Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

PUBLIC HEARING

Held in the Québec Suite
at the Fairmont Château Laurier,
1 Rideau Street, Ottawa, Ontario
on Thursday, February 20, 2025
and Friday, February 21, 2025

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TRANSCRIPT, THURSDAY, FEBRUARY 20, 2025

TRANSCRIPTION DU JEUDI 20 FÉVRIER 2025

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1 C O M M I S S I O N:
2 Anne Giardini — Commission Chair
3 Douglas Hodson — Commissioner
4 Graham Flack — Commissioner
5
6

7 P A R T I C I P A N T S:
8 Pierre Bienvenu — Canadian Superior
9 Jean-Michel Boudreau — Courts Judges
10 Étienne Morin-Lévesque — Association and the
11 Canadian Judicial
12 Council
13 (the Judiciary)
14
15
16
17 Andrew K. Lokan — Federal Court
18 Sonia Patel — Associate Judges
19 Chief Justice Paul Crampton
21
22
23
24
25

1 P A R T I C I P A N T S (Cont.):

2 Elizabeth Richards	Government of Canada
3 Dylan Smith	(Department of
4 Sarah-Dawn Norris	Justice)
5 Anna Dekker	
6	
7	
8	
9 Roselle Wu	Canadian Bar
10 Julie Terrien	Association
11	
12	
13	
14 Louise Meagher	Executive Director
15	of the Commission
15	
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1 -- Upon commencing at 9:24 a.m.
2 COMMISSIONER GIARDINI: Good morning.
3 Welcome. I look forward to our couple of days
4 together. We will introduce ourselves up here and
5 then take the time to go around so that each person
6 can introduce themselves as well. I hope that
7 works.
8 You can assume that we've read the
9 materials assiduously, and we are looking forward
10 to hearing what you have to say that would amplify,
11 provide us with background, maybe insights into
12 your perspectives.
13 We will be listening particularly for
14 areas where you can agree, which makes our job
15 easier, and areas where you can find common ground.
16 So if in hearing each other you find an area that
17 you think we should be aware of where there is an
18 overlap in interests or alignment on the issues,
19 we'll look forward to hearing from you about that
20 as well.
21 We take very seriously the role of the
22 Judiciary in our democratic system. I think I can
23 speak for each us when I say that's why we're here.
24 And we look forward to the work that this group
25 does, that you do, to make sure that that remains a

1 hallmark of our society.
2 My name's Anne Giardini. I'll be the
3 chair of this Commission. I have a background in
4 law and governance and business as well as writing;
5 hopefully that will come in handy when we start to
6 put pen to paper. And I will ask my fellow
7 Commissioners to introduce themselves.
8 Graham?
9 COMMISSIONER FLACK: [TRANSLATION] :
10 Hi, my name is Graham Flack. I am
11 recently retired from the public sector, where I
12 was deputy minister in different ministries,
13 departments, but I've never worked for the
14 Department of Justice just because it would have
15 been a conflict of interest.
16 [English]: So pleasure to meet you
17 all, and I look forward to the hearings.
18 COMMISSIONER GIARDINI: Doug?
19 COMMISSIONER HODSON: Good morning. My
20 name's Doug Hodson. I'm a lawyer with MLT Aikins
21 in Saskatoon. I've practiced for almost 41 years
22 in the area of litigation, and I'm glad to meet
23 you all, and I'm looking forward to this process.
24 Thank you.
25 COMMISSIONER GIARDINI: Thank you.

1 So how do you want to start to
2 introduce yourselves? We're in your hands.
3 MRS. MEAGHER: We'll start with
4 introductions from the Judiciary.
5 MR. BIENVENU: [TRANSLATION]:
6 Hello, Madam Chair --
7 COMMISSIONER GIARDINI: Hello.
8 MR. BIENVENU: -- and Members of the
9 Commission. My name is Pierre Bienvenu. I am very
10 happy to appear before you today.
11 MRS. MEAGHER: If you could speak closer
12 to the mic, thank you.
13 MR. BIENVENU: My name is Pierre Bienvenu,
14 and I am very happy to appear before you on behalf of
15 the Canadian Judiciary.
16 MR. BOUDREAU: [TRANSLATION]:
17 Hello. I am Jean-Michel Boudreau also the Judiciary.
18 MR. MORIN-LÉVESQUE: [TRANSLATION]
19 Hello. I am Étienne Morin-Lévesque.
20 I also work for the Judiciary.
21 MR. LOKAN: Good morning.
22 Andrew Lokan, partner of Paliare Roland, and
23 Sonia Patel accompanies me.
24 MS. TERRIEN: Hello, I am Julie Terrien.
25 I'm the staff lawyer at the CBA, and

1 we have a representative coming shortly.
2 MS. DEKKER: Good morning. I'm
3 Anna Dekker with the Department of Justice.
4 MS. NORRIS: Good morning. I'm
5 Sarah-Dawn Norris, and I'm with the Department of
6 Justice.
7 MR. SMITH: Good morning. Dylan Smith,
8 also with the Department of Justice.
9 MS. RICHARDS: And, good morning.
10 Elizabeth Richards with the Department of Justice.
11 MS. MEAGHER: Louise Meagher. I'm the
12 executive director of the Commission.
13 COMMISSIONER GIARDINI: Others in the
14 room.
15 MR. LACASSE: Philippe Lacasse, Office of
16 the Commissioner for Federal Judicial Affairs.
17 MR. GILENO: Justin Gileno with DOJ.
18 MS. POIRIER: Marie-Josée Poirier
19 with Department of Justice.
20 COMMISSIONER GIARDINI: All right.
21 MS. LOCKHART: I'm Stephanie Lockhart.
22 I'm with the Canadian Superior Courts Judges
23 Association.
24 JUSTICE LAFLEUR: [Translation]:
25 Dominique Lafleur, judge of

1 the Tax Court of Canada and co-chair of the
2 Compensation Committee of the Judges Association.
3 COMMISSIONER GIARDINI: Thank you.
4 CHIEF JUSTICE MORAWETZ: Geoffrey
5 Morawetz, Chief Justice of the Ontario Superior
6 Court of Justice, and member of the -- chair of the
7 CJC Judicial Salaries and Benefits.
8 COMMISSIONER GIARDINI: And you are?.
9 JUSTICE BRANCH: I am a judge with
10 the B.C. Supreme Court and also the other co-chair
11 of the Association's Compensation Committee.
12 ASSOCIATE JUDGE MOORE: I'm
13 Catharine Moore. I'm an associate judge at the
14 Federal Court.
15 COMMISSIONER GIARDINI: All right. All
16 right. We're in your hands. Who's...?
17 We're going to start.
18 MRS. MEAGHER: The Judiciary
19 will start. Mr. Bienvenu.
20 SUBMISSIONS BY MR. BIENVENU:
21 MR. BIENVENU: Thank you. Madam Chair,
22 Members of the Commission, good morning.
23 It is an honour for me and my
24 colleagues, Jean-Michel Boudreau and

1 Étienne Morin-Lévesque, to appear before you, and
2 it is a privilege for us to do so on behalf of the
3 federally appointed Judiciary, represented in this
4 inquiry by the Canadian Superior Courts Judges
5 Association and the Canadian Judicial Council.
6 I would like to begin by expressing, on
7 behalf of the Association and Council, our deep
8 gratitude for your decision to accept to serve on
9 this Commission. As members of this Quadrennial
10 Commission, you have joined a small group of
11 distinguished Canadians, who, ever since the first
12 Triennial Commission back in 1983, have agreed to
13 contribute your time and industry to a process
14 designed not only to ensure that sitting judges are
15 appropriately remunerated but, more important
16 still, to preserve Canada's ability to attract
17 outstanding candidates to the Judiciary.
18 By accepting to serve on this
19 Commission, you share with jurists who have
20 accepted an appointment on one of Canada's
21 Superior Courts a commitment to public service and
22 to the rule of law. No one today needs convincing
23 that any society that takes for granted its stated
24 commitment to the rule of law does so at its own
25 peril.

1 The representatives of the Association
2 and Council, who are attending this hearing in
3 person, have already introduced themselves. I'll
4 simply mention that one additional representative
5 of the Council will join us shortly, and it is the
6 Honourable Blair Nixon, Associate Chief Justice of
7 the Court of King's Bench of Alberta, and he too
8 serves on the Council's Judicial Compensation and
9 Benefits Committee presided by Chief Justice
10 Morawetz.
11 Madam Chair, I know that many other
12 justices are attending this hearing remotely along
13 with members of the public, and to one and all, we
14 extend a warm welcome to these proceedings.
15 As counsel to the Association and
16 Council, our instructions have been to cooperate
17 with the Government of Canada and the Commission
18 with the view to assisting you, Members of the
19 Commission, in formulating recommendations to the
20 Government, consistent with the Judges Act and the
21 applicable constitutional principles.
22 The Commission knows by now that to
23 implement Recommendation 8 of the Turcotte
24 Commission, the parties have front-loaded their
25 efforts in connection with this inquiry by

1 engaging, since November 2022, with the Canada
2 Revenue Agency and Statistics Canada so as to be in
3 the position to put before the Commission data on
4 the income levels of the many self-employed lawyers
5 who practice through professional law corporations.
6 And I wish to take this opportunity to
7 thank our friends from the Government,
8 Ms. Richards, Ms. Norris, Mr. Smith, and their
9 colleagues from the Government of Canada, not to
10 forget Mr. Chris Rupar, who is missed by all of us
11 because he has a long track record appearing on
12 behalf of the Government of Canada before this
13 Commission, and I want to thank them for their
14 cooperation throughout this process, which, at all
15 times, I think it is fair to say, was very much a
16 collaborative process.
17 Let me turn to providing you with a
18 roadmap of what we propose to address in oral
19 argument. I will address two topics.
20 The first one is the Government's
21 attempt to re-litigate issues as to which a
22 consensus has emerged from the reports of past
23 Commissions in disregard of what I would describe
24 as the principle of continuity. This principle was
25 first formulated by the Block Commission. It was

1 subsequently endorsed by the Levitt, Rémillard, and
2 Turcotte Commissions.
3 And in addressing the principle of
4 continuity, I will focus on the Government's
5 attempt at raising, yet again, the issue of the
6 annual adjustment of judicial salaries based on the
7 Industrial Aggregate Index, the IAI, by proposing a
8 reduction of the cap to this adjustment that is
9 already provided in the Judges Act.
10 I will then turn to the question of the
11 collection of pre-appointment income data, which,
12 as the Commission knows by now, surfaced wholly
13 unexpectedly as a recommendation in the Turcotte
14 report.
15 Thereafter, I will pass the baton to my
16 colleague, Mr. Boudreau, who will deliver the
17 lion's share of the Judiciary's oral submissions
18 and speak to the evidence and analysis that support
19 the salary recommendation that is being sought by
20 the Judiciary in light of the newly available data
21 regarding self-employed lawyers practicing through
22 professional law corporations.
23 This data confirms that prior
24 Commissions, as they suspected, issued their salary
25 recommendations based on a truncated view of the

1 income levels of the self-employed lawyers, and the
2 data underscores, in our submission, the need for a
3 corrective salary increase.
4 Now, when Mr. Boudreau comes to
5 addressing the question of judicial salaries, you
6 will not hear him use the word "bonus," and that is
7 because our instructions are not to dignify with a
8 response the Government's use of that term to
9 characterize the corrective increase that is being
10 sought by the Judiciary. I will simply say that
11 the term is wholly in opposite and quite offensive
12 when used in the context of the work of this
13 Commission.
14 To assist in the presentation of our
15 submissions, we've reproduced in a condensed book
16 the relevant extracts of the documents to which my
17 colleague and I will refer in the course of our
18 oral argument. Most of these documents are already
19 in the record, and they've been reproduced there
20 only so that you don't have to search for them as
21 we refer to them in the course of our oral
22 argument. At the beginning of this condensed book,
23 you will find a two-page outline of the Judiciary's
24 oral argument.
25 So the Commission's mandate is to

1 inquire into the adequacy of judicial salaries and
2 benefits payable under the Judges Act, applying the
3 statutory criteria set out in Section 26 of the
4 Act. It has always been the position of the
5 Judiciary that in applying these criteria, the
6 Commission needs to build on the work of prior
7 Commissions.
8 This is not to call into question the
9 requirement that each Commission must conduct its
10 own independent inquiry and formulate its own
11 recommendations based on the evidence before it and
12 other relevant circumstances. But it means that
13 the Commission cannot, as the Government seemingly
14 would have it, embark upon its inquiry as if it was
15 working from a blank slate, having to reinvent the
16 wheel at every turn.
17 For starters, it would be wasteful and
18 inefficient for this Commission to approach its
19 task without due consideration for the accumulated
20 wisdom and collective insight of the other
21 distinguished individuals who have, in the past,
22 served on the Commission.
23 But much more significantly, allowing
24 re-litigation of the same issues every four years
25 would run counter to the nature of the Commission

1 as a permanent institution, created as such by
2 Parliament, not merely by choice but because the
3 constitution requires it, as was made clear by the
4 Supreme Court of Canada in the P.E.I. reference.
5 You don't need to turn to it, but you
6 will find under Tab 1 of our compendium the
7 provisions of Section 26 of the Judges Act, and
8 these provisions make it plain that the Commission
9 is created and exists as a permanent institution.
10 And the fact that its members may change after four
11 years, or eight, in the event of a renewal of their
12 term of office, doesn't change that reality.
13 So what do we mean when we speak of the
14 principle of continuity? We mean to refer to the
15 Block Commission's Recommendation 14 and the Levitt
16 Commission's identical Recommendation 10, which
17 reads as follows, and you will find the extract at
18 Tab 2 of our compendium:
19 "Where consensus has emerged
20 around a particular issue during the
21 previous Commission inquiry, in the
22 absence of demonstrated change, such
23 consensus be taken into account by
24 the Commission, and reflected in the
25 submissions of the parties."

1 This was the Levitt Commission. The
2 subsequent Rémillard Commission proposed its own
3 formulation of the principle, and I quote:
4 "Valid reasons were required -
5 such as a change in current
6 circumstances or additional new
7 evidence - to depart from the
8 conclusions of a previous
9 Commission."
10 Now, there are two aspects to this
11 principle. The first is that the Commission must
12 take into account the decisions and opinions of
13 past Commissions.
14 And the second is that the parties, the
15 Judiciary and the Government of Canada, themselves
16 must reflect these past decisions and opinions in
17 their submissions, and if one of them wishes to
18 invite the Commission to revisit a past decision,
19 it must provide evidence of demonstrated changes
20 justifying that the question be addressed anew.
21 At paragraph 11 of the Judiciary's
22 reply submissions, you will find a list of
23 questions that we characterized as settled
24 questions endorsed by past Commissions and that the
25 Government seeks to re-litigate before this

1 Commission, on occasion without even acknowledging
2 that there is a history to the question and that
3 past Commissions have considered and ruled upon it.
4 And I'll give you one example. At
5 paragraph 49 of the opening submission of the
6 Government of Canada, it's at Tab 3, the Government
7 takes the position that the disability benefit
8 should be included in the valuation of the judicial
9 annuity. Nowhere in that submission does the
10 Government tell you that this question was debated
11 in the past and that two Commissions explicitly
12 rejected the Government's argument that the
13 disability benefit should be included.
14 So here we go again, needlessly forced
15 to revisit an issue and reiterate before you the
16 case that it is inappropriate to include the
17 disability benefit in the valuation of the judicial
18 annuity.
19 Now, acting, I suppose, on the motto
20 that the best defence is to attack, the Government
21 seeks to put the shoe on the other foot by arguing
22 that the Judiciary itself is trying to re-litigate
23 certain issues, and they cite the public-sector
24 comparator, the age-weighted approach to the CRA data,
25 and the relevance of pre-appointment income data.

1 But, Members of the Commission, with
3 respect, that argument falls flat because, unlike
4 the Government, in each of these cases, the
5 Judiciary has acknowledged the pre-existing
6 position, cited the previous decisions, and
7 provided reasons why, consistent with the principle
8 of continuity, the Commission should consider the
9 position anew.
10 This is a good segue for the first
11 substantive topic I propose to address, which is
12 the Government's attempt to tamper with the annual
13 adjustment of judicial salaries based on the
14 Industrial Aggregate Index by proposing to cut in
15 half the current statutory cap to the IAI
16 adjustment from 28 percent to 14 percent over a
17 four-year period.
18 Members of the Commission, there are
19 two fundamental reasons why the Commission must
20 reject that request and must refuse to recommend
21 any changes to the IAI annual adjustment. The
22 first is that the Government has failed to provide
23 valid reasons or evidence of changes in prevailing
24 circumstances that would justify revisiting this
25 issue.

1 Consider, Members of the Commission,
2 that the Government has unsuccessfully sought to
3 modify the IAI adjustment on three separate
4 occasions in the past, three times before as many
5 Commissions, such that it can confidently be said
6 that there is no aspect of the architecture of the
7 Judges Act on which a clearer consensus emerges
8 from the reports of past Commissions.
9 Now, the second reason, we say, is even
10 more fundamental because it undermines the very
11 admissibility of the proposed change to the Act.
12 Under the Government's own evidence, the reduced
13 ceiling to the IAI adjustment that the Government
14 proposes would not come into play during the
15 quadrennial cycle of relevance to this Commission
16 and would therefore have no impact on the level of
17 judicial salaries during that cycle.
18 And this is why we have described this
19 proposed change to the Act as a solution in search
20 of a problem. Under the P.E.I. reference, Salary
21 and Benefit Commissions must be objective and
22 effective. This means that one needs an operative
23 reason to propose a change to the compensation of
24 judges. And this, we submit, precludes any
25 proposed change to the Act, which, on its face, on

1 the Government's own case, is unjustified insofar
2 as it addresses a perceived problem that is
3 admittedly -- admittedly -- hypothetical.
4 Now, the Government argues that the
5 reduced cap is necessary in case its own
6 projections on the IAI turn out to be too low, but,
7 Members of the Commission, this turns the IAI
8 adjustment on its head and defeat its very purpose.
9 The IAI adjustment is there to protect
10 judicial salaries against erosion through
11 inflation. If the Government's IAI projections
12 turn out to be too conservative, it will be because
13 a combination of higher inflation and increased
14 productivity. The IAI adjustment is there to
15 protect judicial salaries against erosion resulting
16 from those factors.
17 Insofar as the cap to the adjustment is
18 concerned, you will have noted that nowhere in the
19 Government's submission is the Commission provided
20 with any reason why an indexation cap of 14 percent
21 over four years is preferable to the existing cap
22 of 28 percent. There is no comparison made between
23 the circumstances prevailing in 1981, when the
24 existing annual cap was set at 7 percent, with the
25 circumstances prevailing today, nor is there any

1 attempt to show a change in circumstances between
2 the time when the Turcotte Commission rejected a
3 proposal to lower the annual cap of 7 percent as
4 compared to the present -- at the present time.
5 So for these two independent reasons,
6 we submit that the Government cannot make it to
7 first base with this proposal. Indeed, if this
8 were an adjudicative body, one would seek summary
9 dismissal of this unprincipled and unjustified
10 change to a key aspect of the Judges Act because,
11 I'm repeating myself, it is based on a hypothetical
12 problem.
13 Now, before ceding the floor to my
14 colleague, I want to speak briefly to the last
15 question I will be addressing, which is the
16 collection of pre-appointment income data.
17 Unlike the annual adjustments based on
18 the IAI, the question of collecting pre-appointment
19 income data was not debated before the Turcotte
20 Commission. The Government never asked for a
21 recommendation that pre-appointment income data be
22 collected. The Commission never raised the
23 question, and therefore, the issue was neither
24 discussed, not even mentioned.
25 So both parties were equally surprised

1 to see the question included in Recommendation 8 of
2 the Turcotte Commission, and they were surprised
3 because the question of collecting pre-appointment
4 income data, even though it was not debated before
5 the Turcotte Commission, was not a novel question.
6 It was not a question unknown to the parties.
7 As the Commission now knows, that
8 question had been raised twice, and each time, it
9 had been fiercely debated before those two
10 Commissions because of its highly sensitive nature
11 and the obvious privacy concerns that are engaged.
12 And as mentioned, two Commissions, after a full
13 debate of the issue, had declined to make a
14 recommendation in favour of its collection.
15 Members of the Commission, less than a
16 month ago, on the 5th of February 2025, the Ontario
17 Court of Appeal issued an important decision in the
18 case of Vento v. Mexico, and the case concerns the
19 requirements of impartiality and independence in
20 the context of commercial arbitration.
21 But before addressing the specific
22 issue before it, the Court engaged in a broader
23 discussion of the requirements of natural justice.
24 Allow me to cite a very brief extract on that
25 decision because it neatly captures the fundamental

1 unfairness of which the Judiciary complains in
2 relation to the Turcotte Commission's issuance of a
3 recommendation on the collection of pre-appointment
4 income data. And you'll find that extract under
5 Tab 4, and it's at paragraph 23. And I'll very
6 quickly quote from paragraph 23:
7 "The requirements of procedural
8 fairness flow from the pillars of
9 natural justice."
10 And, Chair, it is at Tab 4, and it is
11 at page 11.
12 "The requirements of procedural
13 fairness flow from the pillars of
14 natural justice. The first pillar,
15 audi alteram partem, requires
16 decision-makers to hear both sides
17 before deciding a dispute. In
18 essence, it requires that a fair
19 hearing be provided before a
20 decision is made."
21 I emphasize the next sentence:
22 "At its most basic level, a
23 fair hearing requires notice of the
24 decision that is to be made and an
25 opportunity to make submissions to

1 the decision-maker."
2 End of quote. The Judiciary did not
3 receive notice that a recommendation would be made
4 concerning the collection of pre-appointment income
5 data, and it was never provided an opportunity to
6 make submissions to the Turcotte Commission on this
7 subject. And that, we submit, is sufficient reason
8 for this Commission to recommend that the
9 Commissioner for Federal Judicial Affairs cease
10 collecting pre-appointment data.
11 There is no question that the
12 Commission is bound by the duty of procedural
13 fairness, and it is beyond doubt that procedural
14 fairness requires that the Commission provide the
15 parties with an opportunity to be heard in relation
16 to questions to be decided by the Commission.
17 Now, my friends may point the
18 Commission to the submissions made by the parties
19 in 2023 when the Judiciary raised an objection to
20 the proposed implementation of this recommendation,
21 but these exchanges never resulted in a reasoned
22 decision in support of this recommendation.
23 Nearly, in a decision declining to
24 revisit the issue, given the point in time in the
25 mandate of your predecessors, given the point in

1 time that was very late in the mandate of your
2 predecessors, and that, and I'll end on that, that
3 is the other fatal flaw of this recommendation.
4 There is the procedural issue that I've
5 identified, and there is the fact that this
6 recommendation, to this day, was issued without
7 reasons. The parties are left in the dark as to
8 the reasons why the Commission decided to make that
9 recommendation, especially in light of the
10 skepticism expressed by two Commissions about the
11 utility of that information, skepticism expressed
12 after the issue had been fully aired before the
13 Commission.
14 Those are my submissions. With your
15 permission, I'll pass the baton to my friend, and
16 with your indulgence, I'll allow him to sit at my
17 place. Thank you.
18 SUBMISSIONS BY MR. BOUDREAU:
19 MR. BOUDREAU: Madam Chair, Members of
20 the Commission, as mentioned by my colleague, I
21 will be addressing the central question of judicial
22 salaries.
23 To that end, I will discuss, first, the
24 private-sector comparator; namely, the income
25 levels of self-employed lawyers both incorporated

1 and unincorporated. In that context, I will
2 address the filters to be applied to that data, the
3 significance of the new data on incorporated
4 partners, as well as the enduring obstacles to
5 recruiting meritorious candidates from private
6 practice to the federal bench. As part of this
7 comparative exercise, I will also address the
8 valuation of the judicial annuity.
9 Following that, I will discuss the
10 public-sector comparator, which tracks the
11 compensation of the most senior levels of deputy
12 ministers, and I will conclude my submissions by
13 discussing the criterion on prevailing economic
14 conditions.
15 As you know, the last Commission found
16 that past data on the income levels of
17 self-employed lawyers was incomplete; in
18 particular, because we were missing income data for
19 those practicing through professional legal
20 corporations, PLCs.
21 This was all the more problematic
22 considering that it is common ground that the
23 number of lawyers within that category has been
24 steadily increasing over the past 15 years, and
25 this void in the data was a very important concern

1 to the Turcotte Commission. So much so, I think it
2 is worth reading a few excerpts from the Turcotte
3 Commission's report at Tab 7-A of our compendium.
4 7-A. I'm at paragraph 33.
5 The available data shows that there has
6 been a decrease in the reported numbers of
7 self-employed lawyers from 18,700 in 2015 to
8 15,500 by 2019 but a substantial increase in the
9 use of professional corporations by practicing
10 lawyers across Canada.
11 At paragraph 34: The professional income
12 earned through these professional corporations is not
13 reflected in the available CRA data. As far back
14 as 2004, the McLennan Commission, who recognized
15 that those lawyers who had established personal
16 corporations are no longer reporting self-employed
17 professional income, and they are probably those
18 with the higher incomes.
19 And the Commission raises a concern
20 with respect to that at paragraph 40:
21 "As a result, this Commission
22 is left with the lack of complete
23 data as to the professional income
24 level of lawyers in private
25 practice. The implication, however,

1 of the CRA data under-reporting the
2 income of higher-earning
3 private-sector lawyers is
4 inescapable."
5 Now, as my colleague mentioned, in
6 light of the situation, the parties made great
7 efforts to obtain that data. And the good news is
8 that we have filled that void in the data and are
9 now able to present to you the results, revealed by
10 this new data, which was significantly
11 underestimating the earnings of lawyers in private
12 practice as a whole.
13 And what we are going to display on the
14 screen now is also found at Tab C of our
15 compendium. It is a graphical representation of a
16 table that you can find at that same tab, Tab 14,
17 and we have it on the screen.
18 So this is illustrating the combined
19 private-sector comparator, which combines both the
20 income results for unincorporated and incorporated
21 self-employed lawyers. The very bottom line is the
22 judicial salary, and the one on top of it is the
23 judicial salary grossed-up with the judicial
24 annuity. The top line far above is the single
25 combined private-sector comparator, and during the

1 next 30 minutes of my presentation, I will walk you
2 through how we obtained these results.
3 [TRANSLATION]: What becomes
4 apparent and irrefutable, what these data reveal,
5 there is a great disparity between judicial
6 compensation and private-lawyer compensation, and
7 that needs to be taken into account and the
8 consequences that that may represent.
9 [English]: Notwithstanding this, the
10 Government fails to engage with this new data, all
11 the while rejecting outright the salary
12 recommendations sought by the Judiciary.
13 The Association and Council seek a
14 recommendation to increase the base salary of
15 puisne judges by $60,000 because the much-improved
16 data on the private-sector comparator shows that
17 such an increase is essential to preserve Canada's
18 ability to continue to attract outstanding
19 candidates to the Judiciary, including lawyers from
20 private practice.
21 MS. MEAGHER: Excuse me. I wonder
22 if you can speak closer to the mic. Online,
23 they're having difficulty hearing you.
24 MR. BOUDREAU: Sure.
25 MS. MEAGHER: Thank you.

1 MR. BOUDREAU: Speaking of lawyers in
2 private practice, I would like to insist on the
3 importance of the need to attract outstanding
4 candidates to the Judiciary as part of this
5 Commission's inquiry. It is the most important
6 criterion, generally speaking, but, in particular,
7 for the present Commission and in light of this
8 data.
9 The purpose of this criterion is to
10 ensure that judicial salaries are competitive
11 enough to avoid discouraging outstanding candidates
12 from seeking judicial office, and that point is
13 very important. While outstanding candidates can
14 be found in various sectors, the judicial salaries
15 must be set at a level that does not deter
16 outstanding candidates in private practice from
17 appointment to the bench.
18 The judicial salary should thus be set
19 at the level that will attract outstanding lawyers
20 from all practice areas, including lawyers from the
21 private sector. It is not enough to say, like the
22 Government, that there are plenty of lawyers
23 seeking an appointment to the bench.
24 A bench populated only by public-sector
25 lawyers would not provide the diversity of

1 expertise, opinions, and background required for a
2 healthy bench, and I will refer to that later, but
3 we have, in our compendium, Tab 18 -- I'm not
4 suggesting you turn to it now -- but the statement
5 of Chief Justice Morawetz, who emphasizes the
6 importance of this diversity, which is provided by
7 lawyers in private practice.
8 The reality is that salaries are a
9 barrier to attracting private-sector lawyer
10 applicants. These applicants are prepared to make
11 sacrifices in order to serve, but asking them to
12 cut their income in half, as this data shows, this
13 is what is depicted in this graphic, if you take
14 the top line and you're a person in that situation,
15 which is the 75th percentile.
16 So we're looking at all self-employed
17 lawyers earning that income or above, and that is
18 25 percent of that population. The sacrifice they
19 need to make is falling from that top line to the
20 bottom blue line in terms of immediate compensation
21 available to them. That is a very big sacrifice to
22 ask.
23 The Government suggests that looking to
24 the data from the PLC creates a new comparator.
25 That is not so. There is only one private-sector

1 comparator. It has been used consistently by past
2 Commissions, albeit with incomplete underlying
3 data, and the objective of the new data was not to
4 create a new comparator; it's simply to fill that
5 void and complete the comparator that we were
6 already using.
7 And before I continue addressing the
8 final results, I will turn now to the use of
9 filters to that data.
10 Now, as I said, the parties were
11 provided with extensive data sets on the income of
12 lawyers filing taxes in Canada because all this
13 data ultimately comes from tax filings; whether we
14 mention Stats Can or the CRA, it's always coming
15 from tax filings. All past Commissions have held
16 that these raw data sets, they need to be filtered
17 to extract the relevant data for the purposes of
18 this Commission.
19 So filtering fosters two objectives.
20 The first one is to properly circumscribe the
21 qualified candidate pool; simply, people who meet
22 the fundamental requirements to be part of the
23 Judiciary. The second objective is to identify
24 outstanding candidates within that pool.
25 So the first filter, I will discuss the

1 low-income exclusion filter, serves that first
2 objective. The rationale is that we must keep the
3 income data for only those lawyers that are
4 qualified candidates for a judicial position. The
5 use of this filter has been used by all prior
6 Commissions. To the extent that the Government
7 argues today that it should no longer be used at
8 all, I will address that in reply.
9 For now, I will address the increase of
10 that low-income filter. The Turcotte Commission
11 raised the low-income exclusion to $80,000 in 2019.
12 Given recent inflation, Ernst & Young confirms that
13 adjusting for inflation, the low-income cut-off
14 filter should be set at 90,000. On that point, at
15 Tab 8 of our compendium, you will find the
16 supporting data for that.
17 You have two tables. And the first
18 table calculates the increase of that threshold
19 based on the CPI, and, as you can see, it's above
20 90,000. The second table does the same exercise
21 but based on the IAI, which yields a higher number,
22 but they are both above $90,000. And therefore, we
23 request that the low-income exclusion filter be
24 increased to 90,000.
25 Concerning the age filtering: Past

1 Commissions have used the 44-to-56 age range as the
2 filter for comparing judicial salaries with those
3 of self-employed lawyers, as they reflect the
4 typical age range of judicial appointees. Now,
5 while there may be excellent lawyers developing in
6 the 35-to-43 age group, the reality is that there
7 are very few appointments from that age group.
8 In fact, if you still have the same tab
9 of the compendium open, so that's Tab 8, you will
10 find data on appointments on page 18. There is a
11 table, 7-A, and we see there that the number of
12 appointees from the age group 35 to 43 is extremely
13 low, especially at the lower end of the bracket
14 where you see, for instance, no nominations for a
15 ten-year period at 35 or 36.
16 Now, the Turcotte Commission broke from
17 tradition by adopting the age-weighted approach put
18 forth by the Government, but the expert evidence
19 before you today establishes that this approach of
20 age-weighting undervalues income levels, and that
21 is due to the disproportionate weighting of lower
22 incomes at the ends of the age spectrum.
23 So the weighted average, as a matter of
24 principle, is a statistically valid method. The
25 issue here is the data does not allow for its

1 proper application. Ideally, what we would need
2 is, for each and every age, we would need to know
3 the income at each and every age, which we do not,
4 for confidentiality purposes. We are provided with
5 income for buckets or brackets, if you will, and
6 this is what creates the distortion.
7 If we take a concrete example, and we
8 have salaries for age groups from 35 to 43, for
9 example, well, within that group, there was one
10 appointee that was 37. There were 13 appointees
11 that were 43. So mathematically or statistically,
12 if you were to apply that method properly, you
13 would need to weigh the 43 age group, their income,
14 13 times more than the income of a 37-year-old.
15 But the method that was used and is proposed by the
16 Government actually weighs them the same, and this
17 is what creates the distortion.
18 Conversely, it is a fact that the
19 majority of new judicial appointees remain within
20 the 44-to-56 range, supporting a return to this
21 traditional filter of 44 to 56 to ensure accurate
22 and fair comparisons.
23 The Turcotte Commission, in breaking
24 with this tradition, had noted that the number
25 outside that range, the percentage of appointees

1 outside that range at the time was 35 percent,
2 which motivated its decision.
3 However, today, the -- or for the
4 relevant period for this Commission, rather, the
5 percentage of appointees outside that range has
6 decreased to 31.5 percent. And that is actually
7 lower than the percentage of the 33 that was
8 considered by the Rémillard Commission when it
9 decided to continue this tradition of applying the
10 44-to-56 age-range filter.
11 Furthermore, while the Government is
12 advocating for an age-weighted approach, the
13 reality is that this Commission was not provided
14 with age-weighted income for the self-employed
15 lawyers. There is before you, at present, no data
16 applying an age-weighted filter to the income of
17 self-employed lawyers. You will find that most of
18 the data presented in the Government's submissions
19 has, in fact, no age filter at all or no
20 age-weighting.
21 In sum, this Commission should revert
22 to the long-standing tradition of filtering for the
23 44-to-56 age group.
24 Addressing now the final filter, the
25 75th percentile, as I said previously, once we have

1 narrowed the data set to the relevant points for
2 our pool of candidates -- so the first two, I would
3 say, the objective is to see who can postulate,
4 even, to become a judge. Very few people at 35
5 will even meet the requirements of ten years of bar
6 or the required experience.
7 Once we have done that and narrowed our
8 data set, this is when the 75th percentile comes
9 into play. That is what helps us identify the
10 outstanding candidates within that pool.
11 Past Commissions systemically used the
12 75th percentile since the Drouin Commission, in
13 fact, as the filter for evaluating judicial
14 salaries. This is the minimum considered by the
15 experts to identify the outstanding candidates,
16 le meilleur. The Government's focus that you will
17 find in part of the submissions on median salaries
18 simply loses any connection with the direction to
19 seek le meilleur, the best and the brightest. The
20 median is the middle of the pack. It is not the
21 best.
22 And to conclude on filters, the
23 Government's approach suggests that judicial
24 salaries should be linked to those of lawyers of
25 any age with an average salary, and such an

1 approach is not going to attract outstanding
2 candidates. On average, you get the average
3 lawyer.
4 We'll now turn to the important issue
5 of lawyers practicing through a professional law
6 corporation, PLC. In the past, we had data on
7 unincorporated self-employed lawyers. This data
8 was traditionally referred to as the CRA data. For
9 this Commission, we obtained new data; in fact, two
10 databases. One was provided by Statistics Canada,
11 and the other was provided, again, by the CRA.
12 The experts for both parties agree that
13 the Statistics Canada data is the proper database
14 for incorporated lawyers. I note, in passing, that
15 it is also the most conservative one in terms of
16 numbers, so the income figures in the CRA database
17 for corporate lawyers were actually even higher.
18 The Stats Can database is composed
19 itself of two data sets. One is based on T2
20 corporation filings. The other is based on T5013
21 partnership filings. So a corporation, including a
22 PLC, must file a T2, and this is where we find
23 information such as net income, expenses,
24 dividends, et cetera. A partnership must report on
25 a T5013 the income of each individual partner.

1 The relevant metric that we are looking
2 for, the key data point for the purpose of this
3 Commission, is the money flowing into the PLC.
4 That is the key data point. And from the
5 incorporated lawyer's perspective, what she earns
6 from the practice of law is what she brings into
7 her private corporation.
8 Now, the corporations data provided in
9 the T2 data set does not allow to estimate
10 incorporated lawyer compensation for many reasons,
11 which are all detailed in the Ernst & Young report,
12 but, first and foremost, because it does not
13 provide gross income flowing into the PLC.
14 However, what we do have and what does
15 provide an accurate picture of the actual earnings
16 of incorporated lawyers is the data on the total
17 income of incorporated partners because the T5013
18 gives us the number that corresponds to the money
19 flowing from the partnership directly into the PLC,
20 and this is the number we want.
21 Using that data, Ernst & Young has
22 applied the appropriate filters that I have just
23 discussed to the income of incorporated partners,
24 thus finally giving this Commission access to the
25 missing part of the puzzle and ultimately providing

1 a complete picture of compensation for
2 self-employed lawyers.
3 And the tables summarizing those
4 findings are at Tab 12. I'll direct you to
5 Tab 12-B, but at Tab A, you have them in the
6 Ernst & Young format, and at Tab B, you have the
7 same data as presented in our submissions.
8 In the fourth column, you have the
9 75th percentile income, and you will see, on
10 average, that that number, from 2019 to 2022, the
11 average -- by "average," I mean the average of, of
12 course, the P75s -- of those figures is almost
13 exactly $1 million.
14 As we can see here, the gap between the
15 income of a lawyer practicing through a PLC and the
16 salary of a judge is enormous. You have that in
17 the next column. And you will see that the average
18 is above $550,000. So, again, I speak of this
19 inescapable picture that is presented by the data
20 illustrating this gap between compensation in
21 private practice and judicial salaries.
22 One issue, however, is that the
23 Government and its experts completely misinterpret
24 the corporate data that was provided to us, and I
25 will illustrate that with one example from one of

1 the Ernst & Young expert reports, and you will find
2 the relevant excerpts at Tab 9 of the compendium.
3 If you could please turn to page 6, and you will
4 see Table 1 at the top.
5 This is a hypothetical scenario
6 illustrating an incorporated lawyer who earns
7 $1 million through her partnership. That money
8 flows into the PLC, and this is what you see above
9 is the gross PLC income. Her expenses, in this
10 scenario, are a salary paid to herself of $300,000,
11 corporate taxes and employer contributions of
12 200,000, for a total of half a million dollars,
13 which also means that if we take 1 million minus
14 500,000, the net income of that PLC is 500,000.
15 Below, you have a fictitious example of
16 a treatment of net income. Potentially, she could
17 pay herself dividends of 150,000, and therefore,
18 the retained earnings recorded would be 350,000.
19 So in this scenario, the point is that
20 any way you slice or dice these numbers, any way
21 that this person decides to draw money from her
22 corporation, the fact remains that her earnings
23 from the practice of law are $1 million. It does
24 not matter the way she decides to pay it just for
25 herself this year, another year, in salaries or

1 dividends; those decisions are motivated by
2 lifestyle and often decided by the accountant for
3 tax-efficiency purposes.
4 Now, the error that is made by the
5 Government's expert is illustrated in this table.
6 What Eckler is proposing, the Government's expert,
7 is to estimate the income of this person by adding
8 the net income of the PLC in this scenario of
9 500,000 to the dividends, 150,000. So under this
10 scenario, Eckler's method would estimate the
11 earnings of this person to 650,000, whereas we know
12 that it is $1 million.
13 This ultimately results in the
14 Government and its experts not ultimately
15 addressing the data on incorporated lawyers and the
16 huge gap with judicial salaries. There is, in
17 fact, only one graph in the Government's section
18 purportedly dealing with incorporated lawyer data.
19 That graphic is Figure 18. We've since been
20 informed by our friends from the Government that
21 they will not rely on that figure.
22 But we still need to point out that if
23 you remove that graphic, then, from the Government
24 submissions, in that section relevant to corporate
25 data, you have no comprehensive view of the

1 corporate data or graphics presenting this newly
2 available evidence.
3 The only mention of a number, if you
4 want to take Tab 11 of the condensed book, on
5 pages 45 and 46 -- so Figure 18 is the figure I
6 just mentioned and that I understand will not be
7 relied upon; we had mentioned in our reply
8 submissions that it was mislabelled because it is
9 currently labelled as "PLC Individual
10 Partnerships," whereas it actually displays
11 unincorporated data or unincorporated partners.
12 So the only mention that we have in the
13 Government's submission of the data on incorporated
14 lawyers and the relevant data, I submit to you, is
15 that the previous page, page 45, paragraph 106,
16 there's (a) and (b), and at (b), the Government
17 does state the 75th percentile of income for
18 corporation partners in 2022 was 815,000. Now, I
19 do point out that that is a number without a
20 low-income exclusion and without any age filtering.
21 When you take this -- we saw in a prior
22 table, when you take that number and you apply the
23 appropriate filters, that's how we obtain the
24 values in the $1 million range.
25 We'll now discuss the income of

1 unincorporated self-employed lawyers. The tables
2 summarizing the incomes of those lawyers can be
3 found at Tab 13-A of our compendium. So 13-A, you
4 have the Ernst & Young table once again, and at
5 Tab B, you have the table as it appears in our
6 submissions, which will also display on the screen.
7 So at Table 4 of our submissions, we
8 have a comparison of salary of puisne judges with
9 unincorporated self-employed lawyers, and you will
10 see that at the 75th percentile, the average income
11 for the relevant period of unincorporated lawyers
12 is 572,000. Table 4, yes.
13 You are in, Madam Chair, the
14 Ernst & Young, and I apologize, I've been using
15 the -- it might be a good time for me to explain
16 it. I did refer you, my mistake, to Tab A. When I
17 refer to these tables at Tab A, we typically have
18 the Ernst & Young report and, at Tab B, the same
19 information presented differently as part of our
20 submissions.
21 So I was, yes, at Table 4, third
22 column, at the bottom of the 75th percentile. I
23 was saying that the average of those numbers for
24 the relevant period is 572,000. And in the next
25 column, you have the number in absolute terms of a

1 difference between that value, so the "N," judicial
2 salaries, which is in excess of $200,000.
3 On the next page, at Table 5, what you
4 have are the numbers for also unincorporated
5 self-employed lawyers but, this time, for the
6 top-ten CMAs. And as I mention CMAs, I should
7 insist on the fact that I did not address it in the
8 context of filters. That is because the Judiciary
9 is not advocating for the CMA, the top-ten CMAs, as
10 a strict filter that should be applied to all the
11 data. Nonetheless, we believe it remains a
12 relevant figure to consider because a great
13 percentage of the appointments come from those
14 centres.
15 And so, on that table, you will observe
16 that the difference in the top-ten CMAs is even
17 greater, reaching $288,000, on average, when you
18 compare the income of unincorporated lawyers and
19 top-ten CMAs and that of puisne judges.
20 Perhaps I should mention as well, you
21 will not see the CMA data in the corporate numbers.
22 Some data has been provided to us, but it was
23 heavily redacted for confidential reasons, and our
24 experts concluded that it was unusable for those
25 purposes.

1 So we're now roughly where we began
2 30 minutes ago where we finally have worked our way
3 to this combined private-sector comparator, and
4 those results are at Tab 14. We've already
5 displayed the graphics. Once again, you have the
6 Ernst & Young data on Tab A, and Tab B, you have,
7 in table format, the final results for the
8 private-sector comparator.
9 And what we observe is, here, I'm
10 directing you to a table that is including the
11 grossed-up value of judicial salaries at
12 28 percent. So even with that and comparing the
13 third column to the fourth column, even with that
14 grossed-up value, the difference, on average, is in
15 excess of $300,000. Given this data, it is clear
16 that the Judiciary's proposal for a $60,000
17 correction is conservative and respectful, as it is
18 a mere fraction of what the actual data suggests
19 would be reasonable.
20 Turning now to the judicial annuity
21 valuation. Our general position, I've showed you
22 tables with and without the judicial annuity
23 factored in, is that the annuity should be
24 considered by this Commission and other
25 Commissions, but we must, at the same time, keep in

1 mind that it is not salary per se. It is not
2 readily available to the members of the Judiciary.
3 It does not help pay the bills today.
4 With respect to the value of the
5 annuity, as everyone with a mortgage knows, we've
6 just come through a period that clearly illustrates
7 that we cannot assume that interest rates will
8 never increase. And the valuation of the judicial
9 annuity is sensitive to interest rates because we
10 are trying to establish the future value of money,
11 or, vice versa, we're trying to establish: If I
12 want X-amount of money in the future, how much do I
13 need to save today, and for this calculation, we
14 need a discount rate.
15 Very low interest rates or discount
16 rates, as was the case at the time of the Turcotte
17 Commission, will yield a higher value for the
18 judicial annuity, whereas an increase in interest
19 rates, as we saw in the last four years, will
20 result in a lower valuation of the annuity.
21 In its report, EY has applied the same
22 methodology adopted by past Commissions but has
23 adjusted the assumptions to reflect the market
24 conditions for the period of reference of this
25 Commission. Those assumptions are at Tab 15 of our

1 compendium. Tab 15, page 5. So you should have a
2 table at the bottom with the economic assumptions.
3 And the one that has the biggest impact
4 on the valuation, there are other assumptions that
5 were adjusted, is the interest rate. Ernst & Young
6 has very clearly identified the assumptions and the
7 changes from the previous Commission.
8 Ernst & Young has therefore increased the
9 discounted rate from 5 percent to 6, and this
10 reasonable assumption is explained on the next
11 page.
12 On the next page, if you look at the
13 top table, what you have are the returns of fixed
14 assets, long-term fixed assets -- so, long-term
15 government bonds in Canada -- comparing those
16 returns from 2020 to the returns in 2024.
17 Now, what we observe generally is that
18 the difference or the increase in interest rates is
19 roughly 2 percent. Then, applying that 2 percent
20 increase to fixed assets, what Ernst & Young has
21 done is create an assumption for a balanced
22 portfolio [would] (ph) be invested, and that's at
23 the bottom of the page.
24 So using the interest rates at the top,
25 applying a premium to equity investments, they

1 compose a portfolio composed both of equity and
2 bonds, and the total expected return of that
3 balanced portfolio is 5.4 to 6.9 percent. And so,
4 within that bracket, they chose a value of 6, which
5 is not even the middle of that bracket.
6 And so the value estimated by
7 Ernst & Young is 28 percent of a judge's salary.
8 So one that was used by the Turcotte Commission,
9 that both parties ultimately agreed to, was
10 34 percent, but based on what I've just said and
11 the interest rate context, that is a logical
12 conclusion.
13 What is illogical is that the
14 Government's expert would put forth a valuation of
15 38 percent that is higher than the one accepted by
16 the Government before the Turcotte Commission in a
17 context where the interest rates have increased.
18 It should go the other way.
19 And in terms of absolute values, I note
20 that the value estimated by Ernst & Young is
21 completely in line with many of the valuations put
22 forth by the Government's experts in the past. One
23 example, before the Block Commission, the
24 Government put forth a value of 24.6 percent.
25 Furthermore, Eckler arrives at this

1 calculation by applying a methodology that is not
2 the methodology adopted by past Commissions. With
3 respect to determining the discount rate, instead
4 of using the expected return of a balanced
5 portfolio, as I've just explained, Eckler uses a
6 completely different perspective and uses the
7 interest rate that represents the borrowing cost
8 for the Government.
9 So instead of looking at the
10 perspective of the beneficiary of the judicial
11 annuity, we are looking at something completely
12 different of what will it cost the Government, in
13 the context of his disclosures, to provide that
14 judicial annuity. It is not the same perspective,
15 and it is not the method that was used before prior
16 Commissions.
17 I'll turn now to the difficulty in
18 recruiting outstanding candidates from private
19 practice. The latest quadrennial period has been
20 marked by a publicly acknowledged shortage of
21 applicants, contributing to an unprecedented crisis
22 of judicial vacancies. While claiming that the
23 vacancies crisis is now resolved and minimizing the
24 declarations of two Ministers of Justice, the
25 Government states that:

1 "There is nothing to support
2 the Judiciary's assertion that the
3 current judicial salary is
4 insufficient to attract candidates
5 from private practice."
6 Now, to the contrary, there is direct
7 evidence of this problem both in the form of
8 testimony from Chief Justices and data from the
9 Office of the Commissioner for Federal Judicial
10 Affairs, which I will refer to as FJA.
11 In his statement for this Commission,
12 Chief Justice Morawetz of the Ontario Superior
13 Court of Justice notes the difficulty in attracting
14 outstanding candidates from private practice to the
15 bench, highlighting the challenging task of trying
16 to convince outstanding lawyers to apply to fill
17 judicial vacancies. And I think it is worth
18 turning to that statement, which is at Tab 18 of
19 our compendium, and I will emphasize -- it's
20 Tab 18, paragraph 18 as well. Chief Justice
21 Morawetz states:
22 "What I can attest to is that,
23 despite best efforts, I have often
24 found myself unable to persuade
25 qualified potential candidates to

1 apply for judicial appointments. A
2 routinely cited reason for this lack
3 of interest is the combination of
4 the heavy workload of Superior Court
5 judges and the perceived lack of
6 commensurate pay for that work."
7 Paragraph 20:
8 "From exchanges within the
9 Canadian Judicial Council, I know
10 that this challenge exists in other
11 areas of the country, particularly
12 in urban centres. In particular,
13 many potential qualified candidates
14 are aware of and cite the
15 significant workload, travel
16 demands, loss of autonomy, lack of
17 administrative support, and
18 increased public scrutiny imposed on
19 federally appointed judges as
20 reasons not to consider applying for
21 judicial appointment.
22 When these factors are considered
23 alongside the significant resulting
24 reduction in income, many candidates
25 have expressed a lack of interest in

1 seeking appointment."
2 In his most recent annual press
3 conference, Chief Justice Wagner reported that
4 Chief Justices from across the country face similar
5 difficulties in attracting outstanding candidates,
6 especially in provinces with a high cost of living,
7 like British Columbia or Ontario. He also noted
8 that, together with inadequate support for those
9 exercising judicial functions, judicial salaries
10 contribute to the declining appeal of a judicial
11 appointment. This evidence is far from anecdotal,
12 as the Government characterizes it.
13 Further, it corroborates the testimony
14 of Chief Justice Popescul before the Turcotte
15 Commission, and in our compendium, we have included
16 an excerpt of that testimony. It's Tab 19, and I
17 will direct your attention to page 45. At the
18 bottom of page 45, this was testimony given live to
19 the prior Commission:
20 "I have observed, as have most
21 of my colleagues on the CJC, a
22 reduction in the pool of applicants
23 from private practice, the
24 traditional source of candidates for
25 the bench. Outstanding private

1 practitioners, many of whom
2 distinguish themselves as leaders of
3 the profession, have previously seen
4 a judicial appointment to one of
5 Canada's Superior Courts as the
6 crowning achievement of an
7 outstanding career; however, many
8 are increasingly uninterested in
9 seeking appointment to the bench.
10 A large and growing number of
11 leading practitioners no longer see
12 a judicial appointment, with all its
13 responsibilities and benefits, as
14 being worthy of the increasing
15 significant reduction in income."
16 The data from the office, or the FJA,
17 also highlights the challenges in attracting
18 outstanding candidates to serve on Canada's
19 Superior Courts, particularly from private
20 practice.
21 From 2020 to 2024, the proportion of
22 applicants from private practice has declined with
23 only 40 percent of applicants to the bench being
24 from the private sector. During the same period,
25 the proportion of highly recommended and

1 recommended candidates has also steadily declined
2 from 50 percent to 37.2 percent, and you have that
3 illustrated at Tab 20 of our compendium. We also
4 have it on the screen.
5 Now, historically, self-employed
6 lawyers have been the primary source of judicial
7 appointments; however, recent years have seen a
8 decline in appointments from private practice.
9 That is illustrated, if you keep the same tab, on
10 the next page; you have the decline illustrated in
11 the form of a table. And then turning to the next
12 one or on the screen, we have it in graphical
13 format, showing this reduction in appointees from
14 private practice. So all indications are that this
15 decline in appointments from private practice
16 reflects a drop in interest in judicial
17 appointments among lawyers in private practice.
18 The Government argues that the decline
19 in appointments from private practice is a desired
20 outcome of the judicial appointment process, aimed
21 at greater diversity on the bench.
22 First, the inference the Government
23 seems to want this Commission to draw is that
24 candidates with diverse characteristics necessarily
25 earn less such that we don't need to increase

1 salaries to attract them. There is no data
2 supporting this inference. There is no evidence
3 supporting this assumption that people from diverse
4 backgrounds -- whether it be sexual orientation,
5 racialized people -- are not also high earners in
6 private practice. We should not assume that these
7 people are less prone than others at reaching the
8 higher echelons of private practice.
9 And secondly, diversity should also be
10 understood as practice area diversity. Once again,
11 I reference the statement of Chief Justice
12 Morawetz. I will not turn to it, but at Tab 18,
13 paragraphs 9 to 11, he emphasizes the importance of
14 a bench composed of judges with diverse experience
15 to meet the demands of increasingly complex legal
16 proceedings.
17 If you'll allow me just a few seconds,
18 I just want to check how we're doing on time. I
19 think we've been speaking for an hour and a half so
20 far? [Inaudible sidebar]. Yes, I think I would
21 need -- okay. I believe I have 15 minutes left.
22 COMMISSIONER GIARDINI: I think
23 15 minutes is fine. If necessary, we'll just cut
24 our 30 minutes to 25.
25 MR. BOUDREAU: Okay. So, thank you,

1 first and foremost, and I will turn to, now, the
2 public-sector comparator.
3 The public sector, the compensation
4 level, rather, of the most senior deputy ministers
5 has been a relevant factor for Triennial and
6 Quadrennial Commissions.
7 However, as noted by the Drouin
8 Commission, there is a fundamental difference with
9 the private-sector comparator and the public-sector
10 comparator in that the latter does not reference a
11 pool of candidates to the Judiciary. Rather, what
12 we are looking at is what individuals are paid and
13 individuals of outstanding character and ability,
14 attributes that are shared by both senior deputy
15 ministers and judges.
16 And while past Commissions have focused
17 on the midpoint of the DM-3 salary range plus
18 one-half of available at-risk pay, which is
19 commonly referred to as the DM-3 Block comparator,
20 recent developments require that the public-sector
21 comparator also include considerations of, A, the
22 compensation of DM-4s, and, B, the actual total
23 average compensation of DM-3s.
24 Concerning the DM-4s, whereas at the
25 time of the Block Commission, 2008, there were only

1 two DM-4s, their number has recently grown such
2 that the proportion of DM-4 relative to DM-3
3 constitutes a material change that warrants
4 reconsideration of the inclusion of DM-4
5 compensation. Consideration of DM-4 aligns with
6 the intent of the public-sector comparator, which
7 is to compare judicial salaries with the
8 compensation of the most senior deputy ministers;
9 thus, the rationale for looking at DM-3s applies
10 even more to DM-4s.
11 And to illustrate this growth in
12 proportion, we have a table at Tab 21 of the
13 compendium. It's Tab 21, Table 11, and there, we
14 have listed, per year, the number of individuals
15 falling into the DM-3 category and the individuals
16 falling into the DM-4 category.
17 As you will observe, the proportion of
18 individuals from the DM-4 level in relation not
19 just to the DM-3 but to the total number, if we
20 take them as a group, is significant. Some years,
21 if you look at 2020, 2021, the number of DM-4s is
22 roughly half the number of DM-3s. Those
23 proportions provide clear support for our case for
24 including DM-4 compensation as part of the
25 public-sector comparator.

1 And the table on the next page
2 illustrates how judicial salaries are, on average,
3 more than 60,000 below the DM-4 Block comparator.
4 As the name implies, the Block comparator is
5 calculated the same way as the DM-3 Block
6 comparator. We do not have the data on the average
7 total compensation of DM-4s. That's why you will
8 only find the DM-4 Block calculations in our
9 submissions.
10 With respect to the DM-3s, we submit
11 that the public-sector comparator should include
12 consideration of DM-3 total average compensation
13 because the gap between the DM-3 Block metric and
14 the actual real-world pay of DM-3 is widening.
15 And this phenomenon can be observed on
16 the next page of the same tab, paragraph 5, which
17 is also on the screen, and as we observe,
18 especially since 2014, 2015, the gap between the
19 yellow line and the orange line is increasing;
20 thus, comparing judicial salaries with the DM-3
21 Block comparator is increasingly artificial as
22 opposed to considering the actual compensation of
23 DM-3s.
24 And an explanation for this phenomenon
25 is the band of potential performance pay, whereas

1 the Block metric is based on the midpoint of the
2 band; midpoint of the base salary; midpoint of the
3 at-risk pay. In reality, the Government
4 compensates DM-3s at the higher end of the band.
5 So the public-sector comparator should be based on
6 numbers grounded in reality, not theoretical
7 midpoints.
8 When we take into consideration that
9 reality, we observe another gap between judicial
10 salaries, and that's at the Table 14. On the
11 fourth column, we have the difference between
12 judicial salaries and average total DM-3
13 compensation, and that too is quite significant.
14 So when considering all the relevant
15 data, it reveals that there exists a significant
16 gap between the compensation of the most senior
17 deputy ministers and the salary of puisne judges.
18 And a summary of those differentials, they're
19 provided -- still, it's the end of the same tab,
20 21, at paragraph 228, which is an excerpt from our
21 submissions.
22 There, you have the salary of a puisne
23 judge, the DM-3 traditional Block comparator, and
24 the actual total average of compensation for DM-3s,
25 and finally, the DM-4 Block comparator. And those

1 last two figures are roughly around 440,000
2 compared to the judicial salary of the same year of
3 383,000.
4 I will end my submissions by addressing
5 the criterion of prevailing economic conditions in
6 Canada.
7 We submit that this criterion should
8 not prevent the Commission from making
9 recommendations it deems necessary to ensure the
10 judicial compensation remains adequate considering
11 all the statutory factors, including the need to
12 attract outstanding candidates to the Judiciary.
13 The record before you on this criterion does not
14 support the view that current economic conditions
15 weigh against increasing judicial salaries.
16 To the contrary, the letters from the
17 Department of Finance outlining the Government's
18 own assessment of the state of the Canadian economy
19 indicate that the Canadian economy is based on
20 strong economic fundamentals, such as a resilient
21 labour market and that GDP growth is expected to
22 outperform many of its peers.
23 Similarly, Professor Doug Hyatt notes
24 that while the previous Commission faced greater
25 economic uncertainty due to the COVID-19 pandemic,

1 he writes:
2 "It is now evident that
3 economic conditions have largely
4 coalesced around traditional
5 long-term trends. Nonetheless, the
6 Government raises the spectre of
7 uncertainty due to the current
8 geopolitical landscape and proposes
9 that judicial salaries should not be
10 increased on that basis."
11 The future is always uncertain, to a
12 degree, and geopolitics are always uncertain.
13 There is nothing particular outlined by the
14 Government that justifies this position. In fact,
15 as we explained in our written submissions, the
16 Government has raised similar concerns in the past:
17 2011, with the European banking crisis; 2015, with
18 falling crude oil prices; and in 2021, with the
19 pandemic.
20 In our submission, invoking uncertainty
21 year after year is simply insufficient to justify a
22 restraining Commission from making recommendations
23 to ensure that judicial salaries are adequate. And
24 it bears also mentioning that the Commission is
25 making recommendations for a period of four years.

1 It is important to look beyond momentary shifts
2 when setting judicial compensation.
3 In addition, the Government has not
4 provided any evidence that it is pursuing
5 deficit-reduction policies of general application.
6 Absent evidence of such policies, there is no
7 principle basis for singling out the Federal
8 Judiciary for austerity.
9 In short, none of the economic factors
10 presented should hinder this Commission from making
11 recommendations to ensure the adequacy of judicial
12 compensation.
13 Unless you have questions, that will
14 end my submissions for today.
15 COMMISSIONER GIARDINI: [Inaudible].
16 Thank you very much. That was very useful and
17 insightful, and you're largely within your time
18 limit, so thank you for that. We will take a break
19 and reconvene at 11:40.
20 (RECESS AT 11:12 A.M.)
21 (RESUMING AT 11:42 A.M.)
22 COMMISSIONER GIARDINI: Thank you. I
23 believe, Mr. Lokan, we're hearing from you next.
24 SUBMISSIONS BY MR. LOKAN:
25 MR. LOKAN: Thank you, Commissioners,

1 for the opportunity to address the Commission on
2 behalf of the associate judges of the Federal
3 Court. I would like to start by echoing
4 Mr. Bienvenu's words on the important public
5 service that you are performing and thanking you
6 for that public service.
7 As we know from the cases from the
8 P.E.I. reference and others, Judicial Compensation
9 Commissions act as the institutional sieve that
10 stands between the Government and the Judiciary in
11 the setting of remuneration for judicial officers,
12 and it's the existence of that institutional sieve
13 that provides comfort about judicial independence
14 to the public, first and foremost, and to the
15 participants in the system. So it is very
16 important and much appreciated work.
17 On the schedule, you'll see that I will
18 be joined or we will be joined at 12:15 by
19 Chief Justice Crampton of the Federal Court,
20 although he's not yet here, so that will be in due
21 course.
22 There is one little footnote I would
23 like you to take about representation. There is a
24 newly created position of associate judge of the
25 Tax Court of Canada. That position is provided for

1 in the Judges Act at Section 11.1. And also,
2 apparently, that position is subject to the
3 QuadComm process, and you see that in Section 26.4
4 where there is a provision made for representation
5 of that person.
6 It's a new office. I do not have a
7 mandate to speak for the associate judge of the
8 Tax Court of Canada. I've never spoken to this
9 person. I'm not quite sure what they're doing. I
10 think that's all in the process of being worked
11 out.
12 My practical suggestion is that you
13 simply note this in your report that there hasn't
14 been a process covering that position and leave it
15 to the parties to take next steps. It may well be
16 that it can be sorted out with some written
17 submissions, perhaps even a joint submission to the
18 Commission on it, but I did not want you to be
19 making the assumption that I was speaking for that
20 position. Thank you.
21 I would like also to note that there is
22 intense interest amongst the associate judges that
23 I do represent. We have five of them who are
24 online watching the proceedings as well as
25 Associate Judge Catharine Moore, who's with us

1 today.
2 So to start with, the associate judges
3 adopt the submissions of the Canadian Superior
4 Courts Judges Association and the Canadian Judicial
5 Council on the need for a general increase,
6 particularly in light of the new data on
7 professional law corporations and the impact that
8 they have had on the incomes of lawyers in private
9 practice.
10 I will make submissions on the
11 appropriate percentage for associate judge salaries
12 relative to those of Federal Court judges. I will
13 set out the case for an increase from the current
14 80 percent to a higher percentage. The associate
15 judges seek an increase so that their salary is at
16 95 percent of the salary of Federal Court judges.
17 I will also make some comments on the
18 issue of the impact of professional law
19 corporations on private-sector lawyers' incomes as
20 they relate to associate judges.
21 So there are four areas that I'm going
22 to cover.
23 Firstly, I'm going to talk about the
24 nature of the office. It may not be as well known
25 as some of the other judicial offices in the

1 country.
2 Secondly, I'm going to address,
3 briefly, the history of the salary of associate
4 judges.
5 Thirdly, I'm going to talk about the
6 evolution in the role, in particular since 2016,
7 when the 80 percent linkage was set.
8 And fourthly, I'm going to briefly
9 address the statutory factors set out in the
10 Judges Act.
11 So let me start with nature of the
12 office. For those who don't practice regularly
13 before the Federal Courts, the Office of Federal
14 Associate Judge can be a bit of a mystery, but it's
15 well established from prior Commission processes
16 that they are integral to the work of the Court,
17 they exercise the powers of judges, and they have
18 all of the trappings of judicial office.
19 In practice, they must have at least
20 ten years' experience at the bar. They are part of
21 a court, the Federal Court of Canada, which is both
22 bilingual and bijuridical, and it's a court that
23 operates across all of Canada.
24 They must be knowledgeable in the area
25 of Federal Courts procedure as well as the somewhat

1 specialized substantive areas of law that the
2 Federal Courts administer. These specialized areas
3 include intellectual property, the Charter and
4 administrative law, Aboriginal law, and admiralty.
5 There are currently ten associate
6 judges, counting one supernumerary appointment, who
7 work alongside the 42 judges of the Federal Court.
8 They are located in specific cities. There are
9 three in Ottawa, three in Toronto, and one each in
10 Montreal, Edmonton, and Vancouver. Those are, I
11 think, four of the five highest population CMAs, or
12 census metropolitan areas, and I'm going to return
13 to that a little bit later for the significance of
14 that. Edmonton might be slightly behind Calgary in
15 population but not by much, and I may even be wrong
16 on that.
17 The associate judges are treated as
18 judges in terms of the hallmarks of office.
19 They're sworn in by the Chief Justice. They hold
20 office during good behaviour. They have immunity
21 from liability like other judges. They are subject
22 to the same disciplinary process. They are subject
23 to the same ethical principles for judges. They're
24 addressed as "Your Honour," so the face presented
25 to the public, they are essentially

1 indistinguishable from other judges. They
2 participate in the same judicial education programs
3 and process.
4 Their jurisdiction is set out in
5 Section 12 of the Federal Courts Act and Rules 50
6 and 51 of the Federal Courts Rules. In brief, they
7 exercise all of the powers of a Federal Court judge
8 except that they can't hear injunction motions, and
9 their trial court jurisdiction is limited to small
10 and intermediate actions up to $100,000.
11 However, they regularly hear and decide
12 complex motions, including in actions where the
13 damages sought are far in excess of 100,000; for
14 example, motions to strike, regardless of the
15 amount in issue, can be brought before an associate
16 judge.
17 In their admiralty jurisdiction, they
18 can make substantive determinations as to ownership
19 of vessels or beneficial interests in vessels and
20 other property that are often worth millions of
21 dollars.
22 Because much of the work of the
23 Federal Courts involves the federal Crown or
24 federal boards, commissions, and tribunals -- and
25 that's the judicial review stream, in particular --

1 they regularly decide Charter issues. They
2 adjudicate complex commercial matters. And they
3 are heavily involved in case management, including
4 actions commenced under Section 6 of the Patented
5 Medicines (Notice of Compliance) Regulations, which
6 must be determined within 24 months of
7 commencement, and I'll get a little bit later into
8 a bit of a description of that.
9 They regularly decide complex issues of
10 Aboriginal law, and I would respectfully submit
11 that there is nothing more important to the
12 Canadian public and the fabric of the Canadian
13 policy than reconciliation between Indigenous
14 peoples and the federal Crown. They are on the
15 frontline of those issues.
16 Some of the most senior counsel in
17 Canada appear before them on a regular basis.
18 Commissioner George Adams summed up their role, in
19 the first Commission, which was a specialized
20 Commission, on what was then known as
21 Prothonotaries Compensation, in 2008, and we quote
22 this in paragraph 29 of our submissions:
23 "The associate judges deal with
24 a broad range of exceedingly complex
25 and sometimes arcane matters unique

1 to the Federal Court's
2 jurisdiction."
3 So let me move on now to the salary
4 history. For a long time, the associate judges
5 were not recognized and treated as judicial
6 officers who were subject to the guarantees of the
7 P.E.I. reference, but as a result of some
8 persistence on their part, in 2008, they had a
9 process before Commissioner George Adams.
10 On the salary issue, Commissioner Adams
11 recommended that their salary be increased to
12 80 percent of that of a Federal Court judge. At
13 the time, they had been unilaterally set at
14 69 percent by the Federal Government.
15 They say that timing is everything.
16 Unfortunately, shortly after those recommendations
17 came out, we had the Global Financial Crisis, and
18 the Government of Canada declined to implement that
19 recommendation.
20 They had their next process, again, a
21 specialized unique process for them, before former
22 Associate Chief Justice of Ontario Cunningham, and
23 that was in 2013, who again recommended the
24 80 percent linkage to Federal Court judges. At the
25 time, the Government of Canada responded by

1 providing an increase but not all the way to
2 80 percent. They provided an increase to
3 76 percent.
4 And the governing logic was that the
5 military judges, of whom I believe there are four,
6 were, at that time, at 76 percent, and the
7 Government said, well, we don't want the
8 then-called prothonotaries to be earning more than
9 the military judges. So they ran up against that
10 as a cap.
11 In 2016, for the first time, the
12 associate judges were included within the QuadComm
13 process, and the Rémillard Commission recommended
14 again, this is now the third time, the 80 percent
15 figure. This time, the Government did implement
16 the recommendation, and they have remained at
17 80 percent since then. That was now nine years
18 ago.
19 So my third submission is to go through
20 the significant changes, the significant evolution
21 in the Office of Associate Judge that have occurred
22 since 2016, and there are three main areas that I
23 would like to take you through.
24 Firstly, their monetary jurisdiction
25 has increased in terms of their trial court

1 jurisdiction over actions from 50,000 to 100,000,
2 and that happened in 2021.
3 I should note that the trial court
4 jurisdiction is only a slice of the work of the
5 associate judges. They are not primarily a small
6 and intermediate claims court. Primarily, their
7 work is on motions and the regular streams, as
8 previously described, but there is this trial court
9 jurisdiction, and that is an important doubling of
10 the monetary jurisdiction.
11 Secondly, their workload and role has
12 increased dramatically, in particular with the
13 expansion of case management, and I'll elaborate on
14 that shortly.
15 Thirdly, the salaries of some key
16 comparators have increased, and on that, I will be
17 referring to associate judges in British Columbia,
18 Alberta, and Manitoba; the military judges who now
19 have parity with other judges of the Federal Court;
20 and, of course, lawyers in private practice, which
21 is the main labour pool from which -- or a main
22 labour pool from which associate judges are drawn.
23 Now, let me make a few comments first
24 on monetary jurisdiction. The doubling of the
25 limit of trial jurisdiction means that they've

1 assumed more of the work previously done by
2 Federal Court judges. Trials are correspondingly
3 more complex, more document-heavy, and with that
4 increase in jurisdiction and in other areas as
5 well, there's the expectation of longer, more
6 elaborate reasons.
7 In terms of workload and role, the
8 Federal Court has greatly expanded case management,
9 so now a very significant percentage of cases are
10 actively managed by the Court, and I think this
11 goes beyond the experience of other courts across
12 the country. There are some areas in which case
13 management is now the norm; class actions, it's
14 automatic.
15 I mentioned the Patented Medicines
16 (Notice of Compliance) Regulations; those are the
17 cases that must be completed within two years.
18 These are pitched litigation battles that involve
19 well-resourced parties; senior counsel from leading
20 firms. They must be actively managed with a firm
21 hand in order to meet that deadline. It seems to
22 be a truism in litigation that there's always one
23 party that wants to push it ahead and always
24 another party that wants to hold it back, and, of
25 course, the associate judges have to navigate all

1 of that.
2 Aboriginal law cases are subject to a
3 practice direction that makes case management the
4 default. And generally, litigants, as they become
5 more used to the availability of case management,
6 are requesting case management more and more
7 frequently.
8 The overall caseload of the
9 Federal Court is increasing; so, for example, in
10 2016, 2017, there were 5,772 active proceedings.
11 By 2022 to 2023, that had gone up to 10,787, so
12 almost doubled over that period. Similarly, the
13 number of dispositions over those years has doubled
14 in that time frame.
15 The percentage of cases involving
16 self-represented litigants has gone from 14 percent
17 to 25 percent between 2019 and 2024. Now, the
18 associate judges bear the brunt of that particular
19 increase. They are the frontline of justice for
20 the Federal Court, and many cases involving
21 self-represented litigants will fall within the
22 associate judges' trial jurisdiction; also, those
23 are the kinds of cases that may often generate
24 motions such as motions to strike. So a lot of
25 that gets directed towards the associate judges.

1 In dealing with self-represented
2 litigants, the associate judges must typically take
3 a more active role to ensure that these litigants
4 understand the procedures in a way that you don't
5 have to do with counsel, hopefully. All of this
6 has meant increased workload. Although associate
7 judges have some limits on their jurisdiction,
8 their work day is not 20 percent shorter than that
9 of the Federal Court judges; to the contrary, they
10 must work every bit as hard as their colleagues on
11 the Federal Court.
12 The evolving role of the associate
13 judges has also been recognized by the
14 Federal Court of Appeal in a change to the standard
15 of review that applies to appeals from their
16 decisions. Formerly, when it came to discretionary
17 decisions of the then-prothonotaries, now associate
18 judges, the rule was that there would be a hearing
19 de novo.
20 But since a case called Hospira Health
21 Corporation, and we refer to that in our reply at
22 paragraph 9, it is now the general appellate
23 standard; that is to say, the decisions of the
24 associate judges will only be overturned if there's
25 an error of law or a palpable, an overriding error

1 of fact.
2 The Federal Court of Appeal noted in
3 that case that subject to the types of matters
4 assigned to them by Parliament, and there are those
5 relatively minor, I would suggest, carve-outs that
6 I've been through, they are, for all intents and
7 purposes, performing the same tasks as the
8 Federal Court judges. They're expected to write
9 reasons just like any other judge, and those
10 reasons are becoming more and more complex.
11 Now, in terms of the salaries of
12 comparators and what has changed there, associate
13 judges in other jurisdictions are somewhat higher,
14 and we have included a chart on paragraph 70 of our
15 main submissions showing the British Columbia,
16 Alberta, and Manitoba associate judges.
17 Manitoba was missing the most recent
18 increase as of April 2024, which was going to be
19 the, I understand, IAI increase, and I'm not sure
20 exactly what that was, but that would have boosted
21 it in the range of $10,000. When you look at that
22 number, it was still ahead of the associate judges
23 but not an up-to-date current number.
24 Previously, as I have mentioned, the
25 Government matched them to military judges. Now,

1 the roles are quite different, and I don't submit
2 that they are performing exactly the same function,
3 but in response to Special Advisor Cunningham's
4 recommendation of 80 percent, the Government itself
5 took the position that, well, you should put them
6 at the same level as the military judges at
7 76 percent. The military judges have recently gone
8 up to 100 percent. So at the very least, that is
9 no bar to an increase as sought this time around.
10 Lawyers in private practice, I think,
11 may be the most important comparator here,
12 particularly in the major census metropolitan areas
13 where the associate judges are based. Their
14 incomes have increased significantly in a way that
15 has not been visible to prior Quadrennial
16 Commissions because of the use of professional law
17 corporations.
18 This is a very significant part of the
19 labour pool from which associate judges are drawn.
20 I do want to just make a note at this point that on
21 the issue of incomes of lawyers earned through
22 professional law corporations, the Government has
23 misunderstood and initially misstated the data, and
24 it appears that the Government is no longer relying
25 on the data that they put in their submissions

1 in-chief.
2 But the problem, the root problem that
3 there is, is that the Government reported on and
4 previously relied on the net income of professional
5 law corporations. That is not a meaningful figure
6 because it excludes salaries paid by professional
7 law corporations to the practicing lawyer, which
8 can be a very significant component of a lawyer's
9 compensation.
10 So Ernst & Young, for the Judiciary,
11 has confirmed that the only meaningful data on
12 professional law corporations is the data on
13 partners in law firms who elect to be compensated
14 through PLCs.
15 And if I can just speak to that for a
16 moment and give an example: This is really the
17 only apples-to-apples comparison that you have
18 where you're able to say, here's how income earned
19 via a professional law corporation is like income
20 earned by an individual partner.
21 If you're practicing in a partnership,
22 you have the choice. You can say, I'll draw my
23 partnership share as a human being, as an
24 individual, or I'll draw it as a professional law
25 corporation. To the firm, the firm is indifferent.

1 It just will pay to one entity or the other,
2 according to what the partner chooses.
3 And indeed, it's common to have
4 somebody work as a human partner up to a certain
5 level, then incorporate, and then draw their income
6 from that point on via their professional
7 corporation.
8 In the case of law corporations who are
9 part of partnerships, they get the same tax slip,
10 that's the T5013, as a human partner would get,
11 except the tax slip is made out to the PLC rather
12 than to, you know, John Smith or Jane Smith as an
13 individual. So the key point, and the parties are
14 agreed on this, is the money going into the
15 professional law corporation.
16 So just to take an example, and I'll
17 take one at sort of a lower income than my
18 colleagues did, let's say that a firm has $600,000
19 in partnership income for the individual, and they
20 pay that to the professional law corporation. That
21 partner then has a great deal of flexibility as to
22 what to do with that income, but the partner may
23 elect to pay themselves a salary, and in my
24 example, say, $300,000, to fund their ongoing
25 living expenses and leave the remainder in the

1 corporation, as far as possible, as retained
2 income.
3 Of course, they do have to pay
4 corporate tax on what's left in the corporation,
5 but how the numbers come out and how the previous
6 reliance of the Government on the numbers was
7 wrong, if you start with 600,000 and the only
8 significant expense is the salary to the individual
9 lawyer, you're left with 300,000. There's tax
10 payable at 26.5 percent corporate tax on that last
11 300,000, so there's actually net income of 220,000.
12 And, in fact, I also had a mistake in
13 our reply submissions at paragraph 20. I'd
14 suggested that the net income would be 300,000.
15 You have to account for corporate taxes, and so
16 you're left with 220,000.
17 What the Government did in its analysis
18 of this issue was to say, we're going to count net
19 income, that 220,000, and we're going to count
20 dividends that the corporation pays to the
21 individual, but there may well be no dividends.
22 Indeed, the data showed that there were many, many
23 professional corporations that did not pay
24 dividends to their owners.
25 And, again, there's flexibility; you

1 can structure it in many, many different ways, but
2 one way it might be structured is to say, well,
3 we'll pay salary during your working years and then
4 switch over to dividends in retirement years
5 because of tax favourability.
6 If you pay dividends, you are reducing
7 the value of having a professional law corporation
8 because you can't build up the retained earnings.
9 They sort of work like a second RRSP in the ability
10 to build up retained earnings and have funds
11 available for retirement. So, with respect, and I
12 think this is now acknowledged by the Government,
13 it made no sense to look at net income plus
14 dividends and treat that as any kind of estimate of
15 what the real income of lawyers with professional
16 corporations was.
17 Now, my colleagues took you to the
18 T5013 average for all of Canada over four years,
19 and it came to almost exactly $1 million, and
20 that's a very significant figure and far above the
21 numbers that previous Commissions have understood
22 and looked at. It also makes some sense that you
23 would see the higher incomes among those who have
24 incorporated because when you reach a point of
25 having a higher income, there's more to be gained

1 by incorporating. So cutting that out has
2 artificially depressed what previous Commissions
3 have understood about the incomes of lawyers.
4 But if I can just follow with that
5 million-dollar figure a little bit further: For
6 the associate judges, as I've mentioned, they are
7 concentrated in the top five or so CMAs. We don't
8 have a direct figure on what lawyers practicing in
9 partnerships in the top CMAs, who are PLCs, earn,
10 but there is something that you could use as a
11 proxy.
12 If you look at Tab 13 of the compendium
13 of the Judiciary, you will see that they provide,
14 for unincorporated lawyers, the comparative figures
15 for top-ten CMAs and all across Canada. You can
16 derive from that a ratio that the top-ten CMAs are
17 approximately 12.7 percent higher than all of
18 Canada. If you divide the, I think it was,
19 $645,000 figure by the corresponding figure for all
20 of Canada, you get 1.127, approximately.
21 So without getting into the data
22 frailties and the redactions, and just as a
23 rough-and-ready guide, that would give you a rough
24 proxy that if you were to look at professional law
25 corporations, people practicing in partnerships in

1 the top-ten CMAs, you could expect it to be in the
2 range of 12 or 13 percent higher.
3 If you wanted to go further and look at
4 the largest CMAs, you will find, of course, that
5 the numbers escalate further from there. So that's
6 what the Court is competing with when it seeks to
7 attract people from private practice to take on the
8 role of associate judge. Those are very high
9 numbers, and I suggest to you that it's a major
10 disincentive to a lawyer with a healthy practice in
11 private practice to take on that role, and that
12 must inevitably affect recruitment and retention.
13 My final area, and I'll go over this
14 briefly in view of the time, is the application of
15 the statutory factors. So the first of the
16 statutory factors is prevailing economic climate,
17 and on that, I simply adopt the submissions of the
18 Association and Council.
19 The second of the factors is the role
20 of financial security, and we address that in
21 paragraphs 44 to 49 of our submissions. And the
22 key point that we try to make here is that judicial
23 independence requires that the recommendations be
24 independent and objective; that is to say, based on
25 objective criteria. And I respectfully suggest to

1 you that the best objective criteria are the
2 relevant comparators. So that takes you back to
3 the relevant comparators.
4 The comparators have significance not
5 only in Factor C, the need to attract and retain,
6 but also in Factor B, role of financial security.
7 So let me move on to the need to
8 attract outstanding candidates to the Judiciary. I
9 will be brief here because we do have the
10 Chief Justice to make some submissions on that
11 point, and he can address it with more authority
12 than I can.
13 But what I will submit is that the
14 evidence has shown that, practically speaking, it's
15 difficult to find excellent candidates who are
16 familiar with the Federal Court rules and
17 procedures and also have subject-matter expertise
18 in these somewhat arcane and very complex areas.
19 And I would also point out that there's
20 not only the recruitment side but also the
21 retention side that, among those who have been
22 attracted to the Office of Associate Judge, there
23 has been a significant attrition. In recent years,
24 four of the prothonotaries or associate judges have
25 gone on to be appointed to the Federal Court

1 proper, and that's not an optimal situation if
2 people come to the Office and they're only there
3 for a couple years and then move on to becoming a
4 full Federal Court judge.
5 It would be better if the salary was
6 high enough not that it's going to outstrip
7 private-sector incomes, but, at least, for those
8 who are minded towards public service and who would
9 otherwise consider it, that they don't have to look
10 at this and say, this is going to be economic
11 suicide; this is going to be such a disincentive
12 that I can't really contemplate it. It has to be
13 enough that those who are public-service minded
14 will not find it to be a deterrent.
15 The four judges, by the way, who were
16 previously prothonotaries or associate judges in
17 recent years, there was Roger Lafrèniere,
18 Justice Mandy Aylen, Justice Furlanetto, and
19 Justice Duchesne, I do want to just note that three
20 of those were my instructing associate judges at
21 the time in the Commission processes. So perhaps
22 that's a good omen for Associate Judge Moore, who's
23 with me today, but anyway.
24 There has been that -- I mean, it works
25 out to, roughly, over that time, four out of --

1 it's at least a 10 percent attrition rate over
2 those years.
3 So the suggested recommendation that we
4 make is that we retain the percentage methodology,
5 that has worked well, but that the percentage go up
6 to 95 percent in order to balance the factors that
7 I've gone through but still recognize the broader
8 jurisdiction of the Federal Court judges.
9 And subject to any questions, those are
10 my submissions on behalf of the associate judges.
11 COMMISSIONER GIARDINI: We will move
12 on, then, to Chief Justice Crampton, and welcome.
13 SUBMISSIONS BY CHIEF JUSTICE CRAMPTON:
14 CHIEF JUSTICE CRAMPTON: Thank you very
15 much, and good afternoon, and thank you for
16 providing me this opportunity to make some brief
17 submissions before you here today.
18 So I'm going to assume that you have
19 read my written submissions dated January 10th,
20 2025. So today, I'd simply like to make three
21 points in response to the Government's submissions,
22 and then I would be happy to respond to any
23 questions that you might have.
24 So the first point that I'd like to
25 make is to underscore that third factor that

1 Mr. Lokan was just mentioning, the need to attract
2 outstanding candidates to the Judiciary.
3 So the Federal Court has had a
4 long-standing history of difficulty attracting such
5 candidates to apply for appointment to the position
6 of associate judge. At Appendix 3 of my written
7 submissions, I provided you with a summary of the
8 last five recruitment processes for associate
9 judges dating back to mid-2017, so almost eight
10 years.
11 Now, some of those processes included
12 multiple cities, so for all intents and purposes,
13 you have statistics for the processes followed to
14 fill nine separate vacancies at the Federal Court.
15 I suppose I should have added the corresponding
16 data for the process that occurred in the fall of
17 2015 for a vacancy that we had in Ottawa; I'll tell
18 you now that that process only yielded two suitable
19 candidates.
20 So the bottom line is that in the
21 processes to fill the last ten vacancies at the
22 Court, dating back almost ten years, we had only
23 one single suitable candidate on at least three of
24 those occasions. So that's 30 percent of the
25 total. 30 percent of the total, we only had one

1 suitable candidate. And I say "at least" because
2 we were not able to ascertain or recall whether
3 there were one or two on one of those occasions.
4 So for today's purposes, let's just assume that
5 there were two.
6 So on another six occasions, we only
7 had two suitable candidates for the vacancy; that's
8 60 percent of the total. And on the final
9 occasion, representing only 10 percent of the
10 total, we had three suitable candidates. So, in my
11 respectful view, this belies the Government's
12 position as stated at paragraph 141 of its
13 submissions that, and I quote:
14 "There is no evidence of
15 difficulty attracting outstanding
16 candidates to the position of
17 associate judge that would justify
18 increasing their salaries beyond
19 80 percent of judges' salaries."
20 So as I stated in my written
21 submissions, the unsatisfactory level of interest
22 in being appointed to the position of associate
23 judge of the Federal Court is likely attributable,
24 at least, in part, to the current level of
25 compensation, the differential between judges and

1 associate judges.
2 It would have been more apt to simply
3 say that it's likely attributable to the current
4 level of compensation, full stop. This is because
5 we've also had difficulty attracting outstanding
6 candidates for the position of judge.
7 So the second point that I'd like to
8 underscore is that our associate judge positions
9 are based in the largest cities in the country;
10 apart from Calgary, that's Montreal, Toronto,
11 Vancouver, Ottawa, and Edmonton.
12 And when reviewing applicants for
13 vacant associate judge positions, we typically look
14 for candidates with expertise in our core areas of
15 jurisdiction, so intellectual property law, class
16 actions, Aboriginal law, and other core areas. And
17 the best candidates in those areas are invariably
18 located in the big cities, big firms, maybe the
19 regional firms, sometimes boutique firms, or in the
20 Government.
21 While successful candidates who come
22 from the Government will get a material increase in
23 their pay, those from the big national or regional
24 or boutique firms will have to accept a very
25 substantial pay cut in their compensation, and this

1 makes it very difficult for us to attract those
2 candidates. You know, I sometimes joke: We don't
3 have to convince just the candidate to take the pay
4 cut, but then that candidate has to go and convince
5 their spouse. And that's tough.
6 We've lost a number of people -- well,
7 not lost. I guess we haven't been able to succeed
8 in persuading a number of people that maybe I
9 thought were ready to put on their public-interest
10 hat or channel their inner idealist and come to the
11 Court and take a pay cut. So it is a significant
12 factor, I can tell you.
13 At paragraph 142 of the Government's
14 submission, it notes that of the five appointments
15 made in the last quadrennial period, four associate
16 judges were appointed from the private sector in
17 Toronto or Ottawa. What you need to know is that
18 one of those individuals was almost 65 at the time,
19 and that's the age when, typically in the big
20 firms, you're getting elbowed out. You're required
21 to leave, in many cases. And another one ended up
22 applying and getting appointed, as Mr. Lokan just
23 mentioned, to judge after only two years.
24 And I'll pause to note that the latter
25 individual told me that, and I quote, "The pay was

1 a significant factor" for them, and that being
2 appointed as a judge went a significant way towards
3 making up for the pay cut that they had to take
4 when they were appointed as an associate judge.
5 Now, another one of the four persons
6 mentioned by Mr. Lokan who was elevated to the
7 position of judge told me that, and again I'm going
8 to quote:
9 "Pay was a major factor that
10 influenced my decision to move
11 positions."
12 That person added, and I quote again:
13 "I was quite content with the
14 work I was doing as a prothonotary;
15 however, I knew I could earn
16 significantly more in the private
17 sector. The judge's pay made it
18 more palatable to stay with the
19 Court."
20 Now, in the interest of full
21 disclosure, I'll disclose that the other two
22 individuals who were elevated from being an
23 associate judge to being a judge told me that the
24 pay differential was not a significant factor for
25 them.

1 In any event, the bottom line remains
2 that we've had a persistent, long-standing
3 difficulty attracting the best candidates to apply
4 for the position of associate judge at the Court.
5 The numbers don't lie. And compensation was likely
6 a significant factor, having regard to the fact
7 that we're recruiting from high-calibre, national,
8 regional, and boutique firms in the largest cities
9 of the country.
10 So the third and final point that I'd
11 like to make concerns the Government's suggestion
12 at paragraph 143 of its submissions that the nature
13 of an associate judge's work in relation to that of
14 a judge justifies the current differential of
15 20 percent in the salaries associated with the two
16 positions. With the greatest of respect, I
17 strongly disagree.
18 As explained in my submissions and in
19 the submissions of the associate judges, the
20 associate judges perform critical work on the
21 Court. They're at the frontline of much of the
22 most important work that we do, starting with case
23 management, streamlining the issues in dispute,
24 mediation, working with self-represented litigants
25 to save costs for everybody because they make a

1 mess when they come in -- they kind of know a
2 little bit; they know enough to be dangerous, but
3 they make life miserable for everybody -- and
4 dealing with most interlocutory matters that come
5 before the Court.
6 They're absolutely critical members of
7 our team. Without them, we could not provide
8 anywhere close to the level of access to justice
9 that we currently provide to the Canadian public.
10 I was trying to find a good sports
11 analogy last night, and the best I could come up
12 with was a relay team or a rugby team. So they
13 take the baton or the rugby ball, and they move it
14 around the track or down the field before handing
15 it off to a judge to get it over the finish line or
16 into the end zone, and it would just not be
17 possible to get to that finish line or end zone
18 without them.
19 Yes, they perform different functions,
20 but so do first-instance and appellate judges,
21 who've historically received the same pay. So the
22 fact that they're performing different functions, I
23 would respectfully submit, does not justify the
24 differential. It's different work in some ways,
25 but just as the work between appellate and

1 first-instance judges is different, it's equally
2 critical to the overall system of justice in the
3 country and to our Court.
4 In closing, I'd like to briefly add
5 that we've also had difficulty, in general,
6 attracting the best candidates from the bar for the
7 position of judge. This is corroborated by the
8 fact that, most of the time, we have fewer
9 top-notch candidates than a number of vacancies on
10 the Court. Right now, we have no high-quality
11 candidates of which I'm aware in several areas of
12 our jurisdiction, including class actions, national
13 security, Aboriginal law, maritime law, and
14 competition law, and the same is true for
15 intellectual property law in most parts of the
16 country.
17 We also have a long history of being
18 unable to attract high-quality candidates from
19 certain regions of the country, including
20 Atlantic Canada, Québec, and the Prairie provinces.
21 This is corroborated by the fact that since the
22 fall of 2017, we've not had any appointments from
23 Atlantic Canada or high-quality candidates. We've
24 also only had two from the Prairie provinces as a
25 whole and two from British Columbia. We also have

1 had difficulty attracting sufficient top-notch
2 candidates to fill the statutory minimum ten spots
3 reserved for Québec.
4 So, once again, the numbers don't lie.
5 So thank you for permitting me to make
6 these submissions, and I'd be pleased to respond to
7 any questions that you may have.
8 COMMISSIONER GIARDINI: Okay. Thank
9 you, Chief Justice. That was very useful. I think
10 we're not a big questioning bunch at this end, but
11 I wanted to acknowledge that everyone who has
12 spoken this morning has been succinct and
13 concentrated on matters that matter most.
14 You have assumed rightly that we have
15 read the materials and understand them, so that's
16 been very helpful, and you've adhered to time
17 frames and drawn our attention appropriately to
18 arguments that are being made by all of the
19 parties.
20 Anything you want to add to that
21 summary? [No verbal response.]
22 Thank you. And I think you should
23 recognize that you have represented your
24 constituencies ably, so thank you for that.
25 I think we are at 12:29, so we will

1 break until 1:30, when we will reconvene. Is that
2 the right time? Yes. And we will then be hearing
3 from our friends from the Government.
4 Thank you very much.
5 (RECESS AT 12:29 P.M.)
6 (RESUMING AT 1:27 P.M.)
7 COMMISSIONER GIARDINI: [Inaudible].
8 So we're going to start with the Government of
9 Canada, and you look ready. Thank you.
10 SUBMISSIONS BY MS. RICHARDS:
11 MS. RICHARDS: I am ready. Thank you
12 very much. Good afternoon, Commissioners.
13 I would like to start, like my friends,
14 Mr. Bienvenu and Mr. Lokan, to express the
15 Government's profound thanks to all three of you
16 for undertaking this very important role. And I
17 won't repeat what they've said about how
18 fundamental and important this is to our system of
19 democracy to ensure the independence of the
20 Judiciary.
21 I'd also like to echo what my friend,
22 Mr. Bienvenu, said about the extraordinary
23 cooperation between the parties, with Mr. Lokan and
24 Mr. Bienvenu's team, in the lead-up to this
25 Commission and in this Commission. We recognize

1 that this is not an adversarial process, so we are
2 all here to assist you as best we can in fulfilling
3 your very important responsibilities.
4 And, Madam Chair, when you began, you
5 asked us all to point out for you points of
6 agreement as we go through, and we'll certainly do
7 our best to do that.
8 I certainly think we all agree that
9 Canada has an outstanding Judiciary. We simply
10 have a Judiciary that is second to none in the
11 world and commands the respect and admiration of
12 all Canadians. It's composed of a diversity of
13 individuals, each bringing unique life and legal
14 experiences with them from private practice, from
15 public sectors, from legal clinics, academic
16 settings, and everything in between.
17 Canada's committment to ensuring that
18 the Judiciary reflects the society in which it
19 operates so that citizens see themselves reflected
20 in the administration of justice is fundamental to
21 our democratic principles. And you will see that
22 in the mandate letter of the Minister of Justice
23 that is found in the Government of Canada's
24 documents at Tab 14.
25 Indeed, as you will have seen from our

1 submissions, Canada's bench has never been more
2 diverse. More women, racialized persons,
3 Indigenous persons are accessing the bench than
4 ever before.
5 And so, in recent years, we've seen
6 Justice Marchand of the British Columbia Court of
7 Appeal be appointed as the first Indigenous Chief
8 Justice of British Columbia; Justice Smallwood be
9 appointed as the first Indigenous person to serve
10 as Chief Justice of the Northwest Territories,
11 Superior Court; Justice Khullar was appointed as
12 the first woman of South-Asian descent to be
13 Chief Justice to the Alberta Court of Appeal; and,
14 most recently, the Supreme Court of Canada has
15 shifted, for the first time, to a majority of
16 women. Justice Mahmud Jamal became the first
17 racialized person to serve on the Supreme Court,
18 and Justice O'Bonsawin became its first Indigenous
19 justice.
20 I'll pause here just briefly to thank
21 Justices Branch, Lafleur, Morawetz; Chief Justice
22 Crampton, who has left us; Associate Judge Moore,
23 who's with us; and Justice Nixon for making the
24 time in what we know to be a very busy schedule to
25 join us for these important discussions today and

1 tomorrow, and we'd like to thank those who are
2 online also who are watching the important work of
3 this Commission.
4 As you know, this Commission, like the
5 ones before it, is tasked with considering the
6 adequacy of judicial compensation with regard to
7 the four mandated criterion.
8 The first is economic conditions in
9 Canada, and when you look at that, you are required
10 to consider cost of living and overall economic and
11 financial position of the Government of Canada.
12 The second is the role of financial
13 security of judges in ensuring judicial
14 independence.
15 The third is the need to attract
16 outstanding candidates, and, as you know, this
17 third criterion is often the one that is discussed
18 the most. And it flows from comments before the
19 Senate Committee on the need to measure how we
20 compensate judges against the body of people from
21 which we are drawing to ensure that we're
22 competitive. And that is a very important goal for
23 this Commission.
24 As we will discuss further, the range
25 of candidates is diverse, and in the submissions of

1 the Government of Canada, the need to attract
2 outstanding candidates does not mean that judicial
3 salaries should be equivalent to the highest-paid
4 professional law corporation or partner in the
5 corner office on Bay Street. Indeed, previous
6 Commissions have noted that.
7 And so, for example, in the Drouin
8 Commission, that Commission noted that what was
9 meant by adequate was what was fair and sufficient
10 salary. And most recently, in the Turcotte
11 Commission at paragraph 43, Commissioner Turcotte
12 noted that the goal could never be to match
13 compensation earned by the most financially
14 successful private practitioner.
15 The fourth and final objective is the
16 basket clause, other objective criteria that are
17 relevant in your assessment, and, as you know, for
18 many, many Commissions, what has been considered an
19 objective and relevant criteria we call the Block
20 comparator, and that's the salary of the DM-3 level
21 plus half of the potential bonuses.
22 Now, both parties have put forward
23 expert evidence and submissions to assist this
24 Commission in discharging your important
25 responsibilities, and today, we will highlight some

1 of the points without going over in detail our
2 written submissions, which we know you've read.
3 We believe that objective and reliable
4 evidence on the complete picture will assist this
5 Commission in fulfilling your important mandate.
6 Now, I note that my friends,
7 Mr. Bienvenu and Mr. Boudreau and Mr. Lokan, have
8 highlighted that there are points of divergence
9 between the experts and the parties on the approach
10 to considering evidence before the Commission and
11 the factors you should consider.
12 And those points of divergence will
13 include, for example, the importance of benefits
14 outside of the judicial salary, the approach to
15 calculating the value of judicial annuity, and
16 whether disability benefits can be quantified and
17 how they should be considered. And so I'll pause
18 there to say, happily, we appear to agree before
19 you the judicial annuity should be considered.
20 It's just a matter of how you calculate that.
21 We have some disagreement on the
22 appropriate filters to be applied to the data that
23 is available. My colleague, Mr. Smith, will
24 explain in some more detail our [experts] (ph) to
25 you that, consistent with the last Commission's

1 comments and industry practice, age-weighting the
2 data is a preferable option.
3 We have some differences in views on
4 the consequences and utility of the new information
5 before this Commission on the professional law
6 corporations, and we have some differences of view
7 on the importance of completing the pre-appointment
8 survey of judges as recommended by the previous
9 Commission.
10 And finally, I would say we have some
11 difference of views on the extent to which
12 comparison to private-practice salaries should
13 guide the work of this Commission. We note that
14 counsel for the Judiciary relies heavily on that
15 information and has asserted in their submissions
16 that the Act requires comparison with incomes of
17 lawyers from private practice.
18 And we certainly agree that it is an
19 important factor and consideration for you, but it
20 is not the only consideration, particularly given
21 the fact that a significant number of outstanding
22 candidates, almost 50 percent, come from outside of
23 private practice. And so we will urge the
24 Commission to look at the complete picture when you
25 are considering the income and what is necessary to

1 attract candidates.
2 I would like to just briefly address
3 some of the data that is not before you, and, in
4 our view, the best way to resolve the dispute
5 re comparators is through the completion of the
6 pre-appointment income survey with the Judiciary
7 that the previous Commission recommended.
8 So my friend has already gone through
9 that, but as you are aware, the previous Commission
10 recommended that there be a pre-appointment income
11 survey, and the Judiciary sought reconsideration of
12 that after the report came out, and that was
13 dismissed.
14 And so since the recommendation, the
15 parties prepared a questionnaire that appointees
16 could voluntarily provide complete information.
17 Unfortunately, there were disagreements that
18 lengthened that process, and the questionnaire was
19 only distributed late in the process, and we don't
20 know what, if any, data has been collected.
21 We are asking this Commission to
22 confirm the previous recommendation and encourage
23 cooperation and participation in a timely manner.
24 It's important that this Commission and future
25 Commissions have objective and complete evidence

1 before them, and as the previous Commission found,
2 this is one way to ensure that that information can
3 be collected.
4 I'll also just briefly address my
5 friend's submission on what use can be made of
6 previous Commissions' reports and findings. We
7 have a point of agreement that they are important
8 for you to consider, and indeed, you should. But
9 we don't agree with counsel for the judges'
10 submissions that seem to equate them with something
11 that is binding and can only be overturned or
12 departed from on the basis of some sort of
13 evidentiary foundation.
14 And with respect, we don't think that
15 that is what previous Commissions have said, and it
16 wouldn't be in keeping with the independent
17 function of this Commission to consider and
18 discharge its responsibilities based on the
19 information and evidence before you.
20 And so with respect, I don't think
21 there is a consensus among previous Commissions on
22 what can be done with the findings of the other
23 Commissions, and I'll just give you the references
24 to what are the relevant passages for your
25 consideration.

1 So in the Block Commission, and just
2 for your information, that's in the Joint Book of
3 Documents at Tab 11, and at paragraph 1,
4 Commissioner Block was very clear that she found
5 that she was not bound by the assessment of
6 previous Commissions; that they certainly had to
7 take the common-sense -- that Commissions have to
8 take a common-sense approach to new evidence and
9 arguments and only depart from previous findings
10 where there are valid reasons to do so.
11 My friend referred you to the
12 Levitt Commission, and that is in their compendium
13 at Tab 2, and I would refer you to read
14 paragraphs 107 to 111. In our submission, it
15 doesn't stand for the firm test that my friend has
16 put forward, and when you look at that, you will
17 see what was being discussed in that case was a
18 question of whether or not a Commission could
19 simply rely on a recommendation or findings from a
20 previous Commission without any new evidence or
21 information being put before them.
22 And in this case, Commissioner Levitt
23 did find that he could, and he found that in
24 arriving at its recommendations, it's entitled to
25 take into account recommendations made by previous

1 Commission in the absence of a demonstrated change
2 where consensus has emerged around a particular
3 issue during a previous Commission inquiry. So, in
4 our submission, it wasn't setting out a test or
5 imposing some kind of evidentiary requirement.
6 Similarly, in the Rémillard Commission,
7 which is at the Joint Book of Documents, Tab 13,
8 I'll refer you to paragraphs 24 to 27, where,
9 again, we say that the Commissioner in that case
10 found that it was appropriate for a Commission to
11 consider predecessors' findings, and it could
12 follow them where they felt there was a consensus,
13 but they could also depart, and that they had the
14 flexibility to assess whether, in its view, a
15 previous Commission had arrived at a recommendation
16 which ought to be adjusted or reviewed in the
17 current context.
18 And finally, in the most recent
19 Turcotte Commission, to the same extent, that's at
20 Joint Book of Documents, Tab 14, it's the
21 Government's submission that Justice Turcotte
22 applied a similarly flexible approach such that
23 certainly Commissions ought to consider previous
24 Commissions, but they're not bound by it, and they
25 are able to consider, based on the evidence before

1 them, issues anew.
2 Now, my friend has gone through, and,
3 of course, both parties have referenced before you
4 findings from previous Commissions that we're
5 asking you to abide by or depart from. And so you
6 will hear submissions from both parties on that. I
7 think it demonstrates that there isn't a consensus
8 around this, and as you can see from that brief
9 summary, it's an issue that's been raised before
10 every Commission in terms of what to do with
11 previous reports.
12 In our submission, the important and
13 difficult task for this Commission is to consider
14 all of the factors I've referred you to, the four
15 factors, against objective evidence as a complete
16 picture. And you need to balance the need to
17 ensure that judicial salaries are appropriate to
18 ensure independence of the Judiciary and to attract
19 outstanding candidates while also ensuring that the
20 guarantee of a minimum salary is not used as a
21 shield to protect the Judiciary from current
22 economic conditions and the need to shoulder their
23 fair share of the burden in difficult economic
24 times.
25 And an example of considerations that

1 we say tip the balance in the other direction is
2 the proposal for the retroactive $60,000 lump sum,
3 and we say that would tip the balance in the wrong
4 direction. I'll talk about it a little bit more,
5 but as we've said in our written submissions, while
6 certainly not determinative, I think it's notable
7 that $60,000 represents the after-tax income of the
8 median Canadian family in 2022.
9 And so in these uncertain
10 circumstances, it would be difficult to justify a
11 lump-sum increase on top of a projected IAI
12 increase of approximately $53,000 in the upcoming
13 quadrennial period.
14 So with that opening, just by way of
15 outline, I'll just tell you how we're going to
16 split our presentation this afternoon.
17 I'll address the first criterion on
18 economic conditions and the second criterion on
19 financial stability, the independence of judges.
20 I'll then turn it over to my colleague,
21 Mr. Smith, who will address in more detail the
22 third criterion around the ability to attract
23 judges, and he will discuss the components and the
24 value of the judicial annuity; compensation in
25 private practice, including the self-employed and

1 PLC data; the appropriate use of filters; the
2 number of appointments and highly recommended
3 applicants; and the proposed $60,000 increase.
4 And then I'll turn it over to my
5 colleague, Ms. Norris, who will finish on the issue
6 of attracting candidates by addressing the evidence
7 regarding public-sector salary, which we say is
8 very important; and the fourth criterion, other
9 objective criteria that the Commission may
10 consider, namely the Block comparator. Ms. Norris
11 will also address considerations for compensation
12 of the associate judges and conclude the
13 presentation of the Government of Canada.
14 And in the end, the Government of
15 Canada's position will be that when the four
16 criterion are considered against the objective
17 evidence, that the current salary and benefits
18 coupled with the automatic IAI increase meets the
19 adequacy standard to be considered by this
20 Commission.
21 So with that, I'll turn to the first
22 criterion, which are the prevailing market
23 conditions in Canada, and as you know, our written
24 submissions are at paragraphs 16 to 35 of our main
25 submission and 5 to 8 of our supplementary one.

1 As I alluded to in the beginning, under
2 this criterion, you're to consider economic
3 conditions, which will include things like cost of
4 living and overall economic situation for the
5 Government of Canada, and the ultimate question for
6 you is whether or not the economic circumstances
7 currently dictate restraint, and we say they do.
8 Findings on this criterion are truly
9 different from Commission to Commission because, I
10 think as my friends noted, the situation will be
11 different. There will be changing economic
12 circumstances likely in every four-year period.
13 So we saw an example of that, an
14 unexpected example of that in the last Commission
15 with the COVID-19 pandemic, and I think it's safe
16 to say nobody could have predicted that Canada and
17 the world would have found themselves in the
18 circumstances they did with COVID-19. And so while
19 this criterion is not determinative, it has
20 certainly been held by previous Commissions to be a
21 very significant factor.
22 And so both parties have identified for
23 you some of the traditional criterion, and I don't
24 intend to go over all the numbers, but things like
25 inflation, cost of living, Consumer Price Index,

1 unemployment rates, and the projected federal
2 deficit. And, of course, we all read the
3 newspapers and we live in the world we live in, and
4 so these are concepts and issues that will not be
5 unfamiliar to you.
6 And so while Canada says that the
7 current economic situation looks promising, the
8 current geopolitical landscape certainly introduces
9 uncertainty into Canada's economic outlook that
10 simply can't be ignored, and I would say that
11 situation has changed even since we filed our
12 written submissions before this Commission.
13 We've mentioned, certainly, you will
14 see it not only in our written submissions, but
15 you'll see it [averted] (ph) to in the Government's
16 budget documents. So even in the fall financial
17 update that was provided, there is a caveat and a
18 reference there to the uncertainty.
19 And many of those issues continue. The
20 war in Ukraine is one of the issues that has been
21 referenced through the financial documents, which,
22 I think is not disputed between the parties,
23 continues to be a significant issue. The
24 Israel-Gaza war continues to be a significant
25 issue. And the one issue that was certainly

1 referenced in our submissions and has been
2 referenced throughout the documents as leading to
3 some uncertainty for Canada is the appointment of
4 President Trump and the ongoing threats of tariffs.
5 And there has definitely been some evolution in
6 that area since the parties filed their submissions
7 and filed their evidence in this case.
8 I think it's hard to say that those
9 circumstances don't present some uncertainty and
10 concern for the economic situation of Canada and
11 all Canadians. And, in fact, I'd just point you to
12 the report that the Judiciary rely on and that
13 their own expert referred to those factors or those
14 types of factors introducing some uncertainty in
15 forecasting from an economic perspective.
16 So because I'm old and use paper, I
17 will just refer to the paper, but I will give you
18 the pinpoint references so you can have them. I'm
19 looking now at the Book of Exhibits and Documents
20 for the Judiciary. It is Volume I, Tab B. If you
21 are using the PDF, it's at PDF page 43.
22 And the document I just wanted to draw
23 your attention to is Exhibit B to the expert report
24 of the Judiciary on the economic situation, and
25 it's a document that's relied on called "The Policy

1 and Economic Analysis Program," and it's an updated
2 forecast for Canada done on November 4th, 2024.
3 And in the second full paragraph of
4 this document, it states:
5 "Before discussing the forecast
6 numbers, we will first lay out the
7 challenges/uncertainties we are
8 facing in attempting to producing a
9 consistent and sensible economic
10 forecast.
11 First, the international
12 situation remains very unstable.
13 The situation in the Middle East
14 could change dramatically at any
15 moment. The outcome of tomorrow's
16 U.S. election, whatever it is
17 eventually decided, is too close to
18 call, but frankly, even if we could
19 call it, we do not really have a
20 good sense of what the outcome means
21 for Canada, particularly if the
22 Republican candidate is the victor.
23 Weaponized uncertainty may be the
24 order of the day for the next four
25 years from south of the border."

1 Or not. It's a bit prescient to read
2 this now in 2025.
3 "Our forecast, as is usually
4 the case for our forecast of the
5 international situation, is that the
6 U.S. and the world will muddle
7 through."
8 And so I think when you look at the
9 documents, this economic forecasting, the budget
10 documents, there certainly is evidence before you
11 of the mounting concern on how these situations
12 would impact Canada's forecast, and it has been
13 evolving daily, weekly, daily, certainly hourly
14 since 2025. And you can see some of that
15 evolution, and I'll just highlight that for you,
16 even in the documents before you.
17 So the parties have given you, just by
18 way of example, the budget that was filed in
19 April 2024 and the fall economic statement that was
20 filed on December 16th, 2024. So the budget is in
21 the Government of Canada's documents at Tab 16, and
22 the fall economic statement is filed in the
23 Judiciary's Book of Documents at Tab 86.
24 And just in those months, within a
25 year, in the budget in April 2024, the debt was

1 estimated to be 40 million, and by December, it was
2 estimated that it would be 48 -- sorry, 40 billion
3 to $48 billion, in the sense of several months.
4 And, again, I'll just give you the page
5 number for the fall economic statement. At the
6 PDF page 2011, there is the caveat about the
7 uncertainty of what would happen at that point with
8 the new U.S. administration, their economic agenda,
9 and what that would look like for North America and
10 the fact that those considerations were only
11 partially accounted for in these documents.
12 Similarly, you'll see in the Joint Book
13 of Documents, we've provided to you two letters
14 from the Department of Finance on Canada's economic
15 statements. One was done in May 2024, and that's
16 in the Joint Book of Documents at Tab 25; and one
17 was done in November 2024, and that's at Tab 26.
18 So they're one right after the other. And, again,
19 you'll see, even in those number of months, there
20 were changes to what was being anticipated.
21 So, for example, the consumer price
22 indexing around inflation in 2024 was 2.7 and --
23 or, sorry, in May was 2.7, and by November, it was
24 2.0. The letters reflect changes in the interest
25 rate. I think all Canadians have been watching as

1 the Bank of Canada has been changing the interest
2 rate. In that time period, it went from 4.75 down
3 to 3.75, and the forecast was changing.
4 And similarly, on the GDP in May, it
5 was estimated that it was rising by 1.2 in 2023,
6 four times faster; and by November, was rising by
7 1.5 in 2023, five times faster. So we certainly
8 have had a lot of uncertainty around the economic
9 situation and a lot of concern around the
10 geopolitical situation, and, in particular, what's
11 happening with the United States.
12 And we have had a lot of discussion,
13 and there's evidence and submissions, about the
14 important issues in Canada around cost of living
15 and housing for Canadians. And those are all
16 significant issues that Canadians are facing and
17 that the Government of Canada is facing in these
18 challenges, and in our submission, those important
19 issues speak to a need for fiscal restraint at this
20 time.
21 And so we say, and, of course, we agree
22 that IAI is the appropriate increase, but the
23 Government has asked that it should be capped to a
24 maximum of 14 percent. I think we all know what
25 the IAI is, and we certainly recognize that the Act

1 caps it at 7 percent, but in this situation, we
2 submit that the economic situation before you,
3 which is different than what was before Turcotte
4 and previous Commissions, justifies some restraint.
5 There is an estimate, and the
6 Government certainly anticipates and hopes that the
7 cap would not be necessary based on current
8 protections. Based on current predictions, IAI
9 would be 13.8 percent over the quadrennial period.
10 The fact that that number may change has nothing to
11 do with the forecasting. We're not saying it's an
12 issue around the Government not forecasting
13 appropriately, as I understood might have been the
14 suggestion this morning.
15 The concern is that we would have
16 another COVID-19 situation where, in 2022, as you
17 will see in our evidence, IAI jumped to 7 percent
18 or 6.6 percent, I think, unexpectedly.
19 And so the concern is that given the
20 current geopolitical situation, pressures from the
21 south, pressures in the Middle East, the high cost
22 of living, the problems with housing, and the high
23 cost of groceries, that we could see another jump,
24 and we could see the IAI and the raises go beyond
25 what is actually contemplated by this Commission

1 when you render your decision today. And that's
2 the purpose for which the Government is suggesting
3 the cap.
4 What that would mean at this stage,
5 just to be clear about the numbers -- and we've
6 given you the numbers; I think these are numbers
7 that we do not have a dispute as between the
8 parties on -- assuming a 14 percent raise over the
9 quadrennial period, that would mean there would be
10 a $53,708 raise over the quadrennial period.
11 And so at Figure 3, at paragraph 35 of
12 our submissions, we've given you what that looks
13 like. By 2027, the puisne judge's salary would be
14 raised to $436,700. That's just straight salary,
15 not taking into account the other judicial annuity,
16 which my friend will get to. And associate judges
17 would be 80 percent of that, $349,300.
18 The $60,000 lump sum, which we've
19 addressed in reply at paragraphs 5 to 8, we say, is
20 unprecedented. No Commission has ordered such a
21 large or lump-sum increase, and it's certainly not
22 in keeping with the current economic situations
23 facing Canadians.
24 And we've given you some numbers by way
25 of comparison. So $60,000 is greater than

1 75 percent of the income earned by self-employed
2 lawyers in 2023, and as I've already indicated,
3 it's about the after-tax income of the median
4 Canadian family in 2022.
5 The practical impact of that increase
6 would mean that judges would receive approximately
7 $120,000 increase in judicial salary over the
8 quadrennial cycle, which, in the Government's
9 submission, is simply out of keeping with what is
10 facing Canada currently in terms of its economic
11 situation.
12 And in our supplementary submissions at
13 Figure 1, we've given you a chart that demonstrates
14 the significant compounding effect of the proposal.
15 It would just, frankly, be unprecedented,
16 particularly at a time of geopolitical uncertainty
17 and the challenging economic picture, and my
18 colleague, Mr. Smith, will address this just a
19 little more in his submissions.
20 And just to finish off, I'll address
21 very quickly the second criterion, which is
22 judicial independence.
23 There's no reason to believe nor are
24 there submissions before you that there's a risk of
25 interference with the very important independence

1 of the Judiciary as a result of salaries. The
2 parties agree, again, on the fundamental
3 importance, in our system, of judicial
4 independence, and we certainly agree that financial
5 security is an integral part of that independence.
6 In the Prince Edward Island reference,
7 Justice Lamer talked about judicial salaries not
8 falling below an acceptable minimum, and so that's
9 really what you're considering when you're looking
10 at this issue of judicial independence.
11 In our submission, the current salary
12 of 396,700, when you take into account the IAI
13 adjustments, is certainly enough to protect the
14 Judiciary from the appearance of political
15 independence.
16 You'll see in our submissions the chart
17 and the information that shows at this point in
18 time, actually, judicial salaries have the
19 comparison between them and the Block comparator
20 because that's been considered in past Commissions.
21 And at this time, the DM-3 salary plus half of the
22 available risk at pay, if you do the comparison, it
23 shows that IAI is doing its job because they have
24 met or, depending on how you look at it, surpassed
25 that Block comparator.

1 In 2016, the Rémillard Commission
2 reported that the gap between judicial salary and
3 Block comparator had been closed by annual
4 increases in accordance with IAI and that indexing
5 had served its purpose, and Turcotte had noted that
6 judicial salary had surpassed the Block comparator,
7 and that has continued. The continued use of IAI
8 sees judicial salaries keep pace in the next
9 quadrennial period.
10 And as my colleague, Mr. Smith, will
11 discuss, judicial salary and benefits, when you
12 look at the complete package, based on the
13 objective evidence, places the Judiciary at or very
14 near the top of salaries for legal professionals as
15 a whole when you consider those in private practice
16 and outside private practice.
17 So unless there are questions for me, I
18 will hand it over to my colleague, Mr. Smith, who
19 will talk about the third criterion.
20 SUBMISSIONS BY MR. SMITH:
21 MR. SMITH: Madam Chair, Members of the
22 Commission, the objective of my portions of the
23 submissions today is to assist the Commission in
24 its inquiry into the third criterion, that being
25 the need to attract outstanding candidates to the

1 Judiciary.
2 The Government's position is, based on
3 the evidence, that there is no difficulty in
4 attracting outstanding judicial candidates to the
5 Judiciary, be it from the private practice or from
6 other sectors. The judicial salary, IAI indexing,
7 coupled with the generous judicial annuity as well
8 as other benefits are more than sufficient to
9 continue to attract outstanding candidates to the
10 Judiciary.
11 My portion of the submissions on the
12 third criterion today will be focused on that
13 private-practice comparator. Specifically, I want
14 to address four points.
15 The first has to do with the issue that
16 was raised regarding judicial vacancies.
17 The second will be about the judicial
18 annuity, its different facets, and how they work
19 together to continue to attract outstanding
20 candidates.
21 The third point, I'll be going into the
22 private-practice data, talking about the applicable
23 filters, and showing why the current judicial
24 salary is sufficient to satisfy the third
25 criterion.

1 And finally, I will explain why the
2 $60,000 increase is not necessary or appropriate
3 today.
4 Once I'm done talking about those four
5 points, I'll pass the baton to my colleague,
6 Ms. Norris, who will finish the evaluation of the
7 third criterion as well as the submissions of the
8 Government today.
9 Like Ms. Richards has done before me,
10 I'll be making references to the different
11 documents that we have before us today, the
12 submissions of the Government, the Joint Books of
13 Documents, the past Commissions, et cetera. I'm
14 happy to provide those references in PDF or paper,
15 but while I'll be making those references, my
16 intent it not to bring the Commission to each and
17 every page that I'm referring to.
18 So if ever there's a page that I'd like
19 to bring the Commission to, I'll make sure to make
20 that clear. I'll also make use of the screens to
21 put some figures where relevant.
22 So on that note, I'll start with short
23 remarks on what my friends refer to as "the crisis
24 of judicial vacancies," and that's addressed
25 briefly in paragraphs 19 to 21 of the Government's

1 reply submissions.
2 And as the Commission is no doubt
3 aware, there is ongoing litigation regarding
4 related issues in judicial appointments, and the
5 Government's intention at this time is not to
6 revisit that case or re-litigate any of the factual
7 and legal issues therein. But what the Government
8 can say in the context of this inquiry, based on
9 the evidence that's before the Commission, is that
10 there's no evidence to support the existence of
11 such a crisis.
12 The best indicator of this, of course,
13 is the number of judicial vacancies. At the time
14 of the reply submissions, there were only 38
15 vacancies in all of the Superior Courts of every
16 province and territory. And since the reply
17 submission -- and I'm relying on the most recent
18 numbers from the Office of the Commissioner for
19 Federal Judicial Affairs; these are updated monthly
20 and available online -- they've shown that, since
21 then, judicial vacancies have been reduced to 30.
22 So this evidence doesn't support this idea of a
23 crisis in judicial appointments.
24 And it's quite the opposite. The
25 evidence supports that outstanding candidates

1 continue to be attracted to the Judiciary, continue
2 to apply in high numbers, and that these judicial
3 vacancies are being filled by candidates that are
4 being evaluated as highly recommended.
5 In the last year, there's been a record
6 number of appointments, and in the last quadrennial
7 period, I can say there have been 271 appointments.
8 There have been 1,382 applications assessed by
9 Judicial Advisory Committees, which I'll refer to
10 as JACs, in accordance with their objective
11 guidelines. JACs are the body mandated to make
12 such an assessment as to what makes a candidate
13 highly recommended based on the objective
14 guidelines.
15 In assessing these applications,
16 approximately 298 applications, in the last four
17 years, were evaluated and were highly recommended,
18 while another 320 were recommended. And, in fact,
19 in 2023 alone, there have been 95 candidates rated
20 as highly recommended.
21 Simply put, the current state of
22 judicial vacancies is not indicative of an
23 inability to attract candidates. The evidence
24 supports that vacancies are being filled at record
25 rates by outstanding candidates, who, as I'll

1 explain a bit later on, continue to come primarily
2 from the private practice.
3 I'll turn to the second point of my
4 submissions, and I want to talk about the judicial
5 annuity, and we make our submissions in the main
6 Government submissions at paragraph 46, and the PDF
7 page number is 18.
8 Madam Chair, you mentioned that you'd
9 like to hear where the parties agree on certain
10 issues. My friends this morning have mentioned
11 this, it's not contested by any of the
12 participants, that the judicial annuity represents
13 a considerable benefit, and it's a significant part
14 of judicial compensation that must be considered
15 when the Commission undergoes its inquiry into the
16 judicial salary.
17 This is something that the Turcotte
18 Commission took as a given. During the previous
19 Commission, all participants before the Turcotte
20 Commission accepted that the judicial annuity
21 needed to be considered and that it had a value of
22 approximately 30 -- well, not approximately. The
23 value was 34.1 percent at that time. So there's no
24 disagreement that the judicial annuity needs to be
25 considered.

1 But where there is disagreement today
2 is on the value of the judicial annuity and the
3 different parts of that annuity that we need to
4 consider when making the calculation on its value.
5 So in this case, there's a discrepancy
6 of almost 16 percent between the parties. My
7 friends arrived at a valuation of 28 percent,
8 which, for context, is 6 percent less than it was
9 before the previous Commission. And just for
10 context, it would seem, then, that while judicial
11 salaries have done nothing but increase since the
12 last Commission due to IAI indexing, the value of
13 the pension benefit would have decreased during the
14 same amount of time.
15 In contrast, the Government presents a
16 value of 44.1 percent for the judicial annuity, and
17 that 44.1 percent is divided into two categories,
18 the first being related to the pension benefit,
19 which was calculated at 38.5 percent, and the
20 other, the disability benefit, valued at
21 5.6 percent, according to the Eckler report.
22 What I'll do now is that I'll address
23 both of these components of the judicial annuity
24 and explain how we got to those numbers and why
25 those are the numbers that the Commission should

1 privilege when making its calculations.
2 So I'll start with the portion of the
3 annuity attributable to pension, and the
4 difference, while there are some methodological
5 differences in both experts' approaches, what it
6 comes down to at the end of the day is a difference
7 in the value caused by the difference in the
8 discount rates that are applied.
9 So both experts utilized the actuarial
10 assumptions from the Chief Actuary's report to
11 determine the value of the annuities. The Eckler
12 report, our experts, utilized those values for each
13 to calculate its assumptions, and that includes a
14 discount rate of 3.6 percent.
15 Ernst & Young, in their report, applied
16 a discount rate that is almost double, 6 percent,
17 so almost double that which was provided in the
18 Chief Actuary's report. And as my friends
19 explained earlier and as is indicated in the Eckler
20 reply report, the page number for this is at
21 page 8, the general rule is that the more the
22 discount rate increases, the more the value of the
23 judicial annuity decreases as a result. So
24 applying a higher discount rate has an important
25 impact on the valuation.

1 The reason why Ernst & Young's report
2 favours a higher discount rate is based on the
3 significant investment risk in a balanced portfolio
4 to be assumed by an individual in order to obtain
5 an annualized return of 6 percent.
6 The problem with that, and this is,
7 again, explained in the Eckler reply report at
8 page 8, is that this assumption doesn't keep in
9 mind that the Government is responsible for bearing
10 the risks, and by those risks, I mean the
11 investment and longevity risks associated with the
12 payment of the judicial annuity. So, in other
13 words, it's essentially risk-free.
14 So to justify an increase in the
15 discount rate on the basis of risk, that doesn't
16 exist in the circumstances. It doesn't strike the
17 Government as a true justification for an increase
18 in the circumstances.
19 So in the absence of such a
20 justification, the Government proposes that the
21 approach that the Commission should utilize is to
22 rely on the Chief Actuary's report for all of the
23 values used to calculate the annuity. This is what
24 both experts have done with regards to the other
25 values, and that helps inform the percentage

1 benefit, which is how our experts came to the
2 valuation of 38.5 percent.
3 Doing otherwise would risk
4 significantly undervaluing the pension benefit,
5 which, as the Eckler reply report explains at
6 page 7, is widely considered one of the most
7 valuable retirement plans in Canada. And one of
8 the reasons why it's so valuable, again explained
9 this time in Eckler's main reports at PDF page 86
10 and 87, it's not possible for self-employed lawyers
11 to recreate the value of the Judiciary's pension
12 using only conventional methods.
13 I'm not going to go into details on
14 this. We already explained this in our main
15 written submissions at paragraphs 51 to 52, but it
16 remains that the superiority of the judicial
17 annuity to the alternatives available for
18 private-sector lawyers should be taken into
19 consideration when calculating the pension benefit,
20 and this is a guiding principle that was raised
21 before the Levitt Commission which is at Tab 12 of
22 the Joint Book of Authorities, Volume I, at
23 paragraph 42.
24 I'll move on to the next component of
25 the judicial annuity, which is the disability

1 benefit. Just for some context, the disability
2 benefit ensures that judges are eligible for leave
3 with full salary, or, in the event of a full
4 permanent disability, they're entitled to the full
5 judicial annuity, and that's regardless of the
6 amount of time that's spent on the bench.
7 These benefits, of course, come at no
8 additional costs to the judges, whereas practicing
9 lawyers often would need to pay a premium for
10 access to benefits of this type.
11 Our experts came to a calculated
12 evaluation that disability benefits be equal to
13 5.6 percent for the purpose of the annuity, and
14 that percentage is at page 91 of the Eckler report,
15 which is in our Book of Authorities.
16 My friends' calculations don't include
17 the disability benefit in their judicial annuity,
18 and it's on the basis that the Turcotte Commission
19 declined to include it when it made its evaluation
20 of the judicial annuity.
21 And looking at the paragraphs of the
22 Turcotte Commission's report regarding that
23 specific issue, the Government's position is that
24 the Turcotte Commission did not preclude
25 considering the disability benefit, and it didn't

1 indicate in its report that it would be
2 inappropriate to do so before future Commissions.
3 Rather, and this was in the context of
4 a response to the Government's request for a
5 comparative total compensation exercise, the
6 Turcotte Commission declined to include some of the
7 benefits on the basis that it lacked the required
8 evidence regarding the pool from which candidates
9 are drawn. And this reference is at paragraph 187
10 of the Turcotte Commission; again, our Joint Book
11 of Authorities, Volume I, Tab 14.
12 So taking that instruction into
13 consideration, what do we have before the
14 Commission today? Well, we're missing the
15 pre-appointment income data, which we'll get to.
16 But outside of that pre-appointment income data, we
17 submit that the evidence that was missing before
18 the previous Commissions is available here, and it
19 justifies the inclusion of the disability benefit.
20 So, for example, Tab 22, the Joint Book
21 of Authorities is the result of a collaborative
22 effort between the Government and the Judiciary,
23 and it provides comprehensive information regarding
24 appointment demographic that's responsive to some
25 of the Turcotte Commission's concerns.

1 There's also, of course, the PLC data
2 that was missing before the previous Commissions,
3 and as my friends qualify it as "the missing piece
4 of the puzzle," that wasn't before the Turcotte
5 Commission at the time.
6 So we have this comprehensive data
7 regarding the pool from which the Judiciary is
8 drawn. It's submitted that with these evidentiary
9 problems rectified, there's no need for the
10 Commission in today's inquiry or at this
11 quadrennial cycle's inquiry to refuse to include
12 the disability benefit, especially that we have the
13 percentage in the Eckler report. So that's why the
14 Government came to this valuation of 44.1 percent.
15 But even if the Commission decides not
16 to include the disability benefit into its
17 calculations, we're still left with a valuation of
18 the judicial annuity at 38.5 percent.
19 While this would result in an
20 under-valuation of the judicial assessment, it's
21 still great to note that it [would] (ph) result in
22 a total of approximately $531,000 in 2023, total
23 compensation, and for context, this would slot the
24 total compensation for the Judiciary in 2023, based
25 on the self-employed lawyer data with no filters,

1 at the 85th percentile.
2 And in any event, removing the
3 disability benefit from the calculation doesn't
4 mean that the disability benefit is not an
5 important consideration for the Commission's
6 inquiry today. And that's because the Government,
7 and I don't think any of the parties do, we don't
8 endorse a narrow view of what attracts candidates
9 to the Judiciary that's focused solely on
10 compensation.
11 It was the Rémillard Commission that
12 said that financial factors are not and should not
13 be the only factor or even the major factor
14 attracting outstanding judicial candidates. That's
15 at paragraph 81 of the Rémillard Commission, and
16 the paper number is page 23, but I've given you the
17 paragraph number already.
18 And, again, this is something that's
19 repeated throughout multiple Commissions. As the
20 Turcotte Commission explained, there are numerous
21 reasons why or why not that a practitioner in
22 private practice may prefer a judicial appointment,
23 and it's not exclusively judicial compensation.
24 There are many benefits, and the
25 disability benefit is one of them, but the others

1 are listed in our main submissions; for example,
2 there's the ability to elect supernumerary status,
3 which means that judges receive a full judicial
4 salary while carrying 50 percent of the workload.
5 More information on that is at paragraph 53 of our
6 main submissions.
7 There's a comprehensive benefit package
8 that's also paid for by the Government. There are
9 also other factors: Security of tenure, a
10 candidate's desire to serve the public, interesting
11 workload, or even the freedom from the necessity of
12 generating business. These are all relevant
13 factors in considering what can attract an
14 individual to apply to a judicial position.
15 On that note, I'll move on to my third
16 point, which has to do with the private-sector
17 comparator. I'll address three sub-issues under
18 this point. I'll briefly talk about the missing
19 pre-appointment income data, I'll talk about the
20 PLC data, and I'm also going to talk about the
21 filters.
22 Starting with a quick word regarding
23 Recommendation 8(c) regarding pre-appointment
24 income data, which is available in our main
25 submissions at paragraph 76, as Ms. Richards has

1 already explained, we are missing -- well, the
2 Commission does not have data in response to that
3 recommendation of the Turcotte Commission.
4 So, in effect, we're missing reliable
5 and accurate data regarding the income of the
6 individuals at the time of their judicial
7 appointments, which would be important to
8 complement the self-employed and PLC data.
9 So the Government is committed to
10 continuing the collaborative process to obtain this
11 data and hopes the Commission continues to
12 recommend its disclosure.
13 As I said, I would be brief on the
14 issue of pre-appointment income data. That's all
15 I'll say about that, and I'll move on to the next
16 issue on how exactly we should be approaching the
17 different private-practice data.
18 Our written submissions on that point
19 start at paragraph 77 of our factum. I'll take a
20 moment just to flag, as my friends have mentioned,
21 an inaccuracy regarding Figure 18 of the
22 Government's main submissions. There was
23 inadvertently a mislabelling of the PLC data, and
24 for that, we apologize. It certainly wasn't our
25 intention to mislead the Commission or our friends.

1 But with that being said, our friends
2 exaggerate a bit the extent to which this changes
3 our position on the PLC data. Our position remains
4 that the PLC data, while important for the
5 Commission to consider, is still of limited value,
6 and the reason why is that it presents an
7 inaccurate vision of compensation in the private
8 sector in Canada at large.
9 High overview, this is most evident by
10 the fact that almost 60 percent of the PLC data
11 comes from Toronto, approximately 40 percent;
12 Vancouver, 13 percent; and Montreal, 7 percent,
13 where salaries are highest. In fact, while that
14 accounts for 60 percent of the PLC data, these
15 top-three CMAs, 79 percent of all the data for PLCs
16 comes from CMAs. In contrast, only 21 percent of
17 the PLC data comes from non-CMA areas.
18 This is important for the Commission to
19 consider because if we look at the P75 for
20 incorporated lawyers in non-CMA areas, it's around
21 $489,000, which is quite lower than the number of
22 the P75 in Toronto, for example, which is three
23 times higher than that number.
24 So, in other words, from this
25 perspective, the PLC data is essentially data on

1 the highest earners in the CMAs, and it's not a
2 great overview of Canada at large, how
3 private-practice compensation is in other regions
4 other than the CMAs.
5 I think this is a good time to talk
6 about my friends' proposed approach for considering
7 both the PLC data and the self-employed data as one
8 comparator rather than a part. The Government
9 doesn't endorse that approach, and the reason why
10 is that the two data sets, they're not easily
11 reconcilable.
12 Just to name a few examples, unlike the
13 self-employed lawyer data, which covers the whole
14 quadrennial data, the PLC data, specifically the
15 Statistics Canada data, which both parties agree is
16 the relevant data that should be look at, it only
17 goes to 2022. Likewise, the data doesn't include
18 age ranges, and unlike the self-employed data, that
19 makes age-weighing a difficult exercise, which is
20 what the Turcotte Commission endorsed in the last
21 report.
22 But the real problem when you lump
23 these two comparators together is that it results
24 in the application of the self-employed lawyer
25 filters to the PLC data. So for context, the PLC

1 data wasn't before the previous Commissions, and
2 it's important to note that when the past
3 Commissions did apply filters to the data, it was
4 with an eye only on the self-employed lawyer data.
5 So the effects of the filters would be
6 more pronounced with the PLC data given the higher
7 earnings reported in the data. And then combining
8 the PLC data with the self-employed lawyer data, it
9 results in an exclusion of more data from the
10 self-employed lawyer data sets, and as I've
11 mentioned previously, the self-employed lawyer data
12 set, we submit, is a better representation of
13 salary for Canada at large and not just the CMAs.
14 So treating both as the same comparator
15 would really put more, again, emphasis on the CMAs
16 and more emphasis on the highest earners in Canada.
17 For the purposes of this Commission's
18 inquiry, it's sufficient to look at the
19 self-employed lawyer and the PLC data separately.
20 It gives the Commission what it needs. It ensures
21 that the data sets aren't unduly affected from one
22 another. It avoids the gymnastics necessary in
23 order to put these data sets together, and it also
24 ensures that the Commission properly considers
25 these data sets in their proper context.

1 If the Commission were to look at the
2 data as one comparator together, then we would
3 recommend that it consider not applying the same
4 filters to the PLC data because, as I've mentioned,
5 they have more of an impact on this PLC data that
6 is, again, heavily reliant on the income of the
7 highest earners in the CMAs.
8 Or alternatively, and this is something
9 that's mentioned in the Eckler reply report, it
10 would be necessary to apply an income cut-off at
11 the top of the data set, which would compensate for
12 the outliers within the highest earners, as we do
13 with the cut-off at the lower end of the spectrum
14 of compensation.
15 One final point on that is that it's a
16 bit of an overstatement to suggest that the PLC
17 data would in any way alter the findings of past
18 Commissions, especially in the early 2000s and in
19 the 2010s, when the data shows that most lawyers in
20 those time periods didn't operate as PLCs. And it
21 would be an even bigger over-correction to
22 recommend an increase to salaries, like a $60,000
23 increase, solely to compensate for this, but I'll
24 discuss this a bit more when I get to that $60,000
25 increase.

1 On that note, I'm going to talk about
2 the filters now. So that's in our main submissions
3 at paragraph 77. Put another way: What filters
4 should be used to ensure an accurate comparison
5 between the two levels of compensation?
6 In completing this task, there are some
7 goals that the Commission should keep in mind, the
8 first being that the goal of the third criterion,
9 of this inquiry, is not to replicate the salary of
10 the highest earners in private practice. This is a
11 guiding principle that previous Commissions have
12 abided by.
13 As Ms. Richards has explained, the goal
14 of judicial compensation is to attain a reasonable
15 and appropriate judicial compensation, and as the
16 Turcotte Commission mentioned at paragraph 102 of
17 its report, it could never be the role of judicial
18 compensation to, in any realistic way, match the
19 compensation of the most financially successful in
20 private practice.
21 The reason why this is so important to
22 keep in mind is that in filtering the data,
23 especially when applying multiple filters to the
24 data, it affects the analysis quite significantly
25 and, again, pushes the analysis more and more

1 towards the highest earners.
2 So I'll finally make use of the slides.
3 I'll put the slides up on the monitor. I find
4 Figure 11 of the Government's main submission is
5 particularly illustrative of this. So it applies
6 to all of the years on this figure, but I'm going
7 to be looking specifically at the year 2023.
8 So if you see the application of the
9 filters proposed by the Judiciary, it decreases the
10 number of lawyers in the CRA self-employed data set
11 from 11,580 to approximately 2,400. Again, it
12 shows that we aren't looking at the entire data
13 set, we're looking at a small fraction of it, and,
14 in fact, Figure 10 shows this, that in applying all
15 of these filters, we're left with 21 percent of the
16 data set, and this includes the proposed 90K
17 cut-off, which I'll get to a bit later.
18 But then once we're at this 21 percent,
19 we're then looking at the 75th percentile of the
20 data set. So, again, this is limited
21 information -- this is a limited subset of a much
22 larger data set, and it's something to keep in mind
23 that impacts the Commission when it looks at
24 judicial compensation, again, because of how it
25 impacts the highest earners.

1 Another goal and something that the
2 Commission should keep in mind is that limiting the
3 data towards these higher earners supports this
4 false narrative that the most outstanding
5 candidates from the bench, they are the
6 highest-paid individuals from the legal practice.
7 And as we have done in past Commissions, we would
8 urge the Commission not to accept this notion of
9 who would make the best judges.
10 As I've referenced a bit earlier on,
11 the task of evaluating what makes a candidate
12 highly recommended is a task that was given to
13 JACs, the Judicial Advisory Committees, that are
14 responsible for evaluating the candidacies of
15 applicants to the Judiciary.
16 They assess the qualifications of
17 lawyers based on professional competency or
18 competence, overall merit, and one factor that
19 isn't for consideration is how high their salary
20 is. Moreover, JACs are also mandated to achieve a
21 gender-balanced Judiciary that reflects the
22 diversity of the members of each jurisdiction.
23 So it's important that diversity within
24 society be reflected on the bench, and it's
25 necessary to look at all facets of the legal

1 position when appointing and not just on the
2 highest earners in order to promote this diversity.
3 A few words now on the appropriate
4 percentile. This is in our main submissions at
5 paragraph 91. So as the Government indicated in
6 its submissions, past Commissions, including the
7 Turcotte Commission, have looked at the
8 75th percentile.
9 A quick clarification regarding the
10 Government's position on this. As we've explained,
11 the Government has and always has been -- it's
12 always been its view that the application of
13 filters to a data set to look at only a subset of
14 data is not appropriate. So it would be preferable
15 not to filter the data rather than look at the
16 75th percentile of an already-filtered data set.
17 But that being said, the Government
18 doesn't oppose the use of a 75th percentile. The
19 Government agrees with my friends' submissions that
20 the 75th percentile is the appropriate percentile
21 to look at and doesn't oppose the use of this
22 filter once more. We just want to reiterate the
23 point that there is no evidence of a correlation
24 between the 75th percentile and the fact that an
25 individual is an outstanding candidate.

1 And for the purpose of this Commission,
2 the 75th percentile of self-employed lawyers in
3 2023, without any other filters applied, was
4 $349,625. And even when not considering the
5 judicial annuity, the judicial salary in 2023 was
6 $383,700.
7 I'll turn to the age filters next.
8 Those submissions are at paragraph 81 of the
9 Government's main submissions.
10 So the Turcotte Commission said that
11 focusing on the age group from which the majority
12 of judges are appointed is a useful starting point,
13 and the Government agrees with that. That's
14 because 68.5 percent of the appointments in the
15 last quadrennial period came from the 44-to-56 age
16 group.
17 But starting at that age group, it's
18 useful, but it's important not to lose sight of the
19 broader picture. The reason for that is that
20 almost 64 percent of self-employed lawyers in the
21 CRA data are outside of that age group, and it also
22 remains that approximately one-third of judicial
23 appointments come from outside of that age group as
24 well.
25 So if the Commission were to focus

1 exclusively on the 44-to-56 age group, as my
2 friends request in their submissions, then this
3 would result in the Commission looking at only
4 36 percent of the data that's available on
5 self-employed lawyers. This would, again, result
6 in moving the data towards the highest earners
7 because this period of time reflects the most
8 lucrative period for a self-employed lawyer.
9 And Figure 14, at page 37 of the
10 Government's main submission, shows this. You'll
11 see that the income peaks around the 48-to-51 age
12 group and then starts dropping considerably after
13 the 52-to-55 age group.
14 So while income of most self-employed
15 lawyers drops off with age, judges continue to
16 receiving increases in their salaries until they
17 reach 75 years of age, and this is illustrated in
18 Figure 6. Figure 6, which is at page 23 of the
19 Government's main submissions, you can see by that
20 added green line that the judges' incomes remain
21 the same regardless of age.
22 So this is, we would submit, a further
23 attraction to the Judiciary when someone considers
24 a judicial position, the income that they receive
25 with the age that passes.

1 So instead of eliminating all this
2 relevant data when it comes to the age groups, the
3 better approach would be to calculate a weighted
4 average that reflects the age distribution at the
5 age of appointment of judges, and that's what the
6 Turcotte Commission did last time.
7 With age-weighting, we can consider the
8 entire spectrum, and we assign greater weight to
9 where the majority of appointments are made and
10 lesser values where less of the judicial
11 appointments are made, rather than eliminating that
12 data in its entirety. This approach, again, more
13 accurately reflects the whole pool of self-employed
14 lawyers where the judicial appointments are drawn.
15 It's what the Commission endorsed last
16 time. It believed it was preferable in order to
17 reflect the Government's commitment to ensuring
18 that the Judiciary reflects the society in which we
19 live, and the continued use of age-weighing also
20 has a benefit.
21 As explained in the Eckler reply report
22 at page 6, this approach facilitates consistent
23 benchmarking for future comparisons, so if that
24 methodology is applied consistently, then we have
25 useful benchmarks for the Commission to compare in

1 future analysis.
2 I take my friends' submissions
3 regarding the change in numbers of the age groups
4 and where judicial appointments are made, that
5 there are lesser appointments in certain age groups
6 than there were before the last Commission. But a
7 change of one or two percentage points per age
8 group isn't really a change in circumstances that
9 would justify abandoning age-weighing, specifically
10 after the Turcotte report favoured that approach in
11 its evaluation.
12 The reason why is that if we find
13 ourselves in a situation where we're switching
14 methodologies every year based on a percentage
15 change in the appointment data, then what the
16 Commission would find itself in is in a position
17 where the quadrennial cycle changes methodology in
18 every Commission, which, we submit, would have an
19 impact on the usefulness of age-weighing
20 specifically because it is a useful benchmark.
21 I'll talk about salary exclusions.
22 Those are in our main submissions at paragraph 87.
23 We maintain that salary exclusions are
24 problematic, and that's because if, for example, we
25 look at the $80,000 cut-off that was used by the

1 Turcotte Commission, we're not actually looking at
2 the 75th percentile. We're looking at the
3 82nd percentile in the data, in the complete
4 distribution.
5 And at the risk of sounding like a
6 broken record, this would, again, have the result
7 of pushing the analysis more and more towards the
8 highest earners in private practice. And this is
9 especially true when you look at the PLC data
10 because of how heavily it focuses on the top
11 earners in the CMAs. And, again, more problematic
12 is the proposed increase to the cut-off from 80,000
13 to $90,000.
14 For context, the increase to $90,000
15 was the first increase since the McLennan
16 Commission in 2004. And the Turcotte Commission,
17 when it increased the cut-off, it didn't endorse an
18 approach where the cut-off would increase with
19 every quadrennial cycle. Up until that point,
20 previous Commissions that relied on inflation and
21 the CPI, they didn't increase the cut-off, despite
22 the arguments on that point.
23 So the Eckler report, at page 8, shows
24 that excluding salaries less than $90,000 results
25 in up to 32 percent higher compensation when you

1 compare it to the data without this exclusion. So
2 there's a big impact caused by the cut-off. So the
3 increase to $90,000 is something that the
4 Government opposes in the context of this inquiry.
5 Because, again, elevating the cut-offs feeds this
6 idea that there's a correlation between monetary
7 success and outstanding candidates, which is not
8 borne by the evidence.
9 Finally, I'll comment on the CMAs very
10 briefly because, in my understanding, based on my
11 friends' submissions, there should not be a
12 CMA-related filter applied to the data. Rather,
13 the CMA data is meant for broader consideration,
14 and that's something that the Government agrees
15 with.
16 But that being said, in applying a
17 $90,000 cut-off and then looking at the
18 75th percentile of this limited subset of data, the
19 Commission is indirectly applying a CMA filter to
20 the data. And this, again, is even truer when
21 we're looking at the PLC data, which, as I've
22 mentioned, 80 percent come from the CMAs.
23 So I'd previously shown you Figure 10.
24 With all filters applied, we get 21 percent. If we
25 remove the CMA filters, we're still left with only

1 25 percent. So that shows that there's not much of
2 a change from the fact of applying the CMA filters.
3 My friends have made submissions
4 regarding a drop in highly recommended applicants
5 and a drop in the number of appointments from
6 private practice. I'll say now, and considering
7 the time, leave a bit of this for reply, but the
8 evidence before the Commission is that the majority
9 of judicial appointments continue to come from
10 private practice.
11 Based on the statistics from the CFJA,
12 approximately 50 percent of the appointments to the
13 Judiciary between the year 2000 and 2024 were from
14 the private practice, and even more, the data
15 before the Commission supports that approximately
16 65 percent of appointments from the private sector
17 come from CMAs. So it shows this idea that current
18 judicial salaries are sufficient to attract
19 candidates whether or not they are in areas of
20 higher salaries.
21 And this is a good segue into the final
22 point I'd like to address today, which is the
23 $60,000 bonus raised by my friends. It's in our
24 supplementary submissions. We talk about this
25 starting at paragraph 6.

1 So Ms. Richards has already spoken
2 about the proposed increase, how $60,000 represents
3 approximately the median average income after tax
4 of Canadians in 2022, Canadians who face the same
5 inflationary pressures as the Judiciary, and she
6 also explained why it would be inappropriate to
7 give such a raise given the current economic
8 climate.
9 The one thing I'll add to that is the
10 third criterion, it's not meant to be an assessment
11 of whether the salaries of the highest earners in
12 private practice justify a raise in compensation.
13 The third criterion focuses on whether
14 or not there is a need to attract outstanding
15 candidates whether or not compensation is
16 sufficient to continue to attract outstanding
17 candidates, be they from the private practice or
18 the public service. This, alongside the three
19 other statutory criterias, help the Commission in
20 determining whether or not there's a risk to
21 judicial independence.
22 The objective evidence continues to
23 support that there is no difficulty attracting
24 judicial candidates with the current salary, and
25 that includes in private practice in the CMAs, who

1 continue to be the main source of appointments.
2 The $60,000 raise also has important
3 consequences on the work of this Commission and
4 future Commissions. As Ms. Richards has explained,
5 it results in an increase of approximately $119,000
6 over the quadrennial cycle if you keep that raise
7 and the judicial annuity -- ah, not judicial
8 annuity -- the IAI indexing in mind. So that 60K
9 increases the IAI indexing every year. And then
10 when the judicial annuity is then taken into
11 consideration, we get $170,000 in total, in total
12 increases, up until 2027.
13 So this is an unprecedented increase,
14 and the impact would continue on the valuation of
15 the IAI indexing for cycles to come, and it's why
16 the Government's position is it's not necessary to
17 protect judicial independence nor appropriate,
18 given the economic climate, to give this $60,000
19 raise in the circumstances.
20 The current salary with IAI indexing is
21 sufficient to keep the pace with increases in the
22 salaries of Canadians, whom the judges serve.
23 Madam Chair, Members of the Commission,
24 I thank you for your time. Those are my
25 submissions on the private-practice comparator.

1 Subject to any further questions, I'll
2 pass the baton to Ms. Norris to finish our
3 submissions. Thank you very much.
4 COMMISSIONER GIARDINI: Thank you very
5 much, Mr. Smith. That was very helpful for us.
6 And we do look forward to hearing from Ms. Norris.
7 So, you're up. Thank you.
8 SUBMISSIONS BY MS. NORRIS:
9 MS. NORRIS: Thank you, Madam Chair and
10 Commissioners. So I know I am coming close to our
11 time, so hopefully I should finish within the next
12 15 minutes. It may go a moment over.
13 I am going to address some of the other
14 public-sector comparator arguments that we've put
15 in our submissions as well as the fourth criterion,
16 which we're dealing primarily with the Block
17 comparator, and then I will also address some of
18 the arguments with respect to the associate judges.
19 So as Ms. Richards and Mr. Smith
20 reiterated, we're seeing a trend of diversity, and
21 Commissions have repeatedly highlighted that this
22 is important and that they recognize there can be
23 no exact comparator. So it is important to
24 consider the full picture, and, as Mr. Smith said,
25 we need to go beyond simply the highest amount.

1 So in our submissions and in the Eckler
2 report, we have highlighted some other professions,
3 which are, in fact, unlike the DM comparator, a
4 source from which judicial appointments are drawn
5 and, we say, are relevant; that includes Provincial
6 Government, Federal Government, law professors,
7 et cetera; government agency appointees.
8 So, again, this is part of the whole
9 picture that we are trying to paint for the
10 Commission, and we say it is something that you can
11 consider. And as Ms. Richards pointed out, you are
12 not bound by all the comparators that have been
13 considered in the past.
14 This is particularly relevant when you
15 consider the DM comparator, which I'll get to next,
16 which really focused on attributes. We recognize
17 that deputy ministers do not do the same thing as
18 judges, but we use them as a comparator because of
19 their attributes, because of the type of people
20 that they are, and we say that this group that we
21 have highlighted at paragraphs 110 to 115 of our
22 submissions fall within that group of people who
23 are appropriate to look at because, A, they're a
24 source of judges, and, B, they have these
25 attributes.

1 So just briefly, I just want to briefly
2 highlight that. The rest of our submissions are in
3 our submissions, and also, there is some discussion
4 of this in the Eckler report; in particular, on
5 page 32 and 43.
6 So with respect to the fourth
7 criterion, which is whether or not any objective
8 criteria is relevant to increasing judicial salary,
9 we say there is not, that the IAI has done its job
10 and will continue to do its job over the next four
11 years. There is nothing to justify an increase in
12 salary beyond that indexing.
13 And I would like to address
14 specifically here -- because we've already set out
15 in our written submissions, and I'm not going to
16 repeat them -- some of our cautions with respect to
17 the DM comparator and why it cannot be an exact
18 science, and it is something to consider, but it's
19 not binding, why it needs to continue to be the
20 Block comparator. Because what Mr. Boudreau has
21 suggested is that it needs to change into something
22 different.
23 The Block comparator has been used
24 historically as an indicator as to the
25 public-sector portion of the evidence. As I said

1 before, it is tied to attributes, and the idea was
2 it was the attributes of senior public servants.
3 And I would say any deputy minister could be
4 considered a senior public servant -- it was not
5 necessarily the highest level of deputy minister,
6 which would be the DM-4 -- but it was high-level
7 deputy ministers, which would have attributes of
8 individuals that you would be looking to attract to
9 the Judiciary.
10 Another important point about the Block
11 comparator is that consistency as a comparator was
12 very important to past Commissions. The manner in
13 which it was calculated was done in a way to ensure
14 consistency.
15 So the reason that we don't -- and past
16 Commissions have considered this, the reason that
17 we don't just do an average of DM-3 pay is because
18 that is not consistent because the manner in which
19 DMs are appointed and promoted is variable; the
20 amount of at-risk pay is variable from year to
21 year. So you would not get that consistency, and
22 this has been explicitly considered by past
23 Commissions.
24 They recognized that the Block -- that
25 DM-3s could be an important comparator, but they

1 were concerned about the small sample size. They
2 were concerned about the highly individualized
3 nature of deputy ministers' compensation. So that
4 is why the Block Commission picked the halfway
5 point of the at-risk pay and the halfway point of
6 the range in the manner that they did. It was very
7 much on purpose.
8 The DM-4, whether or not that is an
9 appropriate comparator, has also been considered
10 repeatedly by past Commissions, and they remained
11 of the view, and we say that this has not changed,
12 that the DM-4 is truly an exceptional class of
13 individuals, which includes very few people,
14 including the Clerk of the Privy Council.
15 So at paragraph 105 of the Block
16 Commission report, they noted:
17 "There are only two ministers,
18 and this level appears to be
19 reserved for exceptional
20 circumstances and the positions of
21 particularly large scope. We see no
22 justification at this time to use it
23 as a comparator in determining
24 adequacy of judicial salaries."
25 That has not changed. Four is still a

1 very small number. It is still that very, very
2 exceptional circumstance in which it's used.
3 And a point on which we do seem to be
4 in agreement with our friends is that the IAI has
5 done its job with respect to the Block comparator.
6 We're there. We've reached it. We've closed that
7 gap. So the only justification to move past that
8 seems to be that we've reached it, so now we need
9 to look for what's a bit higher.
10 And our submission is that is not
11 appropriate, and there is no justification for
12 moving away from the current manner in which the
13 DM-3 Block comparator is calculated.
14 I'll also just quickly draw your
15 attention to the Levitt Commission, which was right
16 after the Block Commission, where they also
17 considered whether or not the DM-4 should be part
18 of it, and at paragraph 28 of that decision, the
19 Levitt Commission noted it to be a benchmark and,
20 at paragraph 27, said:
21 "The DM-3 may not be ideal, but
22 it is closest. It eliminates
23 outliers both above and below."
24 I'm going to move on from that, unless
25 you have any questions, but I just wanted to

1 highlight why we are taking that position.
2 So with respect to associate judges,
3 the Government acknowledges the important work done
4 by associate judges in ensuring the smooth
5 operation of the Federal Court. We recognize
6 they're indispensable and a group of highly
7 qualified individuals. The Government submits,
8 however, that the current method of calculation of
9 their compensation at 80 percent of the salary
10 level of Federal Court judges or the court to which
11 they are appointed remains appropriate.
12 And the main concern we have here is
13 that the arguments that are being made with respect
14 to the duties of Federal Court judges, their
15 importance, their jurisdiction, all those things
16 have really not changed since 2016. And at that
17 time, this Commission considered 80 percent, which
18 was an increase to what it had been before, to be
19 an appropriate proportion of the Federal Court
20 justice salary.
21 And I note that since -- like, in 2016,
22 the salary increased to 80 percent, there's a
23 judicial annuity, and, more recently, there's the
24 ability to become supernumerary. There's been an
25 increase in incidentals, and judicial independence

1 does not require a further increase above the
2 80 percent.
3 The Rémillard Commission, which was the
4 first Commission in 2016 that included associate
5 judges' salary, really did consider at depth the
6 issue of Federal Court justices, and I would
7 encourage you to take a look at that. They
8 recognized that the Federal Court justice was an
9 appropriate comparator; in fact, the most
10 appropriate comparator, which I think we're in
11 agreement with, with our friends, is that it does
12 need to be a percentage of a comparator of
13 Federal Court judges rather than looking elsewhere.
14 And, in fact, at paragraphs 124 and 125
15 of the Rémillard Commission, they recognized the
16 challenge in using provincial masters as a
17 comparator, as an example.
18 And the fact remains that the associate
19 judges' salary continues to reflect the
20 jurisdiction of associate judges and their role,
21 which we've set out at paragraph 30 of our reply
22 submissions, and it remains relatively the same as
23 it did in 2016. They cannot hear judicial reviews.
24 They cannot hear actions above $100,000. They
25 certainly have a very important role and

1 jurisdiction, but it is different than the
2 Federal Court judges' jurisdiction and rule, and,
3 in our submission, the 80 percent is a reflection
4 of the proportionality that is required.
5 Again, we recognize the hard work that
6 associate judges do, the challenging circumstances
7 in which they work, and acknowledge the statements
8 as to complexity of their work; however, the
9 Judiciary has also noted an increase of complexity
10 in their cases. So, again, proportionality
11 requires that associate judges' salary match their
12 roles and responsibilities.
13 So in conclusion, and I would like to
14 note that we will reserve for reply, just given the
15 time, and I think there are a few points that we
16 may make tomorrow, but Canada has an outstanding
17 independent Judiciary. It is increasingly
18 reflective of the diversity of Canadian society and
19 perspectives, and this is a good thing.
20 What we have attempted to do today is
21 to provide you with a range of evidence and
22 perspective in order to see the full picture with
23 objective evidence. And our submission is that
24 taking that into account -- current salary levels,
25 the significant value of the annuity, and the

1 manner in which the IAI index will continue to
2 operate -- changes to the judicial compensation is
3 not justified over the next four years, and we also
4 recognize the challenging economic circumstances in
5 which we find ourselves.
6 We have outlined each of the statutory
7 criteria, and we say that an annual IAI increase to
8 a maximum of 14 percent is appropriate considering
9 all of these factors and a sufficient guarantee to
10 continue financial security and judicial
11 independence.
12 Unless there are any questions, that's
13 it from us today.
14 COMMISSIONER GIARDINI: [Inaudible].
15 We have Ms. Wu here to speak to us on
16 behalf of the Canadian Bar Association. We really
17 welcome you participating in this important
18 process, and we'll look forward to hearing from you
19 after the break. Thanks, all.
20 (RECESS AT 2:59 P.M.)
21 (RESUMING AT 3:30 P.M.)
22 COMMISSIONER GIARDINI: Thank you, all,
23 for reconvening. We are going to hear now from the
24 Canadian Bar Association.
25 Ms. Wu, you are up.

1 SUBMISSIONS BY MS. WU:
2 MS. WU: Madam Chair and Members of the
3 Commission, my name is Roselle Wu. I am the chair
4 of the Canadian Bar Association's Judicial Issues
5 Subcommittee. Thank you for the opportunity to
6 address the Commission on this important matter.
7 The Canadian Bar Association is a
8 national professional association representing
9 40,000 jurists, including lawyers, law professors,
10 law students, articling and bar admission students,
11 and Québec notaries.
12 The CBA's mandate includes seeking
13 improvements in the law and administration of
14 justice. Judicial independence is a foundational
15 constitutional principle that benefits all
16 Canadians. Our citizens rely upon the high quality
17 of our Judiciary, whose independence is crucial to
18 the administration of justice in Canada. We are
19 here today to speak with you from this perspective
20 on the issue of judicial compensation.
21 You have received our written
22 submission. I would like to speak briefly about
23 some of the principles that the CBA believes should
24 guide the deliberations of this esteemed
25 Commission.

1 The CBA is an objective observer. We
2 are not here on behalf of the judges, the associate
3 judges, the Government, or any party. We want to
4 assist the Commission in its work in the process of
5 determining judicial compensation properly and
6 fairly to reflect the imperative of appropriate
7 judicial compensation. Our sole interest is in
8 protecting and promoting judicial independence in
9 the context of the administration of justice.
10 The proper functioning of our justice
11 system depends on a high level of judicial
12 competence. Judges' compensation and benefits must
13 be at a level to attract and retain outstanding
14 candidates. Such candidates tend to be senior
15 practitioners or practitioners in mid-career who
16 otherwise would be inclined to remain in their
17 current situation, whether in private practice,
18 in-house, Government, et cetera.
19 The appropriate measure or comparator
20 to determine the level of judicial salaries is that
21 of lawyers who are senior private practitioners and
22 senior public servants who form the legal piers of
23 the appointed justices.
24 I'm now going to provide some comments
25 on the data that is or is not available regarding

1 whether outstanding candidates are deterred from
2 applying for the Judiciary. Compensation levels
3 should ensure that judges and their dependents do
4 not experience significant economic disparity
5 between pre- and post-appointment levels so that
6 outstanding candidates are not deterred from
7 applying.
8 The Turcotte Commission noted at
9 paragraph 215 of their report that it was their
10 mandate to determine whether there is a failure to
11 attract outstanding candidates to the Judiciary
12 because of too great a gap between judicial
13 compensation and private-practice compensation.
14 Ultimately, the Turcotte Commission
15 concluded at paragraph 216 that, based on the
16 evidence and submissions before them, they did not
17 see compelling evidence that there was an inability
18 to attract outstanding candidates to the Judiciary.
19 There was before them a clear deficiency of data on
20 the income of lawyers in private practice. It was
21 due to that deficiency that the Turcotte Commission
22 did not see compelling evidence that there was an
23 inability or failure to attract outstanding
24 candidates to the Judiciary.
25 Before this Commission, there is data

1 on the income of lawyers in private practice,
2 including the income levels of self-employed
3 lawyers practicing through professional law
4 corporations. Although the private-sector data
5 demonstrates that there is a gap between judicial
6 compensation and private-sector compensation, there
7 is no direct evidence that is from the potential
8 candidates themselves as to whether that gap is
9 deterring outstanding candidates from applying for
10 judicial positions.
11 The Turcotte Commission made several
12 recommendations directed at the data deficiency;
13 however, in our submission, none of those
14 recommendations extended to obtaining data directly
15 from lawyers in private practice. None of the
16 recommendations were targeted at determining
17 whether outstanding candidates, who are in the
18 higher-income brackets, are deterred by judicial
19 salaries from applying for judicial appointment.
20 This is not a new concept. The Block
21 Commission specifically noted, for example, that a
22 snapshot of appointees' salaries prior to
23 appointment is not particularly useful in helping
24 to determine the adequacy of judicial salaries.
25 In that regard, the Block Commission

1 stated at paragraphs 90 and 91 as follows, quote:
2 "Such a study does not tell us
3 whether judicial salaries deter
4 outstanding candidates who are in
5 the higher-income brackets of
6 private practice from applying for
7 judicial appointment.
8 A study that revealed this
9 information would be more helpful in
10 determining the adequacy of judicial
11 salaries. Ideally, this information
12 would be obtained through a targeted
13 survey of individuals who were at
14 the higher end of the earning scale
15 and who could be objectively
16 identified as outstanding potential
17 candidates for judicial appointment.
18 We acknowledge, however, the
19 difficulties inherent in the design
20 and implementation of any such
21 survey. Such information might also
22 be indirectly obtained through an
23 analysis of whether the number of
24 higher-earning appointees to the
25 bench is increasing or decreasing

1 over time."
2 And at paragraph 91:
3 "Should similar information be
4 sought in the future, we urge the
5 Government and the Association and
6 Council to consult on the design and
7 execution of such studies to ensure
8 that future Commissions are provided
9 with information that both parties
10 agree is reliable and useful."
11 And that's the end of the quote.
12 In our written submissions, we noted
13 that the Commission may wish to consider whether
14 obtaining data from private-sector lawyers would be
15 helpful to future Commissions, and, if so, the
16 Commission may provide guidance on the questions to
17 be asked and the method of data collection.
18 I'm now going to turn to some of the
19 more indirect evidence regarding whether
20 outstanding candidates are deterred from applying
21 for judicial positions due to compensation levels.
22 Although there is no direct evidence
23 from potential candidates themselves that
24 outstanding candidates are deterred from applying
25 for judicial positions due to compensation levels,

1 there is indirect evidence, as noted in the reply
2 submissions of the Judiciary.
3 In particular, the brief statement that
4 had been made by Chief Justice Popescul of the
5 Saskatchewan Court of Queen's Bench, as it then
6 was, at the hearing before the Turcotte Commission,
7 and that's in the transcript from May 10th, 2021,
8 pages 46 to 52, at page 49 to 50, Chief Justice
9 Popescul stated:
10 "That lawyers in private
11 practice seeking appointment to the
12 bench accept a reduction in income
13 is not new. This reduction has,
14 however, become increasingly
15 significant, as is clear from my
16 discussions with prospective
17 candidates as well as my colleagues
18 at the CJC.
19 Outstanding candidates from
20 private practice are increasingly
21 unwilling to accept such a
22 significant reduction in income in
23 exchange for what is perceived as
24 increasingly demanding judicial
25 functions.

1 As a result, in my experience,
2 many outstanding candidates who I
3 would view as ideally suited for
4 appointment to the Court of Queen's
5 Bench are simply not interested in
6 judicial appointment."
7 Notably, Chief Justice Popescul, the
8 trends noted by him were witnessed by him and found
9 in Saskatchewan, which does not even have one of
10 the top-ten CMAs.
11 Secondly, Chief Justice Morawetz of the
12 Ontario Superior Court of Justice has provided a
13 written statement for this Commission. It is found
14 at Exhibit A of the Judiciary's Book of Documents.
15 The second part of Chief Justice Morawetz's
16 statement addresses the difficulty in recruiting
17 candidates from private practice. At paragraph 14,
18 Chief Justice Morawetz states, quote:
19 "An increasing number of
20 qualified practitioners no longer
21 view a judicial appointment,
22 considering its attendant
23 responsibilities and benefits, as
24 attractive in light of the resulting
25 significant reduction in income."

1 And at paragraph 18, Chief Justice
2 Morawetz attests that, despite his best efforts, he
3 has found himself unable to persuade qualified
4 potential candidates from applying for judicial
5 appointments, and that, quote:
6 "A routinely cited reason for
7 this lack of interest is the
8 combination of the heavy workload of
9 Superior Court judges and the
10 perceived lack of commensurate pay
11 for that work."
12 And then finally, the June 2024 CBC
13 article reporting on the comments of Chief Justice
14 of Canada, Chief Justice Wagner, the CBC reported
15 as follows. This is found at Tab 72 of the Book of
16 Exhibits and Documents of the Judiciary, and it's
17 at page 1505 of the PDF, quote:
18 "Wagner said that in British
19 Columbia and Ontario, where the cost
20 of living is higher, it has been
21 difficult to attract candidates to
22 become judges because salaries and
23 working conditions make the job
24 unattractive."
25 In short, while there is no direct

1 evidence that is from the potential candidates
2 themselves that outstanding candidates are deterred
3 or discouraged from applying for judicial positions
4 due to the compensation gap, there are the clear
5 statements of the Chief Justice of Canada, the
6 Chief Justices of two Superior Courts, and this
7 morning, this Commission also heard from the
8 Honourable Paul Crampton, Chief Justice of the
9 Federal Court, on the difficulty in attracting
10 top-notch candidates in certain practice areas and
11 from certain provinces.
12 I'm now going to comment generally on
13 the need to attract candidates to the Judiciary.
14 It is notable that the narrative sometimes flips
15 from the positive "need to attract" outstanding
16 candidates, which is the actual statutory criteria
17 to the negative; namely, whether the extent of the
18 compensation gap has resulted in a "failure to
19 attract" or "inability to attract" outstanding
20 candidates, as was worded by the Turcotte
21 Commission.
22 In other words, the narrative has
23 become whether the compensation gap is so great
24 that outstanding candidates are discouraged or
25 deterred from applying for the Judiciary. We need

1 only go back to earlier Quadrennial Commissions to
2 see how the narrative has shifted.
3 I'll turn to the first Quadrennial
4 Commission; that's the Drouin Commission from 2000.
5 The report can be found at Tab 9 of the Joint Book
6 of Documents.
7 Before the Drouin Commission, the 1997
8 data showed that the income of private
9 practitioners at the 75th percentile of the
10 comparative population, which they defined to have
11 an income exclusion at $50,000 and focused on
12 self-employed lawyers between the ages of 44 to
13 56 years, using that data, the Drouin Commission
14 noted at page 44 of its report that when the
15 attributed value of the judicial annuity is
16 included, judicial compensation exceeded the income
17 of private practitioners at the 75th percentile on
18 a Canada-wide basis in all areas except Toronto and
19 Calgary.
20 On a province-by-province basis, the
21 judges' salary, adjusted for the benefit of the
22 judicial annuity at the larger of the two estimated
23 values, exceeded that of the 75th percentile group
24 in every province. The Canada-wide average was
25 that the adjusted judges' salary at that time was

1 27 percent greater than that of the 75th percentile
2 of the comparator population. Those figures are
3 set out at Table 2.4 of the Drouin report on
4 page 44.
5 Against that backdrop, the Drouin
6 Commission concluded as follows at page 46:
7 "We do not think it responsible
8 to suggest that the salary level of
9 the Judiciary should be set so as to
10 match the income of the
11 highest-income-earning lawyers in
12 the largest urban centres in Canada.
13 What is required, in our view, is
14 the striking of an appropriate
15 balance in order to ensure that the
16 Judiciary salary level is sufficient
17 to continue to attract outstanding
18 candidates to the bench, including
19 outstanding candidates for the most
20 lucrative of legal services markets
21 in Canada, and that current and
22 future judges serving in urban areas
23 receive a fair and sufficient
24 salary."
25 I'll now turn to the second Quadrennial

1 Commission, being the McLennan Commission, in 2004.
2 That report is at Tab 10 of the Joint Book of
3 Documents. The McLennan Commission deplored the
4 deficiencies in the income data available to it but
5 nonetheless considered the income of lawyers in
6 private practice at the 75th percentile between the
7 ages of 44 and 56. The Commission commented as
8 follows at pages 48 to 49 of their report:
9 "There will always be lawyers
10 who earn significantly more than the
11 75th percentile of lawyers'
12 professional income that we use for
13 this comparator group. And while
14 many in that group may choose not to
15 seek judicial office, many qualified
16 persons in that group do accept the
17 financial sacrifice involved because
18 of the other attractions of judicial
19 life."
20 And I want to emphasize the next
21 sentence:
22 "It is important, we believe,
23 to establish a salary level that
24 does not discourage members of that
25 group from considering judicial

1 office."
2 And then at page 15, the McLennan
3 Commission concluded that:
4 "Judicial salaries and benefits
5 must be set at a level that those
6 most qualified for judicial office,
7 those who can be characterized as
8 outstanding candidates, will not be
9 deterred from seeking judicial
10 office."
11 The third Quadrennial Commission, the
12 Block Commission, expressly agreed with that
13 conclusion at page 24 of their report, which can be
14 found at Tab 11 of the Joint Book of Documents.
15 The Block Commission went on to state
16 at paragraph 26:
17 "It is not sufficient to
18 establish judicial compensation only
19 in consideration of what
20 remuneration would be acceptable to
21 many in the legal profession. It is
22 also necessary to take into account
23 the level of remuneration required
24 to ensure that the most senior
25 members of the bar will not be

1 deterred from seeking judicial
2 appointment. To do otherwise would
3 be a disservice to Canadians, who
4 expect nothing less than excellence
5 from our judicial system, excellence
6 which must continue to be reflected
7 in the calibre of judicial
8 appointments made to our Court."
9 The Block Commission found themselves
10 faced with the same difficulties as the McLennan
11 Commission in obtaining reliable data on the income
12 of lawyers in private practice. Based on the data
13 presented to them, the Block Commission was
14 satisfied that there are lawyers in private
15 practice whose income greatly exceeded those of
16 judges, whether the judicial annuity is included or
17 not. At paragraph 116, the Block Commission
18 commented, quote:
19 "The issue is not how to
20 attract the highest earners. The
21 issue is how to attract outstanding
22 candidates. It is important that
23 there be a mix of appointees from
24 private and public practice, from
25 large and small firms, and from

1 large and small centres; however,
2 there is no certainty that if the
3 income spread between lawyers in
4 private practice and judges were to
5 increase markedly that the
6 Government would continue to be
7 successful in attracting outstanding
8 candidates to the bench from amongst
9 the senior members of the bar in
10 Canada."
11 So we now fast-forward. There now does
12 seem to be evidence that the income spread has
13 increased markedly. The Commission also has before
14 it the statements of Chief Justice Popescul,
15 Chief Justice Morawetz, and the oral submissions of
16 Chief Justice Crampton as well as a CBC report of
17 the comments of Chief Justice Wagner.
18 I'm now going to turn to the need to
19 attract a number of outstanding candidates from
20 diverse groups.
21 Attracting and expanding the number of
22 outstanding candidates from diverse groups for
23 judicial appointment requires judicial compensation
24 to be competitive. The Judiciary must reflect the
25 Canadian population, including women, Black,

1 Indigenous, and people of colour, disabled persons,
2 persons of all gender and sexual identities, and
3 members of other underrepresented groups.
4 Inclusion of these candidates reflects
5 the diversity of Canadian society and enhances the
6 Judiciary's credibility. Many of these candidates
7 make significant contributions to their communities
8 by advocating on their behalf.
9 As noted in our written submission, as
10 of February 1st, 2024, only 1.86 [percent] of
11 federal judicial appointees identified as
12 Indigenous, and only 6.44 percent identified as
13 racialized. We do note that the current
14 questionnaire uses the term "visible minority."
15 Many diverse lawyers are involved in
16 organizations that support and promote their
17 members in various sectors, including the legal
18 profession and the Judiciary.
19 For some outstanding candidates, the
20 decision to apply to the bench means stepping back
21 from some personal involvements and loyalties.
22 Diverse lawyers may or may not be willing to give
23 up their role in promoting, advocating for, and
24 supporting their communities' endeavors for a
25 career on the bench. Reasonable compensation can

1 create confidence so they can step away from these
2 commitments without regret and demonstrate their
3 leadership for their communities and the rest of
4 Canada by becoming a judge.
5 Furthermore, it is important to note
6 that the Judiciary should be composed of judges
7 with diverse professional experiences. The
8 importance of this is set out in the statement of
9 Chief Justice Morawetz of the Ontario Superior
10 Court of Justice. Specifically, at paragraph 5 of
11 his statement, Chief Justice Morawetz states,
12 quote:
13 "Within this diversity, it is
14 important that a significant
15 contingent of appointees come from
16 private practice, as they bring a
17 unique expertise that is
18 increasingly essential to addressing
19 the growing complexity of modern
20 litigation."
21 At paragraph 10 of his statement,
22 Chief Justice Morawetz sets out specific examples
23 of the increasingly complex legal proceedings which
24 call for a growing level of judicial
25 specialization, including the areas of commercial

1 law, insolvency, family law, adjudication of
2 First Nations claims, class actions, and estates
3 litigation.
4 In short, it is important for the
5 Judiciary to be composed of judges with diverse
6 professional backgrounds, including a significant
7 contingent of appointees from private practice. As
8 noted by Chief Justice Morawetz at paragraph 13 of
9 his statement, this is, quote:
10 "Essential for Canada's
11 Superior Courts to remain a
12 first-class institution capable of
13 meeting the evolving needs of
14 society."
15 The CBA agrees with those comments.
16 Notably, there has been a stark reduction in the
17 percentage of appointees from private practice,
18 even in the relatively brief period since the
19 beginning of the Quadrennial Commissions.
20 As noted in the Judiciary's main
21 submissions at Table 1 and 2 on pages 30 and 32 of
22 their main submission, the percentage of appointees
23 from private practice during the period from
24 April 2020 to March 2024 was 63 percent, and it was
25 53 percent in British Columbia.

1 This is in stark contrast to the
2 percentages reported by the Drouin Commission in
3 2000, which was the first Quadrennial Commission.
4 At pages 36 to 37, the Drouin Commission noted that
5 in the years 1990 to 1999, 73 percent of appointed
6 judges were drawn from private practice.
7 The Drouin Commission also noted that
8 if the 11 percent of appointed judges who were
9 elevated to the Judiciary from a provincial or
10 territorial bench were excluded from that
11 assessment, then approximately 82 percent of those
12 appointed to the bench were appointed from the
13 private bar.
14 I'm now going to make a few brief
15 comments regarding the compensation of associate
16 judges of the Federal Court.
17 Salaries and benefits of associate
18 judges of the Federal Court must be at a level to
19 attract the most qualified candidates. It must be
20 commensurate with compensation for comparable
21 judicial officers in others courts, such as
22 traditional masters, also known as associate judges
23 in certain of the Superior Courts, and their
24 compensation must reflect the respect with which
25 the Federal Court is regarded but at a level

1 subordinate to Federal Court judges.
2 In conclusion, the Commission is
3 required to consider the need to attract
4 outstanding candidates to the Judiciary. This
5 Commission has before it income data that has been
6 analyzed by the Judiciary and by the Government and
7 by the associate judges as well as the statements
8 of various Chief Justices, including Chief Justice
9 Morawetz and the oral submission of Chief Justice
10 Crampton.
11 If more direct evidence is necessary or
12 would be helpful, the Commission may wish to
13 provide guidance for the collection of such data.
14 Attracting outstanding candidates also requires a
15 consideration of diversity, including attracting
16 outstanding candidates from diverse groups and
17 attracting outstanding candidates from diverse
18 professional experiences.
19 With fair and just compensation, the
20 Federal Government can ensure that it is casting
21 its net as wide as possible in seeking outstanding
22 candidates for the bench.
23 The CBA also notes that alongside the
24 importance of competitive judicial salaries, there
25 is a pressing need to address the broader issue of

1 underfunding within the justice system.
2 Insufficient financial resources impact not only
3 the ability to attract and retain outstanding
4 candidates but also the capacity of courts to
5 function efficiently. The underfunding of a system
6 can exacerbate delays, reduce access to justice,
7 and contribute to the overall strain on the
8 Judiciary.
9 Therefore, ensuring that judicial
10 compensation is competitive must be viewed as part
11 of a broader effort to secure a well-sourced and
12 effective justice system that can uphold its
13 critical role in Canadian society.
14 Those are our submissions. Thank you
15 for the opportunity to provide you with my
16 comments.
17 COMMISSIONER GIARDINI: Thank you,
18 Ms. Wu, and please extend our gratitude to the
19 Judicial Issues Subcommittee and to the board of
20 the CBA for providing us with the insights that
21 you've delivered to us today. We're grateful.
22 MS. WU: Thank you, and I will do so.
23 COMMISSIONER GIARDINI: I'm going to
24 talk a little bit about process. I think we are
25 going to be reconvening tomorrow at 9:30 in the

1 same place.
2 We have been formulating questions that
3 we will be putting to the participants. We want to
4 make sure that they are as crisply and accurately
5 articulated as possible, so we've been debating how
6 to best effect that. We think the best approach is
7 to provide them in writing, in both official
8 languages, as soon as possible after tomorrow to
9 everyone at the same time so we can seek your
10 further responses to the questions.
11 It may be that tomorrow we will have
12 some questions to articulate from where we sit.
13 We're not sure yet. We will decide by the end of
14 the day tomorrow. So that may affect your timing
15 tomorrow as well for how much time you have to
16 devote to being here as opposed to -- I'm sure
17 everyone has other tasks to do as well.
18 Are there questions or requests for
19 clarity on any of that from anybody here?
20 [No verbal response.]
21 We don't propose to ask impossible
22 questions, if that's in your minds. At least, I
23 don't think we will. Are we?
24 COMMISSIONER FLACK: Well, we'll see.
25 COMMISSIONER GIARDINI: Well, we'll

1 just put one impossible question.
2 All right. Well, I think --
3 MR. BIENVENU: Sorry, just to clarify.
4 COMMISSIONER GIARDINI: Yes.
5 MR. BIENVENU: The written questions
6 that you have alluded to would be submitted to
7 parties for them to provide additional written
8 submissions in response; is that correct?
9 COMMISSIONER GIARDINI: In response,
10 yes.
11 MR. BIENVENU: Thank you.
12 COMMISSIONER GIARDINI: Yeah, yeah.
13 MR. BIENVENU: Very well.
14 COMMISSIONER GIARDINI: And I don't
15 think we're going to direct them to anyone in
16 particular, although there may be, obviously, more
17 interest on one side or the other on some of what
18 we might ask. And everything we ask about will
19 arise out of the materials that we have, so.
20 Am I misstating our project in any way?
21 COMMISSIONER HODSON: No, that's good.
22 COMMISSIONER GIARDINI: Do I stand
23 corrected? All right. Well, there's canals to be
24 skated on, so I suggest we adjourn for today.
25 MS. RICHARDS: I was just going to say,

1 if it helps the parties, we've had a brief
2 conversation. That's very helpful for us to know,
3 and we are certainly anxious to assist the
4 Commission however we can, and if that is of the
5 most assistance, of course, we're happy to respond
6 to your written questions.
7 Based on that guidance, certainly, we
8 do not anticipate we will take a full hour tomorrow
9 in terms of reply. I just thought I'd say that. I
10 don't know if my friends have thought about that as
11 well, but in terms of the workings of the
12 Commission and for the other parties, it seems
13 likely that we will not need until later in the day
14 tomorrow.
15 MR. BIENVENU: We'll see how it goes,
16 but, you know, we won't speak beyond what we think
17 would be helpful to the Commission, let's put it in
18 those terms.
19
20 -- Meeting adjourned at 3:58 p.m.