judicial salary, from your perspective, an adequate judicial salary recommendation is $23,000 over four years.

Now, this is a very prosaic way, if I may put it, to look and focus on the parties' respective bottom lines.

But I hope that I have made clear by the nature and the subject matter of my submission that there is a much more important and much more broader point.

And much of the difference between the parties is not about the bottom line.

Much of the difference between the parties is how you reach that bottom line.

We want you not just to get to an acceptable bottom line, we want you to get there based on objective reasons, objective standards that the Commission can articulate, that the parties can appreciate, and from which the parties can be guided in the future.

So, there is much more at stake in the

differences between the parties than their respective bottom lines.

Another point that was made on behalf of the Government to which I would like to respond is that not all outstanding candidates come from the pool of self-employed lawyers in private practice.

And that is true.

There are candidates to be sure, outstanding candidates that come from academia or from the Government.

Now when you are looking at the narrower class of outstanding self-employed lawyers, you have to look at the data that concerns those lawyers, not those coming from academia or the Government.

And I submit to you that Mr. Rupar himself made the point by the examples he gave in trying to justify the Government's position on the lower income exclusion.

He gave the example of individuals making lifestyle choices that could result in their earning less than the data associated with the top 21 percent.

In fact, it's not 21 percent, because 21 percent results from the application of the CMA as a

filter, and I've emphasised this morning that it is not a filter. I think you know what group I am referring to.

Now there is nothing wrong, of course, about individuals making lifestyle choices that result in their professional income being low.

But the question that arises and the question that faces this Commission, is who are the individuals that are suitable candidates for the Bench?

Are individuals who make that choice, individuals who would or who should put their name forward for judicial appointments, are they individuals sufficiently committed to their professional calling, adequately to serve as a federally appointed judge?

I think all of the Justices present here today will attest to the fact that acceding to the Bench is not a lifestyle choice.

It is a gratifying responsibility to be a judge, but it is a demanding one, and it is an increasing, increasingly demanding responsibility.

Now, I make the same point to respond to Mr. Rupar's suggestion that private sector income within the 44 to 56 age group is not what you should be focused on, because as a matter of fact, private sector income declines after age 56.

And the implication here is that it is desirable for judicial candidates to come from the private sector -- forgive me.

The implication is that it would be desirable for judicial candidates to come from private sector lawyers whose income is about to decline.

Well, like the previous group I discussed, this is not, I would submit to you, how one sets about to attract outstanding candidates to the Bench.

Now, on the self-employed lawyer income.

Mr. Rupar quoted from the Block Report, and it's at Tab 14 of his Condensed Book, and he read the first two sentences at paragraph 116.

And what he read to you was:

> *"The issue is not how to attract the highest earners; the issue is how to attract outstanding candidates."*

He also read:

> *"It is important that there be a mix of appointees from private and public practice, from large and small firms and from large and*

small centers."

But he didn't read the next sentence:

"However, there is no certainty that if the income spread between lawyers in private practice and judges were to increase markedly, that the Government would continue to be successful in attracting candidates to the Bench from amongst the senior members of the Bar in Canada."

The Government has reiterated its request that the Commission undertake a PAI study, and reading their submission I understand the position to be that such a study should be conducted either to arrive at your own recommendations, or for the benefit of the next Commission.

Now, much has been submitted to this Commission about the PAI study in the context of the Government's request very early on in the process, that such a study be conducted, and the Commission made a ruling on that.

I don't want to go back on what was argued at the time. You had fulsome submissions.

I refer to these submissions to the

extent that they dealt with the potential usefulness of a PAI study.

But I will read maybe two paragraphs from our submission on this topic, dated January 29th, 2016.

The first is paragraph 3, where we noted that the one Commission that was presented, not with the suggestion to conduct such a study but with actual data resulting from such a study having been conducted, came to the conclusion that it was of no use to the Commission.

And that Commission, as we all know, was the Block Commission, and it stated at paragraph 90 of its report:

> *"We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment."*

Then we developed a submission to explain why in our view a PAI study would not be helpful to you, and essence, it came down to saying that a PAI study looks at the past, and your task it to look at the future.

One point that we made I would like to repeat today.

And that point is made at paragraph 36 of our submission, and I will read it, if I may.

> *"The fallacy in the path proposed by the Government is the fact that once established as a comparator (which it cannot legitimately be) the PAI data would then be referred to by the Government as a conclusive indication that the judicial salary is adequate because a number of appointees increased their income upon appointment, while others accepted an appointment even if it resulted in a reduction in their compensation."*

And we concluded the paragraph by saying:

> *"This is an argument for all*

seasons. It is utterly circular. It is of no use to the prospective exercise that you have to make. And coming as it does from a party who controls the appointments, the danger is apparent."

And it is a good point for me to react to my friend pointing to the fact that one-third of the judicial appointments now come from the public sector, but what I would like to draw to the Commission's attention is that that happened during the tenure of the previous Government, and the bar chart that is used by the Government to illustrate the provenance of judicial appointees shows that that one-third is at variance with the historical pattern in the provenance of candidates to the Bench.

I should have mentioned when talking about the PAI study that since the Commission had to pronounce on the suggestion to conduct such a study, the Commission was provided with the expert report of Ms. Sandra Haydon.

And we asked Ms. Haydon about the usefulness to the Commission of the Government proposed pre-appointment income study, and we also asked her about the potential usefulness for your task of the

quality of life study.

And she said that in her professions opinion, based on her experience, neither study would be of usefulness to this Commission.

So far as the PAI study is concerned she explains that what you're engaged in is a forward looking practice, whereas PAI is backward looking.

Now, in terms of the quality of life study, she says that, and I quote her words:

> *"It is an unheard of practice for purposes of compensation benchmarking…"*

And she explains why this is so. She says:

> *"For a number of reasons, not the least of which would be coming to agreement on what elements are to be included…"*

And I pause here to note that nothing is put forward in the Government's submission as to the eventual content of that study.

And she adds:

> *"And how to objectively cost and account for the value of quality of life indicators."*

She then says this:

> *"Through both the CRA data as well as the salary level of DM-3, the Commission has before it what is arguably the best data for benchmarking the judiciary, and based on that, there is no need to introduce extraneous and unreliable data."*

She concludes:

> *"Quality of life is a highly personal experience, and as the Government notes, intangible, and as such should not be a consideration in compensation determination."*

Mr. Rupar commented on the differences between Mr. Pannu and Mr. Newell on the question of the value of the judicial annuity.

The key difference between the two experts, that which drives the difference in the percentage to which they come is the inclusion of the disability benefit in the calculation.

For the rest, you will see that Mr. Newell very carefully and I would add very

professionally, tracks the difference between the 24 percent of Mr. Sauvé and his own percentage, which I believe is 30 percent. And he explains what accounts for the difference. Again, providing the Commission with continuity with the work of its predecessors.

Now the argument was advanced by Mr. Rupar that Mr. Pannu's report was based -- and I think those were his words -- on "extensive third party backup."

And the evidence offered was in the form of Mr. Pannu's reference at page 5 of his report, to the fact that -- and it's at footnote 4:

> *"… the Compensation Committee of the Coca-Cola Company benchmarks against the 50th, 60th and 75th percentiles of its peer groups' pay practices to gain a better understanding of what is competitive."*

Now, I ask the Commission of what conceivable relevance is it to your work to know that the Compensation Committee of the Coca-Cola Company benchmarks against three percentiles, if you're not given any reason to prefer one or the other of these three for the exercise that you are called upon to

make.

So, I would differ with my friend Mr. Rupar, that this shows that there is extensive backing for Mr. Pannu's analysis.

Now, you were taken to page 5 of Mr. Pannu's report, and your attention was drawn to the fact that according to his numbers, self-employed lawyer income has gone down during the period from the year 2000 and 2014.

And that's in the middle of page 582 of the Condensed Book, if you look at the 75 percentile column. And the same observation could have been made looking at the 65th percentile column.

Now, in considering the reduction suggested by this data, you need to look at page 3 of Mr. Pannu's report, where you see that according to the CRA data from which the number is generated at page 5 are taken, the number of lawyers between 2010 and 2014 has gone down from 22,000 to 18,500. I am rounding the numbers here.

Now, we know for a fact that that is not a reflection of the number of self-employed lawyers. And we know that from one report that is before the Commission, and that is the Federation of Law Societies Report.

And the explanation is given under these numbers.

Mr. Pannu says that CRA was contacted to inquire about the decrease in the number of self-employed lawyers from 2010 to 2014, and was told that this is a result of self-employed lawyers who have structured their practice as professional corporations, not necessarily law corporations.

And we know, Commission Members know from experience that an increasing number of lawyers structure their practice as professional corporations, and the point that I make is that it is not self-employers lawyers who for lifestyle choices or other reasons, earn a very low income, that go through the trouble of structuring their practice as professional corporations.

Those who do are high earners and therefore, the conclusion to be drawn is that the reduction in the CRA data that you see on page 5 is to an extent unknown. I make no representation about this.

But to an extent unknown, that reduction is a function of the increased prevalence of lawyers structuring their practice as law corporations, and therefore, it doesn't capture the income of, we

would say, high earning self-employed lawyers.

A small point.

Mr. Rupar has referred to on numerous occasions to Ms. Haydon's point about the fact that a $100,000 income exclusion would have been, in her opinion, justifiable.

Then he went on, and the tenure of his remarks was that Ms. Haydon, and perhaps by extension the Judiciary, were proposing a $100,000 income exclusion. She is not because she appreciates the value of continuity, and we are not.

What we have taken as a position is that the historical income inclusion should be kept, but simply adjusted to take into account the impact of inflation.

Now, there was mention made of DM-4s, and I want to provide background to the Commission because the suggestion was made that we, at one point, were suggesting that the appropriate comparator should be DM-4s, and that it is not correct.

The issue of what to do with DM-4s first arose before the McLellan Commission.

And at the time the DM-4 category had only just recently been created.

And there was, I stand to be

corrected, one, certainly no more than two individuals who were in that category.

Because the historical position accepted by both parties was that the DM-3 comparator had been selected because the DM-3s were the most senior public servants.

Then, with the creation of the DM-4 category, the question necessarily arose: What should we do with this new category? Should that become the benchmark as the category comprising the most senior public servants?

And there was also uncertainty when this issue first arose, as to how the situation would evolve.

It was very recent, there was one, perhaps two persons within this newly created category, and we just didn't know what the future would hold.

So, what we said to the McLellan position was that on the strength of the representation by the Government that this was an exceptional category into which very few and exceptional positions would be included, we said that we would not seek to move the most senior level comparator from the DM-3 to the DM-4, but would remain with the DM-3, but we reserved our position saying: "Let us see what the future holds."

And in the event, as we understand it, the position remained as the Government represented that it would, the DM-4 remains a category in which there are very, very, few individuals.

They are individuals assuming exceptionally demanding responsibilities, and it is not our position now, and it has never been our position that it should be the comparator.

I am, by expressing agreement with Mr. Rupar, when he said early on in his remarks, that we have one in his words: "… top Judiciary in the world." This seems to be something that all participants in this process acknowledge and I won't repeat. But I will refer to my earlier submission.

This does not come as an accident.

This is the result of Canada making a very wise but very deliberate decision to invest in developing an independent, strong Judiciary, and part of that is insuring that it is adequately compensated.

And on this, I thank you once again for your attention.

LE MEMBRE PRÉSIDENT: Merci, Maître Bienvenu.

I understand that Mr. Rupar, you will have the opportunity tomorrow to answer and make some

comments, I think, at 2 o'clock.

MR. RUPAR: As I understand, I will be, as the order goes, I will be responding, or the Government will be responding to the Reply from the Judiciary and the Prothonotaries, yes, at 1 o'clock.

And then there's a second Reply to the Appellate Judges and the CBA, as I understand. This can be split because of some scheduling difficulties tomorrow.

THE CHAIRPESON: Très bien. So, we will close our first day of hearing with questions.

Margaret, do you want to start the questions?

COMMISSIONER BLOODWORTH: Thanks, Mr. Chairman.

Maybe I will start with you, Mr. Bienvenu, since we've just heard from you, and I will hope I can read my writing from this morning. So excuse me if I have to puzzle it out a bit.

---QUESTIONS BY THE COMMISSION MEMBERS:

First point, you referred several times to the IAI as protection against erosion by inflation.

But would you not agree it's more than that?

That's what CPI would be, presumably.

It also was designed to try and mimic in some way the average wage increases for Canadians.

MR. BIENVENU: Precisely.

The way that Mr. Hyatt puts it is that it reflects not only inflation, not only price inflation but also gains in productivity.

COMMISSIONER BLOODWORTH: Yes. Which in returns reflects on wages.

MR. BIENVENU: Exactly.

COMMISSIONER BLOODWORTH: And some of the charts we have seen in both your material but also in some of Mr. Rupar's, when you show the judges salary, it's more of a straight line, whereas some of the others fluctuate.

And I would suggest it's actually because of the IAI increases, even at times where other public sector may have been freezing, or what have you, they were protected somewhat against that.

So am I right in concluding that if all else remained the same, which never happens, if all wages within the country remained the same in relation to one another, we actually wouldn't need anything other than IAI.

The other process for us is to look at

when lawyers or other comparators have changed differently than what the IAI or the averages.

MR. BIENVENU: Right. Well, do you include in your category self-employed lawyers?

COMMISSIONER BLOODWORTH: I include any benchmark we are looking at. I am trying to avoid the benchmark debate. But any benchmark that we collectively think is appropriate to look at in relation to judges.

If those change differently than the average for Canadian wages in general, that's what we have to look at before your process, if I can put it that way, because actual average wages for everyone are included in the IAI.

MR. BIENVENU: That's correct. And I think that point is particularly relevant for the private sector comparator.

And I just point out that the charts to which you've referred, at least the charts in both parties' material, are charts that show the evolution only of the public sector comparator and judicial salaries.

You don't have, you know, on that…

COMMISSIONER BLOODWORTH: No. You're correct.

MR. BIENVENU: … on those charts, the private sector comparator.

Whereas the point you make is, I believe, if I understand you correctly, mostly relevant when comparing judicial salaries with self-employed lawyers.

COMMISSIONER BLOODWORTH: Well, one of the things governments can do quite easily is freeze public sector wages, which they have done.

MR. BIENVENU: Right.

COMMISSIONER BLOODWORTH: And the scheme we have now for judges actually protects judges from that.

MR. BIENVENU: Right.

COMMISSIONER BLOODWORTH: In the sense that unless they changed, went to Parliament and changed the IAI, which would be much more difficult to do.

So, it does have some protection.

In fact, it may actually be more relevant in the public sector, given that judges are part of the broader public sector.

MR. BIENVENU: Right. Which gives me an opportunity, and I hope you'll forgive me if I seize it, to say that the Scott Commission from which my

friend has cited a number of references, came at a time when there had been a freeze in the compensation of public servants, including DM-3s.

So, this was a time where there was an exceptional delta between that public sector comparator and private sector income.

And that was the reason why Mr. Scott was so concerned about the position in which the Judiciary found itself, and the ability of Government to attract outstanding candidates from the private sector.

So yes, you are correct.

And caution should be exercised when reading extracts from the evidence of Mr. Scott, and when reading the report. I think it's important to be aware that that was the context in which the Scott Commission worked.

COMMISSIONER BLOODWORTH: Which has happened, actually several times, freezes of various kinds or restraint.

On the DM-3 comparator, the Judiciary is proposing a change in the use of that comparator, to move from what was used by several Commissions, it's the mid-point and the mid-point of at-risk pay.

And you're proposing to move to total

average compensation.

But how do you deal with the inconsistency and the jumping around that is inevitable with such a small group, when you do total average?

I mean, right now, at various times I've seen six or eight. I personally know at least two of them have retired, so you could get very small numbers. I am not a mathematician or a statistician, but one thing I do know is when you take averages of very small numbers, they very easily jump all over the place.

MR. BIENVENU: Right.

And that was part of the reasons that the Block Commission offered to opt for the mid-point of the at-risk component. And you'll see that in reasons where I think we all know where to find them.

But what can be observed is that the concern that such a small group, and the fact which is acknowledged by everyone that performance pay is intimately tied to individual performance.

What we're seeing when we look at the actual data is that that concern, a legitimate concern, is not in fact panning out. Because we have the data, if you turn to Tab E, if you look at how total average compensation has evolved, there isn't that -- you know,

those swings that were feared by the Block Commission.

So, what we are saying is let's look at the reasons behind the decision.

Number one, the mid-point is a proxy for the average.

Number two: what should make us be careful about using the average is that with such a small pool the average could really show swings.

But we're saying that's not what the evidence shows.

The evidence shows that both assumptions are incorrect.

The first assumption that the mid-point is a proxy for the average is demonstrably false. We can see here that the average is much higher than the mid-point.

The other assumption about the swings does not appear to pan-out either.

COMMISSIONER BLOODWORTH: Well, it is a bumpier line.

MR. BIENVENU: It's a bumpier line. I grant that. I grant that to you.

COMMISSIONER BLOODWORTH: You also may be running into the age factor of the baby boom but I won't get into that at the moment, why we could see a

change.

But a mid-point, I am not convinced it's a proxy for the average.

Mid-point is used often in compensation for a salary range as being the expected level of a fully performing employee that's experienced.

So the mid-point can mean many things in compensation, and I just can't recall the Scott Commission.

I thing though, we do have a problem with moving to a very small body for averages. I mean, you can fix that in some ways. You could add DM2s to it, as well, which would give you a bigger universe.

I think you have a challenge with such small numbers for averages.

MR. BIENVENU: I recognise this and I acknowledge that that was part of the reasons of the Block Commission for choosing the mid-point.

I am very happy, if I may say so, to see that I have communicated to the Commission the very important distinction that needs to be made between the DM-3 as a comparator and a compensation measure of that comparator, and the fact that it is in no way calling into question the comparator to discuss what should be

the compensation measure of that comparator at any one point.

COMMISSIONER BLOODWORTH: Two other questions.

First, I think it was Mr. Rupar said one-third of the appointments in a certain period to the Judiciary over the last few years have been outside the 44 to 56 age group.

So why wouldn't that argue that we should look at a wider age group? And I move to private sector lawyers.

Should we not be looking at the comparison of the actual group from which appointments are made, if we are going to have an age factor?

MR. BIENVENU: Yes. Well, we must look at it, but that's not the question that arises in this debate.

The debate is not whether you should look at it, the debate is whether it is accurate and best practice to widen the age group when looking at the CRA data. That's the issue.

The issue is if you know for a fact that 66 percent, I believe it is.

73 percent of your appointees fall within the age group 44 to 56. Should you use that age

group when generating data from CRA, or should you do, as Mr. Pannu suggests, take a wider ratio.

It's not about the Commission looking at candidates or salaries outside of that position; it's really a question of making sense of the CRA data and best practice in getting a good sense of the private sector income that we are interested in.

And there, I invite you to compare the rationale offered by the two experts, and my submission is that you'll conclude that the correct way to do it is Ms. Haydon's methodology, not Mr. Pannu's.

COMMISSIONER BLOODWORTH: Thank you. My final question.

I wonder if you can help me to understand and I am going to point you to both Mr. Rupar's book and yours. And you both use private sector income from the 75th percentile, as I understand it, but they're different numbers. So I am obviously missing something.

MR. BIENVENU: Okay. May I ask you what page you are at?

COMMISSIONER BLOODWORTH: Under yours it's Tab F, and under his it's Tab 9, which is actually, I think, Mr. Pannu's report. Yes. And it's page 82.

And in both cases you have income from private sector, 75th percentile 2010 to 2014, but they're different numbers. I am looking for my enlightenment.

What am I missing to have a 75th percentile?

MR. BIENVENU: You're not missing anything, he is missing a low income exclusion. That's the point I made this morning.

COMMISSIONER BLOODWORTH: So the difference, if I look at 2010, between 274,000 and some and 403, I think I am comparing the two years, is what age group you take?

MR. BIENVENU: It's both the age group and the low income exclusion.

If you look at the top of the table in our book at Tab F, let's look at the title together: "Comparison of salary of Puisne Judges with net professional income of self-employed lawyers at 75th percentile. Net professional income greater than 60,000 and age group 44 to 56."

COMMISSIONER BLOODWORTH: Okay.

MR. BIENVENU: He doesn't tell you that, that's why I insisted this morning on taking you to his report and saying: "Be careful."

The only way he's able to tell you what he's telling you is because he's got no low income exclusion.

And his age group, as colleague is pointing out to me, is set out below. He goes from 44 to older than 64 -- I am sorry. He goes from under 44. He's got a much broader range in terms of age group.

COMMISSIONER BLOODWORTH: Okay. Thank you.

THE CHAIRPESON: Peter?

COMMISSIONER GRIFFIN: Just on that point, it says on that page 5, and maybe Mr. Rupar, you can help me, "a further refinement can be made by examining the income of self-employed lawyers by age bands."

I didn't quite understand that there were any age bands than what was shown on the table above.

The further refinements he describes, if I have it right, are things that can be done but they're not reflected in that table. Do I misunderstand it?

MR. RUPAR: That's correct, Mr. Commissioner.

If I can just point out, in the next

page on the next set of figures, where he takes those and puts them into perspective. That's where he gets his percentages from.

COMMISSIONER GRIFFIN: Right. If you follow along what he's doing on subsequent tables. Alright.

Just with respect to Mr. Pannu and Mr. Newell, do they, or do you on both sides of the table, leaving aside the ingredient of a third expert for the moment, do they agree with each other as to why there are differences between their calculation of the percentage value of the annuity, other than the disability inclusion or exclusion?

Because it would be of some value to us to understand whether they're agreed on what the differences are, and if that's something between counsel you could sort out in the next short while for us?

I think that would be helpful.

MR. RUPAR: Certainly on our side, we'd have no difficulty having Mr. Pannu and Mr. Newell discuss their differences. They seem to be methodological from what we can determine.

And if they want to discuss matters, that would be fine with us.

MR. BIENVENU: We certainly have no difficulty in the two experts meeting, but as I have mentioned in my submission just now, I think the main difference between two is the inclusion by Mr. Pannu of the disability benefit in his calculation of the value of the judicial annuity.

COMMISSIONER BLOODWORTH: But I think he indicates that difference and there is still a small difference.

MR. BIENVENU: There is on. Yes.

COMMISSIONER BLOODWORTH: It's about two percent or under that. It would be useful to know what that.

MR. BIENVENU: We certainly, if that is the Commission's wish, will instruct Mr. Newell to meet with Mr. Pannu and try to shed light on where they differ and where they are in agreement.

COMMISSIONER GRIFFIN: Alright. The next question I had was just trying to understand in a tabular sense the differential between the Block comparator and judicial salary.

Because as I look at page 30 of your primary submission, Mr. Bienvenu, you set out in Table 1, the difference between the Block comparator and the total average compensation, as I understand it, at the

DM-3 level, that you seek this Commission's endorsement of.

And I didn't see anywhere in either submission a calculation of Block comparator and judicial salary as it stands.

In other words, I can see it in Tab E of your Condensed Book where you show the various graphical representations, but I just wanted to understand what the parties say the differential is between the Block comparator and judicial salary, as it would be calculated with the increases under the IAI through the Quadrennial period.

MR. BIENVENU: So going forward.

COMMISSIONER GRIFFIN: Going forward.

MR. BIENVENU: Yes.

COMMISSIONER GRIFFIN: Because you talk in terms between you of a $44,000 roughly, differential, what you're looking for, and does that deal with the $23,000 differential?

It would help us to know using the Block comparator, what does differentials are.

MR. BIENVENU: Right.

I would like to make a point. The $23,000 does not represent the delta. It is the portion of the delta by which we invite the Commission

to reduce the delta.

COMMISSIONER GRIFFIN: I understood the 2 to 1.5, or 1.5 as achieving that result.

MR. BIENVENU: That result. The result being to reduce the delta, not to eliminate it.

COMMISSIONER GRIFFIN: Understood.

MR. BIENVENU: So essentially, what you're asking for is, if we look at Tab E of our Condensed Book --

COMMISSIONER GRIFFIN: That's right. It's to essentially, just quantify the differential on a go-forward basis, as you understand it, between essentially your Block comparator line and judicial salary, so we understand that delta.

MR. BIENVENU: Right. We will provide you with that information.

COMMISSIONER GRIFFIN: And if you let Mr. Rupar have it before you give it to us, just to make sure that there's no disagreement on the raw numbers.

MR. BIENVENU: Yes.

MR. RUPAR: Absolutely. We would be happy to receive them.

There may be some issues with respect to the compensation going forwards, that's a year at a

time, but hopefully we will be able to work out some of these differences.

COMMISSIONER GRIFFIN: Right. Don't make heavy weather of it, but if we can get some sense of what that looks like, that would be helpful.

The last thing I wanted to ask you about was your process points, Mr. Bienvenu, you began your submissions in part with talking about the appointment process and issues that had arisen with respect to the initial appointee of the Government.

And I had read your written submissions as saying that you were not seeking a recommendation from this Commission in that respect, at paragraph 49, and does that remain your position?

MR. BIENVENU: It remains our position that we're not seeking a recommendation.

But as I have expressed this morning, we think it would be helpful to the parties to have guidance from the Commission on this point. Absolutely. Otherwise, we wouldn't have gone through the trouble of displaying all of this in our submission for your benefit.

COMMISSIONER GRIFFIN: Could you help me with the distinction in your mind between a "recommendation" and "guidance"?

MR. BIENVENU: Yes. I will give you an example.

You will find in the Block Report, consideration given to the second response and a view being expressed as to the appropriateness of this second response, in the legal framework devised by the *PEI Reference* and organised by the relevant provisions of the *Judges Act*.

So there is no formal recommendation associated to these reasons, but they are very helpful reasons.

They are very thoughtful reasons and we are looking for similar insight from this Commission on the process points that we discussed.

COMMISSIONER GRIFFIN: And is the same then true for the need to respect statutory guideline?

MR. BIENVENU: Yes, although with a small difference.

There, there is a commitment on the part of the Government to look at one aspect of respecting deadlines, which is what happens when an election interferes with the beginning of the Commission.

But there is, you know, a broader point about which you may hear tomorrow, when the CBA

presents its submission.

And the broader point is that there is a pattern of non-compliance with the delays that is a source of concern, and you know, if the Commission considers it appropriate, it could surely consider that and comment on it, if thought appropriate.

COMMISSIONER GRIFFIN: The last thing I wanted to ask you about was, at paragraph 50 and following of your submission, you talk about the need for consultation with respect to the introduction of amendments to the *Judges Act*, and are you seeking a recommendation in respect of that?

MR. BIENVENU: No, Mr. Griffin.

But we are certainly inviting the Commission to consider this submission, the context in which -- or the reasons for the Judiciary's decision to make this submission, and it might be very helpful for the Commission to comment on this.

COMMISSIONER GRIFFIN: Those are the questions I had for you and for Mr. Rupar.

Mr. Nuss, I have one question for you.

As I listened to your travel log about other jurisdictions and what differentials they have in place for Court Appeal Judges, I heard you mention New Zealand.

I didn't hear you mention Australia.

Have you done any research with respect to Australia?

MR. NUSS: I did in 2008. And quite frankly. I couldn't fathom what happened in Australia. One time there was a differential, and then later on there wasn't.

And the complexity of the system between the federal and the non-federal led me to a cul-de-sac, where I just couldn't determine whether it was or it wasn't.

I spoke to judges there, and so I didn't deal with it. What happened since 2008, I don't know.

COMMISSIONER GRIFFIN: Very good.

Mr. Chair, those are my questions. Thank you.

THE CHAIRPESON: I understand, Margaret, that you have a question for Maître Rupar.

COMMISSIONER BLOODWORTH: Yes. I got so entranced with my answers from Maître Bienvenu that I forget about Maître Rupar, and I have three questions.

On your Tab 20 in your book, you forecast salaries going out, but you don't say what the

assumptions are.

For example, you obviously forecast what the IAI would be up until 2023, but it would be useful to have what assumptions have you used about that, what assumptions have you used about DM salaries, what assumptions have you used?

I am not asking you to list them all now, but if you could provide us with the assumptions given those are forward looking?

It would be helpful in looking at the chart.

MR. RUPAR: We will do that for tomorrow, yes.

MR. BIENVENU: And if I may say so, this is a point I was intending to make in relation to Mr. Griffin's request, because obviously, that will influence the position going forward.

We know what the projections of the IAI are, but it's more difficult or more debatable what assumptions should be made about the progression of DMs' remuneration going forward.

COMMISSIONER BLOODWORTH: And obviously, as with any assumptions, going forward they could be wrong or right, but you have to make some doing that. I am not being critical of the

assumptions. I would just like to know what they are.

Tab 9, Mr. Pannu's report, he does, if I understand correctly, in page 6 and 7, he does, especially page 7, he comes up with what the 2014 75th percentile, if it's age-weighted would be.

I wonder if you could do that if we eliminated the two outliers, i.e: the under 44 and the over 60; I know you could do it at each, I am not asking for that.

But it would be interesting to me to see what difference it makes if you eliminate those two categories.

MR. RUPAR: We can do that. I am not sure we can do that for tomorrow morning.

COMMISSIONER BLOODWORTH: That's fine. I am not sure I will read it tomorrow!

And final two question.

One, MPs when they moved away from IAI, did not move to CPI, as I understand from what you said.

MR. RUPAR: Correct.

What we understand is from 67.1 of the *Parliament of Canada Act*, they moved to the average of settlements by private union with 500 members or more.

COMMISSIONER BLOODWORTH: Which I

assume is higher than IAI?

MR. RUPAR: I wouldn't guess. I don't know. I would have to look. I don't know.

COMMISSIONER BLOODWORTH: Maybe you could look. But I am willing to bet it's higher, just given the category.

And finally, can you give us one or two concrete examples if a pre-appointment income study was done before the next Commission, what are a couple of concrete examples of what the next Commission might actually do with it?

MR. RUPAR: I can give you a couple of examples now, and perhaps we can give you a bit more tomorrow.

My friend Mr. Bienvenu talks about moving forward and we shouldn't be looking in the past, but what we would have is we would have real numbers. We would have numbers of what members of the Bar who applied for and became members of the Judiciary, what their actual incomes were prior to their appointment.

We would have it for a number of years, and that would give us a pattern, not a snapshot but a pattern of whether or not there are certain groups over other groups that apply that aren't applying if there is a disincentive, we would have real

numbers.

Because what we have now, and this is the best we've been able to come up with under the present systems: we have the CRA database which captures the self-employment income, but it doesn't capture corporations, for instance. It doesn't capture associates.

There's any number of categories of lawyers that it doesn't capture.

So our submission would be that when you look at the actual numbers, the actual people, you would have hard data from the people who applied and the people who were made judges, which would give the Commission some real numbers to deal with.

I will talk with my colleagues and we may have further in the morning, but that's generally what we suggest would be happening with the pre-income study, pre-appointment income study.

COMMISSIONER BLOODWORTH: Thank you.

THE CHAIRPESON: Well, you have a very good Chairman because we are just on time to close our first day.

Merci beaucoup, Maître Bienvenu. Merci, Maître Nuss, Maître Rupar, merci à vous tous.

Des présentations qui ont été très,

très utiles.

Une collaboration tout à fait exceptionnelle de tous, et voilà.

On se voit demain.

I think tomorrow we start our day with the Prothonotaries and Mr. Lokan, you will be with us for the presentation for the Prothonotaries.

See you tomorrow morning at 9 o'clock.

--HEARING CONCLUDED AT 4H00 P.M TO RESUME ON FRIDAY APRIL 29, 2016 AT 9:00 A.M.

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LE TOUT EXACT ET CONFORME.

M. Bolduc, S.O./CCR