Judicial Compensation and Benefits Commission Hearings

English Transcript
on Tuesday, May 11, 2021

1   IN THE MATTER OF THE JUDGES ACT,

2   R.S.C. 1985, c. J-1

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7   2021 JUDICIAL COMPENSATION

8   AND BENEFITS COMMISSION

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17   ---   This is the transcript of a continued

18   Public Hearing, taken by Neesons Reporting, via

19   Zoom virtual platform, on the 11th day of May,

20   2021 commencing at 9:30 a.m.

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23   [All participants appearing virtually or

24   telephonically.]

25   REPORTED BY: Helen Martineau, CSR

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 1    C O M M I S S I O N    P A N E L:

 2    Mtre Martine Turcotte        Madam Chair

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 4    Peter Griffin               Commissioner

 5

 6    Margaret Bloodworth         Commissioner

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 8

 9    P A R T I C I P A N T S:

10    Pierre Bienvenu             Canadian Superior

11    & Azim Hussain              Courts Judges

12    & Jean-Simon Schoenholz     Association

13    & Chief Justice             and the Canadian

14      Martel D. Popescul        Judicial Council

15                                (The Judiciary)

16

17

18    Andrew K. Lokan             Federal Court

19                                Prothonotaries

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21

22    Christopher Rupar           Government of Canada

23    & Kirk Shannon

24    & Samar Musallam

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1	Chief Justice	Court Martial Appeal
2	Richard Bell	Court
3	& Eugene Meehan, Q.C.	
4	& Cory Giordano	
5		
6		
7	Justice Jacques	Independent Appellate
8	Chamberland	Judge
9		
10		
11	Brad Regehr	Canadian Bar
12	Indra Maharaj	Association

1   -- Upon commencing at 9:30 am.

2   MADAM CHAIR: Welcome to this second

3   day of the Quadrennial Commission. I remind

4   each party ten minutes before the end of your

5   presentation that you have ten minutes left in

6   order to keep the agenda as clean as possible.

7   And I will now call on the representative for

8   the Chief Justice, Richard Bell, to start, which

9   means I gave you my five minutes. But I will

10   stop you at 10:35 in order to keep to the

11   schedule and be fair to all the parties.

12   I understand that the government has a

13   jurisdictional issue. However, as a Commission

14   we have decided to hear your full arguments

15   today but please note that we are not ruling at

16   this time on the jurisdictional issue, but we do

17   want to understand the full arguments.

18   So Mr. -- the representative for Chief

19   Justice, Richard Bell, you're on and I'm

20   starting my stop watch for 50 minutes to warn

21   you ten minutes before. Thank you very much.

22   MR. MEEHAN: Hello, Honourable Madam

23   Chair, Honourable Commissioner Bloodworth,

24   Honourable Commissioner Griffin, and senior

25   staff Louise Meagher. My name is Eugene Meehan.

1   I am here with The Honourable Chief Justice

2   Bell, the Honourable Justice Scanlan and my

3   colleague Mr. Giordano, all four of us are

4   available to answer your questions. We are also

5   joined today by Court Martial Appeal Court of

6   Canada senior staff Ms. Lavictoire and

7   Mr. Bieniasiewicz and, as observers in uniform,

8   Lieutenant Colonel Kerr and Commander

9   Létourneau. My role today is to give a brief

10   introduction plus a super brief, three-point

11   summary of the legal opinion, requested -- or

12   submission requested, by the Office of the Chief

13   Justice of the Court Martial Appeal Court of

14   Canada.

15   The main submission will then be

16   presented by Chief Justice Bell and Justice

17   Scanlan, both of the Court Martial Appeal Court

18   of Canada, the latter also a sitting judge of

19   the Nova Scotia Court of Appeal.

20   Prior to being appointed Chief

21   Justice, Chief Justice Bell was a sitting member

22   of the New Brunswick Court of Appeal.

23   You have a copy of the submission of

24   the office of Chief Justice Bell. Super

25   briefly, three very short points.

1   Number one, in the context of the

2   Court Martial Appeal Court of Canada, the

3   principle of judicial independence is

4   concomitantly also essential to the preservation

5   of fundamental -- the fundamental normative

6   order of the Canadian military. And the

7   perception of, we'll call it CMACC, short for

8   Court Martial Appeal Court of Canada, CMACC'S

9   judicial independence amongst members of the

10   Canadian Armed Forces, not just perception but

11   reality.

12   Number two, this honourable Commission

13   can exercise its jurisdiction to make

14   recommendations to Parliament to address

15   concerns that Chief Justice Bell and Justice

16   Scanlan will set out.

17   Number three, the prime objective of

18   these requested recommendations is to remove

19   juridical inequity in the Federal Court system,

20   to remove the practical, administrative and

21   operational independence concerns associated

22   with the Chief Justice of CMACC struggling to

23   try to balance his or her, in the future,

24   primary responsibilities to CMACC against

25   potential directives to serve as a regular

1   puisne judge of any source court.

2   With the guarded jurisdiction and,

3   again very briefly, government counsel has

4   attempted to limit, restrain, indeed diminish

5   the jurisdiction of this honourable Commission,

6   which is set out in section 26(1) of the Judges

7   Act with regard to, of course, the adequacy of

8   judge's benefits generally, and that's "benefits

9   generally".

10   As Chief Justice Scanlan and -- sorry,

11   Chief Justice Bell and Justice Scanlan will

12   address their remarks, and their requested

13   recommendations fall squarely into both benefits

14   and generally.

15   We have filed a nine-page response to

16   government counsel on jurisdiction and we add

17   this, in addition to the multiple examples of

18   prior Quad Comm's dealing with matters that we

19   will hear and raise, and that's in our material

20   at pages 4 through to 7 of what prior

21   Quadrennial Commissions did.

22   Three brief points here.

23   Number one, a joint submission of the

24   Canadian Superior Court, Courts Judges

25   Association, and the Canadian Judicial Councils

1 at paragraph 7 -- page 71, sorry, recommends

2 structural changes to 26(3) of the Judges Act

3 with regard to judges being paid for the full

4 cost of their participation in a Commission or

5 inquiry. No objection from government counsel

6 as the to jurisdiction of this honourable

7 Commission.

8   Number two, and paragraph 78 of the

9 government's reply, they say they are committed

10 to engaging with the Chief Justice of the

11 Federal Court with regard to pre-retirement

12 arrangements. Again, no objection from

13 government counsel as to jurisdiction of this

14 honourable Commission.

15   Last, number three, the government,

16 also at paragraph 78 in their reply, indicate

17 they are committed to structural changes to the

18 Judges Act as regards supernumerary status or

19 Prothonotaries. Again, no objection with regard

20 to jurisdiction.

21   I now hand the microphone,

22 electronically and virtually, over to Justice

23 Scanlan and to Chief Justice Bell.

24   MADAM CHAIR: Thank you, Mr. Meehan.

25   Chief Justice Bell, thank you.

1   CHIEF JUSTICE RICHARD BELL: Thank
2   very much, Madam Chair, Commissioners Bloodworth
3   and Griffin.

4   First let me say that I consider it a
5   privilege to appear before your Commission,
6   which is so very important to the constitutional
7   underpinnings of our free and democratic
8   society. Secondly, I wish to state from the
9   outset that this presentation's genesis does not
10   arise from any job dissatisfaction by me.

11   To the contrary, I'm the view that I
12   have the best job in the Canadian judiciary. I
13   am Chief Justice of an appellate court that has
14   the privilege of adjudicating a unique
15   cross-section of criminal law, military law and
16   constitutional law.

17   The lawyers who appear before me on a
18   daily basis are always exceedingly well prepared
19   and show tremendous courtesy toward one another
20   and the Bench.

21   I have never, in over six years as
22   Chief Justice of the Court Martial Appeal Court,
23   have had an unrepresented litigant appear before
24   me. I am proud to say that members of the
25   Canadian Armed Forces have excellent access to

1   justice, as you know that is only a dream in

2   most parts of Canada in the civilian justice

3   system.

4   The military judges, the equivalent of

5   the trial judges in the civilian justice system,

6   write cogent, well-reasoned decisions. They

7   give tremendous thought and effort in to

8   perfecting their instructions to the five

9   members of the general court martial, which once

10   again, if I may make a comparison, would be the

11   equivalent of the twelve-person jury in a

12   civilian justice system.

13   CMACC staff are second to none. My

14   relationship with the executive branch has been

15   nothing but professional and exemplary and I

16   can't say enough good about the members of the

17   executive, with whom I have had the privilege of

18   working.

19   If things are so good on your court,

20   you might ask, where is the need for change? I

21   will now turn to several aspects of conflict

22   which flow from a structure which requires the

23   Chief Justice of the Court Martial Appeal Court

24   of Canada to also be a regular judge of a source

25   court. And I deliberately use the word "regular

1 judge" rather than puisne judge. The three

2 areas I intend to address relate to, one, a lack

3 of perceived independence and impartiality as it

4 relates to activities within the Canadian

5 Judicial Council; a lack of perceived

6 independence and impartiality as it relates to

7 activities within the court administration

8 services; and, three, a lack of independence

9 with respect to the Chief Justice of CMACC's own

10 training as well as the training of members of

11 his or her court.

12   First, the Canadian Judicial Council.

13 The Chief Justice of the Court Martial Appeal

14 Court of Canada is 1 of 41 members of the

15 Canadian Judicial Council. Some might refer to

16 the council as the governing body for judges,

17 some might not but some do. The Canadian

18 Judicial Council makes recommendations to the

19 Minister of Justice with respect to the removal

20 of federally-appointed judges.

21   It also enacts policies related to

22 judicial conduct, establishes a Code of Ethics

23 for judges, and makes decisions with respect to

24 courses to be offered to judges, where those

25 courses will be held and, on occasion, allocates

1   spaces for training to particular courts.

2   There can be conflict between the

3   Chief Justice of the Court Martial Appeal Court

4   of Canada and the Chief Justice of his or her

5   source court within the operations of the CJC.

6   Some areas of conflict include access

7   to seats on training programs offered through

8   the Canadian Judicial Council, respective

9   discipline or removal of a federally-appointed

10   judge and, finally, policy initiatives of the

11   Canadian Judicial Council.

12   First to the issue of course

13   allocations. The Court Martial Appeal Court of

14   Canada judges deserve, and are constitutionally

15   entitled to, a Chief Justice who is perceived as

16   being impartial and independent and who will

17   advocate for their interests on course funding

18   and seats. That independence and willingness to

19   advocate can be questioned when the Chief

20   Justice of the CMACC is competing against the

21   Chief Justice of his or her source court for

22   seats and funding.

23   Second, I mention the discipline

24   process. Very importantly, federally-appointed

25   judges who find themselves facing the

1   possibility of removal recommendation from the

2   Canadian Judicial Council are constitutionally

3   entitled to a decision maker who is not only

4   impartial and independent but is perceived to be

5   so. With respect, that perception may be open

6   to question when one of the Chief Justices at

7   the table is a regular member of another court,

8   who's Chief Justice is also part of the

9   decision-making process.

10   Third, policy initiatives at the

11   Canadian Judicial Councils. The CJC makes

12   routine policy decisions on its ethical

13   guidelines, to launch or not launch litigation,

14   litigations' positions and strategies. These

15   can be very hotly contested items. The Chief

16   Justice of the Court Martial Appeal Court needs

17   to be immune from possibility or suggestions

18   that his or her position is coloured by their

19   role as a regular judge of another Chief Justice

20   of another court and, hence, Chief Justice

21   around the Canadian Judicial Council table.

22   I now turn to court administration

23   services where similar problems arise. The

24   Court Administration Services Act identifies

25   four Chief Justices as having equal

1 responsibilities with respect to the

2 administration of the four national courts, of

3 course excluding the Supreme Court of Canada.

4 Those courts are the two intermediate appellate

5 courts, the Federal Court of Appeal and the

6 Court Martial Appeal Court of Canada; and the

7 two national trial courts, the Federal Court and

8 the Tax Court of Canada.

9   At regularly-held meetings of the

10 Chief Justices Steering Committee, essentially a

11 Board of Directors, the four Chief Justices and

12 the Associate Chief Justices of the Tax Court

13 and Federal Court decide such important issues

14 as budget submissions to the executive branch,

15 the allocation of physical, human and other

16 resources among the courts.

17   As an aside, I would note that from my

18 experience in -- quite frankly, I've sat on four

19 courts now in my fifteen-year career, the New

20 Brunswick Court of Queens Bench, the New

21 Brunswick Court of Appeal and now the Federal

22 Court and Court Martial Appeal Court. From my

23 experience in all four courts, of which I have

24 had the privilege of serving, some of the

25 toughest battles are in relation to the

1   assignment of courtrooms. Those battles occur,

2   sadly, not only among courts but among judges

3   sitting on the same court.

4   The Court Martial Appeal Court is

5   constitutionally required to have a Chief

6   Justice who can advocate for resources and

7   policies which advance his or her court's needs,

8   without being beholding to a Chief Justice of

9   another court. Furthermore, and equally

10   important, the other courts around the court

11   administration table are entitled to have

12   comfort and certainty that the opinions from,

13   and positions taken by, the Chief Justice of the

14   Court Martial Appeal Court are his or hers alone

15   and not influenced or coloured by the position

16   as a regular justice of another court at that

17   same table.

18   This assurance of the principle that

19   all votes are equal around the CAS table applies

20   to all issues that might arise in court

21   administration, including, but not limited to,

22   the building of court facilities, the design of

23   those facilities, location of those facilities,

24   assignment of courtrooms, allocation of human

25   resources, digital resources, registry

1   resources, and the list goes on.

2   I now turn briefly to the issue of

3   training within the courts. The Canadian

4   Judicial Council currently recommends a minimum

5   number of training days annually for all

6   federally-appointed judges.

7   Parliament has recently imposed

8   minimum mandatory judicial training in some

9   subject matters. Chief Justices must advance

10   the training of not only the regular members of

11   their courts but also his or her own training.

12   All courses are currently approved in all courts

13   by their Chief Justices or associate Chief

14   Justices. There is a bit of a caveat that we

15   can get into in the question and perhaps that

16   exception might be the Chief Justice of the

17   Court Martial Appeal Court, because all of our

18   judges are regular sitting federally-appointed

19   judges of Superior Courts or Courts of Appeal

20   across the country, which, quite frankly, works

21   very well. We have a tremendous bassin from

22   which to draw. So there are some issues that we

23   can discuss surrounding training on that but

24   they're secondary to what we're here about

25   today.

1   Serious questions do arise, however,

2   about the independence of the Chief Justice of

3   the Court Martial Appeal Court of Canada if he

4   or she is required to seek the permission of his

5   or her source court to attend training, to

6   attend conferences, to lecture at conferences,

7   et cetera.

8   Furthermore, training is impacted by

9   scheduling. Scheduling is perceived by the

10 Chief Justice of source courts as his or her

11 prerogative. You can imagine the challenges

12 such an approach brings to the ability of the

13 Chief Justice of the Court Martial Appeal Court

14 of Canada to properly fulfill his or her

15 responsibilities with respect to training,

16 attending conferences, and effectively being an

17 ambassador for the court and for the military

18 justice system.

19   Justice Scanlan will be addressing

20 that issue, about training, more fully in his

21 observations.

22   I thank you very much for your time.

23 If you have questions in French or English it

24 will be a pleasure for me to answer in the

25 language of your choice.

1   MADAM CHAIR: Thank you, Chief Justice

2   Bell. Thank you very much.

3   Justice Scanlan.

4   JUSTICE EDWARD SCANLAN: Thank you

5   very much. Ms. Chairperson, Commissioner

6   Bloodworth, Commissioner Griffin, I preface my

7   comments by suggesting that Counsel Meehan and

8   the Chief Justice himself have appropriately

9   sugar coated how the current source court

10   arrangement impacts the judicial independence of

11   CMACC, most notably the Chief Justice of that

12   court. I choose to present a less varnished

13   history. The current source court arrangement

14   has a direct negative impact on the independence

15   of a national court which is constitutionally

16   established.

17   A court that plays an important role

18   in the Canadian justice system, Canada's

19   military justice system is a unique,

20   self-contained system, one that is a creature of

21   our constitution, intended to operate in

22   parallel to the civilian criminal justice

23   system. This parallel system, as noted by the

24   Supreme Court of Canada in the Généreux case, is

25   deeply entrenched in our history yet the source

1   court arrangement, as it relates to the Chief

2   Justice, compromises the independence of CMACC.

3   This is more than perception.

4   The source court arrangement sees the

5   Chief Justice of CMACC either beholden to or

6   controlled by the Chief Justice or Associate

7   Chief Justice of a source court. I need not

8   reference just this source court for this Chief

9   Justice but any source court, no matter where

10 the Chief Justice is appointed from. He or she

11 would suffer from the same lack of independence.

12 There is no other court in this land at any

13 level that is dependent upon or controlled by

14 the Chief Justice in a separate court.

15   Judges of all Federal Courts enjoy the

16 benefit of participation in educational

17 conferences, upon approval by their Chief

18 Justice. A Chief is also in control, in terms

19 of assigned cases, locations, writing time or

20 preparation time for trials and many other

21 judicial benefits, yet the Chief Justice of

22 CMACC must get approval from the Chief of his

23 source court to get time to do CMACC work. This

24 speaks to the lack of independence. Even if the

25 Chief of the source court were to be hands off.

1   There are other examples in terms of how

2   independence may be compromised.

3   I wish to explain some of the things

4   required of the current Chief Justice. As Chief

5   Justice he alone is required to set the schedule

6   for both himself and other judges who may hear

7   CMACC appeals. A Chief Justice of any court

8   must be able to set the schedule for his or her

9   court, yet even the Chief Justice in CMACC can

10   have his or her schedule altered unilaterally by

11   the Chief of the source court. Alternatively he

12   or she must negotiate for the time required to

13   do CMACC work. A Chief in the source court may

14   have no idea as to the realty of the workload

15   and the urgency of the workload as generated by

16   CMACC.

17   There's no other court in the country

18   where the Chief Justice of another court could,

19   in effect, make it difficult, if not impossible,

20   for the Chief of an Appeal Court to access and

21   allocate judicial resources and benefits. The

22   Chief Justice must negotiate perhaps even fight

23   for time and resources that the CMACC requires.

24   Work, workload, location, case

25   assignments, even educational benefits and

1   supernumerary entitlements for judges are all

2   things that fall within this Commission's

3   mandate. These items fall within the definition

4   of benefits for judges in the broader sense.

5   The task of scheduling and assigning

6   judges involves consideration as to language,

7   gender, geography, and expertise. The Chief

8   Justice must take into account --

9

10   [SPEAKERS AUDIO IS CUTTING OUT.)

11

12   MADAM CHAIR: I hear background noises

13 and I see a lot of people who are not on mute.

14 Can I ask anyone other than Justice Scanlan to b

15 on mute please?

16   JUSTICE EDWARD SCANLAN: May I

17 continue?

18   MADAM CHAIR: Yes.

19   JUSTICE EDWARD SCANLAN: Thank you.

20   You have to ask whether it was a

21 formal court martial and if so are jury

22 instructions in issue? If so what's the work

23 experience for a potential panel member. Are

24 there constitutional issues or issues of

25 extra-territorial jurisdiction. The list can go

1   on in terms of things the Chief Justice must

2   consider.

3   Chief Justice Bell sits on every

4   appeal, both French and English. He reviews

5   every decision and the translation thereof.

6   CMACC is unique among Canadian courts

7   in that there is single judge responsible for

8   the administration and operation of that court,

9   that's the Chief Justice. All other judges who

10   sit in CMACC have primary responsibility to a

11   source court and act in CMACC only upon the

12   request of the Chief Justice. The Chief

13   Justice, therefore, is on call, 24/7, 365 days

14   per year to deal with emergency issues, motions

15   or applications.

16   By way of example, I refer to bail

17   reviews. Even were he to assign the hearing of

18   such a motion or application to another judge it

19   must, first, come through him. There's no other

20   judge sitting on a regular basis. Yet in spite

21   of this constant on-call status the Chief

22   Justice's schedule is subject to control by a

23   source court.

24   It would not be beyond the pale for

25   the Chief of a source court to simply hand the

1   Chief of CMACC a schedule and say, this is what

2   you must do for the source court, how, where and

3   when you fit CMACC work in that schedule is up

4   to you.

5   The same could occur in terms of

6   vacations. It is the source court that can set,

7   cancel or vary a vacation for a CMACC Chief

8   Justice no matter what the needs of CMACC are.

9   Those are all benefits, for a judge.

10   I've already referred to some of the

11   things that a Chief Justice must do, and even

12   referred to the work he does with the Canadian

13   Judicial Council. The Canadian Judicial Council

14   meets twice per year, there's a minimum three

15   days required for each session. With travel

16   time it may require as much as five days, twice

17   per year; and that's added to his normal

18   workload both in CMACC and with his source

19   court.

20   Judges are often asked to sit on

21   committees in the CJC, while most Chief Justices

22   control their own schedules, the fact that the

23   source court is in control of the CMACC Chief's

24   schedule means it is impossible for the CMACC

25   Chief to agree to sit on any CJC committees that

1   involve substantial commitments of time. No

2   other Chief Justice endures that restriction on

3   the exercise of their benefits in that regard.

4   Chief Justice already mentioned the

5   work he does on the Court Administration

6   Services Committee, I will not repeat. But I do

7   emphasize the fact that the CMACC Chief is put

8   in an awkward position of having to compete with

9   the Chief Justice of his source court when

10   advocating on behalf of CMACC.

11   In a sense, he must go cap-in-hand not

12   only the government but to the Chief of his

13   source court. I recall reading and actually

14   having my hands on an article where the Chief of

15   the Federal Court, June 27, 2017, spoke of the

16   independence of a court being compromised by

17   having to go to government, in terms of budget,

18   he was seeking more independence and control

19   over his own budget. The CMACC Chief not only

20   has to go to government, but at the same time

21   and at the same place that that Chief Justice of

22   the Federal Court has to go, but he has to go

23   cap-in-hand to his own Chief in the source court

24   and do battle, competing for the same scarce

25   resources. If the Chief Justice in the Federal

1   Court viewed that as being an encroachment upon

2   the independence of the court then it's double

3   so for the CMACC courts.

4   The Chief of CMACC serves on a CMACC

5   inquiry committee as well and all disciplinary

6   matters that are not resolved at the inquiry

7   level, for example, the Généreux matter. He's

8   often asked to speak at outreach events, for

9   example, at Canadian Bar Association conferences

10   or various education programs. He does staff

11   interviews, including court administrator,

12   clerks and legal counsel.

13   It's the Chief alone that must

14   spearhead projects like rule revisions or

15   projects and the publications of CMACC

16   decisions. The Chief is also the liaison with

17   other Military Appeal Courts in the Five Eyes

18   countries. And he's been asked to present

19   internationally to update other countries as to

20   the state of the military justice system in

21   Canada.

22   All of these things one might expect

23   of a Chief in terms of requests or demands on

24   their time, but this Chief alone has to seek

25   permission from his source court; and it would

1   be so no matter who the Chief was and what their

2   source court was.

3   The unvarnished reality is that the

4   control of the Chief Justice by the source court

5   is real and it's not just about perception. The

6   current Chief Justice of CMACC is substantially

7   committed to CMACC duties, as would any Chief of

8   CMACC. And in that capacity he sits only as an

9   Appeal Court judge in CMACC.

10   What our written submissions, dated

11   March 26th, 2021, urge is for your Commission to

12   recommend that the Chief Justice be separated

13   from a source court, and that upon electing

14   supernumerary status the Chief Justice not have

15   to return to his or her source court.

16   This is something similar to what the

17   Commission has done before, earlier Commissions,

18   for example, made recommendations related to

19   senior judges in Nunavut. The Commission

20   recommended the senior judges of the Nunavut

21   Court of Justice become Chief Justices of that

22   court, and upon being -- upon electing

23   supernumerary status they be entitled to the

24   benefits attached to the Chief Justice office

25   upon retirement. As supernumerary judges they

1   would be entitled to sit as puisne judges of

2   that court. That is, in fact, what we're asking

3   this Commission to recommend.

4   The current source court arrangement

5   would have the Chief Justice of CMACC return to

6   a trial court, remember? He sits mainly in an

7   Appeal Court capacity now. No other judge in

8   any court, at any level, would be required to

9   return to a different court from an Appeal Court

10 upon electing supernumerary status. This is a

11 direct impact of the benefits available to the

12 Chief of CMACC.

13   There's also geographical aspect as

14 well. CMACC, to a significant extent, is

15 Ottawa-centred in terms of administrative

16 operations. It's also where the only dedicated

17 CMACC courtroom is located. While CMACC

18 regularly sits in various locations throughout

19 the country the administrative heart is in

20 Ottawa. Upon electing supernumerary status in

21 the source court the present Chief Justice may,

22 for example, be required to do work as a trial

23 court judge in the Federal Court in any corner

24 of this country.

25   In fact, if the source court for a

1   Chief Justice was a provincial Superior Court

2   then the election of supernumerary status may

3   involve the permanent relocation of a

4   supernumerary Chief to a different province,

5   because his or her source court could be any

6   province in the country. And they would be

7   required to move back to become a supernumerary

8   judge of that court.

9   The report and recommendations to the

10   Minister of Justice, June 3rd, 2016, page 47,

11   paragraphs 182 and 184, and that's found at tab

12   C of our reply, recommended as part of the

13   mandate that the government recognize that

14   judges sitting in Labrador, or in a remote

15   location, the Commission recommended that

16   relocation benefits be paid upon retirement from

17   office.

18   There's a real possibility that CMACC

19   Chief could be appointed from a Superior

20   Provincial Court if there's no provision for

21   removal costs. And I mention that not that

22   we're pushing for the removal costs, but it

23   illustrates the dichotomy and difficulty of

24   having the source court tie.

25   Yesterday you heard from Mr. Lokan and

1   Mr. Bienvenu speak on the needs to attract

2   outstanding candidates. I, like them, refer you

3   to section 26(1) of the Judges Act. A source

4   court arrangement with the Chief Justice of

5   CMACC being controlled by another court, and the

6   prospect of having to return to a trial setting

7   after many years working primarily in an Appeal

8   Court setting, could be a deterrent to

9   attracting outstanding candidates for the office

10   of Chief Justice of the CMACC court.

11   The Chief Justice's written

12   submissions of March 26, 2021, propose

13   recommendations that would address or attenuate

14   independence concerns by providing a

15   supernumerary position for the Chief Justice, by

16   bringing the office of the Chief Justice into

17   conformity with other Chief Justices in the

18   Federal Court system.

19   I summarize on the issue of

20   jurisdiction. I respectfully disagree with the

21   government's position suggesting that this

22   Commission lacks jurisdiction. Benefits such as

23   supernumerary status, vacations, workload, case

24   assignments, education, and even the requirement

25   to move to a different province upon electing

1 supernumerary, all fall squarely within the

2 purview of benefits forming part of your

3 mandate.

4   I remind you, in terms of benefits,

5 the Chief Justice for CMACC is the only Chief

6 Justice in the federal mandated courts,

7 including the Superior Courts and Territorial

8 Courts, that can, in effect, be denied the

9 opportunity elect supernumerary status in the

10 court which he or she serves in, the only judge.

11   It's a benefit that should be

12 conferred upon the CMACC Chiefs for now and into

13 the future, based on recommendations of this

14 Commission. Also, upon appointment to the CMACC

15 the Chief Justice of CMACC should be entitled to

16 sever its obligations to any source court so as

17 to avoid not only the perception but the reality

18 in terms of independence.

19   If the Commission does not make the

20 recommendations requested or declines to make

21 any comment on the National Defence Act the

22 Commission might note these concerns in the

23 final report.

24   I thank you for your time and patience

25 and I understand now that Mr. Meehan will wrap

1   up for us.   Thank you.

2   MADAM CHAIR: Thank you, Justice

3   Scanlan.

4   Mr. Meehan.

5   MR. MEEHAN: Unless the Chair and

6   Honourable Commissioners have any questions, we

7   have no further comments beyond, of course,

8   emphasizing the comments by Chief Justice Bell

9   and also Justice Scanlan who has just spoken.

10   The only thing I would emphasize would

11   be that prior to appointment as Chief Justice of

12   CMACC, as I mentioned at the beginning, Chief

13   Justice Bell was a sitting member of an Appeal

14   Court in Canada, New Brunswick, as Justice

15   Scanlan is currently a sitting member of the

16   Nova Scotia Court of Appeal.   Those are our

17   comments.   Thank you.

18   MADAM CHAIR: Thank you.   One question

19   I have is, I notice Justice Morris Fish is

20   currently tasked with reviewing military

21   justice, and including in his mandate, as I saw

22   in the press release, a review of the Martial

23   Court and Martial Court of Appeal.   How does

24   that work, assuming that we agree on the

25   jurisdictional issue and so forth?   Can you help

1 me a bit on that side and whether we would be

2 overstepping, I assume not overstepping if we

3 have jurisdiction, but can you help me a bit on

4 that mandate?

5   MR. MEEHAN: Let me say this and then

6 defer to Chief Justice Bell.

7   As Justice Scanlan appropriately and

8 strongly set out, there are structural and

9 functional challenges that exist within the

10 current system. Those structural and functional

11 challenges can be eliminated by the elimination

12 of a source court requirement. And the

13 recommendations from -- to speak plainly, the

14 recommendations from this Honourable Commission

15 will solve the problem.

16   There are other issues related to

17 military justice, but the appropriate and

18 strongest avenue for redress here for CCMAC is

19 through this Honourable Commission.

20   Chief Justice Bell.

21   CHIEF JUSTICE RICHARD BELL: Thank

22 you. That's an excellent question, Madam Chair.

23   Madam Chair and members of the

24 Commission, yes, we did make a presentation

25 before the Fish Inquiry. I will tell you that

1 the presentation to the Fish Inquiry was, shall

2 I say, much less sophisticated than it is before

3 you. There was much less preparation than there

4 is in the Commission before you.

5   We are not unmindful of the fact, and

6 I mean no disrespect, in fact I'm speaking with

7 representatives of the Honourable Fish tomorrow.

8 So I mean no disrespect, please understand. But

9 we understand that the Honourable Fish

10 recommendations may or may not be implemented by

11 the government. We have seen such studies

12 before and such inquiries before.

13   We know that your Commission gets the

14 attention of government. Your Commission the

15 government cannot avoid either implementing or

16 saying why they do not implement your

17 recommendations.

18   Obviously, from a tactical point of

19 view quite frankly, I expected this question

20 from this Commission and that is no doubt one of

21 the reasons why we made a submission to the Fish

22 Commission, albeit brief, less detailed, less

23 professional, but still expressing our view that

24 the Chief Justice of CCMAC's position should be

25 separate and apart from any source court.

1   Just to round out our submissions to

2   the Fish Inquiry, we also question the need for,

3   I think, approximately 56 judges who are

4   appointed to the Court Martial Appeal Court from

5   which I can draw upon. Since coming to office,

6   I have been of the firm view that 56 or 57 is

7   probably too many.

8   The challenge is that we have to have

9   the right mix on the judges. And when I

10   arrived, and I mean no disrespect to anyone on

11   the Federal Court, but when I arrived the large

12   percentage of the judges on the Court Martial

13   Appeal Court came from the Federal Court.

14   The Federal Court has no criminal law

15   jurisdiction. That's the reality. I should be

16   careful saying "no" because I think there is

17   some with respect to misleading advertising, but

18   essentially they do no criminal law work. I

19   have done no criminal law at the Federal Court

20   since my arrival sixteen and a half years ago.

21   So through successive Ministers, and I

22   can tell you that they have been super

23   co-operative, we have worked toward changing

24   that balance of the judges available for the

25   Court Martial Appeal Court from Federal Court

1   judges to Superior Court judges in the

2   provinces. That's no secret. I've done that

3   and there's been a reason for that. This court

4   needs the criminal law expertise.

5   MADAM CHAIR: Thank you very much,

6   Chief Justice Bell.

7   I have another question but maybe I

8   can ask my colleagues, Peter and Margaret, if

9   you have any?

10   MR. COMMISSIONER: I just have one

11   question for Mr. Meehan. Do I understand that

12   the structure of the court is within the four

13   corners of the jurisdiction of Mr. Fish's

14   inquiry?

15   MR. MEEHAN: Yes.

16   MR. COMMISSIONER: Thank you.

17   MADAM COMMISSIONER: I just had one

18   question, Madam Chair.

19   I understand your argument to be all

20   focused on the Chief Justice and his need to

21   control his schedule and so on, but help me

22   understand why that same issue doesn't apply to

23   all the judges of CCMAC. Presumably their

24   schedules, their vacation, is all controlled by

25   the Chief Justice of their court.

1   MR. MEEHAN: Chief Justice Bell, would

2   you like to respond to that?

3   CHIEF JUSTICE RICHARD BELL: Surely.

4   It's interesting, I Chair the Appeal

5   Courts Forum at the Canadian Judicial Council

6   and there has not yet been a meeting that I

7   close at the round table thanking the Chief

8   Justices around that table for, this is a very

9   poor choice of words, loaning their judges to

10   the Court Martial Appeal Court for the past

11   month or the past six months and so on.

12   The same problem doesn't arise, quite

13   frankly, at the regular judge level of the Court

14   Martial Appeal Court, and I'll explain why. The

15   regular judges of the Court Martial Appeal

16   Court, other than the Chief, have serious,

17   serious responsibilities in their home court. I

18   understand that. And most of them are

19   privileged when I ask or delighted when I ask

20   them to serve. I don't normally ask anyone to

21   serve more than once per year. There have been

22   some exceptions lately because we've had more

23   cases than normal and there are a few who have

24   done double duty. But, generally speaking, I

25   don't call upon them that often so that's the

1   main reason why the same problem doesn't arise.

2   And many of them are supernumerary and

3   they share their time with us. Justice Scanlan

4   is supernumerary, there are many others. But

5   I'll just give you an example, Justice Bennett

6   of the BC Court of Appeal is supernumerary. She

7   has answered the call every time. Justice Watt

8   of the Ontario Court of Appeal is not

9   supernumerary but he has sat whenever I have

10   requested. Justice Deborah McCawley, who just

11   recently retired, who has announced her

12   retirement, she was supernumerary. So it fit

13   well within her schedule when we did call her.

14   But that's not to say that we don't call on

15   judges sitting full time. Justice Rennie and

16   Justice Pardu, Justice Rennie of the Federal

17   Court of Appeal and Justice Pardu, I have called

18   upon them often lately and they have made the

19   time.

20   But the big difference is my opening

21   lines, and I don't want to disclose deliberative

22   secrecy but I'm sure no one will find this too

23   offensive, my opening lines after every hearing,

24   my opening lines are, quite simply, I am willing

25   to write if you wish for me to write. And if

1   there's anyone that has a burning desire to

2   write then I will let them write.

3   So when judges get assigned knowing

4   that they don't have to hold the pen at an

5   appellate court it makes a huge difference. It

6   makes a huge difference. I can't say how

7   much -- I can't overemphasize how much. So I

8   think that's the main reason.

9   The other reason this application or

10 this motion, this argument is being made to you

11 folks today is, the role of the Chief Justice of

12 CMACC is much, much different than the role of

13 the regular judges of CMACC. I'm the first one

14 to acknowledge that CMACC probably does not need

15 a full-time roster of three full-time judges

16 sitting alone, as the PEI Court of Appeal. And

17 I often compare our work to the PEI Court of

18 Appeal because we service a population, an adult

19 population of about that same size. That's the

20 reality. When you look at the civilians that

21 are covered by our legislation, and you look at

22 the regular military members who are covered by

23 our legislation, and you look at the number of

24 cases we have, and so on, it's not -- it's a

25 good comparator.

1   But I will say this, I think we

2   benefit greatly, greatly, from having puisne

3   judges from the superior courts and the Federal

4   Courts across the country and I would not want

5   to lose that.

6   I do think, and remain very strongly

7   of the view, that the position of Chief Justice,

8   given the numerous responsibilities with respect

9   to Canadian Judicial Council, committee work,

10   CAS committee work, and being an ambassador for

11   the court and for the military justice system

12   should not be tied to a source court, whatever

13   that source court. Whether it be BC Court of

14   Appeal or BC Superior Court, New Brunswick Court

15   of Queen's Bench or the Federal Court or the

16   Federal Court of Appeal. This position needs to

17   be a stand-alone position.

18   MADAM COMMISSIONER: Okay. Chief

19   Justice, just to make sure I understand what

20   you're saying, I understand you're saying the

21   principle isn't different but practically you

22   haven't had a problem and practically you need

23   judges from -- you benefit and the court

24   benefits from having judges across the country

25   in many different courts.

1   CHIEF JUSTICE RICHARD BELL: Greatly.

2   JUSTICE EDWARD SCANLAN: Can I add to

3 that, just for moment, from a puisne judge's

4 perspective in a province? I sit also as a

5 Deputy Judge in Nunavut and they will call, from

6 time to time, and ask that I sit up there, same

7 as I've been often asked to sit in a CMACC

8 appeal hearing. When I get a request I simply

9 have to look at my schedule, which is set, and

10 say, yes, I'm available or, no, I'm not.

11   For the Chief Justice when something

12 comes in the door he can't say, well, wait till

13 my schedule's freed up. He has to deal with it.

14 He has to deal with it often today. And often,

15 I might suggest as well, that the turnaround

16 time required and expected and delivered in

17 terms of CMACC is quite quick, because one of

18 the mandates on the Defence Act is to get people

19 back serving in the Forces as quickly as

20 possible, if that is a possible outcome. And

21 that is a mandate under the Act.

22   So the Chief Justice, in compliance

23 with that Act, has to get things rolling quite

24 quickly and have appeal hearings quite quickly.

25 But he has a group, he says, of approximately

1   57 judges to call upon. And each and any one of

2   us can simply look at our schedules and say,

3   yes, available; no, not available. That's not

4   the end of it, but for him it is the end of it.

5   He has to and does sit on each and every panel,

6   but a source court controls his schedule.

7   MADAM COMMISSIONER: Thank you, Chief

8   Justice Bell and Justice Scanlan.

9   MADAM CHAIR: Thank you, Chief Justice

10   Bell, Justice Scanlan, and Mr. Meehan. Thank

11   you for the time. You did very, very well. So

12   congratulations but thank you for your

13   arguments. Very much appreciated.

14   Now, it is almost 10:20. Mr. Justice

15   Chamberland, would you be ready to start from

16   10:20 to 10:40 and then take a break afterwards?

17   JUSTICE JACQUES CHAMBERLAND: That's

18   fine with me.

19   MADAM CHAIR: Thank you very much, you

20   have the floor. And just before, I will give

21   you right of rebuttal after Chief Justice Bell

22   at 2:40 p.m. approximately this afternoon if you

23   should need them, I will give you 10 minutes or

24   so. Is that okay?

25   JUSTICE JACQUES CHAMBERLAND: That's

1   fine. Thank you very much and thank you for

2   giving me the floor here and the opportunity to

3   explain the request that I sent to the

4   Commission on March 20, 2021. This is a

5   privilege and I intend to take full advantage of

6   it. Maybe I will not occupy all of the time

7   that you've granted me but I at least would like

8   to express my point of view and that of the

9   Court of Appeals judges of Quebec.

10   For the first part I will present in

11   French and for the second part I will present in

12   English. Or rather, correction, I'm going to do

13   the first part in English.

14   By the unanimous support of my 32

15   colleagues on the Court of Appeal of Quebec,

16   including that of Chief Justice Savard, their

17   names are set out in an annex to my letter dated

18   March 10, 2021.

19   In 2008 the Commission, chaired by

20   Sheila Block, addressed the question of whether

21   appellate judges should receive a higher salary

22   than their colleagues appointed to trial courts;

23   answering in the affirmative and establishing

24   the salary differential at 3 percent; appellate

25   judges had requested the 6.7 percent.

1   In 2012 the Commission, chaired by

2   Ryan Levitt, came to the same conclusion.

3   In 2015 the Commission, chaired by Gil

4   Rémillard, concluded that both prior Commissions

5   had been mistaken and that appellate judges were

6   not entitled to higher salaries than trial court

7   judges. This is, in my humble opinion, an

8   unfortunate error that must be corrected.

9   The question as to whether appellate

10 judges should receive a higher salary than trial

11 judges is a question of principle, that the

12 Block Commission decided after an in-depth

13 analysis of the arguments raised by all of the

14 interested parties. I refer you to paragraph

15 125 to 171 of the Block Commission report. And

16 when questions of principles are decided they

17 must be decided definitively, unless there is a

18 significant change of circumstances. This goes

19 to the argument of continuity that Mr. Bienvenu

20 referred to yesterday.

21   No change in the situation of

22 appellate courts in Canada, let alone a

23 significant change, has occurred since the Block

24 Commission decided the issue nearly thirteen

25 years ago. The position of appellate tribunals

1   in Canada's court hierarchy is the same today as

2   it was then, that is, trial courts, appellate

3   courts, Supreme Court of Canada. The role and

4   responsibilities of appellate courts are the

5   same as they were then, that is, to remedy

6   errors made by trial courts and to speak the

7   law.

8   The Commission, your Commission, is an

9   institution whose existence is established by

10   the Judges Act. Commissioners change but the

11   institution does not. In the -- in this context

12   of continuity the Commission must follow its own

13   decisions. This is, with the utmost respect,

14   what the Rémillard Commission should have done

15   and did not do. I believe that the integrity

16   and credibility of the Commission process

17   depends, at least partly, on this respect for

18   previous decisions.

19   I have read the excerpts of the

20   government's submission that are relevant to

21   this question of a salary differential of

22   appellate judges, as well as the letter from

23   Justice Gordon Campbell on this same topic. As

24   heard yesterday, Madam Chair, I would like to

25   say a few words of this.

1   Firstly, neither the government nor

2   Justice Campbell answer the issues raised by our

3   request. The Rémillard Commission did what it

4   need not do, or should not have done, revisit on

5   substance a matter of principle that had already

6   been decided upon by the Block Commission, as

7   confirmed by the Levitt Commission. It's a bit

8   as if the Commission were sitting in appeal of

9   its decision, which is not its role.

10   Second comment has to do with

11 paragraph 69 of the reply submissions of the

12 Canadian government. The reference to the

13 financial security of appellate judges is

14 misleading or an unfortunate one, the choice of

15 words is up to you, it matters not to me.

16   When judges ask for -- appellate

17 judges for a higher compensation than trial

18 courts it's not to better ensure their financial

19 security, because you will have certainly

20 gathered that 3 percent will not have a big

21 impact on this matter. But it's rather that for

22 the fact that this compensation reflects a

23 hierarchy in the Canadian -- their place in

24 judiciary hierarchy and the roles and

25 responsibilities. And they -- those roles and

1 responsibilities are an objective, relevant

2 factor under 26 -- as laid out in 26(1)(d) of

3 the Judges Act. And adding 3 percent to

4 appellate judges' compensation is done to make

5 their compensation sufficient in comparison to

6 those of their trial division colleagues to

7 satisfy the first paragraph, 26(1), of that

8 section. So it's not really a matter,

9 obviously, of financial security. I would be

10 quite cheeky to defend that point today.

11   The third -- my third comment is about

12 paragraph 70. If the government implies that

13 our request that you respect the previous

14 decision of the Block Commission would only be

15 supported by 32 of the 177 appeal judges in

16 Canada, stated otherwise, no other Canadian

17 appellate judges from sea to sea would support,

18 apparently, this decision, which remarkably is

19 supported by all the judges of the Appeals Court

20 of Quebec, without exception.

21   So, you know, with all due respect,

22 this is a ridiculous assertion, as is the one

23 saying that all Appeals Court judges agree with

24 this because, you know, all the judges, the

25 Appeals Court of Quebec are in agreement. And

1   the fact is we don't know whether they all are.

2   But, you know, whether they do or not our

3   request is for your intellect to consider not

4   your calculator.

5   The reality is that the government is

6   raising the same argument and has been, in one

7   form or another, since the very beginning. This

8   is my 28th year on the appellate court and I'm

9   starting to know my way around and how things

10   work since 1999, because I was there, and it's

11   always the same argument presented differently.

12   You're not enough. It doesn't represent enough

13   courts. It doesn't represent enough

14   geographies. There's always a reason to say

15   that it is not sufficient support.

16   Even in 2008 when we had the explicit

17   support of approximately 70 percent of the

18   appellate courts, in 2011 as we had the support

19   of approximately 50 percent, this is an argument

20   that the Block and Levitt Commissions rejected,

21   in any case. And the truth is that this

22   argument is a smoke screen. And at the end of

23   the day the real question is whether we are

24   right to reproach the Rémillard Commission. And

25   I say this with all kindness, all due kindness,

1   it's not a personal matter.

2   I even called Gil Rémillard, who has

3   been my boss -- who was my boss for five and a

4   half years at the Department of Justice of

5   Quebec, I called him before sending you this

6   letter to explain what I was doing and to give

7   him the reasons for this process of mine. So

8   there's nothing personal here, I would assure

9   you. But it's just a matter of knowing, are we

10   right to reproach the Commission for revisiting

11   an issue of substance and principle that had

12   been dealt with years before?

13   Fourth point, and that will be my last

14   comment, Mrs. Chair and Honourable

15   Commissioners, concerning paragraph 74. It's a

16   paragraph where a series of arguments are

17   listed, the same arguments as the ones presented

18   by Judge Campbell in his letter. So two

19   comments.

20   First, the arguments raised by the

21   government deal with the substance of the issue,

22   which is not relevant here and which was not

23   relevant before the Rémillard Commission. And

24   it is exactly the pitfall in which the Rémillard

25   Commission fell.

1   Second comment. The arguments are the

2   same as the ones that the government has been

3   raising since the very first Quad Comm arguments

4   that was rejected by the Block Commission when

5   it analyzed their substance.

6   My last comment, Mrs. Chair and

7   Mr. and Mrs. Commissioners, is that as far as

8   I'm concerned, this situation is really

9   unfortunate. And for all those reasons, the

10   appellate court judges ask you respectfully to

11   address the recommendations of the Levitt and

12   Block Commissions in your recommendation, in

13   regards to a salary differential of 3 percent

14   between the appellate court judges and the trial

15   court judges, and to recommend that the

16   principle of such a salary differential be

17   established retroactively to April 1st, 2016,

18   the date of the beginning of the period subject

19   to the Rémillard Commission.

20   Thank you very much for your attention

21   and I'm at your disposal if you have any

22   questions for me.

23   MADAM CHAIR: Thank you, Justice

24   Chamberland. I have a question related to the

25   letter sent by Judge Campbell, what he calls the

1   redesign of the tribunal structure, because the

2   Superior Court judges and the appellate judges

3   are appointed based on the same section of the

4   law -- the same section of the constitution.

5   Could you shed some light on this argument?

6   JUSTICE JACQUES CHAMBERLAND: If I

7   answer in depth I will do just like those that

8   want us to begin again with the same debate.

9   And this argument was raised at the time of the

10   Block and the Levitt Commissions.

11   In the Block Commission it is raised

12   and it is said that this argument is irrelevant

13   at the time. Some jurisdictions -- two

14   provinces in Canada, if I recall correctly,

15   where there were not any courts of appeal, as

16   such, there were judges from the -- from section

17   96 who sat as appellate judges but there was no

18   such thing as a Court of Appeal. And at the

19   time there were some bills developed to create

20   courts. Because creating a court within a

21   jurisdiction is the jurisdiction of the

22   province, whereas -- and not federal

23   jurisdictions. So the argument was rejected by

24   the Commission. The Levitt Commission -- the

25   Block Commission rejected it. I don't even

1   remember if the Levitt Commission addressed it,

2   but it was debated and rejected.

3   MADAM CHAIR: Thank you.

4   Peter, Margaret, do you have any

5   questions for Justice Chamberland?

6   MR. COMMISSIONER: I have no

7   questions. Thank you.

8   MADAM COMMISSIONER: No, I don't have

9   any questions, Justice Chamberland.

10   JUSTICE JACQUES CHAMBERLAND: By the

11   way, I realized that you were both -- you have

12   both sat with my friend Gil Rémillard on the

13   previous Commission, of course that's why I had

14   some hesitations, but your decision was such a

15   disappointment for the appellate court judges

16   that I thought that this was not a good enough

17   reason not to speak to you today. And, in any

18   case, if I don't do it today, I will never do it

19   because I'm reaching the age of retirement.

20   So -- and as I was saying, it is

21   nothing personal. I have the feeling that you

22   were carried away on this issue by the Canadian

23   government's position, but I said what I had to

24   say. I rest my case and hopefully you will make

25   the right decision.

1   MADAM CHAIR: I understand. Thank

2 you. Thank you, Justice Chamberland.

3   So it is now 10:36. We will take a

4 longer break and come back at 11:10 with the

5 Canadian Bar Association. Thank you very much.

6   Again, please do not disconnect if you

7 intend to come back. Just put yourself on mute

8 and stop the video if you wish.

9   -- RECESSED AT 10:36 A.M. --

10   -- RESUMED AT 11:10 A.M. --

11   MADAM CHAIR: So I would call upon the

12 Canadian Bar Association representative to make

13 their presentation. And again, I will remind

14 you 10 minutes before the end. You have 40

15 minutes. Thank you very much.

16   MR. REGEHR: Thank you. And good

17 morning, Madam Chair, and members of the

18 Commission. I am speaking to you from Treaty 1

19 Territory in Manitoba and the homeland of the

20 Métis Nation.

21   My name is Brad Regehr and I'm the

22 President of the Canadian Bar Association. I'm

23 here with Indra Maharaj, the Chair of the CBA's

24 Judicial Issues Subcommittee. And thank you for

25 the opportunity to address the Commission on

1   this important matter.

2   The CBA is a professional association

3   of 36,000 members. Our mandate includes seeking

4   improvements to the law and administration of

5   justice. Judicial independence is a

6   foundational constitutional principle that

7   benefits all Canadians. Our citizens rely upon

8   the high quality of our judiciary, whose

9   independence is crucial to the administration of

10   justice in Canada.

11   We are here today to speak to you from

12   the perspective of the issue of judicial

13   compensation. You have received our written

14   submission and I would like to speak briefly

15   about some of the principles that the CBA

16   believes should guide the deliberations of this

17   esteemed Commission. My colleague, Indra

18   Maharaj, is also here to answer any questions

19   you might have.

20   The CBA is an objective observer. We

21   are not here on behalf of judges, the government

22   or any other party. We want to assist the

23   Commission in its work in the process of

24   determining judicial compensation properly and

25   fairly to reflect the imperative of appropriate

1   judicial compensation. Our sole interest is in

2   protecting and promoting judicial independence

3   in the context of the administration of justice.

4   From a practical perspective,

5   Canadians want to know that when they appear in

6   court the judge will be impartial. Canadians

7   must have the confidence that when cases are

8   decided judges have no financial incentive in

9   the outcome. This means that not only judges

10   have no personal or financial interest in the

11   case, but also that they are free from concern

12   about whether the outcome of the case will

13   please or displease the government, which

14   provides their compensation. If judges were

15   embroiled in pay disputes with the government,

16   Canadians would be concerned that judges might

17   be inclined to issue decisions that favour

18   government. This is why the independent

19   compensation Commissions, which serve to

20   depoliticize the determination of judges'

21   compensation, are so crucial.

22   The proper functioning of our justice

23   system also depends on a high level of judicial

24   confidence. Judges' compensation and benefits

25   must be to a level to attract and retain the

1   most qualified candidates. These people tend to

2   be senior practitioners or practitioners in

3   mid-career who otherwise would be inclined to

4   remain in their current situation, whether

5   private practice, in-house, government or other

6   positions.

7   In the CBA's view, the appropriate

8   measure or comparator to determine the level of

9   judicial salaries is that of lawyers who are

10   senior private practitioners and senior public

11   servants who form the legal peers of the

12   appointed justices.

13   Secondly, compensation levels should

14   ensure that judges and their dependents do not

15   experience significant economic disparity

16   between pre and post appointment levels so that

17   the most capable applicants are not deterred

18   from applying.

19   Thirdly, we urge the Commission to

20   give due conversation to the prevailing economic

21   conditions in Canada to ensure adequate judicial

22   compensation. The most notable prevailing

23   economic condition at present is the COVID-19

24   pandemic. The Commission should consider the

25   generalized financial impact of COVID-19 on the

1 Canadian economy and recognize that the impact

2 will be felt on judicial salaries for many years

3 to come, at least through the current judicial

4 compensation review period.

5   Fourthly, attracting and expanding the

6 number of outstanding candidates from diverse

7 groups for judicial appointment requires

8 judicial compensation to be competitive. The

9 judiciary must reflect the Canadian population,

10 including women, Indigenous, black and people of

11 colour, disabled persons, persons of all gender

12 and sexual identities, and members of other

13 underrepresented groups. Inclusion of these

14 candidates reflects the diversity of Canadian

15 society and enhances the judiciary's

16 credibility. Many of these candidates make

17 significant contributions to their communities

18 by advocating on their behalf. The recommended

19 compensation should be reflective of the

20 obligation to become neutral upon appointment

21 and to take on a larger leadership role.

22   Fifthly, Parliament should be

23 cautioned that its review of the Commission's

24 report involves consideration of constitutional

25 principles, such as the rule of law, and the

1   independence of the judiciary from the other

2   branches of government. These considerations

3   can be endangered by a politicized process and

4   by making any links between judicial

5   remuneration and judicial decisions.

6   For the Commission to conclude that

7   competing financial priorities are a rationale

8   to reduce our old, otherwise appropriate

9   compensation for judges, the government must

10 provide the Commission with conclusive evidence

11 of other pressing and competing financial

12 obligations of similar constitutional importance

13 to that of judicial compensation.

14   We urge the Commission, when making

15 its recommendations, to underline for government

16 the importance of responding within the

17 statutory time frame and of complying with the

18 statutory process. This applies equally to the

19 statutory deadlines for establishing the

20 Commission and delivering the Commission's

21 report. Unexplained delay erodes the legitimacy

22 of the Commission process with consequent impact

23 on judicial compensation and independence. This

24 is particularly relevant this year with the

25 delays to the process caused by the pandemic.

1   Finally, we ask the Commission to

2   emphasize in its report that the integrity of

3   the process be maintained. To the extent

4   governments persistently fail to embrace fully

5   the Commission's recommendations on judicial

6   compensation and benefits, or politicize the

7   process, that integrity is then compromised.

8   Ultimately, judicial independence may be

9   threatened. Without an impartial and

10   independent judiciary, there can be neither rule

11   of law nor equal justice for all.

12   Thank you very much for having given

13   the opportunity to share those recommendations

14   with you and I'd like to invite you to ask all

15   the questions you may have to Mrs. Maharaj.

16   MADAM CHAIR: Thank you very much,

17   Mr. Regehr. I would call upon Margaret and

18   Peter. Do you have any questions for

19   Mrs. Maharaj or Mr. Regehr?

20   MADAM COMMISSIONER: No, I have no

21   questions, Madam Chair.

22   MR. COMMISSIONER: A couple of

23   questions, if I might, if you can hear me.

24   One of the issues that this Commission

25   is addressing with respect to the data that it

1   has available is the prevalence of professional

2   corporations and the use of professional

3   corporations by members of the profession and

4   what implications that has for measurement of

5   pre-appointment salaries and compensation. And

6   I was curious as to whether the Canadian Bar

7   Association has performed any compensation

8   studies or similar studies which have looked at

9   the effect of professional corporations on the

10   level of compensation of practitioners in the

11   country.

12   MS. MAHARAJ: Thank you very much for

13   the question and, good morning, Madam Chair and

14   members of the Commission. I am speaking to you

15   today from the traditional territories of the

16   Treaty 7 First Nations. And I choose the

17   pronouns she and her.

18   But to your question, sir, with

19   respect to professional corporations, the

20   Canadian Bar Association has not done specific

21   research with respect to the impact of

22   professional corporations on establishing the

23   actual compensation range for practitioners in

24   the profession. So directly, no, we don't have

25   that information for you.

1   However, what we -- what we do

2   emphasize, since we are an independent

3   participant in this particular process is that

4   if that information is relevant and valuable,

5   then it should be collected on an objective

6   basis so that it can be utilized by this

7   Commission in reaching its decisions.

8   Our view with respect to ensuring that

9   the best candidates are made available and are

10   incentivized to apply to the Bench, is to ensure

11   that there is no detrimental disparity and to

12   consider that there's no detrimental disparity

13   in the pre-appointment and post-appointment

14   compensation for those particular candidates.

15   MR. COMMISSIONER: So does that mean

16   that when you say there's no disparity that the

17   pre and post compensation should be equivalent?

18   MS. MAHARAJ: Equivalent is going to

19   be difficult because there's no single

20   compensation level for members of the Bar across

21   the country. There's a wide variety. So trying

22   to find a sweet spot is a challenge. There's no

23   doubt that it is a challenge for you.

24   In our report, what we've suggested is

25   that the compensation level of peers of the

1 applicants ought to be given weight in your

2 consideration for establishing that threshold.

3 Generally speaking, applicants to the Bench are

4 senior practitioners, mature in their practice,

5 and/or late, mid-career professionals. So to

6 compare that sector of our legal profession to

7 its peers who would be those senior

8 practitioners and senior government officials,

9 is the suggested benchmark that we feel would

10 give the most relevant and objective equivalence

11 or viewpoint as to a compensation level for

12 justices.

13   MR. COMMISSIONER: Thank you.

14   MADAM CHAIR: Thank you, Ms. Maharaj.

15 Following up on Peter, you would, therefore, be

16 in favour of the use of filters. For example,

17 the government argues we shouldn't use filters,

18 but in your case in order to get to a fair

19 proxy, in light of not having professional

20 corporations and so forth, is it my

21 understanding that the Canadian Bar Association

22 would be in favour of filters?

23   MS. MAHARAJ: I'm not sure I

24 understand exactly what you mean by filters?

25   MADAM CHAIR: Filters in the sense of

1   the age filter, the low-income exclusion filter,

2   the top 10 CMAs metropolitan area filters.

3   MS. MAHARAJ: I see. So the Canadian

4   Bar Association position is that all of those

5   factors are relevant and do play a valuable role

6   in your assessment so that you can take into

7   account the breadth and the depth of different

8   experiences, financial experiences of candidates

9   who would be applying in order to ensure that

10   the financial compensation or the compensation

11   overall that's set for justices plays a proper

12   role, if I can say that, a proper role in their

13   desire or incentive to become justices.

14   Because one risk in terms of

15   compensation is the applicant ought not to view

16   the compensation as the purpose for the

17   application to the Bench. And I'm not

18   suggesting that it is a statistical event.

19   However, in our report, what we do try to

20   address is to encourage the broadest and best

21   draw of candidates. Compensation has to be

22   sufficient, but not overly sufficient. And it

23   has to allow those candidates to bring forward

24   their dedication to the administration of

25   justice and to ensuring that we have a strong

1   and -- a strong system of justice that has

2   integrity and that is not influenced, in a

3   negative way, by either external factors through

4   litigants or people who are connected to

5   litigants, or through a sense of having to cater

6   to the position of a government that controls

7   that compensation.

8   So if -- so when you're considering

9   what factors ought to be brought into play, the

10 Bar Association's position is as many as are

11 relevant, objective and have integrity.

12   MADAM CHAIR: Thank you very much,

13 Ms. Maharaj.

14   Margaret, do you have any questions?

15   MADAM COMMISSIONER: No, Madam Chair.

16 Thank you.

17   MADAM CHAIR: Mr. Regehr and

18 Mrs. Maharaj, thank you very much for having

19 taken the time to help the Commission with your

20 views.

21   I would call upon Mr. Lokan. Would

22 you be ready to present? And, Mr. Lokan, I

23 believe you have a 20-minute allocation, so that

24 brings you to 11:45.

25   MS. MAHARAJ: Thank you.

1   MR. LOKAN: Thank you, Commissioner

2   Turcotte.

3   I will actually be briefer than the 20

4   minutes. I expect I'll be no more than 10, so

5   there's a warning for whoever is up next, but

6   also that may allow for questions, if there any

7   questions from the Commissioners.

8   So I'm going to address, by way of

9   reply, two areas. The first is the IAI cap and

10   the second is professional corporations.

11   On the IAI cap, Mr. Rupar, in his

12   presentation, presented a picture of stable IAI

13   increases, which he said averaged 2.4 percent

14   over the 16-year period. What is striking about

15   that is for all of those years, the government

16   was content with the cap that's in the statute,

17   the 7 percent cap for any one year, as being an

18   appropriate protection for the public purse. Of

19   course, if that cap was every reached because of

20   inflationary pressures, it may well be calling

21   for an implicit subsidy from judges and

22   Prothonotaries because of real erosion in

23   incomes. But that cap has also been stable over

24   those many years. The government has never said

25   it's at the wrong amount.

1   Now, all of a sudden, not when the cap

2   is exceeded, but when there is a single year

3   that it's 6.6 percent, the government changes

4   its position. Suddenly the 7 percent is

5   insufficient and must be lowered. We just ask

6   why was it set at 7 percent in the first place?

7   And we urge you to adopt a

8   consistency-in-approach standard, as was

9   outlined by Mr. Bienvenu.

10   Now, Mr. Rupar, did acknowledge that

11 because this is related to the labour market's

12 reaction to the COVID pandemic that, these were

13 his words:

14   "The IAI will trend down to

15   normal levels in the years following

16   2020."

17   But that doesn't quite capture the

18 point here. As the labour market normalizes,

19 the IAI will not just trend down to normal. It

20 will actually go lower than it would otherwise

21 have been. That is to say, there will be a

22 reverse effect of the effect that produced the

23 6.6 percent. The 6.6 percent is explained on

24 the basis that retail employees, some of the

25 lower paid employees, left the work force and

1   that meant that the average was higher.

2   Of course, as those employees rejoin

3   the work force and labour markets normalize in

4   the recovery, that effect will be reversed. So

5   we will have one year of above normal IAI and we

6   will be followed probably by a couple of years

7   of below normal IAI. In other words, it

8   self-corrects over time.

9   If the Commission simply adopts a

10   consistency-of-approach way of dealing with this

11   and recommends IAI increases the way that it has

12   always been done, and the government accepts

13   that recommendation, it will all work out. Five

14   to ten years from now, we will be able to look

15   at the spike and then we will see a subsequent

16   trough below the trend line and see the way that

17   it all evened out over time. And we'll see the

18   updated version of Mr. Rupar's chart and we'll

19   see how that there really wasn't any issue here.

20   If you are to impose a cap that

21   effectively knocks the top off the spike, but

22   allows the trough to continue, what you've done

23   is effectively imposed wage restraint on judges.

24   And we say there is, with respect, no

25   justification to impose what amounts to wage or

1   salary restraints on judges and Prothonotaries

2   only and to single them out when there is no

3   such wage restraint or salary restraint program

4   applying elsewhere out of those paid by the

5   public purse, at least at the federal level.

6   Now, if I can move on to professional

7   corporations. Commissioner Griffin asked

8   Mr. Rupar if there is reason to believe that

9   professional corporations populate the higher

10   end of the curve. And the answer is, yes, there

11   is. There is unchallenged expert evidence from

12   Ernst & Young, the Leblanc Pickler report, that

13   professional corporations become useful at about

14   200 to 300,000, at that income level.

15   Now, Mr. Rupar's answer, you may want

16   to look at the transcript because he answered

17   carefully, he accepted that there is evidence

18   that they become useful at about 200 to 300,000.

19   Though, he went on to say that the government

20   was not excluding that lawyers might be able to

21   use professional corporations at income levels

22   lower than 200,000. But he did accept the basic

23   point, as indeed was responsible given that it

24   is the unchallenged expert evidence before the

25   Commission.

1   But Leblanc and Pickler do go a little

2 further than this. It is also the unchallenged

3 expert evidence that the higher the income

4 level, the greater are the benefits of a

5 professional corporation and I'm going to give

6 you the reference to this. The first Leblanc

7 and Pickler report is in the Association in

8 Council submissions as the last appendix. It's

9 page 150 of the PDF and it's the second

10 paragraph. I'm just going to read out the

11 quote:

12   "[...] the more income that is

13   left in the professional corporation

14   the more tax is deferred and the

15   lawyer is left with greater funds to

16   invest."

17   And I respectfully submit that that is

18 sufficient basis for you to conclude that

19 professional corporations do populate the higher

20 end of the income curve, unfortunately none of

21 us are in a position to be able to quantify that

22 phenomenon. But there is expert evidence that,

23 in all likelihood, professional corporations

24 affect the higher end of the curve more than the

25 lower.

1   Now, that does allow you to conclude,

2 in combination with the other evidence reviewed

3 by Mr. Bienvenu, that there is an emerging

4 problem, at the very least, with recruiting

5 lawyers from private practice. And this is not

6 a false narrative. This is where the majority

7 of appointments have come from.

8   And if -- hearing from Justice

9 Popescul, you think about the difficulties in

10 persuading people who have mature practices and

11 are at the top of their professional game to

12 come to the Bench. Of course those are not the

13 only appointees to the Bench, but they are a

14 very important source. That is something that

15 the Commission should pay careful attention to.

16   That expert evidence also supports the

17 continued use of filters, as the previous round

18 of questions to the CBA indicated, such as the

19 lower income cutoff, the age filter and paying

20 some attention to the top 10 CMAs.

21   I would further submit that that

22 expert evidence gives you grounds to cast a

23 skeptical eye on some of the government's

24 assertions, which are based exclusively on the

25 CRA data. For example, there is no air of

1   reality to the calculation that Mr. Shannon took

2   us through talking about how a lawyer in the CRA

3   subset, or the CRA category, would have to earn

4    $526,000 a year to replicate the value of the

5   judicial annuity.

6   If there was such a lawyer with an

7   income in that range who had the capacity to

8   save that much, well, of course the first thing

9   that he or she would do would be to incorporate

10   so that he or she can save more efficiently. So

11   they are not discrete populations that we've got

12   an impermeable wall between the CRA group and

13   the professional corp group. Of course, as

14   people reach the higher levels of self-employed

15   lawyers that are picked up by CRA, they are

16   likely to cross over into the professional

17   corporation world.

18   So those are my reply submissions. I

19   see I took about 10 minutes and I'm happy to

20   answer questions if I can assist the panel in

21   any way.

22   MADAM CHAIR: Thank you, Mr. Lokan. I

23   do have one question which is a warning. I will

24   also ask the judiciary, when their time comes

25   up, later on, but you're my first test case.

1   You just said that IAI is self-corrective and

2   while I understand the office of the Chief

3   Actuary does not project a negative IAI, they

4   did get it wrong back in 2017. As I realize, it

5   actually came to close to zero, 0.4 percent and

6   they got it wrong.

7   So would the judicial -- would the

8   Prothonotaries, same question for Judiciary,

9   which they can answer later, accept the

10   consequence of a negative IAI, knowing that

11   adequacy of salaries is only going to be looked

12   at the next upcoming Commission? In other

13   words, if IAI were to go negative a year from

14   now, there wouldn't be a Commission to address

15   adequacy of salaries until much later. So can

16   you give me your views on this, please?

17   MR. LOKAN: Yes, my clients remember

18   very well when the IAI increase came in at .4

19   having been projected at much higher. And the

20   short, simple and sufficient answer is, yes,

21   they will take that risk.

22   MADAM CHAIR: Okay, thank you very

23   much. Margaret and Peter, would you have other

24   questions for Mr. Lokan?

25   MADAM COMMISSIONER: No, I have no

1   further questions, Madam Chair.

2   MADAM CHAIR: Peter?

3   MR. COMMISSIONER: Just one question.

4   We didn't hear anything on behalf of the

5   Prothonotaries about recruitment issues. Is

6   that a factor we need to take into consideration

7   for Prothonotaries?

8   MR. LOKAN: There is the general

9   considerations that have been put forward that

10   we are not -- we have not led specific evidence

11   before this Commission. The general

12   considerations include that the Prothonotaries

13   are appointed within the top 10 CMAs

14   exclusively. Their practice areas include

15   matters such as intellectual property where, you

16   know, those are highly paid lawyers in the

17   private Bar are the pool and they are 20 percent

18   lower than the judges. So all of those are

19   structural considerations to be considered over

20   the long term.

21   We haven't got any specific or

22   individualized analysis about particular

23   appointments in the appointment pool and it may

24   not be completely covered by the judicial

25   appointment data because it doesn't seem to have

1   included Prothonotaries as a separate category.

2   So the answer is we have the general but perhaps

3   not the specific for you.

4   MR. COMMISSIONER: Thank you.

5   MADAM CHAIR: Any other questions,

6   Margaret or Peter? No? Thank you very much,

7   Mr. Lokan. Very much appreciated.

8   We are now facing a bit of a logistic

9   issue in that the team of translators changes

10   during the lunch time and they are only back

11   around the 1:30, I am told. And, therefore, we

12   have two potential solutions here. One we go

13   for an extended lunch break and reconvene at

14   1:30 or I would ask Mr. Rupar from the

15   government, you have half an hour for your

16   reply, but I want to be fair to you. Would

17   your -- would yourself and your colleagues be

18   ready to present or do you prefer to start at

19   1:30?

20   MR. RUPAR: Madam Chair, as I

21   understand it, my reply is limited to that --

22   responding to the submissions we heard this

23   morning so we'd be prepared to go with that now.

24   MADAM CHAIR: Perfect. So why don't

25   we give you half an hour and I'll give a slight

1   reminder 10 minutes before the end. Thank you.

2   MR. RUPAR: Thank you, Madam Chair. I

3   certainly won't be the full half hour in dealing

4   with the two presentations we heard this morning

5   and that's not to suggest that the matters were

6   not important to the government and to this

7   Commission, it's just that it reflects the fact

8   that a number of the positions that I will state

9   were already put in our written materials.

10   First I'll deal with the presentations

11   by Chief Justice Bell and Justice Scanlan and my

12   colleague as well.

13   Now, let me start with the position I

14   just stated, which is, of course the government

15   of Canada takes the matters raised by the CMACC,

16   if I can use that acronym that was used this

17   morning, seriously and these are matters which

18   are of concern.

19   The fact that we say that this

20   Commission does not have the jurisdiction to

21   deal with those matters does not, in any way,

22   diminish the importance of those matters. What

23   our submission was about and what I'll talk

24   about in a moment is the need to find a proper

25   forum for these matters to be dealt with and

1   resolved. And, as was raised by the Commission

2   itself, it would be our position that the proper

3   forum is the Commission that's ongoing, inquiry

4   of The Honourable Justice Fish. Those matters

5   seem to be directly relevant to what Justice

6   Fish's mandate is and what he'll be looking at

7   in his work and he'll be making the

8   recommendations. And I understand from the

9   statements this morning from the Chief Justice

10   and Justice Scanlan was that there were

11   representations made to the Fish Inquiry on

12   these serious matters that they've raised.

13   So our opening position is that if you

14   have to find where is it best suited these

15   matters would be raised, recommendations be made

16   for the government's consideration, you have a

17   specific set of -- a specific inquiry that's

18   ongoing where these matters can be dealt with

19   fully.

20   Now, assuming that there's still an

21   issue that we have to deal with with respect to

22   the jurisdiction of this Commission, it would be

23   our submission that what was described this

24   morning by Chief Justice and Justice Scanlan was

25   that there has to be a change in the structure

1   of the CMACC court.

2   It's not a matter of dealing with

3   benefits within that structure. What I heard

4   this morning was that they would like the entire

5   structure of how that court is related to, to

6   use the term, that they use their source courts,

7   must be changed completely.

8   And when you get into changing the

9   structure of how a court is made up, or in this

10   case the structure of how a court is relating to

11   other courts, with great respect, that is

12   something beyond the jurisdiction of this

13   Commission.

14   Now, if we can take a brief look at --

15   and section 26 of the Judges Act is well worn

16   territory, but what it says, just as a reminder

17   is:

18   "The Judicial Compensation and

19   Benefits Commission is hereby

20   established to inquire into the

21   adequacy of the salaries and other

22   amounts payable under this Act and

23   into the adequacy of judges' benefits

24   generally."

25   And I heard my friend, Mr. Meehan,

1   this morning suggest that the phrase "benefits

2   generally" was broad enough to incorporate the

3   structural issues which were being raised this

4   morning.

5   Now, to be fair, there are issues

6   related to benefits and scheduling and vacation,

7   et cetera, et cetera, et cetera, that we heard

8   this morning raised by the justices. But as I

9   understood the position, it was under the

10 chapeau of a change in structure that they were

11 asking for.

12   If there had -- let me put it to you

13 this way, Madam Chair, if there had been a

14 change in the structure by the government of the

15 CMACC and its related courts, and within that

16 changed structure the arguments were made with

17 respect to scheduling or other matters with

18 respect to benefits, then perhaps this

19 Commission would have jurisdiction.

20   And let me put it to you in a

21 different way. There was mention made about how

22 the government has looked at the supernumerary

23 issue with respect to Prothonotaries, and we

24 have. But that was a policy change and decision

25 which was made by the government. Once the

1   government makes that decision, makes that

2   policy change, if there's issues within that

3   supernumerary issue to be decided with respect

4   benefits and salary, et cetera, then this

5   Commission would have jurisdiction.

6   So the first step has to be for the

7   structure to change before you can get into the

8   subissues that were raised this morning. So our

9   primary position is that that primary issue of

10   the structure of the court is beyond, with

11   respect, the jurisdiction of this Commission.

12   The second example was with respect to

13   reimbursement for representation in front of the

14   Commission. It is a financial benefit. We

15   don't argue that. What we suggest, though, is

16   within the determination of that is something

17   that this court -- Commission can make

18   recommendation. So again, once the structure is

19   recognized, within that structure this

20   Commission can have recommendations. This

21   Commission cannot make recommendations with

22   respect to such structural changes as were asked

23   for this morning.

24   So that is the basis for our position

25   with respect to the issues raised by the Chief

1   Justice and Justice Scanlan as to why this

2   Commission should not deal with those matters,

3   and that the Fish Commission inquiry of the

4   Honourable Morris Fish is where this is best

5   placed for recommendations to be made to the

6   government on those issues.

7   Now, if I can turn to the second

8   matter we heard this morning from Justice

9   Chamberland. We are saying that the Commission

10   is not bound, necessarily, by previous

11   Commissions. And if I can just take you to what

12   the Rémillard Commission said. And it's at

13   paragraph 26. And I brought you -- brought to

14   you to this yesterday, but I'll do it again,

15   because it seems appropriate, given what we

16   heard this morning.

17   And what the Rémillard Commission said

18   there:

19   "We approached matters decided by

20   previous Commissions and Special

21   Advisors in light of the evidence and

22   arguments made before us. We adopted

23   a common sense approach: careful

24   consideration has been given to the

25   reasoning of previous Commissions as

1   well as to the evidence brought before

2   us. Valid reasons were required -

3   such as the change in current

4   circumstances or additional new

5   evidence - to depart from the

6   conclusions of a previous Commission."

7   So that's where the launchpad is, if

8 you will, in the Rémillard Commission for making

9 changes, or not adopting or adapting to what

10 previous Commissions had said.

11   Now, if we move on a little bit

12 further in that Commission's report and we start

13 looking at paragraph 86, they talk in some great

14 detail about the appellate judges' salary

15 differential. And I need not go through all the

16 paragraphs there. I will stop at paragraph 96

17 where the Rémillard Commission noted that at

18 that point there were only 64 using the chart

19 that was set out there. It's called "Number of

20 Approving Judges". And as I understand it, the

21 number has now declined to 32, so we have even

22 fewer Court of Appeal judges supporting what was

23 said this morning, which is back to the pay

24 differential.

25   At paragraph 104 of Rémillard, they

1   start with a discussion of Block and Levitt

2   Commissions and we need not go through that

3   again, but that's where the starting point is.

4   But if we go to 106, this is what that

5   Commission said:

6   "We are, however, mindful of what

7   seems to be a diminishing level of

8   support for a salary differential

9   amongst appellate judges in the

10   country. We also note the lack of

11   unanimity amongst appellate judges

12   across the country. The Ontario

13   Superior Court Judges Association,

14   speaking on behalf of roughly 320

15   judges in Ontario, opposes the

16   differential. There is no expressed

17   support from the province's Court of

18   Appeal. We have considered Chief

19   Justice Joyal's observation that

20   implementing such a recommendation

21   would require re-engineering various

22   existing salary differentials between

23   chief justices of superior courts and

24   puisne appellate judges."

25   Paragraph 107:

1   "We have the utmost respect for

2   the conclusions reached by the Block

3   and Levitt Commissions, but this

4   Commission does not believe, in light

5   of our own analysis, according to the

6   section 26(1.1) criteria, that such a

7   salary differential is warranted in

8   this quadrennial period."

9   And much the same can be said of what

10   was discussed by Justice Chamberland this

11   morning. As I noted, there's a continuing

12   decline in support from the appellate judges

13   across the country. I did not note that there

14   were any judges outside of, I believe it was the

15   Quebec Court of Appeal, he noted, who voiced

16   support for this matter. None of the other

17   parties appearing before you have voiced support

18   for this.

19   So there is the continuation of what

20   was before the Rémillard Commission. And

21   there's also a change in circumstances that

22   there's even a lower amount of support within

23   the Court of Appeal community, if I can call it

24   that.

25   With respect to, there was some

1   comment by Justice Chamberland about paragraph

2   74 of our reply factum where we set out, I

3   should say, a number of factors we say are

4   reasons not to implement a salary differential

5   for appellate judges, and I believe we listed

6   five at that point.

7   I'm not going to read through them.

8   You, of course, can read them as well as I can.

9   But we say that these are still matters which

10 are valid and relevant today.

11   I suppose the overall position that we

12 would say is that appellate judges have a very

13 important role in the administration of justice

14 in our courts. They have a separate and

15 distinct role from those of trial judges in

16 Superior Courts across the country. But being

17 separate and distinct in their roles, we don't

18 suggest that one should be paid more than the

19 other.

20   The role of a trial judge is different

21 from the role of an appellate judge, we

22 acknowledge that, but we think and believe that

23 both are equally important for the

24 administration justice in the country.

25   Now, as I said, I understand my reply

1 is limited to what we've heard this morning.

2 And I will leave it at that. Unless you have

3 any questions, Madam Chair, or the other

4 Commissioners?

5   MADAM CHAIR: I wonder, thank you very

6 much, Mr. Rupar, since we have time until 12:30,

7 whether we could start, thanks to you and other

8 parties, whether we can start asking you

9 questions more generally. Would that be fine

10 with you and your team?

11   MR. RUPAR: That would be fine. I

12 will say, I believe Mr. Shannon had to leave the

13 room because it's a mask policy we have, but I

14 believe he's on line. There he is.

15   So as you know, we divided matters

16 yesterday, so if it's a matter addressed to

17 Mr. Shannon's line, it'd be appropriate for him

18 to answer. But, yes, we're prepared to go.

19   MADAM CHAIR: That's great. Thank you

20 very much. Maybe I can start with one, which is

21 a bit corollary to the one I asked to the

22 Prothonotaries on the IAI and I'm going to go to

23 my colleagues on the Commission so that we go

24 around the questions.

25   We actually know the IAI for 2020,

1   which was 2.7 percent. And for 2021, which was

2   6.6 percent. We have projections for 2022, and

3   2023. You've said the IAI for 2021 is unique,

4   given the circumstance is COVID and with the

5   spike at 6.6 percent, but would you agree as the

6   government that IAI is actually self-corrective

7   and may take a number of years, even more than

8   this Quadrennial Commission?

9   MR. RUPAR: Well, we're not -- the

10   reason we say it's not self-corrective in this

11   circumstance is because of the unique nature of

12   what happened in the pandemic year. If the

13   pandemic had not occurred and the bottom end of

14   the labour market had not fallen out, then there

15   likely could be an argument to suggest that

16   there'll be a self-correction down the road.

17   It is the totally unique circumstances

18   of the pandemic, which were not foreseen by

19   anybody and I think accepted by everybody, that

20   this is not a normal trend that happened. There

21   are normal ups and downs in the labour market

22   that would generally go throughout the stratus

23   or the ranges of the market. So there may be a

24   self-correction in the long term normally. The

25   difficulty with the self-correction argument is

1   that it doesn't take into account the unique

2   circumstances of what happened in the past year

3   because those circumstances were not seen at any

4   time before. As we showed you in the chart

5   yesterday, the spike was totally out of line

6   with the rest of the economic data. So the

7   unique nature of what happened in the pandemic

8   year means that it is different from before and

9   different from after. So there may be a

10   continuing trend as was before. And, as I said

11   yesterday, we do think there will be a

12   continuation of the normal trend, but that's not

13   self-correcting of the large spike that happened

14   in 2020 and 2021. So we don't see the two as

15   necessarily correlated.

16   MADAM CHAIR: Okay. Thank you. Just

17   one other, I have a few more, so don't worry,

18   I've got a list, but so do my colleagues.

19   They're all good questions.

20   Use of filters. I think we all agree,

21   all the parties, that the use of filters does

22   reduce the size of the data pool, i.e., the

23   quantity of the information. But isn't quality

24   or relevancy data just as important or even more

25   so?

1   MR. RUPAR: Well, let me -- I think

2   I'll turn to Mr. Shannon and I'll just make a

3   brief comment. The difficulty with the

4   application of filter after filter after filter

5   is you reduce significantly the pool you're

6   looking at. So you don't have that -- as the

7   CBA spoke about a few moments ago, you don't

8   have the breadth of data before you. You have a

9   very narrow scope. I think Mr. Shannon said

10   yesterday about you had 1900 or 2900 lawyers

11   when all the filters are applied. Considering

12   there are tens of thousands of lawyers

13   throughout Canada, that's a very sample small

14   size to deal with.

15   Now, I'll -- sorry, I may have stolen

16   some of Mr. Shannon's comments, but I'll turn to

17   him now.

18   MR. SHANNON: No, I would echo that

19   and I think I would also say that I don't think

20   quality necessarily mirrors -- a reduction in

21   quantity necessarily creates better quality. I

22   don't think there's any evidence to that effect.

23   It simply reduces the quantity. There are

24   fluctuations in lawyers' salaries, high expenses

25   one year, low fees, and the reverse. So I don't

1   know whether the reduction actually increases

2   the quality of the data. Ms. Haydon speaks to

3   this briefly in her report, I acknowledge that,

4   but certainly I'm not sure that there is that

5   correlation.

6   I would also say that as the Rémillard

7   Commission stated in its report, especially with

8   respect to age filters, there may be a starting

9   point to look at some of these filters, the age

10   filter, for example. But when fully 35 and

11   times 38 percent of individuals appointed over

12   the last number of years come from outside that

13   pocket of filter, we say that the Commission

14   shouldn't simply disregard those individuals

15   because they're outside the range that is

16   specifically targeted in the judiciary's

17   proposals.

18   MADAM CHAIR: Thank you, Mr. Shannon.

19   Margaret and Peter, do you want to

20   have a go a bit at a few questions before I come

21   back?

22   MADAM COMMISSIONER: Sure. Thank you,

23   Madam Chair.

24   I'd like to come back to IAI for a

25   minute. As I understand, the reason for the

1 spike in 2021 was because of the dropout of a

2 number of lower income workers in the labour

3 force last year and that left fewer and higher

4 income people within the group that was being

5 considered. But is it not true that the

6 normalizing, the result will be to bring lower

7 income workers back into the labour force and,

8 therefore, exert downward pressure on IAI?

9   MR. RUPAR: I would agree with that,

10 Madam Commissioner, that there will be a

11 downward pressure on IAI. The issue is how much

12 that pressure will be and how it will be in

13 relation to what happened before. And it is our

14 position that the shock, if we can use that

15 term, that occurred at the beginning of the

16 pandemic, where there was a precipitous drop in

17 employment levels that had not been seen before,

18 will not be replicated in the rebound, if I can

19 put it that way. It'll be a smoother trend

20 coming back, so you won't see that same drop.

21   So there has been talk of negative IAI

22 and we certainly said in our submissions, part

23 of our submissions, that we would suggest

24 legislative changes to account for the fact that

25 the judiciary would not suffer a decrease in

1   compensation if there was negative IAI.

2   I don't understand that there's going

3   to be -- that the projections are there will be

4   negative IAI. The projections that we have

5   before us, I think, are for back to what we call

6   a more normal range of 1 to 3 percent.

7   MADAM COMMISSIONER: But Parliament

8   must have addressed its mind to at least some

9   kind of shock when it put for a limit of

10   7 percent, which is well above what IAI has been

11   for the history of Commissions.

12   MR. RUPAR: Yes, that's a fair point,

13   but the thing is when there's a rise -- if there

14   was a rise, it's a rise at all levels of the

15   work force to a level of 7 percent. Then

16   Parliament is saying, well, if we get the

17   7 percent and everybody's rising, that is

18   different.

19   I take you back to -- I don't have it

20   in front of me, but when I referred to the quote

21   from the Rémillard Commission, and that in turn

22   referred to the quote from Mr. Hyatt or

23   Professor Hyatt where the reason IAI was chosen,

24   as I understand from the Rémillard Commission,

25   was because it reflected the average wages of

1   Canadian work force. And that's our point is

2   that the IAI spike in the last fiscal year or so

3   didn't reflect that.

4   So it didn't -- so the rationale for

5   choosing IAI, and the reason IAI was used as the

6   basis, was not reflected in the reality of that

7   spike because it did not reflect what was

8   happening in the average Canadian wage. What

9   was happening was that people above a certain

10   level were making -- would get a benefit of a

11   larger increase because the lower end had come

12   up.

13   MADAM COMMISSIONER: The government is

14   proposing to add a new factor into judicial --

15   comparing judicial compensation with total

16   compensation. They want to add tax implications

17   of a private sector lawyer purchasing a similar

18   annuity, as I understand it. In other words, we

19   already have total compensation of the judge --

20   of the judiciary comprising base salary plus a

21   valuation of the annuity, which is I think

22   agreed to be 34.1 percent. And now the

23   government wants to add a new one, which has not

24   been raised before at previous Commissions, I

25   don't think, of a tax value and it's a tax value

1   to the private sector.

2   I'm trying to understand why that

3   should be added in addition to the value of the

4   pension to a judge.

5   MR. RUPAR: We're not adding a factor,

6   Madam Commissioner. What we're doing is, as

7   Mr. Gorham has pointed out, is he's recognizing

8   the fact that if there's to be a replication by

9   the private sector of both the salary and the

10   annuity, when replicating the annuity portion,

11   it will not be totally tax free, as would be the

12   annuity of the judiciary because it's provided

13   to them and there's no comment or criticism

14   there.

15   But in trying to replicate that

16   annuity, the RRSP levels are such or limits are

17   such that some of the money used by the private

18   sector to replicate the annuity will have to

19   have some tax consequences. So we're not adding

20   a new factor.

21   What we're doing is we're just

22   recognizing the reality of what our tax system

23   is, which is if a private sector lawyer was to

24   try to replicate the annuity and the salary,

25   they won't have the RRSP limits available to

1   them. So there's going be some tax consequences

2   that means that they'll have to have some

3   additional funds to make up the difference in

4   the -- between the tax-free money used to

5   duplicate and replicate the annuity and the

6   tax -- the taxed money, if I can put it that

7   way, to replicate the annuity. So it's a tax

8   issue that's been identified. It's not a new

9   factor that been's brought in, if I can put it

10   that way.

11   MADAM COMMISSIONER: This is assuming

12   it's a private sector lawyer not in a

13   professional corporation I assume?

14   MR. RUPAR: Correct. Yes. But I will

15   add that professional corporations, as I

16   understand it at least, are not tax free. There

17   may be a lower rate of tax applied in a

18   professional corporation, but there will still

19   be some additional tax consequences that

20   previous Commissions have not taken into account

21   because the issue hasn't been identified before,

22   so we identified a new issue.

23   MADAM COMMISSIONER: So the example

24   you used was a private sector lawyer not in a

25   professional corporation, is that correct? The

1   one you used in your --

2   MR. RUPAR: That's correct. Yes,

3   because we're trying to match to what would be

4   the CRA data because we don't have, as we

5   discussed yesterday, we don't have the

6   professional corporation data to make that

7   match. All we have is CRA data. And the CRA

8   data has self-employed lawyers who would be

9   subject to this tax regime because they wouldn't

10 be taking -- they haven't incorporated and they

11 haven't used that vehicle, if I can put it that

12 way.

13   MADAM COMMISSIONER: And my final one

14 is just a question. You have, at some point in

15 your -- I think it was your expert report by

16 Mr. Gorham, expressed the view that the value of

17 a DM-3 pension was, I think, 17 percent as

18 opposed to the judicial one at 34.1 percent.

19   But I didn't see -- do you have the

20 detailed calculations or the explanation of how

21 it came to the 17 percent?

22   MR. RUPAR: I may turn to Mr. Shannon

23 and see if he has it. I don't have it

24 immediately in front of me.

25   MADAM COMMISSIONER: I'm not asking

1   you to give it to us orally. I'm just asking if

2   you have it that you could provide it to us.

3   MR. SHANNON: I can refer you

4   specifically to paragraphs, if you give me a

5   moment, Madam Commissioner.

6   MADAM COMMISSIONER: Take your time,

7   we can get it after.

8   MR. RUPAR: Not trying to play off

9   each other, it's just we had a division of

10 labour here.

11   MADAM COMMISSIONER: That's fine.

12   MR. SHANNON: At paragraphs 221 and

13 222 of his initial report from -- his March

14 report, which is found at tab 4 of the

15 government book, you'll find the explanation of

16 the 17 percent.

17   MADAM COMMISSIONER: Okay, thank you.

18   MADAM CHAIR: Peter, would you like to

19 ask a few questions?

20   MR. COMMISSIONER: Thank you.

21   Mr. Rupar, Mr. Shannon, in looking at

22 section 25 of the Judges Act where the 7 percent

23 cap is created in subsection 25(2)(b), I note

24 there are a series of amendments in that section

25 over time since the last consolidation of the

1   statute. And it would assist me to understand

2   when the 7 percent came on the scene and whether

3   there's any legislative context to it. And I

4   don't expect you can necessarily answer that

5   question sitting here, but it would assist me to

6   have some sense of that and what was around it.

7   Because what you are proposing for

8   this Quadrennial Commission is essentially a cap

9   and a floor to the effect of the IAI. I take it

10   one follows from the other, but it would assist

11   me to understand that, because if we take the

12   IAI as part of a social contract with judges, to

13   quote previous Commission reports, and has a

14   pretty fundamental change to the effect of the

15   IAI, which has risk for everybody obviously.

16   But if you can give, between you and the

17   judiciary, and I extend this to Mr. Bienvenu as

18   well, any insight into that, that would be

19   helpful to me.

20   MR. RUPAR: We'll certainly take a

21   look at that. And I'll just pick up on one

22   point you mentioned there, Mr. Griffin, about

23   the social contract. We're not at all disputing

24   the issue of the social contract. We're not

25   suggesting that the social contract or that IAI

1   is not going to be used going forward. That's

2   not our position.

3   It's just in the very unique

4   circumstance within the one year of the

5   pandemic, we suggested the modification that we

6   have. So we're not resiling at all from any of

7   the previous positions and going forward we

8   agree that IAI will be used.

9   MR. COMMISSIONER: No, I understand

10   that. It's just the short-term effect over four

11   years that I'm trying to understand. And I take

12   it we can also proceed on the basis that there

13   would be no professional corporation income

14   changes that would be reflected in the IAI

15   itself?

16   MR. RUPAR: I'm not sure I quite

17   understand what you mean by that?

18   MR. COMMISSIONER: In other words, if

19   it is an index of broad application, does it

20   include wage and salary shifts, if you like,

21   within professional corporations?

22   MR. RUPAR: I don't know, but we'll

23   look into that.

24   MR. COMMISSIONER: Thank you.

25   I have a question for Mr. Shannon.

1   You did say yesterday, Mr. Shannon, and repeated

2   this morning that there could be variability in

3   lawyers' income because of higher expenses and

4   lower fees. And I was just curious as to what

5   the evidentiary source for that was?

6   MR. SHANNON: There is no evidentiary

7   source for that. That is just based on -- we

8   actually, and that's an interesting question,

9   Commissioner Griffin. We asked for specific

10 information from the CRA on -- that would have

11 hopefully detailed such shifts. And once again,

12 the ability to provide that information -- the

13 CRA simply couldn't do it.

14   We take it as a given that lawyers --

15 lawyers' salaries fluctuate from year-to-year

16 and therefore, especially for a lawyer who's

17 working just above a given wage exclusion, if

18 that is used as a filter, might come in and out

19 of the CRA data. And even lawyers at the

20 further up ends of the given -- further higher

21 ends of income may come into the data depending

22 on what their year is like. But there is no

23 specific evidence to that effect.

24   MR. COMMISSIONER: All right. Either

25 on the income or the expense level?

1   MR. SHANNON: Correct.

2   MADAM CHAIR: Can I ask just as a --

3   it's not a follow-on, but it's on the low income

4   filter and I appreciate you're saying there

5   should be no such filter. But help me, I see

6   your expert Mr. Gorham says that self-employed

7   salaries have moved roughly in line with IAI in

8   the last four years, at least. That's at

9   paragraph 207 of his initial report. If that's

10   the case, wouldn't the 80,000 figure today be

11   more in line with the 60,000 figure that was

12   used back in 2004? So I appreciate you don't

13   want to filter, but help me on the 60 to 80

14   comparison, given your expert's own assessment

15   that salaries have nicely moved.

16   MR. SHANNON: You have our position on

17   the age filters. We think it does not sort

18   of -- they are not justified. Certainly the

19   increase has not been justified. The

20   information that we have on that regard is that

21   in terms of the entire distribution, salaries of

22   lawyers -- of judges are effectively at the

23   72nd percentile for all top CMAs and the

24   72nd for Toronto. We don't have any further

25   information in that regard.

1   I candidly agree that what our expert

2   has said is that there has been -- it's tracked

3   IAI in large part. We fundamentally still do

4   not agree with the age exclusion and -- sorry,

5   not the age exclusion, but the lower income

6   exclusion. But I have nothing further on that.

7   MADAM CHAIR: Okay. So let me

8   follow-up on 75th percentile. You'll just see

9   I'm reading your chart, so all very interesting.

10   On page 31 of your submission, not in

11   the reply, on your submission, you show a chart

12   where, before 2010, the 75th percentile of

13   self-employed lawyers' salaries was actually

14   almost, case for case in line -- I mean, year

15   for year in line with judges' salaries. But

16   after 2010, interestingly, you show that judges'

17   salaries are higher than the 75th percentile.

18   Then I go to your chart on page 23,

19   and interestingly in 2010, the same year where

20   there's this severance between the

21   75th percentile, the 2010 is the year when, in

22   fact, there was a marked increase in the number

23   of lawyers operating as PCs.

24   So does this not lead us to conclude

25   that CRA data is therefore increasingly

1   reflecting lower salaries for employed lawyers?

2   And this is important for me to know whether

3   that's your view, because then there's a whole

4   question on the application of filters in that

5   case. Because it's very interesting, when you

6   look at those two charts, that as a government,

7   in fact, you would be absolutely right that

8   judges' salaries follow the 75th percentile

9   perfectly in line with self-employed lawyers

10   coming from the CRA data, but that is absolutely

11   going in different directions in 2010.

12   MR. SHANNON: I'm not sure if

13   Mr. Rupar wants to start on that one or if he

14   wants me to take this one?

15   MR. RUPAR: Well, I can start.

16   I guess we go back to the problem we

17   have with the professional corporation data. We

18   have the general trend line, but we don't know

19   where the professional corporations are fitting

20   within the various levels of income. That's the

21   difficulty we have.

22   So the other point I would make as I

23   believe is that the 75th percentile has not

24   the -- the amount of income for the

25   75th percentile, I don't think, has decreased at

1   all. And if there was to be a huge exodus of

2   higher earning counsel to professional corps,

3   one would think that the 75th percentile would

4   have a significant drop and I don't believe, I

5   don't have the figure in front of me

6   immediately, but I don't believe there's been a

7   significant drop in that.

8   So I'm not sure there's a direct

9   correlation that you suggest there is, Madam

10   Chair.

11   MADAM CHAIR: If you look at page 31,

12   actually it would show that the 75th percentile

13   has gone down because judges' salaries are

14   actually way higher than the 75th percentile.

15   So it shows that the 75th percentile did not

16   follow pre -- what it did before 2010.

17   MR. RUPAR: Well, as I read the chart,

18   it's been relatively stable. There has been a

19   dip and then it rose again near 2017, 2018, and

20   2019. So I don't know if, again, if the point

21   of if there was a significant withdrawal of the

22   higher end, there would be a marked change, but

23   I'll -- perhaps Mr. Shannon could expand on

24   this.

25   MR. SHANNON: I think and this goes to

1   a point that Mr. Lokan made earlier this

2   morning, he said, you know, if we replicate the

3   salary to, I think it's 526, that those

4   individuals would automatically be

5   incorporating. The simply doesn't -- the data

6   doesn't bear that out. There are individuals

7   within the CRA data who are at the upper ends of

8   income, thus the 75th percentile is where it is,

9   and the CRA data does include that.

10   I also just echo what Mr. Rupar said,

11   that I don't think we can draw even a

12   correlation there without data. That's the

13   problem. That's why we requested the data. And

14   we don't have that data to make that connection,

15   to make that causal link or even a correlation

16   there, and I think that would be our position on

17   that.

18   MADAM CHAIR: Okay. Thank you.

19   One last question for me for now. On

20   representative cost, I see the position of the

21   judiciary and the government, but can I ask you

22   one question, and I'm not saying this would ever

23   happen, but let's say the government decides to

24   bring forth to the Commission, during the four

25   years, multiple requests.

1   Would it be fair then to say that the

2   Quadrennial Commission could decide at that

3   moment, depending on the request, whether to

4   grant full cost versus two-thirds of the cost?

5   Is that a possibility or it's not at all

6   possible? And again, it's a bit hypothetical

7   because there was only one such request, I

8   understand in the past and there's been no abuse

9   of the process. I'm just trying to see if

10 that's a possibility.

11   MR. RUPAR: Well, if I understand the

12 situation correctly, Madam Chair, the issue of

13 representational costs -- are you talking about

14 the ad hoc matter that was dealt with by the

15 previous Commission?

16   MADAM CHAIR: Yes, yes.

17   MR. RUPAR: That matter, as I

18 understand it, the issue of representational

19 costs has been dealt with and we're waiting for

20 an order from the Federal Court on that matter.

21 So I think that it was dealt with in that case

22 in the manner set out by the legislation.

23   I'll have to -- if I may, I'll have to

24 return perhaps after the break because I have to

25 confer with my colleagues in our judicial

 1 affairs office. But I believe the answer is,

 2 no, there wouldn't be a jurisdiction to grant

 3 100 percent representational costs. But that's

 4 with the caveat that I want to double check to

 5 make sure that I give the correct answer to the

 6 Commission on that.

 7   MADAM CHAIR: Okay, that's great.

 8 Thank you very much.

 9   Peter, Margaret, do you have anything

10 else? We have about 12 minutes left on the

11 time. Witch of course we may have other

12 questions at the end, by the way. But I'm just

13 trying to diligently use the time we have.

14   MADAM COMMISSIONER: No, I'm okay,

15 Madam Chair.

16   MR. COMMISSIONER: I have nothing

17 else.

18   MADAM CHAIR: Perfect. So thank you

19 very much, Mr. Rupar and Mr. Shannon, for taking

20 the time and giving us some more time in

21 advancing your reply.

22   So we'll break for lunch and everyone

23 come back at 1:30. Again, I'm going to ask all

24 parties not to disconnect. At 1:30 it will be

25 judiciary coming up.

1   So, Mr. Bienvenu, you your team will

2   be ready to reply at 1:30. Thank you.

3   -- RECESSED AT 12:20 P.M. --

4   -- RESUMED AT 1:30 P.M.

5   MADAM CHAIR: You have the floor for

6   30 minutes. I'll point out to you 10 minutes

7   before the end of your time. .

8   MR. BIENVENU: Thank you, Madam Chair.

9   I thought it would be most useful to the

10   Commission if my reply, to the extent possible,

11   addressed points made by my friends in the order

12   in which they were presented, but I have tried

13   to regroup my reply submissions under the

14   following broad themes, there are four of them.

15   Evidentiary issues, generally; IAI; private

16   sector comparator; and DM-3s.

17   My friend, Mr. Rupar, began his oral

18   submissions with a comment on process,

19   cautioning the Commission against making a

20   finding about the credibility of witnesses in

21   circumstances in which witnesses have neither

22   been heard nor cross-examined. And I understood

23   his remarks to be directed mostly to

24   Mr. Gorham's evidence. We're not seeking, Madam

25   Chair, members of the Commission, a finding

1   about the credibility of Mr. Gorham. What we

2   felt duty bound to point out to the Commission

3   is that Mr. Gorham's report contains opinions on

4   matters falling outside of his expertise, that

5   his report is inconsistent with the principle of

6   continuity, and that his report, considered as a

7   whole, is an advocacy piece more than it is an

8   experts opinion.

9   Now, Mr. Rupar sought to emphasize

10 points on which there was little difference

11 between Mr. Newell, the judiciary's actuarial

12 expert and Mr. Gorham. And specifically he

13 contended that Mr. Newell agreed with

14 Mr. Gorham's value of the judicial annuity.

15 It's important to clarify the position.

16   Mr. Newell disagrees with Mr. Gorham's

17 attempt to include the disability benefit in the

18 valuation. And I understand that the government

19 now appears to concede that the disability

20 benefit should not be included in the valuation,

21 contrary to Mr. Gorham's position. But it

22 remains that this was an area of disagreement

23 not of agreement.

24   Now, it is correct that in so far as

25 the valuation of the annuity is concerned the

1   two experts are not far apart, but that is in

2   relation to the calculation of the value of the

3   judicial annuity under Mr. Newell's approach,

4   which was not the approach advocated by

5   Mr. Gorham.

6   Now, the calculation of the value of

7   an annuity is for actuaries to make and we

8   accept that Mr. Gorham is an actuary. But I

9   need to be clear that the judiciary continues to

10   reject the rest of Mr. Gorham's evidence. And

11   we submit that the Commission should, itself,

12   reject evidence because it falls outside of his

13   area of expertise, and because other witnesses

14   who are experts in those areas have shown

15   Mr. Gorham's evidence to be unfounded and

16   superficial.

17   And, specifically, the Commission

18   should reject the proposed addition of an

19   11.5 percent to the value of the annuity because

20   it is plain, on the face of Mr. Gorham's report,

21   that he failed to take account of known and

22   accepted ways to avoid those costs, as explained

23   in the second E&Y report.

24   And as regards to that report, you

25   will remember Mr. Rupar focusing on the word

1 "possibility" by E&Y, but take a look at their

2 conclusions. There is no doubt in their

3 conclusion that they -- and I'll just read the

4 extract:

5   "We believe that the additional

6   cost at 16.6 percent, as stated in

7   Mr. Gorham's report, would be

8   overstated and does not reflect the

9   true additional cost for a lawyer to

10   replicate the judicial annuity."

11   Now, I also invite the Commission to

12 apply a measure of common sense to Mr. Gorham's

13 mathematical pyrotechnics. Place yourself in

14 the shoes of a potential candidate for judicial

15 appointment. The prospect of acquiring, upon

16 appointment, the future entitlement to a

17 judicial annuity is not the same, it is not

18 equivalent as having in one's bank account the

19 capital amount needed to generate a revenue

20 stream equivalent to the judicial annuity.

21   Now, the other aspect of his evidence

22 that the Commission cannot rely upon, and must

23 indeed disregard, are his views on filters, and

24 there are two reasons for that. The first is

25 that they are settled issues and the government

1   has not shown a demonstrated change that would

2   justify reopening these issues. But more

3   importantly, those experts, and those who came

4   before them, before previous Commissions, those

5   experts were qualified to speak to these issues,

6   contradict the evidence of Mr. Gorham and his

7   arguments.

8   Ms. Haydon tells you that it is a good

9   thing not a bad thing to have filters, and it's

10 a good thing that these filters narrow down the

11 population sample because it allows greater

12 precision. And you summed it up well, Madam

13 Chair, in your question, it is preferable to

14 have quality over quantity.

15   And I would say that the evidence

16 before this Commission provides additional

17 support for the imperative to apply one of those

18 filters which the government seems to be going

19 after, which is the low income exclusion.

20 Please allow me to -- and that reason is the

21 impact on the CRA data of the rise in the number

22 of professional corporations. And please allow

23 me to read the first paragraph on page 6 of

24 Professor Hyatt's second report. Well, I'll let

25 you read it. I'm not going to read it into the

1   record. So this is direct evidence supporting

2   the relevance of a low income exclusion and

3   evidence on the need to increase that low income

4   exclusion from 60 to $80,000.

5   Now, I might as well address now,

6   because it concerns the use of expert evidence,

7   the argument that the evidence contained in

8   Mr. Szekely's report is not put forward as

9   relating to comparators but, you were told, is

10   merely for context. Members of the Commission,

11   for evidence to inform decision making the

12   evidence must be shown to be both relevant and

13   reliable. And to characterize evidence as

14   merely providing context does not dispense the

15   government of demonstrating the relevance and

16   the reliability of the evidence it is tendering.

17   Ms. Haydon is a compensation

18   specialist, she has 25 years of experience in

19   this field and her report establishes, and is

20   not challenged by any witness, that the

21   compensation levels of doctors are simply not

22   relevant to the task that is yours. She

23   expresses the same opinion about bare salary

24   figures without an appropriate context attached

25   to judicial positions in foreign countries.

1   She also points to the fact that the

2   Commission has, over the years, developed two

3   important and reliable comparators, and as

4   regards to one of them, the DM-3 comparator, she

5   points that it is a robust comparator because

6   there is information available about the

7   compensation measure for that comparator.

8   I now turn to the IAI. Now, Mr. Rupar

9   has insisted on the fact that the 6.6 percent

10   adjustment that was applied to judicial salaries

11   was affected, to an unknown extent, by the

12   impact of the pandemic on the job market, and

13   this is not disputed. But Mr. Rupar, in his

14   oral submission, said nothing, not a word, on

15   the fact that based on the evidence before the

16   Commission, whatever impact the pandemic may

17   have had on the IAI for 2020 this is most likely

18   a self-correcting phenomenon.

19   Now, this morning in answer to a

20   question from the Commission Mr. Rupar said, we

21   don't think it is going to be fully

22   self-correcting because it was induced by the

23   pandemic. But, members of the Commission, the

24   reverse is true. It is because it was -- it is

25   because the variation was caused by the pandemic

1   that it is self-correcting. And I would like to

2   refer you to the evidence of Professor Hyatt,

3   his second report, page 7 under tab D.

4   "It would be expected that as the

5   pandemic continues to recede and lower

6   wage workers resume employment there

7   will be downward pressure on the IAI,

8   and that some (or all) of the

9   component of the IAI increase

10   experienced in 2020 attributable to

11   the attrition from employment of lower

12   wage workers would be reversed in the

13   subsequent year (or years)."

14   So that is the evidence before you.

15   And I already mentioned in my main submission

16   that there was direct reference to the

17   self-correcting nature of the adjustment in

18   paragraph 4 of the government's submission.

19   MADAM CHAIR: Can I ask somebody --

20   can I ask every single person who is on this

21   call to put themselves on mute, other than

22   Mr. Bienvenu. Thank you.

23   MR. BIENVENU: Now, you know by now

24   that the only justification for the proposed cap

25   is the notion that judges should share the

1   burden of difficult economic times. I've made

2   the point, what share of what burden? And I've

3   shown that the sentence relied upon by the

4   government was taken out of context. The one

5   sentence in the PEI reference that is relevant

6   to what the government proposes is at paragraph

7   156, and it reads as follows:

8   "If Superior Court judges alone

9   had their salaries reduced one could

10   conclude that Parliament was somehow

11   meting out punishment against the

12   judiciary for adjudicating cases in a

13   particular way."

14   So the PEI reference stands as further

15   proposition that judges cannot be singled out in

16   the way that the government proposes.

17   Now, in considering the proposal for

18   the IAI, let's stand back and look at the

19   forest. If you accept the government's proposal

20   you will worsen the problem that we have pointed

21   to, to ask you to recommend an increase in

22   judicial salaries. And please recall the

23   message that I was seeking to convey with the

24   metaphor of the ocean liner. If you accept the

25   government's proposal you will set judicial

1   salaries in the wrong direction and it will take

2   years to correct it.

3

4   [SPEAKER'S AUDIO NOT COMING THROUGH.]

5

6   -- in the private sector appointees to

7   the Bench, and you have the evidence, very

8   persuasive evidence I submit to you, of Justice

9   Popescul.

10   I turn to the private sector

11 comparator. And, of course, the most

12 significant issue here is the impact on the

13 usefulness and reliability of the CRA data, of

14 the increase in professional corporations. Now,

15 you know, you have two parties taking very

16 different stances in front of this admitted

17 phenomenon. The government said, you don't have

18 enough evidence about the salary level of these

19 lawyers, you shouldn't do anything about it.

20 That's not helpful to the Commission. The issue

21 is there for anyone to see and you will need to

22 confront it.

23   But you have assistance in the

24 evidence to draw conclusions about this

25 phenomenon and its impact on the reliability of

1   the CRA data. There is evidence about the

2   increased prevalence of professional

3   corporations, and you know that once a lawyer

4   practices through a professional corporation it

5   comes out -- he comes out or she comes out of

6   the CRA data. There is evidence as to which

7   category of lawyers use PCs, they are high

8   earning lawyers. And Mr. Lokan and E&Y tell you

9   that they are lawyers at an age where their

10   expenses level off and it is advantageous to use

11   a professional corporation.

12   So you can and you must draw

13   conclusions from this evidence. And the first

14   conclusion is that the CRA data underreports the

15   income levels of self-employed lawyers. We

16   don't know by how much but we know it is

17   significant, and E&Y supports that conclusion.

18   Now, this evidence also helps you,

19   members of the Commission, navigate through some

20   of the government's assertions that you would

21   know from personal experience to be suspect and

22   incorrect. And I'll give you just two examples,

23   the chart at page 27 of the government's main

24   submission is relied upon by the government to

25   advance the proposition that private sector

1   lawyers' income peak at ages 44 to 47. Now, we

2   know that this is incorrect, and the only

3   conclusion you can draw from this chart is that

4   the underlying data is unreliable. It seems to

5   us clear that what this graph illustrates is the

6   exodus of middle age, high-earning practitioners

7   from the CRA data. They have gone to practice

8   under the professional corporation.

9   Now, another graph that we submit

10   defies common experience and common sense is the

11   graph at page 18 of the government's reply

12   submission. This was shown to you yesterday by

13   Mr. Shannon. Now, this graph purports to show

14   the trends of appointment of partners versus

15   nonpartners. And at footnote 60 the government

16   tells us that these statistics were collected

17   from appointment announcements listed by the

18   Department of Justice between 2011 and 2020.

19   You don't have the underlying data, it cannot be

20   reviewed. But ask yourself this question, is it

21   believable that in 2011, 60 percent of those

22   appointed from law firms were nonpartners? Is

23   it not more incredible still to believe that

24   that proportion went up to 80 percent in 2014?

25   You cannot rely on public announcements to

1   determine the status of a given appointee. And

2   we don't even know if the universe of reference

3   are only appointees coming from the private

4   sector.

5   Now, Madam Chair, you asked a question

6   concerning the "recommended" and "highly

7   recommended" categories and how does one

8   reconcile these categories with the objective of

9   recruiting outstanding candidates? We say that

10 the reinstatement of the "highly recommended"

11 category was a welcome indication by the

12 government of its wanting the ability to

13 discern, among recommended candidates, those

14 that are highly recommended. And that's an

15 excellent development that promotes attainment

16 of the objective of recruiting outstanding

17 candidates to the Bench. But the problem,

18 identified by Chief Justice Popescul, is the

19 change in the composition of the pool and the

20 fact that highly suitable candidates coming from

21 the private sector are no longer in that pool in

22 sufficient numbers. And bear in mind that there

23 are constraints to the choice of potential

24 appointees. You may want criminal law

25 expertise, family law expertise and,

1   importantly, there is a diversity imperative.

2   So a narrow pool with these constraints is

3   insufficient.

4   Now, my next topic is DM-3s, it's my

5   last topic. And by way of introduction to this

6   topic let me say that this long-term comparator,

7   and the value of this long-term comparator, its

8   principal nature, are all exemplified by the

9   circumstances we find ourselves in in this

10   Commission cycle. Because we know that we have

11   issues with the compensation measure of the

12   private sector comparator. And there was a time

13   where there was -- we didn't even have data

14   coming from CRA to inform us about the private

15   sector comparator. So in these circumstances,

16   just as when we didn't have data from CRA, the

17   principal DM-3 comparator can serve as an

18   anchor. You can use it as a principal anchor to

19   formulate your recommendation. That is its

20   value.

21   Now, the suggestion was made by my

22   friend, Mr. Shannon, that there is a

23   contradiction between the judiciary reproaching

24   the government for relitigating filters, on the

25   one hand, and on the other inviting you to look

1   not at the block comparator but at the actual

2   average compensation of DM-3s. There is no

3   contradiction.

4   If you take a look at the table at

5   page 36 of the government's main submission you

6   will see that every year since 2004 the salary

7   range of DM-3s, and their midpoint salary, has

8   increased in parallel with average salary.

9   Now, in 2017 we are faced with an

10   unprecedented situation. For the first time

11   since 2004 the salary range of DM-3s remains

12   unchanged and it has remained flatlined since

13   then. How can the government say that the block

14   comparator continues to be a reliable measure

15   for the compensation of DM-3s when you see

16   that it doesn't represent reality? While the

17   block comparator was sitting idle in 2017 to

18   2020, the compensation of DM-3s went up

19   year-after-year. And this goes, members of the

20   Commission, to the credibility of what you are

21   asked to do. What credibility would there be in

22   comparing judicial salaries with the block

23   comparator that you see doesn't reflect reality?

24   Now, please note that the government

25   did not provide an explanation for the

1   flatlining of the DM-3 comparator. When we got

2   those figures we immediately wrote to the

3   government and we said, Are these figures

4   correct? We never received an explanation.

5   Obviously there has been a change in the manner

6   in which the government is remunerating its

7   Deputy Ministers and they are getting steady

8   increases, but otherwise then through a change

9   in the base salary range.

10   Now, the government, and this is in

11   response a point that was raised indirectly

12   yesterday by you, Madam Chair. The government

13   repeats its argument, we've been hearing it for

14   fifteen years, that the individualized nature of

15   the DM-3 compensation causes a high degree of

16   variability in the total average compensation of

17   DM-3s. But if you look at the graph on

18   page 35 of the judiciary's main submission you

19   will see that total average compensation has

20   not, in fact, been highly variable, it has

21   consistently increased over the years. And

22   there were two bumps, and that was when there

23   was an increase to the maximum performance pay

24   of Deputy Ministers from 10 percent to

25   20 percent. And you have that explanation at

1   paragraph 38 of the government's reply

2   submission. So it is not the case that the

3   small number of DM-3s leads to wild variation

4   in the overall compensation.

5   Now, this brings me to my last point,

6   and I see that I have two minutes to convey it

7   to you. And that is to respond to the

8   government's characterization of the basis for

9   the judiciary's salary proposal as formulaic.

10   You remember Mr. Shannon told you that we were

11   applying a formulaic approach to our proposal.

12   Members of the Commission, this is a

13   mischaracterization of the reasoning supporting

14   the judiciary's proposal; and you need only look

15   at paragraphs 146 to 149 of our main submission.

16   We explain in paragraph 147 that as of

17   April 1st, 2019, there was a 14 percent

18   difference between judicial salaries and the

19   compensation of DM-3s. And we showed that the

20   projected difference at the end of the

21   Commission cycle would be 8.5 percent. And we

22   observed that the 8.5 percent is beyond the

23   7.3 percent that the Levitt Commission had said

24   test the limits of rough equivalence. And at

25   paragraph 154 we asked the Commission to give

1 consideration to that gap. And our proposal was

2 for a recommended increase that would reduce

3 that gap by one half; nothing formulaic about

4 that, one half. And the one half is the 4.25

5 that is proposed to be implemented over a

6 two-year period at the end of the cycle,

7 recognizing the situation in which the

8 government finds itself.

9   Now, I leave you with the chart at

10 page 37 of our reply submission. And if you

11 look at the bottom line this is our ocean liner.

12 And your very important responsibility is to

13 determine in which direction is it going to

14 point? In which direction must it point, in

15 light of the evidence before you?

16   And I invite you to carefully consider

17 the concern that was conveyed by Chief Justice

18 Popescul's evidence, and to draw confidence in

19 the anchor of the DM-3 comparator at a time when

20 the other comparator is fraught with the

21 difficulties that we know.

22   MADAM CHAIR: I was cutting you off

23 because of the time, but I assume you're

24 finished?

25   MR. BIENVENU: I was going to simply

1 say that I'll be glad to answer any questions

2 that you may have.

3   MADAM CHAIR: Perfect. I think we

4 will hold those for after the break so that we

5 can have the reply of Chief Justice Bell.

6   Chief Justice Bell, do you need the

7 time? Or your representative?

8   CHIEF JUSTICE RICHARD BELL: Thank you

9 very much, Madam Chair, yes, the representatives

10 will speak, Mr. Meehan and I believe

11 Mr. Scanlan.

12   MR. MEEHAN: I'm here but my video is

13 turned off by -- I can start the video now.

14   MADAM CHAIR: We can see you.

15   MR. MEEHAN: Thank you, Chief Justice

16 Bell. During the break Mr. Giordano and I

17 consulted with CMACC, or Court Martial Appeal

18 Court of Canada judges. So I briefly speak on

19 behalf of Chief Justice Bell, Justice Scanlan,

20 currently of the Nova Scotia Court of Appeal and

21 my colleague Mr. Giordano.

22   The Honourable Peter Griffin asked an

23 important and relevant question as to the

24 jurisdiction of this Quadrennial Commission to

25 deal with CMACC judicial concerns and issues;

1   and asked appropriately and pointedly whether

2   those concerns and issues fit squarely within

3   the jurisdiction of this honourable Commission?

4   I responded yes, and that remains so for these

5   additional reasons, and there are six, very

6   briefly.

7   Number one, the Fish Inquiry formally

8   called The Independent Review Authority is

9   partially a misnomer. The name is a misnomer

10 because that Independent Review Authority or the

11 Fish Inquiry has no authority to deal with

12 matters falling within the purview of the Judges

13 Act.

14   Number two, the legal reason for the

15 independent review authority not having

16 jurisdiction to make recommendations under the

17 Judges Act is because it is military only, not

18 judges only. It deals with -- specifically

19 deals with the National Defence Act not the

20 Judges Act. So it's military only and not

21 judge's only, and this is judges only. Judges

22 is the business of this honourable Commission.

23   Number three, this honourable

24 Commission does have that jurisdiction, matters

25 falling squarely within part 1, statutorily,

1   that's a jurisdiction within part 1 of the

2   Judges Act.

3   Number 4, the office of the Chief

4   Justice of CMACC, via the current Chief Justice

5   and Justice Scanlan, have raised concerns with

6   each of you as to concerns and issues directly

7   referable to part 1.

8   Number five, importantly, and why this

9   honourable Commission is important, is so

10   important in fact, is with regard to this

11   honourable Commission the government has a

12   constitutional obligation to respond to a report

13   of this Commission. The government must say why

14   it is or is not deciding to act on the

15   recommendations of this honourable Commission.

16   And that's clear from the Supreme Court of

17   Canada decision in a case called Bodner, the

18   citation is, 2005 SCC44, paragraphs 22 through

19   to 27. And, interestingly, that judgment is

20   written by the court not by a judge, by the

21   court. So there is no similar constitutional

22   obligation on government with regard to the Fish

23   Inquiry.

24   And last, number six, Mr. Rupar, for

25   the government, stated that government can and

1   does deal with policy issues, "policy issues"

2   herein. CMACC agrees, this honourable

3   Commission can likewise deal with policy issues

4   and policy recommendations, recommendations

5   directly referable to judges.

6   Chief Justice Bell, Justice Scanlan,

7   Mr. Giordano, is there anything else that you

8   would like to say?

9   JUSTICE EDWARD SCANLAN: Yes, I'd like

10   to add or make some comments.

11   As pointed out by Mr. Meehan, I

12   suggest to you that there is a distinct

13   nonconcurrent jurisdiction as between the Fish

14   Inquiry and your Commission.

15   The Fish Inquiry finds its authority

16   in the National Defence Act. Only this

17   Commission has jurisdiction afforded to you

18   under the Judges Act. You have the authority to

19   deal with both, specific and general judicial

20   benefits under part 1 of the Judges Act.

21   Mr. Meehan has outlined that quite adequately.

22   This is reflected in past

23   recommendations, which I noted this morning

24   where you made recommendations in relation to

25   judges and supernumerary benefits; that benefit

1   is tied to a court. And this Commission can

2   clarify any uncertainty as it relates to the

3   CMACC Chief Justice and his supernumerary

4   entitlement, specifically including which court

5   he would serve that in.

6   Our submissions of March 26th, 2021,

7   pages 9 through 11 dealing with the issue of

8   jurisdiction, suggest how the issue can be dealt

9   with under the Judges Act, not the National

10   Defence Act; through amendments to section 28,

11   and 31 of the Judges Act.

12   What's more important, it's a fact

13   that the Fish Inquiry has no authority to make

14   recommendations to amend the Judges Act. In

15   fact the government does not even have to

16   respond to the Fish Inquiry and the

17   recommendations.

18   There is a problem trying to serve two

19   task masters. This is real and it's ongoing. I

20   said this morning that it's not beyond the pale

21   that a source court would say to the CMACC Chief

22   Justice, fit your CMACC work in where, when and

23   how you can. I want to read you, in part, an

24   email that was received by the Chief Justice

25   since I spoke this morning. The part that I

1   want to read you, and it comes from an official

2   in the source court.

3   "You were appointed to the

4   Federal Court in 2015 and have not

5   resigned since. Until the time you

6   do", the trial co-ordinator is named,

7   "will continue to do her job by

8   filling up your agenda as a Federal

9   Court judge, leaving you the entire

10   discretion as to how you are using

11   your CMACC time." (As read.)

12   If there was ever a more direct

13   frontal attack on a court, the Chief Justice of

14   a national court sitting and hearing cases where

15   he is being told by a trial court how much time

16   he is going to get because they fill the rest of

17   his time up. That is a direct, frontal attack

18   by a source court. It has allocated to itself

19   the exclusive authority to decide how much time

20   CMACC justice has to do his work. It's a

21   frontal attack on his judicial independence and

22   on the judicial independence of the court. It's

23   ongoing, it's real, and it's not a figment of

24   somebody's imagination or saying it might come

25   up in the future. This is an attack, like I

1   said, on the Chief Justice and his court.

2   I think that this may have been

3   covered by Mr. Meehan already, but the third

4   independent review of the National Defence Act

5   may make recommendations with respect to the

6   National Defence Act. That's the mandate for

7   the Fish Inquiry.

8   I suggest to you, with respect, that

9   Justice Fish is not likely to address concern

10   with the Judges Act and, I already said, the

11   government is not required to respond. Matters

12   of judicial benefits, such as supernumerary

13   status of the Chief Justice, will probably not

14   be dealt with by him.

15   So where is the proper forum I ask?

16   And there may be a slight overlap between the

17   two bodies, but I suggest to you that he has no

18   authority within the Judges Act. And even if he

19   was to make recommendations that should not

20   exclude the jurisdiction of this Commission.

21   This Commission is the right place, the right

22   body to make recommendations that could very

23   easily fix this problem.

24   And I would urge this honourable

25   Commission to make recommendations to the

1   Government of Canada and to note the Chief

2   Justice's concerns regarding independence. This

3   will ensure that the government must at least

4   respond. The Supreme Court of Canada confirms

5   their obligation to respond in the Borden case,

6   that's at paragraph 22 and 27 of our

7   submissions. Thank you very much.

8   MADAM CHAIR: Thank you very much,

9   Justice Scanlan.

10   Now, we're a bit over time but I can

11 allow Chief Justice Bell if you have anything to

12 add over the arguments already advanced.

13   CHIEF JUSTICE RICHARD BELL: Thank you

14 very much. I did not plan to say anything and I

15 appreciate the opportunity to address you.

16   I was appointed to the court -- the

17 Court of Queen's Bench in New Brunswick in 2006.

18 I was appointed to the New Brunswick Court of

19 Appeal in 2007. I served on that court until

20 2015 when, on the same day, I was appointed to

21 the Federal Court, Court Martial Appeal Court

22 and as Chief Justice of the Court Martial Appeal

23 Court.

24   That court, the Court Martial Appeal

25 Court I hold dear, I want the very best for it

1   and I could retire June 27th of this year.

2   There is no personal gain in any of this for me.

3   I have dutifully served my time for six and a

4   half years. I am eligible to go June 27th. I

5   am a firm believer in term limits for Chief

6   Justices. I told the Chief Justice of the

7   Federal Court, and I told those who cared to

8   listen at the time that I took the job, that I

9   would be there for seven to ten years. I

10   believe that Chiefs should serve a minimum of

11   seven years and by ten years they should be

12   gone.

13   So there is no personal gain in this,

14   but this court, and our service men and women,

15   deserve the separation of these two courts. I

16   shouldn't say "these two courts", the Court

17   Martial Appeal Court from any source court.

18   Because the Chief Justice could come from the BC

19   Court of Appeal. Historically it's been the

20   Federal Court or the Federal Court of Appeal,

21   that is not written in legislation anywhere.

22   Chief Justice -- or Justice Scanlan, were he not

23   supernumerary, could become Chief Justice of the

24   Court Martial Appeal Court sitting in Nova

25   Scotia.

1   So there is no personal gain in this,

2   it is for the betterment of our military men and

3   women serving Canada. And they need an

4   independent Court Martial Appeal Court that is

5   not tied to any source court that effectively

6   gives a Chief Justice two masters. Thank you.

7   MADAM CHAIR: Thank you very much,

8   Chief Justice Bell. And thank you, Mr. Meehan

9   and Justice Scanlan, for your remarks and reply.

10   We're now ready to go to Mr. Justice

11   Chamberland. Do you need a right of reply?

12   JUSTICE JACQUES CHAMBERLAND: Yes.

13   MADAM CHAIR: You have ten minutes.

14   JUSTICE JACQUES CHAMBERLAND: I'm

15   usually the one who say that to lawyers but

16   fine. I can put myself in their shoes for once.

17   First of all, the argument with

18   respect to the diminishing support for what we

19   are proposing and requesting. First of all, I

20   repeat, we don't know whether support is

21   diminishing. We don't know what level it stands

22   at now. What I do know is that 32 of the 32

23   judges of the Court of Quebec are in favour.

24   But to say that the support has gone from 99 in

25   2008 to 32 in 2021 across Canada is based on

1   threadbare evidence.

2   I don't believe I'm wrong when I say

3   that among all the appellate judges in the

4   remainder of Canada, there must be some, I don't

5   know how many, but there must be some who are in

6   favour of the compensation gap. As was the case

7   at the time under the other Commissions,

8   previous Commissions, that must be in favour of

9   a salary differential.

10   Now, the debate has been under way for

11   over twenty years, as it happens. And it would

12   be normal for a certain amount of fatigue to set

13   in and a certain amount of discouragement by the

14   appellate judges. Keep in mind that there's a

15   small number of us, we're spread all over

16   Canada, we don't have an association for

17   ourselves only. And it is quite difficult to

18   keep on defending such a debate with people as

19   well organized as is the government of Canada.

20   In any event, as I've already said

21   earlier, this issue of support for this request

22   is a red herring, it's a smoke screen. The real

23   question is whether the Rémillard Commission was

24   right to reverse the issue, the stand on

25   principle taken by the earlier Commissions in

1   the absence of any significant change in

2   circumstances.

3   Which brings me to the second point

4   raised by Mr. Rupar, who states that the drop in

5   support, supposing it's true, represents such a

6   significant change, a change in circumstances,

7   that it justifies the Rémillard Commission's

8   position to reverse the decision on principle,

9   adopted by the two Commissions that had preceded

10   it.

11   I completely disagree with his

12   position. The decision to provide higher

13   compensation for appellate judges versus their

14   trial court colleagues, taking nothing away from

15   the job that the trial judges do obviously, but

16   this has nothing to do with the number of

17   appellate court judges who are in favour or

18   against.

19   The Block Commission's decision was

20   based on the criterion spelled out in article

21   26. First of all, an objective, relevant

22   factor. I think it's under 26(1.1), factor (d).

23   So what is this objective and relevant factor?

24   Well, it's the roles and responsibilities of the

25   appellate judges.

1   Second criterion, the adequacy of the

2   compensation, the treatment of the appellate

3   judges versus the trial judges.

4   These are the factors that underlie

5   the decisions. It's not the number of appellate

6   judge whose are for or against. And as I said

7   earlier, the court hierarchy in Canada hasn't

8   changed since 2008 and the roles and

9   responsibilities of appellate judges have not

10   changed either. So it's a matter of correcting

11   -- their role is to correct mistakes made in

12   trial court. And basically the support of

13   appellate judges may fluctuate through time, but

14   it doesn't change anything with regard to the

15   decision of principle adopted by the Block and

16   Levitt Commissions.

17   It is not a matter of a change of

18   circumstances, as would be the case, for

19   example, if the roles and responsibilities of

20   the appellate judges, if any such change had

21   happened that would be indeed a change of

22   circumstance but it hasn't happened.

23   I'd like to draw your attention to

24   paragraph 106 of the Rémillard Commission

25   report. I won't come back to the issue of the

1 drop in support but I'd like to say something

2 about the lack of unanimity. Since when do we

3 have to be unanimous? Unanimity is not a

4 relevant factor. That is not what we base our

5 decisions on. It's not a relevant factor with

6 respect to the substance of the decision taken

7 by the Block and Levitt Commissions.

8   Then we are told that the Ontario

9 Court of Appeal has not taken a stand. Well

10 what can I say about that? Okay, they haven't

11 taken a stand. They have not said what they

12 feel. But what does that matter? It's into

13 because the Ontario colleagues haven't said

14 anything in either direction that this reduces

15 the value, the power of the argument that has

16 been raised, and which had already been accepted

17 by the Block and Levitt Commissions. Let's not

18 lose sight of that.

19   Mention is then made of the

20 Association of the Ontario Superior Court

21 judges, 328 who are against such a salary

22 differential. And my attitude would be, so

23 what? I'm pretty much sure that 90 percent of

24 the Association is made up of trial judges. So

25 as far as I'm concerned that's not significant.

1   Ask around you, you'll discover that

2   most people around you in your neighbourhood, or

3   friends and family think that appellate judges

4   already make more money that trial judges. I

5   know that Commissioners who were parts not of

6   investigation Commission but rather inquiry

7   Commissions such as yours, and before joining

8   such Commissions they were sure that there was a

9   salary differential in favour of appellate

10   judges. It was like a kind of epiphany when

11   they discovered it wasn't the case.

12   As for the last comment in paragraph

13   106, comment by the Chief Justice with respect

14   to his compensation versus the puisne judges of

15   the appellate court, that's not argument of

16   substance. That's pure accounting. And the

17   Block Commission had taken this into account by

18   setting not at 6.7 percent the differential but

19   at three point something percent. And I

20   suppose, although they didn't say so, I suppose

21   they wanted to have a salary differential

22   between the appellate judges and their Chiefs,

23   as it were.

24   I'd like to come now to my final

25   point. And at the end of what I was talking

1 about this morning I mentioned that I find the

2 situation distressing. Why? Well, because I

3 get the uncomfortable sensation that the

4 appellate judges have been struggle for more

5 than twenty years to get recognition of a

6 principle, which is that they get a higher

7 salary than the trial judge, which is

8 100 percent commonsensical? It's not because

9 we're better than anyone else, it's because we

10 have find ourselves at a certain echelon in the

11 Canadian judicial hierarchy, which means that we

12 can overturn decisions taken by other judges in

13 courts below ours in the pyramid. The same

14 happens in corporations.

15   Madam Chairman, you've had experience

16 of this. The president of a corporation makes

17 more money than the vice-president. And this

18 isn't a debate that has to be revisited every

19 single year.

20   In the McLellan Commission mention was

21 made, and I find this amusing actually because

22 it refers to the army, and we've just talked

23 about CMACC, going back to the army. And the

24 McLellan Commission said a Colonel is paid more

25 than a Major, this is normal. DM-3s in the

1   government, I mean, I'm not familiar with the

2   structure but I know that Deputy Minister is

3   better paid than an Assistant Deputy Minister.

4   DM-3 is paid more than a DM-2.

5   So I think that this is what makes

6   this whole process so exhausting. Because the

7   Commission -- prior Commissions have twice

8   agreed with our request and the governments have

9   not acted. I understand that in 2008 there was

10   a financial crash and things were difficult, but

11   seven years lapsed between then and the

12   Rémillard Commission once again examining the

13   merits of the case. The government had seven

14   years to act and did nothing. So we're finding

15   ourselves in the position that we're

16   experiencing now.

17   I thank you for your patience and I

18   apologize if I get a little bit carried away in

19   my tone, but I can tell you that this is a

20   debate that has been going on and on and never

21   seems to want to end.

22   Thank you very much and thank you for

23   giving me the opportunity speak.

24   MADAM CHAIR: Now, what we will do is

25   we would like the Commission to take a 15-minute

1   break, so that would bring us to 2:40, so that

2   we can put together questions and come back to

3   the various parties, but expect mostly to the

4   government and the judiciary. So if we can get

5   back at 2:40.

6   -- RECESSED AT 2:25 P.M. --

7   -- RESUMED AT 2:40 P.M. --

8   MADAM CHAIR: Thank you much for the

9   time you have devoted to your presentations. We

10   have some questions we would like to submit to

11   you.

12   And then I've got a list, which is

13   going to be a bit of homework for some of you.

14   [inaudible] and Mr. Bienvenu, you should be

15   prepared since it is exactly the same question I

16   did ask Mr. Lokan this morning.

17   Given that you believe the IAI is

18   self-corrective I assume the judiciary would be

19   ready to accept the consequences of a negative

20   IAI, when we all know that salaries will only be

21   reviewed down the line, if that ever happens.

22   It is not anticipated at this point but if it

23   does happen.

24   MR. BIENVENU: Madam Chair, we did not

25   ask for a floor and we are not asking for a

1   floor.

2   MADAM CHAIR: Thank you very much.

3   Margaret, I believe you do have a question of

4   the judiciary.

5   MADAM COMMISSIONER: Yes, Madam Chair.

6   Mr. Bienvenu, you yesterday, but also

7   today in your reply, pointed out the particular

8   importance of the DM-3 comparator in view of

9   some of the lack in the private sector

10   comparator, which we've gone at at length so I

11   won't repeat that.

12   I wonder though, should we not --

13   particularly given its importance, look at the

14   difference in value of pension as well with

15   regard to that comparator?

16   MR. BIENVENU: Yes.   I was hoping you

17   would ask me that question, Madam Bloodworth,

18   because this is a good example of the government

19   seeking to move the goalpost.

20   I would like to draw attention to

21   paragraph 71 of the report of the Rémillard

22   Commission.   And I don't know if my colleague

23   can put it up?   And the sentence I'm drawing

24   attention is this, this is the first paragraph

25   in which the Commission deals with the value of

1   the judicial annuity. And the Commission says:

2   "We must consider more than

3   income when comparing judges' salaries

4   with private sector lawyers' pay. The

5   judicial annuity is a considerable

6   benefit to judges and is a significant

7   part of their compensation package."

8   Then the Commission goes on to say

9   this:

10   "Deputy Ministers also have

11   pensions of considerable value so we

12   do not need to consider the value of

13   the judicial annuity when examining

14   the public sector comparator."

15   So that has been the position for as

16   long as I can trace. And this is another good

17   example of the government seeking to move the

18   goalpost when -- to suit its purpose. And it

19   seems that the purpose is whatever we can use to

20   put forward the position that judges earn enough

21   or too much we will use. And that's one of the

22   recent finds.

23   MADAM COMMISSIONER: So the fact that

24   now the government has put forward an expert

25   opinion, or their expert report that the value

1   of that pension is half -- about half that of

2   the judiciary you think we should not consider

3   that at all?

4   MR. BIENVENU: I don't think you

5   should consider it without a full evidentiary

6   contribution of all parties on this question.

7   No, I don't think you should.

8   MADAM COMMISSIONER: Okay.

9   MR. BIENVENU: There is very little

10   information on the basis for this evaluation.

11   It's relegated to a footnote in Mr. Gorham's

12   report and there is no evidence from the

13   government on this, apart from Mr. Gorham's

14   report; and no evidence from the judiciary

15   either.

16   So, you know, as I said, this is not a

17   matter that was considered in the past and that

18   explains why we didn't put any evidence on it.

19   And I'm not even aware that the information

20   needed to form a view on this is information

21   that is available to us. So that's the

22   position.

23   MADAM COMMISSIONER: Thank you

24   Mr. Bienvenu.

25   MADAM CHAIR: I now have -- unless,

1   Peter, you have any additional questions in the

2   meantime? No? Okay.

3   I have a series of eight follow-ups

4   that I'd like you to take into account, and I

5   think many are governments but also the

6   judiciary.

7   The first one maybe I can ask

8   Mr. Shannon, you have -- thank you for your

9   letter that you sent to us responding to some of

10   the questions we asked yesterday.

11   I note in the question 1 I did ask for

12   the salary range as of April 1, 2021. You seem

13   to say that the most recent salary range is the

14   one of April 1, 2020. So am I to understand

15   correctly there is no salary range dated

16   April 1, 2021, right now?

17   MR. SHANNON: We don't have that

18   information currently. That was not the

19   information provided in the record. We received

20   updated information in January of 2021 from the

21   Privy Council office on Deputy Ministers. We

22   don't have the current salary to April 2, 2021.

23   But what I can offer to do is go back and see if

24   we can get that information but we don't have it

25   currently.

1   MADAM CHAIR: Okay. We would like you

2   to give to us, and if for any reason it is not

3   available I'd like to know why it is not

4   available. And the why if it's not available,

5   and the why it's not available, is when are

6   salary increases made? Are they made as of

7   January? Or I would assume here that they're

8   made as of April, for instance. Any salary

9   adjustments that would be made for DM-3s would

10   be as of April 1. So they could be made in

11   April 30th, but I just want to understand there

12   is a salary range April 1, 2021, and if there's

13   none why? And if there's none, well when do you

14   actually increase salaries so I understand what

15   happened to that salary range.

16   MR. SHANNON: Understood. I will get

17   back to you on that.

18   MADAM CHAIR: Perfect. Thank you very

19   much, Mr. Shannon.

20   And number 2., CRA data for

21   professional corporations. I understand from

22   Mr. Rupar and Mr. Bienvenu that you will look at

23   checking a bit more. If there is anything we

24   can do to help the Commission on this issue, and

25   if not so that we have a better understanding of

1   the obstacles that we all face in getting the

2   data.

3   Number 3, Mr. Griffin asked Mr. Rupar,

4   you mentioned you would try to obtain the

5   information whether the IAI component includes

6   information derived from the income of lawyers

7   through professional corporations.

8   Number 4 --

9   MR. RUPAR: Madam Chair, if you like I

10   can answer that question now.

11   MADAM CHAIR: Perfect. I'd love it.

12   MR. RUPAR: Our information, and this

13   is subject to -- my friend Mr. Bienvenu may have

14   different views. But our information is that

15   the IAI does not include professional

16   corporations, it only covers employee wages.

17   The only slight caveat would be is if

18   a professional corporation -- in a professional

19   corporation if a lawyer treated themselves as an

20   employee of that professional corporation then

21   it might. That's what I'm told the caveat would

22   be but generally I'm told it would not.

23   So the only thing I would add is if

24   afterwards Mr. Bienvenu and I discover other

25   information we'll correct it and give it to you.

1   The other thing, while I have your

2   attention, you asked me -- this might be on your

3   list, this morning about whether or not you can

4   make recommendations with respect to

5   representation costs of an ad hoc, and I think I

6   said to you that you could only do two thirds.

7   And I've been told that you could make

8   recommendations as you deem appropriate, is the

9   best way to put it.

10   So I just -- if I led you down the

11   wrong path I'm now correcting that path.

12   MADAM CHAIR: That's great. Thank you

13   very much. It was on my list.

14   Mr. Bienvenu.

15   MR. BIENVENU: Madam Chair, I'd like

16   to address this question, if I may. The Act

17   says what it says on the reimbursement of

18   representational costs.

19   In the context of the Minister's

20   referral that occurred in the recent Quadrennial

21   cycle, we asked for reimbursement of the

22   judiciary's full representational costs on the

23   same basis as those put forward in our main

24   submission; in support for our recommendation

25   that in those rare instances the judiciary be

1   reimbursed its full representational costs.

2   Now, in response to our request for

3   full representational costs, what the Commission

4   decided was that it could not order

5   reimbursement of our full representational

6   costs.

7   Now, it is, I think, clear that the

8   Commission could recommend to the government to

9   modify the Act so as to provide. But I just

10   want to point out that that happened in that

11   last Minister's reference. We asked for full

12   representational cost. I think we are right

13   that in those circumstances there should be

14   reimbursement of full representational cost.

15   It is unfair to impose on the

16   judiciary the cost of their participation in a

17   process where they have the constitutional

18   obligation to participate in that process, and

19   it is their participation that gives legitimacy

20   to the process. The Commission would not be

21   helped if there were such a reference by the

22   Minister and only the government participated.

23   The government -- the Commission needs the

24   judiciary to participate. So we say that in

25   those rare instances where there is a special

1   Minister reference the fair outcome is for the

2   judiciary to be fully compensated for its

3   representational costs. And the last time

4   around the Commission felt that it didn't have

5   that leeway, and that's what I want to make

6   clear.

7   MADAM CHAIR: Okay. Thank you.

8   Any comments that you have on the IAI

9   component itself?

10   MR. BIENVENU: No. Simply to confirm

11   that my understanding is exactly the one that my

12   friend, Mr. Rupar, has just conveyed to the

13   Commission.

14   MADAM CHAIR: Perfect. Thank you.

15   Mr. Rupar, there is also the

16   legislative history around the 7 percent cap and

17   the many amendments, as my colleague Mr. Griffin

18   has raised.

19   MR. RUPAR: Yes. I'm sorry, we have

20   started work on that. We just want to make sure

21   we have everything in one package that we'll

22   send off in short order in the next few days

23   hopefully.

24   MADAM CHAIR: That's perfect.

25   MADAM COMMISSIONER: Madam Chair, if I

1   can just -- if you could include, Mr. Rupar, any

2   discussion of the cap either at Committee or in

3   the House that would be helpful as well.

4   MR. RUPAR: Yes, we'll take that under

5   note, Commissioner Bloodworth.

6   MADAM COMMISSIONER: Thank you.

7   MADAM CHAIR: That's perfect.

8   Mr. Shannon, you did answer in

9   question 4 of your letter last night, and I was

10 still grappling with -- we want to make sure we

11 understand the source of applicants, the 1200 or

12 so, 1203 I think, and whether you could give us

13 more details by jurisdiction?

14   We were interested in two things.

15 One, how many come from the private sector

16 versus the public sector? And the number of

17 applicants from the top 10 CMAs, for example?

18 Am I to understand that, one, you see to

19 indicate this would be very labour intensive

20 because it would be a manual review? Is that

21 applicable to both criteria? The top ten CMAs

22 and whether they come from public and private

23 sector?

24   MR. SHANNON: Madam Chair, we reached

25 out to the office of the Federal Commission --

1   sorry, the Office of the Judicial Affairs

2   Commissioner. I've got that wrong but you

3   understand what I'm saying. They are the ones

4   who deal with the application. They are the

5   ones that have the statistics on this. And

6   they -- the CFJA, that's what I was looking for.

7   And the response we've relayed in our letter is

8   actually the response directly from them, that

9   is the wording of their response.

10   I can go back, and I'm happy go back,

11   and ask the question with respect to these two

12   specific categories that you've listed. I do

13   note that there is -- that there are some

14   privacy concerns they have as you get into the

15   regions and being able to identify certain

16   individuals based on where they come from, et

17   cetera. But I will go back, and we will go back

18   and write to the CFJA once more and get that

19   information and reply to you as soon as we can.

20   MADAM CHAIR: And if there are some

21   privacy issues on some of the jurisdiction, it

22   may not be complete but Ontario and Quebec are

23   quite large. If we can get at least some

24   information on that that would be helpful. I

25   don't know, Margaret and Peter, is there

1   anything else to add on this one?

2   MR. COMMISSIONER: It's the focus on

3   applicants versus appointees that was important.

4   MADAM COMMISSIONER: And I would just

5   note that they seem to suggestion there is a

6   breakdown in Ontario and Quebec to -- below the

7   provincial level, so even that would be useful

8   given they are large chunks of the country.

9   MR. SHANNON: I understand, but I

10   think some of the regions in that breakdown may

11   be so small that there are privacy concerns.

12   But we will reach out and get that information

13   or get a response to you.

14   MADAM CHAIR: Thank you very much,

15   Mr. Shannon.

16   The next one is the CRA data.   We'd

17   like you to go back for self-employed lawyers.

18   So only those that are in the CRA data, that's

19   about the 15,000 or so data points.   And we

20   would like to know two things, how many are

21   above the $200,000?   So 200,000 to wherever it

22   goes.   How many are above the $300,000?   So we

23   would like that information.   And I assume

24   that's something between the judiciary and the

25   government so that you work together.

1   And the last one, which is to

2   Mr. Meehan, we would like the presentation, if

3   it's in writing, or any submission in writing

4   that you would have made to the Fish Commission,

5   in addition to the terms of reference that

6   you -- of the Fish Commission that you alluded

7   to. Is it possible to provide that?

8   MR. MEEHAN: I will speak with Chief

9   Justice Bell as well as Justice Scanlan and if

10 that is available -- I was not engaged in that

11 so I was unaware if that is in writing or

12 whether that was done orally. But Chief Justice

13 Bell has just came on and perhaps he can deal

14 with that directly?

15   CHIEF JUSTICE RICHARD BELL: That

16 presentation was made internally through

17 internal legal counsel, and I do believe there

18 was a basis for our representation, a written

19 basis, speaking notes. And we will make that

20 available and send it along, whatever we said to

21 the Fish Inquiry, yes.

22   MADAM CHAIR: That would be very

23 helpful. Thank you, Chief Justice Bell. And

24 the terms of reference for the Fish Commission,

25 I think one of you referred to it and that would

```
 1   be helpful for us to have as well.
 2              MR. MEEHAN:  Justice Scanlan referred
 3   to that and we will get that to you as well.
 4              MADAM CHAIR:  That was my last --
 5   unless I missed something.  Peter, Margaret or
 6   Louise?
 7              MADAM COMMISSIONER:  No.
 8              MADAM CHAIR:  No?  Okay, good.
 9              What's the timeline to get back to us?
10   I realize we're asking for a bit more data, a
11   bit more work. What is a reasonable timeline
12   that you can get this back to us?
13              MR. RUPAR:  We'll aim for the majority
14   hopefully by the end of the week, and if we
15   can't get something to you by the end of the
16   week we'll try and give you another timeline.
17              MADAM CHAIR:  That's perfect.  Thank
18   you very much, Mr. Rupar.
19              That is it for this Commission.  I
20   would like to thank all the parties for the hard
21   work you put into helping the Commission to come
22   to a decision.  It's much appreciated.
23   Obviously we have a lot to think about but thank
24   you so much for all the work that you have done.
25              Thank you very, very much.  Have a
```

1   very pleasant day.

2   CHIEF JUSTICE RICHARD BELL: I do

3   apologize for intervening. I had actually

4   prepared some written notes for this morning's

5   presentation, not for the reply of course. For

6   the reply I just scratched out a few ideas over

7   my lunch break but for this morning's

8   presentation I have written notes. I have these

9   available in both official languages of Canada,

10   I could send them in to you.

11   MADAM CHAIR: Yes, please do that.

12   CHIEF JUSTICE RICHARD BELL: Thank you

13   very much I will.

14   MADAM CHAIR: This concludes the work

15   of the Commission, but the hearing of the

16   Commission so thank you very much everyone.

17   -- Meeting completed 3:02 p.m.

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2   REPORTER'S CERTIFICATE

3

4   I, HELEN MARTINEAU, CSR, Certified

5   Shorthand Reporter, certify;

6   That the foregoing Commission hearing

7   was taken before me at the time and date therein

8   set forth;

9   All discussions had by the

10   participants were recorded stenographically by

11   me and were thereafter transcribed;

12   That the foregoing is a true and

13   accurate transcript of my shorthand notes so

14   taken.

15   Dated this 12th day of May, 2021.

16

17   *signature*

18   _____

19   PER: HELEN MARTINEAU

20   CERTIFIED SHORTHAND REPORTER

21

22

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