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Chair

Mr. Art Hanger

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● (1535)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I call the Standing Committee on Justice and Human Rights to order.

On today's agenda is Bill C-17, An Act to amend the Judges Act and certain other Acts in relation to courts.

We have before the committee the Minister of Justice, the Honourable Vic Toews. Welcome to our committee, Minister.

I think you alone will be presenting at this point.

Hon. Vic Toews (Minister of Justice): I will in fact be presenting at this time, but I have my official, Ms. Bellis, here to provide the committee with background information. The bill is quite technical, and she has the appropriate expertise to enlighten the committee.

The Chair: Thank you. Welcome, Ms. Bellis.

You can proceed, then, Minister.

Hon. Vic Toews: Thank you.

Members of the committee, I have the honour of appearing before you today as you begin your consideration of Bill C-17. This important piece of legislation proposes to amend the Judges Act to implement the government's response to the report of the 2003 Judicial Compensation and Benefits Commission.

As committee members are well aware, the establishment of judicial compensation is governed by constitutional principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, section 100 of the Constitution Act requires that Parliament, and not the executive alone, establish judicial compensation and benefits following full and public consideration and debate.

In addition to the protections of section 100, the Supreme Court of Canada has established a constitutional requirement for an independent, objective, and effective commission that makes non-binding recommendations to government. The government must respond publicly within a reasonable period of time.

As the committee is also well aware, any rejection or modification of a commission recommendation must be publicly justified, based on a standard of rationality. I will say something about this standard in a few moments.

The 2003 Judicial Compensation and Benefits Commission, commonly referred to as the quadrennial commission, delivered its report on May 31, 2004. The former government responded in November 2004 and introduced Bill C-51 in May 2005. However, despite the requirement for the government to act expeditiously, Bill C-51 was never taken beyond introduction and first reading. It died on the order paper in November 2005.

Upon assuming office in February 2006, we made it a priority to review the commission recommendations in light of the constitutional principles and statutory criteria that govern the process. We made this a serious priority precisely because this government is fully committed to the important constitutional principles that govern the establishment of judicial compensation. We recognize that the integrity of this entire process is dependent in part on timely passage of implementing legislation.

The government is firmly of the view that we had a responsibility to take the time to consider the report and recommendations in light of the mandate and priorities upon which we had been elected. However, we did undertake our review as quickly as reasonably possible. This government provided its response to the commission report on May 29 of this year, followed almost immediately by the introduction of Bill C-17 on May 31. The bill was referred after first reading to this committee on June 20.

Mr. Chair and honourable members, I know that you appreciate the critical importance of completing the final stage of the 2003 quadrennial cycle through the passage of legislation. The credibility, indeed the legitimacy, of this constitutional process requires it, especially since the next quadrennial commission process is due to commence in less than one year. I would therefore like to commend and thank the committee for according this bill priority in order to complete this process in a timely way.

Turning to Bill C-17 itself, as you know, the government has accepted virtually all of the commission's recommendations. The key exception relates to the percentage of salary increase. Mr. Chairman, I know that committee members have read the government's response, which fully explains the rationale for the modification of the commission's salary recommendations. I therefore intend to just briefly summarize our thinking on this important issue.

Before doing so, however, I think it's important to speak to the standard of rationality against which any modification of the commission's recommendations by Parliament will be assessed. It is necessary to displace some of the misconceptions that are at play in this area, and in particular suggestions that respect for the constitutional judicial compensation process and for judicial independence, broadly speaking, can only be demonstrated through verbatim implementation of commission recommendations.

● (1540)

To ensure public confidence in the process, I think it is absolutely critical that we have a shared appreciation and understanding of the very balanced guidance that has been provided by the Supreme Court of Canada in the following key cases: the P.E.I. judges' reference case and the Bodner case. In both decisions, the court has quite rightly acknowledged that allocation of public resources belongs to legislatures and to governments. A careful reading of both cases clearly indicates that governments are fully entitled to reject and modify commission recommendations, provided that a public, rational justification is given that demonstrates overall respect for the commission process.

Mr. Chair, I say it here, as we did in the response: the government is confident that we have fully met this requirement. The effectiveness of the commission is not measured by whether all of its recommendations are implemented unchanged; it is measured by whether the commission process, its information gathering and analysis, and its report and recommendations played the central role in informing the ultimate determination of judicial compensation.

The commission's work and analysis have been critical in the government's deliberations. Our response respectfully acknowledges the commission's efforts and explains the government's position in relation to the two modifications to the commission's proposals. Our response also underscores that it will be for this committee to consider the commission report, and ideally, to also hear directly from the commissioners.

I congratulate you for having decided to do that today. It will be for parliamentarians, not the government, to decide which proposal to implement, be it that of the commission, the government, or indeed a third proposal entirely.

In justifying our proposed modification of the salary recommendations, as reflected in Bill C-17, we gave careful consideration to all of the criteria established by the Judges Act, and to two of these in particular: one, the prevailing economic conditions in Canada, including the cost of living and the overall economic and financial position of the federal government; and two, the need to attract outstanding candidates to the judiciary.

With respect to the first of these, we concluded that the commission did not pay sufficient heed to the need to balance judicial compensation proposals within the overall context of economic pressures, fiscal priorities, and competing demands on the public purse. In essence, the government ascribed a different weight than the commission to the importance of this criterion.

In terms of attracting outstanding candidates, we took issue with the weight that the commission placed on certain comparator fact groups against which the adequacy of judicial salaries should be assessed. The government recognizes that the task of establishing appropriate comparators for judges has been a perennial challenge for past commissions as well as parliamentarians, given the unique nature of judicial office. We acknowledge that the commission carefully and thoroughly considered a range of comparative information, including senior public servants, Governor in Council appointments, and private practice lawyers' incomes.

Our key concern was the fact that the commission appeared to accord disproportionate weight to incomes earned by self-employed lawyers, and in particular to those practitioners in Canada's eight largest urban centres. In addition, there was an apparent lack of emphasis given to the value of the judicial annuity.

As the response elaborates, the government believes the commission's salary recommendation of 10.8% overshoots the mark in defining the level of salary increase necessary to ensure outstanding candidates for the judiciary. The government is proposing a modified judicial salary proposal for puisne judges of $232,300, or 7.25%, effective April 1, 2004, with statutory indexing to continue April 1 in each of the following years, with proportionate adjustments for chief justices and justices of the Supreme Court of Canada.

● (1545)

The one other proposed modification relates to the commission's recommendation that the judiciary be entitled to increase the level of reimbursement for costs incurred through the judges' participation before the commission. It recommended increases from 50% to 66% for legal fees and from 50% to 100% for disbursement costs.

As a matter of information, I note that disbursement costs in relation to the commission include not just photocopying and courier services, but in particular the cost of substantial contracts for the retention of expert compensation consultants and related matters. In our view, reimbursement at 100% of disbursement costs would provide little or no financial incentive for the judiciary to incur costs prudently. Accordingly, Bill C-17 would increase the current level of reimbursement for both legal fees and disbursement from the current 50% to 66%.

Mr. Chairman, Bill C-17 also implements a number of other compensation amendments, relating to eligibility for retirement and supernumerary office, and other minor changes to allowances.

Bill C-17 also includes a long overdue proposal aimed at leveling the playing field for partners of judges in the difficult circumstances of relationship breakdown, by facilitating the equitable sharing of the judicial annuity. The judicial annuity is currently the only federal pension that is not subject to such a division, despite the fact that the judicial annuity represents a very significant family asset. The proposed annuity amendments essentially mirror the provisions of the federal Pension Benefits Division Act. Like the Pension Benefits Division Act, these provisions uphold overarching principles of good pension division policy, allowing couples to achieve a clean break, with certainty and portability.

These provisions are also consistent with both the objectives of probative retirement planning and the constitutional requirement of financial security, as part of the guarantees of judicial independence. While on its face it is extremely complicated, the policy objective of this mechanism is very simple: to address a long outstanding equity issue in support of families undergoing the breakdown of the spousal relationship.

Honourable members, I will wrap up here and hand Bill C-17 over to you for your deliberations and decision. I invite you and all parliamentarians to carefully discharge your important responsibilities, in light of the governing constitutional and statutory principles. In doing so, you will help ensure that Canada continues to have a judiciary whose independence, impartiality, commitment, and overall excellence not only inspires the confidence of the Canadian public, but is envied around the world.

Thank you very much, Mr. Chair, for your attention.

I would be pleased to answer any questions that you or committee members may have.

● (1550)

The Chair: Thank you, Minister.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you, Mr. Chairman.

Thank you, Mr. Minister, for outlining the government's position.

I regard the circumstances as almost unique here at the committee. I think in your remarks you came just short of inviting the committee to consider the possibility of a third proposal that would vary from both the original, produced by the compensation commission, and the one outlined in the government's legislation.

We have this very odd circumstance where we have the executive of government with a position, the independent commission, which probably reflects the views of the judiciary, and then we have around this table a representation of Parliament. I can't recall that happening before, where you have all three branches of government essentially looking at each other around the table.

Did you sincerely invite us to consider the possibility of rejigging the proposal here to better reflect the views of our electors, or were you just speaking in the hypothetical?

Hon. Vic Toews: "Rejigging" sounds somewhat shoddy, and I would respect the committee much more than it doing any kind of shoddy workmanship.

All I'm suggesting is that this is a decision truly for parliamentarians, as opposed to the executive. Government has responded to the recommendations made by the commission, and provided that this committee follows the constitutional and statutory principles, it is free to deviate.

I would suggest that the government has considered the proposals very carefully and closely, and I believe they correspond both to the fiscal reality in this country and indeed the constitutional and statutory principles.

Mr. Derek Lee: My recollection of the policy basis for this independent commission was that it was a Supreme Court judgment, which you have referred to in your remarks. As I recall that judgment, it seemed to be rather clear, in my recollection of it. The court was of the view that when the independent commission had completed its work, it would only be in a rare circumstance, to be articulated by—I think they referred to the government, and I presume they meant the executive of government, with or without the support of government.... It would only vary it in extraordinary circumstances. I'm not so sure we have extraordinary circumstances here.

I'm not saying I agree or disagree with the reworking of the proposal in terms of the increase in the compensation, but would you be able to articulate here in some fashion the basis for the government's apparent view that it has ample authority, or reasonable authority, with or without the collaboration of the House and of Parliament, to rework the proposal of the independent commission in a way that coincides with what I described as the "extraordinary circumstances"? I may be using a poor adjective or adverb there, but could you do that?

Hon. Vic Toews: Yes, in fact, I could.

Mr. Chair, the member is quite right that the initial decision—the P.E.I. judges' reference case—was much more restrictive than the second case that came out, which is the Bodner decision, and which I also referred to. We as lawyers sometimes get caught up here in Parliament and don't watch what is happening actually in the courts. I was myself familiar with the P.E.I. case, and when the department briefed me on the Bodner decision, it gave an entirely different light to the entire situation.

It is wrong—indeed, I would suggest, misleading—that modification of a commission recommendation undermines the commission process as established by the Supreme Court of Canada. In Bodner v. Alberta the court clearly acknowledged that decisions about allocations of public resources belong to the legislatures and to government.

Governments are entitled to reject or modify commission recommendations provided—and again I want to go to the principles, because they are very important principles and broaden the P.E.I. reference case—firstly, they have articulated a legitimate reason for doing so; secondly, the government's reasons rely upon a reasonable factual foundation; thirdly, it can be shown that, viewed globally and with deference to the government's opinion, the commission process has been respected and the purposes of the commission, namely preserving judicial independence and depoliticizing the setting of judicial remuneration, have been achieved.

Those are the three principles that expand the original P.E.I. reference case. It's only normal that the court would further refine a very unique decision, when it came out in the P.E.I. reference case. The court has done that in Bodner, and I thought in a very admirable and exemplary way, as we have come to expect from our Supreme Court of Canada.

● (1555)

The Chair: Thank you.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you, Mr. Chairman.

Minister, ladies, good afternoon.

The Bloc Québécois is somewhat uncomfortable with this bill. Apart from the technical side of the matter, it is very difficult for parliamentarians to determine, when it comes to knowledge and impartiality, if the judge is worth 10.8%, 7.25% or 9.4%. That said, we would have liked to have two major parameters respected. The first is the constitutional principle which you yourself raised, in other words, an independent commission which would base its analysis on a number of criteria.

There is also one principle you failed to mention. It has been an integral part of the process from 1999 since quite recently, and it consisted in linking judges' salaries with those of members. The Bloc Québécois is quite uneasy with the idea that, if the bill were to be adopted, the Supreme Court Chief Justice would be earning $254,500, $258,000 or $254,400. We live in a society that respects the rule of law, but also democratic legitimacy. So, based on that last factor, we should not end up with a situation where the Chief Justice could be earning more than the Prime Minister, notwithstanding the work of the individual holding the position and performing the duties of Prime Minister. The Liberals are the ones who decided to stop linking up judges' and members' salaries despite the commission's recommendations.

Would you not agree that it is dangerous not to link up the Prime Minister's and the Chief Justice's salaries? Would you agree that they should be linked and determined by an independent commission?

[*English*]

Hon. Vic Toews: Thank you. That's a good question, because it talks about the role of parliamentarians versus the role of the courts and the responsibility Parliament has under section 100 of the Constitution Act, 1867, to determine these kinds of issues.

The Prime Minister may well think he should receive the same salary as the Chief Justice, but that isn't the criterion. You might think the salaries of the Chief Justice and the Prime Minister should be linked. That isn't necessarily the criterion. Your opinion is important, but we have to go back to those guiding principles as to why in fact we've come up with this conclusion.

The point you raise, while it's one that is worthy of consideration, I don't think is determinative of the issue. For example, in many situations—I dare say, in your home province, perhaps—the premier makes less than the chief judge in the provincial court. I certainly know that's the case in Manitoba. So we see that disparity; indeed, we see departmental officials making more than the Prime Minister or the premier in many jurisdictions.

● (1600)

[*Translation*]

Mr. Réal Ménard: Minister, you are right: That is not one of the criteria. Nonetheless, since 1999, members' salary increases have been matched with those of Supreme Court justices. Members of Parliament salaries are 75% of those of judges. The Prime Minister should be earning as much as the Supreme Court Chief Justice.

Despite the fact that that is not one of the criteria, would you, as Minister of Justice and as a parliamentarian, want us to go in that direction with this bill? Do you agree that, in the name of democratic legitimacy, we should match MPs' salaries with those of the judiciary, and ensure the Prime Minister is not earning less than the Chief Justice of the Supreme Court?

[*English*]

Hon. Vic Toews: Well, members may recall that in April 2005 Parliament delinked MPs' and judges' salaries after full and careful deliberation. Instead, Parliament established a new method of indexation of salaries and allowances for members of Parliament and ministers. At the time, the Bloc alone opposed those amendments, which otherwise would have received broad support within the House and the Senate.

Although he has not clearly said so, in essence what the honourable member is proposing is that the Bloc supports a major increase in MPs' salaries, either 7.5% or 10.8%, for no other reason than that the judges will be getting such an increase. If the honourable member is serious about the proposal, I suggest he propose the necessary motion in the House and that there be full debate on that issue.

[*Translation*]

Mr. Réal Ménard: I personally need very little in life, I am not attached to worldly possessions. But do you not believe, as Minister of Justice, that we should link these salaries and ensure that the Prime Minister is not earning less than the Chief Justice of the Supreme Court? Do you believe in this principle or not?

[*English*]

Hon. Vic Toews: Let me put it this way: I don't believe the Prime Minister is any less than a Supreme Court of Canada justice, but that doesn't necessarily mean they should be paid the same. And that's all I can say on that.

I agree with what Parliament did back in April of 2005. I'm prepared to live with the delinking. I think there are different criteria that justify my salary and your salary and judges' salaries.

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair, and thank you, Minister, for being here today.

To follow up on that, Mr. Minister, the relevancy of that line of questioning is not what your opinion is but whether the delinking issue should have been taken into account by the commission. Would you agree with me that it was totally irrelevant for them to look at the issue of the linking of the salaries of MPs and judges, that it was not a factor for them to take into account?

Hon. Vic Toews: I don't know. All I can say is that certainly there are broad criteria that the commission can look at. I don't think it derails their findings in any way to look at that particular issue. Similarly, though, I think we can discount it if we choose to.

Mr. Joe Comartin: Okay.

With regard to, as Mr. Lee says, sort of the implication that changes might be made here at the committee, do we have your assurances that those changes won't be reversed when they go back to the House?

Hon. Vic Toews: No, you certainly don't have those assurances, because that's a decision for all parliamentarians to make, not simply the members of this committee.

I respect this committee. This committee is a wise committee that will give input into the bill and bring forward its recommendations. But parliamentarians will determine this issue—not the executive, not government.

Mr. Joe Comartin: But as to what's put in front of the House, you're reserving your right to place it before them as opposed to the will of this committee.

Hon. Vic Toews: If the committee comes up with something better than what the government has proposed, I would certainly be willing to consider it, provided it meets the appropriate constitutional and statutory standards.

● (1605)

Mr. Joe Comartin: All right.

Let's go to both Bodner and P.E.I. If we follow your line of reasoning, Mr. Minister, where you say that the changes you've made to the commission's report are legitimate—that is, they have a reasonable factual basis, and they're legitimate reasons—does it not inevitably lead us to draw the conclusion that the commission's recommendations were unreasonable and were not based on reasonable facts?

Hon. Vic Toews: I prefer to express it in the following fashion: the commission gave weight to certain factors that I think could have been better placed in other ways, or not as great weight placed on those.

I mentioned some of those in my remarks. I mentioned the urban salaries and the private practice lawyers' salaries. Again, it's not to say they're unreasonable. It's simply that they place different weight on those factors than I would have placed.

Ultimately, it's not the commissioner's decision. It's our decision as parliamentarians to determine what weight is to be given to each factor, provided we do not err in respect of the constitutional and statutory principles.

Mr. Joe Comartin: Both today and certainly in the House, when you spoke to the bill, you raised the issue of decision-making with regard to appropriate spending of public funds. Not only in P.E.I. and Bodner but also in a number of other decisions the courts have made it quite clear that the test, if I can put it that way, or those criteria are to be applied when a government is in financial difficulty.

You're not suggesting, are you, that there was any inability on the part of the federal government to pay the amounts recommended by the commission?

Hon. Vic Toews: If we look at it in the context of $500 billion of debt, then I would say yes.

Mr. Joe Comartin: There's an annual surplus of $13.5 billion this year.

Hon. Vic Toews: That's another context for looking at it.

Mr. Joe Comartin: Do you think that test would be accepted by the courts?

Hon. Vic Toews: I think the courts have given us quite a bit of latitude within the context of constitutional and statutory principles. I believe what we have brought forward articulates a legitimate reason: that we have relied upon a reasonable factual foundation, striven to maintain judicial independence, and ensured there wasn't politicization of the process.

Mr. Joe Comartin: I guess that's where we fundamentally disagree, Mr. Minister.

I don't see, when you read the P.E.I. and the Bodner cases—and actually some others, by analogy—how this approach by this government would be seen as anything but interference at the political level.

I'll be blunt: you're nitpicking to reduce it from the 10% to the 7.5%.

I'm not downplaying the significance of the dollar, but as I see the decisions, you have a very difficult test before our courts to override, which is what you're proposing we do as a government, as a Parliament: override the report of an independent commissioner. That strikes right at the heart of the whole issue of judicial independence.

It seems to me the criteria and explanations you put forward really amount to no more than nitpicking. The inevitable conclusion one has to draw is that it is political. It's about a political agenda that says we're going to cut back those fat cat judges, and nothing more than that.

● (1610)

Hon. Vic Toews: I certainly have never expressed that kind of view about fat cat judges, any more than I've expressed the view that MPs or ministers are fat cat ministers or MPs. We have a certain responsibility. I believe I've attempted to carry out that responsibility; I don't agree that nitpicking is involved here.

You are a man with a background in labour law, and the difference between criminal law—

Mr. Joe Comartin: Mr. Minister, I've done some of that, but most of it was civil litigation.

I was in the courts all the time, and I respect the role our judges play and how well we should pay them.

Hon. Vic Toews: In terms of the settlements you made in civil cases, a 10.8% and 7.2%—and I might have gotten the numbers mixed up here—is nevertheless significant to your client.

Our client is the people of Canada. We have a responsibility to the people of Canada under section 100 of the Constitution Act. I believe I've carried out that responsibility.

But as I've indicated, you're free to make such amendments as you consider appropriate, in accordance with constitutional and statutory principles. This committee will have that debate, and we'll have that debate in the House, if there isn't unanimity in that respect.

The Chair: Thank you, Mr. Comartin.

Mr. Moore.

Mr. Joe Comartin: This is a point for the chair, if we can get an answer—not at this point, but at some point down the road—on the amendments that have been proposed by the government.

I would like that information shared with the committee, as to whether those have been in any way approved by the representative of the judicial counsels or the judges. That can come at some point in the future.

Hon. Vic Toews: Just for clarification, are you asking if the minister's response has been approved?

Mr. Joe Comartin: The amendments you're proposing.

Hon. Vic Toews: There are two very technical amendments that have been approved by the judiciary.

They're drafting amendments, and we'll get you that information, Mr. Comartin.

The Chair: Thank you, Minister.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair.

Thank you, Minister, for appearing here today on this bill.

I did want to take a bit of an issue with my colleague, Mr. Comartin, on the issue of nitpicking. I don't think that's at all what happened, when I listened to the reasoning that went into this and the study that was undertaken.

In your response, was there any consideration given to, or do you know, the median family income in Canada? Could you please give a little perspective to the numbers we're talking about?

Ms. Judith Bellis (General Counsel, Courts and Tribunal Policy, Department of Justice): There's no specific reference to that.

Mr. Rob Moore: What is the amount we're talking about per year under the proposal that is being put forward, the 7.25%? What would the annual increase be?

Hon. Vic Toews: I can indicate—and this may help you—that the commission devoted considerable attention to analyzing private practice incomes earned among lawyers in Canada's eight largest cities, even though 48% of the appointees were not from one of these centres. Table 17 of the commission report is of interest, because it reports incomes by province rather than by urban centre, giving a better picture of incomes at the 75th percentile across all provincial centres, urban and rural.

The commission's proposed salary of $240,000 exceeds, in some cases to a significant degree, the 75th percentile of self-employed income in every province, with the exception of Alberta and Ontario.

When the value of the judicial annuity, which is 22.5% of the salary, is included with the $240,000, the real value of $294,000 exceeds significantly the 75th percentile for Canada overall, and for every province except Alberta at $297,700 and Ontario at $311,700. So in terms of private practice lawyers, which is what we're talking about here, you can see that this is not a small amount. It is a significant amount and I think takes into account at least the incomes of private practitioners in the area of law.

● (1615)

Mr. Rob Moore: That goes to my next question, about the value of the annuity. I think in most cases individuals who are in private practice, lawyers, whether in commercial or criminal law or otherwise, are probably funding their own retirement out of their own pockets. They have to contribute to an RRSP or some other savings mechanism to provide for their own retirement. Judges, as we know, are going to receive an annuity at the time of their retirement. What is the valuation that went into this to account for the increase being proposed? I think there would be and should be a great value placed on an annuity that someone's going to be receiving at some point.

Hon. Vic Toews: I can only repeat that the value of the judicial annuity is 22.5% of salary and that it then creates a real value of $294,000 per annum. The government believes the commission's salary recommendation placed undue emphasis on the third statutory criterion, which is another criterion that I haven't talked about: attracting outstanding candidates.

There does not appear to be a shortage of outstanding candidates for the bench. The commission's proposal overshoots the mark in defining the level of salary increase necessary to ensure outstanding candidates for the judiciary, and therefore we came, as a government, to the conclusion that the more reasonable salary proposal would be $232,000, or 7.25%, as of April 1, 2004.

Mr. Rob Moore: That leads me to my next question, Minister. It may even be an understatement to say, based on what judges are paid now, and then the increase that's being proposed—the reasonable increase of 7.25%—that the proposal by the commission of a more than 10% increase overshoots the mark needed to attract candidates.

Is there any evidence that practitioners of law are not knocking down the doors to be appointed to the bench? I certainly haven't heard that there's any lack of individuals who would be interested in a judicial appointment, anywhere. Regardless of whether they live in a city or a rural area, and whatever province they live in, I've never heard of that. I'm wondering whether you could comment a bit on that.

Hon. Vic Toews: I can give you some numbers as of May 2006. At that time, Ontario had eight judicial vacancies. In terms of candidates for judicial office, there were 36 highly recommended, 114 recommended, and 25 provincial court judges qualified for appointment, which means that they had brought their names forward and were in fact qualified by the commission, although not in the same manner as ordinary lawyers.

There's a different process, which Mr. Cotler can certainly explain. He's familiar with that process.

But Mr. Lemay notwithstanding, there are many who are applying for a position. And that is Ontario, where, as you will recall, the number was $311,000, as opposed to the $294,000 that the proposal would have brought.

● (1620)

The Chair: Thank you, Mr. Moore.

Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): Thank you.

I have a quick technical question. Hopefully it can be really quick.

I'm assuming that the officials looked at the second reading debate and may have made or agreed with this change. The act has a different term for territorial judges. It calls them “senior judges” and “chief justices” in the provinces, and for no reason any more, because over time they get the same salary and benefits. Everyone seemed to agree. There were no objections from any of the parties during second reading debate. The territorial governments in all three territories agree. The Canadian Judicial Council agrees. They're paid the same and have the same jobs. All we want to do is change the word in this act, so that they're called the same thing. Is there any problem with that?

Hon. Vic Toews: As you are likely aware, the decision to confer the title of chief justice is a prerogative of the Prime Minister. I would suggest it's not something that would be appropriately done in the legislation. In fact, this is something that has been drawn to my attention.

I know that there are considerations in the broader context of the overall structure and operation of the territories. I am not ruling out anything in that respect. But it would not be appropriate to put it into a statute, given that it is the prerogative of the Prime Minister and might raise constitutional issues.

That being said, your points are well taken, in respect of the salaries and other benefits the senior judges in the territories receive.

Hon. Larry Bagnell: Would you commit to review that, seeing as all the territorial governments and the Canadian Judicial Council already have and agree? Would you commit to reviewing that and approaching the Prime Minister, seeing as it's timely with an act coming in?

Hon. Vic Toews: I will bring forward the concerns of ministers, such as Minister Brendan Bell's from the Northwest Territories, who specifically brought this to my attention very recently. I can assure you that I am taking an active interest in that issue. That's all I can say at this point.

Hon. Larry Bagnell: Do you believe in the separation of the executive branch of government and the judicial branch of government?

Hon. Vic Toews: Separation between the executive and government?

Hon. Larry Bagnell: Separation of the executive branch of government and the judicial branch of government in the Canadian system.

Hon. Vic Toews: Absolutely.

Hon. Larry Bagnell: How can they be separate and independent if you're paying the judges? You're determining their pay rate.

Hon. Vic Toews: It's because section 100 of the Constitution requires it, so that every division is modified by a constitutional principle, or can be modified by a constitutional principle. That is one of these constitutional principles.

Hon. Larry Bagnell: That's like suggesting that an employee of someone is going to take equal direction from all Canadians and not give preference to the person who's paying him or her. How could they possibly be independent when you're determining their salaries?

Hon. Vic Toews: All I can say is that the Supreme Court of Canada established the process. They further refined that process in Bodner, and the government officials who put together the government's response took that into account.

Obviously, in our system, we couldn't have the judges paying themselves, because that would be an affront to constitutional democracy and to the requirement that Parliament controls the purse strings in this country.

Hon. Larry Bagnell: That's why they recommended that an independent system be set up. As Mr. Lee says, you didn't really adequately respond. It would only be in an emergency or some drastic condition that we, as parliamentarians or the executive branch of government, would vary what this independent commission suggested should be the salaries.

If it's not independent enough and that's wrong, we should change that. But why would we interfere and remove the public's confidence if there's a separation between the executive branch and the judiciary?

Hon. Vic Toews: I'm sorry, Mr. Bagnell, but I'm having difficulty following this, because this isn't the judiciary that's making this recommendation. It isn't something that falls within the purview of the judiciary; it falls within the purview of this commission. Ultimately, as the Supreme Court of Canada recognized, it's parliamentarians who must make this decision. For us to simply abdicate our constitutional responsibility under section 100 of the Constitution Act, 1867, would be inappropriate. So I'm not quite sure I understand why you feel parliamentarians should abdicate their responsibility.

● (1625)

Hon. Larry Bagnell: That's probably the problem.

I have one other question. When you did this calculation on the judicial salaries, in response to Mr. Moore, you added their pensions and then compared them with everyone else's. I assume you added the pensions to the salaries of everyone to whom you were comparing them, because other people get pensions too.

Hon. Vic Toews: Yes, but generally speaking, as I it understand from my officials—and I think most of the private practice lawyers in this room can testify—they paid their own pensions out of the salaries they made, as opposed to receiving an annuity.

The Chair: That's it, Mr. Bagnell. You've actually had the last question.

I would like to thank the minister for his attendance.

We are pressed, of course. We have the Judicial Compensation and Benefits Commission to speak to yet and the Office of the Commissioner for Federal Judicial Affairs.

Mr. Derek Lee: Mr. Chairman, on a point of order, I know my colleague Mr. Cotler had a couple of questions, and I do note that the first hour has not expired yet. In the event that Mr. Cotler had not signalled his intention to ask a question, I'm certainly indicating so now.

Hon. Irwin Cotler (Mount Royal, Lib.): We've only been at it for 45 minutes, Mr. Chair.

The Chair: I can appreciate the concern. It's actually 50 minutes. However, we do have additional witnesses appearing, and I might point out to the committee that if you look at your agenda, we have committee business at the end of this session.

[*Translation*]

Mr. Réal Ménard: On a point of order, Mr. Chairman.

We have to agree on this. We had agreed to meet with the Minister, and I don't understand why his appearance is being cut short. The Bloc Québécois is entitled to two questions. The government is also entitled to questions. I don't understand.

[*English*]

The Chair: Unfortunately, members on both sides of the committee did not have an opportunity to ask questions. I know it's short, but it's going to be cut on both ends of the schedule for witnesses who are appearing.

[*Translation*]

Mr. Réal Ménard: What criteria are you using? Why are you putting a stop to the Minister's appearance? I don't understand.

[*English*]

The Chair: The minister has left, so I would suggest that it's a moot point.

I'm going to ask the commissioners to step forward now.

Mr. Derek Lee: Mr. Chairman, just a moment.

I consider this to be a very serious issue. I'm not going to take away unduly from the time in order to deal further with this issue, but in advance of the time set aside for hearing from the minister, for whatever reasons exist here, you chose to terminate the minister's appearance, at which point he immediately walked out. He left the colleague he came with sitting at the table and he left my colleague's issues unaddressed, and you didn't recognize my colleague.

This is not satisfactory. It's much less than I expect. I'm just going to say that and let it stand, and I'm going to stand down.

The Chair: I appreciate your comments, Mr. Lee. I think you've made your point.

Mr. Derek Lee: I've made mine. I can make another point of order.

The Chair: I believe the committee was very much aware that the minister's time was limited. In fact, the committee's time is limited.

Mr. Rob Moore: On a point of order, Mr. Chair, it's a little bit ridiculous. We have an order. I have to say, Mr. Chair, that the Liberals are the only party that got to ask two questions of the minister. You have to determine who's going to ask what questions. Mr. Cotler would not have been next in the order anyway. Our tradition is to go around the circle. We agreed that it would be one hour.

An hon. member: [*Inaudible—Editor*]

Mr. Rob Moore: It's not 45 minutes. It's now 4:30.

The Chair: Committee members—

[*Translation*]

Mr. Réal Ménard: Point of order.

We can't work this way. There is a sacred principle within parliamentary democracy: ministers appear before committees because of their ministerial responsibility. We began this meeting 15 minutes late. We are entitled to two questions, the Liberals are entitled to three. The Minister was our first witness. Out of all witnesses, he is the one who should be most available to answer our questions.

When you sat in opposition, you insisted on having ministers appear before committees every two weeks. I don't understand this. Mr. Chairman, if this is how you plan to chair this committee, there will be no cooperation on our part. I'd like to remind you that we have a majority here.

Yesterday, you asked for our cooperation to have the Minister appear on Bill C-10 despite the motion we had passed. I agreed to that, given the fact that the Minister has a busy schedule, but now the Minister, our first witness on a bill dealing with a constitutional matter, in other words judicial appointments, leaves, despite the fact that a former minister has not had an opportunity to ask a question nor has my colleague. If this how you intend to chair this committee, if this is how you want to have this committee operate, Mr. Chairman, you're not going to see many bills passed between now and Christmas. Mark my words.

● (1630)

[*English*]

The Chair: We have five commission members present. I would ask that they take their seats at the commission table.

Hon. Irwin Cotler: Mr. Chairman, I just want to make a point of order here.

The issue is not me speaking or not. The issue is that if a minister undertakes, as part of his responsibility, to appear before a committee for a one-hour duration, then the minister should not depart some 45 minutes into that appearance, nor should the chairman short-circuit or abbreviate the proceedings. That is unacceptable, Mr. Chairman, and I would say that the minister should be recalled in order to allow the committee to go ahead and put at least another 15 minutes of questions to him. That would be an appropriate way to establish the proper procedure for this committee to continue.

The Chair: We'll do this, Mr. Cotler. At the end of this meeting, at the end of this time, at 15 minutes before 5:30, there's some business that this committee has to deal with. We will then bring that point up one more time. In the meantime, we have witnesses to hear.

I'd like to welcome the Judicial Compensation and Benefits Commission representatives: Mr. McLennan, Mr. Cherniak, and Ms. Chambers. Also, from the Office of the Commissioner for Federal and Judicial Affairs, we have Mr. Gourdeau and Mr. Osborne.

Thank you for appearing.

I know our time is limited. I really apologize for the shortness of it, but sometimes things are beyond our control. I know you have two presentations to make briefly.

If you could begin, who will be speaking for the Judicial Compensation and Benefits Commission? Mr. McLennan, please begin.

Mr. Roderick McLennan (Chairperson, Judicial Compensation and Benefits Commission): What I'd like to say at the outset, Mr. Chair and members of the committee, is what our process was. It's outlined at page 3 of the report, but I want to be clear that this was never a fight between the people on the commission. That is, notwithstanding that Mr. Cherniak was appointed by the judges and Ms. Chambers by the government, this was not a partisan exercise in any way. I was never called on to referee or adjudicate between the two positions advanced by them. The three of us embarked on this exercise totally with a perception that we were operating exclusively in the public interest. We weren't conducting an arbitration. I want that to be clear.

The Chair: Thank you.

Mr. Roderick McLennan: We come here today not to extol our report, but to lament the process that has been followed or, properly, not followed. I think it's appropriate to recall the sorry history of why the legislation creating this commission developed. It's outlined in the Drouin report, the report of the first quadrennial commission. At page 2—and I will just say what that says. The Drouin report, as you are aware, came from the first commission called under the changes to the Judges Act following the P.E.I. case in the Supreme Court of Canada. What Drouin reviewed was this.

> Before 1981, judges' salaries and benefits were reviewed by advisory committees, a process which was generally unsatisfactory to the Judiciary. Judges felt that the process merely amounted to petitioning the government to fulfill its constitutional obligations.
>
> In 1982, section 26 was introduced to the *Judges Act*, establishing the "Triennial Commission". The intention was to create a body which would be independent of the Judiciary and Parliament, and which would present the Minister of Justice with objective and fair recommendations. The goal was to depoliticize the process, thus maintaining judicial independence.
>
> There were five Triennial Commissions. Despite extensive inquiries and research by each of them, many of their recommendations on judicial salaries and benefits, between 1987 and 1993, generally were unimplemented or ignored. The Government of Canada...froze judges' salaries and suspended indexation in the mid-1990s. The last adjustment to judges' salaries was made in November 1998 pursuant to recommendations made by the Triennial Commission chaired by David Scott....
>
> In its 1996 report, the Scott Commission described the problem with the triennial commission process by stating:
>
> > In spite of the thorough recommendation by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years.
> >
> > Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of best intentions, been politicized.

As a consequence of that, the reference went to the Supreme Court of Canada—the P.E.I. reference—and the legislation pursuant to which Drouin acted and we acted was created. The clearest possible object of that legislation is to do away with the sorry history of judicial recommendations with respect to judicial compensation and to depoliticize the process. Our grave concern is that the process established, along with the resulting legislation that created this commission, is being perverted into a politicization of the exercise called for by the act.

Consider that we must act within two confined timeframes. The report that we produced must be tabled in Parliament within ten days. The minister must report or shall report within six months. These things surely say the process is to be regarded as requiring prompt action.

Here we are for the first time, two and a half years after we filed this report, to assist parliamentarians to address their constitutional obligations. We have discharged ours. Our concern is that neither the spirit nor the letter of the Judges Act, pursuant to which this commission was created, has been observed thus far by Parliament with respect to the report we filed.

For example, it's inappropriate, in my submission, to focus on a 2006 budget to consider a report that we had to file in May 2004. It's reasonable to expect a certain degree of prescience, but that may be too much. It's inappropriate, in my submission, to focus on this table or that table in the report, to say that an error was made or that there's too much emphasis here or too much emphasis there.

● (1635)

This exercise is somewhat an exercise of arbitrariness. You have to shrink the arbitrariness by gathering all the facts you can so that your decision becomes as informed as possible. But at the end, there's no way we or any other subsequent commission could file a report saying that 3/8 of 42,000, times 12, divided by 16, produces the adequate proper salary for judges. It can't be done. It has to be an exercise in judgment.

So it wasn't presented on the basis that it would be unassailable. Of course it's assailable. You have to work with all these numbers and do the best you can to come up with your best exercise in judgment, and it isn't bulletproof. But it's clear that it's done with the expectation that it will not be viewed through 2006 lenses, which is apparently the case.

I want to cite an observation that the government's second response makes, and with which I wholeheartedly agree. It is at paragraph 1 on page 5 of the second response of the government to the report:

> It is...clear that the Commission undertook a detailed assessment and analysis of data and information available with respect to the relevant comparators for establishing the overall adequacy of judicial compensation. This has been a perennial challenge with which all previous federal judicial compensation commissions have grappled. As successive commissions and governments have discovered, it is as much an art as a science. There is no readily available mathematical formula to apply and a high degree of well-informed judgment is ultimately involved.

I assure you that's what we endeavoured to do. We looked at all the material that was put before us, and we considered it carefully. We debated the issues that it presented; we compromised our respective views; and all our conclusions were reached unanimously. We believe that what we came up with was in the public interest and was consistent with the legislation and the governing priority of judicial independence and securing for this country a pool of potential appointees to the federal judiciary, of outstanding candidates for those important roles.

To be absolutely clear, it couldn't matter less to us whether or not Parliament endorses our recommendations or not. It's the process that we're concerned about. But I want to be clear that we have no proprietary interest in the result of this. Mr. Cherniak and I are too old and Ms. Chambers is overqualified.

Our only concern is that we didn't labour pursuing what we thought was a public duty—and hence poorly paid, I might say—only to have produced a report that falls prey to politicization, such as has happened in the sorry past, when one government said too little, another government said too much, and a third government said, “Well let's just not deal with judges. They're not that important anyway.”

Our job is legislatively mandated and we believe we acted within the confines of our jurisdiction. Your job is constitutionally mandated and has yet to be performed. We hope it is exercised consistent with the honourable minister's assurance that appears on page 11, but which I won't repeat to you now because he said it when he was here giving evidence.

It's for this committee and it's for parliamentarians to decide what the appropriate compensation for judges is. Our sincere hope is that this exercise is promptly done, and is done consistent with the principles of which everyone is aware.

● (1640)

If there are going to be any questions, Mr. Chairman, we may not be unanimous. Frequently, we haven't been. So I would invite any questions, but I would also ask Ms. Chambers and Mr. Cherniak to supplement or contradict anything I might say.

The Chair: Thank you, Mr. McLennan.

I have one question, but I am going to ask for the presentation from Mr. Gourdeau prior to the question time. Has your commission appeared before this committee at any other time?

Mr. Roderick McLennan: No.

The Chair: Mr. Gourdeau.

Mr. David Gourdeau (Commissioner for Federal Judicial Affairs, Office of the Commissioner for Federal Judicial Affairs): Thank you, Mr. Chair. I'll try to be brief.

My name is David Gourdeau, and I am the Commissioner for Federal Judicial Affairs. I'm accompanied today by Mr. Wayne Osborne, the director of our finance division.

I will be brief in my presentation, as the role our office plays in the process related to the Judicial Compensation and Benefits Commission and the ensuing drafting of the legislation is limited. To start with, let me provide you with a short overview of our office for those who may not be familiar with it.

The Office of the Commissioner for Federal Judicial Affairs was created under the Judges Act in 1978, to safeguard the independence of the judiciary and to put federally appointed judges at arm's length from the Department of Justice. At the present time there are 1,045 federally appointed judges who are active. Our services also extend to retired judges, of which there are now 400, as well as the judges' survivors, of which there are 350.

Our mandate extends to promoting better administration of justice and providing support for the federal judiciary. This support or these services stem from the Judges Act. Therefore, any amendment to the act will have an impact on our operations.

● (1645)

[*Translation*]

One of the main roles and responsibilities of the commissioner is to act on behalf of the Minister of Justice on matters related to the administration of Part I of the Judges Act, which deals with the terms of appointment, age limit and salaries applicable to federally-appointed judges. These are matters dealt with by our finance and human resources divisions. The office also has an appointments secretariat which administers 16 advisory committees responsible for evaluating candidates for federal judicial appointments.

For the last appointment to the Supreme Court of Canada our office was also given additional administrative mandates. The federal courts report division of our office is responsible for selecting and publishing Federal Court of Appeal and Federal Court decisions in both official languages. We also have an intranet site called JUDICOM, which provides judges with e-mail, a secure, restricted access conversation system and a virtual library. For judges wishing to better their skills in either English or French, we have a language training program.

We also play a role in the coordination of initiatives related to the Canadian judiciary's role in international cooperation. Finally, we support the work of the Judicial Compensation and Benefits Commission, and this is our reason for being here today. While the Commission is made up of three members—one nominated by the judiciary, another by the government, and a third nominated by the first two members—the Commission requires a secretariat to provide administrative services. For this Commission, the head of the secretariat, the executive director, is Ms. Jeanne Ruest.

[*English*]

What our office essentially does for the commission is support the operation of its secretariat. This includes the provision of office space, furniture, computer equipment—both hardware and software—access to our internal e-mail/communications network, accounting, purchasing, contracting, telecommunications, and website maintenance.

We also distribute copies of the final report to all members of the judiciary and any other interested parties. As well, our office will provide responses to questions for statistical information on the judiciary, as well as responses to questions on administrative practices and support provided to the judiciary.

After completion of the commission's work, we maintain the office space, equipment, files, etc., in a separate, secure area. We monitor and respond to questions asked and forward requests for information from the commission to either the chairperson or the executive director of the commission.

If the Minister of Justice requests that the commission undertake other duties, we will again support the members of the commission through the provision of administrative support, as mentioned above.

[*Translation*]

Once a bill is drafted by the Department of Justice following the report of the Commission, we will take the necessary measures within our office to ensure that we can administer and comply with the provisions of the new bill once it becomes law. Indeed, we have staff preparing now to be able to respond to amendments to the Judges Act.

To conclude, I had indicated at the beginning of my presentation that I would be brief yet I hope that I have been able to provide valuable information on our general role and more specific role in terms of the Judicial Compensation and Benefits Commission. If there are any questions, we would obviously be pleased to answer them. Thank you, Mr. Chairman.

[*English*]

The Chair: Thank you to both of you.

To continue with our direction for the questioning of witnesses, I'll go to Mr. Lemay.

Mr. Lemay.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Present.

Thank you, Mr. Chairman. I will answer the minister, who is not here. I imagine that his parliamentary secretary will report all this to him.

I certainly have no intention of becoming a judge. Indeed, with the number of bills the government will be tabling, the courts will be so clogged that I will have a lot of work in a few years as a lawyer, especially as a criminal defence lawyer.

The following comment is addressed to the members of the Commission. Allow me to congratulate you on the work that you have done. I am sure that is very arduous and complicated. Being familiar with a similar system in Quebec, I can say that establishing judges salaries must have been a huge task. I find it regrettable that the government rejected your conclusion out of hand. I would like to ask you a question that, even if it is rather general in nature, defines the debate rather well.

The court described as follows the three step analysis intended to assess the rationale for the government's refusal. First of all, we must determine if its decision to reject the Commission's recommendations was made on legitimate grounds, that is to say, comprehensive and concrete. Then, it must be made clear that the reasons given had a reasonable factual basis. Finally, given the overall perspective marked by restraint, it must be determined wether or not the review mechanism was respected.

Do you believe that the government, in rejecting your report, has complied with these three steps? Or do you rather believe that it was acting for purely political reasons, that is that it did not wish to increase judges' salaries? Good luck!

● (1650)

Ms. Gretta Chambers (Commissioner, Judicial Compensation and Benefits Commission): We will start in English and continue in French. Personally, I am not a lawyer.

[*English*]

Mr. Roderick McLennan: That's a legal question that may well have to be addressed if the judges don't agree with what eventually occurs here. Presumably, if they don't, or if they feel strongly enough about it, they will attack the second government's response on the basis that it doesn't qualify with the three tests that you've referred to, Mr. Lemay, which is the Bodner case. But I think it would be inappropriate for us to say who is going to win that battle.

[*Translation*]

Ms. Gretta Chambers: Mr. Chairman, I would like to add our report deals not only with judges' salaries. We also made recommendations on how to proceed. There is no rule. The Commission was set up precisely because there were no specific rules. One of the recommendations was that during the four years of peace, therefore during the period where under no circumstances would the salaries be changed, research be done to find comparable criteria. The government justified its rejection by saying that they were not good comparisons. This is vital. We only had a few months and we did our best. There was tons of information to deal with. We assessed the situation and decided that it was the best way to proceed.

The members of our commission did not agree on everything, but they did agree from the outset that judges were crucial entities for the wellbeing of society. Judges had not only to be independent, but that independence had to be obvious. We want the cream of the legal world to come to the bench. It is one thing to say that there are a lot of candidates, but that does not mean that they are the best. These facts had to be emphasized.

We began our work with the idea that it was important to find the happy medium, and we gave it our best shot. We understand that it is not perfect and that we will have to continue studying these issues.

[*English*]

The Chair: Mr. Cherniak.

Mr. Earl Cherniak (Commissioner, Judicial Compensation and Benefits Commission): If I could just add this, Mr. Chair, our report was based on research that we did ourselves and submissions from the government and the judiciary, and considerable public input into and knowledge of what we were doing.

The report speaks for itself. We worked very hard on it. It is really for this committee and perhaps, ultimately, the courts to say whether the government's response, both in its content and timing, meets constitutional requirements. That's not for us to say, but those are very significant issues.

● (1655)

The Chair: Mr. Lemay, your time is actually up. Your question was a good one, I thought.

I would ask Mr. McLennan if he read the response of the Government of Canada to the 2003 report of the Judicial Compensation and Benefits Commission. Did you read that response?

Mr. Roderick McLennan: Oh, yes. Sure.

The Chair: Right at the offset, it said, "...the Government is prepared to accept all of the recommendations of the 2003 Judicial Compensation and Benefits Commission, with one exception." And it accepted that in a modified form.

Is that basically it, in a nutshell?

Mr. Roderick McLennan: Yes, I would say so.

The Chair: And that was the actual aspect on remuneration?

Mr. Roderick McLennan: Compensation. Yes, sir.

The Chair: Compensation. Thank you.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Good afternoon, gentlemen. Thank you for the information on the Commission. I would also like to thank Mr. Gourdeau. Mr. McLennan, it would have been nice if you had given us some written notes, like Mr. Gourdeau did. That would have helped us to come up with questions for you. I am going to have to rely on my memory to try to remember what you said.

First of all, I have to say it bothers me when you equate money with judicial independence. You seem to be saying that the more you pay judges, the less likely they are to take bribes. I cannot agree with that notion. It is very dangerous. You can be independent without money. As a matter of fact, people who are unpaid are far more independent because they do not owe anyone anything.

Perhaps Mr. Gourdeau could answer my question. You said you have criteria regarding terms of appointment and you oversee all of that. I will not ask you to identify all of them. We all have our own ideas about that. But I would like to hear from you on the judges' retirement fund.

I would like to know whether it kicks in on day one. Personally, as a member of Parliament, if I died tomorrow, I would not be entitled to a retirement fund. If I were in the private sector, I would have to rely on my RRSPs, to whatever extent I could. Would a federal judge who died of a heart attack one month after being appointed be immediately entitled to his or her pension fund? If so, would it be a percentage of the fund?

Mr. David Gourdeau: The answer is no, in the unfortunate event of a judge dying within two months of being appointed to the bench. There would be a return of contributions. Up to a certain age, contributions are shared between employer and employee. There are all kinds of exceptions and provisions in the Act, but let's just say most people pay 7% of their gross salary over 15 years. When they become supernumerary or after a certain number of years, the contribution drops to one per cent.

I will tell you what happens next off the top of my head, but it would be better to consult the applicable provisions of the Act. Judges who have been on the bench for 10 or more years are entitled to a pro-rated annual pension. That is not the full pension. Up to around 10 years, there is a return of contributions.

As for the full pension amount, the so-called rule of 80 applies initially. After that, they are entitled to the full pension amount, i.e., two thirds of their annual salary at the time of retirement.

Mr. Daniel Petit: A lot of people think that if a federal judge dies a day or two after being appointed to the bench, the estate is entitled to a pension.

You have explained it well. Not everyone knows what judges get. The idea, as you say, is to maintain some form of independence.

Thank you very much.

● (1700)

[*English*]

The Chair: Is there going to be a response from Mr. Gourdeau? No?

Mr. Ménard, Mr. Cotler is not here, but I'll give you the opportunity.

Mr. Bagnell, when Mr. Cotler walks in he'll take the next question, but go ahead.

Hon. Larry Bagnell: He had to do a TV interview and he'll be right back.

I had a question, Mr. McLennan. You said at the beginning that everyone agreed with the report and that it wasn't as if you had to force one side or the other.

Ms. Chambers, did you agree with the salaries and everything that went into the recommendations?

Ms. Gretta Chambers: You're asking if I agreed with everything that went into the recommendations?

Hon. Larry Bagnell: With everything related to salaries.

Ms. Gretta Chambers: Yes, we signed off on every recommendation.

Hon. Larry Bagnell: In a collaborative process, if the government had good input—and maybe you can't answer this question—I don't understand the necessity of their changing.... Is the spirit of the committee that there'd be some independence of the judiciary from the government, and that's why we have a committee? Should it only be in major circumstances that the government vary your recommendations?

Mr. Roderick McLennan: In a word, yes.

Hon. Larry Bagnell: Just to be fair to the other parties, I'll let Mr. Ménard go ahead, so there's time for Mr. Cotler when he comes back.

The Chair: Yes, go ahead, Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: I would like to understand how you arrive at 10.8%. I do not think there is any connection between money and independence. I want judges to be as well paid as possible, because you have very important responsibilities and you have legitimacy. We believe in the independence of the judiciary.

For example, compared to the industry average salary, I would like to understand how you arrived at 10.8%. I would like you to give a detailed explanation of the factors without getting too technical, especially for people watching. And I am counting on Ms. Chambers' teaching talent to make all of this very accessible. I would like us to be able to really understand the composite index and how you arrived at 10.8%.

We, in the Bloc Quebecois, think that is exactly what the recommendation should be, but linked with MPs' salaries. You can say something about that if you want to, but first I would like to understand the index.

Ms. Gretta Chambers: Mr. McLennan could explain it to you much better, but the explanation has grown into an entire chapter. The way we arrived at that percentage is very complicated. I certainly cannot explain it in two sentences.

As for the other point, that is a political issue. The number 1 rule of our work is not to be politicized.

Mr. Réal Ménard: It is not a political issue.

Ms. Gretta Chambers: The issue of the 10.8% is complicated. The information is in one of the chapters. You can read it.

Mr. Réal Ménard: Can you explain the basics, so that people watching have some idea how you arrived at that decision?

Ms. Gretta Chambers: It is in chapter 2.

[*English*]

Chapter 2.

Gentlemen, why don't you do it?

[*Translation*]

It is in chapter 2, but I cannot summarize it in three sentences.

[*English*]

Mr. Roderick McLennan: In a word, when we talk about judicial independence and money, the money doesn't buy integrity; the money insulates judges in part from the temptations of corruption, bribery, or whatever. To some degree, it insulates them, because they don't have to make their daily bread. Their pension insulates them from a concern about what happens when they quit. So only to that extent does money impact on independence.

The other thing about independence and money is that they ought not to be negotiating directly with the government for their money. That's the second reason for the creation of an independent commission. Otherwise, they would become like a trade union dealing with their employer, and that would, of course, be improper.

The third thing, and a very important thing about independence, is that you want to select from a pool of highly talented, dedicated people, and you're just not going to them for—

● (1705)

Mr. Réal Ménard: That is not my question.

[*Translation*]

With your respect, I regret what Mr. Petit said, because there is no connection between your salary and your integrity. But that was not my question.

Just generally, could you tell us how you arrived at that percentage? The government is saying 7.25%, but you recommended 10.8%. There is a rationale for that. Beyond the technical rationale—because taxpayers are ultimately going to pay—I am sure it was certainly reasonable. I would like people watching to have some understanding of your rationale, without having to read 200 pages.

I would imagine one of you could explain it to us, with your characteristic ability to summarize.

Ms. Gretta Chambers: Even with an ability to summarize, it is a huge document and it is very complicated.

I will read you a few sentences...

Mr. David Gourdeau: If I may, I would just like to make a correction to my answer to Mr. Petit.

In terms of contributions and the pension plan for judges, it is sections 50 of the act and following. I would like to correct or amend my answer, because I mislead you. Once a judge is appointed, the estate is entitled to a pension upon death, under the provisions of the Act. But if a recently appointed judge decides after a couple of months to do something else or quits, there would be a return of contributions.

I wanted to be clear on that. So, it is sections 50 and following. For those who might like to read them.

[*English*]

Mr. Earl Cherniak: Mr. Chairman, could I just respond briefly?

We looked at a variety of the best comparisons we could find, from government, from deputy ministers, from the heads of senior boards and commissions—some of them judicial—and from what the incomes were across the country in private practice. We did not limit ourselves to what the two sides—the government and the judges—put to us. We conducted our own research and we retained our own consultant, Morneau Sobeco, a very highly respected and very able firm that gave us wonderful input.

We also used our own experience as to what it took to become the kinds of judges who are necessary in this country. We distilled all of that, and we distilled it in some detail in our chapter 2, which I urge you to read.

We then came up collectively with the amount we recommended.

[*Translation*]

Mr. Réal Ménard: Thank you.

[*English*]

The Chair: Thank you, Mr. Ménard.

Mr. Moore.

Mr. Rob Moore: Thank you, Mr. Chair.

Thank you, witnesses, for being here.

To the commission, I have to take some issue on some points. There seems to be a suggestion out there that the judiciary could somehow fall into the temptation of bribery or otherwise if they don't receive the amount suggested in the commission's report. That's a bit of what I've heard.

The commission's report recommended a salary increase of $23,400 per year, retroactive to 2004. The government's position is $15,700 per year, retroactive to 2004. If we adopt one or the other, I don't think we're in danger of the judiciary falling into that temptation.

Mr. Roderick McLennan: Certainly not, and that's not what I've suggested.

The Chair: I wonder if Mr. McLennan would respond to that. I think it's important that he does.

Mr. Roderick McLennan: Yes.

Certainly there's no suggestion that corruption starts around the $220,000-a-year level. At either level, they're not likely to be corrupted. But I'm talking philosophically.

Why does our Constitution establish that Parliament sets the salary of judges? Judges are the third arm of the government and they have to be independent. In order to be independent, they have to have a standard of living that's commensurate with the job they do. And amongst other things, philosophically it prevents them from being subject to corruption. It has nothing to do with whether it's $220,000 or $240,000 or $180,000.

● (1710)

Mr. Rob Moore: Thanks for clarifying that.

Some of what we've heard is that in order to attract candidates, this has to be the amount. I know Mr. Bagnell had some questions on it. I know there's a recognition that the Supreme Court has been pretty clear that it is Parliament that has final authority on the public purse. We are ultimately responsible for how taxpayers' money is spent even in this current system.

When we hear about those who have put their names forward for judicial appointment, the number of vacancies that are available, and the number of applicants who are in there as either recommended or highly recommended, then with the government's proposed increase of 7.25%, I fail to see how someone is somehow being denied the opportunity or is being discouraged from seeking judicial appointment.

I know a great deal of weight was put on the commission's work, and I certainly respect the work the commission has done. But I don't see any evidence that somehow we wouldn't be able to attract highly qualified candidates if the wages that judges are currently paid were increased by 7.25% per year.

Mr. Roderick McLennan: First of all, the statistics that are referred to are statistics from 2000 and are not available to us. But there's no doubt that it has been the case for many years that there are many more applicants for judicial office than there are judicial offices. The question is, what is the appropriate level of compensation, and what do you do to ensure that the best and the brightest are in the pool from which candidates can be selected?

Mr. Rob Moore: Do you see evidence among the current pool of applicants that the best and the brightest are not in that pool? Are people of less than stellar qualifications applying? The individual committees provincially have to recommend or highly recommend these individuals, so do you see evidence that there's any shortage of anyone recommended or highly recommended? When we look at what the committees are putting forward, there seem to be many. The minister testified that there are many who are recommended and highly recommended.

Mr. Roderick McLennan: Of course, the minister's statistics are from 2006. I don't know what they were when this committee was sitting, but we obviously didn't have 2006 numbers.

It's just one of the factors in arriving at a number, but it's not *the* factor. With respect, if you're hunting for the new president of Canada Post, you don't put the job up for bid and describe its marvellous pension and the corporate jet and ask people to bid for it. If there are 100 qualified people, 25 of whom are really qualified, you don't have a Dutch auction to see what the lowest one is going to work for. You ought not to do that with judges either, in my submission.

The Chair: Thank you, Mr. Moore.

Ms. Barnes.

Hon. Sue Barnes (London West, Lib.): Thank you very much.

I would apologize for us not being here all the time. The government has chosen to call another piece of legislation at the same time, which necessitates some of us being in the House to speak on it.

I want to first of all put on the record how grateful most Canadians are for the work that you've done and the professional manner in which you have done it for us. I would also like to say that I think it's incredibly important that the concept of the independence of the judiciary is understood by Canadians.

Perhaps this has been canvassed on, but maybe I'll go to Mr. Cherniak to just do a bit of an education process for most Canadians who might be hearing this.

Why should we not be discussing the things we're being forced to discuss at this time?

Mr. Earl Cherniak: Well, the reason is that there was a constitutional process that came about because of the disaster that preceded, which resulted in the P.E.I. reference being necessary in the first place. The constitutional process was to appoint an independent, high-quality commission to work independently, not as an arbitration group but in the public interest, to hear input from the public, from the participants, and to come up with recommendations that, except with very good reason, would be accepted by Parliament to set judicial salaries.

Therein the process mandated not only the method of selecting the commission but the way in which the commission's report was to be addressed by Parliament. The commission had a mandate to report by May 31, 2004—and every fourth year on May 31—which we did. The government had an obligation, under the legislation, to respond in six months, which it did, and either accept the recommendations of the commission or give cogent reasons why it didn't and why the recommendations of the commission should not be accepted.

The government of the day did that, and with one minor exception, which isn't germane to what we're talking about, the government of the day accepted every one of the recommendations we made.

There is no provision in that constitutionally mandated process for what transpired after that. There's no provision for a second report after a new government comes in a year and a half or two years later. In my view, that politicizes the process, and it's extremely dangerous because it causes disrespect for the process among the judiciary, among the public, and it will make it more....

I say, immodestly, this was a very talented commission, and we thought what we were doing was very important to the public of this country. If a future commission's recommendations can be treated in the way that the process has transpired here, there will be a great deal of difficulty finding the kind of commissioners that this country needs to conduct this process every four years.

● (1715)

Hon. Sue Barnes: Thank you very much. So in your opinion there was no legal authority to place before Parliament a second report that differed in nature from the first report. Am I hearing you correctly?

Mr. Earl Cherniak: I don't think I should give a legal opinion. I can read the statute. You can read the statute. There's a provision for the response in six months. That happened. There's no provision for any further response.

Hon. Sue Barnes: Thank you. I think that does answer the concern there.

The Chair: You have time for one more question, Ms. Barnes.

Hon. Sue Barnes: Thank you.

One thing that concerned us at this table is that to increase the numbers, to put this provision back to the original report—as I know some of us would like to do—we need a royal recommendation. Without the royal recommendation of this government, we don't have the authority to spend more money. That puts us in a very difficult position. I just put that on the table so people understand that we can take it down under the rules, but we cannot increase without the government allowing us to do so. We will see how this plays out.

I know my colleague, the former Minister of Justice, wanted to be here, but he's now at another place doing this.

I want to say, at least from my party, and I think from all the opposition parties, with the respect we hold for the judiciary, this attack that seems to be coming from the current government is not only disrespectful, but it is harmful to the whole system of justice in this country. This is a hard-working system of justice. It's led by judicial officers who have been chosen for their talents, as you well know. The fact that we are put in this position today by the current government, I think is wrong. I believe we have sufficient case law on point telling us that.

The Minister of Justice stood in the House, when I responded to it the first time, saying to plead less money in the area, when we had the best surplus ever. To plead that we could get people for cheaper was just a spurious argument. I feel somewhat ashamed to be in this situation at the current time.

I hope that in the future we are able to have people of your calibre doing this work, because it's important for all of us.

If anybody would care to make a comment, I certainly would give my time to them.

● (1720)

The Chair: Thank you, Ms. Barnes.

Would the witnesses like to comment?

Mr. Roderick McLennan: The minister was inviting what would virtually be a free vote, wasn't he? As I understood the minister, I thought he invited the committee to do what they thought was appropriate.

Hon. Sue Barnes: With respect, the minister may have left out the fact that if we want to raise the moneys up, the government has to give its consent, because we don't have that power. That was what I put on the table seconds after he made his statement in the House originally. It's called a royal recommendation.

The Chair: Thank you, Ms. Barnes.

One comment that Ms. Barnes brought up was whether the commission looks at this settlement as an attack on the judiciary.

Mr. Roderick McLennan: I wouldn't say so, Mr. Chair. I don't think it's an attack on the judiciary. The judiciary are much more sensitive about these things than I am, so I don't know what the judiciary would think, but I wouldn't see it that way.

The Chair: Thank you very much.

Hon. Sue Barnes: Mr. Chair, I'd like to clarify. I don't think that's what I was saying at all. I was saying that the government is often attacking the discretion of the judiciary, and they do so with their bills, with certain points.

I do not want my words reinterpreted from the chair.

Thank you.

The Chair: Thank you for the point of clarification, Ms. Barnes.

I would like to thank the witnesses for their appearance.

I think this has been a valuable discussion. It's unfortunate we can't continue on a little longer. I know there are other points the members would like to question further, but time does not permit.

Thank you for your attendance.

I'm going to suspend the meeting for about one minute.

[*Proceedings continue in camera*]

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