JUDICIAL COMPENSATION AND BENEFITS COMMISSION

COMMISSION D'EXAMEN DE LA RÉMUNÉRATION DES JUGES

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

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18e étage, salle d'audience 2
Ottawa, Ontario
Le vendredi, 29 avril, 2016

VOLUME 2

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

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VOLUME 2

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

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

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

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

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

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

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

So we start our discussion from that principle.

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

Thank you very, very much.

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

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

Thank you very much for your collaboration.

Peter, do you want to add something?

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

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

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

That's my request. Thank you.

MR. BIENVENU: It's noted.

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

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

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

THE CHAIRPERSON: Thank you, Mr. Nuss.

We are ready to start officially our hearing.

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

MR. LOKAN: Thank you, Commissioner.

May I first begin by thanking the Commissions and the parties for accommodating my schedule, both by accommodating my appearance today only out of the two days, and also accommodating my travel plans later in the day. I very much appreciate that.

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

--SUBMISSIONS BY FEDERAL COURT PROTHONOTARIES

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

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

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

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

Secondly, I will address salary.

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

Fourth, the incidental allowance point, again briefly.

And fifth and finally, representational costs.

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

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

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

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

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

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

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

Submissions at paragraphs 31 to 45.

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

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

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

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

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

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

So the normal complement is two in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Their work is increasingly complex.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

process that took place before former Justice Adams.

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

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

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

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

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

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

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

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

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

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

The judicial review application was

unsuccessful.

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

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

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

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

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

Instead, the Government chose the

figure of 76 percent of a Federal Court Judge's salary. That was very helpful to the Prothonotaries in that prior to that, they had been at 69 percent. So the original parity with Masters and Provincial Court Judges that had been set a long time ago, then it had been equaled.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And as Special Advisor Adams notes:

> *"On the material placed before me, I prefer the Prothonotaries' submission that in both 1985 and 2000…"*

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

Commission process.

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

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

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

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

That's true of British Columbia, and that's true of Alberta and that's true of Manitoba.

In Ontario there is a little wrinkle which I can perhaps elaborate a little bit later.

There are or were what's called "Traditional Masters", and then in the 1980s, the Government had introduced a category that was called "Case Management Masters".

The Traditional Masters, there were initially two, and one retired and I think there may be one left, was set at the same salary as Provincial Court Judges in Ontario, and that had been historical and that was maintained.

The theory of the government of the day in Ontario was that Case Management Masters, their job was to be more administrative in nature, and therefore they could be paid less. So there was a group of Case Management Masters that were being paid less for a number of years.

When I come to the Bannock Report shortly, the most recent report, that's the group that Commissioner Bannock was looking at. And he actually looked at what they were doing and said: 'You know what? Their job isn't just administrative in nature. Case management is extremely important.'

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

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

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

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

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

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

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

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

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

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

He analyses the salary issue starting at page 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

So I am reading here:

> *"To me, a more appropriate comparator ought to be Provincial Masters."*

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

He said:

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

> *Masters across Canada have benefited from the push by Provincial Court Judges for parity with Superior Court Judges' salaries, the positions and the nature of their supportive work leads me to the conclusion that Masters in Alberta, British Columbia and Manitoba are a close comparator in terms of responsibilities undertaken. In fact…"*

And this gets to a second point:

> *"… the best comparator may very well be the Judges of the Federal Court."*

So those are the two relevant.

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

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

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

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

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

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

of not allowing the disparity to impact on the dignity of the Office."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He goes on to analyse Prothonotaries as:

"Federal Prothonotaries are good comparators for Case Management Masters, since both Offices have their origins in the same historical Office of Master, which had been brought over from the U.K., and therefore play analogous judicial role. In fact, because of their similar roles, the independent remuneration Commissions for the Federal Prothonotaries have looked to the offices of various Provincial Masters for guidance in their reviews."

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

And in particular, the second

paragraph of page 81 notes that:

> *"The Federal Prothonotaries conduct work that is not only judicial in nature but also essential to the efficient management and timely disposition of proceedings before the Federal Court."*

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

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

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

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

At page 100, it's reiterated in the

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

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

> *"The evidence of the functions in jurisdiction of Case Management Masters demonstrates that fair and reasonable remuneration for these members of the Judiciary must be at the same level that has been provided to Traditional Masters and Provincial Court Judges…"*

Et cetera, et cetera.

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

And if I can perhaps give one final reference in that report, I mention the analysis of the Provincial Court Judges versus Case Management Masters. Although they exercise different areas of jurisdiction, that is captured in a couple of paragraphs at page 69 of the report.

And it's noted, this will be the

second full paragraph:

> "As has previously recognised in relation to predecessor offices, the legal issues that Case Management Masters deal with are not trifling in nature. They address complex matters in both civil and family law that can have a profound impact on the lives of individuals and the success of businesses in Ontario. Their lack of criminal law jurisdiction is only relevant to my review to the extent that it demonstrates that it demonstrates that Case Management Masters operate within a subset of Superior Court Judges' full jurisdiction. It does not however invalidate the comparison to either Provincial Court or Superior Court Judges."

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

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

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

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

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

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

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

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

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

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

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

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

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

there are two positions in Ottawa where a lot of the caseload is.

But there was a very small number of qualified applicants which resulted in the position having to be requalified as "bilingualism is an asset but not required."

And we respectfully submit that that shows that even though there would be a number of applicants come forward when positions have been posted, not necessarily every applicant is fully appropriate for the job.

Now, if I can more there to my next point and briefly touch on the request for supernumerary status. The Prothonotaries respectfully submit that this would be in the public interest. There is a small of number of Prothonotaries, complement of six currently down do five.

And that actually means that there has been a 16 percent drop in capacity at the same time as there has been a very large increase in workload and complexity.

And in that context, any future retirements are very likely to have a substantive impact on workload.

If supernumerary status of some kind

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

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

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

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

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

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

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

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

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

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

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

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

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

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

because of that previous activity.

But just to make perhaps the most salient points.

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

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

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

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

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

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

What happened before Special Advisor

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

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

He says at page 33:

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

of $80,000 including the $50,000."

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

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

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

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

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

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

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

And he notes:

> *"In that vein, Military Judges, a small group, received full indemnification in their review process."*

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

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

> *proceedings. It is our understanding that the Government has always paid reasonable costs and do not consider it possible for us to propose a particular formula for establishing what is reasonable in the circumstances."*.

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

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

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

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

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

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

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

THE CHAIRPERSON: Thank you, Mr. Lokan.

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

We will move now to the questions.

Margaret, do you have questions?

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

First, you reject the comparison with

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

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

So how do you explain that?

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

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

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

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

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

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

When it comes to the reimbursement of

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

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

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

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

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

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

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

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

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

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

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

It was created for the functioning of the courts.

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

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

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

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

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

gap when a Prothonotary retires.

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

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

COMMISSIONER BLOODWORTH: Thank you.

COMMISSIONER GRIFFIN: I have no questions.

Thank you, Mr. Lokan.

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

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

Thank you.

--RECESSED AT 10H10 A.M.

--UPON RESUMING AT 10H30 A.M.

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

I will ask our Executive Director,

Louise, could you have some proposals for us?

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

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

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

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

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

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

Have I captured our agreement, I hope?

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

points that I intended to cover.

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

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

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

THE CHAIRPERSON: I understand that everybody agrees.

Maître Bienvenu, à vous la parole.

MR. BIENVENU: Thank you very much.

---REPLY SUBMISSIONS FROM THE JUDICIARY:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a PAI study.

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

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

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

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

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

compared to the previous Commission cycle.

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

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

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

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

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

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

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

So that's on the question of costs.

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

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

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

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

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

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

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

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

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

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

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

Section 43.2, as it stands allows

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

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

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

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

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

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

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

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

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

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

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

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

I would just like to confirm that that

remains the position before this Commission.

LE PRÉSIDENT: Merci. Merci, Maître Bienvenu.

Louise, maintenant?

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

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

THE CHAIRPERSON: Is that acceptable for everybody?

--(no response)

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

THE CHAIRPERSON: Thank you, Mr. Rupar.

--REPLY SUBMISSIONS BY THE GOVERNMENT OF CANADA:

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

we have in the Commission today.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, we would respectfully suggest

that they are not different in importance.

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

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

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

Let me deal with a couple of other points.

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

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

It is our view that all judges are

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

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

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

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

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

He mentions that there will be a

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

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

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

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

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

Chief Justice Crampton's discussion with us.

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

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

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

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

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

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

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

He explains that the inability to transfer pension credits represents a significant barrier that affects indigenous provincial and territorial court Judges disproportionally.

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

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

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

changes can be made to it.

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

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

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

If I just have one minute.

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

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

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

would not be retroactive. That would be going forward.

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

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

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

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

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

COMMISSIONER GRIFFIN: What page are you at?

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

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

> *"As a result, we strongly recommend that some joint method in conjunction with the Government and the Association and Council be sought to provide an appropriate and common information statistical base, the accuracy of which can be made acceptable by both parties as reliable. This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the income levels of those lawyers who are appointed to the Judiciary. There are many ways in which this might be done. A study by independent consultant retained by this Commission to report to the principle parties could be commissioned. Statistical*

information could be gathered over time from those who are appointed to the Bench, in a way that would preserve their anonymity and privacy. There may be other ways. There could be a clearing house for information whereby some independent authority such as the Quadrennial Commission, could obtain information from Judges upon their appointment by means of which their income for three previous years could be ascertained and other useful information obtained from them with respect to their motives and expenses incurred on accepting their appointment. While this information might not be useful immediately, over a period of the next two Quadrennial Commissions it could be very useful indeed having regard to the expected turnover of Judges during that period."

Why that part is important because

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

But if we take the approach that McLellan has suggested, we would have that information. This isn't something that is going to be a one-year project.

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

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

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

back after lunch to deal with those errors and omissions.

THE CHAIRPERSON: Thank you, Mr. Rupar.

Louise?

MS. MEAGHER: Than you, Mr. Chairman. I see the representatives from the Canadian Bar Association are with us.

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

MS. FUHRER: I will speak now.

---PRESENTATION BY CANADIAN BAR ASSOCIATION:

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

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

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

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

improvements in the law and the administration of justice.

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

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

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

You have received our written submission.

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

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

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

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

From a practical perspective,

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

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

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

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

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

Government, et cetera.

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

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

Attracting candidates for judicial appointment requires judicial compensation to be competitive.

This means recommended compensation should be consistent with market conditions.

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

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

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

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

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

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

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

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

Commission appointed expert, and less use of oral proceedings.

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

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

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

Ultimately, judicial independence may be threatened.

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

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

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

des questions…

COMMISSIONER BLOODWORTH: I don't have any questions.

THE CHAIRPERSON: No questions. And for you?

COMMISSIONER GRIFFIN: No, thank you.

Me FUHRER: Merci beaucoup.

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

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

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

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

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

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

COMMISSIONER GRIFFIN: If you don't

feel disadvantaged.

MR. BIENVENU: No. I don't feel disadvantaged.

--REPLY SUBMISSIONS BY THE JUDICIARY:

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

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

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

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

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

But in that footnote the CBA says the following:

> *"CBA trusts that this consent that is the ability under Section 26.3 to postpone the date of commencement of a quadrennial inquiry with the consent of the Minister and the Judiciary."*

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

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

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

And happily, over the years the

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

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

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

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

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

Thank you.

LE MEMBRE PRÉSIDENT: Merci, Maître Bienvenu.

Louise?

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

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

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

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

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

MR. NUSS: Thank you very much.

---REPLY SUBMISSIONS BY THE CANADIAN APPELLATE JUDGES

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

Government basically is a reiteration of their longstanding position.

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

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

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

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

In the Block Commission report we have

a discussion of the difference.

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

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

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

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

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

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

"As discussed below, we do however

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

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

And further on in paragraph 150:

"With the evolution in Court structure described above came an evolution in the role and responsibilities of an Appellate Court and of the Judges appointed to it. We can now identify two essential functions of a Court of Appeal, correcting injustices or errors made in the first instance

and stating the law."

So this is developed in paragraph 151.

Further:

"The Court of Appeal's primary function is the correction of injustice or errors made at first instance. The focus of this role is on the correction of errors of law. The standard of review on a question of law is that of correctness. The consequence that on questions of law an Appellate Court is free to replace the opinion of the trial judge with its own."

At 152, we see:

"This error correcting role discharges the Courts' obligations with regard to the first of its client groups, the litigants before it. It also discharges part of the Courts' obligations towards the second client group, the general public, by upholding the principle of universality which requires

Appellate Courts to ensure that same legal rules are applied in similar situations."

Going down towards the conclusion of this part:

"Courts of Appeal are therefore not only burdened with correcting injustices that relate to a particular case, but of correcting errors that arise from the incorrect application of the law by a Court of first instance. Courts of Appeal not only create the decisions which are binding on Trial Courts, they ensure that those decisions are consistently and correctly applied by lower Courts."

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

And that is at page 49 where it is

cited:

> *"Thus when the primary role of Trial Courts is to resolve individuals disputes based on the facts before them and set of law, the primary role of Appellate Courts is to delineate and refine legal rules and ensure their universal application."*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And recommendation 3 fixes the salaries of the other Judges.

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

That is my reply.

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

LE MEMBRE PRÉSIDENT: Merci, Maître Nuss.

Peter or Margaret, do you have a question?

COMMISSIONER GRIFFIN: No, thank you.

THE CHAIRPERSON: So Louise, your suggestion, please?

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

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

MS. MEAGHER: 1:30.

THE CHAIRPERSON: 1:30?

MS. MEAGHER: Yes.

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

Excuse me. You have a question?

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

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

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

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

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

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

MR. BIENVENU: That works for us.

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

MR. BIENVENU: Monsieur le Président, avec votre permission.

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

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

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

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

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

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

Thank you.

LE PRÉSIDENT: Merci, Maître Bienvenu.

It's lunchtime.

--LUNCHEON RECESS AT 11H40 A.M.

--UPON RESUMING AT 1H25 P.M.

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

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

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

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

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

--PRESENTATION BY THE HONOURABLE CHIEF JUSTICE P. CRAMPTON:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, we're facing a very real prospect of not having just lost one of the five, but having to lose another three of the remaining five. And we lost the one whose position is vacant right now, last April. It's been a full year that we've been waiting to have that position filled, and it has imposed an enormous burden on the Court.

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

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

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

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

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

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

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

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

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

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

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

day in December interviewing these five candidates.

At the conclusion of our interviews we unanimously agreed that there were only [redacted] qualified candidates whose names would be put forward for consideration. And this was after we dropped the bilingual requirement.

Why would we do that?

Because in the first process that had been held a year prior to that, we had a bilingual requirement and [redacted]. And so we decided to drop it. We obviously spoke to Prothonotary Tabib because she would be the person who bears the brunt of that. She's bilingual, so she would have to do all the Ottawa French files and then be the person to back up the Prothonotary in Montreal on the French side. And she agreed that if we could get better candidates, she would be willing to do that.

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

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

[redacted]

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

didn't.

So there's Ottawa for you.

I have told you what the situation was for Toronto, [redacted] We have to do the background checks.

Montreal, there were [redacted] and [redacted] in Vancouver.

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

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

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

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

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

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

> *"It was considered a cost effective means of retaining experienced Judges on the Court who could contribute to the Court's workload and provide additional flexibility to the Chief Justice to manage the docket. From an administrative perspective a Judge's election to assume supernumerary office automatically creates a vacant position into which a new full-time Judge can be appointed, and in this way the full-time complement of the Court is maintained and the Court benefits from the workload carried by the supernumerary Judge."*

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

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

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

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

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

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

And in passing, contrary to the

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

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

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

Merci.

LE PRÉSIDENT: Merci, Monsieur le Juge en chef.

Est-ce que vous avez une question?

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

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

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

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

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

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

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

Those are the people that we are targeting.

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

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

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

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

So, supernumerary status affords that opportunity, and I have suggested a period of three years, not the ten years for the supernumerary judges. But that was important for me. That was a significant factor for me. I can tell you my experience.

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

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

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

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

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

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

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

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

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

COMMISSIONER BLOODWORTH: Thank you, Chief Justice.

Maybe just one more supplementary.

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

CHIEF JUSTICE CRAMPTON: Yes.

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

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

CHIEF JUSTICE CRAMPTON: That's a fair question.

I got the idea from one of the provinces.

So it would be the Chief Justice and

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

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

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

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

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

But thank you very much. That was very helpful.

CHIEF JUSTICE CRAMPTON: My pleasure. Mon Plaisir.

THE CHAIRPERSON: Peter?

COMMISSIONER GRIFFIN: I have no

questions.

Thank you, Chief Justice.

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

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

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

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

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

MR. RUPAR: Yes, I am.

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

--REPLY SUBMISSIONS BY THE GOVERNMENT OF CANADA:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

apart from the other federally appointed positions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Next I will touch briefly on the supernumerary status.

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

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

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

And the issue of adding a

supernumerary status does add to the overall cost of administration.

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

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

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

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

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

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

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

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

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

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

It was something we saw coming.

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

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

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

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

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

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

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

THE CHAIRPERSON: Thank you, Mr. Rupar.

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

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

Thank you very much. We appreciate your presentation.

Louise, the next step could be?

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

MR. BIENVENU: Absolutely, yes.

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

MR. LOKAN: I am.

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

--REPLY SUBMISSIONS BY PROTHONOTARIES:

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

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

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

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

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

The second point is when it comes to pension.

You will understand from reading the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prothonotaries work.

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

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

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

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

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

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

For example, a Prothonotary could deal with a critical, critical substantive issue on a *Charter* case that affects people across all of Canada. It may not be liberty of the subject, but there's no way that it is any less important than liberty of the subject.

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

One is the one I have already mentioned that they are within a closed system.

They're drawn from the ranks of the military and so the Government itself relied on the fact that they were distinguishable from the general population of lawyers and judges in Canada.

But the second was 2012 was early

enough in relation to the *Expenditure Restraint Act*, with the federal wage restraint legislation that the Government said: 'You can't be making an exception for Judges when everybody else is being required to tighten their belts.'

So that was very much a global financial crisis aftermath kind of decision. We have no idea, of course, what's going to happen in this round.

Subject to any questions, those are my Reply Submissions.

THE CHAIRPERSON: Thank you, Mr. Lokan.

I think your comments are very interesting for a good understanding of that situation. Thank you.

And I understand, Louise, that we pass to…?

MS. MEAGHER: We had undertaken with Mr. Nuss that he would have the lunchtime to reconsider whether he had more.

PROTHONOTARY LAFRENIÈRE: Monsieur le Président, est-ce qu'on pourrait être excusés?

On a un avion à prendre?

Avec votre permission, est-ce qu'on peut être excusés pour quitter?

THE CHAIRPERSON: Yes, of course.

And thank you. Thank you for your participation.

Monsieur le Judge en chef a été très sensible à votre participation et je voudrais nous excuser s'il y a eu ce petit, un moment donné, point d'interrogation concernant la partie formelle de cette conférence.

Donc, merci d'avoir finalement été avec nous. On apprécie beaucoup que vous soyez avec nous.

LE JUGE EN CHEF CRAMPTON: Ne vous en faites pas.

LA COUR: Alors, bon voyage de retour.

So, Mr. Nuss?

MR. NUSS: Thank you, Mr. President. I have nothing to add to what I said previously. So I have completed my reply.

THE CHAIRPERSON: Thank you.

MS. MEAGHER: Mr. Bienvenu, you had wanted to speak earlier, I am not sure what you wanted to say.

MR. BIENVENU: I have three very brief points to make rising directly from matters that were raised in the submissions you have just heard, if it is

of interest to the Commission. It's going to take no more than five minutes.

THE CHAIRPERSON: Please go ahead.

--REPLY SUBMISSIONS BY THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION AND THE CANADIAN JUDICIAL COUNCIL (THE JUDICIARY):

MR. BIENVENU: The first point is to draw the Commission's attention to the fact that the submission of the Government that there is no evidence of any difficulty in recruiting outstanding candidates to the Office of Prothonotary is also made in respect of Judges.

Chief Justice Crampton's submission speaks for itself insofar as candidates to the Office of Prothonotaries is concerned, and I submit that what Chief Justice Crampton's experience reveals is that no implications can be drawn by the Commission as to the ability to recruit outstanding candidates from a mere consideration of the number of applicants.

That I think is a very important message to keep from the experience that Chief Justice Crampton has shared with the Commission.

My second point is a reaction to my friend Mr. Rupar's invitation to clarify our position as to representational costs.

I thought I made clear, and accept his invitation to clarify that we are not seeking a variation of the rule of reimbursement of representational costs as it applies to judges.

Had we wanted to seek such a variation, my friend is quite right that the time to do it was in our Main Submission or our Reply Submission.

What I have said however is and am seeking to illustrate our support for the request of the Prothonotaries is that participants do not control this process. It is a parade that once it is in motion, you have to follow.

And I have given examples of steps in that parade, it's not the best of metaphors, I apologise, that we're extraordinary this time around, and those steps have caused additional costs to be incurred by the Judiciary, and it as to these costs that I said that a case could be made that those should be treated separately from the representational costs reimbursement rule in the Act.

My third point is a point of information.

Mr. Rupar is correct in saying that very early on, it was at the end of 2014, the Government reached out to the Judiciary and floated the

suggestion in a very constructive way, I wish to say, to defer the date of the Commission's Inquiry altogether because of the impending election.

And that suggestion was given due consideration by the Judiciary, and the proposal that we made instead was to agree on the early appointment of Commissions members so that the Commission itself can decide what impact the election should have on its inquiry.

We didn't want the parties to take for granted how an impending election should impact the work of the Commission. And you will see that reflected in the correspondence attached under Tab A of the Judiciary's book of exhibits.

You will see in Deputy Minister Pentney's letter of 20 February, there's a reference to our meeting, and he confirms there the parties' agreement and I quote: "*Desirability of early appointment of the members of the Commission*."

I responded to that letter on behalf of the Federal Judiciary on March 12th, and wanting to be concrete, I acknowledge the agreement both parties on the desirability of early appointment, and proposed that both parties undertake to communicate to the other the name of its nominee at the end of April 2015, and

invite them to nominate the Chairperson by the end of May 2015. So that was, if you will, our proposal.

And the idea was then to have time for you as Commission members to decide, having heard the parties, what impact an election should have on the timing of your inquiry.

In the event the Government, and I certainly do not blame the team of colleagues that are before you, but in the event the Government was not able to communicate the name of its nominee within the timeframe that we propose, it came much later, and you know when that proposal was made by the exchange of correspondence under Tab B, concerning the initial nominee. It came on June 5, 2015.

And then because the nominee was who it was, further delays were caused because of the concern arising from the nomination. So that's the background. A very constructive initial suggestion by the Government counterproposal, and then an agreement on the early appointment, and that did not come into being.

So, that's sort of the complete picture I wanted to give on that point.

And those are the only three points I wanted to cover.

Thank you for your attention.

THE CHAIRPERSON: Thank you. Merci, Monsieur Bienvenu.

Et Louise, on procèderait maintenant à la clôture.

Well, it's time to conclude the public hearings of the Fifth Commission. Thank you all for your participation. We have appreciated your presentation.

Margaret and Peter join me to thank you.

I think it will be extremely useful for the continuation of our work for our Report, for our Recommendations.

What we will have to do in the next few days is analyse your presentations, your submissions, and make sure that we have that understanding that we should have regarding these recommendations according to the mandate we received from the law. We should be able, probably, to respect our schedule, respect the timing we are supposed to respect.

But may I ask you, Peter, to say more about that, about the work we have in front of us?

COMMISSIONER GRIFFIN: I will give you

the short version.

As the Chair has said, it's our intention to try and meet the timing that we face. And if we conclude that that's something that is not possible, we will deal with that early as opposed later in the process, but that's what ahead of us.

What will help us is if those who were going to give us some additional information could let Ms. Meagher know on Monday, what they schedule they anticipate meeting with respect to that.

I appreciate some of it is simpler than other parts, but that will help us to understand what we expect to see when, and I can assure that on behalf of all three of us, we've got lots to think about as a result of what were terrific submissions, obvious interest and participation.

And we come out of this part of the process enervated by what you've done for us. Thank you.

THE CHAIRPERSON: Thank you, Peter.

Margaret, do you want to add something?

COMMISSIONER BLOODWORTH: I will just add my personal thanks for all the submissions. Written submissions were excellent, but I have learned

a lot in the last day and three-quarters as well. And I appreciate all the time and effort that obviously every party around the table has put into doing that.

It will be immensely helpful as we puzzle our way through in the next few days and weeks, exactly on what we will conclude. So, my thanks.

THE CHAIRPERSON: We have to thank Louise, our Executive Director.

Thank you very much for all that so sensitive work at the end of the, I could say, last morning, to prepare everything, that we can close the meeting today, just in time to have a good weekend.

Thank you very much. It was very effective work.

Thank you very much, Louise.

I just want to say thank you to Marie-Ève Lamy, Counsel to Denton's. She helped me a lot to prepare these hearings.

Thank you to you, Monsieur Bolduc, et les interprètes. Merci. Thank you.

Have a good weekend.

--WHEREUPON THE HEARING CONCLUDED AT 2H30 P.M.

CERTIFIED TRUE AND CORRECT.

LE TOUT EXACT ET CONFORME.

M. Bolduc, S.O./CCR