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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HEARING BEFORE THE MILITARY JUDGES COMPENSATION COMMITTEE

June 14th, 2012

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

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

MS. CHATELAIN: Yes, that is.

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

MS. CHATELAIN: Thank you. Thank you for this introduction, Madam Justice Glube. I am here today to represent the military judges of Canada and accompanying me is, first and foremost, Mr. Justice Louis-Vincent d'Auteuil, second on my right. I am also accompanied by Mr. André Sauvé an actuary with an expertise in compensation matters and also pension funds and vast experience, as you will see later on,
Canada both at the federal level and at the provincial level. On my right is Mr. Vincent de l'Etoile who is from my office and is also representing the military judges with me today. So we are very happy and pleased to be here today for this unique opportunity to present the observations and concerns of the military judges respecting their compensation benefits. This--

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

MS. CHATELAIN: Okay. Thank you.

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

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

MS. GLUBE: It's the middle.

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

MS. GLUBE: Yes.

MS. LAWRENCE: Technology. Right now I'm using the proper microphone. Thank you, my name is Catherine Lawrence and I'm here this morning with my colleague Craig Collins-Williams. We're here from the Department of Justice representing the Government of Canada, and I have with me this morning three
representatives from the Department of National
Defence and I'll actually ask them to introduce
themselves to you and tell you what groups in National
Defence they are with.

MR. STRUM: Good morning, Madam Justice,
members of the committee. My name is Lieutenant-
Colonel Strum. I'm the director of Compensation,
Benefits, Pensions and Estates. A real tongue
twister.

MS. GLUBE: Thank you.

MR. GOYETTE: Good morning, Madam Justice.
Lieutenant-Colonel Gaétan Goyette, director of Pay
Policy and Development for Canadian Forces.

MR. COX: Good morning, Madam Justice.
Captain Carmen Cox. I work at Directorate of Pay
Policy and Development. Essentially Lt-Col. Goyette
is my boss.

MS. GLUBE: Thank you. And I'm sure you all
know Mr. Guy Regimbald, who is our executive secretary
and has been working with the commission since it was
inaugurated for this session. Unless there are any
other comments by the members of the panel, perhaps we
can proceed then. Thank you.

SUBMISSIONS BY MS. CHATELAIN

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

MS. GLUBE: We have them. Thank you.

MS. CHATELAIN: You have those? Okay, so I understand that that won't be necessary. So those essentially are our documents. I will be using this morning a PowerPoint presentation to help you follow my comments, but by all means I don't want us to be captured in this presentation. What we wish is that this process, which is a unique process and once in every four years that the military judges can address issues relating to their compensation, I would not want this to be a purely unilateral exercise and I of course invite any questions and comments and
interruptions that you see fit because the purpose
today is to freely discuss these issues and not set
out a confrontational exercise as we would see in
typical litigation. Although we're sitting here in
the military -- the court martial, and we're in the
process where we're sitting side by side, what I wish
is that we could have a round table discussion to make
sure that all concerns and the observations of the
military judges are fully addressed and conveyed to
you to enable you to make informed recommendations to
the government about the nature and status and level
of the military judges compensation. Of course we
have the greatest of respect for this process which is
mandated by the constitution of Canada as was
confirmed by the Supreme Court in 1997 in the seminal
Reference case. The purpose of this process is to
foster judicial independence and to ensure that public
confidence in this judicial independence is confirmed
and reassured.

We are mindful also of the important task
which is laid upon you to address those issues and
make recommendations for the benefit of the Government
of Canada. We are mindful of the fact that tight time
lines is imposing upon you to take cognisance of this
vast documentation in a very short time and we're very
grateful for that involvement and energy and efforts that you are putting into this constitutional process. For our part, we have been working with the military judges and our consultants for many, many months to prepare for this hearing today. We appear before you convinced of the accuracy, adequacy and reasonableness of the propositions that we are submitting to this committee.

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

Then going back to the criterias that we find at 204.24 of the QR&Os, we will of course address the economic considerations which form the background of the factors that you have to address. Of course,
within the subject of the other objective criterias
that you must consider, we submit that the nature of
the judicial function is a criteria that cannot be
understated or overlooked and is very important to
inform the recommendations that you will have to make.
Within the other objective criterias that the
committee must consider in our view is the comparison
with the salary paid to other people, other judges,
other senior public servants, other people from the
judicial functions, either judges or lawyers, and on
this topic I will ask Mr. Sauvé later on to make a
presentation to expose and explain what are the common
or most -- the principles that should be at the base
of setting a proper level of compensation. Then of
course I will address the actual proposals of the
military judges and in closing I will make a few
remarks on the nature and the role of this committee.

    It will of course rest upon you to balance all
of these factors, the factors found in 204.24, as well
as the other considerations that we are submitting to
you which form part of the other objective criterias
that you must consider. So you must weight those
factors and give them the proper weight according to
the circumstances. We are mindful of the fact that
depending on the economic situation or other
conductors, the weight to be given to each factor is not something that is set in stone or cast in stone. Each committee I think has to do its own examination within its own context and can, according to the conjecture, give proper weight to or different weight to each of these criterias. But it belongs to this committee to do that balancing act, according to us, and once that is done to ensure that it is set out with sufficient reasons in your report to inform the government and make sure that the government does not then go back home and redo its own balancing act with its own political or administrative considerations, because the reason why we have a committee is essentially to ensure that judicial compensation is not set unilaterally by the government. As you know, and I will not dwell into the case law because I'm sure you're well aware of the principles that are applicable. Judges do not have bargaining power and it's a good thing that they don't. Judges do not go to the government to seek and demand, and negotiate, and exchange favours for compensation benefits. This is the one time where we do that and, to make sure that the other end of this balance is also respected, the government in our view should not then simply impose its own view. It has to give some deference to
the observations and the reasons of this committee to arrive and achieve the recommendations that you will make.

So engaging into the presentation, as I said the first question I think you will have to address is what is the proper starting point of this analysis.

We submit, in our humble view, that the proper starting point cannot be what the government has unilaterally set in 2009 when it rejected the recommendations of this previous committee. If the starting point was always the decision of the government following a rejection of the report then there would be no usefulness in the informed views of this committee and of what we could call the case law or the jurisprudence developed by these committees.

We attended a few months ago the hearings of the Levitt Commission and there was a very important discussion that is not reflected in the report, but a discussion that occurred between the members of the Levitt Commission and the Government of Canada as to whether or not these commissions and committees can rely on the work of the previous commissions or if they have to do "table rasa" each time and start anew, and the view that was followed by the Levitt Commission is that there is a developing case law or
jurisprudence or precedence developed by these committees. In fact, there were recommendations to make sure that the intelligence was not lost in the process every four years because the members change. I think that's a good thing that we have Maitre Regimbald to ensure that the memory of the committee is maintained. That's also one of the reasons why it is important to take into account the work, the reasoning, and the recommendations that were arrived at by your predecessors. If we started anew every four years I think it would be, first of all, a little discouraging for the members of the committee not to have a lasting impression, all the work that you will be doing. I think you will wish that it has a lasting impression and I think your predecessors also worked hard to make sure that that was the case. If we were to consider as a starting point solely the unilateral view of the government, who rejected the report, there would be in our view little object and purpose in the work of these committees.

MR. BASTARACHE: When you speak of -- I'm sorry -- when you speak of a starting point and looking at what previous commissions did I think we have to make a distinction between the amount that they proposed for remuneration and the factors and
analysis of various factors, because it seems to me they're quite different. If the previous commission recommended one level of salary that was rejected, how can we say that there was an adequate remuneration arrived at to establish your starting point with regard to that? I don't think we can, because the rejection of the government shows its view of what may be adequate but then that wasn't the view of the commission, and, as you say, the commission is supposed to make sure that it's not a unilateral finding. So I think when you say "Look at what previous commissions did", it seems to me it means look at the way they chose the various factors, interpreted the factors, and decided to give more or less prominence to one or the other. Is that your view?

MS. CHATELAIN: Yes it is, and I think you also have to consider the actual salary level that was arrived at because that is the end process of the reasoning and the balancing of the various factors. Now as I said in my opening remarks, circumstances of course -- and that's why we have the process every four years -- circumstances may warrant that you give different weight to different factors or that you consider different factors in a different light
because of events that could have happened and
developed over the preceding four years. But I agree
essentially with your comments, which is I think a
good reflection of what the Supreme Court of Canada
stated in the Bodner case in 2005, which was the
second very important case dealt with by the Supreme
Court of Canada on judicial compensation. More
particularly -- you have that at tab 8 at the joint
book of authorities, the Bodner case, and I draw your
attention more particularly to paragraphs 14 and 15
where, and I'll just cite some passages, where the
Supreme Court of Canada stated the following. I'll
read the whole paragraph 14 because I think it is
wholly relevant. It says "The Reference laid the
groundwork". The Reference is the 1997 Reference.
"The Reference laid the groundwork to ensure
that provincial court judges".
Because that's what we're dealing with there,
provincial court judges, but the principles are
equally applicable to federally appointed judges such
as the military judges and the Superior Court judges,
section 96 as well as section 101 judges. So coming
back to the quote:
"The Reference laid the groundwork to ensure
that provincial court judges are independent
from government by precluding salary negotiations between them and avoiding any arbitrary interference with judges' remuneration. The commission process is an institutional sieve".

And that's that you are.

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

And those are the key words.

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

Not the government's response. I think that is to give weight to the actual process. Of course the commission's -- the government's response should not be completely excluded and that's not what I'm saying, because it informs the process and the outcome and the
relevant background. So the government's response is
a relevant fact but what should be the starting point
is the date of the previous commission's report.

At paragraph 15 the Supreme Court continues by
saying:

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

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

"The reports of previous commissions and their
outcomes".

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

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

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

"A new commission may very well decide that,
in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If, on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission and, after a careful review, make its own recommendations on that basis”.

Now that last quote in the Bodner case, if you look at the context of the Bodner case, in one of the cases it was alleged that the commission had made a mistake and the judges were seeking to in fact have that mistake corrected and I think that's where the court -- the comments of the court here was in that context, and that's what we pleaded in 2008 to your predecessors when we asked them to set aside the findings of the 2004 commission which had set the military judges compensation based on the average of the provincial court judges compensation across Canada. We pleaded in 2008 that we were in a situation where the previous commission had failed to properly set the compensation
and the 2008 commission agreed with us, and actually
the government was also of that view that the factors
considered in 2004 were inappropriate, that provincial
court compensation was not a proper guideline to set
compensation of federally appointed judges because
federally appointed judges compensation should be set
according to considerations at the federal level and
not at the provincial level, and we'll come back to
that.

So looking at the actual salary figures of the
starting point, this is actually annex R of our
submissions where we have shown on the third line what
is the actual salary which was set by the government
following its rejection of the 2008 commission report
and we have calculated on the last line what would
have been the level of the military judges
compensation had the 2008 committee's recommendation
been implemented. That salary would be as of today
$257,000, rather than the actual $220,000. That would
have placed the military judges salary roughly at the
midpoint between what its salary is today and what the
other federally appointed judges salary is. I think
you've seen in the material that all the other judges
appointed by the Government of Canada the base salary
for, if we need judges, is around $280,000 whereas the
military judges salary, also appointed by the
Government of Canada, is $220,000 and had the 2008
recommendations been implemented we would have been
roughly at the midpoint between those two, those two
figures. So that, according to our submissions, is
the starting point if we look based on the figures.
It would be the $257,000 rather than the $220,000.

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

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

MR. STERLING: Yes.

MS. CHATELAIN: Which is of course an avenue
that courts across Canada are not welcoming. If they
have, of course, cases they will take it but the
actual process was essentially to avoid protracted
judicial confrontation. I think that looking at the process as saying, well, that this as an opportunity trumps actually what the Supreme Court of Canada had in mind in 1997 and in 2005 where it stated that judicial proceedings would be the last resort and something that we hope would not be resorted to -- and those are the words of the Supreme Court of Canada in the Bodner case in 2005, in the very beginning paragraphs of the decision where the Supreme Court said that its hopes and wishes in drafting the 1997 Reference was that we would not see such exceptional circumstances that led to the 1997 Reference where judges across Canada had engaged into judicial confrontation. So yes there is that possibility, but I think that judges -- well my own experience, I've been involved with judges across Canada also representing the CAPCJ, which is the Canadian Association of Provincial Court Judges, and I also represent the Quebec provincial court judges -- are never enthusiastic about going to court with respect to judicial compensation. What they wish is that the process set by the 1997 Reference will arrive at success. Another discussion we had before the Levitt Commission earlier this year is how to define success in this process, because success is not resorting to
this last opportunity of seizing the court. Success in our view for this process would be a true opportunity to address before you, as we're doing today, all the issues and concerns of the judges, would be the opportunity for you -- with the time necessary to do it and that's one thing I'll come back to -- to reflect on those concerns and issues that were submitted to you, and the opportunity for the committee to draft a very well-reasoned recommendations and report and arrive at recommendations crafted in the public interest that will obtain the adherence of the government. The problem that we have in the process, and there is of course -- the Supreme Court has recognized that your recommendations are not binding. This is not binding arbitration, but I think that the Supreme Court of Canada what it had in mind in 1997 was not that the government would systematically reject the reports, and that is going on across Canada and at the federal level. I don't think that that was the recipe for success, that we would come before you, make all these recommendations, put in all this hard work, and then that the government would be able to simply come back to its starting position and then put it back to the judges, giving them the task of seizing the courts to
have the response set aside. It is a possibility but I don't think that it's a possibility that should be encouraged, and that it should be the last resort. So as I said, yes, the response is part of the context. I don't think you could simply set it aside. I think you do have to consider that the salary of the military judges is essentially set at $220,000 following the response of the government for the reasons that it provided, but the starting point of your analysis I insist, in my view, should give a lot of weight to the work and reasons that were provided by your predecessors.

This would bring me to the second part of the relevant factors that you must consider, I submit, in the context of your reflection on our respective submissions and that is the economic considerations which are provided at 204.24 of the QR&Os. What entails considering the economic -- I'm sorry, I'm going back again. Considering the prevailing economic conditions in Canada involves taking into account two aspects. First, the cost of living. You know, when we discuss economic considerations it might be viewed as simply considering the financial situation of the government and the economic conjuncture, but it involves also considering what is the value and what
is the purchasing power of each dollar that is put into judicial compensation. The economic considerations to be considered should also involve considerations about maintaining the purchasing power of the judges, because the Supreme Court of Canada again and committees across Canada again have recognized that, save exceptional circumstances such as those that led to the 1997 Reference, the salaries of judges should not be reduced in real terms first of all, and, second, by the effect of inflation. So except under those exceptional circumstances -- which are not present now. We're not in the situation which led to the 1997 Reference. We're not in the situation which led to the adoption of the Anti-Inflation Act which was referred to by the Supreme Court of Canada as being one of those exceptional circumstances. The economic conditions of course are matters of concern for the government, for each and every Canadian citizen I think, and should be a matter of concern to you but we are not in a situation where those conditions are such that we should reduce the actual salary of judges. As you will see in my upcoming submissions we are strongly of the view that the salary of military judges are inequitable when compared to all of the other federally appointed
judges and that situation in itself should be corrected, in our humble submissions. But then again, when we look at the propositions of the government, not only is the government satisfied with that discrepancy between the salary of federally appointed judges but they're asking this committee to reduce the compensation of military judges by capping the index at a level which will be below the projected inflation rate, which will be below the projected rate of the Industrial Aggregate Index, and they're also seeking to reduce that salary compensation when looked overall by removing a benefit, a severance benefit, which the military judges enjoy. It is true that the other judges don't enjoy that, but then again when you look at the so vast discrepancy between the salaries of the other federally appointed judges that is one benefit -- Mr. Sauvé has provided a report -- which is worth about 1.5 or 1.56 percent of the salary. The government is proposing to remove that, replacing it by a mere 0.25 percent, so an actual reduction in the compensation package, and a reduction also by providing an increase which is below the projected Industrial Aggregate Index. We do not see what can justify such reduction in the purchasing power and the actual salary of judges in the present economic
context. So then again not ignoring the concerns of
the government and those of -- the legitimate concerns
that we have with respect to the economy and the
general conjuncture, we do not feel that this
conjuncture is in a state where it justifies reducing
the salary of the judges and keeping them in a
situation where they are set apart when compared to
all of the other federally appointed judges.

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

MS. CHATELAIN: Yes.

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

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

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

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

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

MS. CHATELAIN: Yes, and there are some
exceptions, but which we submit does not apply here, is, if they leave for cause or some conditions it could be less than a week per year. But essentially what we have to assume here is that we would not have such removal causes for the judges and the actual severance benefit is one week, and as I said earlier -- and we have Mr. Sauvé's report at tab -- that we have filed with our reply submission at tab -- which actually assesses the monetary value of that severance benefit. As I said, going from memory, I think it's 1.56 percent in average. Yes, that's it. It's 1.56 percent and that's at tab S.

So as I said, not undermining the economic considerations but they will always be a challenge for -- and I think you've experienced that, Mr. Sterling. Economic and financial considerations will always be a challenge for every government. It has always been and will always be. If we're looking for a good time to raise the salary of the judges I think we will never find one. There is never a good time to raise the salary of judges, and as a matter of fact of any public servant, I submit, but that's the reason why we have this process. The judges cannot negotiate, should not negotiate, cannot engage in protracted discussion, don't have any bargaining power
and should not exercise any. They of course, as you
know, perform a function which is mandated by the
constitution which does -- it needs to ensure public
confidence, those protections and those guaranties of
financial securities. It's not easy for the judges to
be here in front of you and to be talking about cents
and pennies and figures. It's once in every four
years. We're happy to be here, but we're also happy
that it's only once in every four years, and because
you know what judges want to do is do what judges need
to do, that is judge, and it's not necessary to be
here in front of you having those discussions.

The submissions of the government I think
imply that the military judges have not shouldered
their share of the burden of the 2008 conjuncture. I,
as I point out in the reply and I think as you would
point out also, Mr. Sterling, the 2008 response to
government is -- the 2008 response to the previous
committee's report is evidence in itself that the
judges have shouldered their share of the burden, but,
more than that, because of the fact that we came
before the 2008 commission submitting that the
previous process for setting their salary was
inadequate, that is, the process of taking into
account the average of all the provincially appointed
judges, as a principle we were of the view that that was not the proper way to set federally appointed judges' compensation but in fact the result of that position that we took in principle was -- had an unfavourable effect on the judges salary, because if the military judges salary had been set today with reference to the average of the provincially appointed judges it would be higher than $220,000. Then again, taking the principle view that they should be in the federal context for the setting of their judicial compensation and adding to that the 2008 response to the committee's report, draw back the military judges salary to a level which is not only less than the other federally appointed judges, which is not only less than the actual recommendations of the 2008 committee, but which is also substantially less than what it would have been had the 2004 process been kept in place, so, I think we could say that the military judges have indeed shared their burden of the fall-back of the 2008 situation.

Did you want to add something? Oh, okay.

Sorry.

Now, with respect to the economic projections I will simply refer to my submissions and point out that both in the government's view and in our view,
because we are relying on the same documentation in that respect, the economic situation in Canada remains concerning but is improving. Again we're not in the 2008 situation. The outlook for the period covering the committee's mandate is positive and the Government of Canada is anticipating to be back on the surplus side with respect to its budget in 2015-2016.

Now the core of the analysis that must be made by this committee is of course considering the unique nature and sui generis nature of the judicial function. We are not here to set the salaries of public servants. We are not here to set the salary of legal officers who just happen to be judges. We're here to set the salary of judges. You might remember, Mr. Justice Bastarache, in the Therrien decision where Mr. Justice Gauthier recited the extract of the work of Mr. Friedland stating that the judges "occupent une place à part", and I think even in the English version that's the word that was retained. They have a unique position, "une place à part". So considering the judicial function I think is at the core of the work that is invested upon the committee. We will be considering comparators such as lawyers in private practice, lawyers in public practice, looking at the salary of legal officers, looking at the salary of
government lawyers, looking at the salary of high
ranking officers in the Canadian Forces. Looking at
all those comparators is to inform you, to give you a
basis, to give you points of reference, but we should
not I think set aside the sui generis nature of
holding office and the judicial function.

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

MS. CHATELAIN: Because I think taking that
position would be going back to the pre 1992
situation, before the Généreux case, where the
function and the office of military judges was viewed
only as a promotion from the legal officer position to
the position of judge, as if it was only one
additional step in the hierarchy, and that is not the
case. It's also inaccurate in our view that the
military judges are or should be pulled from the legal officers. Legal officers are the equivalent of lawyers within the Department of Justice. So it would be saying for example to the Levitt Commission that the only comparator to set the salary of the federally appointed judges, which were the subject of the Levitt inquiry, would be to look at the lawyers salary within the Department of Justice. That is not the case. It would be for example in Quebec where I'm--

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

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

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

MS. CHATELAIN: I think there's one misunderstand- standing, with all due respect. Military judges are
not and should not, and that's not the criteria to be
appointed, are not all taken from legal officers.  
Legal officers is a subcategory of the lawyers who are
officers. Legal officers is -- "avocat militaire" is
within the JAG's office only. For example Raynold
Langlois, who is the main partner of my firm, he's not
in the Reserve any more but he was in the Reserve for
about 20 years. He was a candidate which met the
requirements to be a military judge. Louis Dionne,
who was appointed to the provincial court in Quebec
recently, was in the Reserve and was the director of--

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

MS. CHATELAIN: Yes, but look at the salary.
Why if you're in a private practice -- you know it has
-- well, I'll give you an -- I brought this here.
Earlier this month on June 1st, was appointed to the
Superior Court of Ontario, Robert Goldstein. Robert
Goldstein is a Reserve officer, was a lawyer with
Public Prosecution Service of Canada. He met the
criterias to be appointed a military judge. He's not
a -- in fact I'm not sure. Was he a legal officer?
No? Okay, so he was not a legal officer. He was a
lawyer, private practice, with the Reserves. It's
just I want to make sure that I'm being understood. I
think there's a mistaken assumption that military
judges necessarily come from the legal officer pool
and the Government of Canada--

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

MS. CHATELAIN: Okay. But they have come --
what you're saying is that they have come from the
legal officers. So that's what we must look at. I
think that's a distortion of the process. It's the
same thing that happened in Quebec. Eighty percent of
the judges were nominated from public service, from
the public practice, whereas if you look at the
federal court level it's the opposite. Eighty
percent, or I think it's 78 percent, of the federally
appointed judges come from private practice. I think
salary is the reason for that or is one of the
reasons. It's not the only reason but it's one of the
reasons. If I'm in private practice, as I am, I am an
officer and I have all the credentials to be appointed
to the courts, I have a choice to appoint to the
Superior Court which has a salary of $280,000 or to
the military court which has a salary of $220,000.
Maybe I'm not motivated only by money and I will apply
to both, but I think that the salary does have an
impact and I think it sets in the eye of the public
that there's two levels of justices, there's two
levels of judges. There's the lower paid judges, which are the military judges, and there's all the other judges. If you want to be -- and also we've also set in our submissions in the last few years there's been also some appointments in the provincial court judges. As I said, Louis Dionne would have been a great candidate for the military judges. He's being paid more going to the provincial court in Quebec than he would be here. The reason why we're saying that is not that money drives everything, but the salary, and that's the purpose of this process, the salary of the judges has to be set at a level where it does not constitute a deterrent, it does not constitute an obstacle for those excellent candidates to apply to the function. So, yes, looking at the legal officers salary it is an increase in salary if you're appointed to military judges but I think that's not the way it should be looked at. Exceeding at the function and holding the office of judge should not be viewed as a mere promotion or a salary increase from the legal officer salary. I think you have to look at the whole context, what is the level of salary of other people situated in the same situation, what is the level of salary that the government is willing to pay to people who have the qualities and characteristics of what is
expected of judges, and that's why at the federal level you're looking at the DM-3s. They're not looking at the lawyers within the Public Service, within the Department of Justice. They're looking at this category of very few people, the DM-3s. As the Levitt Commission has pointed out, there are very few of them. I think it's 24 or -- it's very few numbers, and they're not looking at those comparators to say that judges are the same as DM-3s. They're looking at that comparator because it is an illustration of what society is willing to pay for people who have those qualities and characteristics. The JAG, for example, his salary is set -- actually it's linked. It's exactly linked and equated with the salary of federally appointed judges. I don't think you'll ever see a JAG, although he's a legal officer, apply to be a military judge for reasons that are purely financial. But you have to question and this begs the question why would we set the salary of the JAG, equate it, with the salary of federally appointed judges if it's not an illustration of what the government feels should be paid to people who have those qualities.

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

If I take a step back and I go back to the presentation outline, I was to address the consideration of the nature of the judicial function. All of that is set out in my submissions, so I don't want to dwell on that too much. Only to point out some specific aspect. As you have seen in the material the role of military justice, and precisely of military judges, has evolved very quickly in the last two decades. We started at a situation pre 1992, pre Généreux case, where as I said earlier the military judge's function was considered to be an administrative function only and a promotion within the legal officer scheme. This is not the case. Now it's undisputed that military judges are "full patch" judges, if I can use the expression, that they enjoy the same level of judicial independence of other federally appointed judges, be it section 96 or section 101 judges. The military judges are not in a situation which is different from the judges of the Federal Court of Canada or of the Tax Court of Canada. They're in the same situation with respect to the constitutional basis of their existence, save the fact that, in addition, the existence of a military justice system is specifically alluded to in the charter, the
Canadian Charter of Rights and Freedoms, because the
constitution specifically provides for the existence
of such a military justice. So as I said, it is
undisputed that military justice is an integral and
intrinsic part of Canada's legal system. Now the
problem is making sure that this recognition now is
recognized in its full effect. It is fairly recent.
We have seen just -- the LeSage report again reminds
us last week that military judges because of the fact
that they're legal -- they're -- not legal officers,
they're officers, maintain a rank. The LeSage report
says, you know, if we want to truly acknowledge the
integral and intrinsic place of military justice we
should not -- we should remove those ranks. In fact,
there should simply be a military judge rank to truly
reflect the fact that military judges are apart from
the chain of command. They hold a sui generis
function within the Canadian Forces and are not simply
a part of the structure. What is military justice? I
would submit military justice is justice. What is a
military judge? A military judge is a judge, and he's
a federally appointed judge and should have all the
recognition that comes with that.

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

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

"It is no longer true that a posting to a military judge's position is merely a step in the legal officer career and that military judges would necessarily want to maintain
their connections with the Canadian Forces to preserve their chances of promotion. A military judge doesn't receive a performance evaluation report, which is necessary for career advancement.

And at paragraph 20:

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

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

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

A very recent pronouncement which is only an acknowledgement of the facts, but then again we still
have in 2011 and we still need to in 2012 in your
report to restate that fact, that a military judge is
a judge.

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

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

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

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

Now our submissions again address in detail
the jurisdictions, the role and the functions of
military judges. There is no real dispute I think in
that regard. The LeSage report then again provides
another source of a description of the military
judge's jurisdiction. What I think is important to
point out is that, contrary for example to the Federal Court or the Tax Court of Canada, the military judges have jurisdiction to apply foreign law when they're situated abroad. They also have jurisdiction not only over officers but over civilians when they're subjected to the code of civil discipline. Their jurisdiction I think is overarching. They have jurisdiction to try murder cases, which even -- which is only attributed to federally appointed judges across Canada. The Criminal Code of Canada provides that it's Superior Court justices who will try murder cases and cases by jury. The judges across Canada who have the greatest criminal jurisdiction are the military judges in that respect.

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

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

MR. STERLING: Outside of Canada, yes.

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

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

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

MR. STERLING: Thank you.

MS. CHATELAIN: What I think is telling is when you look at a function, an office, what you look at to set the salary is the actual jurisdiction. When you will, for example, try to fix the salary of any position what you will look at is "la description de la tâche" and that is part of the "description de la tâche", that is part of the jurisdiction, and I
think it informs us as to the importance of the role
and of the powers that are vested upon military
judges.

MR. d'AUTEUIL: If I may?

MS. CHATELAIN: Yes.

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

MS. CHATELAIN: With respect to the analogy
with other federally appointed judges, going back
again to the discussion that we had with respect to
the added requirements that military judges also be
officer -- I insist on the fact that it's an added
requirement -- to the appointment requirements to be a
judge is the same for all federally appointed judges.
You have to be an outstanding member of your
respective bar. You have to have extensive knowledge
of the subject matter of the court to which you are
applying and to which you may be appointed. You must
also possess all the qualities and characteristics
that are expected of judges, such as sound judgment,
personal characteristics of honesty, integrity, social
awareness. It comes also with all the impacts of
being appointed to the judiciary where you're then
subject -- and that's a good thing, I'm not saying
that it is an impediment -- to all the Reserves
obligations that apply. Judges have to be
extraordinary citizens, as Mr. Justice Gauthier
reminded us in the Therrien matter. What is expected
of judges is more than what is expected of any other
ordinary citizens. All of that is equally expected of
federally appointed judges as well as military judges.
Military judges have this additional requirement where
they also have to be outstanding members of the
Canadian Forces, they have to be officers, and I'm
surprised when I read the submissions of the
government that this added requirement -- because so
many -- so few people have all those requirements, the
pool is narrowed because of this added requirement --
for some reason should lead to the result that the
salary should be set at a lower level. I think it
should be the opposite. You have an added
requirement. Few people have those qualities and
characteristics and conditions, and that should lead
to a rarity of the resource, which should lead to
considerations to set the salary at a higher level, not the considerations of only looking at what are the legal officers who have those qualities and what would be a salary that would equate with a salary increase and that should be adequate. I think we have to take into account the added requirement and not the fact that because of the rarity of the resource that should bring the salaries down. It should be the opposite.

A proper analysis, in our view, of the nature of the military justice system as I have explained it and as is set out in my submissions, a proper analysis of the role, the functions, the jurisdiction, the responsibilities vested with the military judges and a proper analysis of the composition of the court martial system, should lead in our view to the conclusion that military judges enjoy a status and hold office in a way which is akin and analogous with all other federally appointed judges. We stress that the analogy that we are pressing is not only with Superior Court judges, but then again the connecting factor is federally appointed judges. I referred before to the Federal Court judges and the Tax Court judges of Canada. We can hardly see, as could not also Madam Justice L'Heureux-Dubé in the 2004 and 2008 committee report, why military judges would be set
apart and what distinguishes them in their status and
in the office that they hold from the Federal Court
judges or the Tax Court judges. True, Federal Court
judges have some jurisdictions that the military
judges don't have, but the same is true, Federal Court
judges don't enjoy the same jurisdiction as the
military judges. The connecting factor, again I
insist, is the fact that it's federally appointed
judges. We're not looking at members of an
administrative tribunal. We're not looking at members
of commissions. We're not looking at some sub-level
of justice. We're looking at a parallel justice
system. The people who are tried before the military
court cannot be tried before the civilian courts.
Some offenses are -- there is a choice, you can try
the person before the civilian court or before the
military judges. Those people deserve the same level
of justice but they also deserve the confidence that
they are being judged by the same level of judges,
that they are not submitted to the lower court judges,
if they are tried before the military judges.

This statement respecting the fact that the
courts have the same rights, power, privilege as
Superior Court judges of criminal jurisdiction, you
will find that statement in our submissions recited
again and again in LeBlanc, in Généreux, in Dunphy, in
Nguyen, and even in the government's submission.
There has to be a consequence to that. I will again
not burden you with reading the whole extract but only
draw your attention to the underlying section in
paragraph 37 in the LeBlanc case again where Justice
Letourneau again presses that in view of recent
amendments to the National Defence Act and -- which
were prompted by decisions of the court with respect
to the unconstitutional nature of the previous
process. For example, the LeBlanc case results from a
constitutional attack on the provisions of the
National Defence Act providing that military judges
were appointed for a term of five years. That had
been declared unconstitutional for some time but the
government had not given act to those judicial
decision and had not amended the National Defence Act.
Because of the LeBlanc case it was put into -- before
the situation where now it had no choice. So
resorting to the courts is not -- is not, as I say,
the preferred route but all those recent amendments to
the National Defence Act to recognize and acknowledge
the place of the military justice were achieved
because of judicial contestation of the previous
system. So Justice Letourneau, recognizing that the
roles and functions of military judges are comparable
to those of criminal court judges.

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

I provided you with the LeSage report. I have
highlighted in the version that was sent to Mr.
Regimbald the relevant section, but what I want to
stress with respect to the LeSage report is that it
confirms yet again that a military justice is an
integral part of Canadian justice and it supports our
view as to the nature, role and function of military
judges. The third bullet I think should be looked at
also with more attention, where LeSage -- Mr. Justice LeSage -- quoting from Justice Dickson, which was describing the military justice system, stated that:

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

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

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

Alright? Thank you.
MS. CHATELAIN: Yes, of course.

(SHORT RECESS)

MS. GLUBE: Thank you. Please be seated.

MS. CHATELAIN: Okay? So I'll resume my observations. We're addressing now the fourth branch of the relevant factors to which I wanted to focus my attention on this morning in the outline of presentation, so four of four relevant factors. The comparison with the salary paid to other people, this entails in our view taking into account the salary of course paid to other federally appointed judges, which is a factor to which, as you have surely seen by now, we are according great weight. I think we should also look, to be fully informed, at the salaries paid to other judges in Canada from other jurisdictions because that also forms part of the context which you should be informed of. The salary of lawyers both in public and in private practice, again we're not ignoring the salaries of legal officers and of Government of Canada lawyers and of lawyers in other public sectors, but we're not according -- we're not putting the same weight as the Government of Canada is on those factors, on those comparators, but I think they do form part of the context that you have to look at. Fourthly, the salaries paid to others from the
public purse, we did refer to earlier in our comments to the salaries paid to the DM-3s, a very small group of people, which does not form part of the pool from which judges are selected but which has been recognized by all the federal commissions, starting with the Drouin Commission, as the most relevant factor because it is an illustration of what is expected to be paid to people with such characteristics and qualities. So I wanted to address those four categories of other people and their salaries to inform the committee.

Before engaging into the discussion on those four categories of people I will ask Mr. Sauvé to address a few words because this is his area of expertise. Setting compensation, fixing compensation packages, and looking at what the market should pay to people depending on the qualities and characteristics expected of a particular function, is the expertise of Mr. Sauvé. Mr. Sauvé is a Fellow of the Canadian Institute of Actuaries. He is here before you today as an independent and objective expert. We have retained Mr. Sauvé, but as you will see from his full credentials which are attached to his CV at tab J -- at tab J of our authorities you will find his full credentials, but Mr. Sauvé has been retained mostly by
commissions across Canada. He will correct me if I'm wrong I'm sure, but he has been retained by the Drouin Commission, the 1998 commission, by the Levitt Commission most recently. I don't know if you've been retained by--

MR. SAUVÉ: McLennan.

MS. CHATELAIN: McLennan Commission also. He has been retained also by the committee in Quebec for setting the compensation of the provincial court judges of Quebec. He has been retained by the O'Donnell committee in 2001, by the Johnson committee, and by others. So we offer him, if I can use that expression, to you as an objective and independent expert and I stress right from the outset that we have no objection -- to the contrary, if you want to communicate with Mr. Sauvé he is at your disposal to answer any question that you might have either during this process today or afterwards during your délibéré. So because of his vast expertise and experience particularly in those processes I think he's one of the few in Canada who has been retained by so many commissions. So that being said -- and I'm not sure if he's blushing right now -- but I will ask Mr. Sauvé to comment on the general approach with respect to compensation benchmarking and, by the same token, to
present his report which dealt with a more discrete
item of the four, which is the comparison of the
salary of lawyers in private practice. But before we
get to that point I will ask Mr. Sauvé to comment
generally on compensation benchmarking.
PRESENTATION BY MR. SAUVÉ:

Mr. Sauvé: Thank you, Chantal, and I am.
Members of the Commission, I would like to--

Ms. Glube: Perhaps you'd move the mike just a
little closer? I think that -- thank you.

Mr. Sauvé: Is that okay?

Ms. Glube: Yes.

Mr. Sauvé: I would like to present briefly to
you the results of the analysis that I presented in my
May 28th letter. I'm assuming that you have a copy of
it? At the same time provide some comments and answer
questions that you may have on it. The purpose of
that letter was to compare the compensation of
military judges to the income of lawyers in private
practice taking into account the value of the judges
pension benefits. Now as Maître Chatelain mentioned
earlier, lawyers in private practice constitute an
appropriate benchmark not only because of the need to
ensure that there's no obstacle to the recruitment of
outstanding candidates, but also because they
constitute a pool of individuals with experience and qualities sought in judges. As a matter of fact the very same reason is used to use the deputy ministers as a comparative group in the sense that no recruitment is made from deputy ministers, but they have been used by all of the commissions as an adequate comparator. In its reply submission the government mentioned that benchmarking to any one group was contrary to the purpose of the committee, which is to examine the remuneration of military judges. Now of course it would not be appropriate to tie the compensation of military judges to any single comparator because that would defeat the whole process. I mean, that goes without saying. Having said that, I think it is necessary in any compensation review -- it's necessary for the committee to be able to use a number of or consider a number of comparators and hopefully the compensation of lawyers in private practice, just like deputy ministers, may expand the range of useful comparators that you will want to use.

With respect to the data underlying this analysis, as you may be aware -- you're probably aware, in fact -- the data comes from the Canada Revenue Agency which extracted the income, the net income, from lawyers from income tax returns and that
is including more than 21,000 lawyers in private
practice in Canada in the year 2000. The methodology
used by the CRA for that purpose is better defined,
more robust, and therefore more reliable than what
I've seen. Because I had the opportunity to view the
the Drouin Commission, in 2000 and 2001 for the
McLennan Commission -- and I can assure you that the
data that we have right now and the process that has
been used to get it is much more robust and I have a
better level of confidence with the results that we
have at the moment. So using this information the CRA
tabulated the results by age groups, alternately
including and excluding lawyers with income below
$60,000. Now one thing that we -- this is an issue
that keeps coming back, but I should mention up front
that both the Drouin and the McLennan Commission
agreed with the exclusion of lawyers with earnings
below $50,000, in the case of the Drouin Commission,
or $60,000 in the case of the McLennan Commission. In
fact the McLennan Commission stated in its report, and
if I may read, it says:

"It is unlikely that any in the pool of
qualified candidates will have an income level
lower than $60,000. The salaries of articling
students".
And we're in 2004.
"Range from $40,000 to $66,000 in major urban
centres and the salaries of first-year lawyers
range from $60,000 to $90,000 in those same
centres, and are often augmented by bonuses.
Earnings for more senior associates are
significantly higher".

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

The government reply suggested that it is not
appropriate to use a $60,000 income threshold because
it eliminates 26 percent of lawyers. Now, the number
of or percentage of lawyers that are excluded from the
comparative group is not relevant. For instance,
lawyers under the age of 35 are excluded from this
process because of the 10 years of service requirement
and it does not matter that lawyers under the age of
35 represent five percent, 20 percent or 50 percent of
all lawyers in private practice. The key thing is
that if the decision is made to exclude them because
they don't have experience, they should be excluded.
The same thing goes with the salary threshold. The
other thing is, conceivably some of the lawyers below
the age of 35 may have more than 10 years of service
and could be candidates for the judiciary. Now that
does not mean that excluding all lawyers below 35 is
wrong. It's an approach that is made to establish an
appropriate comparative group against which comparison
can be made, and the same thing applies with the
salary threshold.

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

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

MR. STERLING: So where would the curve peak?

MR. SAUVÉ: Well it's not a bell-shaped curve.

If you look at the progression through the percentiles
of course when you reach the highest level the
salaries go up tremendously, but by using percentiles
you're not taking into account those higher salaries.
I agree if we were using the averages then the numbers
would be distorted by the very high numbers, but we're
not. We're using percentiles.

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

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

MR. STERLING: Significantly would it change?

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

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

MR. SAUVÉ: Well there are not that many. It
wouldn't make such a big difference on the percentiles
themselves. I mean it's only the top ones that are in
that neighbourhood. And again, we're not using
averages. As a matter of fact, back in 2000 in front
of the Drouin Commission it was initially suggested
that what should be used was the average earnings
within the top quartile and at that time the Drouin
Commission eventually -- as a matter of fact the
government at that time suggested using the seventy-
fifth percentile instead of using that approach and
the Drouin Commission accepted. So by using the
seventy-fifth percentile we're sort of eliminating
that problem.

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

MR. SAUVÉ: The reason we're -- the thing that
we have to keep in mind is we're not -- we are not
doing a statistical analysis of the income of lawyers
in private practice. This is not what we're doing. I
mean if we were then, you're right, we should be -- if
we're excluding the lower tail, we should be excluding
the upper tail and so forth. But that's not what
we're doing. We're trying to establish a comparator
group, a comparator group which we assume would be a
pool of individuals from which judges could be
recruited. Now that pool of individuals, the
conclusion that has been made by the Drouin and
McLennan Commissions is it is unlikely to include anyone who earns less than $50,000 or $60,000 for a number of reasons. It could be part-time employment but it could also be a question that this is a new practice, this is an individual who has a practice that is not so successful. So for all of these reasons, which may be valid, we may still be in a situation where someone earning less than $60,000 could very well be a candidate that could be appointed to a position of judge, has a quality to it. We're not denying that. In the same way, that someone below the age of 35 could have more than 10 years of service and be in a position to be appointed. That is not the issue. The issue is we're excluding people below 35 because we think that that takes care of the 10 years service requirement. Excluding the people below a salary threshold is aimed at eliminating a number of people who are considered not to be outstanding lawyers in private practice. I mean if -- money is not a--

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

MR. SAUVÉ: It probably is unless he is
incorporated, in which case it isn't. Even if it is
in it, it doesn't really matter because we're not
taking an average. I would have a great deal of
difficulty if we were taking averages. That would not
be appropriate. But by taking a percentile we're
taking care of that, we're not considering the tail
end except in the count that we're doing.

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

MR. SAUVÉ: Well, and again in my opinion,
when we're excluding lawyers earning less than $60,000
we're being conservative because there are not many
lawyers earning $60,000 or $65,000 that would be
qualified, that you would consider as an outstanding
lawyer that should be deserved of, deserving of, an
appointment to the judicial. Now it's -- and again
we're trying to establish a comparator group. We're
not trying to do a statistical analysis of the
universe. I mean we've passed that stage once we
eliminated lawyers below the age of 35. As soon as we
eliminated those we're no longer looking at the
universe of all lawyers in private practice. We're
looking at an extract, a group, that we feel is a good
comparator. It will never be perfect but I think it's
working not so badly and would work better, in my
opinion, if the $60,000 was increased. As a matter of fact, having a salary exclusion that is as low as $60,000 is actually introducing a bias in the other direction in the sense that -- I mean the seventy-fifth percentile would be higher if we were excluding the proper group rather than only the people below $60,000.

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

MR. SAUVÉ: Yes, federally.

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

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

MR. STERLING: What is the average age of -- that's civilian the 52, the 52 years of age?
MR. SAUVÉ: The 52 years is the average age at appointment of federal judges.

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

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

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

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

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

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

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

MR. SAUVÉ: So the RCA submitted data for the ages between 35 and 69 but also some narrow ranges, between 35 and 46, 47 and 54, and 55 to 69. It also
included the age range that we referred to, that was used federally, which is between 44 and 57. I don't have it in front of me at the moment but I believe that's what it is. But for the purposes of this analysis, given that judges are appointed between 40 and 50 I've taken the two age groups -- the first one between 35 and 46, the second one between 47 and 54 -- and I grouped them together. Given that they are about the same number of judges in both groups I simply averaged them, because they're the same weight, and what I'm getting is the average income of lawyers in private practice between the ages of 35 to 54. The age group between 55 and 69 is not appropriate because judges, military judges, are retired at 60. So we've excluded that section. So if you're looking at the letter of May 28th, on page three what you have is the first two columns are for the sixty-fifth, seventieth and seventy-fifth percentiles; the income, net income, of lawyers between the ages of 35 to 46 in 2010, then between 47 to 54, and then the average of the two between 35 and 54.

MR. STERLING: So none of the -- in those statistics none of the appointed military judges pay would be included in those statistics when they were appointed? In other words--
MR. SAUVÉ: I believe that there is one that came from the private practice.

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

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

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

MR. STERLING: Okay. Thank you.

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

Now if you look on page four what we did is we took the same average number from the previous page, projected it to 2012 using the average weekly earning increases in 2010 of 3.6 percent, in 2011 of 2.5 percent, and compared that to the salary of military judges of 2011, which is $214,643. Then it shows the ratio. At the seventy-fifth percentile the ratio of the salary of military judges to the projected income
of lawyers is 70 percent and the increase needed to
catch up is 42 percent. Now I should mention that
we're comparing at this point with the salary of
military judges increased by the value of the pension
benefits which we have submitted to be 20 percent,
20.2 to be exact. Now with respect to the seventy-
fifth percentile I should say that again both the
Drouin and the McLennan Commission used the seventy-
fifth percentile in their analysis and you will also
know that in the private practice, in private sector,
it is common practise to target the seventy-fifth
percentile of a comparative group when we're setting
the total compensation of best performers when
corporate objectives are fully met or exceeded. Now
one thing that we should mention--

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

MR. SAUVÉ: The total package was worth--

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

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

MR. STERLING: So it's about $70,000 over the
compensation. So it's about $350,000 or $360,000.

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

MR. STERLING: Thank you.

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

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

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

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

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

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

MR. BASTARACHE: One point five percent?

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

MR. BASTARACHE: Okay.

CONTINUED SUBMISSIONS BY MS. CHATELAIN

MS. CHATELAIN: Just for a reference point to continue on the discussion, in the Levitt report that was provided to you -- both I think in paper format and it's on the CD that is in the cover page of my submissions -- you will see starting at page 13 and paragraphs 35 and following, the analysis of the Levitt Commission with respect to the private practitioner comparator. Before the Levitt Commission, because of the age appointment of those judges, which is a little higher than those of the military judges, before the Levitt Commission the age group that was considered was age 44 to 56 and you have that at paragraph 36, whereas for this assessment
here Mr. Sauvé used age 35 to 54 as he explained to
you, for the reasons that he thought were fit. I can
also provide the members of the committee, if that's
useful to you, Mr. Sauvé's report letter before the
Levitt Commission. I could provide that to Mr.
Regimbald and it could be of use to you, where you
have Mr. Sauvé's assessment of the other federally
appointed judges, value of their compensation package,
which is higher than the one of the military judges
even taking into account the severance benefit. As I
said in my introductory comments not only is the
salary level below, but the overall compensation
benefits are also lower, but we're not making before
you any representations or a proposal to increase
those other benefits. We're strongly resisting,
however, the proposition of the government to take
away some of those benefits which are already lower
than the ones afforded to other federally appointed
judges. So I'll just take a note to make sure that I
send you the report of Mr. Sauvé before the Levitt
Commission.

The reason why Mr. Sauvé -- well I don't know
if it's the reason, but before the Levitt Commission
the government contested the use of the seventy-fifth
percentile. Because of the fact that I did not want
to engage into a debate with you we have asked Mr. Sauvé to put both the sixty-fifth, seventieth and seventy-fifth because, in any event, no matter what percentile we look at the salary of that comparator group is substantially higher than that of the military judges, adding, as Mr. Sauvé explained, to the salary of the military judges -- to make sure that you compare on adequate basis -- the value of their pension benefits.

Which brings us back to the four comparator items that I wanted to draw your attention to. Mr. Sauvé covered in his comments the third point. The salary paid to other federally appointed judges I think we've touched upon that already. The gap is 31 percent. It is viewed by the government as an unjustifiable increase that the military judges are seeking. In our view it is, rather, viewed as a gap which cannot be explained or justified by any of the criterias which inform you. As I said, the 2008 commission would have placed the salary of the military judges at midpoint between $220,000 and $288,000, leaving a gap of -- I didn't actually do the actual calculations but it would have been approximately half the 30 percent gap that we have now, which if we look again at the fact that judges --
you know, "A judge is a judge, is a judge", as the Supreme Court of Canada Madam McLaughlin often says, and this cannot be justified in the current context except by, as I stated in my submissions, this mistaken assumption that military judges are not really judges, just as military music is not really music. That I think is a mistaken assumption and we have to give effect to their recent, fairly recent, pronouncements in the last two decades setting aside that mistaken view.

With respect to the fact that we're referring to the salary paid to other federally appointed judges we are not, as is suggested by the government, seeking to set "à parier", as we would say in French, to link the salary of military judges to a given comparator. What we're doing is we're looking at the salary paid to people of the same -- that enjoy the same status, the same office, the same functions. That's what we're looking at and that's why we think it's a relevant factor to take into consideration, which should outweigh the other comparators which inform your decision. The government has referred to in their submissions to the case of the Provincial Court Judges Association of New Brunswick, the New Brunswick Court of Appeal decision stating that it is
inappropriate to try to fix the salary of provincially appointed judges -- linking them with federally appointed judges, and we agree that that's not a proper way. In fact that's a discussion we've been having in Quebec for the past 15 years and my involvement with the provincial court judges there, because provincial context is provincial context and federal context is provincial context, but that works both ways. So the decisions or the reasoning, the rationale behind the Provincial Court Judges Association of New Brunswick case applied integrally should lead to the fact that essentially military judges salary has to be fixed according to what the government sees fit for federally appointed judges. It's not another level of government. It's the same level of government. It's the same appointees, it's the same process, and a judge is a judge. So we're not seeking or the military judges are not seeking before you today a salary increase of 31 percent. They're seeking a correction. They're seeking an adjudgement. They're seeking to correct a wrong that has been long-standing. They're seeking that their salary be fixed at a level which is adequate taking into consideration their true status and the nature of their office. We're not -- again, judges should be
compared to judges. Again, this is not a promotion
from legal officer to a legal officer with a judge's
handle.

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

"No judge nominated by the federal government,
with the powers of the Superior Court, extra
provincial jurisdiction, dealing with
specialized matter in the province of the
federal government, here defence, and having
jurisdiction over offenses dealt with by
Superior Court judges, such as murder, has ever had the status of a provincial court judge in terms of salary and other benefits and even the age of retirement. All are considered Superior Court judges with a salary attached to that status".

And that office, I may add.

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

I also wanted to provide you with the table of the salary of other provincially appointed judges in
Canada. Although everybody recognizes, the government and ourselves, that it is not a -- that the salary of military judges should not be fixed according to the salary of provincially judges, it is however I think enlightening to see where the military judges salary would place them if they would be in that table and actually their salary would be above only the salary of the provincially appointed judges of Nova Scotia, Manitoba, Newfoundland and New Brunswick, so of the Eastern provinces. Maritime provinces, sorry. Atlantic, yes. I'm looking for the right word, I'm sorry. So even -- so I think you have the table there and as relevant information for your background analysis.

The third item, and we touched upon it, was the salary of lawyers in public and private practice. With respect to the salary of lawyers in the public practice the Government of Canada has provided at tab 17 of their authorities the relevant tables and we did not have the resources or the data necessary to obtain those or to contest those so we simply defer to those, but what we do note is that those figures are the figures of May 2010, which will be called upon to be reviewed following collective bargaining. So the salary figures that you have at tab 7 are figures that
will be, in all likelihood, reviewed and increased.
The figures that you have there do not take into
account the performance pay that are available to
public sector lawyers -- these performance pay rates
range, depending on various factors, between five to
20 percent -- and it does not take into account any
other benefit or incentives that could be available.
Although those figures are not taking into account the
revisions from 2010, 2011, 2012, although it does not
take into account applicable performance pay, and
although it does not take into account incentives
available to other lawyers, you will see that they are
in some instances even higher than what you would see
for the military judges. So that again informs, I
think, the committee.

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

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

The fourth category of people to whom we
should look at as a basis of information is the salary
paid to others from the public purse, so others than
the judges and other than the lawyers in public
practice. Under that category I've highlighted two
subcategories, the general service officers and the
specialist officers in the Canadian Forces, and you
have all those numbers in our submissions. There is
no dispute between the figures -- in fact we do not
dispute the figures provided by the Government of
Canada, which actually were updated compared to our
figures. So the figures of the Government of Canada
should be referred to instead of ours in that respect.
What the analysis reveals is that the salary of the
military judges is basically below that of senior
officers such as lieutenant-general, which ranges
between $230,000 to $250,000, but it's also
considerably below some specialist officers such as
medical officer and dental officers, which I assume
their salary is set according to what these
specialists can expect in private practice, so then
again not simply looking or being a constraint into
the structure of the Canadian Forces. I've discussed
in previous comments the salary of the Judge Advocate
General which is -- it's not by coincidence. It has
been linked for as long as we know to the salary of
federally appointed judges. The JAG is thus
benchmarked to the Superior Court judges. As I
stated, this is telling as to the approach of the
government. The JAG is also pulled from the legal officers.

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

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

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

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

MS. CHATELAIN: It's three percent.

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

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

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

MS. CHATELAIN: Yes.

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

MS. CHATELAIN: Yes.

MR. STERLING: So you're faced with a situation here that four people are the highest paid or equal to the highest paid people in the military service, and they're part of the military service and their function -- notwithstanding military court and military judges are very, very important to the system, are they as important as those other people?
And they have to operate within that realm. That's the difficulty I'm having.

MS. CHATELAIN: Yes, I appreciate that. That difficulty I think is nourished also, I submit humbly, by the fact that in your view and maybe in the government's view military judges necessarily have to be constrained in the military justice system. If you look -- a judge is a judge, and military judge is not only a part of the Canadian Forces. He is a part, an integral part, of the Canadian judicial system and I personally see no problem with the fact that the only three individuals -- and that is noteworthy, the only three individuals within the Canadian Forces structure, if we want to look at that only, who are appointed by an order of Governor in Council are the JAG, the Chief of Defence Staff, and the four military judges. No other person within the whole military structure is appointed following an order of the Governor in Council. I see personally no problem in accepting the fact that these people enjoy the qualities and characteristics that are very high. Very high expectations are set for people holding those offices and holding that function and I personally see no problem, for example, with the fact that Superior Court judges are being paid more than
the Prime Minister yet you might say that the Prime
Minister of Canada has a role which is more important
than that of the judges, I don't know, but I don't
think that our constitution asks that we consider
judicial compensation in that view, taking different
functions and saying is that function more important.
I don't think that that's the process that should
inform us, quite respectfully. That's my view.

MR. STERLING: Generally I agree with you, but
unfortunately we're within a structure where other
people who work in the military understand the
structure and have respect for the people that are
there, and the respect in the system -- and it's a
function of the court is to enforce discipline and to
try people who break that. My difficulty is that
these judges are different than the other judges
because they are within that umbrella. That's my
problem. Now the other question I have for you and, I
don't know, I don't think you would get to it, is that
in the 2000 and in the 2004 commission report there
was some mention of the workload and I noticed in the
material you sent us from the Judge Advocate General's
report that 98 percent of the cases are tried by
summary trial by officers in the field and other
people other than the military court. There were 56
cases in the 2009 to 2010 period. Do you have, as
they put out in the 2000 and the 2004 report, how many
days this court is sitting in a year?

MS. CHATELAIN: I do not have that data and
the reason why -- we in fact we haven't looked for it
either -- is that the evolution of the process for
setting judicial compensation -- as you know these
committees exist across Canada and at the federal
level since 1998, following the 1997 -- in fact they
existed before, but in their constitutional format
they exist since 1998 and there's been evolving
jurisprudence of the committees and there's been
judicial contestations -- a lot arising in Quebec in
which I have been involved, the four cases also which
led to the Bodner case, and it has now been widely
acknowledged and recognized and the Levitt Commission
I was trying to find the passage -- I'll get that to
you -- recognizes that we cannot assess the judicial
function by looking at it as if we were assessing an
employee and looking at workload. That is simply not
the way it's being done. You cannot assess the
function and the office of a person who's holding that
office as a judge compared to how many days they're
actually sitting. I did the exercise in 2008 and it
turned out -- with all due respect, Mr. Justice
Bastarache -- that the Supreme Court judges were the
drivers in Canada who were sitting the less, yet
because of their place in the judicial structures
they're the ones who have the higher salary. You
cannot judge the function of a judge by the number of
hours that they're sitting, by the cases that are
being put before them, of which they have no control.
The importance of the judiciary and the functions that
they accomplish is not valued by the numbers of days
and hours that they're sitting. It's valued by how
that office and function is placed in our society to
ensure that we're living in a society which is founded
and grounded on the rule of law. The military judges
because of their particular function, which is focused
on criminal law, have a very important function to
ensure the respect of the Charter of Rights and
 Freedoms and make sure that the rights of individuals
are guarded. Their function is not simply to apply
discipline. That is not their function. They apply
and their jurisdiction extends to all federal
statutes. The criminal law it is under the umbrella
of the code of civil discipline but actually it's the
same function as a criminal court.

MR. STERLING: I understand their extended
jurisdiction.
MS. CHATELAIN: So it's not simply discipline. And looking at the summary trials is also not the same thing. A person that is being charged with an offence has the benefit when he decides to go -- when he has the occasion to decide, because I'm not sure that the officer or the "prévenu" always has the choice, but when he has the choice--

MR. d'AUTEUIL: The accused.

MS. CHATELAIN: The accused, I'm sorry. The accused. Decides to go before a military judge instead of staying within his command unit and being tried at the summary trial level, what he has is the assurance of an independent justice system with the safeguards of judicial independence. I'm not saying that the summary trial, and please don't take me wrong on this, is not objective and independent for the purpose for which it is set but that's not the same thing. The accused has the fundamental, constitutional right to be tried before a judge, which holds the guaranty of independence and impartiality, and that's different. So I don't think you can equate the two. It's not -- a military -- the court martial is not a step above the summary trial. It's a different process. It's a different process and also, going back to that, it is not true to state that lower
offenses or less important offenses are being tried at
the summary trial level and more important offenses
are being tried at the court martial level. That is
simply not the reality. The reality is that it's two
different systems. It's like if you're in the Civil
Service and you have "la discipline" and the right of
the employer to -- his authority, and then you have
criminal or a judicial or a civil contestation. It's
not the same thing, and maybe -- I don't know if Mr.
Justice d'Auteuil wants to add something there because
I know it's a discussion we had many times, that it's
simply not true to say that lower offenses are summary
trials and more important cases are courts martial.
The process is different and the guaranties are
different.

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

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

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

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

MR. STERLING: And it seems very light, from
the report that -- and I believe in value for money
for the taxpayer, as well as judicial independence. So there has to be some marrying of these two principles and I haven't heard any allegation on your part that the independence of our court is in trouble.

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

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

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

MR. de l'ETOILE: Yes.

MR. STERLING: Okay.

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

MS. CHATELAIN: Would like to have what?

MR. d'AUTEUIL: The figures.

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

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

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

MS. CHATELAIN: The number of days.

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

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

MR. STERLING: Some take a long time.

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

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

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

MR. d'AUTEUIL: No, that's fine. You're allowed to get -- if available, and I think it is available. What I'm saying to you is we're dependent on the system. Because prosecutors are involved and maybe, if you look at the system as a whole, a prosecutor may deal with four cases per years, five
cases per year, maybe 10, maybe more. We don’t know yet. But if -- the salary of those people are assessed differently. But if you consider that this is a factor or something you want to look at, I don’t see any problem with that.

MR. STERLING: Thank you.

MS. CHATELAIN: We will add some submissions to that because in our humble view, and we respect the view of all of the committee members of course, but it has been -- having value for your dollar in the judicial context cannot, in my view and I say that with the greatest of respect, be analyzed according to the number of cases or to the number of hours. Having an independent judicial system which is the pride of many countries in the world, as we have in Canada, cannot be assessed as to the number of cases. Then what are you going to do? Are we going to look at the nature of the cases? Is a case dealing with a civil claim less important than a case dealing with murder? Is a case dealing with administrative decisions respecting income tax less important than a case dealing with unauthorized use of a firearm? How are we going to do that? What we assess is the office of the people who hold those functions and, very humbly stated, it has been widely recognized that you cannot
equate the value that you get for your dollar with the
numbers of hours or the case that you're dealing with.
We'll provide you with the numbers and we'll provide
you with our written comments in that respect. And
just as a reference note, paragraph 26 of the Levitt
Commission report also touches upon that, where the
commision report has stated that the submission that
was then made, according to the submission report "Was
a semantic exercise which was detached from the
workplace reality and which had" -- and I'm just
reading the words of the Levitt Commission -- "no
relevance to the commission's inquiry". So we'll
provide you with the numbers and of course you can
weight that -- that's your function, that's your role
and we're very respectful of that -- but nevertheless
we'll stress our views on the subject, with your
permission, when we provide the numbers.

That slide was then leading us into the other
basis of information, which was the salary paid to
senior civil servants. Then again it has been widely
recognized at the federal commission, the other
federal commissions, that the DM-3 comparator was the
most appropriate comparator. It had been proposed by
the Government of Canada in the early stages before
the Levitt Commission. The Government of Canada
submitted that the other DM levels should also be looked at and there was great discussion before the Levitt Commission as to the appropriate level or not. We don't want to get into those discussions because, in any event, just looking at all the DM levels I think provides you with sufficient relevant information as to the level of salary paid to these individuals. The salary range must be increased by the performance award, performance pay, that is also available to these individuals. Our position is of course the fact that we should -- if we look, if we want to pinpoint at a more relevant comparator, it would be the DM-3s but we're still providing all the information for your benefit.

That will lead me to summarizing our proposals for the setting of the military judges salary for the period covered by your committee. On that subject, with respect to the period covered by your committee I intended to talk to my colleague but I unfortunately forgot this morning. I was under the view that, based on their submissions, that they believe that the period covered by your committee starts at April 1st, 2012 whereas in our view the period covered by your committee is September 1st, 2001 to August 30 -- 2011, sorry, 2011 -- to August 30, 2015. That has been the
period that has been set in the QR&Os for the
beginning of the inquiry when the first committee was
put in place and it has not been changed. The
Government of Canada's response to the 2008 committee
report does not detract from that. If we look at the
Government of Canada's response to the 2008 report,
which is at tab G of our annexes, we have both the
French and English version. The English version is
quite clear at -- just I highlighted in the -- I'll
just be a second. I just want to get the proper --
okay, so paragraph two of the government's response
first of all clearly states with respect to -- the
date of commencement of the inquiry is September 1st,
2007 but then again at paragraph six with respect to
the setting of the salary we see that the starting
date -- paragraph six of the government's response to
the 2008 report, "The committee" -- then recognizes
that the recommendation was to set the salary starting
at September 1st, 2007, and then at paragraph 13
following its response the government states that
"Maintaining the current" -- no, it states the
methodology that it is adopting and the last phrase
"This methodology would remain in effect indefinitely
and would be reviewed on September 1st, 2011 when the
next committee is due to convene". So the period
covered is really from September to August.
Notwithstanding the fact that in its response to
mirror the time of the indexation of the salary that
is being paid to other federally appointed judges, the
government decided that the indexation would be
applied April 1st, so a little mix of the two here,
but the period covered by your committee is definitely
September 1st, 2011.

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

MS. CHATELAIN: Yes, we know that and that
doesn't change, unfortunately, the fact that you'll
have to do a retroactive. So with respect to the
proposal, as I stated at many occasions since this
morning, we appreciate that the government's
submission is that we should not consider the salary
of lawyers in private practice, we should not consider
the salary of other federally appointed judges, we
should not consider the salaries of the higher
officers of the military, and we should not consider
the salary of other senior executive members of the
Public Service such as the DMs. According to the
government the only comparator would be the legal
officers and making sure that the salary of the
military judges is an increase compared to that
salary. For the reasons that we have explained, we're not of that view. We don't share that view. We believe that the judges salary needs to -- the military judges salary should be coherent with and in line with what the Government of Canada has itself decided is adequate salary for other federally appointed judges. We believe that this committee must correct the wrongful situation in which the military judges are situated at this time. We believe that it would be coherent and correct to, rather, consider the salary that is paid to the JAG, to the Chief of Defence Staff, to other public servants within the Government of Canada such as the DM level public servants, that it would be appropriate to look at what is expected of people with such credentials and qualities at the private sector lawyers, and also to look at what is being paid to other provincially appointed judges which have for the vast majority a salary which is higher than that of the military judges. We believe that it would be appropriate to look at the specialist officers such as the medical specialist and the dentist in the Canadian Forces and at the very high ranking officers. If you look at all of those bases of comparison I think there is one inescapable conclusion, is that the salary of the
military judges needs to be substantially corrected. It must reflect the true nature and status of that office in review, which is not the case at this time. We also believe, humbly submitted, that there is no rationale to accept the government's position to simply apply a multiplier factor without looking as to whether or not the basis upon which we're applying that factor is adequate. We believe that there is no rationale to retroactively reduce the salary of the judges for 2012, 2013, because you will appreciate that in the government's submission not only do they propose to cap the index at 1.5 but the indexation that was automatically applied in April 4th, 2012 would be clawed back next year, according to the judges' submission -- I mean according to the government's submission. So considering that the military judges enjoyed a 2.5 -- I'm sorry -- yes, 2.5 increase on April 1st, 2012 the government's proposition is that next year that one percent extra would be clawed back, taken back. So that's an actual reduction. We also believe that there is no rationale to support the fact that the military judges would not at least maintain the same purchasing power, and we also believe that there is no rationale to, at this point, to not only take back the severance benefits
but not compensate them. In the government's submission it has stated that to compensate the fact that severance benefits will not be accumulated in the future, they're proposing a 0.25 percent one-time increase. Well that, according to Mr. Sauvé's analysis, is insufficient to compensate because it's less than the actual value of that benefit and that is also acknowledged by the government considering that they have provided other public servants, with bargaining power, at least 0.75 additional compensation. We believe that it is not appropriate also for the government to propose that what will be negotiated in the future for those employees who did not have the additional 0.75 percent will simply be applied to military judges. If that was the case, why do we need an independent and objective and efficient committee as yourselves if the solution would simply be to apply what is negotiated in the public sector and apply it to the military judges? That is exactly the reason why this process was put in place in 1997 in furtherance of the constitutional guaranty of financial security, so that we are not placed in the position where we simply apply the result of public sector negotiations to the judiciary. We also believe that it would be inappropriate to not consider the
fact that in the government's own proposition the
projected consumer price index factor for 2012 and
then thereafter until 2016 is at least 2.0 percent or
above and we see no reason why we would ignore the
reasoning of the Levitt Commission which fully
considered, and rejected, the government's proposition
to cap the index for judges at 1.5 percent because of
the will of the government to simply apply to judges
what was negotiated through protracted discussions
with public sector employees to judges. With respect
to the multiplier factor for the chief military judge,
we touched upon that briefly a few moments ago. We're
not seeking and not making any propositions to this
commission to modify that factor.

With respect to the costs of representation
before this committee the government acknowledges that
it has assumed the cost of representation -- which is
the cost essentially for me to be here today -- both
in 2008 and for this commission, and this is I think
what it should be, but what it shouldn't be is the
need for the military judges to negotiate and discuss
with the government at every commission to obtain that
funding. We believe that it would be most appropriate
that a process be set to confirm in fact the
continuing of the situation. We believe that all
reasonable fees and disbursements should be assumed by
the government, considering the very low number of
military judges. There are only four. At the federal
level it is a portion of their representation costs
which are covered by the government, but the
difference being that there's over 1,000 judges at the
federal level. That's one point. The second point is
that the other federally appointed judges have what we
call expenses, allowances, which the military judges
do not have and they are not making any
representations to you in this respect. Whereas in
other provinces the out-of-pocket costs for the judges
to assume their representation costs can be reimbursed
through their representational allowances, we don't
have that for the military judges. So we believe it
would be an unfair burden to impose upon the judges to
disburse the, I must confess, significant amount of
money which is required to adequately prepare for this
process. We have stressed in our submissions that the
constitutional process encourages and mandates, and I
would go further and say that it requires, the
presence of the military and we should not put that in
peril.

My few closing remarks on the nature and role
of this committee, the military judges as well as
judges at the federal level have been very concerned with the position taken by the Government of Canada to not thoroughly respect this constitutionally mandated process. There has been a lack, in our view, of respect for the process in delaying the response to the previous reports of the committee, whereas the law sets the timing of those responses and whereas the fact of providing a response is a part of the constitutional process. There has been also, in our view, an unfortunate lack of respect for the process in not appointing the members of this committee at the time when it was mandated, first went to the QR&Os. That is the law and the government must also abide the law, especially in a process so important as this one which aims at ensuring judicial independence in the eye of the public. So it's not a question of the judges having to wait a few months to know what will be the outcome of this process. It's a question of having a true respect for the process and we wish that this committee also makes a recommendation in that respect, to avoid being caught in those situations again. We need to follow the rules and we need to follow thoroughly the constitutional rules.

In closing, we also want to insist on what we view as a necessity of thorough and motivated reasons
for your recommendations whatever they may be. There has also been disconcerting events in the past where the governments have taken pretext of the fact that the reasoning of the committee has not been crafted or casted in sufficiently detailed fashion and the government took the liberty to set those aside or to make comments on the sufficiency of the reasons. I think when we're trying to look at what defines success of this constitutional process the core of the process and the outcome is the recommendations that you will make and the reasons and the rationale supporting those recommendations. What was envisaged I believe by the Supreme Court of Canada in 1997 is that there would be, foreseeably, an opportunity for the government to reject of course the commission's report. That's part of the process, but I think what was envisaged is that the process would be such that your recommendations would impose themselves on the government, as they are imposed on the judges, and that everybody would adhere to your well-reasoned and informed views as to what should be a judicial compensation. So we again stress the need for clear and exhaustively reasoned recommendations.

In closing, I want to thank you for this opportunity to have this discussion, this open
discussion with members of the committee. We're still here and willing to answer any questions that you may have.

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

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

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

(LUNCHEON RECESS)

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

SUBMISSIONS BY MS. LAWRENCE

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

I'd like to begin my submissions this afternoon by ingratiating myself to everyone here in this room. My friend made some thank-yous in her written submissions. I'd like to actually make them
here orally before the committee. First of all I'd like to begin by thanking you, members of the committee, on behalf of the Government of Canada for the important public service that you have undertaken. I'd like to acknowledge the excellent work of the Registrar, Maître Guy Regimbald. I appreciate, and I'm sure Maître Chatelain does as well, how well-organized the committee process has been. I would say it has been like a well-oiled machine from start to finish. I'd also like to thank Maître Chatelain for her submissions on behalf of the military judges. I know that it can at times, and certainly from some of the tone in our respective written submissions, it looks like we are adversaries in this process. However, I think it's evident that despite the disagreement both of our clients recognize that this process is not about winning or losing. It's about ensuring public confidence in the independence of the military judiciary. We just have different perspectives on what is necessary to achieve that laudable objective. I'm grateful for the spirit of cooperation demonstrated by Maître Chatelain during the lead up to the hearing, as evidenced by the fact that we managed to agree on a joint book of authorities. So I think certainly speaks a long way
to the level of cooperation among counsel. And I'd also like to take this opportunity to thank the military judges for their ongoing commitment to public service. My friend described in great detail the responsibilities of the four military judges and the government does not take issue with the military judges' submission that they play important roles in the military justice system and that military judges are an integral part of the Canadian judiciary.

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

I don't have a PowerPoint but I will provide you an overview of what my submissions today will look like. That being said, this is my plan. Like Maître Chatelain, I am here to assist you and to answer any questions you may have. My plan is not necessarily your plan. So I would encourage you, as you see fit, to interrupt me and to ask whatever questions you deem necessary as I go through this process. My plan is to start by looking at the jurisprudential context in which this committee's work will be undertaken and that will commence principally with our view of the PEI Judges decision. I'm not going to take you through the entire decision -- we'd be here until the end of next week if I were to do that in any detail -- but there are a few key passages that I think need to be highlighted. They demonstrate in my submission that the government's proposal, and more importantly the rationale from which that proposal flows, are directly linked to reasoning from the Supreme Court of Canada. I'll then move on to talk about the present and the future of the military judges remuneration, so starting first with the current remuneration of military judges and how we got to where we are today and I'll touch on the government's response to the
2008 committee report. I'll then talk about the future. So I'd like to discuss the government's proposal for the upcoming quadrennial period and answer any questions you may have about what exactly the government's proposal is, and, just in brief, the proposal is two-fold. First of all, that the current salaries be maintained and adjusted annually during the quadrennial period based on the Industrial Aggregate Index to a maximum of 1.5 percent, and the cessation of the accumulation of severance.

I'll then move on to the four mandatory criteria and explain why in my submission the government's proposal results in an adequate remuneration for military judges. I'll address in the context of that discussion the military judges proposal for parity with Superior Court judges salaries and why that is not a reasonable proposal at all in light of this committee's mandate, firstly, and secondly in light of the current economic situation in Canada and also in consideration of the unique pool of candidates from whom military judges are drawn. The government's submission is that it is not appropriate to use a single comparator to determine the adequacy of military judicial salaries and that, in fact, if you're going to look at comparators at all those
comparators should be given only an appropriate level
of weight in view of the fact that there are four
mandatory factors that are to be taken into account by
this committee. They are only part of the inquiry, if
you find that they are to be considered at all. They
cannot be, as the military judges would have you
believe, the overarching consideration in your inquiry
into the remuneration of military judges.

I'd like to begin then, as I said, by talking
about the jurisprudential context for the work of this
committee. There have been references sprinkled
throughout both sets of submissions to the PEI Judges
decision because it's the decision that set the stage
for what this committee is doing today. It's
important to recognize the context of the PEI Judges
case. That case was about salary reductions imposed
by governments during the recession in the 1990s on
provincial court judges in Alberta, Manitoba, and
Prince Edward Island. The question before the court
was whether salary reductions were unconstitutional
because they compromise judicial independence. In the
context of that case the Supreme Court of Canada held
that provincial court judges salaries can be reduced,
frozen or increased so long as there is an objective
process in place that examines their remuneration and
is linked to judicial independence. The court in PEI Judges defined the proper role of the judiciary as one that is independent from the executive and found that financial security is one of the key aspects of judicial independence, the others of course being security of tenure and administrative independence. Although the PEI Judges case dealt with many issues relating to judicial independence I would like to focus your attention on three important principles which should in my submission bear on your inquiry and specifically on your assessment of the reasonableness of the Government of Canada's proposal.

So I'll ask you, if you could, to turn up the PEI Judges case. I'm not going to take you to all of the relevant passages. I have made references to them in my submission. There are, however, some that I think it's important that I take you to specifically. So the PEI Judges case is at tab 17 of the joint book of authorities, and that's volume three. I apologize for making you -- making this more difficult. Certainly I see the benefit in having the extracts up on PowerPoint in the future. So I'll take a page from Maître Chatelain's book next time. For now, however, hard copy is all I have. So I'd ask you first -- I'm going to be referring to page 64 of the decision and
I'll be looking at the English version. The first principle that I think is important in terms of your inquiry is that this is a public interest process. This inquiry is not aimed at protecting the individual economic interests of members of the judiciary. It is about ensuring the public interest in an independent judiciary is enhanced and the one passage I would like to draw to your attention with respect to that submission is paragraph 190 on page 64. The second sentence begins:

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

So there's a clear indication from the Supreme Court here that there may well be circumstances in which
military judges -- in the context of this particular case -- or other judges, will not end up being remunerated to the same level that others who are involved in salary negotiations will, but, as the court specifically said, this is a price that must be paid in order to uphold the principles enshrined in the constitution and in order to ensure an independent judiciary. I bring this point forward to respond directly to the arguments that were made by my friend earlier with respect to comparisons to others paid from the public purse and the argument that you as part of your mandate should be looking at the salaries earned by others. For the most part my friend asks you to look at almost anyone across the board. Lawyers, public servants, members of the Canadian Forces, GIC appointees, anyone who earns more than military judges currently do are, in my friend's submissions, the groups to which you should look in determining whether the military judges salaries are adequate. Within those groups, however, there are individuals who are in a position to negotiate salaries with their employers. Almost all of these groups, other than GIC appointees and members of the Canadian Forces whose salaries are set by Treasury Board, have an opportunity for a say in what their
salary would be, and by virtue of that fact they're in a situation entirely different from the military judges. Again this goes right back to the words of the Supreme Court of Canada. You cannot, just because a particular group is entitled to more money by virtue of salary negotiations, say that the level of remuneration must be tied to that. There is a price that must be paid for judicial independence.

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

"In my opinion, the risk of political interference through economic manipulation is
clearly greater when judges are treated
differently from other persons paid from the
public purse. This is why we focused on
discriminatory measures in Beauregard".

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

MR. BASTARACHE: That presupposes that you're
starting from an adequate salary or an adequate
remuneration. The argument made by the other party is
that you need an adjustment before you tie in these
people to measures that are taken for the Public
Service as a whole or everyone who is paid from the
public purse. But also, when you're talking about
people paid from the public purse you're also talking about all those federal judges. They're also there as members of the judiciary, which is similar I guess in nature to the functions of military judges, and why shouldn't we take into account the level of pay of those people? They're paid from the public purse.

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

MR. BASTARACHE: That's the point I don't understand. If you could demonstrate that military judges' present salary is adequate then I could
understand that you say, well, they have to share the burden, they have to have a minimal increase in salary because that's what's happening with regard to the Civil Service in general, but if you can't establish that the present salary is adequate the first thing you have to do is determine what is the level at which you can find it to be adequate. Now with regard to the response of the government to the last two commissions and the level of salary that was established, I can't see anywhere indication that we should take the present salary to be adequate. You can't take the recommendation that was made -- because there was no obligation on the government to accept it. You can't take the government's position as being an adequate salary when it's so far removed from what was recommended by the commission and the only argument you can see in the response is economic conditions. Basically I find it also very difficult to understand that you rely so much on economic conditions generally when you're talking about such a small group and a small adjustment. I mean in actual terms, in volume of money involved. It's more a question of fairness, "Will you share the burden", but it's not because it's going to cost too much and it's going to hurt the Canadian economy. This is why I
think it's more or less irrelevant that you give us all these figures on economic conditions. Economic conditions can justify the fact that where you're talking about people who are at a present level that is acceptable, that you will freeze salaries or provide for minimal increases. But say, for instance, if you have discrimination against a group of women and that you're trying to apply the Act that says that you should have equal compensation for work of similar. Would you say "Oh, no we can't adjust the women because there's -- national economic conditions don't permit"? You're not talking about just a general increase in salary. You're talking about a major adjustment because the present situation is not acceptable.

MS. LAWRENCE: There was a lot in that question and I will attempt to unpack it, and I certainly will tell you in response that part of the goal of my submissions today is to convince you that the current salaries of military judges is an adequate salary by reference to the four factors that you're mandated to consider. So the government's submission is that by virtue of the current economic conditions, coupled with the pool from which military judges are drawn, coupled with the importance of financial
security and its link to independence of the
judiciary, and finally the fourth category, which is
the catch-all, any other objective criteria this
committee considers relevant. It's within that fourth
category that I would urge you to consider the
comments from the Supreme Court about the importance
of taking into account the treatment of others paid
from the public purse. So I will during the course of
my submissions -- that's one of the principle goals I
have today, is to convince you that the current salary
is in fact adequate by reference to those four
criteria.

Just before I get there, one comment with
respect to the economic conditions and the fact that
these four military judges of themselves will not
create a large drain on the fiscal resources of the
Government of Canada. There's certainly no denying
that and the Government of Canada has acknowledged
that in its submissions, but, with respect, the test
is not whether the government can afford a salary
increase. The test is whether -- the test is what, in
view of the current economic situation in Canada,
constitutes an adequate salary and that's something
that's examined from the perspective of a reasonable
person. And I'll get to the reasonable person test in
a moment but the question is, in view of Canada's current economic situation would a reasonable person perceive that the current salaries of military judges are "adequate" or, in French, "satisfaisant". So that's what the test is. The test isn't can the government afford to pay this. Clearly it's not a huge drain on fiscal resources. We don't dispute that. But, with respect, the government's submission is that that's not what the test is and so it's -- it's inherent in your assessment of what an adequate salary is, the fact that the current economic situation is what it is, and that's something you're mandated to consider in terms of reviewing the current salaries of military judges. So I'm not sure that I've responded entirely to your question but I think all of my submissions are aimed at responding to your question.

MR. BASTARACHE: I understand your answer but I guess the first element is, you certainly haven't demonstrated to me that the present salary is adequate and I think that's the starting point. The second thing is when you say take into account the salaries of other people that are paid from the public purse, I tell you yes I agree with that but I think the first consideration there is the salaries paid to other
federal judges. They're all paid from the public purse and I think you have to look at the conditions under which they are functioning. Is the nature of their work more similar than that of a soldier or a general in the Army? Why is it so clear that you would exclude that group and put all of your attention to people who are in the military but who are not exercising work of a similar kind?

MS. LAWRENCE: I have two comments to make in response to that. First of all, I think there's a misconception on my friend's part in terms of how she characterizes the government's submission. The government is not submitting that military judges salary should be linked, or compared even, to the salaries of legal officers in the Canadian Forces. That's not our submission. The reason we make reference to legal officers in the Canadian Forces is because it's part of one of the criteria that this committee is required to examine, which is the pool from which military judges are drawn. So that's the reason that we make reference to legal officers in the Canadian Forces. It's not because we say there should be any benchmarking or linking or tying of military judges to those persons' salaries. The fact is, and I'll take you there when I get to my submission on
that mandatory criteria, the fact is that the vast majority of legal officers who are eligible for appointment as a military judge currently are remunerated at a level that is lower than military judges and our submission on that point is, that then means that the current salaries of military judges are not an impediment to the attraction of outstanding military officers to the judiciary. That's one of the factors that the regulations require this committee to consider. So that's just one point of clarification with respect to the point that my friend made. Then the other point that I wanted to make is, the paragraph that I referred you to in PEI Judges I think there's a distinction that can be drawn between measures affecting the public purse generally in times of budget deficit, in times of recession, which is in my submission what the Supreme Court was referring to here, versus comparisons to other individuals paid from the public purse generally, which is what my friend is urging you to consider. So the reason I take you to this paragraph in PEI Judges isn't to say you have to consider all persons paid from the public purse or the treatment that everyone paid from the public purse is receiving. The reason I take you here is to simply show that in times of economic recession
when the belt is being tightened, it is
constitutionally justifiable for the government to
insist that judges also accept their share of the
burden of those economic conditions.

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

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

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

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

Then the last point I wanted to make with
reference to PEI Judges is, as I mentioned, the
reasonable person test and I would link to that the
need for objective evidence. I'm going to go
backwards in the decision but I'd like to take you to
page 47, paragraph 113, which is where the court
discussed this concept of the reasonable person, which
should bear on your analysis of the issues before you
today. Perhaps what I'll do is simply draw your
attention to paragraph 113 and summarize it for you
very quickly. The court here determined that a
reasonable person essentially is someone who has been
informed of the relevant statutory provisions, their
historical background and the traditions surrounding
them, and the question is: After viewing the matter
from their perspective, what would they conclude?
Would they believe that the military judiciary is
independent in light of the current level of
remuneration that they're receiving and in light of
the government's proposed annual adjustments going
forward?

One more reference and then we will be done
with PEI Judges, at least substantively. Page 60,
paragraph 173, and I draw your attention to this
paragraph -- it goes without saying that one of the
criteria that the Supreme Court of Canada stated was
important in terms of the jobs of judicial salary
commissions was that it must be objective, they must
make recommendations on judges remuneration by
reference to objective criteria, and I pause for a
moment to emphasize that. The government's submission
is that the evidence that the government has provided
provides you with that objective criteria that's
necessary in order to assess the adequacy of the
current remuneration of judicial salaries. We've
presented objective evidence with respect to not only
the economic conditions but also a substantial degree
of objective evidence with respect to the ability of
the current salary -- excuse me, with respect to
whether the current salary is an impediment to
recruiting outstanding candidates to the judiciary,
and I would submit that, in contrast, we have not seen
from the military judges the objective evidence that
is of assistance to you in undertaking your role.

I mentioned that my plan was to turn next to
the present and then the future of military judicial
salaries. I'd like to start then by talking about the
history of their salaries and where we are now, and I
think it would be useful for you to have by way of
reference annex 1 of the Government of Canada's
submissions. At page two of that annex we have set
out for your convenience a table which demonstrates
what the salaries of military judges have been from
1999 to present, and you can see how they have
developed over time. As we note in our submissions,
between 2006 and April 1, 2012 military judges
salaries have seen a 16 percent increase. And I take
my friend's point -- this was a point that she raised
in her reply -- that the percentage increase over those years does not tell the whole picture, that you can always look at statistics from another angle, and her perspective on those statistics and the value thereof is a little different than the one the Government of Canada is advancing but the reason that we have highlighted the percentage increase over those years between 2006 and 2012 is to demonstrate simply that military judicial salaries have grown more than the salaries of others paid from the public purse, including other officers in the Canadian Forces. On that point I'll simply refer you to a table in the Government of Canada's opening submissions on page 11. That table demonstrates that others during the same period saw a more modest 10 percent increase. The government of course acknowledges that it did not implement the recommendations of the last committee which examined military judicial salaries and my friends have criticized the government for the delay in responding to the committee report. In dealing with that issue I simply wanted to note that the rationale which was inherent in the government's response, and which was clear on the face of the government's response to the committee's report, was of course the significant downturn in the Canadian
economy that happened in between the time that the
committee heard and deliberated on the issue of
military judicial salaries and the date that the
commitee issued its report.

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

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

MS. GLUBE: Okay.

MS. LAWRENCE: And in view of the very
significant changes to one of the criteria that the
committee was mandated to require and one of the
criteria upon which the committee based its ultimate
recommendation, that was the basis upon which the
Government of Canada justified its response. I would
note that during the same period of time the
government was also responding to the recommendations
of the Block Commission, the judicial compensation
committee report, as well as to the report of the
Special Advisor on Federal Court Prothonotaries, and
obviously in view of the changing economic
situation -- in view of the changed economic situation
there was -- it was important that some consistency be
achieved across those three different groups.

I want to address -- Justice Bastarache,
getting back to your point about the starting point,
which is linked to my friend's submissions. Her
submission was that the starting point should not be
the current salaries of military judges, if you're
going to look at a starting point the starting point
you should consider is the last committee's
recommendation, and she drew your attention to some
passages from the Bodner decision in support of that
proposition. I'd like to take you there now because
there is an important qualification in both of those
passages that I think needs to be highlighted. The
Bodner decision is at tab 8 of the joint book of
authorities and I'll take you -- I'm taking you to
paragraphs 14 and 15. Before I take you to those
paragraphs I simply would point out that the
Government of Canada does not take issue with the
military judges submission that past committee reports
provide a useful context to your deliberations. What
we take issue with is that this committee as a
starting point should start from where those
recommendations left off. In paragraph 14 the court
date of a subsequent committee may well be the
previous committee's decision, but I think it's
important to look at that last sentence because in the
last sentence of that paragraph 14 the court said:

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

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

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

The reason I highlight these portions is because the
clause that I think is very important is "in the
absence of demonstrated change". When the last
committee deliberated it had objective evidence of the
four criteria that was very different from the
objective evidence that is before you today,
especially with respect to the first mandatory
criteria, and that is why, in the government's
respectful submission, you can't start -- you can't
take as a starting point the last committee's
recommendation because the evidence today in my submission objectively demonstrates that the economic situation is entirely different.

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

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

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

MS. LAWRENCE: Yes.

MS. GLUBE: Which one is it, 25?

MS. LAWRENCE: Tab 25. What this table does is set out in real numbers the difference between the government's submission and the military judges' submission both in terms of a percentage annual projected increase going forward and in terms of real, actual salary dollars. So on the point that I was just making with respect to the indexation and future year adjustment to account for this year's indexation, I'd simply ask you to look at the bottom row of the first part of the table where it says "increase". Then if you look at the 01 April 12 column, which is the current salary of military judges set at $200,226 -- sorry $226,000 -- for the chief military judge and $220,000 for the other military judges, you'll see that below that there's a 2.5 percent increase
calculated in there. That is the IAI number which has
already been applied to that judicial salary. Then if
you look at 01 April 13 the percentage increase
reflected in the bottom of that column is 0.5 percent
and that number is reduced to take account of the fact
that the military judges have received 2.5 percent
this year. I note that the military judges
characterized this proposal as "astonishing" in their
submissions but I would simply point out that this
does not constitute in any way a retroactive salary
adjustment. It's simply a salary correction flowing
from the over-adjustment provided on April 1st, if you
were to accept the government's proposal going
forward, and I would note that the capping of the IAI
at 1.5 percent as proposed by the government is a
temporary measure for the quadrennial period. This is
not what will necessarily be applied. It's not
necessarily the position that the government will
advocate for all time. It will be reviewed by this
committee in four years time.

In addition to the salary component of the
government's proposal, as you know the other component
is that the government proposes that military judges
cease accumulating severance pay in accordance with
article 204 of the QR&O and this position on severance
benefits reflects the approach taken in the Public
Service and with military personnel in the Canadian
Forces. This decision to make this proposal was taken
very recently, the decision to eliminate the accrual
of severance for military judges, and I know my friend
has criticized us for raising this on short notice.
However, from the government's perspective the timing
could actually not have been more ideal because being
able to be here before you today and make this
proposal and provide the military judges an
opportunity to respond is exactly the way this
committee is intended to operate, and the fact that we
were able to fold it into this existing process I
think is a benefit to both parties. In my submission
the issue of severance pay is not a complex issue that
requires actuarial evidence. I acknowledge that my
friend has put forward the report of Mr. Sauvé
speaking to the valuation of severance for military
judges to support her argument that the government's
proposal of compensation of 0.25 percent, plus further
compensation in future years provided that others paid
from the public purse also receive that compensation,
is inadequate in her view. The government position
that military judges should receive 0.25 percent for
the first year that the changes to severance pay take
effect is based on a principled approach and it's consistent with the other arguments that I'm making before you here today. It affords the judiciary a similar treatment, a treatment that is similar not only to the members of the pool from which they are drawn but also to the treatment that other Canadian Forces members will receive.

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

M. LAWRENCE: Let me clarify. Any public servant who has had their severance pay -- and again I need to, with respect, clarify this so that you understand. We're not talking about cancelling severance or removing severance. We're talking about ceasing the accumulation of severance pay, which means that any severance pay that a member -- that a military judge has accumulated to this point vests. They are still entitled to that severance pay. So the one week of pay per year that they've accumulated to this point doesn't disappear. All that they are losing is the ability to continue to accumulate
severance pay between now and the date that they retire or otherwise leave the military judiciary. So that's an important factor to bear in mind. The military judges, should you accept this recommendation, I expect would be offered the same options as other -- as federal public servants have been offered, other members of the Canadian Forces have been offered, which is a three-fold option upon the cessation of the accumulation of severance. One is an immediate payout of the accumulated severance to date. The second option is a partial payout. "I'll take half of the severance, a quarter of the severance today". The third option is to defer collection of severance until retirement or a different form of departure from the federal Public Service. So those are the options. I just wanted to make that point so that you understand we're not talking about taking 20 or 30 years worth of severance back from the military judges. All we're proposing is that they will cease accumulating that severance going forward and that's exactly the same measure that public servants have been subject to.

Now with respect to your point, Justice Bastarache, about the 0.75 percent. That number comes from a combination of the 0.25 percent in the first
year and the 0.5 percent in a subsequent year, that
has been negotiated with sections of the Public
Service. So there are portions of the federal Public
Service who will be entitled to a 0.25 percent amount
as compensation in the first year and they will
additionally receive 0.5 in a subsequent year. Our
submission is not that the military judges shouldn't
also get that 0.5. What we've said in our submissions
is that the question of whether they will should be
tied to Governor in Council appointees, senior
executives of the federal Public Service, and senior
officers in the Canadian Forces, none of whom have
been told yet by Treasury Board whether they will get
that 0.5 percent. So they know they're getting 0.25
percent in the first year, but no decision has been
made with respect to the 0.5 percent. Our submission
is that if the Government of Canada ultimately decides
that those three groups -- Governor in Council
appointees, senior Canadian Forces members, senior
executives of the Canadian Service -- are entitled to
0.5, then that same amount would be accorded to the
military judges as well. So there's a contingency
there.

MR. BASTARACHE: Well, isn't it a fact then
that there is no special process for determining
what's adequate for judges if what's adequate is what
is adequate for the rest of the service?

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

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

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

MR. STERLING: Something else?
MS. LAWRENCE: There may be something else, conditional on treatment granted to those three groups I mentioned earlier. They would be one-time adjustments to the salaries.

MR. STERLING: And the third and fourth year?

MS. LAWRENCE: There would not be adjustments in subsequent years. I did want to make one comment with respect to the report that Mr. Sauvé has submitted on this issue and that's with respect to whether it's even appropriate to try to value the loss of the accumulation of severance based on the personal circumstances of the four judges who are currently military judges. One of the dangers with that of course, and Mr. Sauvé acknowledges this in his report, is that at least one of the current military judges has already ceased accumulating severance pay. So if he's entitled to a 0.25 percent increase he's getting a bonus because he's not accumulating severance anyway. So that's one factor. Then the value to the individual judges of the loss of the accumulation of severance is largely dependent on the length of time, the age of retirement, all of those factors. What we should be looking at is coming up with a compensation that's adequate for all military judges, not for the particular military judges that are sitting on the
bench today. The other point that I think is important to bear in mind and that is another justification for the proposal that the government is making, is that since CF members have now ceased accumulating severance pay what happens if military judges continue to accrue severance pay? What happens when a member of the Canadian Forces is appointed to the bench? They will have already ceased accumulating their severance pay. So you can end up with a discrepancy amongst members of the military judiciary, some of whom are still accumulating severance if you don't accept the government's proposal and others who are coming in who have already lost their severance pay potentially years earlier. So that would result in an inequality or inefficiency in terms of how severance pay is administered for the military judiciary.

The last comment I'll make on severance is just to correct a comment made by my friend. My friend had said that it was unfair to apply this proviso, this contingency of the possible 2.5 percent in the future if members of the Canadian Forces, GIC appointees, et cetera, are ultimately accorded that down the road. One of the things that she said was that was unfair because those individuals have an
opportunity to negotiate that amount. That's not in fact the case, because those three groups that I referred you to -- GIC appointees, senior officers in the CF, senior executives with the federal Public Service -- do not have any bargaining rights. Their salaries and any cessation of the accumulation of severance that they are subject to is dictated to them by Treasury Board.

I'd like to turn now, if I may, to the four factors which are, as you know, first of all the prevailing economic conditions in Canada including the cost of living and the overall economic and current financial position of the federal government, two, the role of financial security of military judges in ensuring judicial independence, three, the need to attract outstanding officers as military judges, and, finally, any other objective criteria the committee considers relevant. Dealing first then with the prevailing economic conditions in Canada. As I noted in responding to your questions, Justice Bastarache, I'd like to reiterate that the issue is not whether the Government of Canada can afford to pay military judges a higher salary. That's not in doubt, given that there are only four of them. The first criteria to be considered is not the financial consequences on
the public purse of a salary increase. The committee is mandated to consider what an adequate salary looks like in view of the prevailing economic conditions in Canada. In my submission the best way to approach this is to take the objective evidence of the prevailing economic conditions and ask yourselves: In light of those conditions would a reasonable person consider the current levels of remuneration, with the proposed annual adjustments, adequate? If the answer is yes, and the Government of Canada says it is, this factor militates in favour of recommending the Government of Canada's proposal. I would note that in looking at what the objective evidence says, the Tellier Commission -- which report was issued recently with respect to judicial compensation of federally appointed judges -- considered the identical criteria, the economic conditions, in relation to the remuneration of the federal judiciary and it accepted the government evidence regarding the prevailing economic conditions in that report. I'll simply refer you to pages 19 to 20 of that report in support of that point. The evidence that was presented to that commission recently was very similar to the evidence that you have before you. In addition, however, you have before you two additional important pieces of
evidence. One of them is the updated analysis of

Benoit Robidoux from the Department of Finance. I

won't take you there, but it's at annex 9 of the
government's submissions. As well, Budget 2012.

Neither of these two pieces of evidence were before
the Tellier Commission. They post-date it. Both of
these documents speak for themselves. I don't intend
to take you through them. Contrary to my friend's
submissions I would not characterize either of these
documents as gloomy or pessimistic. Rather, they both
provide a realistic and quite measured assessment of
today's economic outlook and since this is one of the
factors the committee is mandated to consider, it's
not a reality in my submission that can be swept under
the carpet or dismissed. The current economy is a
factor in determining adequacy of the remuneration of
military judges and right now the picture is not so
rosy. That's just the reality of the way things are.

If you're persuaded by the military judges' submission
in their opening written submissions that you should
consider more objective evidence, I would invite you
to look at the excerpts from the April 2012 World
Economic Outlook prepared by the International
Monetary Fund, which is in the Government of Canada's
annex number 10 and I've provided you with an updated
copy of that annex earlier. The International Monetary Fund predicts that Canada will fare only modestly better than other advanced economies in terms of gross domestic product growth in 2012 and 2013. There's no disputing and I didn't hear my friend dispute that the Canadian economy remains fragile and its future remains uncertain due to the global economic situation. There's also no disputing the evidence that's before you that the recession has taken a significant toll on the financial position of the Government of Canada and I would note that criteria number one speaks to the economic situation of the Government of Canada, the financial position of the Government of Canada. The economy is still suffering from the effects of the recession. The Government of Canada is in a period of restraint in order to deal with the impact that the recession had on the federal purse. To reduce the deficit the government has cut departmental spending and is eliminating more than 19,000 federal jobs over the next three years. The government has negotiated modest wage increases with public sector unions between now and 2014 of 1.5 percent and they're providing that same level of increase to executives and deputy ministers. Some people -- members of
Parliament, deputy ministers -- have had their
salaries frozen. The current economic reality is very
different than it was in 2008 when the last committee
reported and what the committee recommended as
adequate in 2008 is not, in the government's
submission, what an adequate salary looks like in
today's prevailing economic situation. The
government's submission is that the consideration of
the first mandatory factor militates in favour of
restraint in awarding new salary increases.

The second criteria that this committee must
consider is the role of financial security of military
judges in ensuring judicial independence. I don't
have a lot to say on this point. I don't think my
friend takes issue -- I don't think that we're at odds
on this particular issue. There is a clear link
between financial security and judicial independence.
In my submission the government proposal is reflective
of and upholds the role of financial security in
ensuring independence. On the other hand, my friend's
proposal of a significant salary increase actually
risks undermining the public perception of
independence instead of enhancing it. Again looking
at this from the reasonable person's perspective,
would a reasonable person in today's economic climate
think that giving military judges a significant
increase, a 31 percent increase, is appropriate?
Would they see that as necessary in order to ensure
their judicial independence in light of the treatment
that others are receiving, in light of the current
economic restraint that being demonstrated by the
Government of Canada?

The next factor is the need to attract
outstanding officers as military judges. The
government's submission is that the current salaries
of military judges are not an impediment or a
disincentive to highly qualified, highly desirable,
outstanding officers in terms of their willingness or
inclination to apply for appointment as military
judges. The pool of candidates, contrary to my
friend's submission, is much narrower in the situation
of military judges than it is for the federal
judiciary. The fact is -- and this is not something
that you can just gloss over. It's one of the
critical, important criteria for the appointment of an
individual to the military judgeship. They must be an
officer in the Canadian Forces and they must have at
least 10 years standing at the bar of a province. The
military judges downplay the requirement that the
individual be an officer in the Canadian Forces but
that's an important -- it's a critically important distinction. It's a distinction that makes military judges, and in particular the pool from whence they are drawn, entirely different from the pool of the federal judiciary. I ask you, if you could, to take a look at annex 3 of the government's submissions. It's volume one. Just by way of brief explanation of what these two tables represent, the first table at this tab includes statistics on the number of Canadian Forces legal officers eligible for appointment as a military judge as of the 31st of December 2011 and the next page includes statistics on those eligible for appointment as of April 1, 2012. The reason that both of those are in there is because you'll see further on in our annexes that we have received information from the Office of the Federal Commissioner for Judicial Affairs who provided statistical information on selection processes for the military judgeship and the last one took place in 2011. So in order to provide you with an idea of what the pool looked like in 2011 we included information on that as well. I'm going to focus in my submissions, however, on the April 2012 data, which is the second page here. According to these statistics the best data that we have on the size of the pool for eligibility to the military
judiciary is that it is limited to 139 officers, 100 regular force and 39 Reserve force. We also know, and we raise this in our submissions, that the vast majority of the people, the individuals in this pool, earn less -- are presently earning less than military judges.

I'd like to address my friend's argument and her suggestion that you have to also consider other non-legal officer members of the Canadian Forces and in doing that I'll ask you to take out the handout that you received earlier today which includes the Canadian Forces best available information about other Canadian Forces non-legal officers potentially eligible for appointment as a military judge. My friend has queried the reliability of this data. It is not complete. There are some caveats included in this table, as you can see. One of the caveats is that this information depends on non-legal officers reporting in the Human Resources system that they possess law degrees. So it may well be that there are individuals out there who possess law degrees who didn't report that as a fact and they have not been captured in these numbers, but the most important caveat to bear in mind with respect to this data is that this data does not tell us a lot of things. This
data doesn't tell us whether any of these individuals were ever called to the bar. This data doesn't tell us whether if they were called to the bar they've maintained active membership in that bar for the last 10 years. This data doesn't tell us what the salaries of any of these individuals presently are. This data doesn't tell us where these individuals, and I'm talking specifically with respect to the Reserve force members, the data does not tell us where these Reserve force members are employed, whether they're employed in private practice, whether they're employed in government, and as I said earlier it doesn't tell us where they fall on that pay scale to which Mr. Sauvé referred at length in his presentation. We have no information about that.

MR. BASTARACHE: It seems to me that you're almost arguing that these people are sort of captives and their only recourse is to apply for a position of a judgeship with the lowest possible salary because the pool is limited. It seems to me that it's a strange way of determining that. If you consider the salary of federally appointed judges do you really think that if it was, say, $25,000 less that you would have insufficient members applying for judgeships? I don't think so. I doubt it very much, especially in
provinces where the salaries, the average salary of practitioners is not great, it's often less than that of judges. You're putting tremendous importance on the pool itself and it seems to me that -- it's almost suggesting, you know, what's adequate is what I can impose because the pool is so small.

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

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

MS. LAWRENCE: It's an indicia--

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

MS. LAWRENCE: This committee is guided, in terms of its assessment of what an adequate salary is,
by those four factors and one of those factors -- one
of those factors which is an indicia that a salary is
adequate is if the salary does not prevent the
recruitment of outstanding new officers and that's --
the objective evidence is--

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

MS. LAWRENCE: There are four factors and
obviously at the end of the day it's up to this
committee to give the weight that it deems appropriate
to each of those four factors. The government's
submission is that this is an important factor for
this committee to take into consideration especially
since this is one of the factors that distinguishes
military judges significantly, in a critical way, from
the federal judiciary, because the pool from which
potential appointees to the federal judiciary are
drawn is vastly different, the salary levels of the
members of the pool are largely higher, and one of the
factors that was taken into account by years of
judicial compensation commissions in establishing whether the salaries of the federal judiciary were adequate was whether the salary was set at a level that was high enough to encourage and recruit the best possible candidates. So that's one reason why there's a gap between the salaries of military judges and the salaries of federal judges, because the salary needs to be higher for the federal judiciary than it does for the military judiciary. On its face that may appear unfair. I know the judges think it's unfair for that gap to exist and I'm sensing that there's a hesitation on the part of the committee in seeing that that can be fair, but the fact is that we're not constitutionally mandated to examine fairness from the judges' perspective.

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

MS. LAWRENCE: Other factors. Other objective evidence though, that's the issue, and fairness is such a subjective criteria. Even looking at the salaries of other persons and saying what is the value of this job versus this job, ultimately comes down to a subjective determination. It's not based on objective evidence and the Supreme Court of Canada has said in looking at the adequacy of the remuneration of
judges it's the objective criteria that are important. So if the government is emphasizing the pool in a manner that you may ultimately not ascribe the same weight to, the reason, the rationale behind us doing that is because it's objective evidence. There's not a lot of objective evidence that you can put forward that goes to the adequacy of a specific salary but the pool of candidates is one and this evidence that we have speaks unequivocally, I would submit, to the fact that in terms of the pool and in terms of the necessity of recruiting outstanding officers to the military judiciary the current level of remuneration is adequate.

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

MS. GLUBE: While in the Service?

MR. STERLING: While in the Service.

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

MR. STERLING: A person in the Service working
in the Judge Advocate General's office as a prosecutor, have any of them applied to become a judge--

MS. GLUBE: A Superior Court judge?

MR. STERLING: A Superior Court judge.

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

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

MS. GLUBE: Yes.

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

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

MR. STERLING: Or the civilian courts?

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

MS. GLUBE: Yes, within their own province.

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

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

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

MR. BASTARACHE: You're making it relevant.

MS. LAWRENCE: I'd like to move on now to just make a few points about Mr. Sauvé's report and specifically respond to the military judges' submission that the pool includes all lawyers in
private practice. I'm not actually sure what to make of his presentation today because there is no provision in the Rules of Procedure for this committee to hear expert evidence. I know my friend said that he is an objective expert. However I would note that he was retained by the military judges, there was no consultation with the Government of Canada in that respect, and no notice was provided to the Government of Canada. That being said, we're not asking you today for an opportunity to reply to that with actuarial evidence of our own. The government doesn't think it's necessary in the circumstances and I say that because in our submission Mr. Sauvé's report is of limited assistance to this committee in any event because the pool that he examines -- lawyers in private practice -- is not the pool that's relevant to the appointment to the military judiciary. The pool is much narrower and in my submission the data that relates to the wider and unrepresentative pool is not helpful to your deliberations. Although Mr. Sauvé's report may well have been relevant in the context of inquiries into the remuneration of federal judges, by virtue of the unique nature of the pool that's at issue here his report is simply not relevant in my submission. I don't intend today to make substantive
submissions in response to Mr. Sauvé's presentation. I'm not an actuarial expert. I don't have a degree in accounting and I'm not only not qualified to do so, I think I would be doing you a disservice if I were to attempt to provide that information. I'd simply say that if this committee does determine that it intends to rely on Mr. Sauvé's report and that there's some utility in looking at that information, I'd simply ask that the government be given a fair opportunity to provide the information -- information that it has available that could be of assistance.

Before I move on to the next point I want to address one more issue in respect of the recruitment of qualified and outstanding officers to the military judgeship. This ties into the point I made earlier about the fact that the current salaries are not in fact a disincentive to outstanding officers applying, and that's readily apparent if you look at the data from the Office of the Federal Commissioner for Judicial Affairs which is at annex 18. So I'm actually going to make things very complicated here and ask you to not only have open tab 18 -- this is the drawback of not using PowerPoint -- tab 18 as well as the Government of Canada's written opening submissions at page 23. As is always the case with
statistics, they don't mean anything until you actually analyze them. Page 23 of the government's opening submissions. You'll see a table in the middle of page 23. What this table illustrates, in my submission quite effectively, is that if you look at military judiciary 2011 -- which is the second row -- the eligible pool in 2011 was 127 individuals. The Office of the Federal Commissioner for Judicial Affairs tells us that there were 11 applicants in that year and that represents 8.7 percent of the eligible pool. Now my friend is going to say in reply that this doesn't take into account the non-legal officers out there, and this is true, but my submission on that point is that we simply don't have the data available that would allow you to draw any inferences about how many more people there are in the potential pool. What we do however have is statistics, objective evidence which allows you to say that there are 127 legal officers currently eligible for appointment. How many others there may be out there, we don't know. In my submission that question mark over what else is out there means that it's not something you can take into account in your deliberations because it's simply not reliable, objective evidence. Of the 11 applicants nine were recommended, which represents 82
percent of the applicants or 7.1 percent of the pool. If you contrast this with applications to the federal judiciary between 2007 and 2011 the eligible pool was approximately 50,000. On average they received 2,109 applications. Four point two percent of the eligible pool applied for the federal judiciary, versus 8.7 of the pool that applied for the military judiciary in 2011. So in our submission the rates of application in at least the--

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

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

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

MS. GLUBE: They're not all eligible.

MR. BASTARACHE: They're not all eligible.

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

MS. GLUBE: It says 108,000.

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

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

MS. LAWRENCE: So these are all practising lawyers called to the bar for a minimum of 10 years, which make up the pool of 50,000. So in our submission these statistics demonstrate that the rates of application in the 2011 selection process for military judges compare favourably to the historic rates of application for federal judicial appointments. My friend submitted in her written submissions that this data actually suggests that Reserve force officers aren't applying in numbers that would be expected. My submission is that there's no basis to that submission. The stats not only don't support that, but, as we noted -- as the Government of Canada noted in its reply there are factors other than remuneration which may well explain why Reserve force officers are not attracted to military judgeship. One, for instance, is the fact that military judges are located in Ottawa and there may be a reluctance for members of the Reserve force who are located in other areas to relocate to Ottawa. The second is that it's safe to assume, or we certainly can assume, that at least a component of members who are part of the Reserve force have made a deliberate choice to remain
members of the Reserve force rather than become full
regular force members of the Canadian Forces and in
being appointed to the military judiciary a Reserve
force officer would be giving up that civilian
lifestyle and taking on a role as a full member of the
Canadian Forces. So even if the stats did suggest
that Reserve force officers weren't applying, those
statistics can be explained by factors other than
salary.

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

MS. LAWRENCE: I am.

MS. GLUBE: I think we'll take a short break.

Thank you. Fifteen minutes. Thank you.

(SHORT RECESS)

MS. GLUBE: Thank you. Be seated.

MS. LAWRENCE: I was nearing the end in my
plan, certainly the end of the four factors. So the
last factor, as you know, is any other objective
criteria that the committee considers relevant. The
military judges' submission is that this, from what I
understand of their submissions at the very least, is
that this is really the factor that should play at the
forefront of your minds as you deliberate on the
question of the remuneration of military judges. From
the military judges' submission the fact that others
in different situations than them make more money than
they do is the prime factor that you need to look at
in determining what an adequate salary for their
particular unique circumstances should be. Although
they're not this time putting forward a single
comparator I think it is clear from the thrust of the
military judges' submission that the one comparator
that they are focusing on in particular -- it was
certainly the one that they have alluded to the most
throughout their written submissions as well as my
friend's submissions today -- is of course the federal
judiciary. The government's submission is that
benchmarking -- which at the end of the day, as
disguised as you can make it, is effectively what the
military judges are asking for -- benchmarking to the
salaries of the federal judiciary, in the Government
of Canada's submission, is not appropriate. The role
of this committee is to examine the unique
circumstances and the evidence relating to the
mandatory factors in the context of military judges
and, as I've already noted in my submissions, there
are factors explaining why federal judicial salaries
are set at a higher level and those factors are simply
not applicable in the context of military judges. For
example the pool is larger, the salary level of the potential candidates in that pool is different, and that is not the case here where most of the current pool currently earns less than military judges. As I've said, the Government of Canada's position is that benchmarking as an approach to the determination of the adequacy of remuneration is simply not an appropriate approach and in fact it's contrary to the committee's purpose, and I'd like, if I could, to take you to two differences in support of that proposition. I'll start, if I could, with the decision of the Court of Appeal of New Brunswick in the Provincial Court Judges Association challenge and it is at tab 16 of the joint book of authorities, page 77, paragraph 156. The Court of Appeal says here:

"I recognize the 2001 commission did not fix the salary of New Brunswick's provincial court judges as a percentage of the federal salary". So it did not benchmark provincial court judges to federal salaries. Then the court goes on to say:

"Had it done so then, arguably, future provincial commissions would have no role in fixing judicial salaries. Attention would inevitably focus on the salary recommendation of federal commissions to the exclusion of the
framework set out in the Provincial Court Act".

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

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

"The previous committee's determination that the salary of military judges should not be tied directly to the average of provincial court judges was not an appropriate approach to or method for the determination of adequate
compensation for military judges”.

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

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

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

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

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

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

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

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

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

MS. GLUBE:  Yes.

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

MS. GLUBE:  Yes.

MS. LAWRENCE:  She ultimately did, but those
amounts that -- the amounts that were ultimately
determined by the committee were not amounts that were
on equal footing with the salaries of federal judges.
So she makes those comments about the role but at the
end of the day the committee's recommendation was not
that they be paid the equivalent amount as federal
judges.

So, as I've said, the principle comparator
that my friend alluded to was the federal judiciary.
However, she also asked you to take notice of or to
consider other individuals paid from the public purse,
including individuals paid at the DM-3, 4 level and in
fact other DM levels as well, the Judge Advocate
General, the Chief of the Defence Staff and other
specialists in the Canadian Forces. Again I had
mentioned this earlier in my submissions, the
Government of Canada of course acknowledges that these
individuals and certainly others paid from the public
purse may well be and in fact are remunerated at a
level higher than military judges, however that fact
can be explained by factors that are not at issue
here. The Treasury Board can set the salaries of
these individuals based on its own set of criteria and
at the end of the day the public interest and the
independence of these positions is not one of the
criteria that Treasury Board is required to take into
consideration, and that is in sharp contrast with the
factors that are required to be taken into account
here. Military judges salaries, the adequacy of those
salaries, is dictated by the public interest and
that's why, in the government's submission, reliance
on or reference to those other comparators in this
particular context is not useful and is not helpful in
terms of this committee's work.

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

MS. LAWRENCE: I agree that it's the case.
There's no disputing the fact. It's fact and it
certainly is the same as federally appointed judges.
The explanation for that would be an assumption on my
part. I'm certainly not going to make any assumptions
before you, but again my submission there would be
that the salary for the Judge Advocate General is set
by virtue of criteria that are not applicable to
military judges. Whether it's based on the particular
roles and responsibilities of that individual, whether
it's linked to the need to be able to recruit
individuals to that particular position, whether it's
linked to the market, those are factors that are not present today and Treasury Board is not required, in determining what salary it's going to set for the Judge Advocate General, to take into account judicial independence. So those four criteria that are before you for consideration are not part of what must be considered in determining and setting the salaries of these other individuals.

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

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

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

MS. LAWRENCE: No, no-judges.

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

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

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

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

MR. STERLING: I had misunderstood. Sorry.

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

Those are my submissions on the four factors. The rest of my submissions are by way of conclusion and response to my friend's submissions. I have a very, very short -- only a few more moments. So I wanted to respond to my friend's comment with respect to the 3.0 percent additional salary for the chief justice. The government has said in its reply that we have no objection to that, obviously. So we're ad idem on that issue. With respect to the costs of representation before this committee, I wanted to note -- and you have this in the materials. Joint book of authorities, tab 4 is Bill C-15 which has not yet received royal assent and although we can't predict with any certainty when it will in fact receive royal assent, we're not expecting that it will be too far in the future. If you look at page 24, it's section 165.36. You'll note that Bill C-15 makes specific provision for a mechanism which would ensure
compensation for the representation costs of military judges appearing before future committees. Whether you still deem it necessary to include a comment in your recommendations with respect to this being laudable obviously is within your discretion, but in my submission it should give you a certain degree of comfort to know that the Government of Canada already intends to do that, as evidenced by the fact that it's been included in Bill C-15.

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

MS. LAWRENCE: It's 165.38.

MS. GLUBE: Thank you.

MS. LAWRENCE: It says:

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

In closing I'd just like to say a few words specifically with respect to the military judges' submission. As you heard today, the entire focus or certainly the main thrust of the focus of the military
judges' presentation to you today was based on the argument that others are receiving a higher salary and this alone, or this in concert with other factors, certainly justifies a salary increase. In the government's submission this does not accord with the fundamental mandate of the committee, which is required to address all of the four factors in assessing the adequacy of compensation. The fact that others receive higher remuneration may well be a factor that will play into your deliberations but it cannot be the sole and determinative factor. You must give weight to the other criteria, especially in view of the fact that the government has presented objective evidence in respect of those factors. The government submits that when all of those four factors are considered properly along with that objective evidence, the government proposal -- the current salary is adequate and that the government's proposal to adjust annually that salary going forward is also adequate. All of this is respectfully submitted.

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

REPLY BY MS. CHATELAIN

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

And I'm going to go backwards in my comments. With respect to Madam Justice L'Heureux-Dubé's comments in the 2008 report, you're quite right, Mr. Sterling, she was dissent in 2004 but not in 2008. In fact in the 2008 report, which is at tab 5 of the annexes of the government -- which I think you might still have in front of you -- it is worth noting that
her comments, which begin at page 15, are introduced
in the following manner. She states -- and it's an
addenda. It's not when I read her comments. She
states:

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

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

"Madam L'Heureux-Dubé has kindly given me the
opportunity to read her addendum. During our
review of military judges compensation it
appeared to me that there are anomalies in the
salaries of federal judicial appointees which
may or may not be logical. I agree with Madam
L'Heureux-Dubé that the role of the
quadrennial committee appointed pursuant to
the Judges Act".

So the Levitt Commission, for this period.
"Should be expected to review the compensation
of all federally appointed judges and judicial
officers".

So everybody was on line in that respect in the 2008
committee reports. Keeping our thoughts on the 2008
committee report, my colleague I submit tried to
distract I think from the vigour of my criticism with
respect to the late response of the government to the
2008 committee report. I think we have to look at the
dates correctly. The response of the government to
the 2008 was due -- according to the QR&Os, the
regulation -- was due six months following the receipt
of the report and thusly it was due, the response, at
the latest by March 29, 2009. However, it came only
on March 3rd, 2010. So that's more than a year or
almost a year past the delay. My colleague justified
that by saying that the government was analyzing the
economic situation at the time and the downfall of the
2008 situation and was also examining its response to
the Block Commission. However, the government's
response to the Block Commission was issued and made
public on February 11th, 2009. So the government
waited one additional year before it responded to the military judges compensation. The Block response was one year before. So there's no justification, in my humble view, to the delay that the government took. Again I don't want to dwell on this and belabour the point but respect for the process is respect for the individuals concerned by the process, and the individuals concerned by the process are not only the judges but the members of the public which have a right to have confidence in the independence of the judiciary.

This also brings me to the comment about what the reasonable person might think. I think again there's a misstep here where my colleague brings that criteria to the issue of whether a reasonable person will feel that the salary level of the judges is adequate. That's not what the Supreme Court of Canada intended when it referred to the reasonable person concept. The reasonable person was referred to to assess whether the process for determining judicial compensation was adequate, not whether the level of the salary was adequate. That's your job. That's your task. That's your burden, if I may add. But the reasonable person test is to assess whether the process in which we are engaged in passes the test,
and those are the words of the Supreme Court. I think the extracts are taken out of context. Because if judicial salary were fixed by a survey of what the people think I think $50,000 would be more than adequate considering that the average salary of the Canadian constituent, the tax payer, is $46,000. So that's not the test.

With respect to Mr. Sterling's question as to whether legal officers apply to positions at other courts, other civilian courts, of course we don't know who applies or who doesn't apply because those data are confidential. What we do know is who are the appointees and what we have -- this is the legal bulletin that Mr. Justice d'Auteuil referred to before. I have made copies. Unfortunately I only have four copies, but I could send it to you by email. I'll give it to Mr. Regimbald. In the JAG's bulletin what you will see -- I have highlighted the relevant portion -- is, in the past five years there's been four appointments of legal officers. What that means -- and that's what we know and that's what's been reported in the JAG's bulletin. Two of those were before superior courts, one in British Columbia and one in Ontario, and the two others were appointments to provincial courts across Canada. What
we also know, but this is anecdotal information, is that we have non-legal officers who are also appointed. I referred this morning to the recent appointment of Mr. Justice Goldstein to the Superior Court of Ontario. In Quebec there was the recent appointment of Louis Dionne to the provincial court, who was the former directeur des poursuites criminelles et pénales in Quebec. But we don't have accurate data with respect to non-legal officers who are appointed to the court, but what we have as information -- what that reveals to us is that the military justice is in competition with civilian justice to attract the best candidates and I think that the military justice is deserving of those candidates who apply and are appointed at the other courts, at the other civilian courts, and that goes back to our submissions that the compensation for military judges should be such that it is not a deterrent for those excellent candidates to also be interested in a military justice appointment.

MR. STERLING: Could I ask another question which just came to mind after the previous exchange? And I didn't realize that there had been new military judges appointed recently. I'd like to know, since 2000 what's happened in terms of the complement and
how often it's turned over. Do you have any
information in that regard?

MS. CHATELAIN: I think the most recent
appointment was--

MR. d'AUTEUIL: It's Judge Perron and I.

That's in 2006.

MR. STERLING: In 2006?

MR. d'AUTEUIL: Yes.

MR. STERLING: What was the competition then
or the -- when you were--

MR. d'AUTEUIL: What they did, they announced
a competition to create a list, to update the list of
candidates, but there was no--

MR. STERLING: I misunderstood that.

MR. d'AUTEUIL: Yes, but they opened -- and
they just wanted to update the list, just in case
there's a military judge who retired or just retired
from the Canadian Forces, so they were in a position
to propose to the government a list -- or the Governor
in Council -- a list very quickly. That was the sole
purpose.

MR. STERLING: And there were two military
judges from 2000 to 2006 and then it was increased to
four?

MR. d'AUTEUIL: I would say not exactly.
There was four. It came back to three because one retired, and one other left, decided to retire too a bit later, between 2000 and 2006. The competition I applied was in 2005 and there was one -- one appointment considered at that time. Between 2005 and 2006 one judge retired. So it ended up to be two judges to be appointed. But usually it's four and it's a matter for the Governor in Council to appoint another one. So sometimes there's a process. It depends. So to avoid any issue, they created a list that they update.

MR. STERLING: Okay. Thank you very much.

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

MR. BASTARACHE: Who determines what the need is?

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

MS. CHATELAIN: My last point would be on the economic factor. I suppose it doesn't escape anyone's attention that the economic conditions in 2008 were more severe and I think it's undisputable that it was critical in 2008 and more severe than what we are seeing today, yet in 2008 the government was contented with applying the Industrial Aggregate Index and in 2012 until 2015 its proposition is to go below the Industrial Aggregate Index. This according to us is not based on any rational, factual, foundation. And last word, my colleague stated that the Levitt Commission accepted the government's position on economic conditions. I would invite the members of the committee to review paragraph 57 and 61 of the
Levitt Commission report where it is stated that the
state of economy as described by the government was
not sufficient and was no reason to adopt the
government's proposition with respect to judicial
compensation for those federally appointed judges, and
the submission of the government for those judges is
exactly -- exactly the same as it is here. So we're
taking the same -- the government is taking the same
approach, the same capping of the Industrial Aggregate
Index based on essentially the same economic
considerations, although updated since the hearings of
the Levitt Commission, and the Levitt Commission
rejected that position and that reading of the
economic context.

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

Thank you very much.

MS. GLUBE: Thank you. Do you have any
further questions?

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

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

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

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

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

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

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