

Judicial Compensation and Benefits Commission Hearings

English Transcript
on Monday, May 10, 2021



77 King Street West, Suite 2020
Toronto, Ontario M5K 1A1

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1 IN THE MATTER OF THE JUDGES ACT,
2 R.S.C. 1985, c. J-1

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7 2021 JUDICIAL COMPENSATION
8 AND BENEFITS COMMISSION
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17 --- This is the transcript of a Public Hearing,
18 taken by Neesons Reporting, via Zoom virtual
19 platform, on the 10th day of May, 2021
20 commencing at 9:30 a.m.

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23 [All participants appearing virtually or
24 telephonically.]

25 REPORTED BY: Helen Martineau, CSR

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

2 Mtre Martine Turcotte Madam Chair

3
4 Peter Griffin Commissioner

5
6 Margaret Bloodworth Commissioner

7
8
9 P A R T I C I P A N T S:

10 Pierre Bienvenu Canadian Superior
11 & Azim Hussain Courts Judges
12 & Jean-Simon Schoenholz Association
13 & Chief Justice and the Canadian
14 Martel D. Popescul Judicial Council
15 (The Judiciary)

16
17
18 Andrew K. Lokan Federal Court
19 Prothonotaries

20
21
22 Christopher Rupar Government of Canada
23 & Kirk Shannon
24 & Samar Musallam

25

1	Chief Justice	Court Martial Appeal
2	Richard Bell	Court
3	& Eugene Meehan, Q.C.	
4	& Cory Giordano	
5		
6		
7	Justice Jacques	Independent Appellate
8	Chamberland	Judge
9		
10		
11	Brad Regehr	Canadian Bar
12	Indra Maharaj	Association
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1 -- Upon commencing at 9:35 a.m.

2 MADAM CHAIR: Good morning. And
3 welcome to the Judicial Compensation and
4 Benefits Commission. My name is Martine, I am
5 the Chair of this Commission.

6 This is Margaret Bloodworth.

7 MADAM COMMISSIONER: Good morning.
8 everyone.

9 MADAM CHAIR: And I'd like to
10 introduce, as well, my colleague Peter Griffin.

11 MR. COMMISSIONER: Good morning.

12 MADAM CHAIR: I would like to start by
13 saying thank you very much for joining us today.
14 We have a very full agenda and I would like to
15 respect it because we have a very hard stop at
16 4:30 every afternoon otherwise we lose our
17 translators, so this is just a reminder.

18 And with that, I'd like to turn it
19 over to the representative of the judiciary.
20 And I would ask each party, when you start your
21 presentation if you could introduce yourself and
22 your colleagues that would be very helpful to
23 us. Thank you.

24 MR. BIENVENU: Thank you, Madam Chair.
25 Good morning. It is an honour for me and my

1 colleagues, Azim Hussain and Jean-Simon
2 Schoenholz, to appear before you on behalf of
3 the Canadian Superior Courts Judges Association
4 and the Canadian Judicial Council. I would like
5 to begin by thanking each of you, on behalf of
6 the federal judiciary, for having accepted to
7 serve on the Commission. I know that my friends
8 Mr. Rupar, Mr. Shannon, all of their colleagues
9 representing the government of Canada, as well
10 as Mr. Lokan, representing the Federal Court of
11 Prothonotaries, join me in acknowledging and
12 commending the sense of public duty and
13 commitment to judicial independence evidenced by
14 your agreement to serve on the Commission.

15 As members of the Commission your
16 names are added to a small group of renowned
17 Canadians who, since the very first Quadrennial
18 Commission in 1983 agreed to take part in this
19 process and thus contribute to promoting
20 judiciary independence and ensuring that the
21 highest quality candidates make up the Canadian
22 judiciary --

23
24 [AUDIO OF SPEAKER NOT COMING THROUGH]
25

1 -- by the landmark decision
2 of the Supreme Court of Canada in the PEI
3 reference. The Commission is no longer a
4 teenager and it is a sign of the maturity of the
5 Quadrennial process that both principal parties,
6 without consulting each other, chose to
7 re-appoint their respective nominees to the
8 previous inquiry. And in so doing the principal
9 parties expressed confidence not just in the two
10 Commission members concern, but indeed also in
11 the larger process over which the Commission
12 presides.

13 Now, at your invitation I would like
14 to introduce the representatives of the Canadian
15 Superior Court Judges Association and the
16 Canadian Judicial Council who are attending this
17 hearing, albeit, like all of us, virtually.

18 The Canadian Superior Courts Judges
19 Association is represented by its President, the
20 Honourable Thomas Cyr of the New Brunswick Court
21 of Queen's Bench, by its Treasurer The
22 Honourable Justice Michèle Monast from the
23 Superior Court of Quebec, by The Honourable
24 Chantal Chatelain also from the Superior Court
25 of Quebec.

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[AUDIO OF SPEAKER NOT COMING THROUGH]

By The Honourable Kristine Eidsvik of The Alberta Court of Queen's Bench, a long serving member of the association's Compensation Committee who currently serves as Vice-Chair of the committee. Also by The Honourable Lukasz Granosik, The Superior Court of Quebec, and who also serves --

[AUDIO OF SPEAKER NOT COMING THROUGH]

And last but not least, Stephanie Lockhart, who is executive director of the association.

The Canadian Judicial Council is represented by The Honourable David Jenkins of the Prince Edward Island Court of Appeal, and The Honourable Robert Richard of the Saskatchewan Court of Appeal. Justice Jenkins is Chief Justice of PEI and he is the Chair of the Judicial Salaries and Benefits Committee of the CJC. Justice Richard is Chief Justice of Saskatchewan, and he too serves on the Council's

1 Salary and Benefits Committee.

2 Also in attendance, as a
3 representative of the council, is The Honourable
4 Martel Popescul, Chief Justice of The Court of
5 Queen's Bench of Saskatchewan. Justice Popescul
6 chairs the Council's Trial Courts Committee, as
7 well as its Judicial Vacancies Working Group.
8 He will be making a brief statement this morning
9 to relate his own experience, as well as that of
10 many of his colleagues on the Council, with
11 respect to trends in judicial recruitment.

12 Madam Chair, I know that many other
13 justices are attending this hearing remotely,
14 along with members of the general public, and to
15 one and all we extend a warm welcome to these
16 proceedings.

17 As counsel to the Association and
18 Council our instructions have been to co-operate
19 with the Government of Canada and the
20 Commission, with the view to assist you, members
21 of the Commission, in formulating
22 recommendations to the government as it is your
23 mandate to do under the Judges Act, and the
24 applicable constitutional principles.

25 I take this opportunity to thank our

1 friends, Mr. Rupar, Mr. Shannon, Ms. Musallam
2 and their colleagues from the government of
3 Canada for their co-operation in this process,
4 especially considering the strain that everyone
5 has been working under during this once in a
6 lifetime pandemic.

7 Now, the parties have filed extensive
8 written submissions. I do not propose to go
9 over this ground, but I'm confident that the
10 Commission members are now familiar with this
11 material.

12 What I propose to do instead is to
13 address what we consider are the key issues
14 arising from these submissions.

15 The Commission knows that the
16 Association and Council's key submission is that
17 the Commission should recommend that judicial
18 salaries be increased by 2.3 percent as of
19 April 1st, 2022, and April 1st, 2023, in
20 addition to the annual adjustments based on the
21 IAI, provided for in the Judges Act. The
22 evidence relating to the compensation earned by
23 the two key comparator groups provides objective
24 support for these proposed increases.

25 Now, the impetus driving this proposed

1 recommendation is the Association and Council's
2 serious concern, with worrying trends in
3 judicial recruitment to federally-appointed
4 judicial positions over the last decade, and the
5 lack of interest on the part of many senior
6 members of the Bar in an appointment to the
7 bench.

8 Now, we've reproduced, in a condensed
9 book of materials, to be cited in oral argument,
10 extracts of documents to which I will refer in
11 the course of my oral presentation. This was
12 emailed to Commission members yesterday evening.
13 Most of these documents are already in the
14 record and the extracts are reproduced in the
15 condensed book so that you don't have to look
16 for them in the documentation.

17
18 [AUDIO OF SPEAKER NOT COMING THROUGH]
19

20 Let me outline what I propose to cover
21 in oral argument. And I refer you, in this
22 respect, to a document entitled "Outline of Oral
23 Argument", which you will find under tab A of
24 our condensed book. And you'll see it -- you're
25 seeing it now displayed on the screen.

1 So I'll begin by saying a few words
2 about the Commission's mandate, including the
3 scope of its inquiry. I'll then turn to my main
4 submission, which will be divided into two
5 parts, first, the principle of continuity, and
6 then substantive issues.

7 On substance I will begin by
8 addressing the issue of prevailing economic
9 conditions and the current financial position of
10 the government. I will then address the
11 government's proposal to cap the annual
12 adjustments to judicial salaries based on the
13 IAI, a proposal to which the judiciary is firmly
14 opposed, and that we ask the Commission to
15 reject.

16 I will thereafter speak to the salary
17 recommendation that is being sought by the
18 judiciary and point to the evidence, before the
19 Commission, showing that there is a recruitment
20 problem with meritorious potential candidates
21 from the Bar. This is when I will invite
22 Justice Popescul to describe to the Commission
23 how, in his experience, this recruitment problem
24 plays out in the real world.

25 As part of the discussion of the

1 judiciary's proposed salary recommendation, I
2 will address the two key comparators that you
3 are invited to consider, DM-3s and self-employed
4 lawyers.

5 Within the discussion of self-employed
6 lawyers I will address the issue of filters to
7 be applied to the CRA data on income of
8 self-employed lawyers.

9 I begin then with the Commission's
10 mandate, which is to inquire into the adequacy
11 of judicial salaries and benefits payable under
12 the Judges Act, applying the statutory criteria
13 set out in section 26 of the Act.

14 It is the judiciary's submission that
15 in applying these criteria the Commission needs
16 to build on the work of prior Commissions. The
17 Commission must, of course, conduct its own
18 independent inquiry based on the evidence placed
19 before it, and other relevant prevailing
20 circumstances. But the Commission ought not, as
21 the government and its expert, Mr. Gorham, would
22 have it, embark upon its inquiry as if it was
23 working on a blank slate having to reinvent the
24 wheel at every turn. Nor should the Commission
25 approach the exercise without due consideration

1 for the accumulated wisdom and collective
2 insight of the other distinguished individuals
3 who, have in the past, served on the Commission.

4 And that is a good segue into the
5 first topic I would like to address, namely the
6 principle of continuity and the unfortunate
7 pattern of relitigation of settled issues in
8 which we are invited to engage every four years
9 by the Government of Canada. And if my remarks
10 on that subject sound familiar to two members of
11 the Commission, well, that in itself militates
12 in favour of a robust adoption of continuity as
13 a guiding principle in the work of this
14 Commission.

15 Now, the Block Commission's
16 recommendation 14 and the Levitt Commission's
17 identical recommendation 10 formulate a
18 principle that applies irrespective of the
19 subject matter of any given recommendation. And
20 it is what the judiciary calls the principle of
21 continuity between successive Quadrennial
22 Commissions. This recommendation reads as
23 follows:

24 "Where consensus has emerged
25 around a particular issue during a

1 previous Commission inquiry, in the
2 absence of demonstrated change such
3 consensus be taken into account by the
4 Commission and reflected in the
5 submissions of the parties."

6 Now, consensus in this context does
7 not mean that everyone agreed with the position,
8 as the government has once argued, what it means
9 is that once an issue has been fully aired, and
10 a Commission has determined that issue, it
11 cannot be addressed before subsequent
12 Commissions as if the past finding or past
13 practice did not exist. This is what we mean by
14 "the principle of continuity".

15 Now, the value of continuity is so
16 self-evident that one should not have to
17 elaborate upon it. All boards, all Commissions,
18 all tribunals, value and promote continuity by
19 building on practices that build on past
20 experience. The doctrine of precedent is rooted
21 in the principle of continuity.

22 Madam Chair, members of the
23 Commission, we say that as a question of
24 principle, and in the absence of demonstrated
25 changes, the Commission should refuse to

1 reconsider settled issues such as, to pick
2 examples to the submissions before you, the
3 relevance of DM-3 comparator. And by way of
4 another example, which filters should be used
5 when considering the CRA data relating to
6 self-employed lawyers' income, 75th percentile,
7 low income exclusion, 44 to 56 age range, and
8 consideration of large CMAs. From the
9 judiciary's perspective it is simply not open to
10 the Government of Canada to seek repeatedly to
11 relitigate these points.

12 Now, before the Rémillard Commission
13 the judiciary complained about the relitigation
14 of issues and also about the fact that for the
15 fourth time relitigation was being done relying
16 on the absence of --

17
18 [MUSIC COMING IN OVER THE CHANNEL AND
19 DROWNING OUT SPEAKER]

20
21 -- RECESSED AT 9:52 A.M. --

22 -- RESUMED AT 10:01 A.M. --

23 MR. BIENVENU: I believe we left off
24 when I was observing that even though the
25 government has changed experts it has not

1 changed its approach. Looking at the
2 government's -- at the report of the
3 government's new expert, Mr. Gorham.

4 And, first of all, it is difficult to
5 believe, I submit to you, that a single
6 individual's expertise can be so wide ranging as
7 to pretend to offer expert evidence about the
8 concept of economic compensation, economic
9 factors behind the IAI, valuation of the
10 judicial annuity, CRA data and the filters
11 applied to it and the compensation of Deputy
12 Ministers.

13 Mr. Gorham even allows himself to
14 speculate that private legal practitioners,
15 whose remuneration places them at the top of the
16 market, are mere business hustlers rather than
17 accomplished jurists to which clients are
18 willing to pay a premium for their advice and
19 professional services.

20 We acknowledge that Mr. Gorham can be
21 recognized as an expert in actuarial science,
22 and even then we submit that his analysis ought
23 to have been guided by the Commission's
24 precedents and past practice, which it was not.
25 However, Mr. Gorham's report, if it is presented

1 as expert evidence, requires an expertise that
2 goes well beyond actuarial science. Mr. Gorham
3 also wears the hat of economist, compensation
4 specialist and accountant. Consider the fact
5 that the judiciary needed no less than five
6 experts to be able to address in reply --

7
8 [MUSIC COMING IN OVER THE CHANNEL AND
9 DROWNING OUT SPEAKER]

10
11 MR. BIENVENU: So I was observing that
12 a measure of the scope of the evidence offered
13 by Mr. Gorham is the number of experts that the
14 judiciary had to turn to in order, responsibly,
15 to respond to Mr. Gorham's evidence. And I'll
16 just mention them: Professor Hyatt, an
17 economist; Messrs. Leblanc and Pickler, two
18 accountants and tax specialists; Ms. Haydon, a
19 compensation specialist; and, Mr. Newell, an
20 actuary. And that, I submit to you, in and of
21 itself speaks to the nature of the opinion
22 evidence contained in the government's expert
23 report.

24 This report, I respectfully submit, is
25 more an advocacy submission in its own right,

1 and a muscular one at that, rather than the
2 opinion of an independent expert.

3 Now, of particular concern, so far as
4 the relitigation of issues is concerned, is the
5 government's attempt to undermine the DM-3
6 comparator in the salary determination process,
7 and the objectivity provided by the application
8 of this long-standing comparator. And I'll have
9 more to say about this later.

10 Even more troubling, in our
11 submission, is the government's attempt to
12 revisit the IAI as if the issue had not been
13 canvassed by the Levitt and Rémillard
14 Commission. You will recall that the government
15 asked the Levitt Commission for a recommendation
16 to cap the IAI. It asked the Rémillard
17 Commission to replace the IAI with the Consumer
18 Price Index, the CPI. Both Commissions refused
19 and quoted from various sources to demonstrate
20 the deep roots of the IAI as a source of
21 protection against the erosion of the judicial
22 salary.

23 Now the government is attacking the
24 IAI once again before this Commission, reverting
25 back to the approach adopted before the Levitt

1 Commission by advocating for a lower cap than
2 the cap already included in the Judges Act.

3 To conclude on relitigation, we invite
4 the Commission to be as firm as the Block,
5 Levitt and Rémillard Commissions have been and
6 to say enough is enough. Part of the rules of
7 engagement in a process such as this one is that
8 due consideration must be given to the work of
9 past Commissions, and that absent demonstrated
10 changes past findings should not be relitigated
11 but should be incorporated in the parties'
12 submissions.

13 And with the greatest respect, finding
14 an expert willing to contradict 20 years of
15 Commission practices and findings is not a
16 license to disregard settled issues.

17 Now, the government has also put
18 forward Mr. Szekely in support of its argument
19 in favour of more comparators. However, the
20 government does not make the case for a widening
21 of the comparator group, nor does it seek to
22 justify the choice of the proposed additional
23 comparators, or the reliability of the data
24 provided as comparison.

25 Now, members of the Commission, I want

1 to be very clear, the judiciary is not opposed
2 to a party bringing fresh water to the well,
3 however, this must serve to enrich the
4 Commission's analysis, taking into account its
5 past pronouncements not to seek to dilute
6 existing comparators.

7 And take the issue of judges' salaries
8 in other jurisdictions. The judiciary itself
9 presented evidence before the Drouin Commission
10 about judicial salaries in the exact same
11 foreign jurisdictions as those canvassed by
12 Mr. Szekely. And what the Drouin Commission had
13 to say about this evidence is reproduced in your
14 condensed book, and you see it displayed on the
15 screen now. And it's worth reading an extract
16 of it together:

17 "The utility and reliability of
18 comparisons between judicial salaries
19 in other jurisdictions and those in
20 this country are questionable on the
21 basis of the information now available
22 to us. This is so, in our view,
23 because of variations between economic
24 and social conditions in Canada and
25 the other identified jurisdictions,

1 fluctuating exchange rates,
2 significantly different income tax
3 structures, different costs of living
4 and the absence of information
5 concerning the retirement benefits of
6 judges in the other identified
7 jurisdictions."

8 Now, the judiciary took note of these
9 requirements and it has refrained from adducing
10 that kind of evidence, again simply because it
11 could not satisfy the requirements set out by
12 the Commission.

13 The evidence contained in
14 Mr. Szekely's report about the salaries of
15 foreign judges is being placed before you
16 without these safeguards that the Drouin
17 Commission said were required for any comparison
18 to be meaningful and reliable. Mr. Szekely
19 provides no information about the comparability
20 of functions and responsibilities between the
21 jurisdictions canvassed in his report, and he
22 omits relevant information about nonsalaried
23 benefits enjoyed by some of these foreign
24 judges.

25 For example, he does not mention the

1 fact that U.S. federal judges are entitled to
2 their full salary after retirement, nor that
3 federally-appointed Australian judges enjoy a
4 car with driver service and a private vehicle
5 allowance. And because such key information is
6 missing from Mr. Szekely's evidence it is of
7 very little assistance to the Commission.

8 But in any event, even taken at face
9 value, the take-away from Mr. Szekely's report
10 is that the Canadian judiciary is paid
11 substantially less than those holding equivalent
12 judicial functions in Australia and New Zealand.
13 And as for the United Kingdom and the United
14 States, it is well-known that these two
15 jurisdictions face alarming problems in seeking
16 to attract senior practitioners to the bench.

17 So having discussed the need for
18 continuity in the analytical tools used by the
19 Commission I now turn to the substantive issues
20 which, as I mentioned, are framed by the
21 statutory criteria that the Commission must
22 consider, prevailing economic conditions, the
23 role of financial security in ensuring judicial
24 independence and the need to attract outstanding
25 candidates to the judiciary.

1 Now, the criteria I will be
2 concentrating on in oral argument are prevailing
3 economic conditions in Canada, including the
4 current fiscal position of the government and,
5 secondly, the need to attract outstanding
6 candidates to the judiciary.

7 And let me jump right in then and
8 address a subject that is a subject matter that
9 you will need to address and, therefore, that
10 must be on your minds, COVID-19.

11 Members of the Commission, the
12 pandemic has upended everyone's lives. Untold
13 lives have been lost and livelihoods have been
14 impaired and many lost. These are a given and
15 they are terrible losses. The Canadian
16 judiciary has risen to the challenges posed by
17 the pandemic. And, reacting nimbly, has ensured
18 that our justice system, a key institution in
19 maintaining the fabric of Canadian society,
20 continued to function and do what it is tasked
21 to do, resolve disputes fairly, definitively,
22 and peacefully; and in so doing instill
23 confidence in our public institutions.

24 Now, more than one year after the
25 lockdown of March 2020, and the initial doomsday

1 economic forecasts, we are today better able to
2 take stock of the prevailing economic conditions
3 in Canada and of the financial position of the
4 Canadian government.

5 To assist the Commission in its
6 analysis of this factor the judiciary's expert
7 economist, Professor Doug Hyatt, has submitted
8 two expert reports. Professor Hyatt is a
9 renowned economist at the University of
10 Toronto's Rotman School of Management and Centre
11 for Industrial Relations. It is the second time
12 that he submits a report to the Commission,
13 having also contributed to the inquiry of the
14 Rémillard Commission.

15 In his first report, which Commission
16 members will find at tab C of our condensed
17 book, Professor Hyatt makes an important
18 distinction, at page 3, between temporary fiscal
19 deficits and structural deficits. He refers to
20 the pandemic as an "exogenous shock" which has
21 led to near term deficits that, and I quote,
22 "will be eliminated when the pandemic has
23 dissipated".

24 Now, the description by Professor
25 Hyatt is not his own but rather is taken from

1 the government's 2020 Fall Economic Statement.
2 And it is relying on that statement that
3 Professor Hyatt points out that, and I quote:

4 "If exogenous fiscal shock
5 brought about by the pandemic should,
6 therefore, not be treated in the same
7 way as shocks that create permanent
8 irreversible structural damage to the
9 economy."

10 He goes on to say:

11 "The cost of responding to a
12 'once-in-a-century' shock should
13 properly be addressed by amortizing
14 the cost of the shock over time and
15 not by offsetting reductions to
16 otherwise normal Government
17 expenditures[...]. Such actions would
18 be self-defeating to the goal of
19 future economic growth."

20 It is also important to keep in mind
21 the distinction between the financial position
22 of the government, on the one hand, and
23 prevailing economic conditions in Canada on the
24 other. Section 26(1.1)(a) makes that
25 distinction and Professor Hyatt addresses it.

1 In his second report, attached as tab
2 D to your condensed book, Professor Hyatt
3 reviews the 2021 budget. And he points out that
4 its GDP projection for 2021 is more favourable
5 than the projection in the November 2020
6 economic statement. The projected increase is
7 now 5.8 percent, up from 4.8 percent last
8 November. This is at page 3 of his second
9 report.

10 So the picture that has emerged,
11 members of the Commission, as confirmed by the
12 budget, is that the economy is recovering in a
13 very strong way and the forecast is that the
14 recovery will be robust. And this evidence
15 establishes that the prevailing economic
16 conditions do not stand as an obstacle to the
17 judiciary's proposed increase.

18 Now, we say that the financial
19 position of the government does not stand as an
20 obstacle to the proposed salary increase either.
21 And this is evidenced by the fact that the
22 government's own budget, tabled a month ago, was
23 not an austerity budget, as observed by
24 Professor Hyatt in his second report. It's on
25 page 4. This is also relevant, members of the

1 Commission, to the issue of the government's
2 proposed cap on the application of the IAI to
3 adjust judicial salaries. And this is the issue
4 to which I would like now to turn.

5 So the government's proposal is that
6 there should be a cumulative 10 percent cap on
7 the IAI applied over the course of a four-year
8 period. Now I'll get back to the question of
9 which four-year period is being referred to by
10 the government? But, first, I need to provide
11 context by reviewing the recent history of the
12 government's attempt to undermine this crucial
13 feature of judicial compensation, and I refer to
14 that in the introduction.

15 You know that the indexation of
16 judicial salaries, based on the IAI, has been in
17 place since 1981. And today we are witness to
18 the third attack by the government in as many
19 Commission cycles on the IAI as a factor for the
20 annual adjustments of salaries.

21 Before the Levitt Commission the
22 government proposed an annual cap of
23 1.5 percent, resulting in a capped net increase
24 of 6.1 percent over the quadrennial period. The
25 Levitt Commission rejected this and said that

1 the IAI was, and I quote:

2 "[...] a key element in the
3 architecture of the legislative scheme
4 for fixing judicial remuneration."

5 And the Commission added that it
6 should not be likely tampered with.

7 The government tried another angle
8 before the Rémillard Commission. Then it
9 proposed a complete replacement of the IAI by
10 the CPI, and this too was rejected by a
11 Commission that reiterated the Levitt
12 Commission's strong defence of the IAI. Today
13 the government seeks to underline the IAI by
14 proposing a cumulative cap of 10 percent.

15 Now, before I explain why the
16 judiciary invites the Commission to reject this
17 proposal, it is useful to recall why the IAI
18 annual adjustments are so important to the
19 scheme for fixing judicial compensation.

20 Annual adjustments to judicial
21 salaries based on the IAI have been described by
22 the Scott Commission, in 1996, as part of the
23 social contract between the government and the
24 judiciary. find the relevant extract in our
25 condensed book at tab H. And I'll read only a

1 short extract of the relevant passage:

2 "The provisions of s. 25 of the
3 Act are reflective of much more than a
4 mere indexing of judges' salaries.
5 They are, more specifically, a
6 statutory mechanism for ensuring that
7 there will be, to the extent possible,
8 a constant relationship, in terms of
9 degree, between judges' salaries and
10 the incomes of those members of the
11 Bar most suited in experience and
12 ability for appointment to the Bench.
13 The importance of the maintenance of
14 this constant cannot be overstated.
15 It represents, in effect, a social
16 contract between the state and the
17 judiciary."

18 The enduring value of the statutory
19 indexation mechanism, based on the IAI, lies in
20 the fact that it is apolitical in character. It
21 exists since 1981, it is automatic, it reflects
22 inflation and productivity gains and it has a
23 predetermined cap.

24 Members of the Commission, this is
25 something that both parties should want to

1 preserve as a single accomplishment in the
2 relationship between the judiciary and the
3 legislative and executive branches, so far as
4 Parliaments' obligation to fix salaries is
5 concerned.

6 Now, with this background in mind
7 let's look at what the government is proposing.
8 And I begin with what might seem to be a
9 technical point but it is very much substantive.
10 The government refers to the years 2021, 2022,
11 2023 and 2024 as the relevant years for counting
12 the IAI adjustments that would lead to the
13 10 percent cap.

14 If you look at the table on page 13 of
15 the government's submission, it's displayed on
16 the screen, the right-most column shows the
17 projected IAI. However, the figure isn't
18 applied in the year indicated in the left-most
19 column. Rather, it is applied in the subsequent
20 year. And this is explained in footnote 36 on
21 that page, which reads as follows:

22 "Projected IAI for the row year
23 (i.e. 6.7 % is the projected value of
24 IAI for 2020 which will be used to
25 calculate salary increases effective

1 April 1, 2021)."

2 So since the IAI figure actually
3 applies for the next year, it means that the
4 government is proposing that its cap calculation
5 begins as of April 1st, 2021, and go through
6 April 4th, 2024, and that's the zero percent
7 that you see in the right-hand column on the
8 fourth line, and that figure would apply on
9 April 1st, 2024. But the problem is that
10 April 1st, 2024, is the first year of the
11 reference period for the next Commission.

12 Your reference period begins
13 April 1st, 2020, because that's when the
14 reference period of the Rémillard Commission
15 ended. And since your reference period begins
16 April 1st, 2020, a period of four fiscal years,
17 means that it ends March 31st, 2024. That is
18 the quadrennial reference period covered by your
19 inquiry.

20 So under the government's proposal,
21 either the government is ignoring the year of
22 April 1st, 2020, to March 31st, 2021, or it is
23 including a fifth year, April 1st, 2024, to
24 March 31st, 2025. Either way, it's a period
25 that is not consistent with the Judges Act and

1 it has obvious constitutional implications.

2 Now, if the 10 percent cap is applied
3 to the four-year period over which this
4 Commission has jurisdiction, the cap would
5 reduce the adjustment in the third year from the
6 projected 2.1 percent to 0.5 percent. You see
7 that in the third column and it would eliminate
8 the adjustment in the fourth year.

9 I now turn to the substance of the
10 proposed -- the proposal to cap the IAI. And in
11 that respect, the government states that:

12 "[...] the judiciary must
13 shoulder their share of the burden in
14 difficult economic times."

15 And in support of this, the government
16 cites the PEI reference and the Supreme Court's
17 statement in that case that:

18 "Nothing would be more damaging
19 to the reputation of the judiciary and
20 the administration of justice than a
21 perception that judges were not
22 shouldering their share of the burden
23 in difficult economic times."

24 That's at paragraph 196 of the PEI
25 reference.

1 Now, what gets out of the government's
2 invocation of the PEI reference is the fact that
3 the Supreme Court, when using the language
4 relied upon by the government, was specifically
5 referring to deficit reduction policies of
6 general application.

7 If everyone paid from the federal
8 public purse were in fact faced with freezes or
9 reductions in compensation and benefits, but
10 judges were exempt from this, judges could
11 indeed be said not to be shouldering their share
12 of the burden. But there is no burden to be
13 shouldered by persons paid from the public purse
14 at the present time.

15 The government is actually doing the
16 opposite. The government is engaging in
17 stimulus spending as part of its plan of
18 economic recovery. So we say that it is
19 jarringly incongruous in such a context to argue
20 that the judiciary should bear a reduction in
21 the statutory indexation mechanism, which, as
22 I've said, is considered an essential component
23 of the statutory scheme relating to judicial
24 compensation.

25 Now, you've read that the judiciary --

1 the government's proposal seems to be motivated
2 by the relatively high IAI that applied on
3 April 1st, 2021, which was the amount of
4 6.6 percent. This figure is considered to be
5 the result of the so-called compositional effect
6 of the pandemic. Namely the fact that with the
7 dropping off of a large segment of low-earning
8 workers, the resulting increased proportion of
9 high-earning workers caused an upward push on
10 the IAI.

11 Now, Professor Hyatt explains in his
12 second report that there is a self-correcting
13 aspect to this compositional effect. There will
14 be downward pressure on the IAI as low-income
15 workers resume employment. You'll see that at
16 page 7 of his second report. And this downward
17 pressure could continue for years. And you'll
18 note, members of the Commission, that the
19 government itself appears to acknowledge this
20 self-correcting feature in its March 21
21 submission when it argues, as a selling point
22 for a newly proposed floor to the IAI
23 adjustment, that it is possible that there will
24 be a negative IAI during the next four years.
25 It's written right there in paragraph 4:

1 "These unpredictable [...]
2 circumstances may also result in a
3 negative IAI [...] in the near
4 future."

5 So if a negative IAI is to be posited,
6 it can only be the result of this
7 self-correcting phenomenon when low-earning
8 workers re-enter the labour market and, in so
9 doing, exert a downward pressure on the IAI.

10 Now, it should also be pointed out,
11 and this is very important, that Parliament has
12 already turned its mind to what would be an
13 appropriate cap to the annual adjustment to
14 judicial salaries. Parliament decided that a
15 cap of 7 percent to the annual IAI adjustment
16 was reasonable. Now, 6.6 percent is less than
17 7 percent. Parliament did not provide for any
18 exclusionary factors in the Judges Act that
19 would call for a derogation from that 7 percent
20 cap.

21 And please note that, in a way, the
22 proposed cumulative 10 percent cap is an
23 attempt, indirectly and retroactively, to modify
24 the annual 7 percent cap by clawing back what
25 the government seems to think was too large an

1 adjustment.

2 Now, a final point about the IAI. The
3 government states at paragraph 16 of its reply
4 submissions that the judiciary is suggesting
5 that:

6 "[...] it has suffered a loss
7 because actual IAI rates have been
8 lower than the IAI projections used by
9 successive Quadrennial Commissions."

10 The government cites paragraph 75 to
11 80 and 117 and 118 of our March 29 submission as
12 support for this assertion. The assertion is
13 incorrect. The judiciary did not and does not
14 characterize the gap between projected and
15 actual IAI as a loss.

16 What the judiciary did describe as a
17 loss is the consequence in terms of lost salary
18 increases of the failure of the government to
19 implement the McLennan Commission's salary
20 recommendation and later the Block Commission's
21 salary recommendation. That did result in a
22 loss and it was properly described as such in
23 our submission.

24 The gap between projected and actual
25 IAI is significant, but on a different plain.

1 It is significant because the Rémillard
2 Commission included in its reasoning, on the
3 adequacy of judicial salaries, the IAI figures
4 that were projected at the time. And since the
5 actual IAI figures turned out to be much lower
6 than the projections, from 2.2 to 0.4 in 2017,
7 the question arises as to whether the Rémillard
8 Commission would have considered the judicial
9 salary to be adequate in light of the actual
10 figure. That observation was made in paragraph
11 80 of our March submission and it does not
12 contain the word "loss".

13 Now, I leave the topic of the IAI and
14 move to the topic of the proposed increase to
15 the judicial salary. I noted in the
16 introduction that we propose an increase of
17 2.3 percent on each of April 1st, 2022 and 2023.
18 Those are the last two years of this
19 Commission's reference period. And the regular
20 IAI adjustments under that proposal would
21 continue to apply each year.

22 Now, you must approach this proposal
23 in its proper historical context. The last
24 increase to the judicial salary, outside of the
25 annual adjustments based on the IAI, was in

1 2004.

2 You might recall from the historical
3 overview in our main submission that the
4 McLennan Commission issued its recommendation in
5 2004. The government initially accepted the
6 recommendation, but then when a different party
7 was elected to form the government, a second
8 response was issued varying the first response
9 and rejecting the salary recommendation of the
10 McLennan Commission.

11 In 2006 what this new government did
12 was impose the lower increase that it had
13 proposed before the McLennan Commission,
14 retroactive to 2004. But my point here is that
15 in spite of the Block Commission's
16 recommendation for a salary increase, judicial
17 salaries were only adjusted since 2004 based on
18 the IAI.

19 Now, I mentioned the earlier the
20 statutory responsibility of the Commission,
21 being to inquire into the adequacy of judicial
22 salary benefits using, as a framework, the
23 factors listed in subsection 26.1.1. And these
24 factors must be balanced and none of the three
25 enumerated factors obviously can trump the

1 others.

2 Now, I want to highlight the fact that
3 there are constraints inherent to some of the
4 concepts used in subsection 26.1, and there are
5 duties arising from the objectives that these
6 factors serve to attain. And let me try to
7 illustrate the point with two examples. The
8 second factor is the role of financial security
9 in ensuring judicial independence. I believe
10 it's always been common ground between the
11 parties that there flows, from the nature of the
12 second factor, a hard constraint on the
13 Commission. Judicial salaries can never be
14 allowed to fall to a level that would undermine
15 financial security and thus threaten judicial
16 independence. Now, I give this by way of
17 example, not to suggest that we find ourselves
18 in such circumstances.

19 My second example is the third factor,
20 the need to attract outstanding candidates to
21 the judiciary. You have read in our March
22 submission that, in our view, there arises from
23 the third factor a duty that we have
24 characterized as a duty of vigilance. We say
25 that in order to preserve the quality of

1 Canada's judiciary, the Commission must make
2 recommendations designed to preserve Canada's
3 ability to attract outstanding candidates to the
4 judiciary.

5 Now, in weighing that factor, the
6 Commission must consider the consequences of
7 missing the mark. Judicial salaries, by their
8 nature, cannot be quickly adjusted. One can
9 quickly adjust the proposed salary of the CFO of
10 a company if one's recruitment efforts to fill
11 the position are unsuccessful.

12 In contrast, adjustments to judicial
13 salaries must result from a recommendation of
14 this Commission, which only meets every four
15 years, and any corrective measure takes time
16 implement through legislation, assuming the
17 recommendation is accepted by the government.

18 So between the time you are confronted
19 with a recruitment problem and the time that
20 having realized that corrective measures are
21 required, those measures are first recommended
22 by the Commission and then hopefully implemented
23 by the government, years will go by. Years.
24 Years during which vacancies will arise and an
25 insufficient number of meritorious candidates

1 will be available to fill them. And in that
2 sense, it can be said that adjusting judicial
3 salaries is a little bit like correcting the
4 course of an ocean liner. You cannot do it on a
5 dime. It takes time. And what this Commission
6 must bear in mind is that real, long-lasting
7 damage can be caused to Canada's judiciary until
8 the correct -- or the corrected salary incentive
9 is recommended and implemented.

10 Now, why do I say all this? I say all
11 this because the evidence before this Commission
12 shows that there is a recruitment problem. You
13 see it in the table on applications for
14 appointment, which is tab 20 of volume 2 of the
15 joint book of documents, where the proportion of
16 highly recommended candidates in some provinces
17 is extremely low. And when that is combined
18 with the fact that there is a downward trend in
19 appointments from private practice over the past
20 15 years, you see it displayed on the screen,
21 you get a picture revealing a declining interest
22 in the Bench on the part of the private Bar.
23 And that, members of the Commission, is a source
24 of real concern for the association and council.

25 And we thought it might be helpful to

1 the Commission if a senior representative of the
2 judiciary were invited to appear before you to
3 describe the reality that lies behind these
4 numbers. And so as announced in our March 29
5 submission, we are joined by The Honourable
6 Martel Popescul, whom I've introduced at the
7 outset. And Justice Popescul has a brief
8 statement to make, and he will remain available
9 if the Commission has questions at the end of my
10 oral submissions.

11 So Justice Popescul?

12 JUSTICE POPESCUL: Good morning, Madam
13 Chair, members of the Commission. My name is
14 Martel Popescul and I am the Chief Justice of
15 the Court of Queen's Bench for Saskatchewan. It
16 is an honour for me to appear before the
17 Commission as a representative of the Canadian
18 Judicial Council, and I hope my presentation
19 today will be of some assistance to you. My aim
20 is to share my direct experience of what I and
21 many of my colleagues on the CJC view as a
22 worrying trend in judicial recruitment over the
23 last decade or so. These trends raise concerns
24 and are of direct relevance to one of the
25 factors listed at section 26.1.1 of the Judges

1 Act, namely the need to attract outstanding
2 candidates to the judiciary.

3 I speak to the issue of recruitment as
4 someone who has had the privilege to engage with
5 judicial recruitment from various perspectives.

6 I was appointed to the Court of
7 Queen's Bench for Saskatchewan in 2006. Prior
8 to my appointment, I served as the President of
9 the Law Society of Saskatchewan from 2001 to
10 2002. During this time, I sat on the Provincial
11 Court Judicial Council as the Law Society's
12 representative. In that capacity, I considered
13 and provided input on candidates considered for
14 appointment to the provincial Bench.

15 After my appointment to the Court of
16 Queen's Bench, I was appointed the Chair of
17 Saskatchewan's Judicial Advisory Committee in
18 2010. Judicial advisory committees, sometimes
19 referred to as JACs, have the responsibility
20 of assessing the qualifications for appointment
21 of lawyers and provincial and territorial judges
22 who apply for a federally appointed judicial
23 position. There is at least one JAC in one
24 province and territory.

25 In this capacity, I reviewed the

1 applications of each candidate for appointment
2 to the Court of Queen's Bench, which also
3 includes the Saskatchewan Court of Appeal and
4 Saskatchewan applicant's seeking appointment to
5 the Federal Court for the Federal Court of
6 Appeal.

7 I chaired the Saskatchewan Judicial
8 Advisory Committee for five years until 2014.
9 It is during that period of time that I was
10 appointed Chief Justice of the Court of Queen's
11 Bench for Saskatchewan in 2012. In this role, I
12 have been intimately involved in considering
13 each potential appointee to our court, something
14 I will discuss in greater detail later on. As
15 Chief Justice, I have also been involved in the
16 review of the applications of all lawyers who
17 apply for appointment to the provincial court in
18 our province.

19 In other words, for over a decade,
20 I've observed trends in judicial recruitment in
21 both the provincial court and the Court of
22 Queen's Bench for Saskatchewan.

23 As Chief Justice, my experience with
24 judicial recruitment issues extends beyond
25 Saskatchewan. In addition to regularly engaging

1 with my CJC colleagues on these issues, I chair
2 the CJC's Trial Courts Committee, which brings
3 together Chief Justices and Associate Chief
4 Justices of each trial court across Canada. In
5 this capacity, I regularly discuss issues of
6 judicial vacancies and judicial recruitments
7 with my fellow Chief Justices.

8 A key concern for the CJC's Trial
9 Courts Committee has been judicial vacancies.
10 In September of 2020, the Trial Courts Committee
11 proposed to the leadership of the CJC the
12 creation of a working group dedicated to
13 considering the causes of judicial vacancies,
14 which are endemic in many courts and to propose
15 solutions to the problem. I've acted as Chair
16 of the CJC's Judicial Vacancy Working Group
17 since its inception.

18 The statement I have prepared for the
19 Commission is meant to reflect my observations
20 from over 10 years of engagement on issues of
21 judicial recruitment at the local and national
22 level, as well as my discussions with my CJC
23 colleagues across Canada.

24 I've observed, as have most of my
25 colleagues on the CJC, a reduction in the pool

1 of applicants from private practice, the
2 traditional source of candidates for the Bench.
3 Outstanding private practitioners, many of whom
4 distinguish themselves as leaders of the
5 profession, have previously seen a judicial
6 appointment to one of Canada's Superior Courts
7 as the crowning achievement of an outstanding
8 career.

9 However, many are increasingly
10 uninterested in seeking appointment to the
11 Bench. A large and growing number of leading
12 practitioners no longer see a judicial
13 appointment, with all its responsibilities and
14 benefits, as being worthy of the increasing
15 significant reduction in income.

16 This is a concerning trend and one I
17 respectfully submit which should be of concern
18 to this Commission. To be clear, neither I nor
19 my CJC colleagues are questioning the quality of
20 recent appointments to the Bench, nor do we call
21 into question the fact that outstanding
22 candidates can come from all types of legal
23 careers and areas of practice. What I'm
24 concerned about is the future and whether the
25 current trend of a shrinking pool of outstanding

1 candidates will translate into a chronic
2 inability to attract outstanding candidates from
3 private practice, including those practicing in
4 metropolitan areas or in larger firms.

5 It used to be the case that applicants
6 regularly included leaders of the Bar from both
7 the private and public sectors. Increasingly,
8 the applicant pool does not include senior
9 litigators from private practice. A good part
10 of the reason for that lack of interest is a
11 combination of the workload of Superior Court
12 judges and the perceived lack of commensurate
13 pay for that work.

14 Since my appointment as Chief Justice
15 of the Court of Queen's Bench for Saskatchewan,
16 I often find myself having to actively seek out
17 outstanding lawyers to convince them to apply
18 for vacancies at our court. I must say that
19 this was a role I had not anticipated I would
20 need to play, but such is the current state of
21 affairs.

22 The CJC's Judicial Vacancies Working
23 Group has identified two root causes for
24 vacancies endemic to our judicial system.
25 First, there appears to be a lack of urgency on

1 the part of the government in filling judicial
2 positions as they become vacant. Second, and
3 most relevant for our purposes today, there is
4 often a reduced range of outstanding candidates
5 in the applicant pool.

6 I have, as part of my role as Chief
7 Justice, actively communicated on multiple
8 occasions with senior lawyers and even
9 provincial court judges, who my colleagues and I
10 believe would be outstanding and diverse
11 candidates for appointment to the Bench.

12 I've been unable to persuade many of
13 these perspective candidates to apply despite my
14 best efforts. They have shared a common
15 narrative with me. The benefits of judicial
16 appointment, including the judicial annuity, are
17 increasingly perceived as not outweighing the
18 demands imposed on federally appointed judges
19 and the significant and increasingly reduction
20 in income that lawyers in private practice must
21 be willing to accept.

22 In particular, many perspective
23 candidates are aware of the significant
24 workload, travel demands, loss of autonomy, and
25 increased public scrutiny imposed on federally

1 appointed judges. When viewed in light of the
2 significant reduction in income they must
3 accept, many candidates have expressed a lack of
4 interest in seeking appointment.

5 In my experience, these issues are
6 less pronounced amongst public sector lawyers
7 who generally receive a significant pay increase
8 upon appointment.

9 I want to emphasize that this trend
10 that I have personally witnessed is found in
11 Saskatchewan, which does not even have one of
12 the top 10 CMAs. In other words, the market
13 for legal services in this relatively small
14 jurisdiction is such that leading practitioners
15 can still earn much more than the judicial
16 salary such that judicial salaries is
17 unattractive when considered in light of the
18 workload that federally appointed judges must
19 take on.

20 That lawyers in private practice
21 seeking appointment to the Bench accept a
22 reduction in income is not new. This reduction
23 has, however, become increasingly significant as
24 is clear from my discussions with perspective
25 candidates, as well as my colleagues at the CJC.

1 Outstanding candidates from private practice are
2 increasingly unwilling to accept such a
3 significant reduction in income in exchange for
4 what is perceived as increasingly demanding
5 judicial functions.

6 As a result, in my experience, many
7 outstanding candidates who I would view as
8 ideally suited for appointment to the Court of
9 Queen's Bench are simply not interested in
10 judicial appointment.

11 I also note that recruitment from the
12 provincial Bench has become more difficult in
13 some provinces where the gap between salaries of
14 provincial judges and federally appointed judges
15 are narrowing. For example, in Saskatchewan,
16 provincial judges are paid 95 percent of the
17 salary of federally appointed judges, while
18 their workload is significantly less than
19 Superior Court judges.

20 Now, I say this not to be
21 disrespectful to my colleagues in the provincial
22 court, however, the reality is, based upon
23 concordant comments made to me by judges who
24 have been elevated from provincial court to our
25 court, that the complexity and the time required

1 to fulfill the requirements of a judge of the
2 Court of Queen's Bench is significantly greater
3 than they had experienced on the provincial
4 court.

5 I've reviewed the appointment
6 statistics provided by the office of the
7 Commissioner for Judicial Affairs. In my view,
8 based upon the experience in my own province,
9 the decreasing proportion of appointments from
10 private practice, the small pool of highly
11 recommended candidates in certain regions, and
12 the high proportion of not-recommended
13 candidates, are reflective of the trends I have
14 observed, namely, that outstanding candidates
15 from private practice are applying much less
16 frequently.

17 Again, and I underscore, this is not
18 meant to cast doubt on the merit of our recent
19 appointments. Rather, the concern is whether,
20 given that we are already seeing a shrinking
21 pool of quality candidates for judicial
22 appointments from private practice, we will
23 continue to be able to have a large enough pool
24 of highly recommended applicants tomorrow and
25 into the future.

1 In preparing to make this submission
2 to the Commission, I have spoken to a number of
3 my colleagues at the CJC. Many of them have
4 shared similar stories, confirming the trends I
5 have described. Of note, these trends are of
6 particular concern in some of the larger
7 metropolitan regions where the disparity between
8 the incomes of lawyers in private practice and
9 the judiciary salary is particularly
10 significant. From my discussions with my CJC
11 colleagues, I know that such concerns exist in
12 places such as Halifax, Edmonton, Calgary and
13 Vancouver, to be specific.

14 Again, I thank you very much for
15 listening to me and I am prepared to attempt to
16 answer any questions that you may have. So
17 again, thank you very much for your time.

18 MADAM CHAIR: Thank you very much,
19 Justice Popescul.

20 Mr. Bienvenu, if you want us to wait
21 till the end or ask questions now, whichever you
22 prefer and Justice Popescul prefers.

23 MR. BIENVENU: My suggestion would be
24 to wait to the end.

25 MADAM CHAIR: Perfect.

1 MR. BIENVENU: You appear to manage
2 the clock, as it were, but I trust that I will
3 be allowed to spill over a little bit because of
4 the time --

5 MADAM CHAIR: Yes, we will.

6 MR. BIENVENU: Members of the
7 Commission, never before has a member of the CJC
8 appeared before a Quadrennial Commission in
9 connection with the recommendations to be made
10 by the Commission concerning judicial salaries.
11 And Justice Popescul's appearance reflects the
12 association and Council's deep concern about the
13 negative trends in recruitment described in the
14 judiciary's written submissions.

15 Career dynamics in the profession are
16 such that if a compensation disincentive sets in
17 as an obstacle to lawyers in private practice
18 being attracted to the Bench, it will be like
19 turning an ocean liner to try to correct that
20 disincentive.

21 And you see clear evidence of that
22 phenomenon in other jurisdictions like the U.S.
23 and the U.K. And we can be thankful to
24 Mr. Szekely for bringing our attention to these
25 jurisdictions, both of which vividly illustrate

1 the problems that can arise when judicial
2 compensation issues are not addressed in a
3 timely manner.

4 Now, we've demonstrated in our written
5 submissions that the salary increase that is
6 being sought by the judiciary is supported by
7 both the DM-3 comparator and the private sector
8 comparator. Nevertheless, we are once more
9 faced with familiar objections to your reliance
10 on these comparators, and it is to those
11 government objections that I would now like to
12 turn, beginning with the DM-3 comparator.

13 And as regard to the DM-3 comparator,
14 I have two points to make. One is to draw
15 attention to the Government's attempt to water
16 down the DM-3 comparator. Second is the need
17 for the Commission to accept to use average
18 compensation as a measure of the compensation of
19 DM-3s, because of recent changes in the manner
20 in which DM-3s are remunerated.

21 Members of the Commission, believe it
22 or not, the government argues that DM-3
23 compensation, "is not itself a comparator," but
24 only one factor among many in the Commission's
25 consideration of "public sector compensation

1 trends". You will find this in the government's
2 submission in paragraph 51.

3 Now, this submission I say,
4 respectfully, defies reality as evidenced by
5 nearly 40 years of triennial and Quadrennial
6 Commission reports. So I'll limit myself to
7 saying that the government's attempt to replace
8 the DM-3 comparator with some undefined "public
9 sector compensation trends" contradicts past
10 positions of the government, contradicts the
11 considered opinion of successive triennial and
12 Quadrennial Commissions, would break with the
13 longstanding practice rooted in principle, and
14 would undermine objectivity.

15 Now, we've provided extensive
16 references to the various Commission reports
17 endorsing the use of the DM-3 comparator and
18 rejecting the government's proposed focus on
19 public sector compensation trends. The record
20 is so clear that it would be a waste of your
21 time to try to demonstrate this once again.

22 I will reiterate that the sui generis
23 nature of the judicial role does not lend itself
24 to comparison with broad and undefined
25 categories of comparators and this would

1 undermine the role of the DM-3 group as an
2 anchor point. Doing so would remove a constant
3 that creates objectivity for the Commission's
4 inquiry, as Ms. Haydon rightly points out in her
5 expert evidence. In fact, the sui generis
6 nature of the judicial role makes it all the
7 more important for this Commission to rely on a
8 principled, objective, comparator such as the
9 DM-3 comparator.

10 That DM-3 comparator is important
11 because it reflects, as you know, what the
12 government is prepared to pay its most senior
13 employees. And its relevance, as compared to
14 the private sector comparator, comes precisely
15 from the fact that it reflects the salary level,
16 not of outstanding individuals who've elected to
17 work in the private sector and perhaps seek to
18 maximize the financial reward they can derive
19 from their work, but of outstanding individuals
20 who have opted, instead, for public service.
21 Like lawyers who accept an appointment to the
22 Bench.

23 If you accept to dilute the DM-3
24 comparator as the public sector comparator by
25 considering a host of other unprincipled

1 comparators, you will set yourself adrift in
2 comparative exercise.

3 Now, as part of its argument seeking
4 to undermine the DM-3 comparator, the government
5 again refers to the differences in size, tenure,
6 and form of compensation as between DM-3s and
7 judges. I believe we've addressed this fully in
8 our reply and I say only that these arguments
9 have no more merit today than the same arguments
10 had 4 years ago, 8 years ago, 12 years ago or 16
11 years ago.

12 The second point I wish to address
13 with respect to the DM-3 comparators is the
14 judiciary's reliance on the total average
15 compensation of DM-3s. Now, in its reply, the
16 government characterizes this approach as an
17 attempt to measure judicial salaries, "against a
18 different and higher benchmark."

19 Now, in articulating its objection to
20 the judiciary's reliance on average
21 compensation, the government conflates the
22 comparator with the measure of compensation of
23 that comparator. The comparator is the DM-3.
24 The compensation measure is, for example, the
25 midpoint salary range or the average

1 compensation. And historically, the measure --
2 or determining the measure of compensation has
3 required past Commissions to decide, for
4 example, whether to include at-risk pay. And
5 having concluded that at-risk pay must be
6 concluded, how should it be factored in to the
7 compensation measure.

8 And by the way, the same distinction
9 exists between self-employed lawyers, which is
10 the private sector comparator, and the measure
11 of compensation for that comparator, which is
12 derived from the CRA data applying the various
13 filters and deciding at which percentile you
14 will find the appropriate compensation measure.

15 Now, I mention this distinction
16 because it provides a complete answer to the
17 suggestion that by inviting reconsideration of
18 the compensation measure, the judiciary is
19 putting into question the value of the
20 comparator. The two are two completely separate
21 questions.

22 Now, the reason why the Commission
23 must henceforth look at average compensation is
24 a simple one and it is there for anyone to see.
25 Since 2017, for a reason that the government has

1 failed to explain, there has been an
2 unprecedented flatlining of the DM-3 salary
3 range and consequently of the block comparator.
4 And that is so in spite of the fact that between
5 2017 and 2019, the last three years for which
6 data is available, the actual compensation of
7 DM-3s has increased year-over-year.

8 Now, in 2016, the Rémillard Commission
9 reaffirmed the use of the block comparator on
10 the basis that previous Commissions had used the
11 DM-3 reference point:

12 "as an objective, consistent
13 measure of year over year changes in
14 DM-3 compensation policy."

15 Well, this simply is no longer the
16 case because, in reality, the actual total
17 average compensation of DM-3s has, as a matter
18 of fact, increased year-over-year since 2007.

19 So if you look at tab J, you see that
20 between 2017 and 2019 alone, DM-3 total average
21 compensation has increased by more than \$20,000.
22 So clearly the stagnant block comparator can no
23 longer act as a reliable proxy for the actual
24 compensation of DM-3s and thus play its
25 intended role.

1 Now, I refer back to the Block
2 Commission's rationale for favouring the block
3 comparator over the DM-3 total average
4 compensation. It's at paragraph 106 of the
5 Block report and it includes the following
6 caveat:

7 "Average salary and performance
8 pay may be used to demonstrate that
9 judges' salaries do retain a
10 relationship to actual compensation of
11 DM-3s."

12 So what the past four years
13 demonstrate is that in order for judges' salary
14 to retain a relationship with the actual
15 compensation of DM-3s, you have to look at
16 average compensation. Now, the government has
17 not responded to this point, but clearly, in our
18 submission, this is a demonstrated change that
19 requires the Commission to reevaluate the
20 appropriate measure for the DM-3 comparator.

21 Now, this brings me to the graph at
22 paragraph 40 of the government's reply. And you
23 have -- so I'm at tab M. So this is meant to
24 impress upon you the seemingly large difference
25 between the total average compensation of DM-3s

1 and the block comparator.

2 Now, members of the Commission, I
3 invite each of you to put a big question mark in
4 the margin next to that graph because that graph
5 is not a graph that can be relied upon. First,
6 the DM-3 total average compensation shown on
7 that graph is inaccurate. It has been grossed
8 up by the assertive net value of a Deputy
9 Minister's pension calculated at 11 percent by
10 Mr. Gorham. Now, there's no indication of this
11 gross up, whether it be in the chart or in the
12 paragraphs describing it.

13 Second, the chart compares this
14 adjusted DM-3 average compensation with the
15 block comparator, but without the same pension
16 adjustment being made to the block comparator.
17 And likewise, you have a comparison made with
18 the judicial salary, but again without an
19 adjustment for the value of the judicial
20 annuity.

21 So you see that by selectively
22 applying this pension adjustment to the DM-3
23 compensation curve, the graph grossly inflates
24 and misrepresents the DM-3's total average
25 compensation, and misrepresents the significance

1 of the gap between that compensation level and
2 the block comparator.

3 Now, I don't have much time to
4 illustrate the need for caution with the expert
5 evidence tendered by the government, but looking
6 at Mr. Szekely's report, take a look at
7 paragraph 11 of that report. There you are
8 told, and I quote:

9 "Overall salaries [of] the DM-3
10 group (including 'at-risk' pay) have
11 risen, on average from [288,000] as of
12 March 31, 2015 to [305,000] as of
13 March 31, 2020."

14 Well, both of those figures are
15 inaccurate. Contrary to what is said in the
16 parentheses, they do not include at-risk pay.
17 And to give you an example, the correct figure
18 as of March 31, 2020, is not 305,545, it is
19 383,545. \$79,000 more than the figure quoted in
20 Mr. Szekely's report.

21 So we say that the DM-3 comparator, if
22 assessed using an appropriate compensation
23 measure, which is the average compensation of
24 DM-3s, demonstrate the need for an adjustment
25 to the judicial salary, and you have that

1 supported in our written submissions.

2 Now, that gap is but one justification
3 for the judiciary's requested recommendation.
4 The other is even more significant and it's the
5 gap with the incomes of self-employment --
6 self-employed lawyers and that's the question to
7 which I now turn.

8 Now, the Commission knows that
9 self-employed lawyers remain the principle,
10 albeit shrinking, source of outstanding
11 candidates for the Bench and that's why it's
12 been the other key comparator to assess adequacy
13 of judicial salaries.

14 So you have before you the CRA data,
15 but you also have before you something that was
16 not previously available to the Commission and
17 that is cogent evidence of the extent to which
18 higher earning, self-employed lawyers are using
19 professional corporations to earn their income.
20 And you have evidence about the impact of that
21 phenomenon on the CRA data used to --

22

23 [SPEAKERS AUDIO CUTTING OUT]

24

25 The compensation measure for the

1 private sector comparator. We put before you
2 data on the number of lawyers in each of the
3 provinces that use professional corporations and
4 we've put before you the expert evidence of
5 Messrs. Leblanc and Pickler of E&Y on the
6 attractiveness of professional corporations from
7 a tax-planning point of view for high earning
8 lawyers.

9 And what you need to keep in mind when
10 you look at the CRA data is that it dramatically
11 under reports the actual income of self-employed
12 lawyers and Mr. Leblanc and Mr. Pickler explain
13 why. Once a self-employed lawyer starts earning
14 in the 200 to \$300,000 range, there is an
15 incentive to create a professional corporation
16 in which the earnings of the lawyer will be
17 retained. So the lawyer draws a lower salary or
18 lower amount as needed, it can be a salary or it
19 can be dividends, the corporation receives the
20 entire professional income and that's recorded
21 as corporate income. And when the individual
22 lawyer receives either a salary or dividends,
23 neither is recorded in the CRA data.

24 So the data you have before you has no
25 trace of the large and increasing numbers of

1 lawyers practicing in professional corporations.
2 And typically, because having and maintaining a
3 professional corporation involves costs, the
4 experts tell you that it's in the 200 to 300,000
5 range that it starts to make sense to have a
6 professional corporation.

7 Now, even with the data provided by
8 CRA in its limited form, we see, looking at the
9 table at tab 0 of the condensed book, the
10 objective evidence supporting the need for an
11 increase in the judicial salary.

12 Now, I need to address a point raised
13 by Mr. Gorham in his report regarding total
14 compensation and this is really something about
15 which this expert goes overboard. Mr. Gorham
16 grosses up the judicial salary by a whopping
17 49.5 percent under the guise of arriving at a
18 total value of the judicial annuity, inclusive
19 of pension, disability, and what he describes as
20 the additional cost for self-employed lawyers to
21 replicate that annuity.

22 Now, you know, members of the
23 Commission, that Mr. Gorham's 49.5 percent is
24 18.5 percentage points more than the value used
25 by the Rémillard Commission. So ask yourself,

1 is this consistent with the principle of
2 continuity?

3 Mr. Gorham's approach is contrary to
4 the considered decisions of past Commission.
5 Look at the question of whether the disability
6 benefit should be included. The answer is no.
7 The answer was arrived at based on the view of
8 the Commission's own expert, the Levitt
9 Commission's own expert, Mr. Sauvé.

10 Having included this disability
11 benefit, Mr. Gorham further inflates the value
12 of the annuity by another 11.67 percent.
13 There's no precedent for this component of the
14 valuation exercise to be included.

15 And, members of the Commission, if one
16 was going to look into this, one should have
17 done it rigorously, which Mr. Gorham did not.
18 And you know that by consulting the second
19 report of E&Y Canada where it is explained to
20 you that the figure of 11.6 percent does not
21 take into account well-known vehicles like
22 professional corporations, like the individual
23 pension plan, which come to reduce the cost for
24 self-employed lawyers to save privately for
25 retirement.

1 So we say that by adopting this
2 maximalist approach that pays no heed to the
3 precedents of the Commission, Mr. Gorham has
4 just strayed outside of his field of expertise
5 and his opinion is unhelpful.

6 Now, next in line was the proposed
7 relitigation by the government of the filters to
8 be applied in the CRA data on self-employed
9 lawyers. And here Mr. Gorham calls all of the
10 filters into question and leaves the reader
11 wondering, at the end, whether there remains any
12 stable reference points.

13 Take one example. Look at
14 Mr. Gorham's treatment of the percentile filter.
15 At paragraph 169, he states that the evaluation
16 for high performing employees requires looking
17 at the 70th to 80th percentile. And he says
18 about the same thing at paragraph 77 -- 177, and
19 we would agree with this because this is in line
20 with past Commissions. But notwithstanding
21 this, at page 46 of his report, Mr. Gorham
22 devotes an entire page to answering the
23 question, how can percentiles mislead us?

24 Now, the basic point to retain on the
25 issue of relitigating the filters is the simple

1 point made by Ms. Haydon in her report. And
2 I'll quote her report.

3 "One of the foundations of
4 compensation research is the degree of
5 consistency over time in the use of
6 comparators in order to maintain
7 confidence in the data collection and
8 related analytical process."

9 As Ms. Haydon cautions, filters are
10 useful and they are necessary. And bear in mind
11 that she speaks from the point of view of a
12 compensation expert, something that Mr. Gorham
13 is not.

14 Now, I need to say a few words about
15 the low-income exclusions and the reasons why it
16 must be increased from 60 to 80,000. That low
17 income exclusion has always been applied by the
18 Commission every single time the CRA data has
19 been considered. And it's logical because,
20 without it, there's no way to control for those
21 people who are practicing part-time or whose
22 talent simply does not command an income that is
23 even close to the average.

24 Now, Mr. Gorham tells you at
25 paragraph 173 of his report that:

1 "[He] is unable to determine a
2 valid and appropriate reason for such
3 an exclusion."

4 Well, our short answer to that is that
5 20 years of reasoned Quadrennial Commission
6 reports informed by expert evidence every step
7 of the way, including from Commission appointed
8 experts, is a valid and appropriate reason to
9 apply it.

10 Now, why must that low income
11 inclusion be increased? Ms. Haydon notes that
12 the Robert Half 2021 Legal Profession Salary
13 Guide reports that \$81,000 is the salary of a
14 first-year associate. A first-year associate at
15 the 75th percentile. So this is one piece of
16 evidence which demonstrates that a low income
17 cut off of \$60,000 is manifestly too low.

18 Another piece of evidence is the
19 analysis done by Professor Hyatt.

20 MR. LAVOIE: Sorry, to interrupt. I'm
21 getting some messages from the reporters that
22 they might be in need of a break.

23 Madam Chair, I know we're still in the
24 middle of Mr. Bienvenu's submissions, but I'm
25 wondering if we might be able to take a break

1 for the reporters at this time?

2 MADAM CHAIR: Mr. Bienvenu, is it a
3 good time? Can we cut -- of course we'll go
4 back to you after the break. I realize we'll
5 try to juggle around the timing.

6 MR. BIENVENU: No, no, I'm entirely in
7 your hands, Madam Chair. What I would ask is of
8 course we need to take a break for the court
9 reporter. I'm going to streamline what left I
10 have to say to you and I'll be done in 10
11 minutes.

12 MADAM CHAIR: Okay. We will take a
13 10-minute break. I would ask everybody to be
14 back at 11:45.

15 -- RECESSED AT 11:35 A.M. --

16 -- RESUMED AT 11:45 A.M. --

17 MADAM CHAIR: We will check with the
18 relevant people for a change in schedule.

19 Mr. Bienvenu, maybe I can throw it to
20 you to give us a maximum 10 minutes.

21 MR. BIENVENU: Thank you for your
22 indulgence.

23 So the topic I'm addressing is the
24 reasons why the low income exclusion must be
25 raised from 60 to 80,000. The first ground in

1 the evidence is the salary of first-year
2 associate at the 75th percentile.

3 The second is Professor Hyatt's
4 evidence. He shows that if the cutoff had been
5 increased to match the growth in the IAI in 2004
6 when it was last adjusted to 2019, it would give
7 you 87,000. If you apply the CPI, it would be
8 79,000. So it's 79,200, \$800 short of the
9 80,000 that we proposed, which is clearly
10 reasonable.

11 Now, you can come at it by doing the
12 proposed calculation. If it was appropriate in
13 2004, as decided by the McLennan Commission, to
14 have a low income exclusion of \$60,000, the --
15 the effect of inflation alone has reduced that
16 number to the amount of \$46,000. So in effect,
17 if you apply 60,000, as compared to what it was
18 designed to catch, you're applying a \$46,000
19 exclusion.

20 Now, interestingly, Professor Hyatt
21 breaks down the demographics of lawyers earning
22 between the 60 and 80,000 levels and you'll see
23 that he finds that nearly half of them are aged
24 between 55 and 69. So you know that they are
25 people -- should not be included in that group.

1 The other filter is the 44 to 56 age
2 range. It's always been applied because that's
3 where the applicants come from on the top
4 CMAs. So we noted, members of the Commission,
5 what the Rémillard Commission said in paragraph
6 70. And what it said is that it gave very
7 limited weight to the difference between private
8 sector lawyers salaries in the top 10 CMAs and
9 those in the rest of the country, but we have
10 now provided evidence that really should bring
11 you to pay a lot of attention.

12 MR. LAVOIE: Sorry, Mr. Bienvenu, I
13 need to interrupt again. I'm being advised that
14 we're missing Mr. Lokan, Mr. Andrew Lokan. I
15 believe he might be necessary for him to be
16 present during the hearing, but he's not on at
17 the moment.

18 Does Madam Chair wish to take a brief
19 pause while we wait for him to reconnect?

20 MR. COMMISSIONER: If we can take a
21 minute, let's see if we can get him.

22 -- RECESSED AT 11:49 A.M. --

23 -- RESUMED AT 11:52 A.M. --

24 MADAM CHAIR: Over to you,
25 Mr. Bienvenu.

1 MR. BIENVENU: So I was speaking about
2 the need of the Commission to pay attention to
3 the top CMAs. You have the evidence of Chief
4 Justice Popescul. You have the applications
5 table. And please recall that fully 68 percent
6 of appointees come from the top 10 CMAs, so
7 this is more than two thirds of appointees.

8 Now, I'm going to end by talking about
9 incidental allowances and representational
10 allowances. And here, our request is for an
11 increase in these allowances consistent with the
12 rate of inflation since they were last adjusted,
13 and that was more than 20 years ago.

14 The government has replied to our
15 suggested recommendation that the modest
16 increases we proposed are not warranted because,
17 it is said, not all judges use the full
18 allowances available to them.

19 Now, we fail to see the relevance of
20 this point. If anything, it proves that the
21 allowance is only used by those who really need
22 it. The allowance is not a form of judicial
23 compensation. It is an entitlement to the
24 reimbursement of reasonable expenses, reasonably
25 incurred.

1 A number of judges do use the full
2 amount of the allowances available to them or
3 close to it. For example, more than 70 percent
4 of judges use more than \$4,000 of their
5 incidental allowance. And for those judges
6 making use of the allowances, it is only
7 reasonable that, for them, that its amount
8 should be adjusted as the cost associated with
9 related expenses increased with inflation. And
10 for those judges who do not use the allowance,
11 well, the change will be of no consequence to
12 the Government.

13 Now, we focused, in our submission, on
14 the costs associated with the increased use of
15 technology with remote judging. I think the
16 experience we're living this morning speaks for
17 itself in that regard. These costs are
18 significant. I'll just give you a pointer.
19 Half of judges recently canvassed spent more
20 than a quarter of the available incidental
21 allowance on home Internet costs alone. Now,
22 those costs were not even contemplated in 2000
23 when the allowance was last adjusted.

24 Now, please consider the same reverse
25 calculation point that I made earlier. The

1 inflation adjusted value of the \$5,000 allowance
2 recommended by the Drouin Commission is, today,
3 \$3,500. So inflation brought this amount down,
4 but the cost of the expenses designed to be
5 reimbursed has gone up with inflation.

6 Now, the same reasoning holds for
7 representational allowances, and consider this.
8 If it was Parliament's view, and we know that it
9 was, when legislation was adopted to implement
10 the 2000 report of the Drouin Commission, that
11 the sums earmarked for the representational
12 duties of chief justices and associate chief
13 justices were appropriate and commensurate to
14 the proper discharge of their duties, well then
15 you know, you know that the passage of time and
16 inflation have by now defeated Parliament's
17 intention, because these amounts have, in
18 effect, been reduced by more than 40 percent.

19 Madam Bloodworth, Mr. Griffin, Madam
20 Chair, those are my submissions. I wish to
21 thank you for your attention and your patience,
22 in spite of the many interruptions.

23 MADAM CHAIR: Thank you, Mr. Bienvenu,
24 thank you. I'm still waiting on the answer for
25 the relevant parties on the translation and

1 transcript whether we can break for lunch break
2 and do the federal protonotaries and Mr. Lokan
3 after a short break for lunch.

4 Sorry, I've got one answer. We do
5 have a problem with the interpreters.

6 Any questions that you would have,
7 Commissioners?

8 MR. COMMISSIONER: I don't have any
9 particular questions.

10 MADAM COMMISSIONER: No, I'm okay as
11 well, thanks.

12 MADAM CHAIR: Justice Popescul, thank
13 you very much for your evidence, very
14 interesting. The one question I have, being a
15 bit of a neophyte in this is, can you tell me in
16 the highly recommend that you say that that has
17 gone down and the rejection has gone up, what
18 about the recommend? Has highly recommend been
19 in the trends over the past 10 years, really the
20 driver? Would you look at that or more a
21 combination of highly recommend and recommend,
22 just so that I understand the picture a bit
23 better?

24 JUSTICE POPESCUL: A very good
25 question. I can tell you that as 10 years ago

1 when I started to be the Chair of the JAC, there
2 was no "highly recommended" category. Because
3 what had occurred is there was a "highly
4 recommended" category at one point, and when the
5 government changed, they took out the "highly
6 recommended" category, so you just had
7 "recommended" and "not recommended". And then
8 more recently with this government when they
9 came into power, they reinstated the "highly
10 recommended" category.

11 So it's hard to go back 10 years
12 because that category didn't exist 10 years ago
13 when I was doing the JAC, chairing the JAC.

14 MADAM CHAIR: So is it fair that if I
15 look today at highly recommend and recommend, we
16 should feel good? As you said, you're not
17 saying that there's a lack of -- how would I say
18 that, the Bench currently, there's no issue in
19 the quality of the Bench right now. So I should
20 be able to combine the "highly recommend" and
21 "recommend" as a pool when we look at the
22 tables?

23 JUSTICE POPESCUL: Yes, I think that
24 that would be fair to say is that when you're
25 looking at the tables, you can put them both

1 together. And I think again, as a Chair of the
2 JAC, what they are doing is they're trying to
3 signal to the Government, who has the ultimate
4 authority as to who they would appoint, which
5 candidates are of particular outstanding
6 quality, and that would be the highly
7 recommended categories. And they can choose
8 from the highly recommended and recommended
9 categories.

10 So the point, I guess, is the
11 dwindling pool. And that if you -- if you have,
12 say, for example, on a court, four vacancies and
13 you only have six people from which to choose,
14 that means your -- it affects diversity, who you
15 can choose. It would be certainly a lot better
16 if you had four vacancies and you had 20 people
17 from which to choose, that the government could
18 choose from.

19 So -- but I think in answer to your
20 question, yes, the government is able to choose
21 from the highly recommended and recommended
22 categories.

23 MADAM CHAIR: Thank you very much,
24 that answers my question.

25 In terms of moving ahead, normally we

1 would go on -- and I do have questions for the
2 judiciary, but it could wait until tomorrow.

3 Mr. Bienvenu, you have answered many
4 of my questions already, so thank you very much.

5 Peter and Margaret, how would you like
6 to proceed, given I still don't have an answer
7 on whether we can have the team of translators
8 come back earlier in time. Should we break for
9 lunch now and come back early?

10 MR. COMMISSIONER: Well, I think it's
11 probably the logical place to be fair to
12 Mr. Lokan, so that he doesn't get a bit of a
13 kangaroo start.

14 MADAM CHAIR: Okay. So you would
15 propose that we would go for lunch, come back at
16 12:45 at the latest. And, Mr. Lokan, if we give
17 you a 40-minute break, that would mean it brings
18 us back to about 1:25. Would that be okay?

19 MR. LOKAN: That's fine, Madam
20 Commissioner. And I just want to say, I am able
21 to be flexible. I can either do my submissions
22 now, start my submissions now, wait till after
23 lunch. I am completely in your hands.

24 MADAM CHAIR: Are you okay then, Peter
25 and Margaret, to start?

1 MR. COMMISSIONER: If that's going to
2 save time, I'm fine with that.

3 MADAM CHAIR: Probably we should do
4 that, Mr. Lokan. And if you can assume we've
5 read very carefully your documents, which I did.
6 So thank you very much. If we can find some
7 time that would be greatly appreciated.

8 MR. LOKAN: Thank you, Madam
9 Commissioner, and thank you to the Commission
10 for the opportunity to make submissions on
11 behalf of the Prothonotaries.

12 I have with me today as my client
13 representative Prothonotary Aylen who will pull
14 up a couple of documents later in my
15 submissions.

16 The Prothonotaries have raised three
17 discrete issues before this Commission. One is
18 that of supernumerary status. The second is
19 increasing the incidental allowance to achieve
20 parity with the incidental allowance of the
21 judges. And the third is change in their title
22 from Prothonotary to "Associate Judge".

23 Now, on these three discrete issues,
24 the government has indicated that it does not
25 disagree with each substantive position of the

1 Prothonotaries, so I will be able to be briefer
2 on those than I would be otherwise.

3 On supernumerary status, the parties
4 are essentially putting forward a common
5 position on the elements of a supernumerary
6 scheme. Of course, the Commission will want to
7 know the underlying logic to be able to make a
8 recommendation, if so advised.

9 On incidental allowances, the
10 government accepts that there should be parity
11 with -- between judges and Prothonotaries.

12 On the change in title issue, the
13 government asserts that the Commission has no
14 jurisdiction, so I will be addressing
15 jurisdiction. The government advises that it
16 intends to make the change as a matter of
17 policy, but gives no time frame and simply says,
18 well, we will or may do that.

19 On the salary issues, the
20 Prothonotaries are not seeking any variation for
21 this Commission in the 80 percent ratio that was
22 established last time. However, the
23 Prothonotaries are affected by the government's
24 proposed cap on the IAI increases and, as well,
25 by the Association in the Council's proposed

1 salary increases. So I will make some brief
2 submissions on those points.

3 So let me start with supernumerary
4 status. The Commission should make a
5 recommendation on the terms which are set out in
6 the Prothonotaries initial submissions, at
7 paragraph 71. The supernumerary program is a
8 win-win for the government and the
9 Prothonotaries and for the Federal Court. It's
10 a benefit for the Prothonotaries in that it
11 enables them to keep contributing in the years
12 in which they transition to retirement with a
13 reduced workload. It's a benefit to the
14 Government because the government receives the
15 benefit of 50 percent of a full-time
16 Prothonotary's caseload while only being
17 required to pay approximately 33 percent of the
18 salary. So there's a financial benefit there.

19 It is a particular benefit to the
20 court, which can use supernumerary appointments
21 to smooth out workload and retain the benefit of
22 its most experienced Prothonotaries, and this is
23 particularly important for a small cohort.
24 There are a total of nine in the office of
25 Prothonotary.

1 If you have a couple of retirements or
2 disabilities happen in quick succession and
3 you're not able to use supernumerary
4 appointments, then you have the potential of a
5 disruption to the court by the time that new
6 Prothonotaries are found and appointed and
7 brought up to speed. But if you can plug those
8 gaps with supernumerary appointments, it gives a
9 lot more flexibility to the court.

10 These were the factors that led the
11 Rémillard Commission to recommend that the
12 government and the Chief Justice consider the
13 possibility of allowing a supernumerary status.
14 Those discussions, I'm happy to report, were
15 held in the time since the Rémillard Commission
16 and they have led to the more crystallized
17 proposal at paragraph 71.

18 There are four elements, and I do
19 understand this to be a common proposal, as
20 well, from the government. That is to say,
21 Prothonotaries would be eligible when eligible
22 for the full judicial annuity under the Judges
23 Act. The election to go supernumerary would be
24 at the Prothonotary's option both whether and
25 when. The duration of a Prothonotary's

1 appointment as a supernumerary would be up to
2 five years. And the workload would be defined
3 as 50 percent of that of a full-time
4 Prothonotary.

5 Now, in our paragraph 71, we do have
6 some language saying that that would be as a
7 matter to be scheduled between the chief justice
8 and the Prothonotaries. You may not need to
9 include that in your recommendation. You may
10 regard it as implicit since certainly that's the
11 way in which scheduling happens, but that was a
12 point that the Chief Justice had wanted to
13 raise.

14 Now, on incidental allowance, I don't
15 need to say very much because Mr. Bienvenu has
16 covered that ground. This is an allowance that
17 is paid to reimburse expenses and it's on the
18 provision of receipts, it's not an open-ended
19 allowance. It's not a form of compensation, but
20 it is a benefit for Prothonotaries and judges
21 not to have to subsidize the position with
22 personal expenditures. Not to have to say,
23 well, I know I need a second computer or
24 whatever, and the allowance doesn't cover it,
25 but I want to be professional and I want to

1 fulfill the duties of my office, so I'm just
2 going to spring for it myself. We don't want
3 that situation.

4 The range of expenses is set out in
5 our paragraph 77 of our initial submissions.
6 The major expenses, especially lately, have been
7 in establishing and maintaining a home office as
8 well as meeting requirements for continuing
9 legal education, and both of those are the same
10 for judges and Prothonotaries. Staples doesn't
11 give a special Prothonotary deal of an
12 80 percent rate for printer cartridges if you're
13 a Prothonotary. The price is the same. So
14 we're pleased to see that the government agrees
15 with parity and wherever that allowance amount
16 ends up being set, it should be the same for
17 both Prothonotaries and judges.

18 With respect to the change in title, I
19 am going to spend a little more time on that one
20 because it's contested, at least, as to
21 jurisdiction.

22 This is an issue of some importance
23 because there is widespread misunderstanding and
24 confusion with the title of Prothonotary. It is
25 a long-standing issue. The Committee of Judges

1 and Prothonotaries that were first tasked with
2 looking at this issued a report some 15 years
3 ago in 2006, and recommended a change to
4 "Associate Judge" or Judge.

5 The Chief Justice put this
6 recommendation into a notice to the profession
7 in 2009 and perhaps the hope was that the Bar
8 would pick up from the notice to the profession
9 and start using that title, but the difficulty
10 is that it requires legislative change. Both
11 the Judges Act and the Federal Courts Act refer
12 to Prothonotary. So unless and until those are
13 amended, the statutory title will remain
14 Prothonotary.

15 Now, to address jurisdiction. I ask
16 you to look at the wording of section 26
17 carefully. This Commission has jurisdiction:

18 "[...] to inquire into the
19 adequacy of the salaries and other
20 amounts payable under this Act [...]" .
21 And those are very important words.

22 "[...] and into the adequacy of
23 judges' benefits generally."

24 So the insertion of those words, "and
25 other amounts payable under this Act," is your

1 tipoff that benefits can go beyond financial
2 issues, because if it was just financial, you
3 would not need to talk about benefits at all,
4 having said salaries and other amounts payable
5 under this Act. So amounts payable covers the
6 financial field, but then section 26 goes on to
7 say:

8 "[...] and into the adequacy of
9 judges' benefits generally."

10 And I respectfully submit that the
11 title is very much a benefit of the office. The
12 wrong title is a burden; the right title is a
13 benefit.

14 The change that is requested by the
15 Prothonotaries ties into the reasons for having
16 a Quadrennial Commission process in the first
17 place. It's to safeguard the independence of
18 the judiciary.

19 Judges, we know, are held in very high
20 regard and are understood by Canadians to be
21 independent of government. All too often,
22 unfortunately, Prothonotaries are mistaken for
23 part of government. It is a benefit to be
24 regarded as a judge and it's a benefit that
25 reinforces the independence of the judiciary

1 because everybody understands the independence
2 of judges. Conversely, it is a distinct burden
3 to carry a title that litigants, and even
4 counsel, can't pronounce and don't understand.

5 There is some practical importance, as
6 well, to your jurisdictional finding. If you
7 agree with me on jurisdiction and do make a
8 recommendation, I'm going to make a prediction,
9 the government will then have to implement. The
10 government will not be able to articulate any
11 rational reason not to make the change.

12 You know, in the Bodner framework, the
13 government must respond and they can refuse a
14 recommendation on a rational basis, and on
15 financial matters that's often contested. It
16 would be very difficult to imagine on what basis
17 the government would say, we're not going to
18 change Prothonotary title in the face of a
19 recommendation from this Commission. Now, we
20 say that it is helpful that the government
21 currently says that it is its present intention
22 to change the title as a matter of policy, but
23 we do note that things can change. Mr. Bienvenu
24 referred to the change of government in 2006
25 earlier in his submissions. The Prothonotaries

1 were also affected by that change in government
2 because there was a proposal to include them in
3 a Commission process in 2005 that died on the
4 order paper of the House of Commons with the
5 calling of the election.

6 So it's much less secure to have,
7 well, as a matter of policy, we think that would
8 be a good idea when there's always the
9 possibility of a change in policy, whether
10 connected or not to a change in government.

11 At the very least, however, the
12 Prothonotaries do ask, even if you don't find
13 you have jurisdiction to make a recommendation,
14 would you please record that the Prothonotaries
15 raised this issue and that the government stated
16 its intention to fix it.

17 Now, if I can just spend a few minutes
18 and again this goes back to the jurisdictional
19 points, as well as the merits. On some of the
20 confusion that is created by the current title,
21 and if I can ask Prothonotary Ayles to screen
22 share for this? We had a debate in 2014, or so,
23 in the Senate in which a Senator made an
24 assertion about who Prothonotaries were:

25 "Prothonotaries in the Federal

1 Court are clerks who are halfway to
2 being a judge. They are not
3 necessarily legally trained but most
4 of them are. Their salary is being
5 increased to \$228,000 a year [...]."

6 It may not be the most inaccurate
7 thing ever said in the Senate, but it's got to
8 be up there close.

9 If we can look at tab 11 of our book
10 of documents? Here is an email, and this is
11 perhaps a little more serious, from a litigant
12 before the court to Prothonotary Furlanetto, as
13 she then was, she has since been appointed as a
14 judge.

15 "Please be advised that the
16 respondent, his firm and the counsel
17 will not refer to you by the colonial
18 title of Prothonotary as such term
19 refers to the Catholic church and the
20 role of the recorder of slave deeds,
21 and other instruments of slavery
22 [...]."

23 Certainly it's true that the
24 "Prothonotary" label was originally an
25 ecclesiastical office. I don't know about the

1 Catholic church. But the link to slavery caused
2 the Prothonotaries to look into this event,
3 because it's obviously a bit of a concern, and
4 sure enough they found, and this is at tab 12 of
5 our book of documents, that in turn of the
6 19th century America, this is actually in
7 Pennsylvania, the Prothonotaries were
8 responsible for keeping what were called the
9 registers of Negroes and Mulattos. That is to
10 say, listings of slaves born and to whom -- who
11 owns them. Now, that may be a little more
12 ancient history, but obviously concerning for
13 the court.

14 Even the Department of Justice, if we
15 can go to tab 12, in announcing the appointments
16 of the last three, I think, Prothonotaries, in
17 the announcement in French has asserted that
18 "les protonotaires sont des fonctionnaires, de
19 la cour federale", using the word
20 "fonctionnaires", as I say, this is mistaking
21 them for part of government. That is what I
22 would understand to be the same as civil
23 servant. They are not. They are judicial
24 officers. And it might be forgivable if that
25 had happened only once, but it happened three

1 times, as documented in our Book of Documents.

2 And just a final example, a Globe and
3 Mail article reporting on the merits of a case,
4 there was a case in which some affidavits were
5 struck out, and it was a fairly high profile
6 case, and the Globe and Mail reported that Roger
7 Lafreniere, now again Justice Lafreniere:

8 "Prothonotary and explained as
9 chief clerk of the Federal Court
10 stressed the need to allow the judge
11 to hear the wealth of information."

12 So there is rampant, widespread
13 confusion and not only that, but it's confusion
14 that engages the separation of powers. The
15 common theme running through this is that
16 Prothonotaries are seen as government
17 functionaries. They are seen as part of
18 government as opposed to part of the judiciary.
19 It's a wholly unsuitable title. Spellcheck does
20 not even recognize the word.

21 And to get back to section 26 of the
22 Judges Act and to the criteria there, as
23 Mr. Bienvenu pointed out, one of the main ones
24 is the need to attract and retain outstanding
25 candidate. All I can say about that is that the

1 title is distinctly not helpful in terms of
2 attracting leading members of the Bar.

3 You should be aware, and this is in
4 our materials in the initial submissions at
5 paragraph 88, that in Ontario there is a cohort
6 of case management Masters who have many similar
7 functions and there is legislation before the
8 legislative assembly of Ontario to change that
9 title to Associate Judge there as well. Again,
10 it's not clear to the public what a Master is
11 and there may be some connotations to that
12 title, but that's in the works in Ontario.

13 So we respectfully request that you
14 recommend that the title be changed from
15 Prothonotary to Associate Judge or Juge Adoir
16 [ph].

17 Now, that brings me to my comments on
18 the economic issues. The Prothonotaries adopt
19 the submissions of the Association and Council
20 and I will just add a few comments.

21 With respect to the cap on the IAI
22 increases, we say that that cap is unwarranted
23 and lacks any principle. As Mr. Bienvenu
24 pointed out, the issue of the impact of COVID is
25 self-correcting over time. As the labour market

1 normalizes, IAI increases will face downward
2 pressure that will compensate for what is said
3 to have occurred with the 2021 increase.

4 It's contrary to the legislative
5 scheme in which Parliament has already
6 determined that a statutory cap of 7 percent in
7 any given year is the appropriate legislative
8 limit.

9 And, furthermore, the government's
10 position, with respect, is not symmetrical,
11 because what they have said is, well, we'll
12 cap -- we propose that you cap at 10 percent
13 over the 4 years of the mandate, but don't
14 worry, if the downward pressure is sufficient
15 that any given year you would go negative and it
16 would be less than zero, well, we'll protect you
17 from that. But what the economists are telling
18 us and the budget and the Bank of Canada, and
19 the consensus forecast, all of those tell us
20 that it's unlikely that the IAI increases will
21 dip below zero. That there is still sufficient
22 strength in the economy that between
23 productivity improvements and inflationary
24 increases, we are probably looking at, you know,
25 a couple of percent for each of the next couple

1 of years.

2 So the protection that the government
3 would offer is very unlikely to come into play.
4 There is indeed a lot of chatter these days
5 about whether we're underestimating the risks of
6 inflation and that COVID recovery may, in fact,
7 cause inflation to be higher. And if it does,
8 then there's a two-fold effect. The cap becomes
9 more limiting for the judges and Prothonotaries
10 and, again, it's even less likely that there
11 would be any need for downside protection to
12 prevent against a negative increase. So one
13 looks in vain for any articulation of a
14 principled basis for what the government
15 proposes.

16 Now, if I can make some comments on
17 the analysis of the comparators to judges. I'm
18 not going to talk about the DM-3s. That was
19 covered completely by Mr. Bienvenu, but I would
20 like to talk about lawyers in private practice
21 for a couple of minutes.

22 The government's analysis of lawyers
23 in private practice is not reliable for a number
24 of reasons, but including that the government
25 ignores the impact of professional corporations.

1 As you know, the Gorham report applies a gross
2 up to judicial salaries to account for what is
3 presented as more tax efficient saving through
4 the judicial annuity. And in the Gorham report,
5 the analysis is once you've maxed out on your
6 RRSP, you're saving in after-tax dollars if you
7 are a lawyer in private practice, but no
8 allowance is made for professional corps. And
9 that professional corps are a very powerful
10 savings vehicle and they are available to all
11 lawyers. We know they are extremely widespread.
12 They now account for around about a quarter of
13 all practicing lawyers, according to the
14 materials.

15 And now Mr. Bienvenu took you to the
16 point that it's really not worth doing until you
17 hit about 200,000 to 300,000 in income. The
18 reason for that is, firstly, because there are
19 expenses with setting up a separate corporation.
20 But also that when you're in that range, you're
21 more likely to be using most of your income for
22 your expenses, but as income increases above
23 those amounts, the higher the income, the
24 greater the savings for professional
25 corporations.

1 That is to say, if you're being paid,
2 let's say, 800,000 a year and you really only
3 need 300,000 to sustain your spending
4 commitments, that extra 500,000, you pay tax at
5 a lower rate and leave it as retained earnings
6 in the corporation. It becomes very much like a
7 second RRSP, but with no limit on contributions.
8 So as I say, very powerful.

9 MADAM CHAIR: Mr. Lokan, do you have a
10 hard stop in three or four minutes, is that
11 good? I can give you more after lunch. I
12 didn't mean to cut you. I just want to be mind
13 that we lose translators and transcripts at
14 12:30.

15 MR. LOKAN: If I can just finish this
16 point and then break for lunch. I will then
17 only have 5 or 10 minutes after lunch.

18 MADAM CHAIR: That's great.

19 MR. LOKAN: So what I was going to
20 perhaps put in your minds, I hope, is that
21 roughly speaking, once you reach the upper
22 levels, you have \$25,000 in tax savings for
23 every \$100,000 in extra income. So -- and you
24 see that ratio in the Leblanc Pickler report and
25 also in the comparative tax rates that we've

1 included in our materials. So if you can save
2 400,000, then you've got 100,000 saving in tax.
3 So a very powerful vehicle.

4 With that, I will stop for the lunch
5 break and I look forward to completing my
6 submissions, briefly, when we come back.

7 MADAM CHAIR: Perfect. Thank you very
8 much, Mr. Lokan. I apologize, I'm mindful of
9 the people who are there to help us.

10 So, Mr. Lokan, you will give us a
11 maximum of 10 minutes when we come back.

12 MR. LOKAN: I will have less than 10
13 minutes.

14 MADAM CHAIR: Can everyone please stay
15 connected. Please do not disconnect as we would
16 have to test again your audio and that might be
17 a nightmare that would delay us yet again. So
18 thank you. We'll see you starting right sharp
19 at 1:30.

20 -- RECESSED AT 12:28 P.M. --

21 -- RESUMED AT 1:31 P.M. --

22 MR. LOKAN: Before the break I was
23 talking about the widespread use of professional
24 corporations and how that widespread use means
25 that the CRA data is essentially missing the top

1 part of the chart. And I had referred earlier
2 to the fact that professional corporations are
3 not very useful at the lower income levels but
4 become increasingly useful the more that a
5 lawyer earns. There's another dimension to that
6 which is, of course, you can retain more
7 earnings if your income goes up, but you can
8 also retain more earnings if your lifestyle
9 expenses go down.

10 And one feature of professional
11 corporations is that as you reach the stage
12 later in life where you've paid off your
13 mortgage, perhaps you've put your kids through
14 school, university, you may experience a decline
15 in expenses and, again, that's when you
16 typically turn to a professional corporation.
17 It's not so much the junior partners as the
18 middle and senior partners that use them and,
19 again, that's associated with higher earnings.

20 Now, the government in its written
21 submissions conjures up the image of the senior
22 partner in the corner office as being the only
23 kind of lawyer who would be deterred from
24 applying to the judiciary by the lower salaries,
25 but that image is both inaccurate and woefully

1 outdated.

2 There is reason to believe that in the
3 major cities there are thousands of lawyers who
4 are earning average partner incomes and are
5 earning amounts in the higher six-figure range,
6 north of 500,000, 600,000 et cetera, et cetera,
7 that never show up in the CRA data. And this is
8 particularly relevant to the Prothonotaries who
9 are appointed to the largest census metropolitan
10 areas. They are appointed specifically to
11 Toronto, Montreal, Ottawa and Vancouver where
12 the leading lawyers who appear before them often
13 earn far more than they do.

14 We do have one data point, and that is
15 in the judiciary's book of exhibits and
16 documents at tab 30. There is a Globe and Mail
17 article about Cassels Brock. The information in
18 that article gives us enough to be able to
19 deduce that average partner compensation at
20 Cassels Brock is in the range of \$750,000 a
21 year. You can get that from the -- they give
22 the gap between men and women and they talk
23 about how many men there are versus women
24 partners. And you just do a bit of math and get
25 that \$750,000 figure. That's average partner

1 compensation that's is not the corner offices.

2 Now, Cassels Brock is a fine firm, it
3 has offices in Toronto, Vancouver and Calgary,
4 but they are not uniquely profitable. The
5 Cassels Brock firm would be replicated by a
6 number of mid-size to larger firms in the major
7 cities in Canada.

8 So, with respect, when you have that
9 data point, when you understand how professional
10 corporations work, when you understand the tax
11 advantages, and when you see the very large
12 number of professional corporations that private
13 practitioners are electing to use, you can have
14 very little confidence in the percentiles that
15 the government puts forward. And when they talk
16 about 89th percentile this, et cetera, et
17 cetera, those figures are just likely to be very
18 seriously skewed and not reliable.

19 So we say that the recruitment issues
20 are real, and that the modest increases that are
21 sought by the judges, and which would flow
22 through to the Prothonotaries, would begin to
23 address the challenges of recruitment. They
24 would only be a small step but they would begin
25 to address them and those should be recommended.

1 Now, subject to any questions from the
2 panel those are my submissions on behalf of the
3 Prothonotaries.

4 MADAM CHAIR: Mr. Lokan, to get more
5 time I assume you're back tomorrow? There is a
6 reply by the Prothonotaries so I think we will
7 keep and reserve our questions then, if that is
8 all right with you?

9 MR. LOKAN: Yes.

10 MADAM CHAIR: Thank you very much,
11 Mr. Lokan.

12 Now can I call on the representatives
13 for the government, Mr. Rupar.

14 MR. RUPAR: Thank you, Madam Chair. I
15 hope you can hear me.

16 MADAM CHAIR: Yes, very well, thank
17 you.

18 MR. RUPAR: Madam Chair,
19 Commissioners, we would like to echo the opening
20 statements of my friend, Mr. Bienvenu, in
21 respect of the admiration that all Canadians
22 hold for our judiciary. There is simply no
23 question that our judiciary is the envy of the
24 world, it is second to none. And we are very
25 proud to have all the members of the judiciary

1 function in the very difficult circumstances, in
2 this past year in particular, in the manner that
3 they have. So I wish to echo those comments
4 that my friend made.

5 I would also like to echo the comments
6 my friend made with respect to the work of the
7 past Commissions and this Commission. It's
8 always a challenging endeavour, shall we say,
9 and it's always been undertaken in the most
10 professional and independent manner and, again,
11 I echo the comments of my friend there.

12 And, finally, I also echo the comments
13 with respect to the co-operation between the
14 various principal parties. It's worked out very
15 well. There's been very few hiccups. We don't
16 agree on everything, as you will see in a few
17 minutes as we go through some submissions. But
18 I do like to thank Mr. Bienvenu and his teams
19 for their co-operation.

20 Now, one of the very first times I
21 ever appeared in court the judge looked at me
22 and said, Mr. Rupar, now it's time to switch the
23 water to the other side of the bathroom, so
24 we'll see if we can do that.

25 Before we start I just want to talk,

1 just a moment, about the process and some of the
2 comments made about Mr. Gorham in particular.
3 There seemed to be a suggestion that there
4 should be a finding of credibility here. And we
5 just want to make a comment that we understand
6 the process of this Commission is not to go that
7 way. We never understood this Commission to be
8 a litigation-based Commission, more of a
9 co-operative Commission.

10 Mr. Gorham put his report in, it's a
11 very fulsome report. He was asked to find the
12 value of the annuity and total compensation of
13 the judiciary and he set out exactly, in great
14 detail, how he would get there. And, as we will
15 see in a few moments, Mr. Newell agrees, for the
16 most part, with him. They are within a stone's
17 throw of each other.

18 There's been no cross-examinations
19 here, there's been no staggered reports, as you
20 would find in traditional litigation. There's
21 been no discovery. We're not asking for any
22 kind of finding of credibility here and we just
23 think that that's not the way this Commission
24 should be run. And we found that that's the way
25 it's been in the past so just a word of caution

1 with respect to those comments that I think are
2 in order.

3 Now, with those opening words I'd just
4 like to add this, when we go through our
5 materials it's about context and it's about
6 prospective. There were some comments made
7 about the fact that the government has raised
8 other factors or considerations, if I can put it
9 that way, for this Commission to take into its
10 deliberations. Yes, we've looked at what other
11 judiciaries were. And we're well aware what the
12 Drouin Commission said before. And we're not
13 suggesting, in any means, and we said this in
14 our written submission, that there are direct
15 comparisons between our judiciary and those of
16 other countries.

17 We're not suggesting, by any means,
18 that there's a direct comparison between what
19 medical doctors earn and the judiciary. What we
20 are saying, and the reason we put this
21 information before this Commission, is it offers
22 context and perspective. It offers context with
23 respect to what other judiciaries generally are
24 receiving as compensation in similar western
25 democracies. We've tried to address a number of

1 the concerns that were raised by the Drouin
2 Commission with respect to finding comparables
3 and, as our report set out, finding ways to
4 translate the salaries and benefits there
5 through the exchange rate to what a comparable
6 Canadian value would be. Again, we're not
7 suggesting these are direct comparisons, they're
8 contextual comparisons and it provides a broader
9 perspective.

10 Because we're of the view that there's
11 been a narrowing of what the Commission should
12 look at over the years. And we're not at all
13 suggesting that we disregard the DMs, we're not
14 at all suggesting that we disregard the private
15 sector, of course not. We are not doing that.
16 What we are saying is that cannot be the narrow
17 sole perspective.

18 The other judiciaries -- the other
19 information we put before you is not perhaps the
20 primary information you'll turn towards, but we
21 say it's part of the overall picture you should
22 look at.

23 Now, with that, the submissions we
24 make this afternoon will be as follows. I will
25 be starting and I will speak primarily to the

1 judicial annuity issue, the prevailing economic
2 conditions and the attraction of outstanding
3 candidates to the Bench.

4 My colleague, Mr. Shannon, will deal
5 with the CRA information primarily, the ability
6 to track public sector candidates, and he will
7 also deal with the DM-3 comparator and, more
8 broadly, the other comparisons in criteria 4.

9 And I would be remiss, even though
10 Mr. Shannon and I will be speaking to you today,
11 not to acknowledge the outstanding contributions
12 of Ms. Musallam who is also part of our team,
13 although she will not be speaking today.

14 Just one caveat, Madam Chair, I know
15 timing is a little tight today. I will come
16 back after Mr. Shannon has completed -- has
17 discussed briefly the issues of allowance and
18 the issues of the Prothonotaries. I am not
19 suggesting these are not important but I suggest
20 the gulf between us, particularly with
21 Prothonotaries, is much smaller. And we have
22 accepted, as noted by Chief Justice Crampton's
23 letter to the Commission a few days ago, that
24 there's a fair amount of acceptance by the
25 government of the matters which the

1 ProthonotariesProthonotaries have raised. So
2 it's not a disrespect to the Prothonotaries it's
3 just that we've agreed for much of what they've
4 proposed.

5 So with that starting let's turn to
6 annuities. This is really one of the keys, of
7 course, that we have to deal with. And I will
8 address specific issues, I'm not going to go
9 over everything in all the submissions. Of
10 course you've read everything but I will touch
11 on some of the key issues. And let's start with
12 the valuation of the annuity. And I won't ask
13 you to turn these up. These are in our
14 submissions at paragraph -- or sorry, in our
15 condensed book at tab 6. We will turn that up
16 if you don't mind. If we can go to tab 6.? And
17 this is from the most recent Commission.

18 Paragraph 71, this is tab 6 of our condensed
19 book. And what the Rémillard Commission said
20 is:

21 "We must consider more than
22 income when comparing judges' salaries
23 with private sector lawyers' pay. The
24 judicial annuity is a considerable
25 benefit to judges and is a significant

1 part of their compensation package."

2 So there's no issue that the annuity
3 has to be dealt with. And for us the starting
4 point of getting to what compensation should be
5 is what we agree on. And I don't think there's
6 any issue that what we agree with on, between
7 the parties, is that as of April 1st of this
8 past year, so approximately a month ago, the
9 base salary, without any annuity value-added for
10 federally-appointed judges, is \$361,100. So I
11 don't think there's any disagreement there. And
12 that's where we build from.

13 Now, we have to determine what the
14 valuation is of the annuity. And I'll give you
15 the result and then I'll tell you why we get
16 there. We, on the government side, agree with
17 Mr. Newell's valuation of 34.1 percent. We will
18 accept that as a valid value for the annuity.
19 That is different from what Mr. Gorham had.
20 Mr. Gorham had 37.84. Why is there this
21 difference? And it's explained by Mr. Newell in
22 his supplementary report, it's because
23 Mr. Gorham has included the disability benefit
24 as something that should be included as part of
25 the annuity, so that's why there is the

1 distinction. He says that at page 12 of his
2 report and that is at our condensed book
3 number 2.

4 And I would like to pull that up, if
5 we could, because we're going to spend a few
6 moments with Mr. Newell. And he explained this
7 quite clearly at the top of that page where he
8 says:

9 "For clarity, this calculation of
10 the value of the Judicial Annuity of
11 34.1% is distinct from my calculation
12 of 36.7% in the question 1c above,
13 which includes an assumption for
14 disability. The figure of 34.1% does
15 not include a disability assumption
16 whereas the 36.7%[does][...]."

17 So that's where he explains the
18 distinction between the two.

19 And just if we're doing -- as you've
20 seen in many of our submissions an
21 apples-to-apples, the inclusion of the annuity,
22 the 36.7, would be comparable to Mr. Gorham's
23 37.84 because they both include the disability
24 benefit at that point.

25 When I said earlier they're within a

1 stone's throw of each other, we're approximately
2 1 percent difference between the two experts.
3 So even though we heard a great deal this
4 morning about Mr. Gorham's approach, at the end
5 of the day where we end up between the two
6 experts is almost identical, using that
7 methodology.

8 And just to reinforce that Mr. Newell
9 does not have any difficulties with what
10 Mr. Gorham has done, I'd like to go back a page
11 or two to page 6 of Mr. Newell's report. And
12 this is answer 1(c) that was just referred to by
13 Mr. Newell. And if we look at the third
14 paragraph it says:

15 "I wish to observe that some of
16 the key assumptions Mr. Gorham uses
17 are more conservative than mine, which
18 will push the valuation higher - but I
19 believe the assumptions he selected
20 are still within the range of accepted
21 actuarial practice."

22 So Mr. Newell has no difficulty with
23 what Mr. Gorham has done. He says that's within
24 what actuaries can do.

25 He then goes on to talk about down in

1 the bottom of the paragraph:

2 "[...]there are other assumptions
3 in which we have slight differences
4 (e.g. mortality assumption, retirement
5 age assumption, surviving spouse
6 assumption)."

7 So they're within -- like I said, when
8 you use the same methodology they're within
9 1 percent of each other. So we don't see any
10 significant differences between them.

11 So let's take the next step. The next
12 step is to take the \$361,100 and apply the
13 34.1 percent, and that gets us to,
14 approximately, \$484,235. And I won't take you
15 to it now because we don't have to because I
16 just stated it, but this is set out for your
17 convenience at tab 1 of our condensed book,
18 those calculations.

19 Now, if we use Mr. Gorham's number, if
20 we use Mr. Gorham's higher number of
21 37.84 percent we'd end up with a total value of
22 \$497,740. Now I know those two are not the same
23 methodology because Mr. Newell's 34 percent does
24 not include the disability, Mr. Gorham's 37.84
25 does. But I just did this to show you that even

1 using Mr. Gorham's more larger benefit factor
2 the difference really is \$13,000 at the end of
3 the day.

4 So going forward we can use
5 Mr. Newell's number but we're not done yet. And
6 the reason we're not done is we still have to
7 deal with two factors. We have to deal with the
8 tax implications that Mr. Gorham says are
9 necessary to deal with, and then we have to deal
10 with this idea of professional corporations, so
11 let's deal with those in turn.

12 So if we can turn to our condensed
13 book at tab 3? If we can turn that up? And at
14 paragraph 137 this is where Mr. Gorham says we
15 have a tax issue here because to replicate the
16 full amount of the judicial annuity there's not
17 enough RRSP room and so there are going to be
18 tax implications on the additional money used by
19 the private sector to match that, to replicate
20 that annuity. And then if we just turn over the
21 next page, the chart that he's done, and if
22 we -- sorry, keep going to the next, page 32
23 please. There we are. That's where we get the
24 11.67 percent. Mr. Gorham has done a series of
25 weighted calculations and he comes to

1 11.67 percent. And then he talks, in the next
2 paragraph, this is where he says :

3 "By looking at the ages[...]".

4 He does the age calculation of the
5 appointments to calculate the:

6 "[...]age-weighted average value
7 of the Judicial Annuity for all
8 federally appointed judges including
9 the effects of income tax. Net of
10 judges' contributions, that is
11 49.51%[...] a self-employed lawyer
12 would, on average, need to save 49.51%
13 more of their net income than a judge
14 in order to provide savings sufficient
15 to provide the 2/3rds of earnings
16 payable under the Judicial Annuity."

17 That is where Mr. Bienvenu was
18 talking about 45.91, he explains it here.

19 So what do -- we heard this morning
20 Mr. Newell and Messrs. Leblanc and Pickler don't
21 agree with this, and we accept that they don't
22 agree with it. Let's see what they say. Sorry
23 to move around like this but this is how we have
24 to put the pieces together. If we go back to
25 Mr. Newell, which is at our condensed book

1 tab 2, we go to the last page in that, page 12.
2 Now, under question 1(e) Mr. Newell is asked to
3 comment on the figure of 49.51 arrived by
4 Mr. Gorham by taking into account his
5 11.67 percent.

6 Now, I note here that Mr. Newell
7 doesn't come up with a different number than
8 11.67 percent. What he does say in the answer:

9 "It is true that lawyers in
10 private practice would be limited in
11 their use of 'tax-efficient' means to
12 replicate the Judicial Annuity if they
13 were to rely upon RRSP [only][...]."
14 However, there may be other ways to do
15 this.

16 He looks -- in the next paragraph he
17 says:

18 "As is noted in the April 21,
19 2021 Ernst & Young Letter, the 11.67%
20 additional cost to a self-employed
21 lawyer to replicate the judicial
22 annuity would be overstated due to the
23 fact that the tax deferral available
24 through incorporation of a
25 professional corporation, or the use

1 of an Individual Pension Plan, was not
2 taken into consideration by
3 Mr. Gorham."

4 Fine, we don't disagree with that.

5 Let's look for a moment to see what exactly is
6 said by Messrs. Leblanc and Pickler. And let's
7 go to the combined or condensed book number 5
8 please. And if we look at the fourth paragraph
9 it says -- in the actual report prepared by
10 Mr. Gorham. And if we go four lines down it
11 starts with:

12 "As discussed in our previous
13 report entitled 'Fiscal Advantages of
14 Incorporation for Lawyers' dated March
15 26, 2021, there is a possibility of a
16 large tax deferral through the
17 implementation of a professional
18 corporation."

19 And at the end of that paragraph they
20 then conclude, if I can take you there :

21 "The additional cost to replicate
22 the Judicial Annuity, calculated at
23 11.67 percent by Mr. Gorham would be
24 overstated due to the fact that the
25 tax deferral available through

1 incorporation of a professional
2 corporation has not been taken into
3 consideration."

4 Similar comments were made later about
5 the IPP, Individual Pension Plan.

6 What's interesting here is the use of
7 the term, as I brought to you the first part, is
8 the "possibility". We're not denying there's a
9 possibility that this could happen. But you do
10 not have any information before you as to what
11 is actually happening on the ground with respect
12 to professional corporations in the profession,
13 in the legal profession.

14 There was comment made in the
15 Rémillard report about this, there were efforts
16 made by the parties to try to get this
17 information in concert with the CRA. We were
18 not able to do it for this Commission. So what
19 you have before you is theory and speculation
20 and possibility as to what the effect would be
21 here by the inclusion of a professional
22 corporation, but you have no numbers.

23 We don't know how many -- aside from a
24 very broad view of a large percentage -- a
25 largish group of lawyers who will take advantage

1 of professional corporations, we don't have any
2 specific data, as we do in the CRA
3 self-employment data. We don't have the
4 granular numbers that you can then apply the
5 corporate -- the professional corporation tax
6 efficiencies to. We're not denying they may
7 exist, you just don't have that information
8 before you. And it will be our submission that
9 you cannot make a recommendation based on the
10 possibility of using these because you do not
11 have any solid evidence as to how they would be
12 used in particular circumstances, particular
13 ranges of incomes, et cetera. That is the
14 difficulty.

15 Perhaps the next Quadrennial
16 Commission we will be able to have that
17 information before you and we will have our
18 experts make adjustments. What you do have
19 before you is information with respect to
20 self-employed lawyers. And it's our position
21 that Mr. Gorham's 11.67 percent does apply to
22 that group and no alternative percentage has
23 been provided to you, that I recall. So that's
24 the context. That's the perspective that I
25 talked about earlier that we're trying to give

1 to you with respect to these matters.

2 So at the end of the day it's our
3 position that we will accept the 34.1 percent as
4 the value of the judicial annuity. And it's
5 also our position, however, because of the data
6 that you are dealing with from the CRA,
7 Mr. Gorham's addition of 11.67 percent, which he
8 has set out in great detail in his report, is
9 also a fact that has to be taken into
10 consideration in finding the total
11 compensation -- the value of the total
12 compensation for the judiciary.

13 Now, I'd like to turn to the second
14 main item I'm going to deal with, which is
15 prevailing economic conditions.

16 MADAM CHAIR: Can I ask, Mr. Rupar,
17 the CPP contribution of about \$3,160 (sic) that
18 your expert mentions is that something you add
19 to this or is that --

20 MR. RUPAR: Well, he's taking into
21 consideration -- although when there's the
22 discussion between Mr. Gorham and Mr. Newell
23 they talk about the disability. I didn't see
24 Mr. Newell discussing the disability and the CPP
25 I didn't see -- he just talked about the

1 disability. So that's why -- it's another
2 reason -- we can just go with 34,100, it's a
3 little easier, a little simpler, and we don't
4 have to get into that issue of comparing
5 Mr. Gorham who has CPP and disability and
6 Mr. Newell who just talked about disability.
7 He, as I understood, did not deal with the CPP
8 issue.

9 MADAM CHAIR: Okay, thank you.

10 MR. RUPAR: It's not a large issue,
11 it's one that the precision of an actuary would
12 be interested in but I think we can go with, as
13 I said, 34,100.

14 MADAM CHAIR: Perfect. Thank you.

15 MR. RUPAR: Now, when we deal with
16 prevailing economic conditions I'll deal with
17 the IAI 10 percent proposal that we've
18 discussed, which is, you know, I don't think
19 there's any -- telling any tales out of school,
20 that's the point of contention in this hearing.
21 And I will go through the rationale of how we
22 got to the 10 percent.

23 I'll start though, and just again with
24 perspective in context, and Mr. Bienvenu went
25 through some of the figures this morning, I'll

1 add a few more to what he said. I don't think
2 there's any disagreement among the parties that
3 the last year has certainly been a challenging
4 that for the Canadian economy and for the world
5 economy at that.

6 We agree to a certain point that, yes,
7 there are hopeful signs in the future. The most
8 recent unemployment figures that came out on
9 Friday, of course, are not that hopeful. But we
10 say, yes, there could be, to use the proverbial,
11 light at the end of the tunnel but we don't
12 know. That's projections. What we do know is
13 what we have had in the last 15 months or so.
14 And that's where I'll take you to now for a few
15 moments and then turn to the IAI.

16 So I'll just give you where you find
17 these figures in our submissions. I'm not
18 asking you to look them up right now. Just
19 write down -- for the first set of figures from
20 our reply submission, paragraph 19, the budget
21 confirmed that the deficit for the past fiscal
22 year was \$354 billion, projected to be
23 154 billion going forward. And another
24 additional 50 billion for fiscal years 2023
25 and -- sorry, '22-'23, and '23-'24. So, yes,

1 there are significant constraints on the federal
2 budget.

3 In our reply at paragraph 20 we speak
4 of the GDP numbers of -- there's a bit of a
5 variance between 12.4 percent and 13.8 percent.
6 So, again, we're within a fairly close range.
7 However, as we point out in our submissions we
8 must also take into account the contraction that
9 occurred in the pandemic year we just passed,
10 which was 5.4 percent. We have to take that
11 into account when looking at those figures.

12 The last set I'll give you, and these
13 are from our main submissions at paragraph 19,
14 the CPI going forward in 2021 is estimated at
15 1.7 percent, in 2022 is 1.9, in 2023 is 2.0, in
16 2024 is 2.1. Mr. Lokan talked this afternoon
17 about the possibility of inflation fears. You
18 know, economics are always a little hard to
19 predict but these are the figures that we have
20 and we've given you the cites for those.

21 Unemployment, and this is from our
22 main submission as well, paragraph 20, expected
23 to remain close to 10 percent -- going from
24 2020, and we expect it to be down around
25 8 percent in 2021, so it's still significant

1 although hopefully better unemployment numbers
2 going forward.

3 Now, with that economic context is
4 where we'll go next to what we said with respect
5 to IAI. And just before we get there I'd like
6 to take -- and Mr. Bienvenu mentioned this
7 morning the PEI reference. If we can go to our
8 condensed book at tab 8, we have that set out,
9 that reference set out. And in some of the
10 commentary, some of the reply we had from the
11 judiciary they said, well, you have to put the
12 PEI reference in the context of a
13 deficit-fighting budget. And we're not
14 suggesting that was not the case there. I
15 believe it was the Chief Justice that said at
16 the time :

17 "Finally, I want to emphasize
18 that the guarantee of a minimum
19 acceptable level of judicial
20 remuneration is not a device to shield
21 the courts from the effects of deficit
22 reduction. Nothing would be more
23 damaging to the reputation of the
24 judiciary and the administration of
25 justice than a perception that judges

1 were not shouldering their share of
2 the burden in difficult economic
3 times."

4 So what we take from that is that
5 there's a recognition, in this judgment at
6 least, that there is a sense that the judiciary
7 taking -- the remuneration for the judiciary
8 have to take into account the economic
9 structure, the prevailing economic conditions at
10 the time.

11 We're not suggesting that deficits
12 have to be borne solely or disproportionately, I
13 should say, on the shoulders of the judiciary.
14 We're not suggesting that at all. We are
15 suggesting that in the broader context of the
16 economy and the budgetary constraints of any
17 given year of the government, or any given
18 quadrennial cycle, shall I say, is a factor that
19 needs to be taken into consideration, as the PEI
20 reference has said. Not a direct link, again,
21 but a factor, a perspective that needs to be
22 taken into consideration.

23 I'm going to turn now to our position
24 on IAI. And just a brief primer on IAI, and
25 this was set out in our factum and explained by

1 Mr. Gorham in particular at paragraph 70 to 78
2 of his main report: The industrial aggregate is
3 the overall twelve-month average of the average
4 weekly of earnings of Canadians, that's the
5 industrial aggregate. The industrial aggregate
6 index is the rate of change in the industrial
7 aggregate from year-to-year.

8 Now, just to comment on a few things
9 we heard this morning. We're not reconciling
10 (sic) from the use of the IAI as the mechanism
11 for guiding increases in judicial remuneration.
12 We're not going back to CPI. We're not
13 suggesting any other measure. What we are
14 suggesting is that there has been an anomalous
15 growth in the index, the industrial aggregate
16 index in this pandemic -- this past pandemic
17 year, which is out of line with what
18 historically has been the growth of IAI.

19 Now, I'd like to turn back to the
20 Rémillard Commission, and that's our condensed
21 book 6. And if we turn to paragraph 39 of that
22 report -- or sorry, recommendation. And you may
23 recall that there was some -- there was some
24 submissions made in that Quadrennial Commission
25 as to whether it should be CPI or whether it

1 should be IAI as is the relevant measure for
2 increasing judicial compensation.

3 And what the Commission found, in
4 part, is at paragraph 39 what the Commission
5 said was this:

6 "As Professor Hyatt, the expert
7 retained by the Association and
8 Council, said, 'Changes in the IAI
9 reflect changes in weekly wages,
10 including both the cost of living and
11 the real wage (the standard of
12 living)'. The IAI ensures that the
13 'annual earnings of judges' keep pace
14 with the 'annual earnings of the
15 average Canadian'."

16 And if we look at footnote 52 there is
17 the reference back to Professor Hyatt's report
18 in that particular Quadrennial Commission. What
19 he said was:

20 "Keeps pace with the annual
21 earnings of the average Canadian."

22 But that is not what we've seen in the
23 last year. And I don't think there's any
24 disagreement that what we've seen in this last
25 year is that there has been a bottoming out of

1 that average weekly report, that earning's
2 report. In that the lower end of the wage
3 earners have been hit the hardest by the
4 pandemic; tourism, hospitality, restaurants,
5 bars, some of the transient type of employment.
6 And I don't think there's any controversy that
7 that is what happened. And, of course, the
8 inverse occurs to the average; when the lower
9 end is removed the average goes to the top.

10 So what we are suggesting here is
11 there has been a change of circumstances, from
12 when IAI was adopted certainly in the 1980s and
13 when it was reinforced by the Rémillard
14 Commission, that could not have been foreseen.
15 Nobody was foreseeing a pandemic that would turn
16 on its head how the IAI was supposed to work.

17 As Professor Hyatt said, the IAI is
18 supposed to work as a reflection of the average
19 general wage. And what it's done, and this is
20 certainly no fault of anyone, but what it has
21 done is it has done -- it is not a reflection,
22 at least for that period, of those average wages
23 of those real wage earners, as Professor Hyatt
24 said. It is an inflated value because the lower
25 end has been removed. So that's why we say,

1 this is a unique set of circumstances that would
2 justify a review for this quadrennial period.

3 We're not suggesting at all that
4 there's any structural change going forward.
5 We're not suggesting that there has to be a
6 revisiting of the IAI and its indexing -- and
7 the indexing of judicial salaries to IAI. That
8 is not what we're suggesting. What we are
9 saying is for this one particular period of
10 time, where it went to 6.6, because of the
11 removal of the lower end of the wage
12 stratosphere, it does not reflect what it should
13 reflect, as set out by Professor Hyatt.

14 Now, we can look at this in a couple
15 of ways. And if we can turn to our condensed
16 book at tab 9, and this is from our main
17 submission. And this is how we get to our
18 10 percent. Again I emphasize it's a 10 percent
19 for this quadrennial period only. It is not --
20 we are not spilling into the next quadrennial
21 period. April 1st, 2024, the new quadrennial
22 period starts. We're not moving beyond this
23 four years.

24 If we go back one page please? So
25 this is a chart we've put together. And what it

1 shows in the firm lines is the data we have over
2 the last approximately 16 years with respect to
3 increases in salary and effective IAI. And as
4 you can see there's some ups and downs in IAI
5 but it's within a relatively close range. What
6 we see, as we said, is this anomalous spike in
7 2021 for the reasons I just said.

8 And then projections -- and I don't
9 think there's a great deal of controversy, there
10 are projections that we're going to go back to
11 what call a more normal gradient of IAI over the
12 next two to three years.

13 So what we say then, explaining this
14 over the next two charts, what we're saying is
15 this, as we set out in paragraph -- sorry, if
16 you go back to the other page please? Thank
17 you. At paragraph 30 of our main submissions we
18 say:

19 "As set out in the chart below,
20 the average IAI cumulative four-year
21 increase has been 9.9%, with a maximum
22 four-year increase of 11.9% and a
23 minimum four-year Increase of 7.9%."

24 The wide range to this, and I'll pause
25 here, is it's been suggested that there's no

1 rationale to what we're doing. That it seems to
2 be pulled out of thin air but it's we're not.
3 It's based in the statistics that have been used
4 over the past 16 years and projections going
5 forward. So there is a rationale to what we're
6 doing, and it's tied back to the original reason
7 for implementing IAI, as reflected in what I
8 just brought you the with the Rémillard
9 Commission.

10 Now, if we could just go to the next
11 page please? It says:

12 "In addition, the 16-year average
13 yearly increase has been 2.4%, with a
14 yearly high of 3.6% and a yearly low
15 of 0.4%." So as they conclude, "This
16 demonstrates a steady and consistent
17 increase of Judicial salaries in line
18 with IAI that is well within the
19 proposed cumulative four-year increase
20 of 10% for this quadrennial cycle.

21 So that's our rationale. That's how
22 we get -- we get there because it's -- if we
23 didn't have the pandemic, which was certainly
24 not foreseen by anybody, we would have had this
25 continued progression of a little up, a little

1 down. That's what we say is proper when we look
2 at the overall flow of the last 15 to 16 years.

3 Now, my friend took you to a chart
4 that we had. It's -- I'm not asking you to pull
5 it up because I don't have his PowerPoints up,
6 but it was his tab F. And it was projected
7 salaries under the Judges Act with proposed
8 cumulative 10 percent increase. It's difficult
9 to do this. It's this chart here, I put it to
10 you so you recognize what it is.

11 And my friend pointed out that he
12 said, well, it doesn't make sense what's going
13 on here because it looks like what the
14 government is doing is they're pushing beyond
15 the quadrennial period and they're moving into
16 the next quadrennial cycle. And we're not --
17 we're not doing that. There's a slight error
18 that we should have made -- that they should
19 have -- there we are. If you look at under
20 April 1st, 2023, and we go over to "Puisne"
21 judge at 372,600. And it's -- thank you, right
22 there. So that is the figure that at the end of
23 this quadrennial cycle, using our 10 percent
24 proposed increase, would be the base salary.

25 Now, what we should have done is we

1 should have stopped there but we tried to go
2 forward and say, projecting forward what we
3 would be doing. So when we go over to the
4 right-hand side there then and we say there's
5 zero percent increase for the next year, and
6 that's not accurate. We don't know what it's
7 going to be on April 1st, 2024, because that
8 would be for the next Quadrennial Commission.

9 So I just want to clarify how we ended
10 up there. The number of 372,600 is the number
11 we end up with if you use our 10 percent over
12 the quadrennial cycle. We should have left it
13 at that. We should not have moved forward. And
14 certainly it won't be a zero percent increase.
15 We don't know what it will be because that will
16 be for the next Quadrennial Commission to
17 determine.

18 And just to re-emphasize, our proposed
19 10 percent is a one-time-only proposal to deal
20 with the issue of the pandemic. So that's how
21 we get to 10 percent proposal for this period.

22 MADAM CHAIR: Sorry, Mr. Rupar, for
23 interrupting, but while you're on the slide I
24 just want to understand, I calculate the 6.7,
25 the 2.1 and the 1.03.

1 MR. RUPAR: Yes.

2 MADAM CHAIR: Are you including --
3 that's 9.8.

4 MR. RUPAR: Right. Yes. But what
5 we're saying is that it's a 10 percent
6 cumulative from the base of the first year.

7 MADAM CHAIR: From the base, okay.
8 Thank you.

9 MR. RUPAR: Not the percentages, it's
10 10 percent cumulative.

11 MADAM CHAIR: Okay.

12 MR. RUPAR: Yeah, that's where we --
13 yeah.

14 MR. COMMISSIONER: Mr. Rupar, can I
15 ask you one other question?

16 MR. RUPAR: Certainly.

17 MR. COMMISSIONER: Is your proposal
18 that the 7 percent per annum cap remains in the
19 statute?

20 MR. RUPAR: Yes.

21 MR. COMMISSIONER: And the statute
22 specifically says that it is a 10 percent cap
23 for those years only?

24 MR. RUPAR: Yes. I'll double check
25 with my -- with our instructing officers, but

1 that would be the recommendation, that it'll be
2 10 percent for this period but we are not going
3 to remove 7 percent, that will remain going
4 forward.

5 And if there were normal conditions,
6 if I can put it this way, if there were normal
7 conditions, not pandemic conditions, then the
8 7 percent may work because there would be a flow
9 of all the wages and the 7 percent may in fact
10 be perfectly fine.

11 It's just in this very specific and
12 very unique circumstances of the pandemic where
13 we say, we won't go with a 7 percent for this
14 particular year we'll go with a 10 percent for
15 the reasons we stated. Going forward in 2024
16 and onward we're back to where we were before
17 with the legislation untouched.

18 MR. COMMISSIONER: But what is the
19 source of the 10 percent, other than a
20 representative calculation that we just looked
21 at?

22 MR. RUPAR: That is the source of our
23 10 percent, Mr. Griffin, is that we say
24 historically if the pandemic had not occurred,
25 and there hadn't been this anomalous increase of

1 6.6 percent, as I showed you, the figures we
2 have are -- it would have been -- over four
3 years the average would have been a 9.9. Over
4 the 16 years the yearly was 2.4 so that gets us
5 to -- that's how we arrived at the 10 percent.

6 MR. COMMISSIONER: Thank you.

7 MR. RUPAR: I'll touch just briefly on
8 the issue of judicial independence being
9 respected. I don't understand there to be any
10 issue with the judiciary to suggest that there's
11 been any problems with independence with the
12 salaries and compensation. If I'm wrong maybe
13 we can deal with that tomorrow, but I didn't
14 understand anything this morning from what I
15 heard to be -- that to be a significant issue
16 that this Commission would have to deal with.

17 Now I will turn to the final issue I'm
18 going to deal with, and that is the attraction
19 of outstanding candidates. And perhaps we can
20 just go to our condensed -- to my condensed
21 book, if we can do that? And tab 6, this again
22 is the most recent Commission, the Rémillard
23 Commission. And if I can take us -- we'll wait
24 for it to come up on the screen. It will just
25 be a movement. And I think that the statement

1 of paragraph 80 applies today:

2 "All parties agreed that Canada
3 has an outstanding judiciary. To
4 continue to attract outstanding
5 candidates, judges' salaries must be
6 set at a level that will not deter
7 them from applying to the bench."

8 And 81 is an important paragraph.

9 What that Commission said was:

10 "Comparators help us to assess
11 this factor, but this is not a
12 mathematical exercise. Financial
13 factors are not and should not be the
14 only factor - or even the major factor
15 - attracting outstanding judicial
16 candidates. The desire to serve the
17 public is an important incentive for
18 accepting an appointment to the
19 judiciary."

20 And that's repeated at paragraph 83.

21 So that's just a little bit of context when
22 we're dealing with how to attract outstanding
23 candidates. Salary and benefits are absolutely
24 important but they are not everything.

25 And just let me can touch for a moment

1 on some comments we've heard this morning about
2 what our position was with respect to attracting
3 high earners, as the phrase has gone. We
4 absolutely think that high earners need to be
5 attracted to the judiciary, we are not saying
6 anything to the opposite. High earners, to a
7 certain degree, are a reflection of success in
8 their profession, we agree with that. Our
9 position though is that we do not have to focus
10 solely on high earners, and this has been
11 reflected, in our view, on what other
12 Commissions have said.

13 The Block Commission, at paragraph 116
14 of its report, said:

15 "The issue is not how to attract
16 the highest earners, the issue is how
17 to attract outstanding candidates."

18 And the Drouin Commission at page 36
19 of their report said:

20 "No segment of the legal
21 profession has a monopoly on
22 outstanding candidates."

23 So it's a balance, in our view. It
24 has to be -- outstanding candidates, as we said
25 in our submissions, are found in all segments of

1 the profession. They are found in large firms,
2 they are found in small firms, they are found in
3 NGOs, they are found in academia, they are
4 found in government.

5 Outstanding lawyers are found
6 everywhere. The idea is how to attract them.
7 We're not suggesting that we exclude high
8 earners, we need to have high earners, we just
9 do not have to focus exclusively on high earners
10 in setting judicial compensation.

11 I'd like to take you to a couple of
12 points that we think merit some notice. If we
13 can turn to our condensed book, tab 10? Now
14 this is an analysis that we did, it's in our
15 supplemental book. And what it shows, in our
16 analysis from the public information that's
17 available, is that the appointment of partners
18 over the past decade has generally been on the
19 rise to the judiciary.

20 Now, we do admit, we do say at the end
21 there's a bit of an overlap and a bit of a
22 reverse, but it's minor compared to the overall
23 trend. And generally partners would be the
24 higher earners in a firm. So we just say that
25 as a starting point.

1 And if we can go back now to -- sorry,
2 go ahead. I thought there was a question,
3 sorry.

4 If we can turn back a tab to our tab
5 9? And if we can go to the last page there?
6 This is a chart found at page 18 of our main
7 submission. And there's a chart and then the
8 graph. And what we tried to depict here is
9 there's a fairly steady recognition of the
10 private sector as being the main component of
11 appointments to the judiciary.

12 Now, my friend Mr. Bienvenu brought
13 out a chart he had this morning where he said we
14 don't go back far enough. And it's really --
15 there's been a decrease. And I'm not disputing
16 what Mr. Bienvenu's charts were saying. I do
17 recall there was a bit of a -- there was a down
18 then an up and a down. And I'm not disputing
19 that perhaps thirty or forty years ago the
20 percentage of appointments from the private
21 sector was probably around 70 percent, or in the
22 early 70s, as opposed to 64 to 62 percent that
23 we have here. Sorry, Mr. Bienvenu's lost
24 connection.

25 -- RECESSED AT 2:27 P.M. --

1 -- RESUMED AT 2:33 P.M. --

2 MR. RUPAR: Just speaking about the
3 chart we had this morning and 25, 30, 35 years
4 ago, there was a slightly higher percentage in
5 the '70s, from the private sector. And the
6 only submission we have here is that, in our
7 view, it still has been very steady, at least in
8 the last decade, if not beyond the last 20 to 30
9 years that the preponderance of appointments
10 have fairly come from the private sector. If
11 there has been a slight dip, it would be a
12 reflection, maybe, of the growth of areas of
13 practice outside of the traditional private
14 sector government venues for practice. You
15 know, there has been a great deal of expansion
16 in the past 15, 20 years as the profession
17 diversifies in other areas. So we don't see
18 this as a significant change or significant --
19 the private sector is still the dominant source
20 of appointments to the judiciary.

21 Again, I won't ask you to turn this
22 up, but at paragraph 42 of our main submissions,
23 we refer to some statistics as of October 30th,
24 2020, and for the period of March 30th, 2017, to
25 October 23rd, 2020, just some overall statistics

1 with respect to applications and appointments.

2 What we put there is the Judicial
3 Advisory Committees had full assessed 925
4 applicants. Of those, 140 appointments had been
5 made, and an additional 183 applicants had been
6 recommended for appointment, and 105 had been
7 highly recommended. So when we do the quick
8 math there, it's approximately 428 of the 925
9 applicants have either been appointed or
10 recommended or highly recommended.

11 What I'd like to do now is turn to our
12 condensed book 11 and it's the same chart --
13 I'll just dig up where it was in my friend's
14 material. It's the same chart that he has at
15 tab 1 of his materials and I just want to walk
16 through this for a moment. And there was some
17 discussion in some of the written materials, I
18 believe, from my friends that there was only one
19 qualified or highly qualified or highly
20 recommended person from British Columbia based
21 on this chart.

22 And if we look -- there's a couple of
23 things we have to take into consideration here.
24 If we look at the bottom of the chart, the
25 footnotes, they're fairly important actually.

1 They say:

2 "The last column includes
3 appointments resulting from
4 applications received outside of the
5 report period window."

6 So if we look at that last column, it
7 says "Total appointments" for this period. So
8 that includes people who had applied before
9 March 30th, 2017. So that's why there's a
10 larger number there.

11 And the other important aspect to keep
12 in mind is what's highlighted here. It says:

13 "Appointees are not included in
14 the applicant columns."

15 So when we look at the middle columns,
16 it says:

17 "Status of applicants on
18 October 23rd, 2020."

19 For instance, if we look at British
20 Columbia, there's only one highly recommended
21 and there are 18 recommended. But if we slide
22 over to the far side, we had 21 appointments in
23 this period who were applicants from that period
24 and 40 in total. So there was one person left
25 in the pool here, but that doesn't mean there

1 was only one highly qualified or highly
2 recommended applicant in that period.

3 Presumably the -- well, not
4 presumably, the applicants who were appointed
5 have to come from the highly recommended or the
6 recommended. So we just have to read these
7 figures in that context that the appointees are
8 not reflected here, but they were at one time,
9 in that pool.

10 And what I heard this morning from
11 Justice Popescul is that he was of the view, if
12 I recall correctly, that highly recommended and
13 recommended was one pool from which everyone was
14 chosen. And, as he pointed out, there's been
15 some changing of -- their highly recommended,
16 recommended, highly recommended depending on
17 each government's view of how they should be
18 categorized.

19 But at the end of the day, it would be
20 our submission that if you are recommended by an
21 independent judicial advisory committee for a
22 position in the judiciary, then you are an
23 outstanding candidate. And the judicial
24 advisory committees have representatives from
25 the Bar, from the judiciary, from the public.

1 There's a wide variety of people who are on
2 those committees and making these
3 recommendations.

4 So what we take from this in respect
5 to outstanding candidates is for every
6 appointment, there were three available and
7 approved candidates for appointments.

8 Another point I'll make here is when
9 someone is labeled or found to be unable to be
10 recommended, there could be a host of reasons
11 why that is. I don't -- I would not want to
12 leave the thought with this Commission that
13 there's a link between the amount of money a
14 lawyer would make -- the amount of money an
15 applicant would make as a lawyer and his or her
16 being found to be unacceptable or unable to be
17 recommended. There is no evidence that we've
18 seen in the record anywhere to make such a
19 linkage.

20 With that, what I'd think I'd like to
21 do, Madam Chair, if it's agreeable to you, is
22 what Mr. Shannon is going to speak about will
23 follow naturally from where I took. He's going
24 to talk about the CRA. And then as I said, if
25 there's time for me, I'll come back and speak

1 briefly about the other issues that Mr. Bienvenu
2 raised this morning.

3 MADAM CHAIR: That's great. And,
4 Mr. Shannon, if you can do the first 20 minutes
5 or so that we can actually stop for 3:00 and
6 start again with you at 3:30, if you're not
7 finished. So I'll let you figure where is the
8 best to break.

9 MR. SHANNON: Thank you very much,
10 Madam Chair.

11 Just so I can orient you in terms of
12 if my eyes are going in a weird direction, I
13 have screens all around me. So to the extent
14 I'm looking up, I'm actually looking at you.
15 This virtual hearing world, we all are trying
16 new systems and this is my system for the day,
17 so here we go.

18 As Mr. Rupar noted, I'm going to speak
19 further about criterion number 3 and then also
20 address the fourth criterion, after which I will
21 turn it over the Mr. Rupar.

22 As a preliminary point, I want to note
23 that we have included in our discussion of -- we
24 have included our discussion of the DM-3
25 comparison, not in the third criterion, but

1 rather in the fourth, other objective factors.

2 And this follows the Drouin
3 Commission's agreement with this approach and
4 that's been the consistent position of the
5 government that the DM-3 comparator should be
6 included in the fourth criterion. And I'll just
7 give you the cite for that in the Drouin
8 Commission report. It's at page 23 of that
9 report in that first paragraph on that page.
10 And obviously the report is included at tab 9 of
11 the joint book of documents.

12 And the reason for this is the third
13 criterion deals with the pools from which judges
14 are traditionally drawn. Deputy Ministers are
15 not a pool from which judges are traditionally
16 drawn. That's not to say, and we heard a lot
17 this morning frustration with the government's
18 position with respect to DM-3s, that is not to
19 say that the government rejects or challenges
20 the use of the DM-3 block comparator as a means
21 of comparison. Simply to say that it's
22 inappropriate to address this comparator in the
23 context of the third criterion, as the Drouin
24 Commission stated it belongs in the fourth.

25 So with that, I'll move to the private

1 sector comparators as part of the third
2 criterion. Before getting into the numbers, I
3 do want to address the limits of the data that
4 is before this Commission. We've heard a great
5 deal about professional corporations, et cetera.

6 So as Mr. Rupar noted, despite the
7 fact that the parties requested data on lawyers
8 who operate as professional corporations, the
9 CRA unfortunately was unable to provide any such
10 data. And this was for a variety of reasons
11 involving confidentiality and the difficulty
12 with isolating professional corps that are
13 specifically used by lawyers in the tax
14 information.

15 The numbers here are important and
16 they're set out in a graph we've included at our
17 page 23 of our main submissions and I'll call
18 that up right now. So as you can see in this
19 graph, in 2018 there were 63,956 practicing and
20 insured lawyers in Canada. That statistic comes
21 from the Federation of Canadian Law Societies.
22 So 63,000 or almost 64,000 practicing and
23 insured lawyers in Canada.

24 In 2019, there were 17,871 operating
25 as professional corps and 15,510 that are

1 self-employed lawyers within the meaning of the
2 CRA data. And we only have data on those
3 15,510. We do not have any data on lawyers
4 operating as professional corporations. So the
5 only proxy that we had is -- the only proxy we
6 have for private sector lawyers is the CRA data
7 for that 15,510.

8 So as a result, any arguments related
9 to the income of lawyers operating as
10 professional corporations unfortunately are
11 speculative at best. We simply don't know the
12 income of these individuals and we must work
13 with the proxy we have, which is the CRA data.
14 I'm going to speak more about the taxation issue
15 in a little bit because we obviously do have
16 some information on the taxation issue, on the
17 11.67 percent, but with respect the specifics of
18 how many lawyers are professional corporations,
19 who they are, what are their income levels, we
20 don't have any information on that
21 unfortunately. And so the proxy that we do have
22 is the CRA data.

23 So as you will have seen, the central
24 argument between the parties for the private
25 sector comparison is what number do we use to

1 represent the income level for private sector
2 lawyers and what number do we use to capture
3 judicial compensation? So put another way, what
4 filters should be used to ensure an
5 apples-to-apples comparison between the levels
6 of compensation for private sector lawyers
7 versus judges.

8 Before discussing each of the filters
9 that are proposed by the judiciary, I'm going to
10 share another chart, and it's based on a chart
11 that was included by the Rémillard Commission,
12 between paragraph 72 and 73 of their report.
13 The Commission inserted this table and it
14 compares the 75th percentile using the 44 to 56
15 age band, with a \$60,000 exclusion to the base
16 judicial salary and to judicial compensation,
17 including the annuity. And we've made an effort
18 to update that table for this past quadrennial
19 cycle, given that it was of concerns to the
20 Rémillard Commission. And I'm just going to
21 pull up the updated version of that chart now.

22 Sorry, I'm working my own tech, so
23 please bear with me.

24 So this is at tab 13 of our condensed
25 book. And as you'll see here, the numbers in

1 the second column, the average private sector
2 income, 75th percentile, 60K exclusion, 44-56
3 year-old age band, these are taken directly from
4 the CRA data and you see the numbers there.
5 We've got then the judicial base salary, and
6 this fourth column, we've included the judicial
7 salary with a 34.1 percent annuity, no
8 disability, and that comes from Mr. Newell's
9 report. And in the final column, we've included
10 the judicial salary plus the 34.1 percent
11 annuity, plus the 11.67 tax gross up.

12 And I'm going to get into more and
13 more about these issues, but I wanted to start
14 off my presentation by putting this chart up
15 there as it reflects the concerns of the
16 Rémillard Commission and these are the numbers
17 updated to the past four years.

18 As you can see from this table, we
19 have accepted the valuation by Mr. Newell and
20 we've also added the 11.67. And this is
21 important, because we certainly don't dispute
22 the fact that tax treatment is different and
23 perhaps more advantageous for lawyers operating
24 as professional corporations, but we don't have
25 that data and we don't have how that would

1 impact income of people operating as
2 professional corporations.

3 The data we have is the self-employed
4 lawyer data. And given the limits of RSP
5 contributions, a self-employed lawyer making
6 \$361,600 would not be able to have the same two
7 thirds annuity that a judge would have. They
8 would have to save an additional amount and so
9 that's the basis of the 11.67. They would
10 actually, in order to have a two-thirds annuity
11 plus a \$361,000 salary, they would actually have
12 to save or have to make \$526,375, so that's the
13 basis. It's -- the most important part of this
14 is to have an apples-to-apples comparison
15 between the two groups and that justifies the
16 11.67, with respect to this particular
17 comparison.

18 If we had professional corporation
19 data, it would be a different tax gross up.
20 Less. There would still be one because there
21 are still limits to IPPs and other tax
22 considerations, but it would be less than 11.67,
23 but there would still be a tax gross up.

24 I want to also note that Mr. Newell,
25 as Mr. Rupar took you to in parts of this

1 report, he questions the -- he accepts that
2 there is a tax gross up. He accepts the 11.6
3 number, or rather, doesn't offer perhaps an
4 alternative number. His questioning with
5 respect to the tax gross up is that it may not
6 be appropriate when considering the cost of the
7 judicial annuity to the Government, but that's
8 not what's being done. As Mr. Rupar set out, in
9 order to have an apples-to-apples comparison
10 between self-employed lawyer data, which is the
11 CRA data, and judicial compensation, those tax
12 implications have to be considered, otherwise
13 we're doing an oranges-to-apples comparison.

14 So we've included this updated version
15 of the table used by the Rémillard Commission as
16 a comparative aid and we will return to it at
17 the end of my presentation.

18 I do want to discuss the government's
19 position on the filters and on filtering the CRA
20 data because filters are problematic. First,
21 because filtering data, especially if you are
22 putting data through multiple filters,
23 significantly affects the results and any
24 resulting analysis and pushing those results
25 towards higher and higher earners. As

1 Mr. Gorham points out, this is inappropriate
2 from an actuarial perspective because it
3 severely limits the data set.

4 Here we have a data set of 15,510 and
5 if we impose all of the filters proposed by
6 counsel for the judiciary, that brings the data
7 set down to 2990 lawyers, or a mere 19 percent
8 of all the lawyers originally captured by the
9 CRA data. And then we would presumably look at
10 the 75th percentile of that very small set.

11 Second, limiting the data towards
12 higher and higher earners also supports the
13 false narrative, frankly, that Mr. Rupar
14 referred to and that is this notion that the
15 most outstanding candidates for the Bench are
16 the highest paid individuals from the legal
17 practice. And we would urge the Commission to
18 reject this notion of who would make the best
19 judges.

20 The legal community, the legal culture
21 and the makeup of the profession have changed
22 significantly even in the last five years, and
23 it's important that diversity within society and
24 within the profession is mirrored on the Bench.
25 And it is a simple fact that this diversity may

1 not have permeated to all levels of the
2 profession.

3 I want to go through each of the
4 filters in turn. First, with respect to
5 percentile. The government agrees that
6 depending on which other filters are imposed,
7 the appropriate percentile to look at is likely
8 the 75th percentile. Just to note that the
9 75th percentile of all Canadian self-employed
10 lawyers in 2019 was 270,000, that's without any
11 other filters. And even when not considering
12 the judicial annuity, in 2019 the judicial
13 salary was 329,900.

14 So, second, the age filters. I note
15 here that the Rémillard Commission, and I'm just
16 going to pull up a paragraph, if you bear with
17 me, please. The Rémillard Commission said that
18 the 44 to 56 age band was a useful starting
19 point. But that Commission did not lose sight
20 of the fact that 33 percent of appointees
21 from -- came from outside that age band over the
22 past -- the previous 17 years before the
23 Rémillard Commission.

24 I'll note that during this quadrennial
25 cycle, 35 percent of appointees came from

1 outside that 44 to 56-year-old age band.

2 And I'd also note that 62 percent of
3 self-employed lawyers in the CRA data were from
4 outside that age band, so this is a significant
5 filtering or exclusion that we would be
6 applying. So while the 44 to 56-year-old age
7 band is a useful starting point, the broader
8 picture is also important to consider, and that
9 is what the Rémillard Commission said. And I'm
10 going to pull that up now. In paragraph 61, the
11 Rémillard Commission said:

12 "We agree that focusing on the
13 age group from which the majority of
14 judges is appointed is a useful
15 starting point. However, using any of
16 the comparators in considering the
17 appropriate judicial salary is not a
18 mathematical exercise. We must apply
19 sound judgment in determining the
20 adequacy of judges' salaries. In
21 doing so, we have considered the fact
22 that 33 % of the appointments over the
23 past 17 years have come from [outside
24 that age band]."

25 Likewise, we would ask that the same

1 points be considered here. We would ask the
2 Commission to recall that for a self-employed
3 lawyer, the period between 44 to 56 years old is
4 by far the most lucrative period during a
5 self-employed lawyer's life. And you can see
6 this in a chart that we've included and I won't
7 take you there, but we've included it at page 27
8 of our main submissions, where you'll see that
9 income drops precipitously starting at the age
10 of 44.

11 By contrast, when we're looking at the
12 judicial salary, we're looking at a lifetime of
13 income. At the age of 70-plus, working judges
14 are still bringing home the judicial salary,
15 whereas the income of most self-employed lawyers
16 has dropped off significantly by this point.
17 And this is an added attraction for individuals
18 considering a judicial position. Just as
19 incomes of self-employed lawyers being to drop
20 off, the judicial salary and annuity maintains
21 an ongoing and increasing income as far down the
22 road as 75 years of age.

23 I'll touch on salary exclusions. The
24 government maintains its concern with respect to
25 salary exclusions and states that they're

1 problematic. We -- if we add a \$60,000
2 exclusion, this is just to explain, but if we
3 add a \$60,000 exclusion, the figure we get for
4 the new 75th percentile is actually the 82nd
5 percentile in the complete distribution. So put
6 another way, if we use a \$60,000 exclusion, it's
7 simply false to say that we're targeting the
8 75th percentile. With the exclusion, it's not
9 the 75th, it's the 82nd and we have just bumped
10 it up by excluding a chunk of data at the lower
11 end.

12 I'd also note that the Rémillard
13 Commission doesn't appear to -- I was about to
14 say whole hog, but entirely have accepted the
15 application of a \$60,000 salary exclusion. And
16 I'm going to refer you to, or I'll take you to
17 actually, paragraph 65 of the Rémillard
18 Commission's report. And the first part of that
19 sentence is:

20 "Even assuming a basis for
21 excluding lower incomes from the data
22 to be examined [...]."

23 And the point there is that the
24 Rémillard Commission didn't accept necessarily
25 the validity of these exclusions, though it did,

1 as I mentioned with respect to that chart, it
2 did use those exclusions.

3 The second half of that sentence
4 explicitly rejects the use of an increased
5 exclusion to \$80,000. It says:

6 "[...] we are not convinced that
7 a case has been made to increase the
8 salary level based on this type of
9 exclusion."

10 Nevertheless, the judiciary has raised
11 or chosen to reraise this issue before this
12 Commission, despite the rejection before the
13 last Commission. And in response, the
14 government maintains that there is really no
15 basis for any exclusion. And certainly no basis
16 to raise the level of any exclusion. It's
17 simply feeds into this false narrative that
18 lower income is a proxy for a lack of commitment
19 or a lack of success. It favours the notion
20 that the highest paid lawyers are the only
21 outstanding candidates. It would also,
22 presumably, exclude a large number of
23 individuals who work outside the largest cities
24 where lawyers' incomes may be lower. And these
25 are areas from which judges are regularly drawn

1 and the salaries of many of those self-employed
2 lawyers should not be simply factored out.

3 Furthermore, an income exclusion
4 doesn't account for fluctuations in lawyers'
5 income. I just recall that the CRA data is a
6 snapshot in time, but from year-to-year, a
7 self-employed lawyer's income may fluctuate
8 significantly. Such fluctuations have no
9 bearing on whether they're eligible for
10 appointment or whether they would make
11 outstanding candidates. If there's a year with
12 significantly higher expenses and lower fees, an
13 exclusion would factor that lawyer out, whereas
14 the next year with higher fees and lower
15 expenses, they may be back in. We don't see the
16 basis for that.

17 Finally, Mr. Bienvenu noted that half
18 of the people between the 60 and \$80,000 groups
19 are from the age 55 to 69 age group. I would
20 say that people from that age group are
21 regularly appointed to the Bench and there's
22 simply no basis for just excluding them from the
23 data set because of their age.

24 Again, as the Rémillard Commission
25 found, a significant proportion of appointees

1 are from outside that 44 to 56 age band, so we
2 shouldn't, on that basis, exclude lower income
3 earners who may be part of that age group.

4 I'll move to the census metropolitan
5 areas.

6 MADAM CHAIR: Is this a good time
7 to -- before you get on to another filter. So
8 can I have everybody back at 3:30, please?
9 Please do not disconnect. Just put yourself on
10 mute and stop the video. Do not disconnect.

11 And Gab, can you put us each in our
12 breakout rooms, please.

13
14 MR. RUPAR:
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-- RECESSED AT 2:59 P.M. --

-- RESUMED AT 3:30 P.M. --

MADAM CHAIR: Welcome back everyone.

Do we have everyone?

MR. LAVOIE: I believe we're all back.

MADAM CHAIR: Perfect. Welcome back.

Mr. Shannon, can I hand it over?

MR. SHANNON: Thank you very much,
Madam Chair.

The next topic that I wanted to address was the CMA filter, the census metropolitan area filter that's being proposed. As you will know, the Rémillard Commission effectively rejected using a CMA filter or exclusion the last time around, and that's at paragraph 70 of the report. It said:

"Accordingly, we have given very limited weight to the difference between private sector lawyers' salaries in the top ten CMAs and those in the rest of the country and have looked primarily to average national

1 salary figures."

2 Thirty-eight percent of private sector
3 appointees were from outside the top ten CMAs
4 between 1997 and 2019, with 33 percent of
5 private sector appointees coming from outside
6 the top CMAs in the last quadrennial cycle.

7 To use the Rémillard Commission's
8 language, there's is still no evidence that
9 lawyers' salaries in the top ten CMAs had become
10 so high that attracting qualified applicants to
11 sit in those cities has become an issue.

12 I want to note, in that regard, that
13 the 2019 base judicial salary, so that's without
14 annuity, is the equivalent of the
15 75th percentile of all the top ten CMAs,
16 except in Toronto where it is the equivalent of
17 the 72nd percentile. So the 75th for all the
18 top ten CMAs except Toronto with the 72nd.

19 But of course, and I'm going to sound
20 a bit like a broken record, this itself is a
21 false comparison, it's an apples-to-oranges
22 comparison, because once you include the
23 judicial annuity in the comparison judicial
24 compensation is considerably above the
25 75th percentile in all of the top ten CMAs.

1 And that brings me to my final point
2 on private sector comparisons. It's simply
3 wrong to compare self-employed lawyer data with
4 the base judicial salary. The judicial annuity
5 is an excellent, excellent pension regime and,
6 as Mr. Rupar described it, it would be extremely
7 costly to replicate for a self-employed lawyer
8 cover by the CRA data.

9 So, to conclude, I want to take you
10 back to the chart that I put up at the beginning
11 of the private sector comparison, which is at
12 tab 13 of our condensed book. And once again,
13 these -- this data has been updated for this
14 period of time, for this last quadrennial cycle.
15 And we suggest that it shows that the value of
16 judicial compensation is sufficient to attract
17 outstanding candidates from the private sector.

18 And this brings me back to my next
19 point, which is the public sector comparison
20 under the third criterion. Again, doesn't
21 include the DM-3, in our submission, that waits
22 until the fourth criterion. So 38 percent of
23 appointees in this last cycle were from that
24 sector. It includes legal Aid, provincial court
25 judges, public service, profs, deans, et cetera.

1 And from our research, apart from three law
2 deans throughout Canada, the base judicial
3 salary is more than every other one of these
4 groups.

5 As you heard this morning, there is a
6 bit of a discounting of this comparison. It's
7 says it's not entirely relevant because public
8 sector workers often don't make as much as the
9 judicial salary and so, therefore, of course
10 it's adequate.

11 We would say given that almost
12 40 percent of judicial appointees come from this
13 world it's incredibly relevant to look at this
14 public sector data, that we've included at
15 paragraphs 101 and following of our main
16 submissions. So I'm not going to say much more
17 about the public sector data, it's included in
18 our submissions. But, again, we would say that
19 it absolutely has bearing on this issue and it
20 should be considered.

21 And I'll move on to the fourth
22 criterion, which is other objective factors.
23 And, of course, primary among these is a block
24 comparator. Before getting into the details or
25 addressing the judiciary's proposal in this

1 regard I want to make a few brief points on the
2 history of the comparison.

3 The judiciary has expressed its
4 frustration with our written submissions
5 regarding the DM-3 comparison, and I believe
6 there may have been some sort of an
7 understanding on this issue. The government
8 doesn't contest or challenge the use of the DM-3
9 comparator, in so far as we're using the one
10 that has been used by successive Quadrennial
11 Commissions and predecessor Commissions. And
12 what I mean by this is, from the 1975
13 equivalency, through the rough equivalency,
14 including the Guthrie Commission the Crawford
15 Commission, the Courtois Commission, and on to
16 the Quadrennial Commissions, including Block and
17 Levitt, to the extent there has been a consensus
18 among these Commissions, it's using the DM-3
19 midpoint as the comparator. And later on, when
20 at-risk pay came in, the DM-3 midpoint plus half
21 the available at-risk, that is the historical
22 consensus. It is not DM-3 writ large. It is
23 not some other version of DM-3 salary and
24 at-risk pay. The only historical consensus is
25 the DM-3 midpoint plus half of the available

1 at-risk. And, frankly, for obvious reasons the
2 government doesn't contest or relitigate, as
3 it's been put, the use of that comparator as we
4 have already achieved parity. The judicial base
5 salary now exceeds the DM-3 midpoint and half
6 available at-risk.

7 Now, before the Block Commission and
8 the Rémillard Commission, and here again before
9 this Commission, the judiciary proposes a
10 different comparator from the historical one,
11 which is total average compensation of the DM-3
12 group. The first two times the judiciary
13 proposed this it was rejected by the Commission.
14 And, once again, we say it should be rejected by
15 this Commission.

16 We heard Mr. Bienvenu this morning
17 speaking about differences between comparators
18 and compensation measures, this is a new point
19 that I -- that hadn't been argued to date. And,
20 as I understood it, Mr. Bienvenu said that DM-3
21 total average compensation is a compensation
22 measure rather than a comparator and, therefore,
23 the appropriate compensation measure is up for
24 discussion and debate while the comparator is,
25 in his submission a settled matter of precedent.

1 Our response, and with the greatest of
2 respect, is that there is some inconsistency
3 with Mr. Bienvenu's point here. He criticizes
4 the government for relitigation of the CRA
5 filters, which are all compensation measures, by
6 the definition he uses. However, even though
7 the Block and Rémillard Commission rejected
8 these -- the notional total average compensation
9 of DM-3 the issue is once again raised before
10 this Commission. So I think there's a bit of an
11 inconsistency in terms of approach.

12 Before going any further I do want to
13 bring up a passage from the Rémillard
14 Commission's report that deals with DM-3 and
15 deals specifically with block and with the total
16 average. So I'm going to pull up paragraphs 47
17 through 50 of the Rémillard Commission's report.
18 And 47 starts off:

19 "We agree that the position of a
20 highly-ranked deputy minister is very
21 different in a number of ways than the
22 position of a judge, and that the DM-3
23 comparator should not be used in a
24 'formulaic benchmarking' fashion. We
25 do not read previous Commission

1 reports as having done that. Rather,
2 the DM-3 comparator has been used as a
3 reference point against which to test
4 whether judges' salaries have been
5 advancing appropriately in relation to
6 other public sector salaries.

7 Indeed, the Levitt Commission
8 agreed with previous Commissions in
9 calling the DM-3 comparator a 'rough
10 equivalence'. The Levitt Commission
11 found that, while a 7.3% gap 'tests
12 the limits of rough equivalence',
13 judicial salaries did not require
14 adjustment in view of this comparator
15 to remain adequate and respect the
16 criteria in the Judges Act."

17 The Rémillard Commission then goes
18 into what we would call the "new" comparator,
19 total average compensation that has been -- was
20 raised before the Rémillard Commission:

21 "The Association and Council
22 raised a further issue in relation to
23 the DM-3 comparator. They argued that
24 the comparator should be changed from
25 the midpoint of the DM-3 salary range

1 plus half of at-risk pay, to the total
2 average compensation of DM-3s. The
3 difficulty with that proposal is that
4 DM-3s constitute a very small group -
5 currently eight - the compensation of
6 which is subject to considerable
7 variation depending on the exact
8 composition of the group at any given
9 point in time. Previous Commissions
10 have used the DM-3 reference point as
11 'an objective, consistent measure of
12 year over year changes in DM-3
13 compensation policy'. Moving to the
14 total average compensation of a very
15 small group would not meet those
16 criteria. We agree with the Block
17 Commission, which rejected moving to
18 average pay and performance pay
19 because it would not 'provide a
20 consistent reflection of year over
21 year changes in compensation'."

22 I'd also note that further than just
23 suggesting the total average compensation, the
24 judiciary has also hinted at something further,
25 and they say they asked the Commission to keep

1 an eye on, and they use those words "keep an eye
2 on" the DM-4 category, raising the possibility
3 there would be a push away from the consistent
4 approach taken since 1957 towards an even higher
5 and higher comparator.

6 The government's position on this is
7 as follows: The government does not contest the
8 notion that the DM-3 midpoint, plus half
9 at-risk, as the Rémillard Commission said, is a
10 useful reference point against which to test
11 whether judges' salaries have been advancing
12 appropriately, and I'm going to underscore this,
13 in relation to other public sector salaries.
14 It's a relative test.

15 The government fully agrees with the
16 Rémillard Commission that this should not be
17 done in a formulaic -- it's not a formulaic
18 benchmarking exercise. And, in our view,
19 frankly, it is unfortunately that the
20 judiciary's submissions at paragraphs 146 and
21 following, there is what can only be described
22 as a formulaic benchmarking exercise that is
23 undertaken; ultimately concluding that there
24 is -- excuse me, 4.62625 percent gap that needs
25 to be filled via an increase to judicial salary,

1 and that begets the 2.3 percent over the two
2 years. Surely we must consider a percentage to
3 the 5th decimal place to be a formulaic
4 benchmarking exercise.

5 Regarding the new total average
6 compensation that's proposed for, this would
7 once again involve calculating the average
8 income of the eight, and it is still currently
9 eight Deputy Ministers occupying the DM-3
10 position. I want to be clear, it's not the same
11 eight. During the last quadrennial cycle
12 between 2015 and 2020 there were as many as
13 fourteen DM-3s and as few as 8 DM-3s.

14 So the concerns articulated by the
15 Rémillard Commission at paragraph 50, which I
16 just read, and by the Block Commission, are
17 still applicable. We're speaking about the
18 average pay to eight people who have short
19 average periods of tenure and whose pay is
20 individually targeted to the specific Deputy
21 Minister.

22 And as we set out in our reply
23 submission, salaries and at-risk pays of DMs,
24 as I said, they are dictated individually.

25 One can easily imagine a year, for

1 instance, where several deputy DM-3's retire or
2 move on to other jobs and a number of new Deputy
3 Ministers are promoted and receive a salary at
4 the lower end of the range. And in this
5 hypothetical the total average compensation of
6 DM-3s would change significantly, because
7 you've lost some, presumably, from the top and
8 gained some at the bottom, and there's a shift
9 in total average compensation. Total average
10 compensation is, therefore, subject to
11 considerable variation depending on the exact
12 composition of the group at any given point in
13 time.

14 By contrast, as the Block Commission
15 wrote, midpoint, plus half available at-risk
16 does not vary over time; and consistency is key.
17 And as the judiciary's expert, Ms. Haydon,
18 points out at page 2 of the report, and
19 Mr. Bienvenu quoted this passage this morning:

20 "One of the foundations of
21 compensation research is a degree of
22 consistency over time in the use of
23 comparators in order to maintain
24 confidence in the data collection and
25 related analytical process."

1 Now, Ms. Haydon is speaking about
2 another comparator but I think that statement
3 applies equally to the DM-3 comparator. And
4 just for your reference, that report is at
5 Exhibit C of the joint reply of the Association
6 and Council.

7 MADAM CHAIR: Mr. Shannon, can you
8 help me, and you may want to do it later, just
9 on the data set two questions I have. And I'm
10 asking right now because just to understand the
11 data. We're past April 1, 2021, do you have the
12 current salary range for the DM-3s? And the
13 reason why I'm saying that is I notice that
14 every time you're close your average is within
15 2,000, or less even, than the high end of range.
16 So presumably you have either no room to move,
17 unless every changing in the mix. So I just
18 wondered if you to have that. You don't have to
19 answer me today but that's something that I just
20 want to understand because it does impact the
21 block comparator as well, right?

22 MR. SHANNON: Absolutely.

23 MADAM CHAIR: The second thing is I've
24 noticed, and don't take my comment as looking
25 for average compensation, but just so that I

1 understand, and it goes to your argument that
2 bonuses, paid performance and salaries are very
3 individualized, which I'm not disputing. The
4 only thing I realize is that the bonus average
5 itself is pretty much constant.

6 So prior to 2007 it was around 33,000
7 and it moved to 55,000. And in between 2007 and
8 2011 it was pretty constant, maybe 55 to 57, but
9 pretty constant. And it jumped in 2011 to
10 64,000 to 65,000. And, again, it stayed very
11 constant as an average until 2019 where it
12 jumped to 80,000, and then we have no data.

13 So I find that the bonus average stays
14 pretty much in the same realm. So I just want
15 to understand, because often I view salary plus
16 pay perform, target performance not the actual,
17 target bonus is often what you view as total
18 compensation and what the market is ready to
19 accept.

20 I just want to understand when you
21 say, well, it may change and it's
22 individualized, it hasn't changed so much. So
23 what is it I'm not getting from those statistic
24 and that data?

25 MR. SHANNON: So, Madam Chair, I would

1 like the opportunity to come back to you on
2 those points briefly tomorrow.

3 MADAM CHAIR: That's fine.

4 MR. SHANNON: And especially the
5 current salary range, because I want to make
6 sure that I get the numbers exact for you rather
7 than flipping through documents madly right now.

8 As to the bonus average, or rather the
9 at-risk average, I fully recognize that there's
10 been a consistency over time. My point is, and
11 the point of the Rémillard Commission's comments
12 in this regard, and the Block Commission's
13 comments, is there's no guarantee of consistency
14 there. That though that has been the case if
15 the make-up of the DM-3 group changes
16 significantly, which it can through promotions,
17 through retirement, given the short tenure of
18 the DM-3s, et cetera, it will adjust and it
19 will shift, and that necessarily has to be taken
20 into consideration.

21 When we consider the purpose of the
22 DM-3 of -- and the goal of consistency in the
23 DM-3 comparator, a midpoint plus half at-risk is
24 going to be consistent over time and not shift.
25 And that is -- was the goal of the original

1 creation of the DM-3 comparator, and have been
2 the goal consistent, and have been the comments
3 of both the Block and Rémillard Commissions in
4 that regard.

5 So I think -- I'll come back to you on
6 the specific numbers with respect to averages,
7 but I -- my point still stands that the
8 consistency may have been there at different
9 points but it -- there's no guarantee that it
10 will continue. And to the extent it does this
11 it doesn't assist the Commission in performing
12 an actual comparison.

13 MADAM CHAIR: Okay. Thank you very
14 much.

15 MADAM COMMISSIONER: Mr. Shannon,
16 perhaps I could just piggy-back on the data, and
17 if you could come back with what the at-risk
18 component is for fully satisfactory performance,
19 and whether that is half of that risk? Or maybe
20 over the same time period?

21 Because I think some of the variation
22 may be related to changing of the amount of the
23 at-risk, but I think the at-risk we should focus
24 on is the kind of fully satisfactory one, or
25 whatever they're calling the equivalent right

1 now.

2 MR. SHANNON: And, Commissioner
3 Bloodworth, just so I'm clear, you're looking
4 for a percentage of where fully satisfactory
5 would be within that 33 percent range, is that
6 correct?

7 MADAM COMMISSIONER: Yes.

8 MR. SHANNON: Got it. I cannot speak
9 as to whether that data is available, but to the
10 extent we have it we will track it down and get
11 it to you.

12 Two other brief points in response to
13 issues raised by the judiciary. I note that the
14 judiciary expressed concerns with our inclusions
15 of data on or information on DM-3 tenure and the
16 nature of the DM-3 job. But to understand why
17 total average compensation is problematic this
18 information is essential.

19 It's important to consider the short
20 tenure, the highly individual nature of the
21 compensation because they caused fluctuations in
22 the compensation, and can cause fluctuations in
23 the compensation to DM-3s and render this
24 proposal problematic. So that's -- to a certain
25 extent that is why that data is in there. And I

1 wanted to note as much.

2 I also want to just take the
3 Commission to judiciary's table 7, which was
4 inserted at their paragraph 156 of their main
5 submissions. I have it here in the condensed
6 book at tab 15, and I'll bring it up now. So
7 this is a table which shows judicial salary,
8 obviously it's base salary which doesn't include
9 the annuity, which will be my next point.

10 But it shows judicial salary for these
11 years, projected forward to 2023. It shows DM-3
12 total average compensation. And the only thing
13 I would note here is that everything other than
14 the first row is a projection. And obviously
15 the second row of the second column is not a
16 projection, but everything in gray is a
17 projection and it assumes quite a bit. It
18 assumes no change in the compensation of the
19 group. It assumes also that the DM-3 range will
20 change. And what I mean by that is currently,
21 as things currently stand, a DM-3, top of the
22 range, top of the performance pay or at-risk
23 pay, gets you to 407,645. And here if you look
24 at the April 1st, 2023, it's 413,725. So my
25 point here is simply that there are a lot of

1 assumptions built into this chart.

2 We don't know where the DM-3 range
3 will go. That is not before this Commission in
4 terms of why the salaries to DMs are set in
5 the way they are. But this chart in and of
6 itself necessarily includes quite a bit of
7 projections going forward that may -- are
8 subject to shift, especially given the small
9 number of individuals, especially given that
10 we're talking about eight -- between eight and
11 fourteen, I would suggest, individuals.

12 My final point on DM-3 is, again, a
13 call for apples-to-apples comparison. Total
14 compensation must be considered in any
15 comparison. Like the judiciary DMs, of
16 course, have an annuity. But the DM annuity is
17 not as beneficial or as generous as the judicial
18 annuity.

19 According to the Gorham report at
20 paragraph 221 and 222 the DM pension is valued
21 at 17 percent, versus the judicial pension,
22 which we are accepting Mr. Newell's number at
23 34.1 percent.

24 We certainly took note of
25 Mr. Bienvenu's comments this morning regarding

1 the table, which was included at page 14 of our
2 submissions. That's at tab M of the
3 judiciary's -- "M" as in Michael, of the
4 judiciary's condensed book. And after review of
5 it we certainly acknowledge and apologize for
6 the error. Mr. Bienvenu is entirely right, that
7 the chart incorrectly adds the value of the
8 annuity to the top line but not to the others,
9 and we apologize for that. And before the ends
10 of the day we will provide a replacement chart
11 for that specific chart.

12 However, the error illustrates the
13 point I'm trying to make here quite nicely. We
14 can't fairly compare compensation without
15 considering annuities, and I'm going to list off
16 some numbers, and it's looking at 2019 numbers
17 specifically. So in 2019 we have the block
18 comparator, and if you adjust it to include
19 17 percent annuity that takes you to 386,498.
20 The judicial salary, adjusted to include the
21 34.1 percent annuity, takes you to 442,395.
22 And, interestingly, the total average
23 compensation of DM-3s, adjusted to include their
24 annuity, again 17 percent, takes you to 448,641.
25 So doing an apples-to-apples comparison judicial

1 compensation measures up very well.

2 Before I turn it over to Mr. Rupar I
3 want to briefly address the other professions as
4 context not comparator. So you will see at
5 paragraphs 130 to 135 of our main submissions we
6 included a section on other professions and
7 other judiciaries, and this morning you heard
8 some submissions on those submission.

9 Just to be clear, as Mr. Rupar already
10 said, the government is not proposing new
11 comparators. We're providing context to
12 understand where judicial compensation fits in
13 with the broader societal picture. And, in our
14 view, it is essential to understand not only the
15 legal and public service context but the broader
16 context.

17 So we've noted that in 2018 family
18 doctors made approximately \$204,000, and general
19 surgery specialists made an average of
20 approximately \$347,000. And this is not
21 including annuities, et cetera, but this is in
22 terms of income, that's what's listed. So
23 judicial-based compensation in 2018, which is
24 the year I quoted for those other professions,
25 was 321,600 without annuity. So are we saying

1 that these jobs are directly comparable?
2 Certainly not, but we believe they assist the
3 Commission to fit the judicial compensation
4 within the broader context of high-level
5 professionals in Canada.

6 As for other commonwealth and common
7 law judges perhaps there is more direct
8 comparison that can done but, yet again, we
9 don't propose them as comparator in the strict
10 sense, it's context. And as you'll see at
11 paragraph 134 of our main submission, Canadian
12 federally appointed judges make slightly more
13 than their counterparts in Australia and the
14 U.S. and the U.K. as well, but slightly less
15 than other counterparts in the U.K., Australia
16 and New Zealand.

17 The conclusion is simply this, the
18 Canadian judicial base salary is in the same
19 range as other commonwealth and common law
20 judges. That is the submission we're putting
21 forward.

22 Subject to any questions I will turn
23 the microphone back to Mr. Rupar.

24 MADAM CHAIR: We probably will have
25 other questions for you tomorrow after we hear

1 all the replies, but we just wanted to get that.

2 Unless, Peter and Margaret, there is
3 any specific questions that might be useful for
4 Mr. Shannon to get back to us?

5 MR. COMMISSIONER: I don't have
6 anything else.

7 MADAM COMMISSIONER: No, I'm fine.

8 MADAM CHAIR: Perfect. Thank you,
9 Mr. Shannon.

10 Mr. Rupar

11 MR. RUPAR: Thank you, Madam Chair.
12 I'm happy to report I will be brief, this late
13 in the day for everybody.

14 With respect to the allowances for the
15 judiciary that Mr. Bienvenu spoke of this
16 morning, I've reviewed our position and our
17 submissions were -- the point I was going to
18 make is we've reviewed our written submissions
19 and we don't really have anything to add with
20 respect to the allowances that are not found in
21 our written submissions so we'll stand by those.

22 And with respect to Prothonotaries, I
23 take what Mr. Lokan said this morning, a number
24 of the issues raised by the Prothonotaries have
25 been, to use the general term, agreed with by

1 the government. We have agreed with the
2 creation of a supernumerary office and with the
3 increase in the allowances, and those
4 discussions are ongoing and matters are
5 pressing.

6 With respect to compensation,
7 Mr. Lokan went on a bit, to some degree, about
8 professional corporations and taxation. We've
9 dealt with that in our main submissions and we
10 don't see a significant, if any, difference
11 between how the judiciary and the Prothonotaries
12 will be treated, as the Prothonotaries is
13 based -- the compensation is based on that of
14 the Judiciary. So I'll just say that what we
15 said this afternoon applies to them as well.

16 The last point that I raise, and it's
17 not that we are disagreeing here I just want to
18 clarify a couple of points that Mr. Lokan raised
19 with respect the change of title to Associate
20 Judge. The government has committed to making
21 this change and has given its intention to bring
22 the necessary legislative changes to do this.
23 Mr. Lokan has suggested that it's still
24 necessary for this Commission to make a
25 recommendation. And we are of the view that it

1 is beyond the jurisdiction of this Commission,
2 dealing with compensation and benefits, to deal
3 with the matter of process and legislation,
4 which is what the title of "Prothonotary" deals
5 with. So although we agree there should be a
6 change, and we have signalled our very clear
7 intention to make the necessary changes, we do
8 not agree it's something that the
9 recommendations of this Commission should be
10 dealing with.

11 And subject to that those would be our
12 submissions until tomorrow.

13 MADAM CHAIR: Thank you very much.
14 Mr. Rupar.

15 Peter and Margaret, anything else? Do
16 you want to probe a bit on professional
17 corporations or wait until tomorrow?

18 MR. COMMISSIONER: We do have a little
19 bit of time. Mr. Rupar, could I ask you this
20 question, it's troubling to me that we have a
21 lacuna in the data with respect to professional
22 corporations where we have a crossover now of
23 17,000 versus the 15,000 of self-employed
24 lawyers.

25 And I take it from your submission

1 that what you're telling this Commission to do
2 is to only rely on the self-employed lawyer
3 data, because we have data there, and not to,
4 for want of a prettier way of saying it, not to
5 pay any attention to the professional
6 corporation side of the equation. First off, is
7 that your position?

8 MR. RUPAR: I wouldn't quite put it
9 that way, but at the end of the day it is our
10 position that there is not enough evidence,
11 enough specific evidence before the Commission
12 for it to make conclusions and recommendations
13 based on professional corporations. Because we
14 have the theory, we have the general approach
15 that would be taken but we don't have any data
16 to apply to. And that's where we run into the
17 problem where the lacuna, as you describe it,
18 Mr. Griffin.

19 MR. COMMISSIONER: Okay. But do you
20 accept at least this much, that it is likely
21 that the higher-earner category, leaving aside
22 the significance of that component of the
23 criteria under section 26, that the higher
24 earning category may be found within that data
25 if it was available to us?

1 MR. RUPAR: Well that's why we need to
2 see the data, Mr. Griffin. I'll check today,
3 but I don't think we're prepared to make that
4 assumption because until we see the data, until
5 we see what stratuses of categories of -- or
6 levels of income are using the professional
7 corporations, to what degree, it would be
8 difficult for us to agree that it would be the
9 higher end strata.

10 MR. COMMISSIONER: Do you accept that
11 it would be earners in the 200 to \$300,000
12 category would begin to use the alternative of a
13 professional corporation?

14 MR. RUPAR: We'll agree with what
15 Messrs. Leblanc and Pickler have said in their
16 evidence, that it would generally be a starting
17 point. But we're not excluding, and I should be
18 clear that we're not wish to exclude that
19 earners who make less than \$200,000 may be able
20 to take advantage of that as well.

21 Much like Mr. Shannon talked about,
22 the exclusion of the lower end of the CRA data.
23 At this point we simply see no basis for
24 excluding -- if professional corporations are to
25 be applied it should be across the Board. We

1 don't see a reason for excluding below 200,000.

2 Right now you have the general
3 propositions that have been set out by the
4 gentlemen I described, Mr. Leblanc and
5 Mr. Pickler, but we don't -- it comes down to
6 the point of we just don't have the data set
7 that we can put the experts' focus on and come
8 up with numbers.

9 It may very well be that the
10 propositions you have put to us, Mr. Griffin,
11 are accurate. We just don't know because we
12 don't have the data. And I wouldn't want to tie
13 the hands of the government, and necessarily the
14 Commission, to a proposition where we cannot
15 support it.

16 MR. COMMISSIONER: No, I appreciate
17 that point. But it leaves the Commission in a
18 position where it has, at worst, anecdotal
19 evidence of a higher earning category that is
20 not reflected in the data we have in front of
21 us.

22 Perhaps you can help me with this, I
23 appreciate that there seem to be impediments to
24 being able to reach the data that presumably
25 would tell us which professional corporations

1 are lawyer professional corporations, but we
2 seem to have that data in the 17,000
3 professional corporation numbers so we know
4 we've got that much information.

5 Presumably within the cohort of
6 professional corporations' line items
7 distinguished between professional income and
8 passive income, which seems to be the other area
9 that is described as an advantage of a
10 professional corporation, and so are we to
11 understand that there is no potential to have
12 that greater granularity now for this Commission
13 or in the future for successive Commissions?
14 Because that is something we need to grapple
15 with.

16 MR. RUPAR: Correct. And I can't
17 speak to future Commissions because
18 circumstances may change in two, four years or
19 eight years. I can say that requests were made
20 and efforts were made to work with the CRA to
21 retrieve this data, because we learned from the
22 Rémillard Commission it was a trend and it was
23 something that would be of interest.

24 And I don't think I'm speaking out of
25 turn here, correct me if I am, but both parties

1 were invested in trying to get this sort of
2 data, and it simply wasn't available for the
3 reasons that Mr. Shannon said.

4 We can -- Mr. Bienvenu and I can
5 speak, and our teams can speak maybe tonight or
6 tomorrow, or even after the completion of the
7 Commission tomorrow to see if there's any
8 further material that we can provide to you
9 which would provide objective information. But
10 as it stands now we did make joint efforts to --
11 and we did co-operate with each other to make
12 efforts with the CRA to get this material and we
13 were unsuccessful for this Commission.

14 MR. COMMISSIONER: And was it a
15 question of time or cost? Because you were able
16 to distill out the information as to the number
17 that were legal professional corporations. So
18 I'm just trying to understand what the
19 limitation are in this data?

20 MR. RUPAR: Right. That information
21 came from -- as I understood it came from the
22 Federation of Law Societies and not the CRA.
23 When we went to the CRA, as Mr. Shannon set out,
24 there were issues of privacy and ability to
25 extract that type of data from the information

1 they had available to them.

2 MR. COMMISSIONER: Well, I can
3 understand the Federation of Law Societies
4 because you have to register a professional
5 corporation with the provincial regulator, so
6 that would give us some indication that that
7 number is likely accurate as to number. It just
8 leaves us in even more of a quandary, right?

9 MR. RUPAR: It does. I don't have
10 anything further to offer you right now. As I
11 say, we've made the efforts. We can speak
12 again.

13 But I believe the last time, the last
14 Commission, the Rémillard Commission, they were
15 post-hearing discussions with respect to the
16 actuaries discussing numbers with each other.
17 So this may be a situation where we have to
18 speak with Mr. Bienvenu and his team to see what
19 if anything we can provide to you.

20 I'm not hopeful. I don't want to
21 raise hopes because we have gone down this road
22 with the CRA over the last number of months and
23 these road blocks -- I won't say road blocks,
24 these difficulties in extraction were explained
25 to us and we were not able to get the material.

1 But given the issues raised today by the
2 Commission we will see what, if anything, in
3 addition we can do about that.

4 MR. COMMISSIONER: I think it would be
5 a help. And I don't think I speak just for
6 myself, but others are better able to express it
7 for themselves. And it is something that is
8 incumbent on us to have the best information we
9 can possibly have.

10 MR. RUPAR: Absolutely. And if we had
11 the information available, as I said, if we had
12 the data, the granular level data then we could
13 have our various experts look at it, reports
14 made and we'd have the sort of discussion we've
15 had with the CRA data over the last number of
16 the Commissions. So we're not at all
17 unwelcoming this change. We have to deal with
18 the reality of how the profession operates.

19 We are saying that we cannot give you
20 the sort of representations and guidance, if you
21 will, in making recommendations that you need
22 based on the information that we have now
23 available to us.

24 MADAM COMMISSIONER: What I would --
25 just to piggyback on what Mr. Griffin was

1 asking, I would like to know whether this is a
2 time issue. Because if CRA had been asked in
3 last couple of months and they're simply saying,
4 this would take us too much time and cost us too
5 much to do that. Then I think it's incumbent on
6 us as a Commission to say, well, this is
7 something that should be done for the next
8 Commission, if that's the only option. And I
9 didn't quite understand your answer about time,
10 but maybe you could try and confirm for us
11 tomorrow? Are they saying no, they could never
12 do it? Or are they saying it would take them
13 some time and perhaps some money to be able to
14 do it?

15 MR. RUPAR: Well, it was a bit more
16 than time, as I understood it, Ms. Bloodworth,
17 as Mr. Shannon pointed out. There were
18 significant privacy issues raised by the CRA and
19 extraction ability, is the way to put it, of the
20 data.

21 So we'll go back and we'll look at
22 this again and provide some of that information
23 to you. I don't think it was simply a time and
24 money issue. There were other issues that were
25 involved as well.

1 But since the Commission has now
2 raised it it would be incumbent on both of the
3 main parties to go back to you, either tomorrow
4 or within a reasonably short period after the
5 close out of the hearing tomorrow, with what we
6 have, what we can reasonably ask for now and
7 what possibilities there may be in the future.

8 Let me put it to you this way, we're
9 not -- on the government side we're not trying
10 to avoid professional corporations, it's a
11 reality. What we're saying is we have to do it
12 in a fulsome manner. And we just don't have the
13 information now so that we can have that
14 discussion between us, the judiciary and other
15 interested parties, as to where this fits within
16 the recommendations you need to make, with
17 respect comparators and ultimately a
18 recommendation on salaries going forward, and
19 compensation.

20 MADAM COMMISSIONER: But you do
21 understand that if the trends continue there
22 will be a point at which, I don't know in the
23 next Commission or the Commission after that,
24 where the self-employed lawyers will be such a
25 small percentage compared to the professional

1 corporations that their data will become less
2 and less useful as well.

3 MADAM CHAIR: And also the use of
4 filters. For example, just the simple fact of
5 saying, filter, no matter which one, reduces the
6 data pool, as you correctly point out, is
7 unfortunately a big function of us missing
8 50 percent of the data through the professional
9 corporations; so that exacerbates the issues.

10 MR. RUPAR: I hear you, Madam Chair,
11 and I would invite Mr. Bienvenu to jump in if he
12 has anything to add.

13 The parties did recognize this issue
14 well in advance of this hearing and did make
15 significant efforts to try and get that sort of
16 information for you. We were cognizant of what
17 the Rémillard Commission said. We did work to
18 try to get it. We were unable to get it.

19 We understand the position that places
20 the Commission in now and the concerns the
21 Commission is raising about that now. And I
22 don't want to get -- I don't want to overpromise
23 and say we're going to come up with something
24 that we didn't come up with over the last number
25 of months, when we worked together with CRA to

1 try to get this information. But we will try
2 and get some answers for you, if that is
3 satisfactory.

4 MADAM CHAIR: That is fair enough.
5 Thank you very much, Mr. Rupar.

6 MADAM COMMISSIONER: On another --

7 MADAM CHAIR: Mr. Bienvenu?

8 MR. BIENVENU: I was just going to say
9 that perhaps we can work with our friends from
10 the government to describe the position, in so
11 far as the limitations faced with CRA, in a
12 joint submission to the Commission. And you
13 will know what the issues are and what prospect
14 there may be in the future of getting
15 information about PCs.

16 I can certainly say that one of the
17 big issue, as I understand it, was the ability
18 of CRA to identify, within the broader group of
19 professional corporations, which were legal
20 corporations. And just identifying the correct
21 universe posed challenges.

22 But my suggestion would be that we get
23 together with our friends and we'll describe the
24 position in a joint submission so you will know
25 what are the issues and what prospect there is

1 of getting them solved at one point.

2 MR. COMMISSIONER: Can I add one other
3 point? In some circumstances lawyers, perhaps
4 other professionals, have used two professional
5 corporations in the structure. And so when you
6 address it with CRA you may have one actual
7 income earner but two corporations. So that's
8 another factor that if they're in any position
9 to provide the information which isolates it by
10 single lawyer taxpayer, if you like, lawyer
11 taxpayer as opposed to corporation. There may
12 need to be some additional granularity. Now, as
13 I understand it that advantage went away with a
14 budget a couple of years ago. But if we're
15 looking at historical data we still may have an
16 overlay with respect that. So that's another
17 factor when you're asking questions just to keep
18 in the back of your mind.

19 MR. BIENVENU: And the situation we
20 are facing today, with respect to the impact of
21 professional corporations on the reliability of
22 the CRA data, the exact same issue that we faced
23 twelve years ago when we were at the high water
24 mark of the use of family trusts within the
25 profession. And none of that was captured by

1 the CRA. Then there was a change in policy on
2 the part of the federal government and the
3 family trust disappeared, but the other
4 professional corporation gained favour and
5 prevalence.

6 MR. RUPAR: I just add, Madam Chair,
7 given the scope of the questions raised by the
8 Commission today I agree fully with
9 Mr. Bienvenu's position that we should work
10 together to bring this information to you. I
11 don't think we're going to be able to do it by
12 the end of tomorrow. What I would suggest is
13 that we get it to you as quickly as we can
14 within the next number of days. Because we'll
15 have -- we'll go back to CRA and just clarify
16 some of these issues.

17 MADAM CHAIR: That's fair.

18 MR. RUPAR: We understand you're under
19 a legislative time constraint as well so we
20 understand the need to get it to you as quickly
21 as possible.

22 MADAM CHAIR: Thank you, Mr. Rupar.

23 Mr. Bienvenu, yes we would -- at least
24 if we can't get any form of reliable data, as it
25 looks like, understanding the difficulties and

1 the obstacles would at least be useful for us,
2 as Commissioners, in developing where we end.
3 So that would be very useful as well.

4 Margaret, you have I believe another
5 question?

6 MADAM COMMISSIONER: Yeah, another
7 data related question, Madam Chair, and that was
8 about applicants for the judiciary. We have a
9 table we looked at today and I remembered it
10 from the submissions, where it talks about
11 applicants by province. I'm wondering if there
12 is data available for a further breakdown of
13 applicants?

14 Now, I realize in a place like PEI it
15 may be difficult to break down further because
16 it's smaller, but a place like Ontario it might
17 be relevant for us to know how many of those
18 applicants are coming from the Toronto area as
19 opposed to northern Ontario, for example. But I
20 don't know whether that data is available but
21 perhaps you can look for that?

22 MR. RUPAR: We have to inquire at the
23 CGFA for that, that's the source, the
24 independent office. But we can inquire to see
25 if they have that sort of breakdown, yes.

1 MADAM COMMISSIONER: Thank you.

2 MADAM CHAIR: Any other things? No?
3 So thank you very much everybody. Sorry we had
4 a few technological glitches but hopeful they
5 are gone for tomorrow.

6 Again we start at 9:30 tomorrow
7 morning and I'm more than happy to give my ten
8 minutes away to Chief Justice Richard Bell, not
9 to add to your time but to basically make sure
10 we have more time for the questions in the end.

11 I would ask everybody to please sign
12 on around 9:00 a.m. so we can again test all
13 your microphones and cameras and then shift you
14 into the breakout rooms, and that allows to
15 start on time effectively.

16 Gabriel, am I forgetting anything?

17 MR. LAVOIE: No I think you covered
18 everything, Madam Chair. I wanted to say thank
19 you everyone for the few technical difficulties
20 we had earlier in the day.

21 JUSTICE J. CHAMBERLAND: That being
22 said I have no reply so I feel a little bit
23 isolated in the group who don't have right of
24 reply, but I can live with that.

25 But my question is the following, are

1 you expecting me to take advantage of my right
2 to speak to comment on the government's reply,
3 for example, with regard to what the appellate
4 judges are proposing?

5 MADAM CHAIR: Yes, and if you need a
6 right of reply, because we've seen what the
7 government has submitted, but if afterwards the
8 government comes back to us and if would like to
9 intervene quickly we can probably find you some
10 time in our question period, if that suits out.

11 JUSTICE J. CHAMBERLAND: Yes, that's
12 good. Thank you very much.

13 MADAM CHAIR: Anything else? No.
14 Thank you. Please place us in breakout rooms
15 and people can leave from there.

16 -- Meeting adjourned at 4:22 p.m.

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1 REPORTER'S CERTIFICATE

2
3 I, HELEN MARTINEAU, CSR, Certified
4 Shorthand Reporter, certify;

5 That the foregoing public hearing was
6 taken before me at the time and date therein set
7 forth;

8 All discussions had by the
9 participants were recorded stenographically by
10 me and were thereafter transcribed;

11 That the foregoing is a true and
12 accurate transcript of my shorthand notes so
13 taken. Dated this 12th day of May, 2021.

14
15 

16
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18 CERTIFIED SHORTHAND REPORTER
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