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Chair

Mr. Art Hanger

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● (1530)

[*English*]

The Vice-Chair (Mr. Derek Lee (Scarborough—Rouge River, Lib.)): Colleagues, I see a quorum.

We are on time and online. We are now reviewing Bill C-17, An Act to amend the Judges Act and certain other Acts in relation to courts.

We have today witnesses on that bill, continuing our hearings of yesterday. From the Canadian Bar Association, we have Robert Leurer and Tamra Thomson, whom I recognize from many appearances here at the justice committee. We also have an individual, Patrice Garant, who is a professor at the University of Laval.

Let's begin. I would ask the witnesses to make a presentation of relatively short duration, and we'll take the witnesses in sequence, beginning with the Canadian Bar Association. Then we'll have questions following that.

The floor is yours.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Mr. Chair, honourable members, thank you for the invitation to address you today concerning judicial compensation and Bill C-17. I will start with a brief overview of the Canadian Bar Association's interest in this issue. Then my colleague Mr. Leurer will give more detailed comments on the various aspects of the government's response to the recommendations of the 2003 Judicial Compensation and Benefits Commission that we believe warrant your close scrutiny.

The CBA has approximately 36,000 members across the country. Our mandate includes a commitment to an impartial and independent judiciary, without which there is no rule of law. That is the lens through which we have analyzed Bill C-17, and it governs our comments today.

While this bill looks to be about money, the underlying issue is that Canadians have a right to have disputes heard by impartial judges who can act freely and without interference.

The CBA's approach to judicial compensation is process-oriented. The right process is one that is objective, dispassionate, and rational. Some describe it as being depoliticized.

Judicial compensation commissions are established to provide a non-partisan method of reviewing and setting judicial compensation. Parliament's deliberations on commission reports involve special constitutional considerations, and these should not be endangered by a politicized and partisan approach. Judges cannot and should not be drawn into the political fray through the setting of judicial salaries, nor should this process be used to gain political points.

I would now turn to Mr. Leurer and ask him to explain in further detail the constitutional deficiencies in the government's response.

● (1535)

Mr. Robert Leurer (Member, Judicial Compensation and Benefits Committee, Canadian Bar Association): Thank you, Tamra.

Let me begin by indicating that the CBA recognizes that the role of this committee puts politicians in the unfamiliar position of leaving political considerations at the door. You must, because public confidence in the justice system is at stake. Canadians should not be left with the impression either that judges are beholden to their boss, who decides their salary, or that judges are predisposed against government because of a salary dispute.

Depoliticizing judicial compensation isn't simply an ideal; it is a constitutional requirement. Every person in Canada involved in the justice system must receive a hearing by a judge who is fair and impartial, and as importantly, who is seen to be so. This principle is a cornerstone of our democracy.

Judicial compensation is one of three pillars on which judicial independence is based, the other two being security of tenure and control over court administration. When this committee reviews the bill before it, the CBA believes it should do so with an eye to whether the government has respected the raison d'être for the commissions: preserving judicial independence and depoliticizing the process for determining judicial compensation. In the CBA's view, the government's response to the commission's report—the foundation for the bill—does not do so.

However, there has been an inordinate delay in implementing the commission report. The CBA cautioned against any delay in the last Parliament, when it considered Bill C-51, saying that delay undermines the commission's effectiveness and consequently, judicial independence. Therefore, we recommend that the bill be amended without delay to reflect the commission's recommendations.

If it is not possible to make these amendments in a timely way, then Bill C-17 should be passed, to avoid more harm to judicial independence. If the latter course is taken, the CBA urges that the committee take the opportunity to comment on the deficiencies in the government's response. This is particularly important given that the next commission is following shortly, to which the government will also need to respond.

I'd now like to turn to the detail of the government response.

As the members of the committee will be aware, the government has refused to implement the salary recommendations of the commission. The government has expressed two reasons for not doing so. First, it concluded that the commission did not give sufficient consideration to the criterion in subsection 26(1.1) of the Judges Act relating to prevailing economic conditions in Canada. Second, it disagreed with the comparator groups chosen by the 2003 commission. In this aspect of its response, the CBA believes that the government has articulated a legitimate reason for departing from the commission's recommendation and a reasonable factual foundation for its decisions.

The CBA's concerns, therefore, are limited to the first of the two reasons given by the government. The unfortunate fact is that while the government has articulated two reasons for the government's salary recommendation, it has failed to articulate the degree to which each influenced its overall recommendation. The inference from the ordering of the considerations is that the first was dominant. Our concern is that this reason, then, permeates the entire response.

Constitutionally, the government must articulate reasons for departing from the recommendations made by a commission. The constitutional requirement to give reasons is illuminated by three further principles, two of which I want to briefly touch on.

First, the government must give rational reasons for departing from commission recommendations; this has also been described as the need to give legitimate reasons. In the words of the Supreme Court of Canada, reasons must be based on facts and sound reasoning, and bald expressions of rejection and disapproval are inadequate.

Second, reasons given by a government to reject a commission recommendation must have a reasonable factual base.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Mr. Chairman, would it be possible for the witness to slow down a bit?

[*English*]

The Vice-Chair (Mr. Derek Lee): Excuse me. We are, of course, always in the process of giving simultaneous translation, and sometimes the French translations use 0 .113 extra words per paragraph, so if you could just slow down a little, the translation would be able to keep up.

Mr. Robert Leurer: Thank you, Mr. Chair. My apologies to member of the committee. It's a disability I suffer from, so I'll try to slow down.

Again to quote the Supreme Court, "...a mere assertion that judges' current salaries are 'adequate', would be insufficient." Together, these directions require specificity in reasons for rejecting a commission recommendation, and not just specificity in explanation of what is put forward as a substitute.

With respect, the CBA believes that the first part of the government response relating to the provision of the Judges Act is so generalized and so lacking in particulars that it fails to give meaningful effect to the 2003 commission report. The government response suggests a tension between the commission recommendations on the one hand and other social and economic priorities of the government on the other hand. However, it provides only generalized statements that other priorities exist, without supporting in any way the conclusion that implementing the recommendations of the commission would have any bearing on these priorities.

The evidence upon which the government relies to show that its words "economic pressures and [competing] fiscal priorities" were not properly weighed in the commission report is found in only two paragraphs of the government response. Reduced to its core, the government simply says that it has key priorities, which it lists, one of which is not judicial independence; it is committed to fiscal responsibility generally and reducing the national debt by $3 billion each year, and the President of the Treasury Board has been tasked to identify savings of $1 billion to support new and ongoing program expenses.

Although the government identifies key priorities and refers to other budgetary objectives, there is no explanation of how or why the implementation of the recommendations of the commission would impair or affect the ability of the government to pursue these goals or objectives.

The generality of the government's response is even more evident in the next paragraph of its response. It says, "Canadians expect that any expenditure from the public purse should be reasonable and generally proportional to all of these other economic pressures and fiscal priorities."

In sum, the government does not believe that the commission's salary recommendation pays adequate heed to this reality. There is no substantive explanation or justification as to how or why the recommendation of the 2003 commission is not, in the words of the government, reasonably and generally proportional to all of these other economic pressures and fiscal priorities. In the absence of further explanation, with respect, the basis for the government's rejection of the commission report is a mere assertion, not a reason.

The CBA accepts that judges are paid from the government purse and that the competing demands on public moneys can mitigate the amount that might otherwise be paid for judicial salaries. The CBA further accepts that a dollar spent on judicial salaries or benefits is a dollar that cannot be spent on another priority, or collected. However, judicial independence is not just a government priority; it is a constitutional imperative. It is for this reason that any decision to deviate from a commission recommendation not only should but must be based on more than a mere assertion.

A reasonable reader of the government response is left with the impression that so far as the response relies on economic conditions and the overall economic and financial position of the country as a reason to disregard the 2003 commission report, the government simply thought the recommendation was too high and a lower salary level was adequate. With all due respect to the government, therefore, the CBA's position is that its response does not meet the constitutional challenge.

● (1540)

The Vice-Chair (Mr. Derek Lee): Thank you very much.

[*Translation*]

We will now hear from Professor Garant, from Laval University.

Prof. Patrice Garant (Professor, University of Montreal, As an Individual): Mr. Chairman, members of Parliament, and members of this important Committee, I have already sent you some thoughts, some of which relate to the constitutional background. I may be somewhat behind on this topic, but I could not help appearing before the Committee to say—and this is the first time I've been invited—what I think of the new process for determining judicial compensation, as regards the Constitution.

In the Government of Canada's current response, I see the accomplishment of a constitutional obligation on the part of the Parliament of Canada to assume its constitutional responsibilities. However, I also believe that it has every right to distance itself from the Commission's report, and I would like to explain what I mean by that.

Constitutionally speaking, the Supreme Court has said that priority must be given to the wording of the Constitution, and that wording, as you know appears in section 100 of the Constitution, even though, as the Supreme Court has stated on a number of occasions, there are some underlying constitutional principles that may involve obligations for both governments and Parliaments. However, the Supreme Court said, in the Bodner decision, and repeated in 2005, that these unwritten, underlying constitutional principles are not an invitation to completely disregard what is written in the Constitution. “On the contrary—as stated in paragraph 53—we confirmed that there are compelling reasons to insist upon the primacy of our written Constitution.” Indeed, our written Constitution provides, in section 100 of the Constitution Act, 1867, as you well know, that “the salaries, allowances and pensions of the judges of the superior, district and county courts... shall be fixed and provided by the Parliament of Canada.”

In terms of the historical background of this provision, we know that in 1867, the Fathers of Confederation wanted judicial compensation to be Parliament's responsibility, whereas the administration of justice was deemed to be a provincial responsibility under the Constitution, as you know. Section 100 does not provide for any consultation whatsoever, not even consultation with the provinces. Therefore, if the framers of the Constitution had wanted there to be consultations provided for under the Constitution, they would probably have said so.

As you know, only Parliament and the provincial legislatures can amend the Constitution, and particularly the wording of section 100. There is a process for amending the Constitution, which you are aware of, under sections 38 to 49 of the Constitution Act, 1982. However, I believe that by requiring Parliament to create an independent commission that must be consulted and whose recommendations are binding on Parliament itself, except where Parliament provides grounds for deviating from them, the Supreme Court made a structural amendment to the Constitution, thus usurping—forgive me for saying so—a constitutional power that does not belong to it. I see that as serious, in a constitutional system of government.

The Court, of course, described the importance of these unwritten constitutional principles, but does amending Parliament's sovereign power or the formal wording of the Constitution truly amount to filling the gaps in the Constitution, as the Supreme Court suggests? Because the Supreme Court says that these unwritten constitutional principles can in fact help to fill in the gaps in the Constitution. Yet the sovereignty of Parliament, and thus of its elected representatives, over public finances, which include taxation—no taxation without representation—and government expenditures, is absolutely fundamental, and has been the most deeply rooted principle in our constitutional tradition from King John's *Magna Carta* to the present.

● (1545)

At the same time, setting the compensation of the entire public sector is a highly political issue, as the Supreme Court has stated. It is difficult to depoliticize this decision, for which government and Parliament are responsible. The Parliament and the government must be accountable to the electorate.

So, what are these independent commissions that the Supreme Court has invented, and imposed on us, in the name of the democratic principle? The democratic principle is enshrined. It is one of the four fundamental principles in the Constitution, as the Supreme Court reminded us in the *Reference re Secession of Quebec* in 1998.

Are these commissions democratic in nature? What is their democratic legitimacy? Of course, you may say I am a rather late critic of the system, but the fact is that this does give food for thought and, indeed, prompts me to agree with the position taken by the government, which is distancing itself from the content of the report.

Among government and parliamentary responsibilities can be included not only those actually identified, and which the McLellan Commission considered, but also much broader responsibilities. The government has to appreciate not only economic conditions in Canada, but also the country's overall financial situation, the share of financial resources that should go to the various government programs and, I would add, the extremely important role of Parliament in redistributing wealth, within the meaning of section 36 of the Constitution Act 1982, with respect to the spending power. A significant portion of the federal budget must be used for provincial transfers to support essential public services, and that is a concern which the so-called independent commission is not required to consider. Yet these are government and parliamentary responsibilities and, in that respect, I believe that Parliament has a right to distance itself from the content of these commissions' reports.

This commission, as the Supreme Court reiterated in 2005, performs an advisory function. But an advisory function is not a decision-making function, as you know full well. Indeed, the Supreme Court ruled, in a 1992 decision, that a recommendation is merely a recommendation, not a decision, and that it does not strip the holder of decision-making power of the power. Furthermore, section 100 entrenches the decision-making power of Parliament, which is a unilateral power.

On that point, it is interesting—and I will just briefly touch on this—to compare section 100 with section 99. Section 99 concerns the process for removing or terminating judges, and 30 years ago, the Judges Act was amended to establish the Canadian Judicial Council and a disciplinary and ethics process, whereby quasi-judicial committees of inquiry of the Council may recommend that a judge be removed or terminated. The constitutionality of this mechanism was raised before one of those committees, the committee involved in the Gratton affair in 1994, and subsequently Justice Barry Strayer had to study the matter in Federal Court. It was considered that this process did not alter the Parliament of Canada's unilateral power to remove judges. In that respect, one may wonder on the basis of what logic, if Parliament does retain its sovereign power to write an "Address of the Senate and House of Commons" to remove a judge, it would be bound by the report of an independent commission with respect to pay increases for judges?

In one case, we're dealing with financial security, one of the essential ingredients of constitutional independence and, in the other case, we're talking about security of tenure, which is as important a component, if not more so, of that financial independence.

● (1550)

Now, I would like to say a few words about what has been written over the last five or six years in rulings of both the Superior Court or the Court of Appeal, and in reports at both the provincial and federal levels. I have done a considerable amount of reading on the subject, which has prompted me to give this quite a bit of thought and conclude that the process that has been put in place is cumbersome, complex, and cannot easily meet the objectives that those who designed it had in mind.

Consider the fact that in Quebec, the 2001 report is still under consideration by the Superior Court, the Court of Appeal, etc. According to a 2004 report, there may yet be legal challenges. And then the process will begin all over again, with the Federal Court, the Supreme Court, and so on, in order to apply criteria that are not that simple. As for the test of simple rationality, I will spare you the explanation, because I have read things written by eminent justices of courts of appeal and superior courts that introduce all sorts of qualifications in that area.

What exactly is simple rationality when, with respect to the factual basis for the government's position, it is said that the government is providing rationale for its position? When you read these reports, it is clear that there can be respectful differences of opinion as to the choice of certain criteria or comparators. Some things seem to rely almost on a kind of mythology. Over the years, a certain number of concepts have been passed on. And I have to smile at times, for example, when I hear people suddenly make much—or otherwise—of the comparison between justices of superior courts and deputy ministers.

There are nine DM-3s in Canada and two DM-4s. There is no doubt that most of these DM-3s with legal training could easily become judges. There are some in the Supreme Court: the former associate deputy minister, and so on. But does it work in the reverse? I know a great many justices of the Superior Court and nothing on earth would ever prompt me to appoint them deputy minister of a major federal department. And many of them, when they see that they are supposed to have exceptional skills—or that, at least, is what it says in the reports—acknowledge that they are good judges, have a thorough knowledge of the law, are capable of moving litigation forward, and are human beings able to listen to what others have to say and write decisions, but they do not believe they have exceptional skills. And yet, this is what you see in the reports: in other words, judges must be exceptional, just as exceptional as our nine deputy ministers or our 11 deputy ministers who, naturally, have responsibilities of a completely different nature—and the reports actually state this—from those of a justice of the Superior Court. A deputy minister's responsibility is enormous: government programs, accountability, managing a large staff, and so on. I think that is one example of the myths that very often tend to be passed along.

In order to compare, we use standards of comparison applicable to lawyers in private practice working for large firms in large cities. As can be seen in the Commission's report, the compensation received by lawyers in the public sector is not considered. Let's compare that, for example—and this may be a bad example, because it's not particularly convincing—with the salary received by law professors.

An hon. member: It's not bad either.

Prof. Patrice Garant: True, it's not bad, but there is a considerable difference, when you see what some private practice lawyers at the top of the wage scale are earning. Furthermore, there is no requirement to perform only that job, meaning that you can engage in other activities, conduct research, and so on; but in order to earn $230,000 or $220,000 a year, I suppose a law professor would have to work seven days a week, 370 days a year. These are comparators about which people may have differing opinions, and when a government, for good reasons that have been considered by its officials, decides that it disagrees with these reports, well, I have to say that it doesn't shock me at all. And when a government that takes over from another one does not share the opinion of the previous government, I would say that it is perfectly normal.

So, I guess I could add a great many other things. But in terms of the quality of the justices serving on our superior courts, particularly at the trial level, the fact is there are many excellent judges there that do not come from the big law firms in Montreal or Quebec City; rather, they come from legal aid offices, the public service, and so on. So, I believe the net must be cast much wider than did the McLellan Commission.

● (1555)

Mr. Chairman, thank you for your patience. I will be available to answer your questions later.

[*English*]

The Vice-Chair (Mr. Derek Lee): Thank you, Professor Garant.

I want to thank both witnesses for providing their submissions in writing prior to the meeting. It's very helpful to members.

We'll start with our seven-minute rounds, and I'll go first to Mr. Cotler.

Hon. Irwin Cotler (Mount Royal, Lib.): Thank you, Mr. Chairman.

I want to begin by welcoming the witnesses from the Canadian Bar Association. As the Minister of Justice, I was very much the beneficiary of your counsel, including on the matter that is before us today.

[*Translation*]

I also want to wish a very warm welcome to Professor Garant, whom I met, in my capacity as Minister, at the Laval University Faculty of Law.

[*English*]

I appreciate that the fundamental constitutional principle that has underpinned the presentation of the Canadian Bar Association is that of the independence of the judiciary as the cornerstone of our democratic process, as being, in effect, the lifeblood of constitutionalism, a principle that has had a certain increased importance with the advent of the charter. Financial security is a basic component of that independence. Indeed, as your brief points out, an important and related principle is not only that the judiciary must be independent, but it must be seen to be independent, which is the raison d'être for the establishment of the independent commission. In effect, this independent commission—and here I reply as well to Professor Garant's statements—was established to protect this constitutional principle, to protect our constitutional democracy, because with the advent of the Charter of Rights and Freedoms we have moved from being a parliamentary democracy to being a constitutional democracy, where the principle of the independence of the judiciary has, as I say, an enhanced importance.

I saw the work of the independent commission to protect our constitutional democracy in that principle, rather than to be seen, Professor Garant, as usurping it, to depoliticize the process of setting judicial salaries and benefits, and to ensure that judicial salaries and benefits would be determined by an evidence-based inquiry conducted by a commission that was independent from both the government and the judiciary, but giving Parliament an important role to give effect to this principle.

The parliamentary role, as I understand it—and here I relate to Professor Garant's presentation as well as to yours—takes place as follows. The Constitution does not require that the commission's report be binding, but the government must give a rational or legitimate set of reasons to depart from the commission's findings, and those reasons must have a factual and evidentiary basis, all part of the protection of the independence of the judiciary. Therefore, when a standing committee of Parliament, such as ours, reviews the government response to a commission report, it's our responsibility—and this is why there is an important parliamentary role distinct from the parliamentary role being usurped—to ensure that the reasons given by the government, as the Canadian Bar Association put it, are not incomplete, generalized, or lacking in particulars.

Here I come to the essential point. It is your view, as I appreciate it and as you expressed it today in terms of the Canadian Bar Association, a view which I share, that the government response is so generalized, so lacking in particulars, that it fails to give a meaningful effect to the 2003 commission report. The alleged reasons given by the government do not demonstrate how or why the implementation of the recommendations of the commission would somehow, as you put it, impair or affect the ability of the government to pursue its economic and social priorities as set forth in its budget of 2006, which could not have been before the commission in 2003.

To sum up, there's no justifiable explanation to reject the commission's findings. My question to the members of the CBA here today is this. Is it fair to say that, between what I call the constitutional imperative of protecting the independence of the judiciary, as against the lack of a demonstrably based justification for rejecting the commission's decisions, this standing committee should support the recommendation of that independent commission?

Either one could answer.

● (1600)

Mr. Robert Leurer: Thank you, Mr. Cotler.

You have summed up well two things. First of all, you have summed up the position the Canadian Bar Association has attempted to articulate in its reasons, and second, you've drawn out of the government response the conundrum the Canadian Bar Association had with respect to the two reasons given by the government in its particular response. Without question, the statute entitled the government to look at the overall economic and current financial position of the federal government. But when we looked at the three paragraphs of the response, which was the first response given, we couldn't slot it into the constitutional mandate that was articulated by the federal government, which was to develop a rational and logical reason to depart from the commission.

Again, and we say this with all respect to the federal government, something more than a bald expression is required constitutionally. That presented a difficulty, because we then didn't know how, and the extent to which, it ended up influencing and infiltrating the remaining reasons that were given by the government in its response.

● (1605)

Hon. Irwin Cotler: You say, as well, that there's also the process, namely that we need to move on this and make a decision with all deliberate speed, to use that phrase, because the independence of the judiciary also gets prejudiced the longer we go without a decision to in fact adopt the recommendations of the independent commission.

Mr. Robert Leurer: The Canadian Bar Association is certainly concerned. And we would invite members of the committee to take into account the fact that the next commission is going to be meeting in 2007, so it's important to get this process right, and it's important to move on. Otherwise, we're simply compounding a problem that presently exists.

The Vice-Chair (Mr. Derek Lee): There is half a minute left, Monsieur LeBlanc. You have half a minute.

Hon. Dominic LeBlanc (Beauséjour, Lib.): Thank you, Mr. Chair.

Perhaps my question was a very specific one that I hear from former partners of mine who practise law in New Brunswick and from other members of the bar in my province. They were quite distressed that the government chose to remove the provisions of the previous legislation that created additional seats in the Unified Family Court. It's not precisely with respect to compensation, but the previous legislation had included that.

I'm wondering if you have any views on whether in fact the removal of that prejudices, for example, the many child custody cases and protection cases in my province that may be backlogged and would benefit from an increased capacity in the family court. This was a national issue, but I hear about it in New Brunswick.

I'm wondering if any of you have any views on that having been taken out of the legislation.

Ms. Tamra Thomson: Certainly members of the CBA have noted the problem of backlogs in family courts in provinces other than New Brunswick, as well. We see it as a problem across the country, and we certainly supported the additional complement of judges for the unified family courts that were in the previous bill. We have asked the minister if he would bring those complements forward, and we hope he will do so.

Hon. Dominic LeBlanc: Thank you, Mr. Chair.

The Vice-Chair (Mr. Derek Lee): Thank you.

Monsieur Ménard, pour sept minutes.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Mr. Chairman, I am very pleased to welcome our witnesses to the Committee. I am particularly pleased to see Professor Garant here. Unlike my colleague, I did not have the pleasure of directly benefiting from his teaching. However, I am sure that he is a very dynamic professor and is greatly appreciated by his students.

Professor, I would like to explore two questions with you.

The Commission does exist and, of course, we have to deal with that reality. We cannot simply ignore it. However, I was a little disappointed with the group that appeared before the Committee. The fact is, we do need to have comparators. Judges must be compensated. We want them to be well compensated, to be free from corruption or the vagaries of politics, and to enjoy tenure, except in cases of improper conduct. And of course, we also want them to be impartial.

I could go so far as to ask you how much a law professor earns in his best earning years, but instead, I will show restraint, unless you yourself are prepared to lift the veil on that matter. You state in your brief that within the legal profession, lawyers who make a good living earn approximately $150,000. And I liked your comparison with Level 3 and 4 deputy ministers.

But, in order to set appropriate compensation for judges, what kind of base of comparison are you suggesting? How much does a Level 3 or 4 deputy minister with the federal government earn? And finally, if you could also answer the following question, I would like to know what you see as the qualifications for being both a good judge and a good deputy minister.

Prof. Patrice Garant: I believe a whole host of criteria should be considered, not only those relating to Level 3 and 4 deputy ministers or a certain category of private practice lawyers who, because they earn a fortune, are considered to be very successful.

I believe there is a need to broaden our palette, and that is what the government seems to be saying in its report. There is a real need for comparators.

● (1610)

Mr. Réal Ménard: Give us some examples.

Prof. Patrice Garant: The legal profession does not only comprise lawyers working for large firms in big cities. There are also public servants. We've been talking about deputy ministers, but there are also a large number of professionals. There are several thousand in Canada. In every department of justice and even in other departments, they practice law and fulfill very important responsibilities, including advising their minister. In their case, the salary scale may vary, but their compensation does not exceed $150,000.

And there are also the law professors. Of course, this is an area where people negotiate collective agreements. However, it is rare for a collective agreement to provide for compensation of more than $100,000 or $120,000. In addition, because there is no requirement for exclusivity, professors can hold copyright or engage in consulting. But here we're talking about amounts that may vary between $25,000 and $50,000, approximately. That is probably the most that a professor could receive by way of compensation, unless he or she happens to be a big star. I think Mr. Cotler could confirm that.

Mr. Réal Ménard: Yes, but Mr. Cotler is not interested in material things. That's why I didn't ask him that question.

I'd like to move now to my second question. In the Bloc Québécois, we are interested in tying the mechanism for increasing judges' compensation to the one for elected representatives. This is a principle that we defend, and in the circumstances, we have the benefit of the subtle but clear leadership of our House Leader. As members of the Bloc Québécois, we are quite indignant at the idea that the Chief Justice of the Supreme Court would, if this bill passes, be earning $3,000 more than the Prime Minister. We also believe that, in accordance with the principle of democratic legitimacy, judges should not earn more than members of Parliament.

Now, I wouldn't want you to immediately jump to the conclusion that I'm seeking a 10% wage increase. However, I am interested in hearing your opinion. Do you think we should consider linking salary increases for members of Parliament to those of judges?

Prof. Patrice Garant: Well, I am inclined to think that given their responsibilities, parliamentarians should be better paid. In terms of giving them the same level of compensation as judges, I find nothing scandalous about that, given their responsibilities. The fact remains, however, that our society relies on certain myths. For example, we have always expected judges to earn much more than ordinary members of Parliament, or even ministers.

Mr. Réal Ménard: Do I have the time for one last question, Mr. Chairman? I don't want to go too far.

I was surprised by your statement. I'm just wondering, with respect to people who have been appointed judges in our various courts of law whether the fact of being part of a firm—and I won't name any one in particular—in Montreal or Quebec City is a factor that increases your chances of being selected. Of course, we want to know which individuals are most qualified to be appointed to the bench. In my opinion, such an individual must have a thorough knowledge of the law, the ability to synthesize material, and have values that pretty well jibe with prevailing attitudes—which, of course, does not rule out the right to a dissenting view. Some justices of the Supreme Court have availed themselves of that right more than others. But, in your opinion, does being a partner in a major law firm or practising law in a large city make you a more attractive candidate?

Prof. Patrice Garant: It does make you attractive, but it's not the only factor. I have trouble understanding why commissions attach so much importance to that. I know of many public servants with legal training who work in departments all across Canada. In administrative tribunals, an area I am relatively familiar with, there are many remarkably talented people. Some of them become judges.

Have you considered the fact that many lawyers are earning high fees in areas of the law that do not prepare them very well for ordinary practice? Lawyers working for corporations, for example, are very often more like business people. They work on boards of directors, among other things. Imagine that from one day to the next, these people are suddenly sent to preside over a trial involving family law, which requires having some psychology, and other skills.

Indeed—and Mr. Cotler can confirm this—a great many of these lawyers from large firms in Toronto, Vancouver and Montreal would not agree to a career in a superior court, except perhaps in the Appeal Court or the Supreme Court, because it would not suit them. Their professional practice has nothing whatsoever to do with the work of a justice of the superior court, who has to hear a great many cases involving family law, private law or trade law, for example.

[*English*]

The Vice-Chair (Mr. Derek Lee): *Merci.*

Mr. Comartin, for seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

I want to apologize to the committee and to the witnesses for my tardiness in being here, but as you know, Mr. Chair, I was caught on a privilege motion that kept me in the House until I could get here.

Professor Garant, I don't think there's anybody sitting at this committee table who has any doubt that the constitutional authority in this country lies with the government—with Parliament ultimately, I suppose—in terms of determining judicial salaries. I think the brief you gave us confirms all of that. But with due respect, it seems to miss the point that is set out in the CBA's brief, that there are three basic criteria that have generally been accepted in terms of analyzing the government response to the commission's report. You haven't addressed that other than in an indirect fashion.

There are three basic points. One, the government has to have rational reasons for departing from the commission's recommendations. Two, the government, again, to reject the commission's recommendations, must also have a reasonable factual basis. And three, the process has to show respect for the commission process.

I think what we heard from the commission yesterday, certainly on the latter point, was that they felt totally disrespected by the process we put them through and agreed with the CBA that the government had not given rational reasons or a reasonable factual basis for that.

So I would ask you, where do you see the government's position as being valid when you apply, in particular, the first two criteria?

● (1615)

[*Translation*]

Prof. Patrice Garant: With respect to the third one, I do not believe the government's response in any way suggests that the process was tainted. Personally, I am satisfied with the level of evidence and reasons the government is required to give.

Of course, the government could provide additional details when it says, for example, that it has other economic and social priorities and that these do not jibe with the normal concerns of this type of commission. The latter does, in fact, focus on specific aspects of public spending, such as the policy on compensation for judges.

The government says in its response that it has many other economic and social priorities and that these require it to allocate its budget differently. But how far can we go in terms of what we demand of the government? For example, should the government have to provide pages and pages of detailed explanation of the entire political agenda on which it was elected, and say exactly how the next budget will implement that agenda?

I, personally, am relatively satisfied. I don't really see how the evidence and information the government and Parliament are required to provide as rationale for deviating from or rejecting a recommendation could be more comprehensive. And, of course, we're talking about marginal differences. The commission is proposing compensation of $240,000. The government—for a variety of reasons—is saying that compensation of $230,000 seems reasonable to it under the circumstances. It could provide additional details with respect to its rationale.

Mr. Joe Comartin: Supposing you were to put this in front of a judge or a court of law in any province in Canada. Do you think a court would say that these three reasons were adequately developed by the government? It has provided practically no explanation for the changes it is suggesting to the recommendation.

Prof. Patrice Garant: You could do what was done in Quebec, which was to send the whole matter back to government and ask it to provide a more detailed rationale, without suggesting that it was wrong to deviate from the recommendation, given its particular priorities. The government could deal with that matter fairly quickly. If you like that approach, it could, indeed, prove beneficial.

Mr. Joe Comartin: We can't do that kind of thing, Professor Garant. That is not within the powers of this Committee.

Prof. Patrice Garant: It would be yes or no.

[*English*]

Mr. Joe Comartin: Mr. Leurer, can you address this issue in terms of, as I'll put it, the inadequacy of the reasons given by the government? In particular, if we're again trying to judge it through some neutral decision-maker based on the constitutional law and practice of this country, is the government's position even weaker because what they came back with is exactly the same position as they started with, as the commission sets out somewhere in their report? You didn't address it in your brief, but does it further weaken the government's position again in front of that imaginary independent tribunal?

● (1620)

Mr. Robert Leurer: I want to resist the temptation to reiterate a couple of the things that were said in the written brief that was filed.

In its decisions and opinions on this particular subject, the Supreme Court said the government must not simply reiterate the submission that it has given to a commission when issuing the reasons for deviating from the commission report itself.

To that extent, it would certainly be an observation a third party may have that underscores the difficulty we have in trying to pull out the three paragraphs in the response that explain the reasons or purport to explain the reasons that the government deviated on the basis of an economic and financial position and could not implement the commission recommendations. We view it as a collateral point that supports the conclusion as opposed to the reason itself.

I want to very briefly comment on the other issue that has been bandied about a little bit, which is the use of comparators.

From a Canadian bar perspective, I want to emphasize that the fact of the matter is that judges must be lawyers. The fact of the matter is that the issues that courts are called upon to decide are more and more important, and sometimes this is the subject of negative comment.

We think it's a mug's game. We'd urge this committee not to get into a particular comparator at this stage. The issue at this point is one of process and whether the response has been true to the process itself.

I hope that helps you, Mr. Comartin.

Mr. Joe Comartin: It does.

Let me pursue it to this degree, because I agree that it's not appropriate for us to get into those kinds of details. But Monsieur Ménard from the Bloc keeps bringing up a point, which I think is an irrelevant point, about linking the salaries of judges to the incomes paid to members of Parliament. Could you give us an opinion on whether that would have been a proper consideration for the commission to make?

Mr. Robert Leurer: I think the best I could do to help you, Mr. Comartin, and the other members of the committee is to refer you to the commission report itself. This was something that became the subject of submissions before the commission. The commission, I think very correctly, indicated that it is not part of their role—and we would suggest to you it shouldn't become part of your role—to look at the consequences that follow by reason of the fact that other decisions have been made to link salaries to judges' salaries. The point we should be considering, at this point of time in the constitutional imperative, is setting judicial salaries in accordance with the process that's been prescribed by the Supreme Court.

The Vice-Chair (Mr. Derek Lee): That's all the time you have.

Mr. Moore, for seven minutes.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair, and thank you to all of the witnesses for taking the time to meet with us today.

I want to ask a couple of questions, but first I want to say that I think some of the response, particularly from the opposition, has been a little alarmist on this issue. I agree on a number of fronts with some of the witnesses we've heard and I agree with the Canadian Bar Association submission that we should act quickly. I think our government did act very quickly. Shortly after we were elected, we brought in this bill. We studied the committee's findings. As a matter of fact, this bill contains all the committee's recommendations, except there was one exception, and that is on the salary. Some have suggested that somehow this whole process undermines judicial independence, and I think that's a little alarmist. I know that's not the intention at all.

Professor Garant, I found your testimony to be interesting on some of the constitutional underpinnings, the fact that even today, ultimately, we as parliamentarians, as government, are responsible for the public purse.

So the facts are that the government acted quickly and brought in this bill. The only deviation from what the committee recommended is this. The committee recommended that judges receive a 10.8% increase retroactive to 2004, and we studied that, gave fair weight to that, but also felt that there were some shortfalls in their analysis and decided on a 7.25% increase.

So I just want to caution that in no way do I see, nor does the government see, this as impacting on the independence of the judiciary. There have been some rather alarmist comments made that somehow this could shake the foundation and judges would somehow be more susceptible to bribes, and I think that's pretty far-fetched. Whether we go with (a) or with (b), I don't think judges in this country will be any more or less susceptible to any wrongdoing. To suggest that shows a real lack of faith in the judiciary.

I almost get the sense from the opposition that somehow there's no way the commission—an independent commission, where one member is nominated from the government, one member from the judiciary, and then one selected by the other two—could ever do anything out of line with what the public expectations and the government responsibility is. I'm wondering what we would responsibly say if the commission had recommended a 30% increase in salaries.

We all have a sense, I think, of what's reasonable and what's not reasonable. I know if you talk to lawyers, and I know you do, I would suggest that most lawyers in the Canadian Bar Association, regardless of which of these increases is ultimately chosen at the end of the day, or something in between, would love to have a judicial appointment. To me, it's almost an insult to some lawyers and to those who get that very important appointment that somehow the salary would play that huge an impact anyway. So many people would take on that responsibility for half of what judges currently make. To think that 10.8% is some sort of magical number...because honestly, the sense I get from the opposition is that there's no way any other number could possibly do, that all of a sudden 10.8% is infallible.

For example, compared to incomes in the 75th percentile across all provincial centres, urban and rural, we felt there was too much of an emphasis placed on urban. And I can tell you—and you all know this already—there is no lack of highly qualified and qualified individuals who would love to have a judicial appointment and to be a member of our judiciary.

● (1625)

But could you comment a bit on when it would be reasonable? Under what scenario would the test be met? To the Canadian Bar Association, I note that you do feel that the government has met the test as set out by the Supreme Court in some respects, so under what scenario do you think that would be completely met?

Mr. Robert Leurer: Thank you, Mr. Moore. I'll do my best to try to answer the question.

What I'd like to do is begin the answer by taking you back to one of the questions that you included in your comments, which was the hypothetical—and I emphasize that it was hypothetical—situation of if the commission had recommended 30%, and I'll leave off to the side the observation that of course it didn't, that it recommended another number.

From the Canadian Bar Association's perspective, the important principle here is, first of all, not the number itself. The commission has explained how it has come up with the particular number, and after the number has been articulated by the commission it's quite clear from a constitutional perspective that the analysis then evolves into one that is process based.

So that leads to the second question that I think you've posed for us, in looking for some help from the Canadian Bar Association for the benefit of the commission, which is what is an adequate response from the government? There I have to go back to the problem the Canadian Bar Association has with the process and the detail of the government response itself, because you correctly observe that the government has explained the choice of a different comparator to derive a particular number.

The problem is that the rationale they layer into the response starts from something that doesn't explain the relationship between the need to deviate from the commission report and the—to quote from it—“economic and financial position” of the government itself. So we have this void where we have to take a leap.... We've been told in this process that “Canadians expect that any expenditure from the public purse should be reasonable and generally proportional to all of these other economic pressures and fiscal priorities.” But there's nothing we can draw out of the report that explains why the number that's been recommended by the commission is not reasonable and generally proportional. That's where the breakdown takes place, from the perspective of the Canadian Bar Association.

● (1630)

[*Translation*]

Prof. Patrice Garant: I am inclined to link that to the perception of independence, something that was raised on this side of the table. The process that the Commission engaged in was perfectly appropriate. I believe the Association had asked for a 17% increase. The Commission, which relied on serious studies, held hearings and consulted quite a number of people, including experts, proposed an increase of 18.9%. For slightly different reasons, which are well explained in the government's response, the latter is proposing a 7.5% increase.

But why not ask the general public, your constituents, or some 750,000 employment insurance recipients whether they consider that kind of salary increase to be unreasonable? Why not ask 40% of the people working for the City of Montreal, who earn less than $30,000 a year, whether they feel that judges will no longer be independent if they only receive a 17 or 10.5% salary increase? I think the answer there is obvious.

As members of Parliament, you must understand that people's perception of independence is not related to that sort of thing. These issues will not change much in that regard. As experts in the field, we may be keeping a myth alive by looking closely at these issues and endlessly analyzing the report of the Commission and the government's response. In my opinion, if we take a more comprehensive view of things, we should be satisfied with the fact that in our constitutional system, the judiciary is independent and the compensation process is satisfactory. Everyone has to take their own responsibilities. Parliament has its responsibilities, which are of a constitutional nature.

I already stated that in my view, the government can deviate from the recommendation. It has good reasons to do so. Perhaps we would have liked a little more information in terms of what it says on pages 5 and 6. But the Canadian public is aware of the government's priorities. People want there to be federal transfers, in order to reduce waiting times for health care services or improve the daycare system. The vast number of federal government programs currently operating means that the government will have to invest a great deal of money. And that money simply cannot be invested elsewhere.

[*English*]

The Vice-Chair (Mr. Derek Lee): Thank you.

That was just about eleven minutes. Thank you.

I'll recognize Mr. Bagnell, who will have five minutes. Then we'll go to Mr. Lemay and then Mr. Petit.

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

My question is for the Canadian Bar Association. Maybe the biggest issue for the opposition, for me, and for you might be that the frivolous or ideological change in the judges' salaries is threatening the independence of the judiciary.

We had the commission before us yesterday, and that wasn't their biggest concern. Their biggest concern was that after the government had made a decision on the commission report and it was all finalized and ready to be implemented, a new government came in and changed it completely. The commission was apoplectic, in that this action was causing a travesty in the process.

I wonder what your thoughts are on that.

● (1635)

Mr. Robert Leurer: I can't help but begin by noting that fundamentally the Canadian Bar Association's position is that the first bill should have passed, which of course would render the matter moot. Beyond that, the Canadian Bar Association has not developed a position with respect to the constitutionality of the fact that the government has changed its position with the change in the government that's behind the commission—

Hon. Larry Bagnell: It's not the constitutionality, but the travesty of the spirit of the independence of the commission and the process.

Mr. Robert Leurer: It's impossible for me to take myself away from the first conclusion I expressed, because the spirit of the legislation would be a timely response and an implementation of the commission reports themselves. We find ourselves less than 12 months away from the implementation of the next quadrennial commission itself. I don't know whether I can provide much more help to committee members than that.

Hon. Larry Bagnell: To go on to the main concern that we've talked about, if you're paying someone and deciding their salary, they're not really independent; our understanding is that's why we have an independent commission, and I think it was suggested yesterday in committee that only in dramatic circumstances should there be changes to those recommendations.

I think you'd tend to agree that there are no dramatic reasons for jeopardizing the public perception of the independence of the judiciary by making these changes in salary at this time.

Mr. Robert Leurer: Simply put, the test that's prescribed—the existence or non-existence of rational, evidence-based, legitimate reasons—doesn't exist, in the submission of the Canadian Bar Association. Again, we end up with the conclusion, the feeling, that a reasonable person, leaving aside the detail of the salary, would conclude that the government response was that judges are paid enough already, or will be paid enough, without responding to the detail, at least insofar as the attempt is to peg the rationale for that upon economic conditions of the government.

Hon. Larry Bagnell: I think your very first opening was that you recommended that the committee and the Parliament agree with the commission's recommendations and implement them. In my understanding, the problem is that we need a royal recommendation, because we'd be increasing money and we have no ability to do that. The government has already stated its position. The government has to provide a royal recommendation, so this committee and Parliament have no power to implement the commission's recommendation.

Where do you suggest we go from here?

Mr. Robert Leurer: There are two things. The Canadian Bar Association would hope that the government is persuaded by the strength of the reasons that the Canadian Bar Association brings forward. Failing that, and if the only option is to pass the bill in its present form, it's very important for this committee to emphasize the deficiencies in the existing response and to recognize that next year we're into another commission process.

That's one of the few happy facts that come from the fact that this matter has been allowed to drag for three years.

Hon. Larry Bagnell: Mr. Garant, you took away the validity of the commission—you suggested that, which is not what we're debating today—but things in Canada also run through convention, and Supreme Court decisions refine the law, so those should be the validity for the commission to exist.

Prof. Patrice Garant: I'm sorry, I didn't pick up your question.

● (1640)

Hon. Larry Bagnell: Things are done by convention, such as separation of the judiciary and the executive branch, and the Supreme Court is responsible for refining when there's not enough definition in law. So those reasons alone should be enough to validate the existence of the commission.

[*Translation*]

Prof. Patrice Garant: I do not believe with the 1997 reference, the Supreme Court caused a constitutional revolution or that it in any way set aside the principle of the separation of powers. It said that in addition to the democratic principle and other constitutional principles, there is the principle of judicial independence and that, in order to comply with that principle, it would create an advisory commission that would make a recommendation to the government. The government would then have to try and support the recommendation or reject it, if it had valid reasons to do so. Subsequently, the courts would examine the government's response based on the test of simple rationality, which is reasonable.

However, when you read all the reports, it becomes clear that the choice of a government's rationale can vary considerably. It is not necessarily unreasonable to emphasize one aspect more than another. Governments succeed one another and we all know that they are elected on the basis of political platforms that may be different.

So I am not in any way scandalized by the fact that the government is not taking this to the letter, 100%. There is nothing unconstitutional in that. The Supreme Court did in fact open the door to that kind of difference of opinion.

The Vice-Chair (Mr. Derek Lee): Mr. Lemay.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chairman.

I'm not sure that your perspective and your enlightening testimony have or will help us to better understand this complex issue. That's the reason why I would like to address my question to Professor Garant, who taught me Administrative Law I, II, and III in the 1970s.

Professor Garant, I think this would be a fantastic examination question for your students. This is how I see the question: section 100 of the Constitution says that salaries, allowances, and so on are paid by the Government of Canada. On the other hand, section 99 of that same Constitution says that justices of the Superior Court shall hold office during good behaviour, etc.

Now, I absolutely have to be in the House at 4:55 p.m. So, I will ask my question this way, although you will probably correct me. Where does the legislative power—in other words, the power of this Committee—end in relation to the power of the judiciary or judges serving in a court of law? It seems to me that there is a very fine line there, particularly when we're talking about judges' compensation.

So, this is the question in my mind, and I want to apologize for sloughing it off on you in your great wisdom. I am certain that you will be in a position to enlighten us. Just how far does it go? Where does it end? I don't know if you understand my position. The student in me has come to the fore once again and thus I am putting the question directly to the teacher. So, please enlighten us.

Prof. Patrice Garant: I have read a number of rulings where appear courts and Superior Court justices have attempted to define the criterion of simple rationality, what is reasonable.

But where a compensation policy is concerned, it's more complex. There is a need to consider a number of political and economic issues. It's essentially political. Indeed, the Supreme Court clearly stated that the compensation policy was a political matter; we may try in vain to depoliticize it by having an independent commission process, but the fact remains that it is fundamentally a political choice. In a democratic system, this choice ultimately rests with Parliament.

Now, can Parliament make mistakes in expressing a different opinion? It's quite possible. But ultimately, there is the electorate. Now, you will say that what we're talking about around this table will certainly not be an election issue, but the fact is that this is where our democratic process comes into play.

Finally, as a democrat, I am inclined to say that this decision is one for parliamentarians to make. If they believe that the rationale provided is not adequate, they should do what the Canadian Bar Association has done. The next time, give us more information, or more to go on with respect to your rationale. If the judges ended up being dissatisfied with this legislation and decided to go to the Federal Court, and then on to the Supreme Court, on an issue like this, I have a hard time believing that the actions of this government would be deemed to be unconstitutional, in the sense that its answer was not consistent with the rationality test demanded by the Supreme Court. That, at least, is how I see it.

● (1645)

Mr. Marc Lemay: Do I have any time left?

The Vice-Chair (Mr. Derek Lee): No. Thank you, Mr. Lemay.

Mr. Petit, you have the floor.

Mr. Daniel Petit: I want to thank you, Professor Garant, Ms. Thomson and Mr. Leurer for being here today.

My first question is for Mr. Garant. You quoted several sections of the Constitution and, naturally, the Constitution makes reference to the Parliament of Canada, of which we are a part.

But you raised a doubt in my mind because the Commission that has been created could whittle away the powers of Parliament. And one of the privileges of members of Parliament is not to have their powers whittled away under any circumstances, and that is a privilege that the House of Commons, through its Speaker, is required to protect. The very reason why we have law clerks at the House of Commons is to ensure that the laws we pass do not remove any of those privileges.

But when I hear you speak, I really get the feeling that there is an attempt here to remove my right to decide, as a member of Parliament, for a number of reasons that do not require justification, to grant or reject a specific amount of compensation. My only master is the electorate.

But in this case, there is an attempt to impose another master, which is the Commission. And yet, if I understood your approach to this, I have no need to justify myself with such a commission. Naturally, it was created, but I do not need... If I have to justify what I do, that means I have lost certain rights at the House of Commons. It also means that at some point, the Commission will have too much power and could dictate to me, as a member of Parliament, how much money I should allocate. And when I go to the electorate, I will be defeated because of a commission that isn't even elected. I have a problem with that.

It's true that it may be a little late to be saying that now, but we have a bill before us. As Mr. Bagnell was saying, they cannot increase what we have put on the table, because otherwise it will not be passed by the House. So, I would like to ask you, because I was really non-plussed by what you said, whether you believe that this Commission seems to want to take powers away from me, as a member of Parliament.

Prof. Patrice Garant: That is my analysis of the entire system invented or proposed by the Supreme Court based on an unwritten, underlying constitutional principle. The system in itself, if the Commission has an advisory function, is perfectly valid and defensible. But from there to force Parliament to justify itself, not to the electorate alone, but in relation to the report of a commission, before the courts, and ultimately the Superior Court, the Federal Court or the Supreme Court...

As for the reasonableness of choices which are political, this comes as a surprise to me. As a member of Parliament, you are right to consider that the powers of Parliament are being whittled away, even though the Supreme Court has said that this is an advisory commission. In fact, I believe it was a Quebec Superior Court or Court of Appeal which ruled that a judge may not order Parliament to do something. A justice of the Superior Court had ordered the National Assembly to pass legislation to implement something, and the Court of Appeal said no, that this would be completely unconstitutional.

So, we have to come back to reality. I believe that when the government has defensible reasons to present a different opinion, it should do so and stick to its guns. Even the Supreme Court, in the 2005 ruling, did nuance somewhat the strictness, I guess I could say, of its opinion in the 1997 Reference. Mr. Cotler is not here now, but I think he would agree. When you read the two rulings and the overall arguments made by judges in every single one of the provinces, well, it's clear that there is a huge amount of literature and case law on what exactly can be considered reasonable.

You are right to say that Parliament should have the last word, and that Parliament is the one that has to face the electorate. The political choices that are made must be reasonable and cannot violate the Charter. I fully agree with your reasoning. This is not contrary to what the Supreme Court said. It may be an interpretation or a response to the rulings of the Supreme Court, but like laws, those rulings are subject to interpretation.

So, I am inclined to interpret it as giving precedence to Parliament's sovereignty, which is the very foundation of our democracy.

● (1650)

[*English*]

The Vice-Chair (Mr. Derek Lee): That was five minutes. Thank you.

Under the rules, we will continue to recognize members who have not spoken for five minutes yet.

The next person who hasn't spoken is Mr. Jean, followed by Mr. Batters.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Lee.

Thank you to the members who presented today. I appreciate that very much.

I'm not going to take issue with the constitutionality of what has taken place. Indeed, Monsieur Garant, I appreciate the recommendation of the legislative change on the commission as being a consultative process. I think that's very wise and a good idea.

I'm wondering if the CBA actually polled their members in relation to the issue of raises and whether they've received an opinion from them.

Ms. Tamra Thomson: The policy of the CBA is set through our council process and through the expertise of the members on our standing committees. Just as every law is not subject to a plebiscite, the policies of the CBA go through a representative process.

Mr. Brian Jean: That's why I was asking. As a past member, I know I hadn't been able to consult or give opinion on specific issues that the CBA had taken on itself.

Do you have judges who are members of the CBA?

Ms. Tamra Thomson: There are judges who are members. However, the constitution of the CBA isolates them from participation in the policy-making process.

Mr. Brian Jean: What's the fee for the judges? Is there a fee for their membership in the CBA?

Ms. Tamra Thomson: Yes, and I'm not sure what it is offhand. It's comparable to that of a regular member.

Mr. Brian Jean: Somewhere between $300 and $700?

Ms. Tamra Thomson: Depending on the province.

Mr. Brian Jean: Do you know how many judges are members of your organization?

Ms. Tamra Thomson: Not offhand, no.

Mr. Brian Jean: It's a fair number, though. Is that accurate?

Ms. Tamra Thomson: I don't know the proportion of judges who are members. As I said before, all of them are isolated from the policy-making decisions. None of the judges who are members participated in the process of developing this brief, or any other policy of the CBA.

Mr. Brian Jean: I understand, but they still are members of the organization itself.

I worked in the trenches for years—when I say "trenches", I mean the law court trenches in Fort McMurray—and I spent considerable time arguing cases before many courts. I even went to the Court of Appeal on a particular occasion. I saw over the some 11 years I did this that different judges react in different ways to court processes. I don't know how it could be done, but I'm wondering if your organization has thought about any way you could tie the wage to work ethic.

For instance, in my own particular area, the Honourable Judge Stan Peck is a very hard-working man—extremely hard-working—but other members of the profession in different areas, because of the caseload, quite frankly just don't work very much. I've heard stories of where they'll work a day a week, or an hour or two hours a day for four or five days and then go golfing and other things. Quite frankly, I find it extremely disturbing. I think most taxpayers would find it disturbing.

I would direct this question to both the CBA and Monsieur Garant. This government stands for accountability, transparency, and getting something of value for taxpayers' money for work performed and wage received. Has the organization looked at ways to tie wage to performance?

● (1655)

Mr. Robert Leurer: Let me try to answer that for you, Mr. Jean.

First of all, the fundamental principle that has to be protected as a cornerstone for democracy is judicial independence. Even setting that aside, I know of no parallel you could draw on that would link somebody who needs to be independent to uphold the rule of law to so-called performance issues.

That said, the honourable member should recognize that there are constitutionally permissible methods to question issues that relate to particular judges. The Canadian Judicial Council has a process. With all respect, I would say that if there's an issue with respect to a particular judge or court, it's that constitutionally recognized forum to which you should refer. We would be deeply disturbed by any suggestion that the salary be tied to somebody's perception of performance.

Mr. Brian Jean: You mean somebody like their boss, the chief judge?

Mr. Robert Leurer: I don't think anybody in the judicial process, with respect, has their salary tied to somebody's concept of performance. You would know, again with respect, the process that has to be followed constitutionally, that is in the written Constitution, for removal of a judge. I have to reiterate, with the greatest respect, that not only can we not go there, but we don't want to go there as a society.

Mr. Brian Jean: So the answer would be that the CBA has not looked into the issue of work performance for—

Mr. Robert Leurer: I think, with respect, the CBA would say that doing that would profoundly undermine judicial independence.

Mr. Brian Jean: Indeed.

Monsieur Garant, what are your comments in relation to that?

[*Translation*]

Prof. Patrice Garant: In terms of performance evaluation, that is something that is done for administrative tribunals—in other words, people working [*Inaudible—Editor*], and it is an accepted practice. It is also an accepted practice in the United States.

For judges, I believe that some felt—and that may be a myth—that even chief justices should not be evaluating performance, although some chief justices do monitor the work performed by judges and the distribution of work.

You are right to mention that litigants do realize in some cases that judges have it easy. That may be the fault of the system. A judge was telling me this summer that he was supposed to be in a rural district for one week, but that the case was resolved in half a day. So, for the rest of the week, he visited the area. Of course, that is really a problem of work distribution among judges. That judge had probably earned his salary for that week. So, that cannot be an argument. In my opinion, most judges work hard, particularly appeal court judges and judges that preside over important and complex cases.

In my profession, as a law professor, we examine court rulings, both the ones that are published and those that are put on the Internet. We have noticed that some judges write relatively short opinions, or may even write relatively few of them. Now the time allocated for deliberations and for writing a judgment may be too long, and thus there are probably judges who have a pretty easy time of it.

However, that is not a valid argument for not keeping judges compensation at a reasonable level—I believe I said "reasonably high" in my brief—in a democratic society such as ours.

[*English*]

The Vice-Chair (Mr. Derek Lee): *Merci.*

Mr. Batters, you have five minutes.

Mr. Dave Batters (Palliser, CPC): Thank you very much, Mr. Chair.

Thank you to all the witnesses for appearing today. This is a treat for me. It's the first time I've been to the justice committee.

First of all, I think all members of Parliament would agree, and my colleague Mr. Jean would agree, that judges in this country do fantastic work. The vast majority of judges are very capable. They do very difficult work and they work very hard.

I'll tell you a little bit about my perspective and what I bring to this committee. My wife Denise is a lawyer in Regina. She has been at the bar for 10 years now. She'll make an annual salary of probably $50,000, maybe a bit more, in a good year. So as I sit down here and look at some of these figures, I think it's very reasonable, actually, that the government, instead of accepting a recommendation of a 10.8% increase, reduce it to 7.25%.

Judges make just shy of $220,000 per year, and I just cannot imagine, I just can't dream that many Canadians will cry in their beer—nor would a lot of judges, frankly, to my mind—if judges don't get a $33,000 a year pay increase. There are issues of fiscal prudence that governments have to wrestle with, and I think the government has made a very reasonable proposal to give an increase of 7.25% instead of 10.8%.

I do have a question I'd like to put to whoever chooses to answer it. Mr. Garant, I'll start with you.

When the commission looked at the question of salaries, it looked at private practitioners from Canada's largest urban centres as the appropriate comparative groups—the largest urban centres. I'm a guy from Regina, Saskatchewan. The result is that the commission gave too much weight to the income of self-employed high-paid lawyers in private practice and not enough consideration to the income levels of lawyers from across all provincial centres, urban and rural.

I'd like to ask you, since one of the stated criteria for determining judicial compensation is, "the prevailing economic conditions in Canada", meaning all of Canada, do you really consider the income of most highly paid urban lawyers in our largest centres to be in line with the prevailing economic conditions in Canada?

● (1700)

[*Translation*]

Prof. Patrice Garant: You are right to wonder about this and doubt the relevance of such a statement. You are right that the entire legal profession must be considered.

You talked about a lawyer with ten years' experience earning $50,000 or $75,000. She may be excellent and may be doing remarkable work. After ten years in practice, she may even be a candidate for a position on the bench. So, why would we automatically rely on the idea that in the past, a great many judges have come from large law firms? That is not a good reason.

Increasingly, there are large numbers of public servants working in the legal branch of various departments who are doing excellent work. They are not deputy ministers. They act as counsel, general counsel, and so on. There are also lawyers working in legal aid clinics.

In the field of family law, I know of some judges who came from legal aid offices and are excellent. They may have a greater appreciation than private practice lawyers for family or social issues facing litigants.

That is the kind of person we should be looking for. So, you're right: we need to consider a much broader range than just those who have supposedly had successful careers in large law firms in Montreal, Toronto or Vancouver.

[*English*]

Mr. Dave Batters: Would anyone else like to respond to that?

Mr. Robert Leurer: Thank you, Mr. Batters. As another prairie boy, I'll try it, because I think in some respects I understand very well where you come from.

Let me start by indicating, as you will know from the brief that the Canadian Bar Association has filed, that we observed that the government put different weight than the commission did on the comparators, or chose to use a different comparator than the government did. From a constitutional perspective, the Canadian Bar Association says we may not have reached the same judgment as the government did, but we don't take issue with that and our conclusion is not that there's anything objectionable to that.

The concern that the Canadian Bar Association would have, though, is that although you articulate the relative salaries across Canada as relating to the paragraph in the Judges Act that relates to the economic condition and overall economic and financial position of the government, that's not a linkage that in that particular context the government drew in order to justify the deviation from the commission report. The Supreme Court has very clearly articulated that it's incumbent upon the government, in order to ensure it's part of a fair process, that it lay its cards on the table, so to speak.

So with all due respect, it would involve a recasting of the rationale to infuse the second reasoning into the first, because it doesn't exist in the context of the—

Mr. Dave Batters: Right. With respect, though, Mr. Leurer, I'm brand new to this committee. I sat down for 10 minutes and this is hitting me right in the face. There seems to be this heavy reliance on what lawyers in our largest urban centres make. The commission relied heavily on that. I wonder how many lawyers' salaries they studied in Regina, Saskatchewan.

I'm sure my wife would welcome—I guarantee you we'd welcome—the 500% increase to her salary as a judge. This hits me in 10 minutes, so I'm sure that the government took this into account in terms of its calculation from what was a 10.8% recommendation to 7.25%. It seems perfectly reasonable to me.

● (1705)

Mr. Robert Leurer: It's completely clear from the commission report that, first of all, they cast around very broadly, with the assistance of the government and the other parties that appeared in front of the commission, for as much information as they had with respect to salaries.

Many of us approach any particular salary issue and immediately begin to relate it to our own particular circumstances. The commission did not take the salary of the best-paid lawyers in the country. The commission also, very interestingly, decided to—

Mr. Dave Batters: Yes, they did. They took it from the largest urban centres.

Mr. Robert Leurer: Let me just say one other thing, Mr. Batters.

The Vice-Chair (Mr. Derek Lee): Mr. Batters assured me his intervention would be really quite a short add-on. I will allow the witness to wrap up.

Mr. Robert Leurer: I'll be very quick, Mr. Chairman.

With respect to Mr. Batters, the commission also, interestingly, rejected a joint submission that was made by both government and judges for an annual $2,000-a-year increase, all with a view to try to get it right.

Again, the Canadian Bar Association is not here to defend *x* dollars or *y* dollars. We're here to defend a process, because that's fundamentally what ultimately drives the protection of the independence of the judiciary.

Mr. Dave Batters: Then let's get it right.

The Vice-Chair (Mr. Derek Lee): Thank you, Mr. Batters.

I have indications from Mr. Bagnell, M. Ménard, and Mr. Comartin, and the chair has a couple of real zingers when we're done, and there may be members opposite who do also.

We'll have Mr. Bagnell, for five minutes.

Hon. Larry Bagnell: Thank you.

Mr. Leurer, you said, in response to Mr. Jean, that judicial independence was a cornerstone of our democracy. Not being a lawyer, I'm just going to ask a simple Law 100 question. Where is that? What is the reference to that? How is it ingrained? How is it enforced? Where is it referenced in Canadian society?

Mr. Robert Leurer: I think Professor Garant can do as fine a job as I can in taking you back, but I would invite the honourable member to review the Supreme Court's rather eloquent explanation of this in the Bodner decision.

Prof. Patrice Garant: It was Bodner, yes.

Mr. Robert Leurer: Our democratic system is dependent upon the courts as the guardian of our Constitution, and that's what separates Canada and other western democracies and other free and democratic societies from autocratic societies.

Hon. Larry Bagnell: But what is the reference? Is it in the Constitution?

Mr. Robert Leurer: It's implicit in a variety of provisions of the Constitution, including the provisions that deal with the appointment and tenure of judges.

Prof. Patrice Garant: Yes.

Hon. Larry Bagnell: So if you're deciding someone's salary, if you're deciding how much someone gets paid, does that not appear to reduce your independence, especially if you're doing it frivolously or ideologically?

Mr. Robert Leurer: That's why the Supreme Court of Canada said two very important things. They said yes, fundamentally, the allocation of public resources rests with the Parliament of Canada. But—and there is a "but" attached to that, as a "but" attaches to very many other aspects of the supremacy of Parliament—there is a necessity to ensure that there is an institutional sieve, which is the commission process, to ensure that we don't end up with a clash between government, which is the payer, and judges, who are the payees, in this quasi-employment relationship that can politicize the process and destroy their independence.

So yes, it is very important, because absent that institutional sieve and the process behind it, we run the very real risk that we incrementally, slowly, over time undermine the importance of the judiciary and the independence of the judiciary.

Hon. Larry Bagnell: Okay. My last question is this. Isn't that a bit of a stretch? If you put the government's budget in terms of.... Let's say the government's budget is $100, then payments to judges would be a couple of cents. They are a tiny proportion of the Government of Canada's budget. Isn't it a bit of a stretch to say that the effect of a variation in the salaries would stop them from implementing their objectives, especially when there's a $13 billion surplus, and they have never once put a specific amount of a required surplus or a paydown of the debt in their objectives?

● (1710)

Mr. Robert Leurer: The Canadian Bar Association is here neither to condemn nor to support a particular allocation of a particular decimal point or dollars and cents. So at the end of the day, the Supreme Court has affirmed that, if adequately explained, the government can choose its allocation of resources. The problem here is that we don't understand—and with all due respect, we don't think that a reasonable reader of the commission report can understand—the effect that the change in the commission's recommendations from what they were in the government's proposal will have on the government's social and economic programs. It's that vacuum or void that renders, in our respectful view, the government response subject to criticism.

Hon. Larry Bagnell: The Supreme Court said there had to be a rationale, and if it's a tiny, infinitesimal amount of money, wouldn't it be very hard to make that rationale?

Mr. Robert Leurer: I repeat back to the honourable member what I just said.

[*Translation*]

Prof. Patrice Garant: However, the Supreme Court said it had to be justified, and therefore, reasonable. It did not provide comprehensive details as regards that rationale. That is a government responsibility. I believe the government has to consider its overall political responsibilities.

On the other hand, the Commission has a more specific mandate. It is also required to consider economic conditions. The Commission's mandate is far more restricted than is the government's or Parliament's mandate. The government states in its response that it has to face the music in terms of its election platform and promises, and that it will subsequently have to face the electorate. That is not the same kind of mandate.

When it talks about subsequent judicial review, the Supreme Court seems to be saying that if the government's response is unconstitutional, if it does not abide by the principle of independence, it will be censored by the courts.

Some lower court judges have said that when there is the slightest difference between the Commission's recommendations and the government's response, the principle of independence has been violated. But that is incorrect. What has been said is that this would be the case if the government's response was not reasonable. But political rationale is very broad; it includes the government's overall responsibilities. I guess this is something that could be discussed at great length, but at some point, someone has to decide. And that responsibility rests with Parliament.

[*English*]

The Vice-Chair (Mr. Derek Lee): Thank you.

Mr. Ménard, this is going to be a very strict five minutes. When you get close to five, I'll give a warning, and I'll be cutting everybody off.

Then Mr. Comartin, the same rule, and then Mr. Petit. Maybe you could alternate with Mr. Petit to get some balance here. So after Monsieur Ménard, if you're okay with that, Mr. Comartin, I really should alternate here.

Mr. Joe Comartin: As long as I get my five minutes in, Mr. Chair, that's fine.

[*Translation*]

Mr. Réal Ménard: Thank you, Mr. Chairman.

I am an ardent defender of Parliamentary sovereignty, and other kinds of sovereignty as well. But that is a whole other debate.

It is important that parliamentary sovereignty not put us in an awkward position. The people who are interested in an alternative mechanism to the Commission have not said what they are talking about. There is a difference between a deputy minister and senior officials working for the government, who are serving their fellow citizens through their involvement in the public service, where the hierarchy is clear: it's Parliament or the minister. Theoretically, ministerial responsibility extends to all the decisions they make on behalf of the minister.

It's true that we're talking about public money here, and ultimately, about public policies. The judiciary has a very special role. We have to have constitutional guarantees so that when someone appears before a court of law, judges won't make rulings that have negative consequences for the government. If we don't have a commission, what mechanism could replace it?

Mr. Garant, on page 4 of your brief, you wrote something that I found quite interesting:

> It is extremely rare for judges to be allowed to negotiate directly with governments, although they are often permitted to take part in advisory bodies.

What did you mean by that?

● (1715)

Prof. Patrice Garant: When the Supreme Court uses the word “negotiation”, it is referring to negotiation in the labour relations sense—in other words, collective bargaining.

However, to my knowledge, there is relatively little collective bargaining of working conditions elsewhere in the world. However, there are advisory commissions in France and certain European countries that judges are involved in. They are only advisory bodies but make recommendations to government, which then sets the level of compensation for magistrates. These commissions are often highly credible, because it is relatively rare—in France, for example—for their recommendations not to be followed. But it is an advisory process.

I know of no system where judges negotiates directly with governments. In some Canadian provinces, there have occasionally been negotiations between the provincial government and the judges' association.

Mr. Réal Ménard: I will ask my question and then turn it over to Mr. Comartin and Mr. Petit.

I assume you are not in favour of a system where lawmakers would be responsible for giving the overall direction in terms of compensation for magistrates? In terms of maintaining the strict separation of the three powers, I guess we agree that this would result in undesirable vulnerability or interaction between the legislative branch and the judicial branch.

Do you agree?

Prof. Patrice Garant: On that point, the advisory commission process is an attractive one. There is different input. The Department of Justice develops a compensation policy for everyone involved in the administration of justice, be they public servants working for the department or other officials. But there is input. In the final analysis, however, I believe it is Parliament's responsibility to make the decision and be accountable for it to the electorate.

In my opinion, the notion of rationality must be tied to respect for constitutional independence. Is this legislation recommending 7.5%, rather than 10 or 17% unconstitutional in and of itself? You would tear your hair out trying to prove it. The government's decision with respect to a 7.5% increase has to be clearly articulated. The document could be more precise. In fact, it is rather oddly drafted. Starting on page 7, there is a very interesting explanation.

Mr. Réal Ménard: I will interrupt you so that there is enough time left for my colleagues to ask their questions.

Thank you for your commitment.

[*English*]

Mr. Derek Lee: *Merci*.

Monsieur Petit, five minutes.

[*Translation*]

Mr. Daniel Petit: My question is for Mr. Garant.

I find myself in a rather delicate position. I myself am a lawyer in the province of Quebec, and you are talking about judicial compensation. I hope there is no camera here.

I also find myself in the position of taking the Bloc's place, in that I am defending taxpayers here, rather than the upper middle class, if I could put it that way.

In their analysis, they look at lawyers practising in each province, the best paid, in the largest firms, and so on. But, in Quebec, our situation is somewhat special as regards lawyers and notaries. In the other provinces, the two are together, so that their income is much higher. In Quebec, lawyers' salaries alone are considered, even though they cannot be notaries at the same time, and nor can notaries be judges.

The problem is that the figures used in their analysis are completed distorted as far as Quebec is concerned. It is illusory to want to use that other reference, because it cannot work for the province of Quebec. We operate in a completely different manner for these two professions.

● (1720)

Prof. Patrice Garant: I agree with you that we need a broader basis of comparison. In Quebec, the legal profession also includes notaries. I know a great many notaries, particularly some young ones, who don't have a very high income, compared to what lawyers earn. If you take that into account, as you say, it tells you much more about what people in the legal profession are paid.

Other than deputy ministers, would it not be possible to include all public servants who practice law? I know people in Quebec who have become Superior Court or Appeal Court judges after simply working as a public servant at the Department of Justice. Why not also consider law professors?

So, there is definitely a need to broaden the basis for comparison of all people involved in legal work.

Mr. Daniel Petit: Lawyers in Ontario, Manitoba and Saskatchewan are both barristers and notaries. That is not the case in Quebec: a lawyer cannot be a notary, and vice versa. The basis of comparison they used therefore does not work for Quebec. In the nine other provinces, which are English-speaking, lawyers are also notaries, whereas in Quebec, the two functions are completely separate. Therefore no comparison is possible.

Prof. Patrice Garant: You are right; it will be difficult to apply as is. Some nuance is necessary that is, unfortunately, missing in the commission's report.

[*English*]

Mr. Derek Lee: Thank you.

Mr. Comartin, for five.

Mr. Joe Comartin: Thank you, Mr. Chair.

I may ask for comment from the Canadian Bar Association on this. I have just a quick comment about a concern.

In my professional career, as I watched the appointment of judges at both the provincial court level in Ontario and the county court level, which we had at one period of time, there were any number of superior candidates who simply didn't apply, quite frankly. We had a long list of people who were prepared to take the bench, but they weren't the top quality. It was simply because of the amount of money that was there for compensation, in terms of the lifestyle they had already created for themselves and their families. I'm quite afraid of that happening now.

I'm not surprised that we have a long list now. I say without equivocation, without making comments about the political interference in appointments, that we generally get the best appointments. But I don't see that continuing to happen when we get this kind of interference with the independent commission.

That's really where my question comes to, Mr. Leurer. I have the perception that at the provincial level a number of the commissions or the alternatives that they've set up are not functioning well because too many of the provinces have done just what this government is doing now. They have not accepted the commissions' reports or have not accepted them without valid reasons. Does the Canadian Bar Association have any position on what's happening at the provincial level across the country with the other commissions?

Mr. Robert Leurer: The Canadian Bar Association echoes the comment that you make, Mr. Comartin. Happily, we are getting good appointments. We would fundamentally echo your concerns that an erosion in the process incrementally can erode that particular outcome.

The Canadian Bar Association does not have a position on a national level with respect to the functioning of particular provincial commissions. We observe that the litigation arising out of the provincial commissions has been gradually declining as constitutional principles have been refined and articulated by the Supreme Court of Canada. What that essentially means is that we're slowly getting it right because they're adhering to constitutional principles.

Mr. Joe Comartin: That's all I have, Mr. Chair. Thank you.

The Vice-Chair (Mr. Derek Lee): Thank you.

I have a couple of questions on the structure created by the Supreme Court to generate the salary and allowances recommendations, the independent commission construct.

Notwithstanding section 100 of the Constitution, which says that Parliament shall set the salaries and remuneration—I'm paraphrasing—the Supreme Court decided that the whole effort should be turned over to an independent commission that would make recommendations, and not just as a consultative body; they were essentially nailing the numbers down. But for whatever reason, the Supreme Court then decided that report would not be sent to Parliament; it would be sent to the government, to the executive. I suppose that's understandable, though, because in modern times the executive is one of the major bus drivers of Parliament.

You may not have given much thought to it; however, could I ask you if we're going to have problems here with the existing mechanism created by the courts—in their own file, I may say? Could we reconstruct a mechanism that would have the body reporting to Parliament? Maybe the report ought to be sent to the Speaker and not the Minister of Justice, thereby pre-empting the executive of government role.That might sail through Parliament more easily than it would through the executive and then Parliament.

I'm prepared to hear that the Canadian Bar Association would never think of second-guessing the Supreme Court of Canada and would never have conceived of such an impudent proposal, but I'll take your answer.

● (1725)

Mr. Robert Leurer: A fair characterization is that the witness who is sitting in front of you has never considered the question before this point in time, Mr. Chairman.

The Vice-Chair (Mr. Derek Lee): Okay, then here's a simple question. Is it your view that, since setting up this independent commission, the Supreme Court of Canada was of the view that the independent commission had the right to be wrong and still have their will, their report, their recommendations implemented?

Mr. Robert Leurer: I think I can answer that question, Mr. Lee.

The Supreme Court of Canada indicated that at the end of the day, the commission's conclusions are not necessarily binding unless provided for by statute—that is, by decision of Parliament itself. I think all parties here, Professor Garant, and I would agree that at the end of the day it is possible to have a constitutional deviation from the recommendations of the commission.

Ultimately, I don't know whether the Supreme Court of Canada would consider as constitutional other mechanisms to serve as an institutional sieve to protect the legitimacy and the independence of the judiciary, which is the other aspect of the question you've posed.

The Vice-Chair (Mr. Derek Lee): I have a final question, and it's related to that.

The Minister of Justice essentially said yesterday that this task is Parliament's. He was correct in that. He was simply quoting the Constitution on this task of setting the remuneration, of dealing with the report. So I want to ask the following question.

In the event that Parliament, on the advice of this committee or any other committee, decided to enhance the remuneration beyond what is in the bill, would Parliament have a royal recommendation trump card by the very nature of the wording of the Constitution, where it says Parliament shall set the remuneration? Could the committee enhance the remuneration, claiming it didn't need a royal recommendation through the executive, that it simply had one constitutionally because the Constitution says Parliament shall set, and this committee would offer to the House a report that recommended an enhancement beyond that which is contained in the current government report, with a view to coming closer to the recommendations of the independent commission?

● (1730)

Mr. Robert Leurer: Mr. Lee, I learned one hard lesson early in my legal career.

The Vice-Chair (Mr. Derek Lee): You're not a constitutional lawyer.

Mr. Robert Leurer: No, when a client comes in and asks me a question that I haven't considered, I don't give an answer.

The Vice-Chair (Mr. Derek Lee): Or you want a retainer.

I realized that I might not get answers to those, but I did want to get them on the record for Professor Garant's next constitutional law class.

[*Translation*]

Prof. Patrice Garant: You have raised some interesting questions to which there is no easy answer. Earlier you suggested that the Committee's report be tabled directly before Parliament, rather than with the government. However, that could run counter to constitutional practice, according to which money bills must be tabled by the government so that it can fulfill its constitutional responsibility.

It would be rather difficult to short-circuit the government by tabling the report of an independent commission directly with the Speaker of the House of Commons and, in so doing, with Parliament. The government would be stuck.

It's an interesting question, although somewhat theoretical.

[*English*]

The Vice-Chair (Mr. Derek Lee): It was just food for thought. I'll stop there.

I thank both groups of witnesses for coming. It has been a useful addition to the debate.

Colleagues, we'll be doing clause-by-clause on this bill on Monday, I believe.

Having said that, we can stand adjourned.

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