

GRS Reference No. 12-0741

Hearing Before the
MILITARY JUDGES COMPENSATION COMMITTEE
(Ms. C. Glube; Mr. M. Bastarache; Mr. N. Sterling)
June 14th, 2012, 8:58 A.M.

APPEARANCES:

Ms. C. Lawrence

Mr. C. Collins-Williams, for the Military Judges

Ms. C. Chatelain, for the Government of Canada

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1 HEARING BEFORE THE MILITARY JUDGES COMPENSATION COMMITTEE

2 June 14th, 2012

3 MS. GLUBE: Thank you. You may be seated.

4 Good morning and welcome. May I introduce the panel
5 to you? On my right is the Honourable Michel
6 Bastarache and on my left is Mr. Norman Sterling, and
7 my name is Constance Glube, and I'm just going to add
8 that we'll operate under the rules of procedure that I
9 believe you've all had an opportunity to review and to
10 agree with. We're going to commence this morning with
11 the military judges and this afternoon with the
12 Department of Justice. Perhaps Ms. Chantal --
13 Chatelain, is that how you pronounce your last name?

14 MS. CHATELAIN: Yes, that is.

15 MS. GLUBE: If you would introduce the people
16 that are with you? I'd appreciate that. Thank you.

17 MS. CHATELAIN: Thank you. Thank you for this
18 introduction, Madam Justice Glube. I am here today to
19 represent the military judges of Canada and
20 accompanying me is, first and foremost, Mr. Justice
21 Louis-Vincent d'Auteuil, second on my right. I am
22 also accompanied by Mr. André Sauvé an actuary with an
23 expertise in compensation matters and also pension
24 funds and vast experience, as you will see later on,
25 in assisting other compensation commissions across

1 Canada both at the federal level and at the provincial
2 level. On my right is Mr. Vincent de l'Etoile who is
3 from my office and is also representing the military
4 judges with me today. So we are very happy and
5 pleased to be here today for this unique opportunity
6 to present the observations and concerns of the
7 military judges respecting their compensation
8 benefits. This--

9 MS. GLUBE: I'm going to interrupt you before
10 you get started because I'd like to introduce the
11 others who are here with us today.

12 MS. CHATELAIN: Okay. Thank you.

13 MS. GLUBE: Catherine Lawrence, if you'd
14 introduce who is with you?

15 MS. LAWRENCE: Good morning, Madam Justice
16 Glube. Is my microphone working?

17 MS. GLUBE: It's the middle.

18 MS. LAWRENCE: I have to use the middle one?

19 MS. GLUBE: Yes.

20 MS. LAWRENCE: Technology. Right now I'm
21 using the proper microphone. Thank you, my name is
22 Catherine Lawrence and I'm here this morning with my
23 colleague Craig Collins-Williams. We're here from the
24 Department of Justice representing the Government of
25 Canada, and I have with me this morning three

1 before I get started with that, you've received all of
2 our material. We have filed our main submissions as
3 well as our reply submissions. We have agreed to file
4 a joint book of authorities. We have filed each our
5 own sets of annexes and when I've looked at them I
6 said to myself we should have filed a joint book of
7 annexes also, because many of them were filed in both
8 submission packages, but here it is and you have both
9 sets of submissions. We have also sent to Mr.
10 Regimbald yesterday a most recent document, which is
11 the LeSage report. We have unfortunately, because we
12 were on the road yesterday, not provided you this
13 morning with paper copies but we will be happy to--

14 MS. GLUBE: We have them. Thank you.

15 MS. CHATELAIN: You have those? Okay, so I
16 understand that that won't be necessary. So those
17 essentially are our documents. I will be using this
18 morning a PowerPoint presentation to help you follow
19 my comments, but by all means I don't want us to be
20 captured in this presentation. What we wish is that
21 this process, which is a unique process and once in
22 every four years that the military judges can address
23 issues relating to their compensation, I would not
24 want this to be a purely unilateral exercise and I of
25 course invite any questions and comments and

1 interruptions that you see fit because the purpose
2 today is to freely discuss these issues and not set
3 out a confrontational exercise as we would see in
4 typical litigation. Although we're sitting here in
5 the military -- the court martial, and we're in the
6 process where we're sitting side by side, what I wish
7 is that we could have a round table discussion to make
8 sure that all concerns and the observations of the
9 military judges are fully addressed and conveyed to
10 you to enable you to make informed recommendations to
11 the government about the nature and status and level
12 of the military judges compensation. Of course we
13 have the greatest of respect for this process which is
14 mandated by the constitution of Canada as was
15 confirmed by the Supreme Court in 1997 in the seminal
16 Reference case. The purpose of this process is to
17 foster judicial independence and to ensure that public
18 confidence in this judicial independence is confirmed
19 and reassured.

20 We are mindful also of the important task
21 which is laid upon you to address those issues and
22 make recommendations for the benefit of the Government
23 of Canada. We are mindful of the fact that tight time
24 lines is imposing upon you to take cognisance of this
25 vast documentation in a very short time and we're very

1 grateful for that involvement and energy and efforts
2 that you are putting into this constitutional process.
3 For our part, we have been working with the military
4 judges and our consultants for many, many months to
5 prepare for this hearing today. We appear before you
6 convinced of the accuracy, adequacy and reasonableness
7 of the propositions that we are submitting to this
8 committee.

9 The outline of my presentation will
10 essentially be in four -- fourfold. I don't know if I
11 can use that expression. First of all I would like to
12 address what I consider to be the relevant factors
13 that should be on your mind when you are addressing
14 the factors set out in section 204.24 of the QR&Os and
15 those elements, according to us, will require that you
16 first ask yourselves the question "What is the
17 starting point?". Before we can assess where we're
18 going, as the saying goes, we have to know where we're
19 coming from. So one of the questions I submit to you,
20 members of the committee, is to adequately address the
21 proper starting point.

22 Then going back to the criterias that we find
23 at 204.24 of the QR&Os, we will of course address the
24 economic considerations which form the background of
25 the factors that you have to address. Of course,

1 within the subject of the other objective criterias
2 that you must consider, we submit that the nature of
3 the judicial function is a criteria that cannot be
4 understated or overlooked and is very important to
5 inform the recommendations that you will have to make.
6 Within the other objective criterias that the
7 committee must consider in our view is the comparison
8 with the salary paid to other people, other judges,
9 other senior public servants, other people from the
10 judicial functions, either judges or lawyers, and on
11 this topic I will ask Mr. Sauvé later on to make a
12 presentation to expose and explain what are the common
13 or most -- the principles that should be at the base
14 of setting a proper level of compensation. Then of
15 course I will address the actual proposals of the
16 military judges and in closing I will make a few
17 remarks on the nature and the role of this committee.

18 It will of course rest upon you to balance all
19 of these factors, the factors found in 204.24, as well
20 as the other considerations that we are submitting to
21 you which form part of the other objective criterias
22 that you must consider. So you must weight those
23 factors and give them the proper weight according to
24 the circumstances. We are mindful of the fact that
25 depending on the economic situation or other

1 conductors, the weight to be given to each factor is
2 not something that is set in stone or cast in stone.
3 Each committee I think has to do its own examination
4 within its own context and can, according to the
5 conjecture, give proper weight to or different weight
6 to each of these criterias. But it belongs to this
7 committee to do that balancing act, according to us,
8 and once that is done to ensure that it is set out
9 with sufficient reasons in your report to inform the
10 government and make sure that the government does not
11 then go back home and redo its own balancing act with
12 its own political or administrative considerations,
13 because the reason why we have a committee is
14 essentially to ensure that judicial compensation is
15 not set unilaterally by the government. As you know,
16 and I will not dwell into the case law because I'm
17 sure you're well aware of the principles that are
18 applicable. Judges do not have bargaining power and
19 it's a good thing that they don't. Judges do not go
20 to the government to seek and demand, and negotiate,
21 and exchange favours for compensation benefits. This
22 is the one time where we do that and, to make sure
23 that the other end of this balance is also respected,
24 the government in our view should not then simply
25 impose its own view. It has to give some deference to

1 the observations and the reasons of this committee to
2 arrive and achieve the recommendations that you will
3 make.

4 So engaging into the presentation, as I said
5 the first question I think you will have to address is
6 what is the proper starting point of this analysis.
7 We submit, in our humble view, that the proper
8 starting point cannot be what the government has
9 unilaterally set in 2009 when it rejected the
10 recommendations of this previous committee. If the
11 starting point was always the decision of the
12 government following a rejection of the report then
13 there would be no usefulness in the informed views of
14 this committee and of what we could call the case law
15 or the jurisprudence developed by these committees.
16 We attended a few months ago the hearings of the
17 Levitt Commission and there was a very important
18 discussion that is not reflected in the report, but a
19 discussion that occurred between the members of the
20 Levitt Commission and the Government of Canada as to
21 whether or not these commissions and committees can
22 rely on the work of the previous commissions or if
23 they have to do "table rasa" each time and start anew,
24 and the view that was followed by the Levitt
25 Commission is that there is a developing case law or

1 jurisprudence or precedence developed by these
2 committees. In fact, there were recommendations to
3 make sure that the intelligence was not lost in the
4 process every four years because the members change.
5 I think that's a good thing that we have Maître
6 Regimbald to ensure that the memory of the committee
7 is maintained. That's also one of the reasons why it
8 is important to take into account the work, the
9 reasoning, and the recommendations that were arrived
10 at by your predecessors. If we started anew every
11 four years I think it would be, first of all, a little
12 discouraging for the members of the committee not to
13 have a lasting impression, all the work that you will
14 be doing. I think you will wish that it has a lasting
15 impression and I think your predecessors also worked
16 hard to make sure that that was the case. If we were
17 to consider as a starting point solely the unilateral
18 view of the government, who rejected the report, there
19 would be in our view little object and purpose in the
20 work of these committees.

21 MR. BASTARACHE: When you speak of -- I'm
22 sorry -- when you speak of a starting point and
23 looking at what previous commissions did I think we
24 have to make a distinction between the amount that
25 they proposed for remuneration and the factors and

1 analysis of various factors, because it seems to me
2 they're quite different. If the previous commission
3 recommended one level of salary that was rejected, how
4 can we say that there was an adequate remuneration
5 arrived at to establish your starting point with
6 regard to that? I don't think we can, because the
7 rejection of the government shows its view of what may
8 be adequate but then that wasn't the view of the
9 commission, and, as you say, the commission is
10 supposed to make sure that it's not a unilateral
11 finding. So I think when you say "Look at what
12 previous commissions did", it seems to me it means
13 look at the way they chose the various factors,
14 interpreted the factors, and decided to give more or
15 less prominence to one or the other. Is that your
16 view?

17 MS. CHATELAIN: Yes it is, and I think you
18 also have to consider the actual salary level that was
19 arrived at because that is the end process of the
20 reasoning and the balancing of the various factors.
21 Now as I said in my opening remarks, circumstances of
22 course -- and that's why we have the process every
23 four years -- circumstances may warrant that you give
24 different weight to different factors or that you
25 consider different factors in a different light

1 because of events that could have happened and
2 developed over the preceding four years. But I agree
3 essentially with your comments, which is I think a
4 good reflection of what the Supreme Court of Canada
5 stated in the Bodner case in 2005, which was the
6 second very important case dealt with by the Supreme
7 Court of Canada on judicial compensation. More
8 particularly -- you have that at tab 8 at the joint
9 book of authorities, the Bodner case, and I draw your
10 attention more particularly to paragraphs 14 and 15
11 where, and I'll just cite some passages, where the
12 Supreme Court of Canada stated the following. I'll
13 read the whole paragraph 14 because I think it is
14 wholly relevant. It says "The Reference laid the
15 groundwork". The Reference is the 1997 Reference.

16 "The Reference laid the groundwork to ensure
17 that provincial court judges".

18 Because that's what we're dealing with there,
19 provincial court judges, but the principles are
20 equally applicable to federally appointed judges such
21 as the military judges and the Superior Court judges,
22 section 96 as well as section 101 judges. So coming
23 back to the quote:

24 "The Reference laid the groundwork to ensure
25 that provincial court judges are independent

1 from government by precluding salary
2 negotiations between them and avoiding any
3 arbitrary interference with judges'
4 remuneration. The commission process is an
5 institutional sieve".

6 And that's that you are.

7 "An institutional sieve, a structural
8 separation between the government and the
9 judiciary. The process is neither
10 adjudicative interest arbitration nor judicial
11 decision making. Its focus is on identifying
12 the appropriate level of remuneration for the
13 judicial office in question".

14 And those are the key words.

15 "All relevant issues may be addressed. The
16 process is flexible and its purpose is not
17 simply to update the previous commission's
18 report. However, in the absence of reasons to
19 the contrary, the starting point should be the
20 date of the previous commission's report".

21 Not the government's response. I think that is to
22 give weight to the actual process. Of course the
23 commission's -- the government's response should not
24 be completely excluded and that's not what I'm saying,
25 because it informs the process and the outcome and the

1 relevant background. So the government's response is
2 a relevant fact but what should be the starting point
3 is the date of the previous commission's report.

4 At paragraph 15 the Supreme Court continues by
5 saying:

6 "Each commission must make its assessment in
7 its own context. However, this rule does not
8 mean that each new commission operates in a
9 void, disregarding the work and
10 recommendations of its predecessors".

11 Again giving a lot of weight to the work of the
12 commission.

13 "The reports of previous commissions and their
14 outcomes".

15 Now, their outcomes is essentially the government's
16 response to these reports.

17 "The reports of previous commissions and their
18 outcomes form part of the background and
19 context that a new commission should
20 consider".

21 So again I'm not saying that you should not consider
22 the government's response, but I think a lot of weight
23 in your balancing act has to be given to the previous
24 commission's work.

25 "A new commission may very well decide that,

1 in the circumstances, its predecessors
2 conducted a thorough review of judicial
3 compensation and that, in the absence of
4 demonstrated change, only minor adjustments
5 are necessary. If, on the other hand, it
6 considers that previous reports failed to set
7 compensation and benefits at the appropriate
8 level due to particular circumstances, the new
9 commission may legitimately go beyond the
10 findings of the previous commission and, after
11 a careful review, make its own recommendations
12 on that basis".

13 Now that last quote in the Bodner case, if you look at
14 the context of the Bodner case, in one of the cases it
15 was alleged that the commission had made a mistake and
16 the judges were seeking to in fact have that mistake
17 corrected and I think that's where the court -- the
18 comments of the court here was in that context, and
19 that's what we pleaded in 2008 to your predecessors
20 when we asked them to set aside the findings of the
21 2004 commission which had set the military judges
22 compensation based on the average of the provincial
23 court judges compensation across Canada. We pleaded
24 in 2008 that we were in a situation where the previous
25 commission had failed to properly set the compensation

1 and the 2008 commission agreed with us, and actually
2 the government was also of that view that the factors
3 considered in 2004 were inappropriate, that provincial
4 court compensation was not a proper guideline to set
5 compensation of federally appointed judges because
6 federally appointed judges compensation should be set
7 according to considerations at the federal level and
8 not at the provincial level, and we'll come back to
9 that.

10 So looking at the actual salary figures of the
11 starting point, this is actually annex R of our
12 submissions where we have shown on the third line what
13 is the actual salary which was set by the government
14 following its rejection of the 2008 commission report
15 and we have calculated on the last line what would
16 have been the level of the military judges
17 compensation had the 2008 committee's recommendation
18 been implemented. That salary would be as of today
19 \$257,000, rather than the actual \$220,000. That would
20 have placed the military judges salary roughly at the
21 midpoint between what its salary is today and what the
22 other federally appointed judges salary is. I think
23 you've seen in the material that all the other judges
24 appointed by the Government of Canada the base salary
25 for, if we need judges, is around \$280,000 whereas the

1 military judges salary, also appointed by the
2 Government of Canada, is \$220,000 and had the 2008
3 recommendations been implemented we would have been
4 roughly at the midpoint between those two, those two
5 figures. So that, according to our submissions, is
6 the starting point if we look based on the figures.
7 It would be the \$257,000 rather than the \$220,000.

8 MR. STERLING: Madam, there is an opportunity
9 for military judges to address the inadequacy of the
10 minister's response. Does that not then set the
11 starting point back where the minister found it? I
12 mean if there is an opportunity to address the
13 situation at that point in time and there's a choice
14 not to, then how can you argue the starting point
15 should be the commission rather than the Defence
16 minister?

17 MS. CHATELAIN: I guess the opportunity that
18 you would be referring to is the opportunity to seize
19 the court with a judicial contestation of the response
20 of the minister.

21 MR. STERLING: Yes.

22 MS. CHATELAIN: Which is of course an avenue
23 that courts across Canada are not welcoming. If they
24 have, of course, cases they will take it but the
25 actual process was essentially to avoid protracted

1 judicial confrontation. I think that looking at the
2 process as saying, well, that this as an opportunity
3 trumps actually what the Supreme Court of Canada had
4 in mind in 1997 and in 2005 where it stated that
5 judicial proceedings would be the last resort and
6 something that we hope would not be resorted to -- and
7 those are the words of the Supreme Court of Canada in
8 the Bodner case in 2005, in the very beginning
9 paragraphs of the decision where the Supreme Court
10 said that its hopes and wishes in drafting the 1997
11 Reference was that we would not see such exceptional
12 circumstances that led to the 1997 Reference where
13 judges across Canada had engaged into judicial
14 confrontation. So yes there is that possibility, but
15 I think that judges -- well my own experience, I've
16 been involved with judges across Canada also
17 representing the CAPCJ, which is the Canadian
18 Association of Provincial Court Judges, and I also
19 represent the Quebec provincial court judges -- are
20 never enthusiastic about going to court with respect
21 to judicial compensation. What they wish is that the
22 process set by the 1997 Reference will arrive at
23 success. Another discussion we had before the Levitt
24 Commission earlier this year is how to define success
25 in this process, because success is not resorting to

1 this last opportunity of seizing the court. Success
2 in our view for this process would be a true
3 opportunity to address before you, as we're doing
4 today, all the issues and concerns of the judges,
5 would be the opportunity for you -- with the time
6 necessary to do it and that's one thing I'll come back
7 to -- to reflect on those concerns and issues that
8 were submitted to you, and the opportunity for the
9 committee to draft a very well-reasoned
10 recommendations and report and arrive at
11 recommendations crafted in the public interest that
12 will obtain the adherence of the government. The
13 problem that we have in the process, and there is of
14 course -- the Supreme Court has recognized that your
15 recommendations are not binding. This is not binding
16 arbitration, but I think that the Supreme Court of
17 Canada what it had in mind in 1997 was not that the
18 government would systematically reject the reports,
19 and that is going on across Canada and at the federal
20 level. I don't think that that was the recipe for
21 success, that we would come before you, make all these
22 recommendations, put in all this hard work, and then
23 that the government would be able to simply come back
24 to its starting position and then put it back to the
25 judges, giving them the task of seizing the courts to

1 have the response set aside. It is a possibility but
2 I don't think that it's a possibility that should be
3 encouraged, and that it should be the last resort. So
4 as I said, yes, the response is part of the context.
5 I don't think you could simply set it aside. I think
6 you do have to consider that the salary of the
7 military judges is essentially set at \$220,000
8 following the response of the government for the
9 reasons that it provided, but the starting point of
10 your analysis I insist, in my view, should give a lot
11 of weight to the work and reasons that were provided
12 by your predecessors.

13 This would bring me to the second part of the
14 relevant factors that you must consider, I submit, in
15 the context of your reflection on our respective
16 submissions and that is the economic considerations
17 which are provided at 204.24 of the QR&Os. What
18 entails considering the economic -- I'm sorry, I'm
19 going back again. Considering the prevailing economic
20 conditions in Canada involves taking into account two
21 aspects. First, the cost of living. You know, when
22 we discuss economic considerations it might be viewed
23 as simply considering the financial situation of the
24 government and the economic conjuncture, but it
25 involves also considering what is the value and what

1 is the purchasing power of each dollar that is put
2 into judicial compensation. The economic
3 considerations to be considered should also involve
4 considerations about maintaining the purchasing power
5 of the judges, because the Supreme Court of Canada
6 again and committees across Canada again have
7 recognized that, save exceptional circumstances such
8 as those that led to the 1997 Reference, the salaries
9 of judges should not be reduced in real terms first of
10 all, and, second, by the effect of inflation. So
11 except under those exceptional circumstances -- which
12 are not present now. We're not in the situation which
13 led to the 1997 Reference. We're not in the situation
14 which led to the adoption of the Anti-Inflation Act
15 which was referred to by the Supreme Court of Canada
16 as being one of those exceptional circumstances. The
17 economic conditions of course are matters of concern
18 for the government, for each and every Canadian
19 citizen I think, and should be a matter of concern to
20 you but we are not in a situation where those
21 conditions are such that we should reduce the actual
22 salary of judges. As you will see in my upcoming
23 submissions we are strongly of the view that the
24 salary of military judges are inequitable when
25 compared to all of the other federally appointed

1 judges and that situation in itself should be
2 corrected, in our humble submissions. But then again,
3 when we look at the propositions of the government,
4 not only is the government satisfied with that
5 discrepancy between the salary of federally appointed
6 judges but they're asking this committee to reduce the
7 compensation of military judges by capping the index
8 at a level which will be below the projected inflation
9 rate, which will be below the projected rate of the
10 Industrial Aggregate Index, and they're also seeking
11 to reduce that salary compensation when looked overall
12 by removing a benefit, a severance benefit, which the
13 military judges enjoy. It is true that the other
14 judges don't enjoy that, but then again when you look
15 at the so vast discrepancy between the salaries of the
16 other federally appointed judges that is one
17 benefit -- Mr. Sauvé has provided a report -- which is
18 worth about 1.5 or 1.56 percent of the salary. The
19 government is proposing to remove that, replacing it
20 by a mere 0.25 percent, so an actual reduction in the
21 compensation package, and a reduction also by
22 providing an increase which is below the projected
23 Industrial Aggregate Index. We do not see what can
24 justify such reduction in the purchasing power and the
25 actual salary of judges in the present economic

1 context. So then again not ignoring the concerns of
2 the government and those of -- the legitimate concerns
3 that we have with respect to the economy and the
4 general conjuncture, we do not feel that this
5 conjuncture is in a state where it justifies reducing
6 the salary of the judges and keeping them in a
7 situation where they are set apart when compared to
8 all of the other federally appointed judges.

9 MR. STERLING: Can you just advise me of the
10 authority? You had mentioned the Supreme Court said
11 that it shouldn't decrease their salaries.

12 MS. CHATELAIN: Yes.

13 MR. STERLING: You can give that to me later.

14 MS. CHATELAIN: Yes, I'll give it to you
15 later. I just wonder if I have it here, but I'll
16 provide that to you later on.

17 MR. STERLING: I guess the other question I
18 had is, what is the actual severance that is allowed
19 to military judges when they--

20 MS. CHATELAIN: It's essentially one week's
21 salary per year of service, and of course Mr. Sauvé
22 can correct me if I'm wrong, to a maximum of 30 years.

23 MR. STERLING: So their previous service prior
24 to their appointment also counts?

25 MS. CHATELAIN: Yes, and there are some

1 exceptions, but which we submit does not apply here,
2 is, if they leave for cause or some conditions it
3 could be less than a week per year. But essentially
4 what we have to assume here is that we would not have
5 such removal causes for the judges and the actual
6 severance benefit is one week, and as I said earlier -
7 - and we have Mr. Sauv e's report at tab -- that we
8 have filed with our reply submission at tab -- which
9 actually assesses the monetary value of that severance
10 benefit. As I said, going from memory, I think it's
11 1.56 percent in average. Yes, that's it. It's 1.56
12 percent and that's at tab S.

13 So as I said, not undermining the economic
14 considerations but they will always be a challenge
15 for -- and I think you've experienced that, Mr.
16 Sterling. Economic and financial considerations will
17 always be a challenge for every government. It has
18 always been and will always be. If we're looking for
19 a good time to raise the salary of the judges I think
20 we will never find one. There is never a good time to
21 raise the salary of judges, and as a matter of fact of
22 any public servant, I submit, but that's the reason
23 why we have this process. The judges cannot
24 negotiate, should not negotiate, cannot engage in
25 protracted discussion, don't have any bargaining power

1 and should not exercise any. They of course, as you
2 know, perform a function which is mandated by the
3 constitution which does -- it needs to ensure public
4 confidence, those protections and those guaranties of
5 financial securities. It's not easy for the judges to
6 be here in front of you and to be talking about cents
7 and pennies and figures. It's once in every four
8 years. We're happy to be here, but we're also happy
9 that it's only once in every four years, and because
10 you know what judges want to do is do what judges need
11 to do, that is judge, and it's not necessary to be
12 here in front of you having those discussions.

13 The submissions of the government I think
14 imply that the military judges have not shouldered
15 their share of the burden of the 2008 conjuncture. I,
16 as I point out in the reply and I think as you would
17 point out also, Mr. Sterling, the 2008 response to
18 government is -- the 2008 response to the previous
19 committee's report is evidence in itself that the
20 judges have shouldered their share of the burden, but,
21 more than that, because of the fact that we came
22 before the 2008 commission submitting that the
23 previous process for setting their salary was
24 inadequate, that is, the process of taking into
25 account the average of all the provincially appointed

1 judges, as a principle we were of the view that that
2 was not the proper way to set federally appointed
3 judges' compensation but in fact the result of that
4 position that we took in principle was -- had an
5 unfavourable effect on the judges salary, because if
6 the military judges salary had been set today with
7 reference to the average of the provincially appointed
8 judges it would be higher than \$220,000. Then again,
9 taking the principle view that they should be in the
10 federal context for the setting of their judicial
11 compensation and adding to that the 2008 response to
12 the committee's report, draw back the military judges
13 salary to a level which is not only less than the
14 other federally appointed judges, which is not only
15 less than the actual recommendations of the 2008
16 committee, but which is also substantially less than
17 what it would have been had the 2004 process been kept
18 in place, so, I think we could say that the military
19 judges have indeed shared their burden of the fall-
20 back of the 2008 situation.

21 Did you want to add something? Oh, okay.

22 Sorry.

23 Now, with respect to the economic projections
24 I will simply refer to my submissions and point out
25 that both in the government's view and in our view,

1 because we are relying on the same documentation in
2 that respect, the economic situation in Canada remains
3 concerning but is improving. Again we're not in the
4 2008 situation. The outlook for the period covering
5 the committee's mandate is positive and the Government
6 of Canada is anticipating to be back on the surplus
7 side with respect to its budget in 2015-2016.

8 Now the core of the analysis that must be made
9 by this committee is of course considering the unique
10 nature and sui generis nature of the judicial
11 function. We are not here to set the salaries of
12 public servants. We are not here to set the salary of
13 legal officers who just happen to be judges. We're
14 here to set the salary of judges. You might remember,
15 Mr. Justice Bastarache, in the Therrien decision where
16 Mr. Justice Gauthier recited the extract of the work
17 of Mr. Friedland stating that the judges "occupent une
18 place à part", and I think even in the English version
19 that's the word that was retained. They have a unique
20 position, "une place à part". So considering the
21 judicial function I think is at the core of the work
22 that is invested upon the committee. We will be
23 considering comparators such as lawyers in private
24 practice, lawyers in public practice, looking at the
25 salary of legal officers, looking at the salary of

1 government lawyers, looking at the salary of high
2 ranking officers in the Canadian Forces. Looking at
3 all those comparators is to inform you, to give you a
4 basis, to give you points of reference, but we should
5 not I think set aside the sui generis nature of
6 holding office and the judicial function.

7 MR. STERLING: May I ask you, in reading some
8 of the Levitt report and knowing what their
9 comparators were, and I believe Mr. Sauvé had some
10 submissions to that as well, why would not the chief
11 comparator for military judges be the legal officers
12 that are in the Services? Why wouldn't that be the
13 chief comparator? Because I mean that's where they
14 came from. Those are the people who are appointed and
15 have been appointed. Why isn't that the chief
16 comparator when striking the salary levels for the
17 military justices?

18 MS. CHATELAIN: Because I think taking that
19 position would be going back to the pre 1992
20 situation, before the Généreux case, where the
21 function and the office of military judges was viewed
22 only as a promotion from the legal officer position to
23 the position of judge, as if it was only one
24 additional step in the hierarchy, and that is not the
25 case. It's also inaccurate in our view that the

1 military judges are or should be pulled from the legal
2 officers. Legal officers are the equivalent of
3 lawyers within the Department of Justice. So it would
4 be saying for example to the Levitt Commission that
5 the only comparator to set the salary of the federally
6 appointed judges, which were the subject of the Levitt
7 inquiry, would be to look at the lawyers salary within
8 the Department of Justice. That is not the case. It
9 would be for example in Quebec where I'm--

10 MR. STERLING: But the federal judges in
11 civilian courts come from a whole range of backgrounds
12 and mostly from the private sector. So why would you
13 say that we should look only within the government in
14 terms of their salaries when appointing them?

15 MS. CHATELAIN: Military judges, to be a
16 military judge, to be--

17 MR. STERLING: No, I understand the
18 differences between the two. I'm just saying that
19 you -- when you join the Forces and you go through
20 their -- first you're a legal officer in the military
21 and then you become a judge. The comparators are
22 very, very different in the civilian and in the
23 military.

24 MS. CHATELAIN: I think there's one misunder-
25 standing, with all due respect. Military judges are

1 not and should not, and that's not the criteria to be
2 appointed, are not all taken from legal officers.
3 Legal officers is a subcategory of the lawyers who are
4 officers. Legal officers is -- "avocat militaire" is
5 within the JAG's office only. For example Raynold
6 Langlois, who is the main partner of my firm, he's not
7 in the Reserve any more but he was in the Reserve for
8 about 20 years. He was a candidate which met the
9 requirements to be a military judge. Louis Dionne,
10 who was appointed to the provincial court in Quebec
11 recently, was in the Reserve and was the director of--

12 MR. STERLING: But all the judges who have
13 been appointed have been a JAG advocate.

14 MS. CHATELAIN: Yes, but look at the salary.
15 Why if you're in a private practice -- you know it has
16 -- well, I'll give you an -- I brought this here.
17 Earlier this month on June 1st, was appointed to the
18 Superior Court of Ontario, Robert Goldstein. Robert
19 Goldstein is a Reserve officer, was a lawyer with
20 Public Prosecution Service of Canada. He met the
21 criterias to be appointed a military judge. He's not
22 a -- in fact I'm not sure. Was he a legal officer?
23 No? Okay, so he was not a legal officer. He was a
24 lawyer, private practice, with the Reserves. It's
25 just I want to make sure that I'm being understood. I

1 think there's a mistaken assumption that military
2 judges necessarily come from the legal officer pool
3 and the Government of Canada--

4 MR. STERLING: I know he was in the Reserves.

5 MS. CHATELAIN: Okay. But they have come --
6 what you're saying is that they have come from the
7 legal officers. So that's what we must look at. I
8 think that's a distortion of the process. It's the
9 same thing that happened in Quebec. Eighty percent of
10 the judges were nominated from public service, from
11 the public practice, whereas if you look at the
12 federal court level it's the opposite. Eighty
13 percent, or I think it's 78 percent, of the federally
14 appointed judges come from private practice. I think
15 salary is the reason for that or is one of the
16 reasons. It's not the only reason but it's one of the
17 reasons. If I'm in private practice, as I am, I am an
18 officer and I have all the credentials to be appointed
19 to the courts, I have a choice to appoint to the
20 Superior Court which has a salary of \$280,000 or to
21 the military court which has a salary of \$220,000.
22 Maybe I'm not motivated only by money and I will apply
23 to both, but I think that the salary does have an
24 impact and I think it sets in the eye of the public
25 that there's two levels of justices, there's two

1 levels of judges. There's the lower paid judges,
2 which are the military judges, and there's all the
3 other judges. If you want to be -- and also we've
4 also set in our submissions in the last few years
5 there's been also some appointments in the provincial
6 court judges. As I said, Louis Dionne would have been
7 a great candidate for the military judges. He's being
8 paid more going to the provincial court in Quebec than
9 he would be here. The reason why we're saying that is
10 not that money drives everything, but the salary, and
11 that's the purpose of this process, the salary of the
12 judges has to be set at a level where it does not
13 constitute a deterrent, it does not constitute an
14 obstacle for those excellent candidates to apply to
15 the function. So, yes, looking at the legal officers
16 salary it is an increase in salary if you're appointed
17 to military judges but I think that's not the way it
18 should be looked at. Exceeding at the function and
19 holding the office of judge should not be viewed as a
20 mere promotion or a salary increase from the legal
21 officer salary. I think you have to look at the whole
22 context, what is the level of salary of other people
23 situated in the same situation, what is the level of
24 salary that the government is willing to pay to people
25 who have the qualities and characteristics of what is

1 expected of judges, and that's why at the federal
2 level you're looking at the DM-3s. They're not
3 looking at the lawyers within the Public Service,
4 within the Department of Justice. They're looking at
5 this category of very few people, the DM-3s. As the
6 Levitt Commission has pointed out, there are very few
7 of them. I think it's 24 or -- it's very few numbers,
8 and they're not looking at those comparators to say
9 that judges are the same as DM-3s. They're looking at
10 that comparator because it is an illustration of what
11 society is willing to pay for people who have those
12 qualities and characteristics. The JAG, for example,
13 his salary is set -- actually it's linked. It's
14 exactly linked and equated with the salary of
15 federally appointed judges. I don't think you'll ever
16 see a JAG, although he's a legal officer, apply to be
17 a military judge for reasons that are purely
18 financial. But you have to question and this begs the
19 question why would we set the salary of the JAG,
20 equate it, with the salary of federally appointed
21 judges if it's not an illustration of what the
22 government feels should be paid to people who have
23 those qualities.

24 I've looked at the numbers that the government
25 has submitted. I question some accuracy of the

1 numbers because the numbers that were provided
2 yesterday -- and the government itself acknowledges
3 that it might not be fully accurate. It states that
4 there is about 20 officers in private practice who
5 could be -- that are non-JAG officers who have
6 reported to have a law degree. Twenty across Canada.
7 I think we can count on our hands only the people that
8 we know in Quebec. So those figures according to me
9 should be looked at with a lot of reserve, but just
10 looking at the numbers of the government the lawyers
11 in private practice would represent roughly 15 percent
12 of the eligible candidates to military justice. Why
13 should we ignore those? Why should we set the salary
14 at a level where it could constitute a deterrent for
15 these people to be interested in a military judge
16 appointment? We see no reason for that. Across
17 Canada, both at the federal level and at the
18 provincial level, I've been reading all the
19 committees' reports for many years and they all agree
20 that we should take into account the salary of private
21 practice lawyers. They don't give them the same
22 weight, I agree, and I think that's your task to
23 balance that, but everybody agrees that it should be
24 taken into account except here the Government of
25 Canada who says that we should simply ignore the

1 salary of private practice lawyers.

2 If I take a step back and I go back to the
3 presentation outline, I was to address the
4 consideration of the nature of the judicial function.
5 All of that is set out in my submissions, so I don't
6 want to dwell on that too much. Only to point out
7 some specific aspect. As you have seen in the
8 material the role of military justice, and precisely
9 of military judges, has evolved very quickly in the
10 last two decades. We started at a situation pre 1992,
11 pre Généreux case, where as I said earlier the
12 military judge's function was considered to be an
13 administrative function only and a promotion within
14 the legal officer scheme. This is not the case. Now
15 it's undisputed that military judges are "full patch"
16 judges, if I can use the expression, that they enjoy
17 the same level of judicial independence of other
18 federally appointed judges, be it section 96 or
19 section 101 judges. The military judges are not in a
20 situation which is different from the judges of the
21 Federal Court of Canada or of the Tax Court of Canada.
22 They're in the same situation with respect to the
23 constitutional basis of their existence, save the fact
24 that, in addition, the existence of a military justice
25 system is specifically alluded to in the charter, the

1 Canadian Charter of Rights and Freedoms, because the
2 constitution specifically provides for the existence
3 of such a military justice. So as I said, it is
4 undisputed that military justice is an integral and
5 intrinsic part of Canada's legal system. Now the
6 problem is making sure that this recognition now is
7 recognized in its full effect. It is fairly recent.
8 We have seen just -- the LeSage report again reminds
9 us last week that military judges because of the fact
10 that they're legal -- they're -- not legal officers,
11 they're officers, maintain a rank. The LeSage report
12 says, you know, if we want to truly acknowledge the
13 integral and intrinsic place of military justice we
14 should not -- we should remove those ranks. In fact,
15 there should simply be a military judge rank to truly
16 reflect the fact that military judges are apart from
17 the chain of command. They hold a sui generis
18 function within the Canadian Forces and are not simply
19 a part of the structure. What is military justice? I
20 would submit military justice is justice. What is a
21 military judge? A military judge is a judge, and he's
22 a federally appointed judge and should have all the
23 recognition that comes with that.

24 I referred earlier in my comments to the
25 G n reux, Supreme Court of Canada case. As you will

1 have seen also from additional cases from the Court
2 Martial Appeal Court that came after the Généreux
3 case, even the Généreux case is now outdated because
4 we've crossed many more seas since the Généreux case.
5 But it's still an important and seminal case that
6 informs the place of the military justice within the
7 Canadian judicial structure. I will not burden you
8 with the reading of those passages. They're cited in
9 my submissions at length.

10 So I'll just move ahead to the Dunphy and
11 Parsons case from the Court Martial Appeal Court in
12 2007, which is particularly relevant in light of
13 today's government approach to simply assess the
14 military judges salary in comparison with the legal
15 officers salary and to suggest that as long as it is
16 viewed as an increase in salary, and that's a
17 discussion we were having a little bit earlier, then
18 that it's adequate. In Dunphy and Parsons the Court
19 Martial Appeal Court stated, notably, at paragraph
20 19 -- as I said, the rationale behind Généreux and
21 Lauzon no longer exist.

22 "It is no longer true that a posting to a
23 military judge's position is merely a step in
24 the legal officer career and that military
25 judges would necessarily want to maintain

1 their connections with the Canadian Forces to
2 preserve their chances of promotion. A
3 military judge doesn't receive a performance
4 evaluation report, which is necessary for
5 career advancement".

6 And at paragraph 20:

7 "At general courts martial the military judge
8 is no longer an advisor but now performs a
9 role akin to a judge in civilian courts".

10 So all of this very recent, I think, and as I said
11 before the Supreme Court of Canada in Bodner instructs
12 you to take into account circumstances that allow you
13 to go further than the previous committee's report.
14 Leblanc vs. Regina, 2011 decision of the Court Martial
15 Appeal Court, I think is one of the circumstances
16 which should invite you to go further even than the
17 2008 report. In Leblanc, Mr. Justice Letourneau I
18 think wrote the decision for the court. It states the
19 following, where he says that he completely agrees
20 first with the observations of the lower court, which
21 is the court martial in that matter, that:

22 "The function of a military judge has taken on
23 a stature of its own".

24 A very recent pronouncement which is only an
25 acknowledgement of the facts, but then again we still

1 have in 2011 and we still need to in 2012 in your
2 report to restate that fact, that a military judge is
3 a judge.

4 "For a judge it is no longer, as it was at the
5 time of Généreux and Lauzon, a simple
6 transition stage in his or her military
7 career, a springboard to another promotion or
8 a feather in his or her cap".

9 Going again to the discussion that we had, Mr.
10 Sterling.

11 "It has become a career for jurists who seek
12 to apply their knowledge for the benefit of
13 and in the service of the needs of military
14 criminal justice".

15 Just as it was for Justice Bastarache and Justice
16 Glube when they decided to offer their service to the
17 courts, which are part of the judicial structure in
18 Canada. The military justice system is part, an
19 integral part, of the Canadian judicial structure.

20 Now our submissions again address in detail
21 the jurisdictions, the role and the functions of
22 military judges. There is no real dispute I think in
23 that regard. The LeSage report then again provides
24 another source of a description of the military
25 judge's jurisdiction. What I think is important to

1 point out is that, contrary for example to the Federal
2 Court or the Tax Court of Canada, the military judges
3 have jurisdiction to apply foreign law when they're
4 situated abroad. They also have jurisdiction not only
5 over officers but over civilians when they're
6 subjected to the code of civil discipline. Their
7 jurisdiction I think is overarching. They have
8 jurisdiction to try murder cases, which even -- which
9 is only attributed to federally appointed judges
10 across Canada. The Criminal Code of Canada provides
11 that it's Superior Court justices who will try murder
12 cases and cases by jury. The judges across Canada who
13 have the greatest criminal jurisdiction are the
14 military judges in that respect.

15 MR. STERLING: Do you have any instances where
16 we have -- we were discussing this. We were trying to
17 find an instance where a foreign law had been applied
18 by a military court, and is there any instances where
19 that has been done?

20 MS. CHATELAIN: I will maybe ask Mr. Justice
21 d'Auteuil to -- I know he can tell you about cases,
22 with respect to the Wilcox case I think, with respect
23 to murder cases which are--

24 MR. STERLING: Outside of Canada, yes.

25 MS. CHATELAIN: Yes. Which are being tried.

1 MR. d'AUTEUIL: But basically, to answer your
2 question, foreign law -- when Government of Canada
3 decides to exercise its jurisdiction on its own people
4 it's very rare that -- I try to just remember a case.
5 It is in the regulation, in the Act basically, the
6 National Defence Act, because the idea for the
7 Government of Canada I think is to take jurisdiction
8 over its own citizens, its own soldiers. The court
9 has that. Is there a precedent about this? Maybe.
10 Maybe some years ago. Maybe before I joined the JAG
11 organization, before I was interested in military law.
12 From my own memory I don't know any--

13 MR. STERLING: It was just from, really, a
14 point of interest for me.

15 MR. d'AUTEUIL: Yes. But it's very rare
16 because usually the federal act, such as the Criminal
17 Code, would apply.

18 MR. STERLING: Thank you.

19 MS. CHATELAIN: What I think is telling is
20 when you look at a function, an office, what you look
21 at to set the salary is the actual jurisdiction. When
22 you will, for example, try to fix the salary of any
23 position what you will look at is "la description de
24 la tâche" and that is part of the -- "description de
25 la tâche", that is part of the jurisdiction, and I

1 think it informs us as to the importance of the role
2 and of the powers that are vested upon military
3 judges.

4 MR. d'AUTEUIL: If I may?

5 MS. CHATELAIN: Yes.

6 MR. d'AUTEUIL: If I may, in Germany -- when
7 we were in Germany -- it's a long time before I
8 joined -- sometimes they were used to charge a soldier
9 under the German law for drunkenness or drunken drive
10 issues, but I wasn't part of the JAG at that time, but
11 they were used to do this once in a while, to use, and
12 then they used foreign law, German law. People were
13 charged under German law.

14 MS. CHATELAIN: With respect to the analogy
15 with other federally appointed judges, going back
16 again to the discussion that we had with respect to
17 the added requirements that military judges also be
18 officer -- I insist on the fact that it's an added
19 requirement -- to the appointment requirements to be a
20 judge is the same for all federally appointed judges.
21 You have to be an outstanding member of your
22 respective bar. You have to have extensive knowledge
23 of the subject matter of the court to which you are
24 applying and to which you may be appointed. You must
25 also possess all the qualities and characteristics

1 that are expected of judges, such as sound judgment,
2 personal characteristics of honesty, integrity, social
3 awareness. It comes also with all the impacts of
4 being appointed to the judiciary where you're then
5 subject -- and that's a good thing, I'm not saying
6 that it is an impediment -- to all the Reserves
7 obligations that apply. Judges have to be
8 extraordinary citizens, as Mr. Justice Gauthier
9 reminded us in the Therrien matter. What is expected
10 of judges is more than what is expected of any other
11 ordinary citizens. All of that is equally expected of
12 federally appointed judges as well as military judges.
13 Military judges have this additional requirement where
14 they also have to be outstanding members of the
15 Canadian Forces, they have to be officers, and I'm
16 surprised when I read the submissions of the
17 government that this added requirement -- because so
18 many -- so few people have all those requirements, the
19 pool is narrowed because of this added requirement --
20 for some reason should lead to the result that the
21 salary should be set at a lower level. I think it
22 should be the opposite. You have an added
23 requirement. Few people have those qualities and
24 characteristics and conditions, and that should lead
25 to a rarity of the resource, which should lead to

1 considerations to set the salary at a higher level,
2 not the considerations of only looking at what are the
3 legal officers who have those qualities and what would
4 be a salary that would equate with a salary increase
5 and that should be adequate. I think we have to take
6 into account the added requirement and not the fact
7 that because of the rarity of the resource that should
8 bring the salaries down. It should be the opposite.

9 A proper analysis, in our view, of the nature
10 of the military justice system as I have explained it
11 and as is set out in my submissions, a proper analysis
12 of the role, the functions, the jurisdiction, the
13 responsibilities vested with the military judges and a
14 proper analysis of the composition of the court
15 martial system, should lead in our view to the
16 conclusion that military judges enjoy a status and
17 hold office in a way which is akin and analogous with
18 all other federally appointed judges. We stress that
19 the analogy that we are pressing is not only with
20 Superior Court judges, but then again the connecting
21 factor is federally appointed judges. I referred
22 before to the Federal Court judges and the Tax Court
23 judges of Canada. We can hardly see, as could not
24 also Madam Justice L'Heureux-Dubé in the 2004 and 2008
25 committee report, why military judges would be set

1 apart and what distinguishes them in their status and
2 in the office that they hold from the Federal Court
3 judges or the Tax Court judges. True, Federal Court
4 judges have some jurisdictions that the military
5 judges don't have, but the same is true, Federal Court
6 judges don't enjoy the same jurisdiction as the
7 military judges. The connecting factor, again I
8 insist, is the fact that it's federally appointed
9 judges. We're not looking at members of an
10 administrative tribunal. We're not looking at members
11 of commissions. We're not looking at some sub-level
12 of justice. We're looking at a parallel justice
13 system. The people who are tried before the military
14 court cannot be tried before the civilian courts.
15 Some offenses are -- there is a choice, you can try
16 the person before the civilian court or before the
17 military judges. Those people deserve the same level
18 of justice but they also deserve the confidence that
19 they are being judged by the same level of judges,
20 that they are not submitted to the lower court judges,
21 if they are tried before the military judges.

22 This statement respecting the fact that the
23 courts have the same rights, power, privilege as
24 Superior Court judges of criminal jurisdiction, you
25 will find that statement in our submissions recited

1 again and again in LeBlanc, in Généreux, in Dunphy, in
2 Nguyen, and even in the government's submission.
3 There has to be a consequence to that. I will again
4 not burden you with reading the whole extract but only
5 draw your attention to the underlying section in
6 paragraph 37 in the LeBlanc case again where Justice
7 Letourneau again presses that in view of recent
8 amendments to the National Defence Act and -- which
9 were prompted by decisions of the court with respect
10 to the unconstitutional nature of the previous
11 process. For example, the LeBlanc case results from a
12 constitutional attack on the provisions of the
13 National Defence Act providing that military judges
14 were appointed for a term of five years. That had
15 been declared unconstitutional for some time but the
16 government had not given act to those judicial
17 decision and had not amended the National Defence Act.
18 Because of the LeBlanc case it was put into -- before
19 the situation where now it had no choice. So
20 resorting to the courts is not -- is not, as I say,
21 the preferred route but all those recent amendments to
22 the National Defence Act to recognize and acknowledge
23 the place of the military justice were achieved
24 because of judicial contestation of the previous
25 system. So Justice Letourneau, recognizing that the

1 roles and functions of military judges are comparable
2 to those of criminal court judges.

3 Now I think I've made myself clear on that
4 point. So I won't dwell on it again, with respect to
5 the added requirement to be an officer. All the other
6 conditions are the same. The selection process is the
7 same. It's managed also by Le Commissaire ... la
8 magistrature fédérale. The appointments are made by
9 the Governor in Council. The revocation process
10 following an inquiry committee are the same. The
11 process for determining compensation, although we're
12 before you today and not before the Levitt Commission
13 this process is essentially the same. When you look
14 at the conditions -- I mean the criterias, that are
15 suggested to you and those that the Levitt Commission
16 had to look at they're essentially the same and the
17 process is the same in that it's by the constitution.

18 I provided you with the LeSage report. I have
19 highlighted in the version that was sent to Mr.
20 Regimbald the relevant section, but what I want to
21 stress with respect to the LeSage report is that it
22 confirms yet again that a military justice is an
23 integral part of Canadian justice and it supports our
24 view as to the nature, role and function of military
25 judges. The third bullet I think should be looked at

1 also with more attention, where LeSage -- Mr. Justice
2 LeSage -- quoting from Justice Dickson, which was
3 describing the military justice system, stated that:

4 "The need for an efficient and expeditious
5 justice system is greater in the military than
6 in civilian society".

7 Now I point to that again to stress that there are
8 added requirements to military justice because of the
9 context within which it functions. Military justice
10 has to be quicker, has to be swift, has to be mobile,
11 because they have to respond to the specific
12 requirements of the military, which are added
13 requirements. Then again I don't see why those
14 particularities should bring the salary down, where
15 we're actually adding to the requirements of the
16 function. I referred also before in my comments to
17 this recommendation by Justice LeSage to set a
18 distinct rank of military judge, to then again
19 acknowledge the "place à part" that military judges
20 hold within the Canadian Forces and to hopefully one
21 day finally set aside that assumption that military
22 judges are only legal officers with judging powers.

23 MS. GLUBE: I think before you start the next
24 section perhaps we'll take our 15-minute break.

25 Alright? Thank you.

1 MS. CHATELAIN: Yes, of course.

2 (SHORT RECESS)

3 MS. GLUBE: Thank you. Please be seated.

4 MS. CHATELAIN: Okay? So I'll resume my
5 observations. We're addressing now the fourth branch
6 of the relevant factors to which I wanted to focus my
7 attention on this morning in the outline of
8 presentation, so four of four relevant factors. The
9 comparison with the salary paid to other people, this
10 entails in our view taking into account the salary of
11 course paid to other federally appointed judges, which
12 is a factor to which, as you have surely seen by now,
13 we are according great weight. I think we should also
14 look, to be fully informed, at the salaries paid to
15 other judges in Canada from other jurisdictions
16 because that also forms part of the context which you
17 should be informed of. The salary of lawyers both in
18 public and in private practice, again we're not
19 ignoring the salaries of legal officers and of
20 Government of Canada lawyers and of lawyers in other
21 public sectors, but we're not according -- we're not
22 putting the same weight as the Government of Canada is
23 on those factors, on those comparators, but I think
24 they do form part of the context that you have to look
25 at. Fourthly, the salaries paid to others from the

1 public purse, we did refer to earlier in our comments
2 to the salaries paid to the DM-3s, a very small group
3 of people, which does not form part of the pool from
4 which judges are selected but which has been
5 recognized by all the federal commissions, starting
6 with the Drouin Commission, as the most relevant
7 factor because it is an illustration of what is
8 expected to be paid to people with such
9 characteristics and qualities. So I wanted to address
10 those four categories of other people and their
11 salaries to inform the committee.

12 Before engaging into the discussion on those
13 four categories of people I will ask Mr. Sauvé to
14 address a few words because this is his area of
15 expertise. Setting compensation, fixing compensation
16 packages, and looking at what the market should pay to
17 people depending on the qualities and characteristics
18 expected of a particular function, is the expertise of
19 Mr. Sauvé. Mr. Sauvé is a Fellow of the Canadian
20 Institute of Actuaries. He is here before you today
21 as an independent and objective expert. We have
22 retained Mr. Sauvé, but as you will see from his full
23 credentials which are attached to his CV at tab J --
24 at tab J of our authorities you will find his full
25 credentials, but Mr. Sauvé has been retained mostly by

1 commissions across Canada. He will correct me if I'm
2 wrong I'm sure, but he has been retained by the Drouin
3 Commission, the 1998 commission, by the Levitt
4 Commission most recently. I don't know if you've been
5 retained by--

6 MR. SAUVÉ: McLennan.

7 MS. CHATELAIN: McLennan Commission also. He
8 has been retained also by the committee in Quebec for
9 setting the compensation of the provincial court
10 judges of Quebec. He has been retained by the
11 O'Donnell committee in 2001, by the Johnson committee,
12 and by others. So we offer him, if I can use that
13 expression, to you as an objective and independent
14 expert and I stress right from the outset that we have
15 no objection -- to the contrary, if you want to
16 communicate with Mr. Sauvé he is at your disposal to
17 answer any question that you might have either during
18 this process today or afterwards during your délibéré.
19 So because of his vast expertise and experience
20 particularly in those processes I think he's one of
21 the few in Canada who has been retained by so many
22 commissions. So that being said -- and I'm not sure
23 if he's blushing right now -- but I will ask Mr. Sauvé
24 to comment on the general approach with respect to
25 compensation benchmarking and, by the same token, to

1 present his report which dealt with a more discrete
2 item of the four, which is the comparison of the
3 salary of lawyers in private practice. But before we
4 get to that point I will ask Mr. Sauvé to comment
5 generally on compensation benchmarking.

6 PRESENTATION BY MR. SAUVÉ:

7 MR. SAUVÉ: Thank you, Chantal, and I am.
8 Members of the Commission, I would like to--

9 MS. GLUBE: Perhaps you'd move the mike just a
10 little closer? I think that -- thank you.

11 MR. SAUVÉ: Is that okay?

12 MS. GLUBE: Yes.

13 MR. SAUVÉ: I would like to present briefly to
14 you the results of the analysis that I presented in my
15 May 28th letter. I'm assuming that you have a copy of
16 it? At the same time provide some comments and answer
17 questions that you may have on it. The purpose of
18 that letter was to compare the compensation of
19 military judges to the income of lawyers in private
20 practice taking into account the value of the judges
21 pension benefits. Now as Maître Chatelain mentioned
22 earlier, lawyers in private practice constitute an
23 appropriate benchmark not only because of the need to
24 ensure that there's no obstacle to the recruitment of
25 outstanding candidates, but also because they

1 constitute a pool of individuals with experience and
2 qualities sought in judges. As a matter of fact the
3 very same reason is used to use the deputy ministers
4 as a comparative group in the sense that no
5 recruitment is made from deputy ministers, but they
6 have been used by all of the commissions as an
7 adequate comparator. In its reply submission the
8 government mentioned that benchmarking to any one
9 group was contrary to the purpose of the committee,
10 which is to examine the remuneration of military
11 judges. Now of course it would not be appropriate to
12 tie the compensation of military judges to any single
13 comparator because that would defeat the whole
14 process. I mean, that goes without saying. Having
15 said that, I think it is necessary in any compensation
16 review -- it's necessary for the committee to be able
17 to use a number of or consider a number of comparators
18 and hopefully the compensation of lawyers in private
19 practice, just like deputy ministers, may expand the
20 range of useful comparators that you will want to use.

21 With respect to the data underlying this
22 analysis, as you may be aware -- you're probably
23 aware, in fact -- the data comes from the Canada
24 Revenue Agency which extracted the income, the net
25 income, from lawyers from income tax returns and that

1 is including more than 21,000 lawyers in private
2 practice in Canada in the year 2000. The methodology
3 used by the CRA for that purpose is better defined,
4 more robust, and therefore more reliable than what
5 I've seen. Because I had the opportunity to view the
6 same data back in 1997, in 2000, and 2001 -- 1997 for
7 the Drouin Commission, in 2000 and 2001 for the
8 McLennan Commission -- and I can assure you that the
9 data that we have right now and the process that has
10 been used to get it is much more robust and I have a
11 better level of confidence with the results that we
12 have at the moment. So using this information the CRA
13 tabulated the results by age groups, alternately
14 including and excluding lawyers with income below
15 \$60,000. Now one thing that we -- this is an issue
16 that keeps coming back, but I should mention up front
17 that both the Drouin and the McLennan Commission
18 agreed with the exclusion of lawyers with earnings
19 below \$50,000, in the case of the Drouin Commission,
20 or \$60,000 in the case of the McLennan Commission. In
21 fact the McLennan Commission stated in its report, and
22 if I may read, it says:

23 "It is unlikely that any in the pool of
24 qualified candidates will have an income level
25 lower than \$60,000. The salaries of articling

1 students".

2 And we're in 2004.

3 "Range from \$40,000 to \$66,000 in major urban
4 centres and the salaries of first-year lawyers
5 range from \$60,000 to \$90,000 in those same
6 centres, and are often augmented by bonuses.
7 Earnings for more senior associates are
8 significantly higher".

9 So that was McLennan at that time. This is, I'm
10 sorry, on page 43 of the McLennan report. In fact, in
11 my opinion the \$50,000 that was used back in 2000 and
12 the \$60,000 that was used in 2004 are both seriously
13 outdated and in fact a higher threshold than that
14 should be, would be, justified I think for 2012.
15 Meaning that when we're using data which excludes
16 earnings below \$60,000 it's a measure of conservatism,
17 because I think we should be excluding more than that.

18 The government reply suggested that it is not
19 appropriate to use a \$60,000 income threshold because
20 it eliminates 26 percent of lawyers. Now, the number
21 of or percentage of lawyers that are excluded from the
22 comparative group is not relevant. For instance,
23 lawyers under the age of 35 are excluded from this
24 process because of the 10 years of service requirement
25 and it does not matter that lawyers under the age of

1 35 represent five percent, 20 percent or 50 percent of
2 all lawyers in private practice. The key thing is
3 that if the decision is made to exclude them because
4 they don't have experience, they should be excluded.
5 The same thing goes with the salary threshold. The
6 other thing is, conceivably some of the lawyers below
7 the age of 35 may have more than 10 years of service
8 and could be candidates for the judiciary. Now that
9 does not mean that excluding all lawyers below 35 is
10 wrong. It's an approach that is made to establish an
11 appropriate comparative group against which comparison
12 can be made, and the same thing applies with the
13 salary threshold.

14 MR. STERLING: I have a question. Are these
15 the means or are these the averages?

16 MR. SAUVÉ: They rank by percentiles. So
17 Revenue Canada, the RCA -- I'm giving you the French
18 acronym. The RCA provides the salary levels at each
19 fifth percentile. So it gives the fifth percentile,
20 the tenth, fifteenth, and so forth. So they're not
21 averages, they're -- the point -- if we're looking at
22 the sixtieth percentile, for instance, it means that
23 60 percent of the lawyers earn less than that specific
24 amount and 40 percent earn more. So if we're looking
25 at the fiftieth percentile it is the median, not the

1 average.

2 MR. STERLING: So where would the curve peak?

3 MR. SAUVÉ: Well it's not a bell-shaped curve.
4 If you look at the progression through the percentiles
5 of course when you reach the highest level the
6 salaries go up tremendously, but by using percentiles
7 you're not taking into account those higher salaries.
8 I agree if we were using the averages then the numbers
9 would be distorted by the very high numbers, but we're
10 not. We're using percentiles.

11 MR. STERLING: So if you take out the top 200
12 earners it wouldn't change the numbers?

13 MR. SAUVÉ: Well it would change the numbers
14 to the extent that the percentiles would not be the
15 same, but you're not--

16 MR. STERLING: Significantly would it change?

17 MR. SAUVÉ: Well we're looking at -- I mean if
18 we're looking at lawyers excluding earnings below
19 \$60,000 we're looking 7,000 to 8,000 lawyers.

20 MR. STERLING: But if you took out all lawyers
21 that were earning more than a million out?

22 MR. SAUVÉ: Well there are not that many. It
23 wouldn't make such a big difference on the percentiles
24 themselves. I mean it's only the top ones that are in
25 that neighbourhood. And again, we're not using

1 averages. As a matter of fact, back in 2000 in front
2 of the Drouin Commission it was initially suggested
3 that what should be used was the average earnings
4 within the top quartile and at that time the Drouin
5 Commission eventually -- as a matter of fact the
6 government at that time suggested using the seventy-
7 fifth percentile instead of using that approach and
8 the Drouin Commission accepted. So by using the
9 seventy-fifth percentile we're sort of eliminating
10 that problem.

11 MR. STERLING: But why are you eliminating?
12 You're eliminating on the low end but you're not
13 eliminating on the high end.

14 MR. SAUVÉ: The reason we're -- the thing that
15 we have to keep in mind is we're not -- we are not
16 doing a statistical analysis of the income of lawyers
17 in private practice. This is not what we're doing. I
18 mean if we were then, you're right, we should be -- if
19 we're excluding the lower tail, we should be excluding
20 the upper tail and so forth. But that's not what
21 we're doing. We're trying to establish a comparator
22 group, a comparator group which we assume would be a
23 pool of individuals from which judges could be
24 recruited. Now that pool of individuals, the
25 conclusion that has been made by the Drouin and

1 McLennan Commissions is it is unlikely to include
2 anyone who earns less than \$50,000 or \$60,000 for a
3 number of reasons. It could be part-time employment
4 but it could also be a question that this is a new
5 practice, this is an individual who has a practice
6 that is not so successful. So for all of these
7 reasons, which may be valid, we may still be in a
8 situation where someone earning less than \$60,000
9 could very well be a candidate that could be appointed
10 to a position of judge, has a quality to it. We're
11 not denying that. In the same way, that someone below
12 the age of 35 could have more than 10 years of service
13 and be in a position to be appointed. That is not the
14 issue. The issue is we're excluding people below 35
15 because we think that that takes care of the 10 years
16 service requirement. Excluding the people below a
17 salary threshold is aimed at eliminating a number of
18 people who are considered not to be outstanding
19 lawyers in private practice. I mean if -- money is
20 not a--

21 MR. STERLING: In one case, in -- there's a
22 lawyer in Toronto who I'm aware of who made over
23 \$8 million last year involved in class action suits.
24 Is his statistic in here?

25 MR. SAUVÉ: It probably is unless he is

1 incorporated, in which case it isn't. Even if it is
2 in it, it doesn't really matter because we're not
3 taking an average. I would have a great deal of
4 difficulty if we were taking averages. That would not
5 be appropriate. But by taking a percentile we're
6 taking care of that, we're not considering the tail
7 end except in the count that we're doing.

8 MR. STERLING: But the percentile is jiggered
9 depending on who you cut off at each end?

10 MR. SAUVÉ: Well, and again in my opinion,
11 when we're excluding lawyers earning less than \$60,000
12 we're being conservative because there are not many
13 lawyers earning \$60,000 or \$65,000 that would be
14 qualified, that you would consider as an outstanding
15 lawyer that should be deserved of, deserving of, an
16 appointment to the judicial. Now it's -- and again
17 we're trying to establish a comparator group. We're
18 not trying to do a statistical analysis of the
19 universe. I mean we've passed that stage once we
20 eliminated lawyers below the age of 35. As soon as we
21 eliminated those we're no longer looking at the
22 universe of all lawyers in private practice. We're
23 looking at an extract, a group, that we feel is a good
24 comparator. It will never be perfect but I think it's
25 working not so badly and would work better, in my

1 opinion, if the \$60,000 was increased. As a matter of
2 fact, having a salary exclusion that is as low as
3 \$60,000 is actually introducing a bias in the other
4 direction in the sense that -- I mean the seventy-
5 fifth percentile would be higher if we were excluding
6 the proper group rather than only the people below
7 \$60,000.

8 MR. BASTARACHE: I wanted to know -- we know
9 for a fact that for men the average age at appointment
10 is 52.

11 MR. SAUVÉ: Yes, federally.

12 MR. BASTARACHE: If we took that and
13 established the average revenue for those people would
14 you come up with figures that would be very different
15 from those that are acquired under your present
16 scheme?

17 MR. SAUVÉ: Well as a matter of fact there's
18 been the -- I mean the age group that was selected was
19 from 46 to 57, if I'm not mistaken. So it's actually
20 centred around that age 52 and is meant to include a
21 substantial portion -- I don't have the numbers in
22 front of me -- a substantial portion of the age at
23 nomination, if you will.

24 MR. STERLING: What is the average age of --
25 that's civilian the 52, the 52 years of age?

1 MR. SAUVÉ: The 52 years is the average age at
2 appointment of federal judges.

3 MR. STERLING: And what is it for the military
4 judges?

5 MR. SAUVÉ: Military have been appointed
6 between the age of 40 and 49. So, there are four of
7 them. The average age would be around 45 I'm assuming
8 at appointment, much younger than federally.

9 MR. STERLING: So why wouldn't you do your
10 analysis on that basis?

11 MR. SAUVÉ: Well that's what I did, as a
12 matter of fact. I've used -- because there are three--
13 -

14 MS. CHATELAIN: If I may? At tab J--

15 MR. STERLING: Yes, I've got it.

16 MS. CHATELAIN: Okay? At page three. I'll
17 let you explain. In fact Mr. Sauvé might explain to
18 you what is the difference between the age groups that
19 was considered by the federal commission as compared
20 to the age group that was considered by him for this
21 process, taking into account the fact that you have
22 mentioned.

23 MR. SAUVÉ: So the RCA submitted data for the
24 ages between 35 and 69 but also some narrow ranges,
25 between 35 and 46, 47 and 54, and 55 to 69. It also

1 included the age range that we referred to, that was
2 used federally, which is between 44 and 57. I don't
3 have it in front of me at the moment but I believe
4 that's what it is. But for the purposes of this
5 analysis, given that judges are appointed between 40
6 and 50 I've taken the two age groups -- the first one
7 between 35 and 46, the second one between 47 and 54 --
8 and I grouped them together. Given that they are
9 about the same number of judges in both groups I
10 simply averaged them, because they're the same weight,
11 and what I'm getting is the average income of lawyers
12 in private practice between the ages of 35 to 54. The
13 age group between 55 and 69 is not appropriate because
14 judges, military judges, are retired at 60. So we've
15 excluded that section. So if you're looking at the
16 letter of May 28th, on page three what you have is the
17 first two columns are for the sixty-fifth, seventieth
18 and seventy-fifth percentiles; the income, net income,
19 of lawyers between the ages of 35 to 46 in 2010, then
20 between 47 to 54, and then the average of the two
21 between 35 and 54.

22 MR. STERLING: So none of the -- in those
23 statistics none of the appointed military judges pay
24 would be included in those statistics when they were
25 appointed? In other words--

1 MR. SAUVÉ: I believe that there is one that
2 came from the private practice.

3 MR. d'AUTEUIL: Yes. Probably two. I'm not
4 directly from private practice but I have been in
5 private practice before.

6 MR. STERLING: But nobody working for the
7 Public Service? Their salaries aren't included in
8 here?

9 MR. SAUVÉ: No. This is lawyers in private
10 practice.

11 MR. STERLING: Okay. Thank you.

12 MR. SAUVÉ: And again on page three the fourth
13 column shows the 2010 salary of military judges and
14 then the ratio of that salary to the income of lawyers
15 in private practice. It shows a ratio of 60 percent
16 at the seventy-fifth percentile and even at the sixty-
17 fifth percentile the ratio is 78 percent.

18 Now if you look on page four what we did is we
19 took the same average number from the previous page,
20 projected it to 2012 using the average weekly earning
21 increases in 2010 of 3.6 percent, in 2011 of 2.5
22 percent, and compared that to the salary of military
23 judges of 2011, which is \$214,643. Then it shows the
24 ratio. At the seventy-fifth percentile the ratio of
25 the salary of military judges to the projected income

1 of lawyers is 70 percent and the increase needed to
2 catch up is 42 percent. Now I should mention that
3 we're comparing at this point with the salary of
4 military judges increased by the value of the pension
5 benefits which we have submitted to be 20 percent,
6 20.2 to be exact. Now with respect to the seventy-
7 fifth percentile I should say that again both the
8 Drouin and the McLennan Commission used the seventy-
9 fifth percentile in their analysis and you will also
10 know that in the private practice, in private sector,
11 it is common practise to target the seventy-fifth
12 percentile of a comparative group when we're setting
13 the total compensation of best performers when
14 corporate objectives are fully met or exceeded. Now
15 one thing that we should mention--

16 MR. STERLING: What is the number for a
17 federally appointed judge with the adjustment for the
18 annuity? What is their total package worth?

19 MR. SAUVÉ: The total package was worth--

20 MR. STERLING: Twenty-seven or 29 percent is
21 the annuity's worth?

22 MR. SAUVÉ: The annuity was estimated between
23 24 and 27 percent depending on which valuation you
24 took. My number was--

25 MR. STERLING: So it's about \$70,000 over the

1 compensation. So it's about \$350,000 or \$360,000.

2 MR. SAUVÉ: Yes, but now I'm using an
3 assumption that is even more conservative than what we
4 used federally. Federally we used 5.75 percent and
5 now I'm using 5.0 percent interest assumption, which
6 produces greater value. If I had used the same
7 assumption as the 5.75 the 20 percent would have been
8 16.4 percent, but in my opinion the 5.75 percent was a
9 little stretched in the current economic environment.
10 So I prefer to use a lower rate than that.

11 MR. STERLING: Thank you.

12 MR. SAUVÉ: That pretty well concludes what I
13 have to say about this letter. Unless you have other
14 questions on it?

15 MR. BASTARACHE: I'd like a little explanation
16 on the comparative value of the pension, because the
17 bases are entirely different for federal judges in
18 this. How do you compare -- here I suppose you took
19 into account the system as it is now, with the payment
20 that is made on retirement and that the government
21 proposes to eliminate?

22 MR. SAUVÉ: No, I did not take into account
23 the severance allowance. That's only the pension, the
24 pension benefits.

25 MR. BASTARACHE: Okay.

1 MR. SAUVÉ: I must admit I was not even aware
2 that it existed at the time I did this valuation.

3 MR. BASTARACHE: So if you add the severance
4 there as a part of the pension benefit, then they
5 would be more similar?

6 MR. SAUVÉ: Well it would add 1.5 percent,
7 which is not--

8 MR. BASTARACHE: One point five percent?

9 MR. SAUVÉ: So it would go from 20.2 to 21.7.
10 It's not a huge difference.

11 MR. BASTARACHE: Okay.

12 CONTINUED SUBMISSIONS BY MS. CHATELAIN

13 MS. CHATELAIN: Just for a reference point to
14 continue on the discussion, in the Levitt report that
15 was provided to you -- both I think in paper format
16 and it's on the CD that is in the cover page of my
17 submissions -- you will see starting at page 13 and
18 paragraphs 35 and following, the analysis of the
19 Levitt Commission with respect to the private
20 practitioner comparator. Before the Levitt
21 Commission, because of the age appointment of those
22 judges, which is a little higher than those of the
23 military judges, before the Levitt Commission the age
24 group that was considered was age 44 to 56 and you
25 have that at paragraph 36, whereas for this assessment

1 here Mr. Sauvé used age 35 to 54 as he explained to
2 you, for the reasons that he thought were fit. I can
3 also provide the members of the committee, if that's
4 useful to you, Mr. Sauvé's report letter before the
5 Levitt Commission. I could provide that to Mr.
6 Regimbald and it could be of use to you, where you
7 have Mr. Sauvé's assessment of the other federally
8 appointed judges, value of their compensation package,
9 which is higher than the one of the military judges
10 even taking into account the severance benefit. As I
11 said in my introductory comments not only is the
12 salary level below, but the overall compensation
13 benefits are also lower, but we're not making before
14 you any representations or a proposal to increase
15 those other benefits. We're strongly resisting,
16 however, the proposition of the government to take
17 away some of those benefits which are already lower
18 than the ones afforded to other federally appointed
19 judges. So I'll just take a note to make sure that I
20 send you the report of Mr. Sauvé before the Levitt
21 Commission.

22 The reason why Mr. Sauvé -- well I don't know
23 if it's the reason, but before the Levitt Commission
24 the government contested the use of the seventy-fifth
25 percentile. Because of the fact that I did not want

1 to engage into a debate with you we have asked Mr.
2 Sauvé to put both the sixty-fifth, seventieth and
3 seventy-fifth because, in any event, no matter what
4 percentile we look at the salary of that comparator
5 group is substantially higher than that of the
6 military judges, adding, as Mr. Sauvé explained, to
7 the salary of the military judges -- to make sure that
8 you compare on adequate basis -- the value of their
9 pension benefits.

10 Which brings us back to the four comparator
11 items that I wanted to draw your attention to. Mr.
12 Sauvé covered in his comments the third point. The
13 salary paid to other federally appointed judges I
14 think we've touched upon that already. The gap is 31
15 percent. It is viewed by the government as an
16 unjustifiable increase that the military judges are
17 seeking. In our view it is, rather, viewed as a gap
18 which cannot be explained or justified by any of the
19 criterias which inform you. As I said, the 2008
20 commission would have placed the salary of the
21 military judges at midpoint between \$220,000 and
22 \$288,000, leaving a gap of -- I didn't actually do the
23 actual calculations but it would have been
24 approximately half the 30 percent gap that we have
25 now, which if we look again at the fact that judges --

1 you know, "A judge is a judge, is a judge", as the
2 Supreme Court of Canada Madam McLaughlin often says,
3 and this cannot be justified in the current context
4 except by, as I stated in my submissions, this
5 mistaken assumption that military judges are not
6 really judges, just as military music is not really
7 music. That I think is a mistaken assumption and we
8 have to give effect to their recent, fairly recent,
9 pronouncements in the last two decades setting aside
10 that mistaken view.

11 With respect to the fact that we're referring
12 to the salary paid to other federally appointed judges
13 we are not, as is suggested by the government, seeking
14 to set "à parier", as we would say in French, to link
15 the salary of military judges to a given comparator.
16 What we're doing is we're looking at the salary paid
17 to people of the same -- that enjoy the same status,
18 the same office, the same functions. That's what
19 we're looking at and that's why we think it's a
20 relevant factor to take into consideration, which
21 should outweigh the other comparators which inform
22 your decision. The government has referred to in
23 their submissions to the case of the Provincial Court
24 Judges Association of New Brunswick, the New Brunswick
25 Court of Appeal decision stating that it is

1 inappropriate to try to fix the salary of provincially
2 appointed judges -- linking them with federally
3 appointed judges, and we agree that that's not a
4 proper way. In fact that's a discussion we've been
5 having in Quebec for the past 15 years and my
6 involvement with the provincial court judges there,
7 because provincial context is provincial context and
8 federal context is provincial context, but that works
9 both ways. So the decisions or the reasoning, the
10 rationale behind the Provincial Court Judges
11 Association of New Brunswick case applied integrally
12 should lead to the fact that essentially military
13 judges salary has to be fixed according to what the
14 government sees fit for federally appointed judges.
15 It's not another level of government. It's the same
16 level of government. It's the same appointees, it's
17 the same process, and a judge is a judge. So we're
18 not seeking or the military judges are not seeking
19 before you today a salary increase of 31 percent.
20 They're seeking a correction. They're seeking an
21 adjudgement. They're seeking to correct a wrong that
22 has been long-standing. They're seeking that their
23 salary be fixed at a level which is adequate taking
24 into consideration their true status and the nature of
25 their office. We're not -- again, judges should be

1 compared to judges. Again, this is not a promotion
2 from legal officer to a legal officer with a judge's
3 handle.

4 I have also referred to in my reply
5 submissions to the case law emanating from Quebec
6 where that tendency to look at the percentage was very
7 strong and the Court of Appeal, the Quebec Court of
8 Appeal, on two occasions -- one of these cases led to
9 the Bodner case although the Bodner case did not touch
10 upon that specific element -- stated without a doubt
11 that looking at mere percentage is irrational, and
12 that's the words of the court, because we're not
13 seeking here to simply apply an increase. We're
14 seeking to set the adequate level and we're seeking to
15 correct a wrong. The authorities are in tab 10 and
16 tab 14 of the joint books of authorities, with the
17 relevant quotes underlined. I could not say better
18 than Madam Justice L'Heureux-Dubé in her 2004 report
19 where she stated that to her knowledge:

20 "No judge nominated by the federal government,
21 with the powers of the Superior Court, extra
22 provincial jurisdiction, dealing with
23 specialized matter in the province of the
24 federal government, here defence, and having
25 jurisdiction over offenses dealt with by

1 Superior Court judges, such as murder, has
2 ever had the status of a provincial court
3 judge in terms of salary and other benefits
4 and even the age of retirement. All are
5 considered Superior Court judges with a salary
6 attached to that status".

7 And that office, I may add.

8 The argument or the proposition of the
9 government that military judges should not be treated
10 in the same way as other federally appointed judges as
11 a result of their sui generis roles of being in the
12 military was also raised by the government before the
13 2008 commission and there again Madam Justice
14 L'Heureux-Dubé in her additional comments stated that
15 that proposition "Does not touch on the logic of the
16 system for federally appointed judges" and she
17 recognized that this "May give rise to the perception
18 that there are second-class judges", as I said before,
19 in the eye of the beholder, in the eye of the person
20 to be tried before a military judge that could also be
21 tried before civilian courts. They should have the
22 conviction that they are dealing with the same level
23 of judges.

24 I also wanted to provide you with the table of
25 the salary of other provincially appointed judges in

1 Canada. Although everybody recognizes, the government
2 and ourselves, that it is not a -- that the salary of
3 military judges should not be fixed according to the
4 salary of provincially judges, it is however I think
5 enlightening to see where the military judges salary
6 would place them if they would be in that table and
7 actually their salary would be above only the salary
8 of the provincially appointed judges of Nova Scotia,
9 Manitoba, Newfoundland and New Brunswick, so of the
10 Eastern provinces. Maritime provinces, sorry.
11 Atlantic, yes. I'm looking for the right word, I'm
12 sorry. So even -- so I think you have the table there
13 and as relevant information for your background
14 analysis.

15 The third item, and we touched upon it, was
16 the salary of lawyers in public and private practice.
17 With respect to the salary of lawyers in the public
18 practice the Government of Canada has provided at
19 tab 17 of their authorities the relevant tables and we
20 did not have the resources or the data necessary to
21 obtain those or to contest those so we simply defer to
22 those, but what we do note is that those figures are
23 the figures of May 2010, which will be called upon to
24 be reviewed following collective bargaining. So the
25 salary figures that you have at tab 7 are figures that

1 will be, in all likelihood, reviewed and increased.
2 The figures that you have there do not take into
3 account the performance pay that are available to
4 public sector lawyers -- these performance pay rates
5 range, depending on various factors, between five to
6 20 percent -- and it does not take into account any
7 other benefit or incentives that could be available.
8 Although those figures are not taking into account the
9 revisions from 2010, 2011, 2012, although it does not
10 take into account applicable performance pay, and
11 although it does not take into account incentives
12 available to other lawyers, you will see that they are
13 in some instances even higher than what you would see
14 for the military judges. So that again informs, I
15 think, the committee.

16 The next table was with respect to the salary
17 of lawyers in private practice but that has been dealt
18 with in the submissions and the presentation of Mr.
19 Sauvé.

20 If you'll just bear with me. I'm going
21 through my notes just to eliminate some of them.

22 The fourth category of people to whom we
23 should look at as a basis of information is the salary
24 paid to others from the public purse, so others than
25 the judges and other than the lawyers in public

1 practice. Under that category I've highlighted two
2 subcategories, the general service officers and the
3 specialist officers in the Canadian Forces, and you
4 have all those numbers in our submissions. There is
5 no dispute between the figures -- in fact we do not
6 dispute the figures provided by the Government of
7 Canada, which actually were updated compared to our
8 figures. So the figures of the Government of Canada
9 should be referred to instead of ours in that respect.
10 What the analysis reveals is that the salary of the
11 military judges is basically below that of senior
12 officers such as lieutenant-general, which ranges
13 between \$230,000 to \$250,000, but it's also
14 considerably below some specialist officers such as
15 medical officer and dental officers, which I assume
16 their salary is set according to what these
17 specialists can expect in private practice, so then
18 again not simply looking or being a constraint into
19 the structure of the Canadian Forces. I've discussed
20 in previous comments the salary of the Judge Advocate
21 General which is -- it's not by coincidence. It has
22 been linked for as long as we know to the salary of
23 federally appointed judges. The JAG is thus
24 benchmarked to the Superior Court judges. As I
25 stated, this is telling as to the approach of the

1 government. The JAG is also pulled from the legal
2 officers.

3 MR. d'AUTEUIL: He is a legal officer.

4 MS. CHATELAIN: Yes, but -- he's a legal
5 officer with the JAG title but before he was appointed
6 JAG he's pulled from the legal officers pool. If the
7 same reasoning that is presented by the government
8 would apply, why would the JAG need to have the same
9 salary as the Superior Court judge? We could only set
10 the salary at a level which is above the other legal
11 officers and then everybody would be happy, but that's
12 not the situation because when we're fixing the salary
13 of the JAG we're again looking at the characteristics
14 and the values of what we are willing to pay to people
15 in that position. The same reasoning should apply to
16 military judges. We're not simply here looking at a
17 promotion and going one step in the "échelles", in the
18 levels. We also provided data for the salary of the
19 Chief of Defence Staff, which occupies a wholly
20 different function but is a relevant factor to inform
21 you of what is being paid to other officers. It is
22 also noteworthy--

23 MR. STERLING: Could I just ask a question
24 here?

25 MS. CHATELAIN: Yes.

1 MR. STERLING: If in fact military judges
2 received what you want, we would be then faced with
3 the situation that three military judges would get the
4 same remuneration as the Judge Advocate General and
5 the Chief Justice would get almost as much as the
6 Chief of the Defence Staff. You get 10 percent more.

7 MS. CHATELAIN: It's three percent.

8 MR. STERLING: It's three now but under their
9 rules I think it's 10, the Chief Justice.

10 MS. CHATELAIN: You mean in -- it's closely --
11 it's not actually a percentage. It's an amount, which
12 is roughly 10, but the military judge -- the chief
13 military judge multiply factor is three percent here.

14 MR. STERLING: That's the way it is presently.

15 MS. CHATELAIN: Yes.

16 MR. STERLING: But in the other system it's
17 10.

18 MS. CHATELAIN: Yes.

19 MR. STERLING: So you're faced with a
20 situation here that four people are the highest paid
21 or equal to the highest paid people in the military
22 service, and they're part of the military service and
23 their function -- notwithstanding military court and
24 military judges are very, very important to the
25 system, are they as important as those other people?

1 And they have to operate within that realm. That's
2 the difficulty I'm having.

3 MS. CHATELAIN: Yes, I appreciate that. That
4 difficulty I think is nourished also, I submit humbly,
5 by the fact that in your view and maybe in the
6 government's view military judges necessarily have to
7 be constrained in the military justice system. If you
8 look -- a judge is a judge, and military judge is not
9 only a part of the Canadian Forces. He is a part, an
10 integral part, of the Canadian judicial system and I
11 personally see no problem with the fact that the only
12 three individuals -- and that is noteworthy, the only
13 three individuals within the Canadian Forces
14 structure, if we want to look at that only, who are
15 appointed by an order of Governor in Council are the
16 JAG, the Chief of Defence Staff, and the four military
17 judges. No other person within the whole military
18 structure is appointed following an order of the
19 Governor in Council. I see personally no problem in
20 accepting the fact that these people enjoy the
21 qualities and characteristics that are very high.
22 Very high expectations are set for people holding
23 those offices and holding that function and I
24 personally see no problem, for example, with the fact
25 that Superior Court judges are being paid more than

1 the Prime Minister yet you might say that the Prime
2 Minister of Canada has a role which is more important
3 than that of the judges, I don't know, but I don't
4 think that our constitution asks that we consider
5 judicial compensation in that view, taking different
6 functions and saying is that function more important.
7 I don't think that that's the process that should
8 inform us, quite respectfully. That's my view.

9 MR. STERLING: Generally I agree with you, but
10 unfortunately we're within a structure where other
11 people who work in the military understand the
12 structure and have respect for the people that are
13 there, and the respect in the system -- and it's a
14 function of the court is to enforce discipline and to
15 try people who break that. My difficulty is that
16 these judges are different than the other judges
17 because they are within that umbrella. That's my
18 problem. Now the other question I have for you and, I
19 don't know, I don't think you would get to it, is that
20 in the 2000 and in the 2004 commission report there
21 was some mention of the workload and I noticed in the
22 material you sent us from the Judge Advocate General's
23 report that 98 percent of the cases are tried by
24 summary trial by officers in the field and other
25 people other than the military court. There were 56

1 cases in the 2009 to 2010 period. Do you have, as
2 they put out in the 2000 and the 2004 report, how many
3 days this court is sitting in a year?

4 MS. CHATELAIN: I do not have that data and
5 the reason why -- we in fact we haven't looked for it
6 either -- is that the evolution of the process for
7 setting judicial compensation -- as you know these
8 committees exist across Canada and at the federal
9 level since 1998, following the 1997 -- in fact they
10 existed before, but in their constitutional format
11 they exist since 1998 and there's been evolving
12 jurisprudence of the committees and there's been
13 judicial contestations -- a lot arising in Quebec in
14 which I have been involved, the four cases also which
15 led to the Bodner case, and it has now been widely
16 acknowledged and recognized and the Levitt Commission
17 I was trying to find the passage -- I'll get that to
18 you -- recognizes that we cannot assess the judicial
19 function by looking at it as if we were assessing an
20 employee and looking at workload. That is simply not
21 the way it's being done. You cannot assess the
22 function and the office of a person who's holding that
23 office as a judge compared to how many days they're
24 actually sitting. I did the exercise in 2008 and it
25 turned out -- with all due respect, Mr. Justice

1 Bastarache -- that the Supreme Court judges were the
2 judges in Canada who were sitting the less, yet
3 because of their place in the judicial structures
4 they're the ones who have the higher salary. You
5 cannot judge the function of a judge by the number of
6 hours that they're sitting, by the cases that are
7 being put before them, of which they have no control.
8 The importance of the judiciary and the functions that
9 they accomplish is not valued by the numbers of days
10 and hours that they're sitting. It's valued by how
11 that office and function is placed in our society to
12 ensure that we're living in a society which is founded
13 and grounded on the rule of law. The military judges
14 because of their particular function, which is focused
15 on criminal law, have a very important function to
16 ensure the respect of the Charter of Rights and
17 Freedoms and make sure that the rights of individuals
18 are guarded. Their function is not simply to apply
19 discipline. That is not their function. They apply
20 and their jurisdiction extends to all federal
21 statutes. The criminal law it is under the umbrella
22 of the code of civil discipline but actually it's the
23 same function as a criminal court.

24 MR. STERLING: I understand their extended
25 jurisdiction.

1 MS. CHATELAIN: So it's not simply discipline.
2 And looking at the summary trials is also not the same
3 thing. A person that is being charged with an offence
4 has the benefit when he decides to go -- when he has
5 the occasion to decide, because I'm not sure that the
6 officer or the "prévenu" always has the choice, but
7 when he has the choice--

8 MR. d'AUTEUIL: The accused.

9 MS. CHATELAIN: The accused, I'm sorry. The
10 accused. Decides to go before a military judge
11 instead of staying within his command unit and being
12 tried at the summary trial level, what he has is the
13 assurance of an independent justice system with the
14 safeguards of judicial independence. I'm not saying
15 that the summary trial, and please don't take me wrong
16 on this, is not objective and independent for the
17 purpose for which it is set but that's not the same
18 thing. The accused has the fundamental,
19 constitutional right to be tried before a judge, which
20 holds the guaranty of independence and impartiality,
21 and that's different. So I don't think you can equate
22 the two. It's not -- a military -- the court martial
23 is not a step above the summary trial. It's a
24 different process. It's a different process and also,
25 going back to that, it is not true to state that lower

1 offenses or less important offenses are being tried at
2 the summary trial level and more important offenses
3 are being tried at the court martial level. That is
4 simply not the reality. The reality is that it's two
5 different systems. It's like if you're in the Civil
6 Service and you have "la discipline" and the right of
7 the employer to -- his authority, and then you have
8 criminal or a judicial or a civil contestation. It's
9 not the same thing, and maybe -- I don't know if Mr.
10 Justice d'Auteuil wants to add something there because
11 I know it's a discussion we had many times, that it's
12 simply not true to say that lower offenses are summary
13 trials and more important cases are courts martial.
14 The process is different and the guaranties are
15 different.

16 MR. STERLING: I didn't say that. I'm just
17 saying--

18 MS. CHATELAIN: No, but I'm responding -- the
19 government is saying that--

20 MR. STERLING: I'm talking about the workload
21 for military judges.

22 MS. CHATELAIN: Yes. I got carried away in my
23 comments.

24 MR. STERLING: And it seems very light, from
25 the report that -- and I believe in value for money

1 for the taxpayer, as well as judicial independence.
2 So there has to be some marrying of these two
3 principles and I haven't heard any allegation on your
4 part that the independence of our court is in trouble.

5 MR. BASTARACHE: Well I'd like to intervene
6 here. I don't think judges decide how many cases
7 they're going to hear. Cases are presented to them.
8 The workload varies per court and per province. And
9 just look at the fact that we have a great number of
10 supernumerary judges. What about them? Should we cut
11 their salaries in two? I don't think there are
12 adjustments of that kind and I don't think it makes
13 sense because basically people are paid according to
14 their qualifications and the nature of their office
15 and then they hear the cases presented to them. In
16 the Supreme Court it's true, this was mentioned, that
17 the number of cases varies from year to year. When I
18 first started we were hearing 100 cases a year. The
19 last year I was there I think we heard 76. I didn't
20 think the court was working less. The complexity of
21 the cases and the nature of the larger cases that come
22 make a big, big difference. You can't say, like a
23 journalist, a case is a case. I mean you have cases
24 that can be dealt with with much less effort and
25 others that take tremendous work. So to me that's an

1 irrelevant factor.

2 MS. GLUBE: I think you have to add the fact,
3 to what Mr. Bastarache was saying, is that it's not
4 just the work in the courtroom that a judge is
5 involved in. The work outside the courtroom can be
6 almost twice as much as the work in the courtroom, to
7 prepare and to decide.

8 MR. d'AUTEUIL: If I may, I would like just to
9 add -- military judges are available 52 weeks. The
10 thing is, as mentioned by Mr. Bastarache, military
11 judges will sit in court when there is cases, that we
12 have cases, and it goes with the system. The workload
13 depends, because our only task as military judges is
14 to sit in court and we are devoted to that. Now if we
15 don't have -- we have a certain number of cases we're
16 dealing with and we're dependent on that. We're
17 totally dependent on that. It doesn't mean that when
18 you look at this figure, how many cases, it's also how
19 the military justice system is dealing with all those
20 cases and I don't think that's the purpose here of the
21 committee to review all the military justice system.
22 I think Judge LeSage, Justice LeSage, did that
23 recently. So, and that's why there's no figure on
24 that point. I think Maître Chatelain was clear that
25 the approach taken was not a matter of workload.

1 MR. STERLING: Well I think that -- I'd like
2 to have that figure, please.

3 MR. de l'ETOILE: Yes.

4 MR. STERLING: Okay.

5 MR. d'AUTEUIL: Probably it would be possible-

6 -

7 MS. CHATELAIN: Would like to have what?

8 MR. d'AUTEUIL: The figures.

9 MS. CHATELAIN: About the time that they're
10 sitting or the number of cases? Because I'm not sure,
11 "le nombre d'heures d'auditions".

12 MR. STERLING: Well you can tell me in the
13 past. You know how many days the court sat.

14 MR. d'AUTEUIL: Yes, we know the number of
15 courts.

16 MS. CHATELAIN: The number of days.

17 MR. d'AUTEUIL: The number of days in court.

18 The total number of days away travelling, because
19 sometimes we are -- as I have been, involved in an
20 eight weeks court for--

21 MR. STERLING: Some take a long time.

22 MR. d'AUTEUIL: A long time, but it doesn't
23 mean that I sit five days a week. Because if --
24 depending on matters in the case.

25 MR. STERLING: Lots of adjournments.

1 MR. d'AUTEUIL: Adjournments, things I have to
2 decide, and things like this. But it can be
3 reflected. I don't have any problem with that. It's
4 just a matter -- it will be provided. Not today, for
5 sure, but there is a way probably to collect the data
6 from what we have at the office.

7 MR. STERLING: Having been the former attorney
8 general for the Province of Ontario and having had
9 other responsibilities in government, the justice
10 system cannot avoid value for money. You can't avoid
11 it. You have to provide value for money. It doesn't
12 matter that we're not getting value for money perhaps
13 in some other situations in our justice system. My
14 job here is to not only ensure -- my first job is to
15 ensure the independence of the judiciary and meet the
16 factors and those kinds of things, but I'm also here
17 for the tax payer in terms of considering what is
18 reasonable compensation for the work you do. Sorry,
19 that's the way I view it.

20 MR. d'AUTEUIL: No, that's fine. You're
21 allowed to get -- if available, and I think it is
22 available. What I'm saying to you is we're dependent
23 on the system. Because prosecutors are involved and
24 maybe, if you look at the system as a whole, a
25 prosecutor may deal with four cases per years, five

1 cases per year, maybe 10, maybe more. We don't know
2 yet. But if -- the salary of those people are
3 assessed differently. But if you consider that this
4 is a factor or something you want to look at, I don't
5 see any problem with that.

6 MR. STERLING: Thank you.

7 MS. CHATELAIN: We will add some submissions
8 to that because in our humble view, and we respect the
9 view of all of the committee members of course, but it
10 has been -- having value for your dollar in the
11 judicial context cannot, in my view and I say that
12 with the greatest of respect, be analyzed according to
13 the number of cases or to the number of hours. Having
14 an independent judicial system which is the pride of
15 many countries in the world, as we have in Canada,
16 cannot be assessed as to the number of cases. Then
17 what are you going to do? Are we going to look at the
18 nature of the cases? Is a case dealing with a civil
19 claim less important than a case dealing with murder?
20 Is a case dealing with administrative decisions
21 respecting income tax less important than a case
22 dealing with unauthorized use of a firearm? How are
23 we going to do that? What we assess is the office of
24 the people who hold those functions and, very humbly
25 stated, it has been widely recognized that you cannot

1 equate the value that you get for your dollar with the
2 numbers of hours or the case that you're dealing with.
3 We'll provide you with the numbers and we'll provide
4 you with our written comments in that respect. And
5 just as a reference note, paragraph 26 of the Levitt
6 Commission report also touches upon that, where the
7 commission report has stated that the submission that
8 was then made, according to the submission report "Was
9 a semantic exercise which was detached from the
10 workplace reality and which had" -- and I'm just
11 reading the words of the Levitt Commission -- "no
12 relevance to the commission's inquiry". So we'll
13 provide you with the numbers and of course you can
14 weight that -- that's your function, that's your role
15 and we're very respectful of that -- but nevertheless
16 we'll stress our views on the subject, with your
17 permission, when we provide the numbers.

18 That slide was then leading us into the other
19 basis of information, which was the salary paid to
20 senior civil servants. Then again it has been widely
21 recognized at the federal commission, the other
22 federal commissions, that the DM-3 comparator was the
23 most appropriate comparator. It had been proposed by
24 the Government of Canada in the early stages before
25 the Levitt Commission. The Government of Canada

1 submitted that the other DM levels should also be
2 looked at and there was great discussion before the
3 Levitt Commission as to the appropriate level or not.
4 We don't want to get into those discussions because,
5 in any event, just looking at all the DM levels I
6 think provides you with sufficient relevant
7 information as to the level of salary paid to these
8 individuals. The salary range must be increased by
9 the performance award, performance pay, that is also
10 available to these individuals. Our position is of
11 course the fact that we should -- if we look, if we
12 want to pinpoint at a more relevant comparator, it
13 would be the DM-3s but we're still providing all the
14 information for your benefit.

15 That will lead me to summarizing our proposals
16 for the setting of the military judges salary for the
17 period covered by your committee. On that subject,
18 with respect to the period covered by your committee I
19 intended to talk to my colleague but I unfortunately
20 forgot this morning. I was under the view that, based
21 on their submissions, that they believe that the
22 period covered by your committee starts at April 1st,
23 2012 whereas in our view the period covered by your
24 committee is September 1st, 2001 to August 30 -- 2011,
25 sorry, 2011 -- to August 30, 2015. That has been the

1 period that has been set in the QR&Os for the
2 beginning of the inquiry when the first committee was
3 put in place and it has not been changed. The
4 Government of Canada's response to the 2008 committee
5 report does not detract from that. If we look at the
6 Government of Canada's response to the 2008 report,
7 which is at tab G of our annexes, we have both the
8 French and English version. The English version is
9 quite clear at -- just I highlighted in the -- I'll
10 just be a second. I just want to get the proper --
11 okay, so paragraph two of the government's response
12 first of all clearly states with respect to -- the
13 date of commencement of the inquiry is September 1st,
14 2007 but then again at paragraph six with respect to
15 the setting of the salary we see that the starting
16 date -- paragraph six of the government's response to
17 the 2008 report, "The committee" -- then recognizes
18 that the recommendation was to set the salary starting
19 at September 1st, 2007, and then at paragraph 13
20 following its response the government states that
21 "Maintaining the current" -- no, it states the
22 methodology that it is adopting and the last phrase
23 "This methodology would remain in effect indefinitely
24 and would be reviewed on September 1st, 2011 when the
25 next committee is due to convene". So the period

1 covered is really from September to August.
2 Notwithstanding the fact that in its response to
3 mirror the time of the indexation of the salary that
4 is being paid to other federally appointed judges, the
5 government decided that the indexation would be
6 applied April 1st, so a little mix of the two here,
7 but the period covered by your committee is definitely
8 September 1st, 2011.

9 MR. BASTARACHE: But you know we were
10 appointed in 2012.

11 MS. CHATELAIN: Yes, we know that and that
12 doesn't change, unfortunately, the fact that you'll
13 have to do a retroactive. So with respect to the
14 proposal, as I stated at many occasions since this
15 morning, we appreciate that the government's
16 submission is that we should not consider the salary
17 of lawyers in private practice, we should not consider
18 the salary of other federally appointed judges, we
19 should not consider the salaries of the higher
20 officers of the military, and we should not consider
21 the salary of other senior executive members of the
22 Public Service such as the DMs. According to the
23 government the only comparator would be the legal
24 officers and making sure that the salary of the
25 military judges is an increase compared to that

1 salary. For the reasons that we have explained, we're
2 not of that view. We don't share that view. We
3 believe that the judges salary needs to -- the
4 military judges salary should be coherent with and
5 in line with what the Government of Canada has itself
6 decided is adequate salary for other federally
7 appointed judges. We believe that this committee must
8 correct the wrongful situation in which the military
9 judges are situated at this time. We believe that it
10 would be coherent and correct to, rather, consider the
11 salary that is paid to the JAG, to the Chief of
12 Defence Staff, to other public servants within the
13 Government of Canada such as the DM level public
14 servants, that it would be appropriate to look at what
15 is expected of people with such credentials and
16 qualities at the private sector lawyers, and also to
17 look at what is being paid to other provincially
18 appointed judges which have for the vast majority a
19 salary which is higher than that of the military
20 judges. We believe that it would be appropriate to
21 look at the specialist officers such as the medical
22 specialist and the dentist in the Canadian Forces and
23 at the very high ranking officers. If you look at all
24 of those bases of comparison I think there is one
25 inescapable conclusion, is that the salary of the

1 military judges needs to be substantially corrected.
2 It must reflect the true nature and status of that
3 office in review, which is not the case at this time.

4 We also believe, humbly submitted, that there
5 is no rationale to accept the government's position to
6 simply apply a multiplier factor without looking as to
7 whether or not the basis upon which we're applying
8 that factor is adequate. We believe that there is no
9 rationale to retroactively reduce the salary of the
10 judges for 2012, 2013, because you will appreciate
11 that in the government's submission not only do they
12 propose to cap the index at 1.5 but the indexation
13 that was automatically applied in April 4th, 2012
14 would be clawed back next year, according to the
15 judges' submission -- I mean according to the
16 government's submission. So considering that the
17 military judges enjoyed a 2.5 -- I'm sorry -- yes, 2.5
18 increase on April 1st, 2012 the government's
19 proposition is that next year that one percent extra
20 would be clawed back, taken back. So that's an actual
21 reduction. We also believe that there is no rationale
22 to support the fact that the military judges would not
23 at least maintain the same purchasing power, and we
24 also believe that there is no rationale to, at this
25 point, to not only take back the severance benefits

1 but not compensate them. In the government's
2 submission it has stated that to compensate the fact
3 that severance benefits will not be accumulated in the
4 future, they're proposing a 0.25 percent one-time
5 increase. Well that, according to Mr. Sauvé's
6 analysis, is insufficient to compensate because it's
7 less than the actual value of that benefit and that is
8 also acknowledged by the government considering that
9 they have provided other public servants, with
10 bargaining power, at least 0.75 additional
11 compensation. We believe that it is not appropriate
12 also for the government to propose that what will be
13 negotiated in the future for those employees who did
14 not have the additional 0.75 percent will simply be
15 applied to military judges. If that was the case, why
16 do we need an independent and objective and efficient
17 committee as yourselves if the solution would simply
18 be to apply what is negotiated in the public sector
19 and apply it to the military judges? That is exactly
20 the reason why this process was put in place in 1997
21 in furtherance of the constitutional guaranty of
22 financial security, so that we are not placed in the
23 position where we simply apply the result of public
24 sector negotiations to the judiciary. We also believe
25 that it would be inappropriate to not consider the

1 fact that in the government's own proposition the
2 projected consumer price index factor for 2012 and
3 then thereafter until 2016 is at least 2.0 percent or
4 above and we see no reason why we would ignore the
5 reasoning of the Levitt Commission which fully
6 considered, and rejected, the government's proposition
7 to cap the index for judges at 1.5 percent because of
8 the will of the government to simply apply to judges
9 what was negotiated through protracted discussions
10 with public sector employees to judges. With respect
11 to the multiplier factor for the chief military judge,
12 we touched upon that briefly a few moments ago. We're
13 not seeking and not making any propositions to this
14 commission to modify that factor.

15 With respect to the costs of representation
16 before this committee the government acknowledges that
17 it has assumed the cost of representation -- which is
18 the cost essentially for me to be here today -- both
19 in 2008 and for this commission, and this is I think
20 what it should be, but what it shouldn't be is the
21 need for the military judges to negotiate and discuss
22 with the government at every commission to obtain that
23 funding. We believe that it would be most appropriate
24 that a process be set to confirm in fact the
25 continuing of the situation. We believe that all

1 reasonable fees and disbursements should be assumed by
2 the government, considering the very low number of
3 military judges. There are only four. At the federal
4 level it is a portion of their representation costs
5 which are covered by the government, but the
6 difference being that there's over 1,000 judges at the
7 federal level. That's one point. The second point is
8 that the other federally appointed judges have what we
9 call expenses, allowances, which the military judges
10 do not have and they are not making any
11 representations to you in this respect. Whereas in
12 other provinces the out-of-pocket costs for the judges
13 to assume their representation costs can be reimbursed
14 through their representational allowances, we don't
15 have that for the military judges. So we believe it
16 would be an unfair burden to impose upon the judges to
17 disburse the, I must confess, significant amount of
18 money which is required to adequately prepare for this
19 process. We have stressed in our submissions that the
20 constitutional process encourages and mandates, and I
21 would go further and say that it requires, the
22 presence of the military and we should not put that in
23 peril.

24 My few closing remarks on the nature and role
25 of this committee, the military judges as well as

1 judges at the federal level have been very concerned
2 with the position taken by the Government of Canada to
3 not thoroughly respect this constitutionally mandated
4 process. There has been a lack, in our view, of
5 respect for the process in delaying the response to
6 the previous reports of the committee, whereas the law
7 sets the timing of those responses and whereas the
8 fact of providing a response is a part of the
9 constitutional process. There has been also, in our
10 view, an unfortunate lack of respect for the process
11 in not appointing the members of this committee at the
12 time when it was mandated, first went to the QR&Os.
13 That is the law and the government must also abide the
14 law, especially in a process so important as this one
15 which aims at ensuring judicial independence in the
16 eye of the public. So it's not a question of the
17 judges having to wait a few months to know what will
18 be the outcome of this process. It's a question of
19 having a true respect for the process and we wish that
20 this committee also makes a recommendation in that
21 respect, to avoid being caught in those situations
22 again. We need to follow the rules and we need to
23 follow thoroughly the constitutional rules.

24 In closing, we also want to insist on what we
25 view as a necessity of thorough and motivated reasons

1 for your recommendations whatever they may be. There
2 has also been disconcerting events in the past where
3 the governments have taken pretext of the fact that
4 the reasoning of the committee has not been crafted or
5 casted in sufficiently detailed fashion and the
6 government took the liberty to set those aside or to
7 make comments on the sufficiency of the reasons. I
8 think when we're trying to look at what defines
9 success of this constitutional process the core of the
10 process and the outcome is the recommendations that
11 you will make and the reasons and the rationale
12 supporting those recommendations. What was envisaged
13 I believe by the Supreme Court of Canada in 1997 is
14 that there would be, foreseeably, an opportunity for
15 the government to reject of course the commission's
16 report. That's part of the process, but I think what
17 was envisaged is that the process would be such that
18 your recommendations would impose themselves on the
19 government, as they are imposed on the judges, and
20 that everybody would adhere to your well-reasoned and
21 informed views as to what should be a judicial
22 compensation. So we again stress the need for clear
23 and exhaustively reasoned recommendations.

24 In closing, I want to thank you for this
25 opportunity to have this discussion, this open

1 discussion with members of the committee. We're still
2 here and willing to answer any questions that you may
3 have.

4 MS. GLUBE: Thank you. Do you have any
5 questions at this time? No?

6 MR. STERLING: I don't think so. I probably
7 have said enough.

8 MS. GLUBE: You can always say more, and there
9 will be another opportunity too as well. There'll be
10 another opportunity later today. Fine, then I think
11 we'll adjourn, take the hour recess. It's now just
12 about quarter after 12:00. So we'll resume again at
13 1:15. Thank you.

14 (LUNCHEON RECESS)

15 MS. GLUBE: Thank you, you may be seated.
16 Thank you. Whenever you're ready.

17 SUBMISSIONS BY MS. LAWRENCE

18 MS. LAWRENCE: Good afternoon. I trust that
19 everyone has had a good lunch, but I hope it wasn't so
20 good that everyone is ready for a nap just as I begin
21 my submissions.

22 I'd like to begin my submissions this
23 afternoon by ingratiating myself to everyone here in
24 this room. My friend made some thank-yous in her
25 written submissions. I'd like to actually make them

1 here orally before the committee. First of all I'd
2 like to begin by thanking you, members of the
3 committee, on behalf of the Government of Canada for
4 the important public service that you have undertaken.
5 I'd like to acknowledge the excellent work of the
6 Registrar, Maître Guy Regimbald. I appreciate, and
7 I'm sure Maître Chatelain does as well, how well-
8 organized the committee process has been. I would say
9 it has been like a well-oiled machine from start to
10 finish. I'd also like to thank Maître Chatelain for
11 her submissions on behalf of the military judges. I
12 know that it can at times, and certainly from some of
13 the tone in our respective written submissions, it
14 looks like we are adversaries in this process.
15 However, I think it's evident that despite the
16 disagreement both of our clients recognize that this
17 process is not about winning or losing. It's about
18 ensuring public confidence in the independence of the
19 military judiciary. We just have different
20 perspectives on what is necessary to achieve that
21 laudable objective. I'm grateful for the spirit of
22 cooperation demonstrated by Maître Chatelain during
23 the lead up to the hearing, as evidenced by the fact
24 that we managed to agree on a joint book of
25 authorities. So I think certainly speaks a long way

1 to the level of cooperation among counsel. And I'd
2 also like to take this opportunity to thank the
3 military judges for their ongoing commitment to public
4 service. My friend described in great detail the
5 responsibilities of the four military judges and the
6 government does not take issue with the military
7 judges' submission that they play important roles in
8 the military justice system and that military judges
9 are an integral part of the Canadian judiciary.

10 I have a few housekeeping matters to address
11 as well. I noticed late yesterday that annex 10 which
12 was included in the government's materials was
13 deficient. We'd made references in our written
14 materials to portions of that annex which were in fact
15 missing. So I have provided you this morning with
16 those portions of the report from the International
17 Monetary Fund, which are the correct passages, and
18 they've been flagged for your convenience. I
19 apologize for that mistake. As well, I emailed the
20 committee yesterday two documents, one of which I
21 understand you actually already had in electronic form
22 from Maître Chatelain. The other one was the table of
23 non-legal officer members of the Canadian Forces with
24 law degrees, which I have provided a copy to my friend
25 and Maître Regimbald has also been provided with hard

1 copies of those for your use here today.

2 I don't have a PowerPoint but I will provide
3 you an overview of what my submissions today will look
4 like. That being said, this is my plan. Like Maître
5 Chatelain, I am here to assist you and to answer any
6 questions you may have. My plan is not necessarily
7 your plan. So I would encourage you, as you see fit,
8 to interrupt me and to ask whatever questions you deem
9 necessary as I go through this process. My plan is to
10 start by looking at the jurisprudential context in
11 which this committee's work will be undertaken and
12 that will commence principally with our view of the
13 PEI Judges decision. I'm not going to take you
14 through the entire decision -- we'd be here until the
15 end of next week if I were to do that in any detail --
16 but there are a few key passages that I think need to
17 be highlighted. They demonstrate in my submission
18 that the government's proposal, and more importantly
19 the rationale from which that proposal flows, are
20 directly linked to reasoning from the Supreme Court of
21 Canada. I'll then move on to talk about the present
22 and the future of the military judges remuneration, so
23 starting first with the current remuneration of
24 military judges and how we got to where we are today
25 and I'll touch on the government's response to the

1 2008 committee report. I'll then talk about the
2 future. So I'd like to discuss the government's
3 proposal for the upcoming quadrennial period and
4 answer any questions you may have about what exactly
5 the government's proposal is, and, just in brief, the
6 proposal is two-fold. First of all, that the current
7 salaries be maintained and adjusted annually during
8 the quadrennial period based on the Industrial
9 Aggregate Index to a maximum of 1.5 percent, and the
10 cessation of the accumulation of severance.

11 I'll then move on to the four mandatory
12 criteria and explain why in my submission the
13 government's proposal results in an adequate
14 remuneration for military judges. I'll address in the
15 context of that discussion the military judges
16 proposal for parity with Superior Court judges
17 salaries and why that is not a reasonable proposal at
18 all in light of this committee's mandate, firstly, and
19 secondly in light of the current economic situation in
20 Canada and also in consideration of the unique pool of
21 candidates from whom military judges are drawn. The
22 government's submission is that it is not appropriate
23 to use a single comparator to determine the adequacy
24 of military judicial salaries and that, in fact, if
25 you're going to look at comparators at all those

1 comparators should be given only an appropriate level
2 of weight in view of the fact that there are four
3 mandatory factors that are to be taken into account by
4 this committee. They are only part of the inquiry, if
5 you find that they are to be considered at all. They
6 cannot be, as the military judges would have you
7 believe, the overarching consideration in your inquiry
8 into the remuneration of military judges.

9 I'd like to begin then, as I said, by talking
10 about the jurisprudential context for the work of this
11 committee. There have been references sprinkled
12 throughout both sets of submissions to the PEI Judges
13 decision because it's the decision that set the stage
14 for what this committee is doing today. It's
15 important to recognize the context of the PEI Judges
16 case. That case was about salary reductions imposed
17 by governments during the recession in the 1990s on
18 provincial court judges in Alberta, Manitoba, and
19 Prince Edward Island. The question before the court
20 was whether salary reductions were unconstitutional
21 because they compromise judicial independence. In the
22 context of that case the Supreme Court of Canada held
23 that provincial court judges salaries can be reduced,
24 frozen or increased so long as there is an objective
25 process in place that examines their remuneration and

1 is linked to judicial independence. The court in PEI
2 Judges defined the proper role of the judiciary as one
3 that is independent from the executive and found that
4 financial security is one of the key aspects of
5 judicial independence, the others of course being
6 security of tenure and administrative independence.
7 Although the PEI Judges case dealt with many issues
8 relating to judicial independence I would like to
9 focus your attention on three important principles
10 which should in my submission bear on your inquiry and
11 specifically on your assessment of the reasonableness
12 of the Government of Canada's proposal.

13 So I'll ask you, if you could, to turn up the
14 PEI Judges case. I'm not going to take you to all of
15 the relevant passages. I have made references to them
16 in my submission. There are, however, some that I
17 think it's important that I take you to specifically.
18 So the PEI Judges case is at tab 17 of the joint book
19 of authorities, and that's volume three. I apologize
20 for making you -- making this more difficult.
21 Certainly I see the benefit in having the extracts up
22 on PowerPoint in the future. So I'll take a page from
23 Maître Chatelain's book next time. For now, however,
24 hard copy is all I have. So I'd ask you first -- I'm
25 going to be referring to page 64 of the decision and

1 I'll be looking at the English version. The first
2 principle that I think is important in terms of your
3 inquiry is that this is a public interest process.
4 This inquiry is not aimed at protecting the individual
5 economic interests of members of the judiciary. It is
6 about ensuring the public interest in an independent
7 judiciary is enhanced and the one passage I would like
8 to draw to your attention with respect to that
9 submission is paragraph 190 on page 64. The second
10 sentence begins:

11 "The purpose of the collective or
12 institutional dimension of financial security
13 is not to guaranty a mechanism for the setting
14 of judicial salaries which is fair to the
15 economic interests of judges. Its purpose is
16 to protect an organ of the constitution which,
17 in turn, is charged with the responsibility of
18 protecting that document and the fundamental
19 values contained therein. If judges do not
20 receive a level of remuneration that they
21 would otherwise receive under a regime of
22 salary negotiations then this is a price that
23 must be paid".

24 So there's a clear indication from the Supreme Court
25 here that there may well be circumstances in which

1 military judges -- in the context of this particular
2 case -- or other judges, will not end up being
3 remunerated to the same level that others who are
4 involved in salary negotiations will, but, as the
5 court specifically said, this is a price that must be
6 paid in order to uphold the principles enshrined in
7 the constitution and in order to ensure an independent
8 judiciary. I bring this point forward to respond
9 directly to the arguments that were made by my friend
10 earlier with respect to comparisons to others paid
11 from the public purse and the argument that you as
12 part of your mandate should be looking at the salaries
13 earned by others. For the most part my friend asks
14 you to look at almost anyone across the board.
15 Lawyers, public servants, members of the Canadian
16 Forces, GIC appointees, anyone who earns more than
17 military judges currently do are, in my friend's
18 submissions, the groups to which you should look in
19 determining whether the military judges salaries are
20 adequate. Within those groups, however, there are
21 individuals who are in a position to negotiate
22 salaries with their employers. Almost all of these
23 groups, other than GIC appointees and members of the
24 Canadian Forces whose salaries are set by Treasury
25 Board, have an opportunity for a say in what their

1 salary would be, and by virtue of that fact they're in
2 a situation entirely different from the military
3 judges. Again this goes right back to the words of
4 the Supreme Court of Canada. You cannot, just because
5 a particular group is entitled to more money by virtue
6 of salary negotiations, say that the level of
7 remuneration must be tied to that. There is a price
8 that must be paid for judicial independence.

9 The other principle that I think you must take
10 from the decision in PEI Judges is that the treatment
11 of others paid from the public purse is a relevant and
12 important consideration and to that end I would draw
13 your attention to page 57 of the decision. The pages
14 numbers are very small at the top of the page. The
15 paragraphs I'm going to are paragraphs 158 and 159, if
16 that's of assistance. In paragraph 158 there's a
17 clear statement from the Supreme Court that the
18 treatment of others paid from the public purse is an
19 important factor to take into account when examining
20 the adequacy of remuneration of members of the
21 judiciary. I'm not going to read the entire
22 paragraph. I want to draw your attention to the last
23 two sentences.

24 "In my opinion, the risk of political
25 interference through economic manipulation is

1 clearly greater when judges are treated
2 differently from other persons paid from the
3 public purse. This is why we focused on
4 discriminatory measures in Beauregard".

5 And I'll just leave you for a moment to read the next
6 quote, which is from Professor Reinke, which talks
7 about sparing judges from compensation decreases
8 affecting others. So in my submission this is a clear
9 endorsement by the Supreme Court of Canada for the
10 approach the Government of Canada is recommending to
11 you, which is that judges should be treated similarly
12 to others who are paid from the public purse. So if
13 others paid from the public purse are subject to
14 limited wage increases as a result of economic factors
15 beyond their control, then those measures applicable
16 to others paid from the public purse should be taken
17 into account when determining an adequate level of
18 compensation for judges, including military judges.

19 MR. BASTARACHE: That presupposes that you're
20 starting from an adequate salary or an adequate
21 remuneration. The argument made by the other party is
22 that you need an adjustment before you tie in these
23 people to measures that are taken for the Public
24 Service as a whole or everyone who is paid from the
25 public purse. But also, when you're talking about

1 people paid from the public purse you're also talking
2 about all those federal judges. They're also there as
3 members of the judiciary, which is similar I guess in
4 nature to the functions of military judges, and why
5 shouldn't we take into account the level of pay of
6 those people? They're paid from the public purse.

7 MS. LAWRENCE: There's no denying and I
8 certainly would not say that there are not a number of
9 variables that need to be taken into account in
10 examining treatment of others from the public purse.
11 So, yes, my friend has pointed to a number of people
12 paid from the public purse who are remunerated at a
13 level higher than military judges. That's certainly
14 something that this committee can take into account.
15 However, the government's submission is that a factor
16 that should be given more weight than that in the
17 context of this particular case is the current
18 economic situation and the fact that the current
19 economic situation has led to a tightening of the
20 fiscal purse with respect to the vast majority of
21 federal public servants, government departments,
22 et cetera.

23 MR. BASTARACHE: That's the point I don't
24 understand. If you could demonstrate that military
25 judges' present salary is adequate then I could

1 understand that you say, well, they have to share the
2 burden, they have to have a minimal increase in salary
3 because that's what's happening with regard to the
4 Civil Service in general, but if you can't establish
5 that the present salary is adequate the first thing
6 you have to do is determine what is the level at which
7 you can find it to be adequate. Now with regard to
8 the response of the government to the last two
9 commissions and the level of salary that was
10 established, I can't see anywhere indication that we
11 should take the present salary to be adequate. You
12 can't take the recommendation that was made -- because
13 there was no obligation on the government to accept
14 it. You can't take the government's position as being
15 an adequate salary when it's so far removed from what
16 was recommended by the commission and the only
17 argument you can see in the response is economic
18 conditions. Basically I find it also very difficult
19 to understand that you rely so much on economic
20 conditions generally when you're talking about such a
21 small group and a small adjustment. I mean in actual
22 terms, in volume of money involved. It's more a
23 question of fairness, "Will you share the burden", but
24 it's not because it's going to cost too much and it's
25 going to hurt the Canadian economy. This is why I

1 think it's more or less irrelevant that you give us
2 all these figures on economic conditions. Economic
3 conditions can justify the fact that where you're
4 talking about people who are at a present level that
5 is acceptable, that you will freeze salaries or
6 provide for minimal increases. But say, for instance,
7 if you have discrimination against a group of women
8 and that you're trying to apply the Act that says that
9 you should have equal compensation for work of
10 similar. Would you say "Oh, no we can't adjust the
11 women because there's -- national economic conditions
12 don't permit"? You're not talking about just a
13 general increase in salary. You're talking about a
14 major adjustment because the present situation is not
15 acceptable.

16 MS. LAWRENCE: There was a lot in that
17 question and I will attempt to unpack it, and I
18 certainly will tell you in response that part of the
19 goal of my submissions today is to convince you that
20 the current salaries of military judges is an adequate
21 salary by reference to the four factors that you're
22 mandated to consider. So the government's submission
23 is that by virtue of the current economic conditions,
24 coupled with the pool from which military judges are
25 drawn, coupled with the importance of financial

1 security and its link to independence of the
2 judiciary, and finally the fourth category, which is
3 the catch-all, any other objective criteria this
4 committee considers relevant. It's within that fourth
5 category that I would urge you to consider the
6 comments from the Supreme Court about the importance
7 of taking into account the treatment of others paid
8 from the public purse. So I will during the course of
9 my submissions -- that's one of the principle goals I
10 have today, is to convince you that the current salary
11 is in fact adequate by reference to those four
12 criteria.

13 Just before I get there, one comment with
14 respect to the economic conditions and the fact that
15 these four military judges of themselves will not
16 create a large drain on the fiscal resources of the
17 Government of Canada. There's certainly no denying
18 that and the Government of Canada has acknowledged
19 that in its submissions, but, with respect, the test
20 is not whether the government can afford a salary
21 increase. The test is whether -- the test is what, in
22 view of the current economic situation in Canada,
23 constitutes an adequate salary and that's something
24 that's examined from the perspective of a reasonable
25 person. And I'll get to the reasonable person test in

1 a moment but the question is, in view of Canada's
2 current economic situation would a reasonable person
3 perceive that the current salaries of military judges
4 are "adequate" or, in French, "satisfaisant". So
5 that's what the test is. The test isn't can the
6 government afford to pay this. Clearly it's not a
7 huge drain on fiscal resources. We don't dispute
8 that. But, with respect, the government's submission
9 is that that's not what the test is and so it's --
10 it's inherent in your assessment of what an adequate
11 salary is, the fact that the current economic
12 situation is what it is, and that's something you're
13 mandated to consider in terms of reviewing the current
14 salaries of military judges. So I'm not sure that
15 I've responded entirely to your question but I think
16 all of my submissions are aimed at responding to your
17 question.

18 MR. BASTARACHE: I understand your answer but
19 I guess the first element is, you certainly haven't
20 demonstrated to me that the present salary is adequate
21 and I think that's the starting point. The second
22 thing is when you say take into account the salaries
23 of other people that are paid from the public purse, I
24 tell you yes I agree with that but I think the first
25 consideration there is the salaries paid to other

1 federal judges. They're all paid from the public
2 purse and I think you have to look at the conditions
3 under which they are functioning. Is the nature of
4 their work more similar than that of a soldier or a
5 general in the Army? Why is it so clear that you
6 would exclude that group and put all of your attention
7 to people who are in the military but who are not
8 exercising work of a similar kind?

9 MS. LAWRENCE: I have two comments to make in
10 response to that. First of all, I think there's a
11 misconception on my friend's part in terms of how she
12 characterizes the government's submission. The
13 government is not submitting that military judges
14 salary should be linked, or compared even, to the
15 salaries of legal officers in the Canadian Forces.
16 That's not our submission. The reason we make
17 reference to legal officers in the Canadian Forces is
18 because it's part of one of the criteria that this
19 committee is required to examine, which is the pool
20 from which military judges are drawn. So that's the
21 reason that we make reference to legal officers in the
22 Canadian Forces. It's not because we say there should
23 be any benchmarking or linking or tying of military
24 judges to those persons' salaries. The fact is, and
25 I'll take you there when I get to my submission on

1 that mandatory criteria, the fact is that the vast
2 majority of legal officers who are eligible for
3 appointment as a military judge currently are
4 remunerated at a level that is lower than military
5 judges and our submission on that point is, that then
6 means that the current salaries of military judges are
7 not an impediment to the attraction of outstanding
8 military officers to the judiciary. That's one of the
9 factors that the regulations require this committee to
10 consider. So that's just one point of clarification
11 with respect to the point that my friend made. Then
12 the other point that I wanted to make is, the
13 paragraph that I referred you to in PEI Judges I think
14 there's a distinction that can be drawn between
15 measures affecting the public purse generally in times
16 of budget deficit, in times of recession, which is in
17 my submission what the Supreme Court was referring to
18 here, versus comparisons to other individuals paid
19 from the public purse generally, which is what my
20 friend is urging you to consider. So the reason I
21 take you to this paragraph in PEI Judges isn't to say
22 you have to consider all persons paid from the public
23 purse or the treatment that everyone paid from the
24 public purse is receiving. The reason I take you here
25 is to simply show that in times of economic recession

1 when the belt is being tightened, it is
2 constitutionally justifiable for the government to
3 insist that judges also accept their share of the
4 burden of those economic conditions.

5 The next paragraph that I wanted to draw your
6 attention to was paragraph 159, and I'll let you read
7 that. I draw your attention to the middle of this
8 paragraph where the court talked about the fact that:

9 "Manipulation and interference most clearly
10 arise from reductions in remuneration. Those
11 reductions provide an economic lever for
12 governments to wield against the courts, but
13 salary increases can be powerful economic
14 levers as well. For this reason salary
15 increases also have the potential to undermine
16 judicial independence and engage the
17 guaranties of section 100".

18 And this is why in my submission the military judges
19 proposal -- which includes a proposal for a
20 significant salary increase -- must be carefully
21 scrutinized, because the Supreme Court of Canada has
22 said that significant salary increases also risk
23 undermining, rather than promoting, judicial
24 independence.

25 Then the final paragraph I'd like to draw your

1 attention to on this point, which is with respect to
2 treating others paid from the public purse in a
3 similar fashion, is paragraph 196, which is on page
4 65. I don't want to belabour this point but this
5 paragraph simply reinforces the government's approach
6 to this case, which is based in part on a
7 recommendation that this committee consider the fact
8 that others paid from the public purse over the last
9 few years and into the future are subject to limited
10 wage increases, and in our submission this militates
11 strongly in favour of similar restraints being
12 exercised with respect to the setting or examination
13 of the remuneration of military judges. This is an
14 argument that the Government of Canada hasn't come up
15 with off the top of its head. It's an argument that
16 is derived directly from language from the Supreme
17 Court of Canada in the PEI Judges reference.

18 Then the last point I wanted to make with
19 reference to PEI Judges is, as I mentioned, the
20 reasonable person test and I would link to that the
21 need for objective evidence. I'm going to go
22 backwards in the decision but I'd like to take you to
23 page 47, paragraph 113, which is where the court
24 discussed this concept of the reasonable person, which
25 should bear on your analysis of the issues before you

1 today. Perhaps what I'll do is simply draw your
2 attention to paragraph 113 and summarize it for you
3 very quickly. The court here determined that a
4 reasonable person essentially is someone who has been
5 informed of the relevant statutory provisions, their
6 historical background and the traditions surrounding
7 them, and the question is: After viewing the matter
8 from their perspective, what would they conclude?
9 Would they believe that the military judiciary is
10 independent in light of the current level of
11 remuneration that they're receiving and in light of
12 the government's proposed annual adjustments going
13 forward?

14 One more reference and then we will be done
15 with PEI Judges, at least substantively. Page 60,
16 paragraph 173, and I draw your attention to this
17 paragraph -- it goes without saying that one of the
18 criteria that the Supreme Court of Canada stated was
19 important in terms of the jobs of judicial salary
20 commissions was that it must be objective, they must
21 make recommendations on judges remuneration by
22 reference to objective criteria, and I pause for a
23 moment to emphasize that. The government's submission
24 is that the evidence that the government has provided
25 provides you with that objective criteria that's

1 necessary in order to assess the adequacy of the
2 current remuneration of judicial salaries. We've
3 presented objective evidence with respect to not only
4 the economic conditions but also a substantial degree
5 of objective evidence with respect to the ability of
6 the current salary -- excuse me, with respect to
7 whether the current salary is an impediment to
8 recruiting outstanding candidates to the judiciary,
9 and I would submit that, in contrast, we have not seen
10 from the military judges the objective evidence that
11 is of assistance to you in undertaking your role.

12 I mentioned that my plan was to turn next to
13 the present and then the future of military judicial
14 salaries. I'd like to start then by talking about the
15 history of their salaries and where we are now, and I
16 think it would be useful for you to have by way of
17 reference annex 1 of the Government of Canada's
18 submissions. At page two of that annex we have set
19 out for your convenience a table which demonstrates
20 what the salaries of military judges have been from
21 1999 to present, and you can see how they have
22 developed over time. As we note in our submissions,
23 between 2006 and April 1, 2012 military judges
24 salaries have seen a 16 percent increase. And I take
25 my friend's point -- this was a point that she raised

1 in her reply -- that the percentage increase over
2 those years does not tell the whole picture, that you
3 can always look at statistics from another angle, and
4 her perspective on those statistics and the value
5 thereof is a little different than the one the
6 Government of Canada is advancing but the reason that
7 we have highlighted the percentage increase over those
8 years between 2006 and 2012 is to demonstrate simply
9 that military judicial salaries have grown more than
10 the salaries of others paid from the public purse,
11 including other officers in the Canadian Forces. On
12 that point I'll simply refer you to a table in the
13 Government of Canada's opening submissions on page 11.
14 That table demonstrates that others during the same
15 period saw a more modest 10 percent increase. The
16 government of course acknowledges that it did not
17 implement the recommendations of the last committee
18 which examined military judicial salaries and my
19 friends have criticized the government for the delay
20 in responding to the committee report. In dealing
21 with that issue I simply wanted to note that the
22 rationale which was inherent in the government's
23 response, and which was clear on the face of the
24 government's response to the committee's report, was
25 of course the significant downturn in the Canadian

1 economy that happened in between the time that the
2 committee heard and deliberated on the issue of
3 military judicial salaries and the date that the
4 committee issued its report.

5 MS. GLUBE: The date when? I'm sorry, say
6 that again, please?

7 MS. LAWRENCE: There was a significant -- the
8 state of the Canadian economy changed significantly
9 between the time that the committee deliberated on the
10 remuneration of military judges and the date that it
11 issued its report.

12 MS. GLUBE: Okay.

13 MS. LAWRENCE: And in view of the very
14 significant changes to one of the criteria that the
15 committee was mandated to require and one of the
16 criteria upon which the committee based its ultimate
17 recommendation, that was the basis upon which the
18 Government of Canada justified its response. I would
19 note that during the same period of time the
20 government was also responding to the recommendations
21 of the Block Commission, the judicial compensation
22 committee report, as well as to the report of the
23 Special Advisor on Federal Court Prothonotaries, and
24 obviously in view of the changing economic
25 situation -- in view of the changed economic situation

1 there was -- it was important that some consistency be
2 achieved across those three different groups.

3 I want to address -- Justice Bastarache,
4 getting back to your point about the starting point,
5 which is linked to my friend's submissions. Her
6 submission was that the starting point should not be
7 the current salaries of military judges, if you're
8 going to look at a starting point the starting point
9 you should consider is the last committee's
10 recommendation, and she drew your attention to some
11 passages from the Bodner decision in support of that
12 proposition. I'd like to take you there now because
13 there is an important qualification in both of those
14 passages that I think needs to be highlighted. The
15 Bodner decision is at tab 8 of the joint book of
16 authorities and I'll take you -- I'm taking you to
17 paragraphs 14 and 15. Before I take you to those
18 paragraphs I simply would point out that the
19 Government of Canada does not take issue with the
20 military judges submission that past committee reports
21 provide a useful context to your deliberations. What
22 we take issue with is that this committee as a
23 starting point should start from where those
24 recommendations left off. In paragraph 14 the court
25 there was talking about the fact that the starting

1 date of a subsequent committee may well be the
2 previous committee's decision, but I think it's
3 important to look at that last sentence because in the
4 last sentence of that paragraph 14 the court said:

5 "However, in the absence of reasons to the
6 contrary, the starting point should be the
7 date of the previous committee's report".

8 And that same line is repeated in paragraph 14 in the
9 middle, where the court said -- sorry, 15:

10 "A new commission may very well decide that,
11 in the circumstances, its predecessors
12 conducted a thorough review of judicial
13 compensation and that in the absence of
14 demonstrated change only minor adjustments are
15 necessary".

16 The reason I highlight these portions is because the
17 clause that I think is very important is "in the
18 absence of demonstrated change". When the last
19 committee deliberated it had objective evidence of the
20 four criteria that was very different from the
21 objective evidence that is before you today,
22 especially with respect to the first mandatory
23 criteria, and that is why, in the government's
24 respectful submission, you can't start -- you can't
25 take as a starting point the last committee's

1 recommendation because the evidence today in my
2 submission objectively demonstrates that the economic
3 situation is entirely different.

4 Looking forward then, having discussed the
5 past, the government's proposal for the future is that
6 the current salaries be adjusted during the
7 quadrennial period at the IAI but capped at a maximum
8 of 1.5 percent per annum. My friend takes issue and
9 has characterized the government's next proposal,
10 which I'm going to get to, as a clawback of judicial
11 salaries for the current year. As you're aware, the
12 Industrial Aggregate Index has been set already at 2.5
13 percent for 2012 and that indexing automatically took
14 effect for the military judges on April 1st, 2012,
15 which means that the military judges for this current
16 fiscal year have received their 2.5 percent Industrial
17 Aggregate Index adjustment. If this committee accepts
18 the government proposal what this means is that the
19 military judges will have been over-compensated for
20 the current fiscal year. We're not suggesting that
21 their current salary be clawed back in future years.
22 We're simply suggesting that an adjustment of the
23 Industrial Aggregate Index in order to even out the
24 amount so that it's commensurate with the government's
25 proposal, that that be applied, and that's simply and

1 practically because the automatic indexation has
2 already been applied to the military judges salaries.

3 To see what the government's proposal means in
4 terms of real numbers I'd ask you to turn up annex 25,
5 volume three of the government's annexes, which is the
6 thinnest book of annexes.

7 MR. BASTARACHE: Is that about capping of
8 the--

9 MS. LAWRENCE: Yes.

10 MS. GLUBE: Which one is it, 25?

11 MS. LAWRENCE: Tab 25. What this table does
12 is set out in real numbers the difference between the
13 government's submission and the military judges'
14 submission both in terms of a percentage annual
15 projected increase going forward and in terms of real,
16 actual salary dollars. So on the point that I was
17 just making with respect to the indexation and future
18 year adjustment to account for this year's indexation,
19 I'd simply ask you to look at the bottom row of the
20 first part of the table where it says "increase".
21 Then if you look at the 01 April 12 column, which is
22 the current salary of military judges set at \$200,226
23 -- sorry \$226,000 -- for the chief military judge and
24 \$220,000 for the other military judges, you'll see
25 that below that there's a 2.5 percent increase

1 calculated in there. That is the IAI number which has
2 already been applied to that judicial salary. Then if
3 you look at 01 April 13 the percentage increase
4 reflected in the bottom of that column is 0.5 percent
5 and that number is reduced to take account of the fact
6 that the military judges have received 2.5 percent
7 this year. I note that the military judges
8 characterized this proposal as "astonishing" in their
9 submissions but I would simply point out that this
10 does not constitute in any way a retroactive salary
11 adjustment. It's simply a salary correction flowing
12 from the over-adjustment provided on April 1st, if you
13 were to accept the government's proposal going
14 forward, and I would note that the capping of the IAI
15 at 1.5 percent as proposed by the government is a
16 temporary measure for the quadrennial period. This is
17 not what will necessarily be applied. It's not
18 necessarily the position that the government will
19 advocate for all time. It will be reviewed by this
20 committee in four years time.

21 In addition to the salary component of the
22 government's proposal, as you know the other component
23 is that the government proposes that military judges
24 cease accumulating severance pay in accordance with
25 article 204 of the QR&O and this position on severance

1 benefits reflects the approach taken in the Public
2 Service and with military personnel in the Canadian
3 Forces. This decision to make this proposal was taken
4 very recently, the decision to eliminate the accrual
5 of severance for military judges, and I know my friend
6 has criticized us for raising this on short notice.
7 However, from the government's perspective the timing
8 could actually not have been more ideal because being
9 able to be here before you today and make this
10 proposal and provide the military judges an
11 opportunity to respond is exactly the way this
12 committee is intended to operate, and the fact that we
13 were able to fold it into this existing process I
14 think is a benefit to both parties. In my submission
15 the issue of severance pay is not a complex issue that
16 requires actuarial evidence. I acknowledge that my
17 friend has put forward the report of Mr. Sauvé
18 speaking to the valuation of severance for military
19 judges to support her argument that the government's
20 proposal of compensation of 0.25 percent, plus further
21 compensation in future years provided that others paid
22 from the public purse also receive that compensation,
23 is inadequate in her view. The government position
24 that military judges should receive 0.25 percent for
25 the first year that the changes to severance pay take

1 effect is based on a principled approach and it's
2 consistent with the other arguments that I'm making
3 before you here today. It affords the judiciary a
4 similar treatment, a treatment that is similar not
5 only to the members of the pool from which they are
6 drawn but also to the treatment that other Canadian
7 Forces members will receive.

8 MR. BASTARACHE: But isn't it different from
9 other civil servants? Mr. Sauvé said that the
10 cancellation of severance would be compensated by a
11 higher number in the case of people who had negotiated
12 agreements with the Government of Canada, 0.75 instead
13 of 0.25, something like that.

14 MS. LAWRENCE: Let me clarify. Any public
15 servant who has had their severance pay -- and again I
16 need to, with respect, clarify this so that you
17 understand. We're not talking about cancelling
18 severance or removing severance. We're talking about
19 ceasing the accumulation of severance pay, which means
20 that any severance pay that a member -- that a
21 military judge has accumulated to this point vests.
22 They are still entitled to that severance pay. So the
23 one week of pay per year that they've accumulated to
24 this point doesn't disappear. All that they are
25 losing is the ability to continue to accumulate

1 severance pay between now and the date that they
2 retire or otherwise leave the military judiciary. So
3 that's an important factor to bear in mind. The
4 military judges, should you accept this
5 recommendation, I expect would be offered the same
6 options as other -- as federal public servants have
7 been offered, other members of the Canadian Forces
8 have been offered, which is a three-fold option upon
9 the cessation of the accumulation of severance. One
10 is an immediate payout of the accumulated severance to
11 date. The second option is a partial payout. "I'll
12 take half of the severance, a quarter of the severance
13 today". The third option is to defer collection of
14 severance until retirement or a different form of
15 departure from the federal Public Service. So those
16 are the options. I just wanted to make that point so
17 that you understand we're not talking about taking 20
18 or 30 years worth of severance back from the military
19 judges. All we're proposing is that they will cease
20 accumulating that severance going forward and that's
21 exactly the same measure that public servants have
22 been subject to.

23 Now with respect to your point, Justice
24 Bastarache, about the 0.75 percent. That number comes
25 from a combination of the 0.25 percent in the first

1 year and the 0.5 percent in a subsequent year, that
2 has been negotiated with sections of the Public
3 Service. So there are portions of the federal Public
4 Service who will be entitled to a 0.25 percent amount
5 as compensation in the first year and they will
6 additionally receive 0.5 in a subsequent year. Our
7 submission is not that the military judges shouldn't
8 also get that 0.5. What we've said in our submissions
9 is that the question of whether they will should be
10 tied to Governor in Council appointees, senior
11 executives of the federal Public Service, and senior
12 officers in the Canadian Forces, none of whom have
13 been told yet by Treasury Board whether they will get
14 that 0.5 percent. So they know they're getting 0.25
15 percent in the first year, but no decision has been
16 made with respect to the 0.5 percent. Our submission
17 is that if the Government of Canada ultimately decides
18 that those three groups -- Governor in Council
19 appointees, senior Canadian Forces members, senior
20 executives of the Canadian Service -- are entitled to
21 0.5, then that same amount would be accorded to the
22 military judges as well. So there's a contingency
23 there.

24 MR. BASTARACHE: Well, isn't it a fact then
25 that there is no special process for determining

1 what's adequate for judges if what's adequate is what
2 is adequate for the rest of the service?

3 MS. LAWRENCE: This is the government's
4 proposal and, with respect, it's evidently up to this
5 committee to determine what it considers adequate in
6 the circumstances. The government submits that a
7 proposal which reflects the treatment that others in
8 the federal Public Service have received is justified
9 in the circumstances. I would note that the 0.25
10 percent was never -- whether it's applied to members
11 of the federal Public Service or the military judges
12 that amount was never intended to be an exact measure
13 or an exact valuation of the value of the loss of the
14 accumulation of severance pay. It wasn't with respect
15 to the federal Public Service, nor are we intending
16 today to suggest that that is in concrete terms what
17 the value is of the loss of that severance. Our
18 proposal is that it is a reasonable compensation for
19 the loss of the accrual of severance benefits.

20 MR. STERLING: Does the 0.25 continue on for
21 the four years?

22 MS. LAWRENCE: It would be 0.25 in the first
23 year that the adjustment takes place and then there
24 would be--

25 MR. STERLING: Something else?

1 MS. LAWRENCE: There may be something else,
2 conditional on treatment granted to those three groups
3 I mentioned earlier. They would be one-time
4 adjustments to the salaries.

5 MR. STERLING: And the third and fourth year?

6 MS. LAWRENCE: There would not be adjustments
7 in subsequent years. I did want to make one comment
8 with respect to the report that Mr. Sauvé has
9 submitted on this issue and that's with respect to
10 whether it's even appropriate to try to value the loss
11 of the accumulation of severance based on the personal
12 circumstances of the four judges who are currently
13 military judges. One of the dangers with that of
14 course, and Mr. Sauvé acknowledges this in his report,
15 is that at least one of the current military judges
16 has already ceased accumulating severance pay. So if
17 he's entitled to a 0.25 percent increase he's getting
18 a bonus because he's not accumulating severance
19 anyway. So that's one factor. Then the value to the
20 individual judges of the loss of the accumulation of
21 severance is largely dependent on the length of time,
22 the age of retirement, all of those factors. What we
23 should be looking at is coming up with a compensation
24 that's adequate for all military judges, not for the
25 particular military judges that are sitting on the

1 bench today. The other point that I think is
2 important to bear in mind and that is another
3 justification for the proposal that the government is
4 making, is that since CF members have now ceased
5 accumulating severance pay what happens if military
6 judges continue to accrue severance pay? What happens
7 when a member of the Canadian Forces is appointed to
8 the bench? They will have already ceased accumulating
9 their severance pay. So you can end up with a
10 discrepancy amongst members of the military judiciary,
11 some of whom are still accumulating severance if you
12 don't accept the government's proposal and others who
13 are coming in who have already lost their severance
14 pay potentially years earlier. So that would result
15 in an inequality or inefficiency in terms of how
16 severance pay is administered for the military
17 judiciary.

18 The last comment I'll make on severance is
19 just to correct a comment made by my friend. My
20 friend had said that it was unfair to apply this
21 proviso, this contingency of the possible 2.5 percent
22 in the future if members of the Canadian Forces, GIC
23 appointees, et cetera, are ultimately accorded that
24 down the road. One of the things that she said was
25 that was unfair because those individuals have an

1 opportunity to negotiate that amount. That's not in
2 fact the case, because those three groups that I
3 referred you to -- GIC appointees, senior officers in
4 the CF, senior executives with the federal Public
5 Service -- do not have any bargaining rights. Their
6 salaries and any cessation of the accumulation of
7 severance that they are subject to is dictated to them
8 by Treasury Board.

9 I'd like to turn now, if I may, to the four
10 factors which are, as you know, first of all the
11 prevailing economic conditions in Canada including the
12 cost of living and the overall economic and current
13 financial position of the federal government, two, the
14 role of financial security of military judges in
15 ensuring judicial independence, three, the need to
16 attract outstanding officers as military judges, and,
17 finally, any other objective criteria the committee
18 considers relevant. Dealing first then with the
19 prevailing economic conditions in Canada. As I noted
20 in responding to your questions, Justice Bastarache,
21 I'd like to reiterate that the issue is not whether
22 the Government of Canada can afford to pay military
23 judges a higher salary. That's not in doubt, given
24 that there are only four of them. The first criteria
25 to be considered is not the financial consequences on

1 the public purse of a salary increase. The committee
2 is mandated to consider what an adequate salary looks
3 like in view of the prevailing economic conditions in
4 Canada. In my submission the best way to approach
5 this is to take the objective evidence of the
6 prevailing economic conditions and ask yourselves: In
7 light of those conditions would a reasonable person
8 consider the current levels of remuneration, with the
9 proposed annual adjustments, adequate? If the answer
10 is yes, and the Government of Canada says it is, this
11 factor militates in favour of recommending the
12 Government of Canada's proposal. I would note that in
13 looking at what the objective evidence says, the
14 Tellier Commission -- which report was issued recently
15 with respect to judicial compensation of federally
16 appointed judges -- considered the identical criteria,
17 the economic conditions, in relation to the
18 remuneration of the federal judiciary and it accepted
19 the government evidence regarding the prevailing
20 economic conditions in that report. I'll simply refer
21 you to pages 19 to 20 of that report in support of
22 that point. The evidence that was presented to that
23 commission recently was very similar to the evidence
24 that you have before you. In addition, however, you
25 have before you two additional important pieces of

1 evidence. One of them is the updated analysis of
2 Benoit Robidoux from the Department of Finance. I
3 won't take you there, but it's at annex 9 of the
4 government's submissions. As well, Budget 2012.
5 Neither of these two pieces of evidence were before
6 the Tellier Commission. They post-date it. Both of
7 these documents speak for themselves. I don't intend
8 to take you through them. Contrary to my friend's
9 submissions I would not characterize either of these
10 documents as gloomy or pessimistic. Rather, they both
11 provide a realistic and quite measured assessment of
12 today's economic outlook and since this is one of the
13 factors the committee is mandated to consider, it's
14 not a reality in my submission that can be swept under
15 the carpet or dismissed. The current economy is a
16 factor in determining adequacy of the remuneration of
17 military judges and right now the picture is not so
18 rosy. That's just the reality of the way things are.
19 If you're persuaded by the military judges' submission
20 in their opening written submissions that you should
21 consider more objective evidence, I would invite you
22 to look at the excerpts from the April 2012 World
23 Economic Outlook prepared by the International
24 Monetary Fund, which is in the Government of Canada's
25 annex number 10 and I've provided you with an updated

1 copy of that annex earlier. The International
2 Monetary Fund predicts that Canada will fare only
3 modestly better than other advanced economies in terms
4 of gross domestic product growth in 2012 and 2013.
5 There's no disputing and I didn't hear my friend
6 dispute that the Canadian economy remains fragile and
7 its future remains uncertain due to the global
8 economic situation. There's also no disputing the
9 evidence that's before you that the recession has
10 taken a significant toll on the financial position of
11 the Government of Canada and I would note that
12 criteria number one speaks to the economic situation
13 of the Government of Canada, the financial position of
14 the Government of Canada. The economy is still
15 suffering from the effects of the recession. The
16 Government of Canada is in a period of restraint in
17 order to deal with the impact that the recession had
18 on the federal purse. To reduce the deficit the
19 government has cut departmental spending and is
20 eliminating more than 19,000 federal jobs over the
21 next three years. The government has negotiated
22 modest wage increases with public sector unions
23 between now and 2014 of 1.5 percent and they're
24 providing that same level of increase to executives
25 and deputy ministers. Some people -- members of

1 Parliament, deputy ministers -- have had their
2 salaries frozen. The current economic reality is very
3 different than it was in 2008 when the last committee
4 reported and what the committee recommended as
5 adequate in 2008 is not, in the government's
6 submission, what an adequate salary looks like in
7 today's prevailing economic situation. The
8 government's submission is that the consideration of
9 the first mandatory factor militates in favour of
10 restraint in awarding new salary increases.

11 The second criteria that this committee must
12 consider is the role of financial security of military
13 judges in ensuring judicial independence. I don't
14 have a lot to say on this point. I don't think my
15 friend takes issue -- I don't think that we're at odds
16 on this particular issue. There is a clear link
17 between financial security and judicial independence.
18 In my submission the government proposal is reflective
19 of and upholds the role of financial security in
20 ensuring independence. On the other hand, my friend's
21 proposal of a significant salary increase actually
22 risks undermining the public perception of
23 independence instead of enhancing it. Again looking
24 at this from the reasonable person's perspective,
25 would a reasonable person in today's economic climate

1 think that giving military judges a significant
2 increase, a 31 percent increase, is appropriate?
3 Would they see that as necessary in order to ensure
4 their judicial independence in light of the treatment
5 that others are receiving, in light of the current
6 economic restraint that being demonstrated by the
7 Government of Canada?

8 The next factor is the need to attract
9 outstanding officers as military judges. The
10 government's submission is that the current salaries
11 of military judges are not an impediment or a
12 disincentive to highly qualified, highly desirable,
13 outstanding officers in terms of their willingness or
14 inclination to apply for appointment as military
15 judges. The pool of candidates, contrary to my
16 friend's submission, is much narrower in the situation
17 of military judges than it is for the federal
18 judiciary. The fact is -- and this is not something
19 that you can just gloss over. It's one of the
20 critical, important criteria for the appointment of an
21 individual to the military judgeship. They must be an
22 officer in the Canadian Forces and they must have at
23 least 10 years standing at the bar of a province. The
24 military judges downplay the requirement that the
25 individual be an officer in the Canadian Forces but

1 that's an important -- it's a critically important
2 distinction. It's a distinction that makes military
3 judges, and in particular the pool from whence they
4 are drawn, entirely different from the pool of the
5 federal judiciary. I ask you, if you could, to take a
6 look at annex 3 of the government's submissions. It's
7 volume one. Just by way of brief explanation of what
8 these two tables represent, the first table at this
9 tab includes statistics on the number of Canadian
10 Forces legal officers eligible for appointment as a
11 military judge as of the 31st of December 2011 and the
12 next page includes statistics on those eligible for
13 appointment as of April 1, 2012. The reason that both
14 of those are in there is because you'll see further on
15 in our annexes that we have received information from
16 the Office of the Federal Commissioner for Judicial
17 Affairs who provided statistical information on
18 selection processes for the military judgeship and the
19 last one took place in 2011. So in order to provide
20 you with an idea of what the pool looked like in 2011
21 we included information on that as well. I'm going to
22 focus in my submissions, however, on the April 2012
23 data, which is the second page here. According to
24 these statistics the best data that we have on the
25 size of the pool for eligibility to the military

1 judiciary is that it is limited to 139 officers, 100
2 regular force and 39 Reserve force. We also know, and
3 we raise this in our submissions, that the vast
4 majority of the people, the individuals in this pool,
5 earn less -- are presently earning less than military
6 judges.

7 I'd like to address my friend's argument and
8 her suggestion that you have to also consider other
9 non-legal officer members of the Canadian Forces and
10 in doing that I'll ask you to take out the handout
11 that you received earlier today which includes the
12 Canadian Forces best available information about other
13 Canadian Forces non-legal officers potentially
14 eligible for appointment as a military judge. My
15 friend has queried the reliability of this data. It
16 is not complete. There are some caveats included in
17 this table, as you can see. One of the caveats is
18 that this information depends on non-legal officers
19 reporting in the Human Resources system that they
20 possess law degrees. So it may well be that there are
21 individuals out there who possess law degrees who
22 didn't report that as a fact and they have not been
23 captured in these numbers, but the most important
24 caveat to bear in mind with respect to this data is
25 that this data does not tell us a lot of things. This

1 data doesn't tell us whether any of these individuals
2 were ever called to the bar. This data doesn't tell
3 us whether if they were called to the bar they've
4 maintained active membership in that bar for the last
5 10 years. This data doesn't tell us what the salaries
6 of any of these individuals presently are. This data
7 doesn't tell us where these individuals, and I'm
8 talking specifically with respect to the Reserve force
9 members, the data does not tell us where these Reserve
10 force members are employed, whether they're employed
11 in private practice, whether they're employed in
12 government, and as I said earlier it doesn't tell us
13 where they fall on that pay scale to which Mr. Sauvé
14 referred at length in his presentation. We have no
15 information about that.

16 MR. BASTARACHE: It seems to me that you're
17 almost arguing that these people are sort of captives
18 and their only recourse is to apply for a position of
19 a judgeship with the lowest possible salary because
20 the pool is limited. It seems to me that it's a
21 strange way of determining that. If you consider the
22 salary of federally appointed judges do you really
23 think that if it was, say, \$25,000 less that you would
24 have insufficient members applying for judgeships? I
25 don't think so. I doubt it very much, especially in

1 provinces where the salaries, the average salary of
2 practitioners is not great, it's often less than that
3 of judges. You're putting tremendous importance on
4 the pool itself and it seems to me that -- it's almost
5 suggesting, you know, what's adequate is what I can
6 impose because the pool is so small.

7 MS. LAWRENCE: My submission is that the
8 mandatory -- one of the mandatory criteria, one of the
9 things that the regulations require this committee to
10 consider, is whether the current level of remuneration
11 imposes a barrier on the recruitment of outstanding
12 officers. So all of these points that I'm making to
13 you now relate to that particular factor and the
14 objective evidence that the government has put before
15 you demonstrates that the current salary is not an
16 impediment to the recruitment of outstanding officers,
17 and that is an indicia that the current salary is
18 adequate. I hear your point that--

19 MR. BASTARACHE: I don't think it proves it's
20 adequate.

21 MS. LAWRENCE: It's an indicia--

22 MR. BASTARACHE: It proves that you can impose
23 it.

24 MS. LAWRENCE: This committee is guided, in
25 terms of its assessment of what an adequate salary is,

1 by those four factors and one of those factors -- one
2 of those factors which is an indicia that a salary is
3 adequate is if the salary does not prevent the
4 recruitment of outstanding new officers and that's --
5 the objective evidence is--

6 MR. BASTARACHE: No, I accept that and I think
7 you're absolutely right and it's quite obvious that
8 it's not discouraging to a point where you can't
9 fulfill these positions adequately. It's just the
10 importance, the weight you're giving to that factor as
11 compared to all others, which seems to me terribly
12 great.

13 MS. LAWRENCE: There are four factors and
14 obviously at the end of the day it's up to this
15 committee to give the weight that it deems appropriate
16 to each of those four factors. The government's
17 submission is that this is an important factor for
18 this committee to take into consideration especially
19 since this is one of the factors that distinguishes
20 military judges significantly, in a critical way, from
21 the federal judiciary, because the pool from which
22 potential appointees to the federal judiciary are
23 drawn is vastly different, the salary levels of the
24 members of the pool are largely higher, and one of the
25 factors that was taken into account by years of

1 judicial compensation commissions in establishing
2 whether the salaries of the federal judiciary were
3 adequate was whether the salary was set at a level
4 that was high enough to encourage and recruit the best
5 possible candidates. So that's one reason why there's
6 a gap between the salaries of military judges and the
7 salaries of federal judges, because the salary needs
8 to be higher for the federal judiciary than it does
9 for the military judiciary. On its face that may
10 appear unfair. I know the judges think it's unfair
11 for that gap to exist and I'm sensing that there's a
12 hesitation on the part of the committee in seeing that
13 that can be fair, but the fact is that we're not
14 constitutionally mandated to examine fairness from the
15 judges' perspective.

16 MR. BASTARACHE: Well, "other factors" they
17 say.

18 MS. LAWRENCE: Other factors. Other objective
19 evidence though, that's the issue, and fairness is
20 such a subjective criteria. Even looking at the
21 salaries of other persons and saying what is the value
22 of this job versus this job, ultimately comes down to
23 a subjective determination. It's not based on
24 objective evidence and the Supreme Court of Canada has
25 said in looking at the adequacy of the remuneration of

1 judges it's the objective criteria that are important.
2 So if the government is emphasizing the pool in a
3 manner that you may ultimately not ascribe the same
4 weight to, the reason, the rationale behind us doing
5 that is because it's objective evidence. There's not
6 a lot of objective evidence that you can put forward
7 that goes to the adequacy of a specific salary but the
8 pool of candidates is one and this evidence that we
9 have speaks unequivocally, I would submit, to the fact
10 that in terms of the pool and in terms of the
11 necessity of recruiting outstanding officers to the
12 military judiciary the current level of remuneration
13 is adequate.

14 MR. STERLING: Can I ask a question? Has
15 there ever been someone in the Services -- I've heard
16 there's been members of the Reserve who've applied to
17 be appointed to the bench, the federal bench, but
18 within the Services, the Canadian Armed Services, have
19 there been lawyers who have applied to outside the
20 Service?

21 MS. GLUBE: While in the Service?

22 MR. STERLING: While in the Service.

23 MS. LAWRENCE: I'm not sure I understand your
24 question.

25 MR. STERLING: A person in the Service working

1 in the Judge Advocate General's office as a
2 prosecutor, have any of them applied to become a
3 judge--

4 MS. GLUBE: A Superior Court judge?

5 MR. STERLING: A Superior Court judge.

6 MS. LAWRENCE: I don't know the answer to that
7 question offhand. I know my friend referred you
8 earlier to instances where members of the Reserve
9 force -- members of the Reserve force have applied and
10 in fact been appointed as judges of the federal
11 judiciary. So there are instances of that happening.

12 MR. d'AUTEUIL: If I may answer your question?
13 You're meaning somebody from -- a legal officer?

14 MS. GLUBE: Yes.

15 MR. d'AUTEUIL: Yes, five were appointed in
16 the last five years. I think it's five. Four, five.
17 In the JAG bulletin it was clearly stated. There's a
18 legal officer from the regular force who was appointed
19 a Superior Court -- a Provincial Court judge, and four
20 legal -- three or four legal Reserve officers were
21 appointed Superior Court judges or Provincial Court
22 judges in the last five years.

23 MR. STERLING: So there's nothing to prevent
24 them from applying the other way? I mean they can
25 apply either to become a military judge--

1 MR. d'AUTEUIL: Or.

2 MR. STERLING: Or the civilian courts?

3 MR. d'AUTEUIL: Because they qualify in
4 their -- they qualify in their own province for sure.

5 MS. GLUBE: Yes, within their own province.

6 MS. LAWRENCE: My friend was saying a judge is
7 a judge, is a judge. A lawyer is a lawyer, is a
8 lawyer. So although there are obviously restrictions
9 on recruitment into the military judiciary by virtue
10 of needing to be an officer in the Canadian Forces,
11 the same would not apply in the federal judiciary. So
12 if you're a lawyer, whether you're in the Canadian
13 Forces, whether you're a lawyer in private practice or
14 in the public sector, if you meet the eligibility
15 criteria you could apply for appointment to the
16 federal judiciary.

17 MR. BASTARACHE: Well you can apply, but you
18 know something about the appointment process.

19 MS. LAWRENCE: Fortunately we're not here to
20 debate that today.

21 MR. BASTARACHE: You're making it relevant.

22 MS. LAWRENCE: I'd like to move on now to just
23 make a few points about Mr. Sauvé's report and
24 specifically respond to the military judges'
25 submission that the pool includes all lawyers in

1 private practice. I'm not actually sure what to make
2 of his presentation today because there is no
3 provision in the Rules of Procedure for this committee
4 to hear expert evidence. I know my friend said that
5 he is an objective expert. However I would note that
6 he was retained by the military judges, there was no
7 consultation with the Government of Canada in that
8 respect, and no notice was provided to the Government
9 of Canada. That being said, we're not asking you
10 today for an opportunity to reply to that with
11 actuarial evidence of our own. The government doesn't
12 think it's necessary in the circumstances and I say
13 that because in our submission Mr. Sauvé's report is
14 of limited assistance to this committee in any event
15 because the pool that he examines -- lawyers in
16 private practice -- is not the pool that's relevant to
17 the appointment to the military judiciary. The pool
18 is much narrower and in my submission the data that
19 relates to the wider and unrepresentative pool is not
20 helpful to your deliberations. Although Mr. Sauvé's
21 report may well have been relevant in the context of
22 inquiries into the remuneration of federal judges, by
23 virtue of the unique nature of the pool that's at
24 issue here his report is simply not relevant in my
25 submission. I don't intend today to make substantive

1 submissions in response to Mr. Sauvé's presentation.
2 I'm not an actuarial expert. I don't have a degree in
3 accounting and I'm not only not qualified to do so, I
4 think I would be doing you a disservice if I were to
5 attempt to provide that information. I'd simply say
6 that if this committee does determine that it intends
7 to rely on Mr. Sauvé's report and that there's some
8 utility in looking at that information, I'd simply ask
9 that the government be given a fair opportunity to
10 provide the information -- information that it has
11 available that could be of assistance.

12 Before I move on to the next point I want to
13 address one more issue in respect of the recruitment
14 of qualified and outstanding officers to the military
15 judgeship. This ties into the point I made earlier
16 about the fact that the current salaries are not in
17 fact a disincentive to outstanding officers applying,
18 and that's readily apparent if you look at the data
19 from the Office of the Federal Commissioner for
20 Judicial Affairs which is at annex 18. So I'm
21 actually going to make things very complicated here
22 and ask you to not only have open tab 18 -- this is
23 the drawback of not using PowerPoint -- tab 18 as well
24 as the Government of Canada's written opening
25 submissions at page 23. As is always the case with

1 statistics, they don't mean anything until you
2 actually analyze them. Page 23 of the government's
3 opening submissions. You'll see a table in the middle
4 of page 23. What this table illustrates, in my
5 submission quite effectively, is that if you look at
6 military judiciary 2011 -- which is the second row --
7 the eligible pool in 2011 was 127 individuals. The
8 Office of the Federal Commissioner for Judicial
9 Affairs tells us that there were 11 applicants in that
10 year and that represents 8.7 percent of the eligible
11 pool. Now my friend is going to say in reply that
12 this doesn't take into account the non-legal officers
13 out there, and this is true, but my submission on that
14 point is that we simply don't have the data available
15 that would allow you to draw any inferences about how
16 many more people there are in the potential pool.
17 What we do however have is statistics, objective
18 evidence which allows you to say that there are 127
19 legal officers currently eligible for appointment.
20 How many others there may be out there, we don't know.
21 In my submission that question mark over what else is
22 out there means that it's not something you can take
23 into account in your deliberations because it's simply
24 not reliable, objective evidence. Of the 11
25 applicants nine were recommended, which represents 82

1 percent of the applicants or 7.1 percent of the pool.
2 If you contrast this with applications to the federal
3 judiciary between 2007 and 2011 the eligible pool was
4 approximately 50,000. On average they received 2,109
5 applications. Four point two percent of the eligible
6 pool applied for the federal judiciary, versus 8.7 of
7 the pool that applied for the military judiciary in
8 2011. So in our submission the rates of application
9 in at least the--

10 MR. BASTARACHE: I'd like to know what the
11 50,000 is. Is that all lawyers in Canada? It's just
12 the number seems extremely high.

13 MS. GLUBE: It's a huge number, yes.

14 MR. BASTARACHE: And if it's all lawyers it
15 can't be right, because --

16 MS. GLUBE: They're not all eligible.

17 MR. BASTARACHE: They're not all eligible.

18 MS. LAWRENCE: It's in the footnotes. So that
19 number was taken from the Federation of Law Societies'
20 2010 statistical report.

21 MS. GLUBE: It says 108,000.

22 MS. LAWRENCE: So there was 108,000 total
23 members in 2010 and from this total figure we subtract
24 22,000 non-practising members and 36,000 members with
25 zero to 10 years of call for a total of 50,330 in the

1 eligible pool.

2 MS. GLUBE: Yes. It seems like a lot.

3 MS. LAWRENCE: So these are all practising
4 lawyers called to the bar for a minimum of 10 years,
5 which make up the pool of 50,000. So in our
6 submission these statistics demonstrate that the rates
7 of application in the 2011 selection process for
8 military judges compare favourably to the historic
9 rates of application for federal judicial
10 appointments. My friend submitted in her written
11 submissions that this data actually suggests that
12 Reserve force officers aren't applying in numbers that
13 would be expected. My submission is that there's no
14 basis to that submission. The stats not only don't
15 support that, but, as we noted -- as the Government of
16 Canada noted in its reply there are factors other than
17 remuneration which may well explain why Reserve force
18 officers are not attracted to military judgeship.
19 One, for instance, is the fact that military judges
20 are located in Ottawa and there may be a reluctance
21 for members of the Reserve force who are located in
22 other areas to relocate to Ottawa. The second is that
23 it's safe to assume, or we certainly can assume, that
24 at least a component of members who are part of the
25 Reserve force have made a deliberate choice to remain

1 members of the Reserve force rather than become full
2 regular force members of the Canadian Forces and in
3 being appointed to the military judiciary a Reserve
4 force officer would be giving up that civilian
5 lifestyle and taking on a role as a full member of the
6 Canadian Forces. So even if the stats did suggest
7 that Reserve force officers weren't applying, those
8 statistics can be explained by factors other than
9 salary.

10 MS. GLUBE: Excuse me, are you going on to
11 something else now?

12 MS. LAWRENCE: I am.

13 MS. GLUBE: I think we'll take a short break.
14 Thank you. Fifteen minutes. Thank you.

15 (SHORT RECESS)

16 MS. GLUBE: Thank you. Be seated.

17 MS. LAWRENCE: I was nearing the end in my
18 plan, certainly the end of the four factors. So the
19 last factor, as you know, is any other objective
20 criteria that the committee considers relevant. The
21 military judges' submission is that this, from what I
22 understand of their submissions at the very least, is
23 that this is really the factor that should play at the
24 forefront of your minds as you deliberate on the
25 question of the remuneration of military judges. From

1 the military judges' submission the fact that others
2 in different situations than them make more money than
3 they do is the prime factor that you need to look at
4 in determining what an adequate salary for their
5 particular unique circumstances should be. Although
6 they're not this time putting forward a single
7 comparator I think it is clear from the thrust of the
8 military judges' submission that the one comparator
9 that they are focusing on in particular -- it was
10 certainly the one that they have alluded to the most
11 throughout their written submissions as well as my
12 friend's submissions today -- is of course the federal
13 judiciary. The government's submission is that
14 benchmarking -- which at the end of the day, as
15 disguised as you can make it, is effectively what the
16 military judges are asking for -- benchmarking to the
17 salaries of the federal judiciary, in the Government
18 of Canada's submission, is not appropriate. The role
19 of this committee is to examine the unique
20 circumstances and the evidence relating to the
21 mandatory factors in the context of military judges
22 and, as I've already noted in my submissions, there
23 are factors explaining why federal judicial salaries
24 are set at a higher level and those factors are simply
25 not applicable in the context of military judges. For

1 example the pool is larger, the salary level of the
2 potential candidates in that pool is different, and
3 that is not the case here where most of the current
4 pool currently earns less than military judges. As
5 I've said, the Government of Canada's position is that
6 benchmarking as an approach to the determination of
7 the adequacy of remuneration is simply not an
8 appropriate approach and in fact it's contrary to the
9 committee's purpose, and I'd like, if I could, to take
10 you to two differences in support of that proposition.
11 I'll start, if I could, with the decision of the Court
12 of Appeal of New Brunswick in the Provincial Court
13 Judges Association challenge and it is at tab 16 of
14 the joint book of authorities, page 77, paragraph 156.
15 The Court of Appeal says here:

16 "I recognize the 2001 commission did not fix
17 the salary of New Brunswick's provincial court
18 judges as a percentage of the federal salary".

19 So it did not benchmark provincial court judges to
20 federal salaries. Then the court goes on to say:

21 "Had it done so then, arguably, future
22 provincial commissions would have no role in
23 fixing judicial salaries. Attention would
24 inevitably focus on the salary recommendation
25 of federal commissions to the exclusion of the

1 framework set out in the Provincial Court
2 Act".

3 And in my submission that is exactly the situation
4 that this committee would find itself in if it were to
5 determine that military judges salaries should be
6 benchmarked to the salaries of the federal judiciary.
7 It would effectively mean that going forward this
8 committee's role would be limited.

9 Next I'd like, if I could, to take you to the
10 recommendations of the 2008 Military Judges
11 Compensation Committee. It's at annex 5 of the
12 Government of Canada's submissions, page 13. In the
13 conclusion, which is the fourth paragraph from the top
14 -- and again, based on my previous submissions I put
15 this forward as context. It's certainly not binding
16 on you but it's something that you can take into
17 consideration in making your own determination as to
18 what an adequate salary is, but I think it is useful
19 to note that that the last committee to examine this
20 issue determined that:

21 "The previous committee's determination that
22 the salary of military judges should not be
23 tied directly to the average of provincial
24 court judges was not an appropriate approach
25 to or method for the determination of adequate

1 compensation for military judges".

2 MS. GLUBE: I think there's a typo.

3 MS. LAWRENCE: There's actually a typo in this
4 paragraph. That "not" shouldn't be there.

5 MS. GLUBE: Yes, it doesn't make sense.

6 MS. LAWRENCE: Because the previous committee
7 had determined it was an appropriate approach and this
8 committee is disavowing that approach.

9 "This committee agrees, among other problems,
10 this would constitute an abdication of the
11 responsibility of this committee to make its
12 own determination by linking the outcome to
13 the conclusions of the various other judicial
14 compensation committees in Canada. This would
15 also entail a degree of circularity. It's up
16 to each such judicial compensation committee
17 to make its own assessment rather than to
18 predicate its conclusion on those of others".

19 And then finally -- I won't take you to them
20 but I'll simply note that in the Government of
21 Canada's reply at footnote 17 we make reference to the
22 British Columbia and Quebec commissions on provincial
23 court salaries and both of those recent commission
24 reports comment on the inappropriateness of
25 benchmarking, and those references, as I've said,

1 footnote 17 of the Government of Canada's reply.

2 I'd also note, since we've just looked at the
3 2008 report of the Military Judges Compensation
4 Committee that my friend read to you at length from
5 the dissent of Madam Justice L'Heureux-Dubé wherein
6 she was of the view, the very strong view, that
7 military judges compensation should be equitable,
8 should be on equal footing, with that of federally
9 appointed judges. Yes, the government of course
10 acknowledges that was the view of Madam Justice
11 L'Heureux-Dubé. However, at the end of the day she
12 was in the minority on that issue and the ultimate
13 determination of the last committee in 2008 was that
14 salaries should not be directly linked to the federal
15 judiciary.

16 MR. STERLING: I think she was in a minority
17 in '04 and then in '08 her comments were a little bit
18 different. She did say -- I think she did--

19 MR. BASTARACHE: She voted with the majority
20 for the amounts, I think.

21 MS. GLUBE: Yes.

22 MR. STERLING: Yes. I think it's '04 that she
23 was in a minority.

24 MS. GLUBE: Yes.

25 MS. LAWRENCE: She ultimately did, but those

1 amounts that -- the amounts that were ultimately
2 determined by the committee were not amounts that were
3 on equal footing with the salaries of federal judges.
4 So she makes those comments about the role but at the
5 end of the day the committee's recommendation was not
6 that they be paid the equivalent amount as federal
7 judges.

8 So, as I've said, the principle comparator
9 that my friend alluded to was the federal judiciary.
10 However, she also asked you to take notice of or to
11 consider other individuals paid from the public purse,
12 including individuals paid at the DM-3, 4 level and in
13 fact other DM levels as well, the Judge Advocate
14 General, the Chief of the Defence Staff and other
15 specialists in the Canadian Forces. Again I had
16 mentioned this earlier in my submissions, the
17 Government of Canada of course acknowledges that these
18 individuals and certainly others paid from the public
19 purse may well be and in fact are remunerated at a
20 level higher than military judges, however that fact
21 can be explained by factors that are not at issue
22 here. The Treasury Board can set the salaries of
23 these individuals based on its own set of criteria and
24 at the end of the day the public interest and the
25 independence of these positions is not one of the

1 criteria that Treasury Board is required to take into
2 consideration, and that is in sharp contrast with the
3 factors that are required to be taken into account
4 here. Military judges salaries, the adequacy of those
5 salaries, is dictated by the public interest and
6 that's why, in the government's submission, reliance
7 on or reference to those other comparators in this
8 particular context is not useful and is not helpful in
9 terms of this committee's work.

10 MR. BASTARACHE: We were told that the JAG's
11 salary was equivalent to that of a federal court
12 judge. What explanation do you have for that? Or do
13 you agree that that's the case?

14 MS. LAWRENCE: I agree that it's the case.
15 There's no disputing the fact. It's fact and it
16 certainly is the same as federally appointed judges.
17 The explanation for that would be an assumption on my
18 part. I'm certainly not going to make any assumptions
19 before you, but again my submission there would be
20 that the salary for the Judge Advocate General is set
21 by virtue of criteria that are not applicable to
22 military judges. Whether it's based on the particular
23 roles and responsibilities of that individual, whether
24 it's linked to the need to be able to recruit
25 individuals to that particular position, whether it's

1 linked to the market, those are factors that are not
2 present today and Treasury Board is not required, in
3 determining what salary it's going to set for the
4 Judge Advocate General, to take into account judicial
5 independence. So those four criteria that are before
6 you for consideration are not part of what must be
7 considered in determining and setting the salaries of
8 these other individuals.

9 MR. STERLING: But if Treasury Board didn't
10 take into account judicial independence, would they
11 not just be inviting a lawsuit in terms of setting the
12 salaries? You say they don't have to take it into
13 account.

14 MS. LAWRENCE: Not in setting the salaries of
15 non-judges.

16 MR. STERLING: Oh, non-judges? Sorry, I
17 thought you--

18 MS. LAWRENCE: No, no-judges.

19 MR. STERLING: I thought you were talking
20 about--

21 MS. LAWRENCE: No, I'm talking about others.

22 MR. STERLING: I'm sorry. I--

23 MS. LAWRENCE: Deputy ministers, the Judge
24 Advocate General, the Chief of the Defence Staff.
25 There's -- obviously judicial independence isn't an

1 issue there.

2 MR. STERLING: I had misunderstood. Sorry.

3 MS. LAWRENCE: And so Treasury Board is at
4 liberty to take whatever factors it thinks are
5 important into consideration in setting those
6 salaries. That's not the case with respect to
7 military judges.

8 Those are my submissions on the four factors.
9 The rest of my submissions are by way of conclusion
10 and response to my friend's submissions. I have a
11 very, very short -- only a few more moments. So I
12 wanted to respond to my friend's comment with respect
13 to the 3.0 percent additional salary for the chief
14 justice. The government has said in its reply that we
15 have no objection to that, obviously. So we're ad
16 idem on that issue. With respect to the costs of
17 representation before this committee, I wanted to note
18 -- and you have this in the materials. Joint book of
19 authorities, tab 4 is Bill C-15 which has not yet
20 received royal assent and although we can't predict
21 with any certainty when it will in fact receive royal
22 assent, we're not expecting that it will be too far in
23 the future. If you look at page 24, it's section
24 165.36. You'll note that Bill C-15 makes specific
25 provision for a mechanism which would ensure

1 compensation for the representation costs of military
2 judges appearing before future committees. Whether
3 you still deem it necessary to include a comment in
4 your recommendations with respect to this being
5 laudable obviously is within your discretion, but in
6 my submission it should give you a certain degree of
7 comfort to know that the Government of Canada already
8 intends to do that, as evidenced by the fact that it's
9 been included in Bill C-15.

10 MS. GLUBE: What's the number of the section
11 again?

12 MS. LAWRENCE: It's 165.38.

13 MS. GLUBE: Thank you.

14 MS. LAWRENCE: It says:

15 "If the military judges are represented at an
16 inquiry of the Military Judges Compensation
17 Committee, the costs of representation shall
18 be paid in the amount and manner, and
19 according to the terms and conditions,
20 prescribed by regulations made by the Governor
21 in Council".

22 In closing I'd just like to say a few words
23 specifically with respect to the military judges'
24 submission. As you heard today, the entire focus or
25 certainly the main thrust of the focus of the military

1 judges' presentation to you today was based on the
2 argument that others are receiving a higher salary and
3 this alone, or this in concert with other factors,
4 certainly justifies a salary increase. In the
5 government's submission this does not accord with the
6 fundamental mandate of the committee, which is
7 required to address all of the four factors in
8 assessing the adequacy of compensation. The fact that
9 others receive higher remuneration may well be a
10 factor that will play into your deliberations but it
11 cannot be the sole and determinative factor. You must
12 give weight to the other criteria, especially in view
13 of the fact that the government has presented
14 objective evidence in respect of those factors. The
15 government submits that when all of those four factors
16 are considered properly along with that objective
17 evidence, the government proposal -- the current
18 salary is adequate and that the government's proposal
19 to adjust annually that salary going forward is also
20 adequate. All of this is respectfully submitted.

21 MS. GLUBE: Thank you. Any questions? Thank
22 you very much. You're on again.

23 REPLY BY MS. CHATELAIN

24 MS. CHATELAIN: Yes, with your permission I
25 will address a few words in reply. I have

1 anticipated, because we had an exchange of documents
2 beforehand, most of the comments of my colleague. So
3 I incorporated most of my reply in my main submissions
4 this morning. So I have only a few points to address,
5 with your permission. Just starting on the last item,
6 respecting the cost of representations, you will have
7 seen in our main submissions of May 28th that we did
8 refer to Bill C-15 and the expected new provision
9 165.38. However, the government I think needs the
10 guidance of this committee with respect to the terms
11 and conditions of the payment of the cost of
12 representations because Bill 15 only provides that the
13 terms and conditions are to be prescribed by
14 regulations made by the Governor in Council. So the
15 government needs I think your guidance in the sense of
16 recommending that the entire cost of representations
17 be assumed by the government for the reasons that I
18 outlined this morning.

19 And I'm going to go backwards in my comments.
20 With respect to Madam Justice L'Heureux-Dubé's
21 comments in the 2008 report, you're quite right, Mr.
22 Sterling, she was dissent in 2004 but not in 2008. In
23 fact in the 2008 report, which is at tab 5 of the
24 annexes of the government -- which I think you might
25 still have in front of you -- it is worth noting that

1 her comments, which begin at page 15, are introduced
2 in the following manner. She states -- and it's an
3 addenda. It's not when I read her comments. She
4 states:

5 "While I am in complete agreement with my
6 colleagues of the military compensation
7 committee as to the adequacy at this time of
8 the recommended remuneration of the military
9 judges in the present report, I wish to make
10 an additional point".

11 So the committee was unanimous and in line in the 2008
12 report with respect to the recommendation. She did
13 add, however, the comments that I referred you to
14 earlier and what is interesting is, at page 17 of the
15 report the president of the committee Justice
16 Gruchy -- I hope I pronounce his name correctly --
17 responds to Madam L'Heureux-Dubé's additional comments
18 and he says:

19 "Madam L'Heureux-Dubé has kindly given me the
20 opportunity to read her addendum. During our
21 review of military judges compensation it
22 appeared to me that there are anomalies in the
23 salaries of federal judicial appointees which
24 may or may not be logical. I agree with Madam
25 L'Heureux-Dubé that the role of the

1 quadrennial committee appointed pursuant to
2 the Judges Act".

3 So the Levitt Commission, for this period.

4 "Should be expected to review the compensation
5 of all federally appointed judges and judicial
6 officers".

7 So everybody was on line in that respect in the 2008
8 committee reports. Keeping our thoughts on the 2008
9 committee report, my colleague I submit tried to
10 distract I think from the vigour of my criticism with
11 respect to the late response of the government to the
12 2008 committee report. I think we have to look at the
13 dates correctly. The response of the government to
14 the 2008 was due -- according to the QR&Os, the
15 regulation -- was due six months following the receipt
16 of the report and thusly it was due, the response, at
17 the latest by March 29, 2009. However, it came only
18 on March 3rd, 2010. So that's more than a year or
19 almost a year past the delay. My colleague justified
20 that by saying that the government was analyzing the
21 economic situation at the time and the downfall of the
22 2008 situation and was also examining its response to
23 the Block Commission. However, the government's
24 response to the Block Commission was issued and made
25 public on February 11th, 2009. So the government

1 waited one additional year before it responded to the
2 military judges compensation. The Block response was
3 one year before. So there's no justification, in my
4 humble view, to the delay that the government took.
5 Again I don't want to dwell on this and belabour the
6 point but respect for the process is respect for the
7 individuals concerned by the process, and the
8 individuals concerned by the process are not only the
9 judges but the members of the public which have a
10 right to have confidence in the independence of the
11 judiciary.

12 This also brings me to the comment about what
13 the reasonable person might think. I think again
14 there's a misstep here where my colleague brings that
15 criteria to the issue of whether a reasonable person
16 will feel that the salary level of the judges is
17 adequate. That's not what the Supreme Court of Canada
18 intended when it referred to the reasonable person
19 concept. The reasonable person was referred to to
20 assess whether the process for determining judicial
21 compensation was adequate, not whether the level of
22 the salary was adequate. That's your job. That's
23 your task. That's your burden, if I may add. But the
24 reasonable person test is to assess whether the
25 process in which we are engaged in passes the test,

1 and those are the words of the Supreme Court. I think
2 the extracts are taken out of context. Because if
3 judicial salary were fixed by a survey of what the
4 people think I think \$50,000 would be more than
5 adequate considering that the average salary of the
6 Canadian constituent, the tax payer, is \$46,000. So
7 that's not the test.

8 With respect to Mr. Sterling's question as to
9 whether legal officers apply to positions at other
10 courts, other civilian courts, of course we don't know
11 who applies or who doesn't apply because those data
12 are confidential. What we do know is who are the
13 appointees and what we have -- this is the legal
14 bulletin that Mr. Justice d'Auteuil referred to
15 before. I have made copies. Unfortunately I only
16 have four copies, but I could send it to you by email.
17 I'll give it to Mr. Regimbald. In the JAG's bulletin
18 what you will see -- I have highlighted the relevant
19 portion -- is, in the past five years there's been
20 four appointments of legal officers. What that
21 means -- and that's what we know and that's what's
22 been reported in the JAG's bulletin. Two of those
23 were before superior courts, one in British Columbia
24 and one in Ontario, and the two others were
25 appointments to provincial courts across Canada. What

1 we also know, but this is anecdotal information, is
2 that we have non-legal officers who are also
3 appointed. I referred this morning to the recent
4 appointment of Mr. Justice Goldstein to the Superior
5 Court of Ontario. In Quebec there was the recent
6 appointment of Louis Dionne to the provincial court,
7 who was the former directeur des poursuites
8 criminelles et pénales in Quebec. But we don't have
9 accurate data with respect to non-legal officers who
10 are appointed to the court, but what we have as
11 information -- what that reveals to us is that the
12 military justice is in competition with civilian
13 justice to attract the best candidates and I think
14 that the military justice is deserving of those
15 candidates who apply and are appointed at the other
16 courts, at the other civilian courts, and that goes
17 back to our submissions that the compensation for
18 military judges should be such that it is not a
19 deterrent for those excellent candidates to also be
20 interested in a military justice appointment.

21 MR. STERLING: Could I ask another question
22 which just came to mind after the previous exchange?
23 And I didn't realize that there had been new military
24 judges appointed recently. I'd like to know, since
25 2000 what's happened in terms of the complement and

1 There was four. It came back to three because one
2 retired, and one other left, decided to retire too a
3 bit later, between 2000 and 2006. The competition I
4 applied was in 2005 and there was one -- one
5 appointment considered at that time. Between 2005 and
6 2006 one judge retired. So it ended up to be two
7 judges to be appointed. But usually it's four and
8 it's a matter for the Governor in Council to appoint
9 another one. So sometimes there's a process. It
10 depends. So to avoid any issue, they created a list
11 that they update.

12 MR. STERLING: Okay. Thank you very much.

13 MS. CHATELAIN: What should also be borne in
14 mind is, contrary to the Superior Court judges where
15 the number of judges is provided in the law, there's
16 not a fixed number of military judges provided. So
17 the military judges -- it's four, it's been four for a
18 while, but if the need was for five it might be five
19 and if the need was for three we would expect that the
20 recent appointments would have been only one and not
21 two. So they're appointed according to the actual
22 needs.

23 MR. BASTARACHE: Who determines what the need
24 is?

25 MS. CHATELAIN: I -- I have no clue.

1 MR. d'AUTEUIL: There is -- you know, if you
2 look at it as from a military perspective, the way I
3 explain it is you have boxes. So there's an
4 establishment, the military establishment. Somebody
5 determined this. It probably goes with the needs.
6 There's four -- I would say for the last 20 years at
7 least there was four positions. So I think it goes
8 with this, but there is no indication in any
9 regulation or in the Act about the number of judges to
10 be appointed. I think it's more an administrative
11 decision, I would say.

12 MS. CHATELAIN: My last point would be on the
13 economic factor. I suppose it doesn't escape anyone's
14 attention that the economic conditions in 2008 were
15 more severe and I think it's undisputable that it was
16 critical in 2008 and more severe than what we are
17 seeing today, yet in 2008 the government was contented
18 with applying the Industrial Aggregate Index and in
19 2012 until 2015 its proposition is to go below the
20 Industrial Aggregate Index. This according to us is
21 not based on any rational, factual, foundation. And
22 last word, my colleague stated that the Levitt
23 Commission accepted the government's position on
24 economic conditions. I would invite the members of
25 the committee to review paragraph 57 and 61 of the

1 Levitt Commission report where it is stated that the
2 state of economy as described by the government was
3 not sufficient and was no reason to adopt the
4 government's proposition with respect to judicial
5 compensation for those federally appointed judges, and
6 the submission of the government for those judges is
7 exactly -- exactly the same as it is here. So we're
8 taking the same -- the government is taking the same
9 approach, the same capping of the Industrial Aggregate
10 Index based on essentially the same economic
11 considerations, although updated since the hearings of
12 the Levitt Commission, and the Levitt Commission
13 rejected that position and that reading of the
14 economic context.

15 Those are my reply submissions. I wish again
16 to thank you for this opportunity. I am sure that
17 you'll have a lot of pleasure in your délibérer and I
18 remain of course, as my friend I'm sure, available for
19 any additional questions should you have any. We
20 would be happy to respond in any way and until that
21 time I will of course follow up with Mr. Regimbald
22 respecting the additional information you have
23 required.

24 Thank you very much.

25 MS. GLUBE: Thank you. Do you have any

1 further questions?

2 MR. STERLING: Do you have any objection to
3 her rebutting your remarks?

4 MS. CHATELAIN: No, of course. This is the
5 occasion to.

6 MS. GLUBE: Is there anything you wanted to
7 add?

8 MS. LAWRENCE: Thank you for the offer, but I
9 think you've heard everything today that I intended to
10 convey to you. That, and in addition of course I
11 think both parties' written submissions as well as the
12 reply are very comprehensive. You have plenty of
13 information to go away with today. Thank you.

14 MS. GLUBE: Thank you. Okay. Thank you,
15 we're adjourned and we'll file in due course.

16

17 WE HEREBY CERTIFY THAT the foregoing was
18 transcribed to the best of our skill and
19 ability, from recorded and monitored
20 proceedings.

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