

LA COMMISSION D'ENQUÊTE SUR L'OCTROI
ET LA GESTION DES CONTRATS PUBLICS
DANS L'INDUSTRIE DE LA CONSTRUCTION

SOUS LA PRÉSIDENCE DE
L'HONORABLE FRANCE CHARBONNEAU, J.C.S., présidente
M. RENAUD LACHANCE, commissaire

AUDIENCE TENUE AU
500, BOUL. RENÉ-LÉVESQUE OUEST
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ROSA FANIZZI et ODETTE GAGNON
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RIOPEL GAGNON LAROSE & ASSOCIÉS
215, rue Saint-Jacques, Bureau 110
Montréal (Québec) H2Y 1M6

COMPARUTIONS

POUR LA COMMISSION :

Me GENEVIÈVE CARTIER,
Me DAVID DROUIN-LÊ

INTERVENANTS :

Me SIMON LAROSE pour la Procureure générale du
Québec
Me JOSÉANE CHRÉTIEN pour le Barreau du Québec
Me ROXANE GALARNEAU pour l'Association des
constructeurs de routes et grands travaux du Québec
Me PIERRE POULIN pour le Directeur des poursuites
criminelles et pénales

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report to the CEIC, February 15, 2013

82

1 L'AN DEUX MILLE QUATORZE (2014), ce troisième (3e)
2 jour du mois de novembre,

3

4 (09:43:46)

5 PRÉLIMINAIRES

6

7 LA PRÉSIDENTE :

8 Good morning. Bonjour, Maître. Est-ce que les
9 avocats peuvent s'identifier?

10 Me GENEVIÈVE CARTIER :

11 Bonjour, Madame la Présidente.

12 LA PRÉSIDENTE :

13 Bonjour, Maître Cartier.

14 Me GENEVIÈVE CARTIER :

15 Geneviève Cartier pour la Commission.

16 Me DAVID DROUIN-LÊ :

17 David Drouin-Lê pour la Commission.

18 Me SIMON LAROSE :

19 Bonjour. Sdimon Larose pour la Procureure générale.

20 Me JOSÉANE CHRÉTIEN :

21 Bonjour. Joséane Chrétien pour le Barreau du
22 Québec.

23 Me ROXANE GALARNEAU :

24 Bonjour. Roxane Galarneau pour l'Association des
25 constructeurs de routes et grands travaux du

1 Québec.

2 Me PIERRE POULIN :

3 Bonjour. Pierre Poulin pour le Directeur des
4 poursuites criminelles et pénales.

5 Me GENEVIÈVE CARTIER :

6 Alors, bonjour, Madame la Présidente, Monsieur le
7 Commissaire. Nous discutons ce matin du « False
8 Claims Act » qui est une loi américaine qui permet
9 à un citoyen d'intenter au nom du gouvernement une
10 poursuite civile contre des entreprises qui
11 produisent des réclamations frauduleuses à l'État.

12 Cette loi a ceci de particulier qu'elle
13 prévoit qu'aux termes des procédures qui condamnent
14 l'entreprise à verser des dommages, une partie de
15 ces dommages sont remis au citoyen qui a intenté la
16 poursuite. Quel est l'intérêt pour la Commission
17 d'étudier ce type de loi?

18 Les recherches et les audiences des
19 derniers mois suggèrent un certain nombre
20 d'éléments. D'abord, la corruption et la collusion
21 sont difficiles à détecter sans la contribution
22 d'un dénonciateur. Or, les dénonciateurs n'ont pas
23 la vie facile, leurs gestes peuvent leur coûter
24 leur carrière, il y a donc peu de dénonciateurs
25 donc peu de poursuites, peu de condamnations et,

1 sous cet angle, très peu de dissuasion.

2 Par ailleurs, la question s'est souvent
3 posée à la Commission, comme dans d'autres forums,
4 de savoir comment recouvrer les sommes que des
5 entreprises auraient illégalement obtenues des
6 donneurs d'ouvrages publics.

7 Le « False Claims Act » pourrait peut-être
8 contribuer à atténuer cette combinaison de
9 problèmes. En compensant la personne qui dénonce,
10 on obtient des informations qui permettent de
11 récupérer une partie des sommes détournées dans un
12 cadre qui produit des effets dissuasifs.

13 Nous avons toutefois également appris, de
14 nos recherches et de certains experts, qu'il est
15 délicat d'importer un modèle étranger. La séance de
16 ce matin a donc un double objectif. D'abord, bien
17 comprendre cette loi, son fonctionnement, ses
18 avantages et ses inconvénients aux États-Unis et,
19 d'autre part, réfléchir à la possibilité d'importer
20 ce type de loi dans le paysage juridique, politique
21 et culturel québécois. Nous recevons pour ce faire
22 deux avocats d'expérience, monsieur Neil Roberts et
23 maître Michel Jolin.

24 Neil Roberts est avocat à Los Angeles
25 depuis plusieurs années, mais il connaît bien la

1 situation canadienne pour avoir enseigné à la
2 Osgoode Hall Law School de l'Université York. Il a
3 travaillé dans des cabinets d'avocats et de
4 comptables et il nous fera part dans quelques
5 minutes de son expérience professionnelle et de son
6 expérience lus directement liée au False Claims
7 Act.

8 Maître Michel Jolin, bâtonnier, avocat,
9 associé de la firme Langlois Kronström Desjardins à
10 Québec, mène une carrière de plaideur et a mené
11 plusieurs dossiers d'envergure à tous les niveaux
12 d'instances judiciaires. Il possède une expertise
13 en droit civil comme en droit public. Cette
14 expertise lui permet de se voir confier des mandats
15 majeurs par les gouvernements du Canada et du
16 Québec, de nombreux organismes et sociétés d'État
17 et par des entreprises publiques et privées. Maître
18 Jolin a également été directeur des plaideurs au
19 ministère de la Justice du Québec, ce qui lui donne
20 une expérience très précieuse pour les fins de la
21 discussion d'aujourd'hui. Je les remercie tous les
22 deux en votre nom d'avoir accepté d'être ici ce
23 matin.

24 Alors, nous procéderons comme suit.
25 Monsieur Roberts fera tout d'abord sa présentation,

1 il a préparé une présentation PowerPoint, donc il
2 va faire une partie de la présentation en anglais.
3 Nous allons ensuite céder la parole à maître Jolin
4 qui pourra faire ses réflexions sur l'importation
5 possible donc de cette loi au Québec.

6 Puis nous prendrons une courte pause de
7 manière à planifier le reste de la discussion dans
8 laquelle nous nous concentrerons un peu plus sur
9 les succès de cette loi aux États-Unis et sur ce
10 qu'elle pourrait nous apporter concrètement au
11 Québec.

12 Alors, Madame la Greffière, je vous invite
13 à assermenter...

14 THE CLERK:

15 Would you please stand up to be sworn in.

16 _____
17

1 IN THE YEAR TWO THOUSAND FOURTEEN (2014), this
2 third (3rd) day of November,

3

4 APPEARED:

5

6 NEIL A. ROBERTS, lawyer

7

8 MICHEL JOLIN, avocat

9

10 WHOM, having made a solemn declaration, doth depose
11 and say as follows:

12

13 (09:49:55)

14 Me GENEVIÈVE CARTIER:

15 Q. **[1]** So thank you, welcome again to the Commission
16 this morning. So Mr. Roberts, I said a few words
17 about your training and professional experience but
18 I would like to hear more about it and perhaps,
19 more especially, I would like to hear about your
20 personal experience with the False Claims Act in
21 the United States. So over to you.

22 Mr. NEIL A. ROBERTS:

23 A. Okay. So I would like to begin by saying thank you
24 for having me come and to be able to work on this
25 report which I find to be a very interesting

1 experience.

2 I come to this situation with a little bit
3 of Canadian credentials in that I taught at Osgoode
4 Hall in a very exciting time when it was first
5 being put together and perhaps... Louise Arbour was
6 one of my colleagues, it was a very exciting time
7 to be there and I then went back to the United
8 States and practised law and worked in some of the
9 big accounting and consulting firms and I came to
10 the knowledge about the False Claims Act in a very
11 direct way.

12 I was an employee at a firm with a hundred
13 and forty thousand (140 000) employees and it was a
14 place where the integrity was what you sold - that
15 was one of the things you did - and I was the
16 contracting partner with a big job with the federal
17 government. I was testifying, I testified in
18 damages when I was with the big firm and I signed
19 the contract with the government and, if you do a
20 professional work, there's some private, some part
21 of it is expenses and I noticed we had to keep
22 going through this one portal to get travel and the
23 travel was very expensive. And so, in the middle of
24 it, I called up and heard "Well, gee, there's a
25 kickback going on. There's a cash kickback going

1 on." and I said "That couldn't be because, if it
2 did, it would be against the law and it's not just
3 a civil thing about taking money out of the pot."
4 but I would have a problem, right? I would be a
5 felon and I wasn't about to do that for anybody's
6 job and so I called up the chief counsel of the
7 firm and said "Please give me assurances this isn't
8 happening." and I didn't get a call back. And I
9 eventually had conversations with the highest guys
10 in the firm and they said "Mind your own business."

11 Now, as it turned out, what I then did was
12 I personally, in my name, brought a lawsuit so it's
13 Neil Roberts ex rel., in the name of the United
14 States, versus the big company. The big company
15 eventually paid along with a series of other ones,
16 they, this may sound familiar, they had meetings
17 every quarter, the biggest accounting consulting
18 firms in the world, about how to keep the travel
19 cost up and they would meet in a room and go, you
20 know, you go, this "How could this be?" So each one
21 of them was engaged in this best practice which was
22 really a worst practice and that was to pay a great
23 deal of the highest prices possible for travel and
24 get kickbacks and checks which they kept and didn't
25 account back to their clients.

1 In that process, I actually was, went
2 through this False Claims that I'm going to
3 describe to you. The FBI arrives at my house and
4 said "We'd like to..." because they started off
5 with a criminal investigation, "We'd like to have
6 you interview your bosses." and they then tape-
7 record the interview with your bosses and the boss
8 says, you know "It's too much of a profit this
9 year. It's too significant an amount of money."

10 Needless to say, it was an exciting time,
11 but I had given up, there's no chance you can do
12 that without giving up your career. Once you're
13 there, as it turned out, when it came to light they
14 certified that what I did was in the best interest
15 of the organization. And they did that because
16 that's the right thing to do. Eventually,
17 organizations fix themselves.

18 But it was a difficult time, and when you
19 take that position, it's a position that puts your
20 career and your whole set of friendships in danger.
21 And it's not something you do lightly. And in the
22 firm, there were fourteen hundred (1,400) partners,
23 there were about ten (10) of them who went forward
24 and said, "Why are we paying so much for this
25 travel?" And I'm the only one that raised it. They

1 just kept going, so...

2 Anyway, so that's the answer, and the same
3 thing came out about the world of consulting in
4 technology, because I've had the same process, so
5 part of the same companies.

6 So, I'm very proud of what I did, and I've
7 helped collect an enormous amount of money for the
8 federal government. But I also am proud of the
9 other whistleblowers, or relators they're called
10 under the statute, that take that position, take
11 that step. And so, I'd love to tell you about the
12 Act(?).

13 Q. **[2]** Well, thank you for this introduction. And
14 then, so, you've prepared a report for the
15 Commission. We asked you to actually expose the
16 history, the content and the principle, so we'll go
17 through that report. You prepared a presentation,
18 so I will leave it to you to expose the general
19 context in which that statute was created, and then
20 its main components, and then we can have a more
21 specific discussion on the procedures after that,
22 so...

23 A. And I might mention that there's a thin version,
24 not to be daunting, and then there's a fat version,
25 which has all the appendices, so... And I guess, at

1 this point, it's now a public document?

2 Q. **[3]** It will be, yes. From this afternoon.

3 A. I was asked to do this, now a year or so ago, a
4 year and a half ago, and I very much understood
5 your mandate, because you have a mandate about the
6 construction industry. But I want to say that this
7 really has to do with all public contracting. What
8 we're talking about is anytime that the government
9 does what it does, it uses contracts for the
10 private sector. And the question is, if it's being
11 defrauded. So, I focus on the construction
12 industry, but it really has to do with the
13 contracting process.

14 The interesting thing about the Act is that
15 it goes back in America a long time. President
16 Lincoln was fighting a war, again, to save the
17 Union, and the uniforms that arrived at the front,
18 and they'd be made of shoddy. Shoddy is a kind of
19 fabric made from the dust in the wool mills, and
20 it's glue and dust. And they'd arrive at the front,
21 and it would rain, and their uniforms would drip
22 off them. And the meat was tainted, the gun powder
23 was really flour, and... the Union side, we... the
24 Union side was losing the war. And president
25 Lincoln himself said he couldn't trust his own

1 attorney general, and he couldn't trust his war
2 department. So, it's the equivalent of the
3 department of whatever, roads or whatever.

4 And so, he put together a statute, took it
5 to Congress and said, "Any citizen can come forward
6 and bring a civil action to get damages", and the
7 damages is not just what the contracting party
8 took, but in that case it was double, it's now
9 triple, "and that citizen will get part of that
10 reward, as a reward for going through this
11 process."

12 And it worked, it helped in the civil war,
13 but it sort of languished. And the odd thing was,
14 in the American history, that it wasn't supported
15 as much as you might think about it, necessarily by
16 the civil service, because in some ways, the civil
17 service said, "Oh, it's showing us not doing our
18 job right." And so, there was a certain antipathy
19 to it. Right?

20 One thing to keep in mind is, this is not a
21 novel, like crazy idea a president of the United
22 States said. This idea of citizen initiating cases
23 for the government goes back to, actually Greek
24 times, when the citizens, one of the thing they
25 could do was to bring a suit. And in England, on

1 the common law side of things, there was no City
2 Constibular, there was no constables until eighteen
3 thirty-five (1835), so you had to have somebody who
4 could protect the public goods. Lincoln was a
5 lawyer. He knew about these things, and so that's
6 where it came from.

7 And what was interesting about it, was it's
8 a common thing in all government work. You think
9 about government doing government work, and the
10 private sector doing private work. But when you
11 think about it, the government doesn't really do
12 any, I mean it doesn't make pistols, it doesn't
13 build roads, it doesn't... It's really always a
14 combination of the public purse and the private
15 wherewithal, to get things done. Within that
16 setting, there's only one buyer, right? And so,
17 there's always a chance there's going to be
18 collusion. It's in everybody's, if they're
19 dishonest interest, it sort of collude. So it's not
20 anything unique, incidently I understand there's
21 been some in Québec issues of this. But it's
22 inherent in the process. And it's inherent and it's
23 kept secret, right? How would you find out about
24 it?

25 And usually, the government doesn't have

1 the kind of resources to do investigations, because
2 it's a very technical investigation, I mean. I'll
3 talk about the big dig, there's some great examples
4 in the construction industry. But it turns out that
5 if you don't get the cement made and poured in
6 ninety minutes (90 min.), it starts to go off. And
7 it looks like cement if you add water to it, but
8 it's not really cement anymore. You'd have to have
9 somebody who actually watches the batching of
10 cement, when you're pouring the big dig or the big
11 concrete, or whatever, right? And how would you
12 know those things? So what's interesting about it
13 is that it's inherent in the process of government
14 contracting.

15 I went to law school in the sixties, at
16 Berkeley, which was a wonderful time to go to law
17 school. And there was a fellow there named John
18 Philips; and he knew this history, and he had been
19 in a big firm, kind of, like a Toronto firm like
20 Blake, one of those Tories, one of those kind of
21 firms. He went to work for a public interest entity
22 like Cartdale, you know, the one in Toronto for
23 Osgoode. And he decided that if you resuscitated
24 this act, if you make the act work, it would deal
25 with a series of problems we had in America in

1 eighties (80), which was about the defence
2 industry, because we had toilet seats that cost
3 seven hundred dollars (\$700), and coffee makers
4 that cost twelve hundred dollars (\$1,200).

5 And he's now the Ambassador to Italy. He's
6 a very smart guy. And he went to our politicians,
7 and he went to both republicans, who don't want
8 that, in our country, they're in favour of honesty,
9 and government private activities providing the
10 resources. And he went to the democrats, and put a
11 coalition together. And he know that he'd have
12 opposition from the Attorney General, because the
13 Attorney General said : « We don't need any help.
14 We're doing just fine. Thank you. ».

15 And in that year, we were spending about a
16 trillion dollars on the federal budget. And the
17 Attorney General and all the resources that we had,
18 in nineteen eighty-six (1986), which was the FBI
19 and the Department of defence, Investigative
20 services, and all that, right; they collected
21 seventy-nine million dollars (\$79 M) in total
22 damages.

23 The Act came in, which I'll explain how it
24 works, but basically, it got resuscitated from, I
25 had been some of put to sleep in the Second World

1 War by Howard Hughes, who said, you know, it
2 doesn't do the defence people any good.

3 We now do about four billion dollars a year
4 in collections. So it goes from seventy-nine
5 million (79 M) to four billion. And those, almost
6 all of those, are private initiated cases, where
7 it's (inaudible) ex rel. versus big bad company,
8 with the name of Québec in it if it were here. And
9 it's been a great success.

10 So I think it's an interesting to look at.
11 And maybe the themes you might want to think about
12 is that it goes to the question of how do you get
13 evidence, right? How would evidence ever come
14 forward? Whether there's the labor union - I will
15 here when professor Arthurs was here - whether it's
16 in the situation of a labor union situation, if
17 it's a situation of construction details; how would
18 you ever get that, without a False Claims Act?

19 The... Next slide, please. So here's how
20 the Act works. It's a civil claim. It's not
21 criminal. It's a civil claim, and what it means is
22 that in the middle of the contracting process of
23 delivering services, goods and services to the
24 government, whether that they be educational
25 services the province gets or construction services

1 from the Department of Transportation, or
2 whichever, if there is a fraud, if someone is being
3 cheated and you can prove it, by false
4 representation, something's being made, a falsity
5 is stated to the government, then in that process
6 of the government loses money and basically the
7 contracting party has to pay it back times three,
8 maybe times two and there's negotiations but
9 basically, instead of making fraud pay like they
10 just get caught and give it back, you double that
11 up. It's not really a penalty in the sense of being
12 a penalty; it's sort of like the adequate amount of
13 damages to make up for the fraudulent activity they
14 undertook. So that's the basics. There's fraud
15 against the government and there's a contractual or
16 in some cases an implied situation like a fake pay,
17 royalties on oil, and they're supposed to pay so
18 much money per barrel. They cheat on that, they
19 have to make it right. So it's either an act of
20 omission or commission. So that's the basic idea.

21 So the way it works is that the company,
22 individual comes along, finds out that the company
23 is doing something. It's not an individual who
24 reads it in the newspaper. That doesn't do you any
25 good. He has to have original source, have, you

1 know, confidential information that no one else
2 has. He comes forwards and comes forward to the
3 government by going, in our case, he goes to the
4 local office of the Attorney General, has a private
5 meeting and has a disclosure statement. He says
6 this is what's going on. The... He then files a
7 claim. The claim is in the name of the government
8 and it's the government's case. It's not ever his
9 case, ever, no matter how it works. He's always
10 doing something as a citizen for the government.
11 Now, he has, we'll talk about it, he has ways to
12 both help the government and he has ways if the
13 government doesn't want to pursue it, to keep going
14 but it's still in the name of the government
15 because the only party that was injured here is the
16 government. It's not at all like a class action who
17 has to do with a single, a whole bunch of private
18 parties who are getting together to get redress for
19 a private harm. That's not what this is. This is
20 about the government being defrauded.

21 The entity, or usually a company, has to
22 have some knowledge that it happened but it doesn't
23 mean they have to have a big criminal level
24 intention to commit fraud. All they have to know is
25 that they were doing it, that they were putting in

1 the wrong kind of concrete or the wrong bill or the
2 whatever.

3 When the case goes in, it's then sealed. So
4 you don't have to worry about the lawyers for these
5 private entities grand standing or taking over the
6 case or anything. In fact they can't do anything.
7 It's the government case. They back off, right? And
8 the government then investigates it and you'll see
9 that I don't know how your set of investigative
10 services work on government contracts but if you
11 knew about more frauds, you might have to have some
12 more resources, which is probably a good thing
13 because you'd then save some money. But you
14 definitely have to have some sort of investigation
15 that goes on. But at least in America, it's done
16 secretly, because it's under seal, and they
17 basically go back and look at the contract. And so,
18 if there's an assertion of something wrong with the
19 material for instance, they go look at the material
20 and they can do all that without the party knowing
21 yet that they're coming, right?

22 And the average case stays sealed for about
23 eighteen (18) months. So the case is inside for
24 about eighteen (18) months. The bigger cases, the
25 ones involving say fifteen million dollars (\$15 M),

1 they might last three, four, five years but it's
2 worth it. You need a full investigation if you're
3 going to do it.

4 The history is that the cases that are
5 brought, about five hundred (500) at the moment a
6 year, the government only takes on about fifteen
7 percent (15%) or twelve percent (12%) of them and
8 when they take them on, they almost always win. Now
9 why is that? Well they spend two years
10 investigating, looking at what the allegations,
11 they then decide the ones they're going to take,
12 are they really good ones and the company wakes up
13 in the morning and says, oh! the FBI is now
14 knocking at my door and twenty percent (20%) of my
15 work comes from the government and I can get banned
16 too right? Because you can, if you're doing bad
17 things, you can get banned with it, from dealing
18 with the government so that the companies, if
19 there's a good case against them, usually settle
20 okay? Again, all in the hands of the government,
21 the Attorney General in America and all in the
22 hands of investigative services whether they be the
23 Department of Army, the Department of Defence or
24 whoever it is.

25 The basic system then is if the government

1 gets, if they go to trial, three times what a jury
2 would award.

3 We, as opposed to your judges who do fact
4 and finding, we would have a jury trial on the fact
5 side of this. It would be three times if you go to
6 trial but if the government takes the case, the
7 chance of an IBM - one of the companies I've sued
8 is IBM - the chance that they want to have the US
9 government across the table with, personally Mr.
10 Joe representing the government, is very low,
11 right? If it's a bad case, they'll want to settle
12 it. And they have a lot at stake because they might
13 want to put in place a, it's called a Corporate
14 Integrity Agreement saying "We won't do this again
15 because we'll watch out for ourselves."

16 What's happened then is you then prove up
17 how much the damage was, the one, the actual money
18 that was taken based on the cheat and then they
19 turn around and double that, set an amount and that
20 money goes directly to the government. The
21 government is in charge of the amount, the
22 government is in charge of when it's paid, all that
23 is put in place.

24 You may well ask, we can go maybe to the
25 next slide, you may well ask "What does the

1 individual do during that period?" Well, the
2 individual relator, the specific whistleblower,
3 turns out to be a very helpful person to the
4 government and the investigators because they've
5 never seen whatever the problem was. There was a
6 case last week, a really good case in the
7 construction area, a really horrible case but...

8 There was a company in Texas that supplies
9 the guard rails for our roads. Our roads in America
10 are federal, state, joint venture with state taxes
11 and federal taxes and the federal government on the
12 interstate highway like when you see, I noticed you
13 see the road as you go to Maine, it says the "I" -
14 interstate highway means it has certain standards -
15 so they tested the guard rails because you want a
16 guard rail that collapses when you run into it,
17 right? And they fully tested it, the company in
18 Texas tested it and it turns out you have to have a
19 certain amount of steel and then it crumples. Okay?
20 They tested it, the DOT, our Department of
21 Transportation said that's great, you can use it
22 all over the United States.

23 A guy inside the company, just an
24 individual who's in the part of manufacturing then
25 goes to his boss and said "You know, a test that

1 had to be..." I don't know what it was, like twelve
2 inches (12") of collapsible rods "... and you save
3 some money, you made it four inches (4") and they
4 don't work." and the boss said "I don't want to
5 hear about this." same thing I heard, right? And
6 the problem was, it's kind of the cool how the case
7 worked because the problem happened to be that if
8 you then go off the highway and hit it when it's
9 four inches (4") it stabs you, I mean it breaks off
10 and comes into the car and kills people.

11 So you would think it's a perfect case for
12 the Justice Department to go to its client, the
13 Department of Transportation, and say "What should
14 we do?" but, for reasons, unexplained reasons, I'm
15 sure it wouldn't happen here, the Department of
16 Transportation didn't like this at all. Right? They
17 had approved every guard rail in America, right?
18 And then, they forgot to test whether it was really
19 going on so that the government was in the middle
20 of this and the judge said "You've been sitting on
21 this for two years." and the government said "Well,
22 okay, we're not going to, we're not ready to go
23 forward." and a friend of mine named Stone, and
24 another rather famous lawyer named Boies said
25 "Okay. We'll do it because the way this case works,

1 it's the government's case but if they decline to
2 go in..." Remember, there's a hundred (100) cases,
3 there's ten (10) or so the government takes, or
4 fifteen (15), there's eighty-five (85) cases there,
5 many of them are crazy, right? I mean, of those,
6 people were making things up and they get tested
7 but if there is a good case there, the private
8 person and his lawyer just keep right and going.

9 So they tried that case two weeks ago in
10 Texas. They showed graphic pictures of the people
11 being stabbed by the guard rails and they collected
12 a hundred and seventy-five million dollars (\$175 M)
13 times three. Now, when you think about that, it's a
14 lot of money. The lawyers and the private party
15 will make a lot of money. But think of the good it
16 did. Right? Think of the lives it saved and how it
17 changed the world of guard rails. The company, it
18 didn't go out of business, but it's doing a rapid
19 job of trying to figure out how to save it. It's a
20 big company, it does all the guard rails in
21 America.

22 So, anyway, those are the examples, and the
23 kinds of measures for harm, which is a question
24 that's been raised, is sort of how the damages
25 determined?

1 Damages are pretty traditional damages.
2 That is back to law school, when I taught law
3 school in contracts. It's: but for the fraud what
4 have you gotten? So, a typical case is if you're
5 giving a kickback, then by definition you shouldn't
6 have done the kickback, so you multiple the
7 kickback times three. But if you knew if it was
8 really a bad kickback, which meant that the
9 contract went to one party and not another,
10 kickback amounting to bid-rigging, then maybe it's
11 the entire contract, right? So, judges know how to
12 make those decisions, as to damages. So, it's
13 nothing new about damages here. It just has to do
14 with the... the mechanism of determining, and then
15 getting that evidence to come forward.

16 There's, as you see on the slide, there's
17 examples of certifications... Think I can write on
18 this? Maybe I can.

19 Q. **[4]** With your... you have to use the...

20 A. Oh, a different pen?

21 Q. **[5]** No, no, no. You take this side of your...

22 A. This is so exciting. Oh, this?

23 Q. **[6]** Yes, that's right.

24 A. Oh, how exciting. Anyway, you have to look at the
25 contract, right? Because often, the problem is that

1 the contracts that the government has with its
2 providers don't actually say what the rules are,
3 right? So, you'll find that this systems works much
4 better as you begin to have contracts that have...
5 So, you start thinking about it. Well, we'll
6 certify that we measured the concrete, and it was
7 made within ninety (90) minutes. As long as it's in
8 there, then they violated it. If it doesn't say the
9 standard in the contract, it's hard to do the case.

10 So, those are sort of the basics. Wrong
11 amount, kickbacks, bid-rigging, cheating the
12 government in the process of securing the contracts
13 which is bid-rigging, making false statements about
14 what you were going to deliver, giving poor
15 products, not doing what you said you were going to
16 do on time, and hiding it, right? That's the whole
17 thing, is it's all hidden away inside the thing.

18 Generally, what the media talks about is
19 rogue bad people, right? These are bad apples. In
20 America at least, there are companies, there are
21 big organizations that do bad things, because
22 there's human beings in the company. And usually,
23 since it's a well-run company, somebody way up the
24 chain knows that you're maximizing profits one way
25 or another. And so, it's companies that have paid

1 all these monies, it's rarely an individual.

2 The important thing here is retaliation
3 against the whistleblower, not only do protect the
4 relator - the whistleblower is called the relator -
5 not only do protect him by giving him some part of
6 what the government gets with this percentage, but
7 there's also a section that protects his job. Now,
8 he gets back pay and he gets reinstated in his job,
9 you might well ask if he really wants to sit in
10 that corner office with no windows for the rest of
11 his career, but somebody might well want to keep
12 it, because remember, a lot of these cases are
13 little cases, by meaning it's a million dollars
14 (\$1M). The guy is giving up the same career, "I
15 can't be partner in a big audit firm ever again",
16 but they can really work again, maybe for the
17 union, maybe for the company.

18 So, it's important to worry about them as
19 an individual in their job, so there's a section
20 that says, you can't be fired, if you were fired
21 for that, just like you were fired for some other
22 reasons, and I don't know all your rules, but I
23 assume you can't fire pregnant ladies or whatever
24 else, I don't know what the standard are, but it's
25 the same kind of concept, if you're doing right you

1 you can stay at your job and you get your back pay.

2 Next slide, please. I think we sort of laid
3 out the basics now of the Act, and what I'd like to
4 do is, I know we're going to have some discussion,
5 and I'd sort of like to say two things. I will save
6 the part about how it's worked in construction and
7 the amount of dollars, maybe for a little bit
8 later.

9 Q. [7] Yes.

10 A. And then, I'd just like to comment that the basic
11 scheme I just laid out is how we do it down there,
12 but it can be worked with, you can, if you have
13 particular issues, you can worry about them. We
14 have rules already that say that you bring a
15 frivolous or vexatious lawsuit, then you have to
16 pay the other parties law fees, which tends to
17 discourage lawyers from doing it.

18 But what I want to say is, the thing you
19 have to have if it's a False Claims Act, there's
20 two things you have to have. You have to give the
21 brave relator some part of the amount, there's some
22 sort of bounty. Now maybe you share the, if it's
23 too big, with some of the little guys who didn't
24 get enough. You can do all kinds of working with
25 it. But there has to be that incentive. And the

1 other thing is absolutely mandatory. It's when the
2 government doesn't take the case, you have to allow
3 that individual to keep going with the case. Now,
4 usually, they won't, if it's a bad case. Why would
5 they? But that keeps the system working.

6 And we had, in the round tables, we had
7 both federal and State folks, who very clearly,
8 went out of their way to say two things. They
9 said... just get this straight. « That relator
10 brings the case. I'm grateful to him. But it's
11 really a case the United States of America versus
12 my case, Hewlett Packard one of the (inaudible) of
13 thing. » But they also said: « But we'd still very
14 much like it to be a Qui Tam, because then we know
15 we have to keep going. ». It gives integrity. So
16 this is the two things I'd say are absolutely
17 crucial. The rest of it can be worked with. There
18 you go.

19 Me GENEVIÈVE CARTIER:

20 Q. [8] So thank you. Yes. So thank you very much.
21 We'll, in the second part of your presentation, I
22 think we'll go through the Qui Tam procedure, just
23 to make sure that we know a little bit more about
24 the concrete ways in which it is brought. And then,
25 we could ask monsieur Jolin to, Maître Jolin to

1 reflect on the possibility of integrating that
2 statute in...

3 A. It is one thing I should also, that I didn't quite
4 make clear. There's two buckets of money that are
5 there, in our statute. One is for the lawyers fees.
6 The lawyer gets paid hid fees and hiss expenses,
7 over what could be this five year period. There's
8 also this share. So there's two different ways that
9 you get paid. So even a small case, you can still
10 have ways to pay the lawyer to bring in the case.
11 So, it's important to mention that, I think.

12 And then, note that at the bottom there,
13 there's a bunch of ways that you can stop frivolous
14 cases. So okay, I'm done.

15 Q. **[9]** O.K. So should we, if we take the next slide,
16 would you like to go through the next slide as
17 well, or do we ask... What do you think? We...

18 A. Well I could and then, maybe, there's some
19 questions you might have.

20 Q. **[10]** Okay. So we'll... So let's go through that
21 slide.

22 A. This is what I've now done...

23 Q. **[11]** Yes.

24 A. ...in the way I laid this out in the report. It's
25 then I go: how does it actually work, right, where

1 does the rubbery meet the road? And so I could take
2 you through...

3 Q. **[12]** Yes. Let's do that.

4 A. ... and you might have some questions.

5 Q. **[13]** Yes. So the first question we would have is
6 actually who can bring an action, in a Qui Tam?

7 A. Okay. In American False Claims Act, the United
8 States Federal False Claims Act, incidentally, we
9 have now twenty six (26) States have State False
10 Claims Acts, as well as federal, there's a federal,
11 because there's different governments being
12 defrauded. Any citizen, and incidentally, any non
13 citizen entity like there's been a labor union who
14 brought one, and a cooperative association that had
15 a legal right, but any individual can bring a case.
16 They bring it in their name. Neil Robert's ex rel.
17 United States versus IBM, or HP, or Cisco, or other
18 people.

19 You write out a disclosure statement saying
20 these are the bad things that happened, and this is
21 my original secret information. You walk in and
22 give it to the federal government. It's usually
23 somebody from the criminal side, and the civil side
24 said : « Listen. ». And I will tell you, because I
25 know a lot of federal and state guys. They say:

1 « Usually, we think that whistleblowers are crazy,
2 because some of them are crazy, right? I mean they
3 just gotten fired, and they've gotten some, you
4 know... So they look very carefully, because
5 they're not going to waste the government resources
6 on a case if they're being hoodwinked, right? So
7 they spend a lot of time with that relator, saying
8 what, you know, testing out the assumptions.

9 And then, they start their own
10 investigation. And they don't often, after they've
11 gotten the evidence out of the relator, they don't
12 talk to him for a while. They go about their own
13 investigation. They're very good at doing
14 investigations, once they've got the evidence,
15 right? Oh, the guard rails don't work or oh, the
16 concrete wasn't pasted or whatever.

17 Q. **[14]** So perhaps, just before going to the question
18 of the investigation, what you describe is in fact
19 that the relator is what we could call a
20 whistleblower. You call it a relator, but it really
21 is someone who has new information to give, right?

22 A. Right.

23 Q. **[15]** That's the way it works?

24 A. Yes, and I want, the trouble with the word
25 "whistleblower" is it means too many different

1 things. A whistleblower is someone inside the
2 government who says that his boss isn't doing his
3 job. A whistleblower is an investigative journalist
4 who brings to light scandals. This is a particular
5 kind of whistleblower who can bring, who decides to
6 bring a law suit. So that's why I made, yes, you
7 can call him whistleblower but it's a big word.

8 Q. [16] Yes, and from what I've seen from the Statute,
9 who cannot qualify as a relator if you planned or
10 you initiated the fraud, is that right?

11 A. Well, it's a little more complicated than that but
12 generally, anyone can bring the case, okay? And the
13 government, once they see the evidence will keep
14 going but if they're in the middle of investigating
15 it and they find out that the guy who brought it
16 in, the relator, was in fact a very bad guy,
17 right?, they'll turn around and charge him with a
18 crime if he did something wrong. So the Statute
19 specifically says that if he was caught, convicted
20 of a crime involving the elements, he didn't get
21 anything wherein sometimes they go through it and
22 they find that he was a participating part of the
23 company and he kept saying don't do it and he kept
24 doing it, right?, instead of standing up a year
25 ago, in which case the judge on the case can say,

1 well, I'm going to lower your reward but I'm still
2 going to give you something because you at least
3 finally came forward. So it's sort of a graded
4 thing if they have culpability.

5 Q. [17] Huh, huh. And typically, what kind of
6 individuals bring forward the cases. So you have,
7 you were talking about some of the typical cases
8 that is the person within an institution who sort
9 of sees bad things going on but sometimes, it's not
10 the person within the organization. What kind of
11 ...?

12 A. The legal filter, we've discussed, Mister Jolin and
13 I, there's filters to make sure you don't have
14 frivolous cases. A primary one in the Statute is
15 you must have original source information. It must
16 be new information. It can't be something you read
17 in the newspaper or get from a reporter or hear on
18 TV or something. Those people tend to be inside the
19 company. Sometimes, it might be a consultant to the
20 company or the engineers that helped the
21 construction company or whatever. So it could be on
22 the periphery or a labour union or a variety, but
23 it tends to be somebody who's sort of in the body
24 of the beast. You have to know what's going on in
25 order to have the information.

1 Q. **[18]** Huh, huh. So, when the evidence is handled,
2 well brought to the attention of the government,
3 what happens? So you're say... they're sitting with
4 the investigators to make sure that this is not a
5 frivolous case but then, I guess the information is
6 handled in a particular way, I mean, you were
7 talking a few minutes ago...

8 A. I'll give you my example.

9 Q. **[19]** Yes.

10 A. So my second set of cases had to do with the fact
11 that the consulting firms that were helping the
12 federal government changed their computers, you
13 know. In Y2K, there was... all the computers didn't
14 quite work. So there was a whole new system's
15 integration, whole new over the last ten (10)
16 years, new computers running everything. And
17 they're called, they have fancy names, they're ERP
18 or whatever, the one computer that runs the whole
19 business process and in that situation, they... the
20 consultants go out and do an analysis of the
21 business process. Then they suggest to the entity
22 like the post office or whoever, they suggest,
23 here's the kind of things you might want to buy.
24 You can buy this kind of software and this kind of
25 hardware and this kind of servers and, so you'd

1 have EMC servers, big data servers, if you're the
2 federal government, or you'd have HP printers or
3 you'd have IBM consultants and all that sort
4 (inaudible). So I'm at... I knew this, right? And I
5 interviewed one of my... The great thing, I
6 happened to be sitting in a place where I, not only
7 was inside one of the big consulting firms but all
8 my former managers were at the other consulting
9 firms, right? So I had one of the guys who was at a
10 different consulting firm. He wrote me a chart. He
11 said "This is how this works". They go and it has
12 the people approaching the market, it's a
13 PowerPoint like this, and it shows the money; so I
14 understood it. But if you're a U.S. attorney, you
15 don't know anything about the computer business and
16 it's a little outrageous to think that Hewlett-
17 Packard, Appache, Cisco, Sun, EMC, IBM, all those
18 companies would be do... I mean, it's a little
19 outrageous, right? So the federal government U.S.
20 attorney and his assistant came to our offices, my
21 lawyers' offices, and brought along the client's
22 investigators so the Department of Defence
23 investigator comes and the Department of the Post
24 Office because they were all buying these computers
25 and they all sat in the room and I then did this,

1 just like I'm doing now, and I showed that chart
2 and I sort of said "This..." I said "I think if you
3 look at these contracts and you check with these
4 vendors..." because just think how many people are
5 doing that job "... you'll find it out." and they
6 said "Maybe, we don't know if we believe you."

7 Q. [20] So, it's really a process of having the
8 relator meeting with the resources in the
9 government and sharing information and
10 investigative resources trying to match.

11 A. Yes. And then they go off, that is those
12 investigators, and then they follow up on that
13 situation, right?

14 Q. [21] Okay. So then... So the investigation is a
15 crucial part in the process because, as you said,
16 the government doesn't want to lose time or
17 resources in bad cases. So if... So I suppose
18 there's an investigation in every case that is
19 brought to the, at least a minimal investigation.
20 What is, during the investigation you, as you
21 described, the relator acts as a partner with the
22 government, saying "Here is what I have." Generally
23 speaking, what is the role of the relator during
24 the whole period of the investigation? Is there a
25 point when he has...

1 A. There's an intense period when an industry expert -
2 one of my good friends was an accountant, senior
3 accountant inside something called HCA Columbia
4 Healthcare and there was an intense period when he
5 was there and they had a, they were the biggest
6 hospital company in America and they had a
7 programme institutionalised to charge the federal
8 government too much. They would have seminars and
9 how to pull the costs up and, I mean, it was just
10 outrageous, right? So an intense period when he
11 educated the folks and then, there's just quiet for
12 a long time because you just go away and wait.

13 Q. **[22]** Okay. So for the government to...

14 A. To do whatever governments do.

15 Q. **[23]** Yes. Okay. So... And, then, I guess, at some
16 point the government decides to go on with the case
17 or he says "I'm not taking the case." So, what is
18 the difference between these two situations and
19 what is the role of the relator then in those...

20 A. Well, let's take when the government likes the
21 case.

22 Q. **[24]** Yes.

23 A. I don't speak for your government officials but the
24 US government, or the state of New York or
25 California Attorney General's Office, they don't

1 ever like to lose, okay? So they're not going to
2 bring a case they think they're going to lose so
3 they're very conservative. They're very careful,
4 right? So they make that decision and when they
5 then unseal it and announce to the big company, the
6 big company says "Ah! Well, then, we know you have
7 the goods on us." right? "And we'd like to settle
8 this." That happens in almost all the cases but,
9 occasionally, there is a case when the government
10 is there, it's decided to intervene and the entity
11 says "No, we didn't do it." and then they'll have
12 to try the case. And they do try cases. And that
13 takes quite a long time and that relator will come
14 back and help the government in the case because
15 one of the star witnesses is going to be...

16 Q. [25] The relator.

17 A. ... the relator saying "Well, I talked to my boss
18 and he said steal the money." or whatever it is,
19 right? So those are the two cases when the
20 government, and it's called in our statute
21 "intervene", takes the case.

22 If the government doesn't intervene,
23 there's a crucial question here: sometimes they
24 don't intervene because the cases are just
25 frivolous silly cases, right? And the lawyer got

1 mislead by his client or the client was delusional,
2 who knows, right? But there's a whole other set of
3 cases where they didn't quite have enough time to
4 develop the case, there wasn't depositions, this
5 whole time it's been sealed, there really isn't
6 putting someone on the stand, there weren't
7 depositions and they didn't quite get the subpoena
8 to get the right kind of documents but the judge
9 says "You've been sitting on this for two years."
10 so fish or cut bait.

11 So those cases are cases where the
12 government will not think it's frivolous but isn't
13 quite of a mind to go forward with it. And they'll
14 sit and back off and let that lawyer, if he wants
15 to, and his client go forward. If it's a small
16 case, nobody will do it anyway, right? If it's a
17 small case, why would you? The total amount you're
18 going to get is twenty-five percent (25%) of two
19 hundred thousand dollars (\$200,000) or something,
20 you're not going to do it.

21 But some of the best cases are the cases
22 like the one I mentioned with the guard rail, where
23 the government said... they didn't say it's a
24 frivolous case, they said, "I just can't do it
25 right now."

1 And then, you just take the regular civil
2 procedure you're well used to here, you start
3 scheduling depositions, you get the chief corporate
4 officer who can speak for the company, you ask for
5 their phone logs for the days that they were
6 talking to your relator. Those sort of things. And
7 you build that case. Now, the federal government
8 sits in the background, but they always have a
9 right to look at every document, right, so they're
10 getting copied on all the... and they may sit in on
11 the deposition.

12 And often, remember inside a government
13 bureaucracy, there's a senior guy, and then there's
14 a guy on the case, and the guy on the case maybe
15 want to go forward but didn't have it, because he
16 wasn't there. So, he reports back and says, this
17 would be a great case.

18 So, sometimes, they then, in a non-
19 intervene case, the government intervenes later,
20 comes back in. And you have this problem though,
21 because if you're trying the case, what the defence
22 wants to say is, "You'll notice this man here is
23 not from the United States government, even though
24 it says it's a government case." So, you spend a
25 lot of time in motions saying you're prohibited.

1 This is an American government case, event though
2 if government's not here. And then, they try to
3 say, well, if it wasn't intervene, then it was no
4 good. And there's lots of law that says, "No,
5 that's not how it works, (inaudible) come forward."

6 So, those cases are few and far between,
7 but they're very exciting cases for the lawyers who
8 take the risk. There's a friend of mine, there is
9 a... we have a somewhat crazy health system, and
10 there's a system of doing Medicaid for poor people
11 in the state of Illinois, and the company said,
12 "We'd love to do it. This is what we're going to
13 charge." And then, they went out to get people in,
14 and they said, every time a lady came in, they
15 said, "Are you pregnant?" And the lady said, "Yes",
16 and they'd say, "We don't want you." So they, of
17 these people they were trying to serve, they didn't
18 it. And who knows why the federal government didn't
19 take the case, but my friend, Dave Scher, took it,
20 and got before the jury, and the jury was just
21 outraged, right? And so, there's a case where if it
22 wasn't for that private going forward, and he got a
23 hundred and forty-five million bucks (\$145M).

24 Q. [26] So, that's why you say that if we had to
25 distill the essence of the False Claims Act, one

1 part of its essence is that you have to allow a
2 private party to go forward...

3 A. To keep going.

4 Q. **[27]** ... even if the government declines to
5 intervene. So, let's... to make sure that we have
6 time for maitre Jolin's presentation, I would like
7 to discuss the question of the award. So, when...
8 let's suppose that the case is... that the relator
9 wins his case, or her case, how is the award...

10 A. Well, let's take a case where the government does
11 the case.

12 Q. **[28]** Yes.

13 A. Okay? So, when the government does the case, the
14 award is between fifteen (15%) and twenty-five
15 percent (25%). Now, you might well ask, on either
16 the share, which we're talking about, or the fees
17 and cost, how is it actually done, okay? In
18 normal... well people negotiate things, right? But
19 the good news here is that judge, the federal judge
20 sitting on this case ultimately decides this, so,
21 and then you can go to the circuit court, the court
22 of appeal, okay?

23 So, there's a law that says this fifteen
24 (15%) to twenty-five percent (25%) is, if the
25 government took the case, you got to pay a minimum,

1 the fifteen (15%), just for doing the case, right?
2 Even if you didn't help at all, because they
3 wouldn't have gotten the case, right? Now, there is
4 some law that says, "What about if they file the
5 case against the ABC company and the government
6 sues ABC for something completely different?"
7 That's called the Rockwell Case. Well, then you
8 don't get anything, because it's not the same case.
9 But that sorted the fifteen (15%) to twenty-five
10 (25%), and then you say, "Well, how does it set
11 between fifteen (15%) and twenty-five (25%)?" The
12 answer is the government, that was your best friend
13 as a relator, they were, they said, "Oh, we don't
14 really want to pay you a lot", because that's their
15 job to save the taxpayer money. So, you have an
16 argument, but you go to the federal judge, and he
17 then awards somewhere in that range. So, that's
18 that.

19 The same thing goes for the fees and costs,
20 that you go to the defendant. They're paying the
21 lawyers fees directly. And he says, "We're not
22 going to pay that." You go to the judge and you
23 prove up your hours, and you prove up your
24 expenses.

25 Q. [29] So, and I suppose there are limitations on

1 awards to the relator, I guess?

2 A. Well, let me mention that if you have to bring the
3 case yourself, then you get a little bigger reward,
4 relator share because...

5 Q. [30] You did all that.

6 A. ...you have to do all this work.

7 Q. [31] That's right.

8 LA PRÉSIDENTE :

9 Q. [32] And if you lose?

10 A. If you lose, you lose. If it was frivolous or
11 vexatious, you'll pay their legal fees. So, if you
12 keep, if the government says: « We don't like this
13 case. ». And you, the lawyer and the guy keep
14 going, right, and there's not really a case, and
15 you can see it; there's no case, and it keeps
16 going, and it shows up, and they don't even put the
17 jury in, and they dismiss it. You can turn around
18 if you're the defendant, and get your legal fees
19 back, from the relator and his lawyer, okay? So
20 that tends to make them not bring frivolous cases.
21 But otherwise, if you lose, you just lost all your
22 effort, then you don't.

23 Me GENEVIÈVE CARTIER :

24 Q. [33] Yes. We were talking about limitations on
25 awards to the (inaudible).

1 A. Yes. What I mean here is what I mentioned before,
2 is that if you're convic... if the relator is
3 convicted of a crime, you're going to get nothing,
4 no matter if you brought in the best thing in the
5 world and the government got a billion dollars. And
6 also, if you were sort of part of, you contributed
7 to the bad activity, it can be decreased by the
8 judge, for your badness.

9 Me GENEVIÈVE CARTIER :

10 O.K. Well, thank you very much. This is a very good
11 exposé of the False Claims Act, its principles and
12 the procedure. Now, I'm going to discuss with
13 Maître Jolin.

14 Q. **[34]** Donc bonjour Maître Jolin.

15 R. Bonjour.

16 Q. **[35]** Bienvenue à nouveau. Donc, vous avez entendu
17 la présentation de monsieur Roberts. Comme nous
18 disions en introduction, l'importation d'un
19 mécanisme juridique est toujours de maniement
20 délicat. Donc, nous souhaitons vous entendre sur
21 ce qui, à votre avis, constituent des aspects
22 intéressants et prometteurs pour le Québec, mais ce
23 qui aussi pourrait susciter un certain nombre de
24 questions ou de préoccupations. Donc, vous avez
25 pris le temps de réfléchir pour nous à cette

1 question-là. Donc, je vous inviterais à nous faire
2 part de vos réflexions.

3 R. Alors je n'aurai certainement pas le loisir d'aller
4 dans tous les détails. Je peux vous faire part de
5 mes préoccupations par rapport au False Claims Act,
6 tel que je le comprends. L'importation d'un False
7 Claims Act implique des choix politiques importants
8 de la part du législateur. Je dis des choix
9 politiques au sens noble du terme, et non pas au
10 sens partisan du terme.

11 Dans les éléments rassurants, c'est qu'une
12 dénonciation, dénonciateur doit détenir une
13 information qui n'est pas publique, avant qu'il
14 soit mis en cause, le système législatif du False
15 Claims Act. Et, dans les aspects qui sont
16 intéressants aussi, c'est les aspects de
17 confidentialité qui sont associés à la divulgation
18 non publique... c'est-à-dire à la divulgation
19 d'informations utiles, mais non publiques.

20 Là où j'invite cette Commission à
21 réfléchir, c'est que le système américain démarre
22 avec une action qui est introduite par le
23 dénonciateur. C'est le meilleur que j'ai trouvé
24 pour le... entre le « whistleblower » et je ne sais
25 trop quel, et le « relator », alors je l'appelle le

1 dénonciateur. Et je ne crois pas qu'il soit... Je
2 vous invite à réfléchir sur la nécessité qu'il
3 doive y avoir une action judiciaire introduite pour
4 que la Loi démarre, pour que les recours démarrent.

5 J'aurais plutôt tendance, moi, à vous
6 inviter à considérer que le gouvernement crée un
7 bureau, peut-être que le terme office est un terme
8 trop anglophone, mais un bureau dédié à la
9 cueillette d'informations, et à la prise en charge
10 de dénonciations d'informations non publiques et
11 qui pourraient conduire à la mise en oeuvre de
12 recours pour récupérer des sommes qui ont été, par
13 exemple, détournées. Évidemment, si cette
14 suggestion-là était retenue, ça prend des
15 ressources, des ressources qui sont qualifiées, qui
16 sont compétentes et qui oeuvrent dans différents
17 domaines.

18 De la même manière que le False Claims Act,
19 les informations reçues devraient être totalement
20 traitées confidentiellement et là alors, à la suite
21 de la réception d'information et de l'analyse de
22 cette information-là, le bureau, ou le proc... puis
23 je... puis on peut l'appeler le procureur général
24 parce que c'était, ce sont des recours de nature
25 vraiment civile de mon point de vue, va exercer un

1 filtre sur l'information reçue, la qualité de
2 l'information, la recherche qui doit être faite et
3 va prendre, pourrait prendre une décision, c'est-à-
4 dire décider il y a matière à ce que nous
5 intervenions et qu'on initie une réclamation.

6 Et dans ce contexte-là, je vois très bien
7 que le dénonciateur et les responsables au
8 gouvernement coopèrent pour bâtir le dossier, le
9 suivre et je ne vois pas de difficulté en ce qui
10 concerne la collaboration avec le dénonciateur et
11 la poursuite du dossier. Pourquoi cette
12 collaboration-là est utile et nécessaire? Parce que
13 c'est le dénonciateur probablement qui non
14 seulement détient l'information, mais qui peut
15 conduire les personnes responsables à ce bureau que
16 j'imagine à aller aux bons endroits, voir les
17 bonnes personnes pour être capable de constituer le
18 dossier. Donc, et en plus dans le False Claims Act,
19 il y a des pouvoirs d'assignation et des pouvoirs
20 de recherche bien qui me semblent tout à fait
21 adéquats.

22 Quant au fardeau de la preuve, quand le
23 False Claims Act indique qu'il n'y a pas à prouver
24 d'intention, ça me semble également correct et ce
25 que notre, ce qui semble se relire dans ces cas-là,

1 c'est que lorsque le gouvernement prend un dossier,
2 le taux de succès serait très élevé. On dit qu'il
3 est, parce qu'ils sont conservateurs, que le taux
4 est très élevé, ayant déjà été dans une position
5 gouvernementale, je modulerais, je nuancerais ce
6 propos. On a un bon dossier ou on n'a pas un bon
7 dossier.

8 Là où j'ai des préoccupations, c'est
9 lorsque le procureur général, exerçant son pouvoir
10 d'apprécier, décide de ne pas y aller ou de ne pas
11 introduire de recours. Première question qui vienne
12 à l'esprit, est-ce que cette décision-là devrait
13 être définitive? J'ai tendance à croire que oui. Il
14 pourrait éventuellement réviser sa décision à la
15 suite de nouvelles informations ou d'un progrès
16 d'enquête par le dénonciateur, mais j'ai... il y a
17 ici, si on laisse à des personnes agir pour et au
18 nom du gouvernement et introduire pour et au nom du
19 gouvernement des recours, on a là un choix que je
20 n'ai pas vu encore au Québec, c'est-à-dire, on
21 laisse le choix à une partie privée d'introduire un
22 recours pour et au nom du gouvernement. Ça me
23 préoccupe.

24 On me dira qu'il y a des mécanismes prévus
25 lorsque les recours ainsi exercés par des parties

1 privées seraient frivoles. On pourrait y introduire
2 un contrôle judiciaire sur ces recours qui sont
3 frivoles, oui. La réponse c'est oui, mais le fait
4 d'introduire des contrôles judiciaires, introduit
5 également des procès mais le contrôle judiciaire va
6 nécessiter un effort judiciaire important pour
7 déterminer si un recours est frivole ou non.

8 Et j'ai aussi la préoccupation
9 simultanément, de ce que les Américains appellent
10 eux-mêmes dans leur littérature, le « Legal Gold
11 Rush », c'est-à-dire la chasse au trésor ou le zèle
12 excessif. Alors j'ai une préoccupation, donc, de
13 deux ordres. Le premier ordre c'est un choix
14 politique que le gouvernement devrait faire de dire
15 « Nous acceptons que des parties privées puissent
16 réclamer en notre nom. » et, deux, j'ai une
17 préoccupation aussi lorsque des recours frivoles ou
18 non fondés ou manifestement non fondés sont
19 introduits, j'ai la préoccupation de protéger les
20 personnes visées qui doivent subir, qui doivent
21 subir ces recours-là, ce qui est coûteux, ce qui
22 demande beaucoup d'énergie et beaucoup de coûts
23 financiers aussi.

24 Alors, il y a comme un équilibre à
25 déterminer, c'est pourquoi je, j'ai tendance à

1 penser que le filtre devrait être assez définitif
2 de la part de...

3 (10:49:55)

4 LA PRÉSIDENTE :

5 Q. **[36]** Si vous me permettez.

6 R. Oui.

7 Q. **[37]** Je voudrais prendre la... intervenir
8 maintenant si vous me le permettez.

9 Me GENEVIÈVE CARTIER :

10 Bien oui, bien oui.

11 LA PRÉSIDENTE :

12 Q. **[38]** Mais s'il y avait une préenquête, par exemple,
13 judiciaire, c'est-à-dire que, à ce moment-là, le
14 gouvernement vient dire pourquoi il estime que la
15 poursuite ne devrait pas être intentée et la partie
16 qui veut intenter expliquerait pourquoi il y a lieu
17 d'intenter, peut-être que ça réglerait. Une
18 préenquête? Comme on a des préenquêtes...

19 R. En matière criminelle?

20 Q. **[39]** En matière criminelle...

21 R. Je comprends.

22 Q. **[40]** ... privée.

23 R. Alors, cette préenquête là, vous la suggérez comme
24 étant confidentielle?

25 Q. **[41]** Elle peut être confidentielle, certainement.

1 R. Ça peut être une hypothèse, ça peut être une
2 hypothèse.

3 Q. **[42]** Hum, hum.

4 R. Je veux...

5 Q. **[43]** Parce que ça peut peut-être aussi, ça pourrait
6 peut-être, je ne sais pas mais éviter des motifs
7 obliques d'une partie ou de l'autre...

8 R. Oui, oui.

9 Q. **[44]** ... à ne pas... Et d'un autre côté, si le
10 gouvernement dit « je ne veux pas poursuivre » et
11 que ça a une fin, l'effet pervers c'est que ça veut
12 dire que lorsque le gouvernement dit oui, c'est
13 qu'il devrait intervenir.

14 R. Mais, à mon sens, lorsque le gouvernement dit oui,
15 il doit intervenir, il doit prendre le dossier.

16 Q. **[45]** Alors ça veut donc dire qu'il... S'il
17 intervient, c'est le gouvernement est donc impliqué
18 dans la poursuite?

19 R. Oui.

20 Me GENEVIÈVE CARTIER :

21 Q. **[46]** Ça exclut...

22 LA PRÉSIDENTE :

23 Oui.

24 Me GENEVIÈVE CARTIER :

25 Q. **[47]** ... si je vous comprends bien, votre

1 préoccupation c'est de dire : si on limite, si on
2 dit lorsque le gouvernement considère que l'affaire
3 n'est pas suffisamment, enfin, refuse
4 d'intervenir...

5 R. Oui.

6 Q. **[48]** Soit parce que c'est pas une bonne cause, soit
7 parce que c'est une bonne cause mais il n'y a pas
8 les ressources suffisantes pour le faire, dans les
9 deux cas, vous dites « s'il décide de ne pas
10 intervenir, ça devrait se terminer là. » ou est-ce
11 que vous dites ça devrait se terminer là uniquement
12 quand il considère que c'est pas une bonne cause?
13 Autrement dit, quelqu'un qui décide de poursuivre,
14 le gouvernement pourrait penser que c'est quand
15 même une bonne cause, mais ne pas avoir toutes les
16 ressources pour le faire. Est-ce qu'à ce moment-là
17 ça permettrait à l'individu...

18 R. Je pense qu'il faudrait voir si le gouvernement
19 prendrait éventuellement cette position-là de
20 dire : « Écoutez, je constate que c'est un très bon
21 dossier, mais je n'ai pas les ressources. » c'est
22 un peu inquiétant comme, ce serait un peu
23 inquiétant si le gouvernement agissait de cette
24 façon-là. Je pense qu'il faut se concentrer sur
25 l'idée que le gouvernement estime qu'il n'y a pas

1 de cause suffisante de prendre une poursuite. Quant
2 aux ressources, c'est sa responsabilité de donner,
3 d'octroyer les ressources suffisantes pour que
4 l'organisme ou le service ou appelons-le comme on
5 le voudra, puisse réaliser les objectifs.

6 Q. [49] hum, hum.

7 R. Donc, j'ai cette préoccupation-là et qui implique
8 des choix politiques. Je voudrais parler, j'aurais
9 terminé là-dessus parce que le temps file.

10 J'aimerais parler maintenant de
11 compensation. Je n'ai pas de difficulté, moi, à
12 l'idée qu'un dénonciateur puisse être rémunéré, et
13 son avocat aussi, quant au service et à son apport
14 dans un dossier. Je suis plus préoccupé que ce soit
15 cristallisé par des pourcentages dans une loi. Je
16 pense qu'il faut trouver un juste équilibre, une
17 juste mesure et que cette mesure-là doit être, doit
18 reposer sur l'effort et les services offerts, tant
19 par le dénonciateur que par l'avocat.

20 Je peux être... me manifester ainsi comme
21 étant d'un conservatisme dépassé, mais je crois que
22 les pourcentages risquent d'inciter à la chasse au
23 trésor ou à la recherche du billet de loto. Et
24 donc, je préférerais, je suggérerais que vous
25 considériez davantage, si vous allez vers cette

1 voie-là, que la rémunération ou la compensation
2 soit basée sur la valeur réelle, quitte à ce
3 qu'elle soit... qu'elle ait un élément rajouté ou
4 une... qu'elle soit généreuse, mais qu'elle soit
5 basée sur la réalité du travail effectué et des
6 services rendus.

7 Qu'il y ait un contrôle judiciaire là-
8 dessus, je pense que ça va de soi, c'est-à-dire que
9 le... je verrais très bien un dénonciateur
10 réclamer, ne pas être satisfait de ce qu'on lui
11 offre et de réclamer des frais ou une juste
12 compensation, même chose pour l'avocat, et qu'il y
13 ait un contrôle judiciaire là-dessus, je n'ai pas
14 de difficulté. Mais j'ai une difficulté avec la
15 cristallisation des pourcentages, surtout lorsqu'on
16 atteint des montants qui sont très importants.

17 En ce qui concerne maintenant la mécanique
18 d'attribution des sanctions monétaires aux
19 entreprises ou aux personnes qui jouent le système,
20 je comprends que, dans le False Claims Act, on
21 parle parfois du double ou du triple du montant du
22 contrat, et qu'il peut même y avoir aussi des
23 pénalités additionnelles. Je suggère que... je
24 suggererais plutôt qu'on donne plus de latitude aux
25 tribunaux lorsqu'ils auront à en décider. Des

1 possibilités, oui, mais ne pas chercher à, encore
2 une fois, à systématiser des barèmes qui peuvent ne
3 pas être acceptables lorsqu'on prend en compte
4 l'ensemble d'une situation ou des événements de
5 nature frauduleuse qui ont été réalisées.

6 Si d'aventure, le gouvernement acceptait
7 que le dénonciateur puisse lui-même initier la
8 procédure, et qu'il doive assumer les conséquences
9 des gestes qu'il pose si l'affaire tourne mal pour
10 lui, je suis convaincu que c'est une sorte de frein
11 à l'introduction de recours frivoles. Il n'en
12 demeure pas moins que tous les dénonciateurs n'ont
13 certainement pas les moyens de rembourser ou
14 d'assumer la responsabilité de frais découlant d'un
15 procès qui pourrait être important, compliqué et de
16 longue durée. Alors, je mets un bémol également là-
17 dessus, mais sûrement que ça constitue un frein.

18 Il y a un dernier point que je voudrais
19 aborder avant qu'on me pose d'autres questions, si
20 vous avez d'autres questions à me poser, c'est la
21 protection des dénonciateurs. Ce n'est pas une
22 affaire facile, et je... et il n'y a pas de recette
23 facile non plus, mais il va de soi, à mon sens, que
24 le dénonciateur de bonne foi devrait recevoir une
25 protection dans son emploi, dans son salaire, et le

1 cas échéant pourrait recevoir une forme d'indemnité
2 ou de mesure compensatoire s'il devient impossible
3 qu'il puisse continuer dans son emploi ou encore
4 maintenir son salaire.

5 J'ai à l'esprit de vous suggérer de
6 considérer que cette démarche que vous entreprenez
7 ou que vous voulez analyser pourrait faire l'objet
8 d'un... de la création, comme je le disais
9 précédemment, d'un office ou d'un bureau qui
10 recueillerait les informations, qui les traiterait,
11 avocats et experts et autres, et on pourrait penser
12 que le gouvernement puisse créer une espèce de
13 fonds, à même les sommes qu'il pourrait récupérer,
14 pour financer les activités de ce bureau, de ce
15 groupe de travail, qui serait dédié à assurer que
16 les réclamations frauduleuses sont contrecarrées et
17 qu'elles font l'objet de poursuites.

18 J'ai observé, avec le temps, et on parle de
19 deux systèmes et de deux choses différentes, mais
20 que le Fonds d'aide aux recours collectifs, avec le
21 temps, avec les années, a réussi à constituer un
22 fonds qui lui permet de vivre, je dirais de façon
23 quasi-indépendante du gouvernement. Donc, ça
24 facilite l'introduction de cette possibilité
25 d'exercer des recours.

1 Me GENEVIÈVE CARTIER :

2 Q. [50] J'aurais quelques questions, si vous
3 permettez, Madame la présidente. Donc, si je résume
4 bien, en fait, vos préoccupations, on pourrait dire
5 qu'il y a des préoccupations de deux grands ordres.
6 Vous exprimez des préoccupations sur la question
7 des recours frivoles, donc cette idée qu'il
8 pourrait découler de l'adoption d'une telle loi
9 certains excès, ou enfin la présence de gens qui
10 n'ont pas nécessairement une bonne cause, et qui
11 sont tout à coup présents dans le système
12 judiciaire, qui en consomment les ressources et
13 qui...

14 R. Ou encore qui ont des motifs obliques.

15 Q. [51] Voilà. Alors ça, c'est une préoccupation.

16 R. Oui.

17 Q. [52] Et l'autre préoccupation, c'est que vous
18 dites : dans l'hypothèse où on envisagerait de
19 proposer une loi de cette nature-là, il faudrait,
20 pour l'adapter à la culture juridique québécoise,
21 et canadienne peut-être aussi, conserver ou
22 reconnaître qu'au Québec, les juges ont, en
23 général, une grande discrétion, en fait, jouent un
24 rôle important dans la détermination des dommages
25 ou des montants qui sont payés. Ça, c'est une

1 préoccupation que vous avez. Donc...

2 R. Définitivement.

3 Q. **[53]** Alors compte tenu...

4 R. Éviter, si vous me permettez, éviter qu'on cherche
5 à limiter la discrétion des juges. Pour les côtoyer
6 depuis quelques années, la magistrature n'aime pas
7 beaucoup que sa discrétion soit limitée. Et je
8 pense qu'on peut lui suggérer des balises, mais
9 laisser aux tribunaux la discrétion que chaque
10 situation puisse être analysée conformément à son
11 mérite.

12 Q. **[54]** Évaluée au mérite. Compte tenu de ces deux
13 réserves-là, en fait, il y a une question qui
14 m'embête un peu. Dans l'hypothèse où on dit qu'une
15 des caractéristiques du False Claims Act américain,
16 comme nous le discussions avec monsieur Roberts, une
17 des caractéristiques, c'est de permettre que des
18 recours soient poursuivis, indépendamment de la
19 décision du gouvernement d'intervenir ou non, dans
20 la mesure où c'est le seul rempart contre des
21 situations où le gouvernement n'aurait pas avantage
22 à pousser la cause.

23 On donnait l'exemple de cas où, par
24 exemple, le ministère des Transports américain
25 était un peu dans l'embarras, donc se voit dans une

1 situation difficile, et peut-être pas intérêt à
2 poursuivre ou à appuyer le dénonciateur dans sa
3 démarche. Il pourrait dire : « Bien moi, je
4 n'interviens pas. ». Comment se prémunir contre le
5 risque? Vous parliez de motifs obliques. Comment se
6 prémunir contre ce risque-là? Et est-ce qu'à ce
7 moment-là, ce n'est pas un peu inévitable, de
8 permettre que des individus poursuivent malgré la
9 décision du procureur général de ne pas prendre la
10 cause? Ou est-ce qu'il n'y a pas de solution au
11 problème?

12 R. Il faut essayer de trouver des solutions au
13 problème. Le fait qu'on permettrait à des citoyens
14 d'exercer personnellement et au profit de l'État
15 des recours, il n'y a rien d'immoral en soi, il n'y
16 a rien d'illégal en soi. La loi peut y pourvoir.
17 Mais je, mon expérience au gouvernement et même
18 après, je n'ai jamais vu de situation où il y avait
19 empêchement d'exercer des recours appropriés, qui
20 pouvaient laisser mal paraître le gouvernement. Et
21 c'est comme si on anticipait que le gouvernement ou
22 certains ministères du gouvernement pourraient être
23 de mauvaise foi ou pourraient inciter les personnes
24 qui doivent prendre une décision à ne pas le faire.
25 Je ne vous dis pas que c'est impossible. Mais moi,

1 lorsque j'étais au gouvernement, au ministère de la
2 Justice, je n'ai jamais...

3 Q. **[55]** Été témoin...

4 R. ... jamais été témoin et honnêtement, j'ai jamais
5 reçu de pression quelle qu'elle soit...

6 Q. **[56]** Et ma question de...

7 R. ... ou pour me limiter dans mes agirs.

8 Q. **[57]** Et ma question ne visait pas à supposer que
9 c'était le cas, là. En fait, je vous posais
10 vraiment une hypothèse, mais...

11 R. Oui.

12 Q. **[58]** ... je...

13 R. Mais c'est un choix, c'est un choix politique. Est-
14 ce que... le... au Québec, on est prêt? Maintenant,
15 est-ce que dans ce type de situation-là, un citoyen
16 puisse exercer un recours au nom de l'état, au nom
17 et au profit de l'état?

18 Q. **[59]** Je proposerais à ce stade-ci qu'on prenne une
19 courte pause. On a une petite contrainte. Maître
20 Jolin doit nous quitter au plus tard à onze heures
21 trente (11 h 30), mais je propose une courte pause
22 pour qu'on puisse quand même faire un petit bilan
23 des discussions.

24 R. Puis Madame la Présidente, si jamais vous avez des
25 questions puis que vous les connaissez maintenant,

1 me les indiquer pour que je puisse y réfléchir
2 pendant l'intermission.

3 (11:05:03)

4 LA PRÉSIDENTE :

5 Q. **[60]** I'll ask the questions in English so that Mr.
6 Roberts can also understand. You've said that the
7 relator has to be someone from the inside of the
8 company, is that so? Is it obliged?

9 Mr. NEIL A. ROBERTS:

10 A. If somebody has secret original information, how
11 they get it, usually it's inside de company.

12 Q. **[61]** Okay.

13 A. They could have somehow found it in the trash too,
14 or whatever, but it has to be secret.

15 Q. **[62]** Okay. And if we suppose that it is someone
16 from outside, outside the... the company...

17 Me GENEVIÈVE CARTIER:

18 The company.

19 LA PRÉSIDENTE :

20 Q. **[63]** ... who tells the fraud or that there is
21 something going on in the company, would, and give
22 this information to a journalist that himself, on
23 his side, covered... discovered the real fraud
24 himself, can a journalist sue under the name of the
25 government?

1 A. Well, let's talk about can there be relators who
2 are just investigators in some way, whether
3 they're... they could then file a case, okay? The
4 answer is yes, but it's sort of hard to get
5 original secret information if you're not inside a
6 group, but assuming you had ways to do that,
7 interviewing people, getting documents out of trash
8 bins, whatever it was, you can file that case, and
9 you have to obey the seal remember? Because you
10 want it sealed so the government can do its
11 investigation, so you can't talk about the case but
12 once it's filed, then you can talk about the fraud.
13 You just can't talk about the case. So there have
14 been situations where the journalist talks to the
15 individual. He doesn't talk about his case but he
16 can talk about the matter.

17 I have never heard of a case where
18 journalists could bring it but it's not
19 inconceivable, but once he puts it in the paper,
20 then it's not private anymore and it's already
21 open, in other words, there's been cases where
22 someone went to the Congress and said there's this
23 bad thing and then, he then tried to file a case
24 and it was difficult because he already made it out
25 in the public. The whole idea is to get the private

1 information to the government so they can
2 investigate.

3 Me GENEVIÈVE CARTIER :

4 Donc on prend une pause, une dizaine de minutes
5 seront suffisantes pour permettre à maître Jolin.
6 Merci.

7 SUSPENSION DE L'AUDIENCE

8 REPRISE DE L'AUDIENCE

9

10 (11:20:24)

11 THE CLERK:

12 Mr. Roberts, you are under the same oath. Monsieur
13 Jolin, vous êtes sous le même serment.

14 M. MICHEL JOLIN :

15 Oui.

16 Mr. NEIL A. ROBERTS:

17 Thank you, yes.

18 Me GENEVIÈVE CARTIER :

19 Q. **[64]** Alors rebonjour. Donc, nous avons pris
20 quelques minutes pendant la pause pour échanger
21 avec monsieur Roberts et maître Jolin. Donc,
22 monsieur Roberts aura quelques remarques à faire
23 sur les commentaires de maître Jolin mais
24 j'aimerais tout de suite saluer et remercier maître
25 Jolin qui doit nous quitter pour des raisons très

1 importantes donc je voudrais le remercier en votre
2 nom de sa disponibilité et de sa grande
3 flexibilité, au nom de la Commission. Ses
4 réflexions vont nous permettre d'avoir en tête un
5 certain nombre d'éléments cruciaux dans la décision
6 d'importer ou non le False Claims Act. Donc, je
7 vous remercie d'avoir été ici ce matin, merci
8 beaucoup.

9 M. MICHEL JOLIN :

10 R. Et merci de m'excuser.

11 LA PRÉSIDENTE :

12 Oui. Merci Maître Jolin.

13 Me GENEVIÈVE CARTIER :

14 Q. **[65]** Alors, donc Mr. Roberts, we've had a chance to
15 discuss with maître Jolin during the short break
16 that we had, you managed to grasp a couple of, the
17 main ideas that he developed before that break. So,
18 perhaps, just before finishing the presentation
19 that you had prepared, if you had a couple of
20 comments to make on those...

21 A. Yes.

22 Q. **[66]** ... on his presentation?

23 A. I just want to be clear that I, in my academic
24 role, really came to bring this as a sample of a
25 way that it happens in a different country than

1 yours and that listening and having conversations
2 with Mr. Jolin, I understand that there's going to
3 have to be a Quebec False Claims Act if you have
4 one, which is going to be different than anyone
5 else's and some of the issues, I think, depending
6 on what they are, you can figure out what the right
7 answer is and I don't know whether that's part of
8 the attorney general's office or part of the
9 legislative committee or whatever. But, clearly, if
10 you're worried about frivolous and vexatious, you
11 can change the penalties.

12 Australia, in the class action world, has a
13 much higher penalty for the lawyers in frivolous
14 class action world for instance so you can finetune
15 it. I think the only thing that I'd say is that the
16 two main things have to be there if it's going to
17 be a False Claims Act. One is there has to be a
18 reward for the person who risks his whole career
19 and, with that, some rather major compensation
20 because, in my own example, there were fourteen
21 hundred (1,400) partners going along with, you
22 know, an obviously bad thing to be doing.

23 And the second thing is that even in
24 situations where the government decides not to go
25 forward, you could put some more filters in, you

1 could say there could be a preliminary hearing
2 about whether it's frivolous and the government
3 would opine to that. But you have to have the right
4 to keep going because that will keep the government
5 honest. So, anyway, those are my only thoughts.

6 Q. [67] Yes.

7 A. So it's not, none of it is set in stone but those
8 two stones are needed or else it's not a False
9 Claims Act.

10 Q. [68] Yes. So...

11 A. And I might mention that in the States, the same
12 senator, Senator Grassley, was very upset with the
13 Internal Revenue Service and Securities and
14 Exchange service because they weren't doing their
15 job, same sort of thing, and he set up reward
16 systems, right? And they haven't worked in the
17 States. Much at all because it's kept behind the
18 confines of the entity and it's not a Qui Tam. So,
19 there you go.

20 Q. [69] So... Yes.

21 A. That's my only comment.

22 Q. [70] So, that's...

23 A. I totally understand his concerns and there's ways
24 to deal with them.

25 Q. [71] So thank you for your thoughts on that. So,

1 what we will do is we will go through the remaining
2 parts of your presentation. I guess we might be
3 fine with ten (10) or fifteen (15) minutes, we
4 would need to finish by quarter to twelve (11:45).
5 So the fact that it works and it is successful...

6 A. If we could go to the next slide.

7 Q. **[72]** Madame Blanchette, we would need the next
8 slide. And so it works and, more specifically,
9 perhaps...

10 A. And maybe...

11 Q. **[73]** ... what is the case in the construction
12 industry?

13 A. Yes. Exactly. Okay. This was a slide that says what
14 I just said, which there are other whistleblower
15 programs, they don't...

16 Q. **[74]** So, next slide, yes.

17 A. So, we go to slide 9. So, at the end of my report,
18 I then spent some time on the fact that this tool
19 in the United States has been a very good tool for
20 citizens, plain old citizens, working in companies,
21 define fraud. Often fraud is well hidden within the
22 system. There's elaborate schemes, if you think
23 about a situation such as the drug testing, there
24 will be a situation where they test the drug for
25 one thing, and then they go sell it for another,

1 event though it might cause suicide for the kids,
2 for instance, there's been some cases like that.

3 So, the citizens have done a fine job of
4 that, but I know your mandate has to do with the
5 construction industry, so I looked specifically at
6 examples of situations where whistleblowers unearth
7 fraud and schemes in the construction industry, and
8 it works very well there, as you may well imagine.

9 Human beings get together in organizations
10 usually called corporations. People inside them are
11 meant to maximize profits, some human beings are
12 venal, and therefore there's going to be fraud, and
13 it happens everywhere, and it happens in the
14 construction. There were series of examples of
15 contractors kickbacks, bid-rigging, over billing
16 and dangerous construction materials, and I'll go
17 through a few. But it's only the people inside the
18 companies that have been very good at finding them
19 and bringing them forward.

20 It's interesting, it's not only the
21 executives that have done it, but often it's a guy
22 on the line. One of the famous cases was the guy,
23 he actually had a pony tail and he was testing a...
24 they're called mother boards for computers in the
25 defence industry, and it was a Japanese company,

1 Panasonic, I think, and he noticed that... he'd
2 checked off the failure rate, and his boss would
3 come over and change the ring, right? They had to
4 have a certain failure rate, because it said in the
5 contract they can only have, you know, one in a
6 hundred (100) they were failing, and the guy just
7 changed them. I mean, it's as simple as that. And
8 the guy go, "That can't be right", managed to find
9 a lawyer and bring the case.

10 Next slide, so I've listed some
11 construction cases and I'll tell you a couple of
12 stories about them, in sort to give you the idea.
13 One of the big construction situations was this
14 private situation between the federal government
15 and the State of Massachusetts, because Boston,
16 like Montréal, is built on islands, and they
17 couldn't get across the bridges, so they built the
18 Big Dig, and they build under it. If you've been to
19 Boston, you're going through those big tunnels. And
20 it was a several billion dollar dig.

21 And the problem was that, what had happened
22 was that Bechtel just wasn't doing its job, and it
23 knew it, and it covered it up. This sounds
24 familiar. It covered up the bad things. And an
25 employee or two, two or three, began to bring these

1 cases, secret cases, and in the middle of it, the
2 ceilings began to fall in and crush people. And the
3 reason was that they didn't use good concrete,
4 another guy against another company that was
5 supplying the concrete noticed they were changing
6 the batching receipts. Again, a low level guy in
7 that case, and a high level engineer in the other
8 case.

9 But it was bringing forth this information
10 that it would have been very difficult for the
11 government to figure out what it was, because they
12 said, "Well, it's just the ceiling that fell in."
13 So, as you see, there five hundred million dollars
14 (\$500M) of recovery for the State of Massachusetts.
15 And it's very good, bringing forward that kind of
16 bad activity that would be very difficult to figure
17 it out otherwise, because they would, you know,
18 they'd say, "It just one of these things that
19 happens, right?"

20 Next case is fraudulent testing, things
21 like, and I'm sure you have the same situation
22 here, we keep redoing the roads, you're supposed to
23 put two inches (2") of asphalt on the road, the guy
24 puts an inch (1") and the asphalt, who would know,
25 and somebody brings it forward, and brings the

1 case, and it's an eight million dollar (\$8M) case.
2 It's not a giant case, but it began... all of the
3 other asphalt companies then start worrying about
4 whether they're doing it right. So, it works, it's
5 just a simple kind of thing that works.

6 The testing of construction material is a
7 typical situation where you can see they get four
8 million dollars (\$4M) because the guys doing the
9 testing, and the manager certifies it works, but it
10 doesn't really work.

11 Next slide. The bid-rigging, when you can
12 find out about it; it's obviously illegal, and the
13 whole contract's illegal. This case happened to be
14 US funded public works in a foreign country, and
15 there was some notion of everybody's doing it, but
16 the employee who said, "Yes, but we're not supposed
17 to be doing it. It's the United States tax payers'
18 money that's spending forty million bucks (\$40M) on
19 these Egyptian whatever." And they brought it
20 forward in American court, and the fact, that even
21 though it occurred far away, it was illegal, it
22 hurt the United States and they paid their fine.

23 The... Some of the things that I've
24 heard... I've sat in on two or three of these, but
25 there's some sets of things that people do, and

1 there's some standard, like, well, are they
2 supposed to, you know, get the free boat or get the
3 yacht or whatever. Again, you have to have the
4 contract, should be pretty clear on what the rules
5 are. But there's a great case in here, where the
6 government was billed for the goods that were then
7 given to the people inside the company. I mean, so
8 you can take care of it.

9 Similarly, when the actual government
10 official is being fraudulently bribed, the guy in
11 the company can bring the case, and somebody else
12 can worry about the member of the government that
13 got the money; his brother-in-law had the roofing
14 contract, but they paid the three million dollars
15 (\$3M) and it gets done. And even the last case,
16 which is as plain on politics, they got a federal
17 contract, they started to bill the government, to
18 go lobby the government, to get more federal
19 contracts, you know. And someone inside the company
20 just said, "That's not right", and brings a case.

21 Now, you know that some of these aren't
22 very big cases, but they're good for government,
23 right? It's a good thing to know, that you're going
24 to get caught, someone's going to come forward and
25 it's worth somebody's while to get twenty percent

1 (20 %) of the million dollars (\$1M), and the lawyer
2 gets his fees, to sort of keep the game honest.

3 So the answer is -- next slide please --
4 that it has absolutely has worked, as I mentioned.
5 In seventy-eight (78), there was a pittance,
6 fifteen million (15M) one year and seventy-nine
7 million (79M) the next year, and now it's up to
8 three or four billion a year. If you take the
9 billion over the spend, it's still a small
10 percentage.

11 There's much more fraud out there, and the
12 more people talk about the cases and give lectures
13 on corporate integrity, the more cases will come
14 forward. And you will have to staff up. I heard
15 part of that dialogue; you'll have to have some set
16 of resources in the civil division inside the
17 Attorney General's office, to deal with it. But
18 that's a good thing. And if you take the money that
19 comes, if you take a certain part back to the
20 supervising and at these, in the case the US
21 Attorney; the US Attorney gets a certain share of
22 everything that's recovered, and it pays for all
23 those lawyers and investigators. So it... You can
24 make the system pay for itself.

25 Next slide. So here is the overall. My law

1 school chum, in nineteen eighty-six (1986), changed
2 the law, so there was no cases in place by eighty-
3 seven (87). You now see, the last year I put on
4 here, it's five billion dollars (\$5G). It's a lot
5 of money. And it tends to have two... Maybe if we
6 go overall, next slide, I think we're getting close
7 to done.

8 Q. [75] I think we're done. Yes.

9 A. Overall, here is what you might want to take away.
10 If you keep the basics of the false claims scheme
11 in place, that is a reward for the fellow who risks
12 his career and compensation to him of significant
13 amount, and his lawyer paid. And if he can keep
14 going, if the government doesn't do it, you get the
15 following things that seem to be a positive if. But
16 again, I'm a believer, so... One, you get the
17 evidence you'd never get any other way. Two is
18 there's damages back to the public purse, for the
19 contractors who, in some sense, spend their whole
20 life on the public well, right? They keep taking it
21 out. It's nice to give it back, when they've done
22 something wrong.

23 Within it, that number, that five billion
24 (\$ 5G), doesn't count all the other companies that
25 knew that they shouldn't do something they were

1 about to do, 'cause their employee or president or
2 salesmen would turn them in. So the deterrent
3 effect is a very significant effect.

4 And finally, the compensation is an
5 important thing, and I don't believe it should be
6 capped, but I think you might work out ways that
7 some of the compensation both goes to the
8 government entities to fund the situation and maybe
9 goes to some of those people who bring perfectly
10 important million dollar cases that have given up
11 their career. So I think I'm very flexible how you
12 do it as long as you keep those two things. So I
13 think with that, I'd say that I wish you well and
14 I'm more than happy incidently to come whenever you
15 want, if not necessarily for fear or anything, if
16 anyone needs to think about it or talk about it
17 'cause I'm sure that there'll be some process of
18 the Attorney General's office which has to be a
19 stakeholder here, 'cause suddenly they have new
20 work that they wouldn't have before. And then
21 there'll be legislative committees and a bunch of
22 other people but, so I stand ready to serve if you
23 need help.

24 Q. [76] Well, I thank you very much, Mr. Roberts.

25

1 LA GREFFIÈRE :

2 Est-ce que vous produisez la pièce?

3 Me GENEVIÈVE CARTIER :

4 Oui, je vais produire la présentation sous la
5 cote...

6 LA GREFFIÈRE :

7 260P-2156.

8 Me GENEVIÈVE CARTIER :

9 Vous me dites 21...?

10 LA GREFFIÈRE :

11 2156.

12 Me GENEVIÈVE CARTIER :

13 Parfait. Merci.

14

15 260P-2156 : The United States False Claims Act

16 report to the CEIC, February 15, 2013

17

18 Q. [77] So, yes, thank you very much Mr. Roberts. Do
19 you have questions for Mr. Roberts? I could,
20 perhaps I could just add just a few words. So as
21 you said, I think, it is... from what I understand
22 from your presentation, is that it is important to
23 view the False Claims Act on a wider basis than
24 just the fact of having money in exchange for
25 information. It really is a scheme that allows us

1 to reach a number of important objectives
2 deterrence, well finding information, protecting
3 and compensating whistleblowers and I know that in
4 your career, you also worked as an anti-corruption
5 consultant and that you have experience on that
6 score so, would you say that within the weapons
7 that a State should have at its disposal in any
8 anti-corruption policy, do you think this is a
9 crucial part? Is it just an instrument or is it,
10 how does it fit within a general anti-corruption
11 policy?

12 A. A False Claims Act only works if you have a
13 civilized society with rule of law. It tends not to
14 work in a developing country if the corruption's so
15 bad that the judges and the police and the systems
16 don't work. But if you have a functioning system, I
17 believe this is one of the greatest ways to have
18 democracy and capitalism work. I mean, we... you
19 can't make democracy work without public goods and
20 services. You can't do them because governments
21 don't do things; they buy things and this is a
22 system that gives integrity to that whole process.
23 So I think it's a very important way to make
24 capitalism and democracy work.

25 Q. [78] Huh, huh. So I can only thank you enough.

1 Well, thank you a lot for your report, both your
2 report and your very inspiring and engaged
3 presentation of the False Claims Act. So thank you
4 for being here with us this morning. So...

5 A. And I am ver... I want to thank the Commission. I'm
6 very proud to have made this report, so... It's
7 been great.

8 LA PRÉSIDENTE :

9 Q. [79] We thank you very much. You've been very
10 helpful and it is very (inaudible) for you to offer
11 us to come back if ever needed. Thank you very much
12 Sir.

13 Me GENEVIÈVE CARTIER:

14 Q. [80] Thank you very much, Mr. Roberts.

15 SUSPENSION DE L'AUDIENCE

16 REPRISE DE L'AUDIENCE

17

18 (14:05:03)

19 Me GENEVIÈVE CARTIER :

20 Donc Madame la Présidente, Monsieur le Commissaire,
21 alors nous entamons cet après-midi la dernière
22 étape des audiences d'experts de la Commission.
23 Nous accueillons le professeur Andrea Di Nicola qui
24 est professeur adjoint à la Faculté de droit de
25 l'Université de Trento en Italie. Le professeur

1 Di Nicola nous fera part de son parcours
2 professionnel, mais j'aimerais mentionner d'entrée
3 de jeu qu'il a récemment appris qu'il était le
4 lauréat du prix Paolo Borsellino pour son
5 engagement civil dans la lutte au crime organisé.
6 Le prix est octroyé en mémoire à l'un des juges qui
7 s'est le plus démarqué dans la lutte au crime
8 organisé en Italie au début des années quatre-
9 vingt-dix (90) donc nous le félicitons de cet
10 honneur.

11 Alors, la question de l'infiltration de
12 l'industrie de la construction par le crime
13 organisé fait l'objet d'un paragraphe particulier
14 de notre mandat. C'est donc un sujet qui occupe une
15 place centrale dans nos travaux. C'est aussi un
16 sujet qui est très difficile à cerner et c'est une
17 réalité qui n'est pas simple à comprendre et, donc,
18 nous avons besoin de l'éclairage d'experts comme le
19 professeur Di Nicola pour nous indiquer quelles
20 orientations privilégier pour l'avenir. Alors,
21 Madame la Greffière, nous pouvons assermenter.

22 THE CLERK:

23 Please stand up to be sworn in please.

24

25

1 IN THE YEAR TWO THOUSAND FOURTEEN (2014), this
2 third (3rd) day of November,

3
4 APPEARED:

5
6 ANDREA DI NICOLA, professor, University of Trento

7
8 WHOM, having made a solemn declaration, doth depose
9 and say as follows:

10
11 Me GENEVIÈVE CARTIER:

12 Q. **[81]** So thank you very much, Professor Di Nicola.
13 Welcome to the Commission.

14 A. Thank you.

15 Q. **[82]** Thank you for finding time in your busy
16 schedule for us. So, you will be making a
17 presentation of about forty-five (45) minutes about
18 what you think might be the areas of reflection and
19 the thoughts that we should have in mind when
20 recommending measures likely to prevent the
21 infiltration of organized crime in the construction
22 industry. But before you do that, I would like you
23 that to present your professional experience and
24 expertise in the field of organized crime so...

25 A. Okay. Thank you for inviting me. I've been working

1 for more than fifteen (15) years on researching,
2 especially on transnational organized crime and on
3 policies against organized crime, repressive and
4 preventive policies basically.

5 I teach at the University of Trento, I am a
6 criminologist so I teach criminology and,
7 currently, I am coordinating a research group of
8 more than twenty (20) persons, professors from and
9 PhD students from different disciplines from law,
10 social sciences and to ICT and we work together to
11 research in terms of applied research on crime and
12 organized crime and transnational, international
13 organized crime.

14 What I've done of my life professionally
15 speaking it is conducting studies, especially for
16 European institutions and governments across Europe
17 and in my country on organized crime and,
18 currently, we are working, my university and I, on
19 a study for the European Commission on the
20 evaluation of policies on organized crime within
21 the countries of the European Union and we are just
22 finishing this.

23 Q. [83] So thank you. So, your European experience
24 will be particularly relevant for us so, in your
25 presentation, you will discuss strategies to fight

1 organized crime, you will be talking about the
2 definition of organized crime, the questions of
3 repressive and, repressive measures and prevention.
4 So we give you around forty-five (45) minutes, and
5 then we have a question and answer period which
6 will follow. So, over to you.

7 A. Okay. Thank you. It's... let's say that there are
8 so many things that could be touched, so I'll try
9 to select some aspects that I think might be
10 interesting for your work. And I will... talking
11 about strategies against organized crime, I will
12 try to touch at least three pillars, maybe four,
13 but at least three. The first one is the idea
14 that... that the way in which we interpret
15 organized crime, our vision about this kind of
16 problems has a great impact on the way we work
17 against organized crime.

18 So, first of all, I would like to speak
19 about definition, because definitions influence our
20 strategies. This is a... this can be found in the
21 history of countries working against organized
22 crime. I will try to give you some examples. The
23 second pillar is the repressive side against
24 organized crime and I will try to touch both
25 substantive criminal law and procedural criminal

1 law, and institution against organized crime, with
2 the main focus on the idea of coordinating actions
3 against organized crime, so the coordination and
4 coordination activities that might be very relevant
5 in the fight against organized crime. And the last
6 pillar will be prevention and administrative
7 systems and administrative ways to fight organized
8 crime. And if there will be time left, I will try
9 to touch also the idea of transparency and
10 involvement of citizens in the fight against
11 organized crime, which is something happening in
12 several countries of the European Union, which as
13 they say is giving good results.

14 Starting from the definition and the way
15 which we interpret reality, and also considering
16 what I know about the Canadian experience and what
17 you've told me about this... the problem that you
18 are facing, and the mandate, within the mandate of
19 this commission. I think it's important to realize
20 that a definition is not something... is something
21 useful and is something that has practical impact
22 in terms of legislation and practices. Basically,
23 one could say that organized crime is what we, in
24 Italy, call "mafia", which is a traditional view of
25 considering organized crime. So, I am calling this

1 type of organized crime "traditional organized
2 crime" in order to be able to speak with you, in
3 terms of simple language. Let's call it traditional
4 organized crime. Basically, what I am saying now is
5 that organized crime is not only this one across
6 Europe and across the world, that we should change
7 the way in which we interpret organized crime, that
8 it's more and more the interconnection between
9 professional and white collar criminals and
10 traditional organized crime. I call this phenomenon
11 "economic organized crime". We can call it whatever
12 we want, in whatever way. But there are different
13 typologies of organized criminals. I mean, and the
14 common denominator is the illegal enterprise, the
15 entrepreneurship, the illegal entrepreneurship or
16 this kind of criminal activities and the
17 organization of this kind of criminal activities.

18 If we are capable of including within the
19 notion of organized crime also this gray area of
20 interconnection between white collar organized
21 criminals and traditional organized criminals,
22 maybe we can boost our action against organized
23 crime, especially because this is what is happening
24 - I know much more the European experience for
25 sure - but this interconnection is happening in my

1 country, in all the countries of the European
2 Union; I think it's the same also here in Canada.

3 Why am I saying that this is important?
4 Because I will give you a pair of examples. The...
5 one is taken from the American, the United States
6 experience. Until the seventies (70's) what they...
7 they thought that organized crime was an alien
8 conspiracy, something coming from abroad. Something
9 coming Italy, something coming from Ireland and
10 from the country from which a different traditional
11 organized family came. Until the eighties (80's) is
12 approached, the fight against organized crime was
13 very low, was ineffective.

14 Then suddenly, a bunch of criminologists
15 said to the government come on, this is not
16 something coming from outside. This is U.S. This is
17 our economy, these are our enterprises, these are
18 our politicians, these are our (inaudible). They
19 are speaking with... not italian. They have the
20 U.S. citizenship. This change was a change in the
21 way the U.S., but this is one of the possible
22 examples, there was a slight, an important change
23 in the way the legislation was shaped and the
24 investigation was shaped. They call it the
25 enterprise model of organized crime. The RICO was

1 enacted, new methods were enacted in terms of
2 investigation and new confiscation laws were
3 enacted, all based on the idea of enterprises,
4 which is the common denominator.

5 This is happening also in several European
6 countries, also in my country now where we speak
7 about ethnic organized crime coming from Albania,
8 Eastern European Union and we are forgetting the
9 interconnection about this kind of organized crime
10 from abroad in the Italian system. So a vision is
11 needed because this vision will help us construct
12 strategies and this vision should be as broad as
13 possible and I'll give you another example and by
14 giving this example, I'm using your criminal code,
15 the Canadian one. I've studied it but it's not,
16 it's also an example that I faced in several
17 European countries.

18 Let's use the Italian example. We have a
19 couple of offenses of participation in an organized
20 criminal group, one is very broad and another one
21 is the mafia type association, which is more
22 specific and shaped on the characteristics of
23 typical Italian mafia. But anyway. Several times
24 happen, I'm not speaking about country so I won't
25 blame anyone, that the Italian prosecutors are

1 asking for cooperation from, so a rogatory letter,
2 from abroad, from other countries, European
3 countries, saying, come one I know that Andrea Di
4 Nicola and Valentina Tenti since they have Italian
5 names but from an intelligence and investigation, I
6 know that they are mafiosi and we are conducting
7 investigation on them. But now we know that they
8 are going to meet with other eighteen (18) people
9 in that room and we presume, we assume that they
10 will probably decide something very important for,
11 in terms of criminal activities in your countries.
12 The answer is, but these are professionals, these
13 are politicians. What kind of criminal activities
14 are they conducting? Can you give me proof about
15 evidence about criminal activities in terms of
16 offenses? Are they committing traffic in human
17 beings? Weapons? Drugs? No. They are just meeting
18 and they are an organization, and a criminal
19 organization and you have members of this criminal
20 organization in this room so please intercept them.
21 No, there are no criminal offenses in the room. But
22 you have the criminal offense of participation in a
23 criminal organization. Probably they are committing
24 this offense in these moments. Intercept them.
25 Well, what is happening is that rogatory letters

1 are refused of course, and in the end, nothing,
2 nothing is changing but after a few weeks, criminal
3 activities and murders are committed because of
4 that meeting.

5 What I'm trying to say is that we have to
6 change our mind, we have to change the approach. I
7 was, in terms also of criminal offenses, we can
8 have a crime, a perfect criminal offenses, also in
9 the Canadian criminal code but then investigators
10 say, we are going to use it only for Italian
11 families, Irish families, but why? And we are going
12 to look for criminal activities and concrete
13 criminal offenses otherwise, we are not going to
14 intercept, we are not going to surveil, to surveil
15 these people and et cetera.

16 I was, twenty-one (21) month ago, I was at
17 the anti-mafia prosecutor office in Italy, and
18 interviewing some of these anti-mafia prosecutors
19 for a study. And what they told me is: « You know,
20 Andrea, the why these offenses of participation in
21 a criminal association is a powerful instrument,
22 because what we are doing is that we can, starting
23 from these offenses, we can get a lot of evidence
24 of a lot of other crime that we didn't know. We can
25 intercept people on the basis of the fact that they

1 are members of criminal organization, and we can
2 surveil and understand that grey area of
3 interconnection between our families in the south,
4 and what is happening in Milan, what is happening
5 in the infiltration in the construction industry in
6 Milano, what is happening with the expo in Milano,
7 you know, the problem that we are facing now with
8 the expo, the exposition in Milan. Otherwise, we
9 would be without any instrument.

10 Just intercepting communication between the
11 traditional mafiosi and other person or surveil the
12 way, the places where they meet, allow us to
13 understand the links with politicians, and the
14 links with the, let's say, entrepreneurial legal
15 slash illegal world. Without this article, it
16 wouldn't be possible. ». But still, the article is
17 there.

18 In other countries, if not in Europe, the
19 article is more or less the same, because all our
20 country which signed the convention of the United
21 Nation have similar approaches, in terms of
22 participation in an organized criminal
23 organization.

24 They have these offense, but they are
25 looking for evidence of other offenses, and

1 criminal activities. And they use these evidence in
2 order to go back to the crime of participation in a
3 criminal organization. But it should be the
4 opposite. If you want to boost and use, in terms of
5 effect, in a very effective way, the instrument
6 that you have, what I'm going to say is that the
7 instrument is there, is written more or less in the
8 same way. The difference is the approach. The
9 difference is the way in which we interpret
10 organized crime, and the connection between
11 traditional organized crime and white collar
12 criminals.

13 The difference is how far you want to go.
14 And it depends on practices, rather than on the
15 legislation. So perfect legislation can be
16 interpreted in not a perfect way, I'm not saying
17 that it is the fault of something, it's just some
18 cultural, social phenomena that happens in all
19 country. And this is a clear example of a good
20 offense that can be useful or totally useless,
21 depending on the way we are going to interpret
22 these. So interception of communication allow
23 judge, based on the article of participation in a
24 criminal offenses, to investigate the link between
25 mafia traditional association and the legal world.

1 Legal is not the right adjective, but anyway,
2 almost legal.

3 Then, probably my time is not at much, but
4 I will say that, at least in Europe, the two other
5 instruments that have been using, I'm using in
6 terms of criminal, substantive criminal law, are
7 the confiscation regimes, which are different.
8 Honestly, I don't know the Canadian situation, but
9 maybe we can talk about these; so, how to attack
10 capitals and how to confiscate assets in the
11 different systems and the more or less effective
12 system in order to achieve these goals. And I think
13 that this is useful also because when we speak
14 about, again, the interconnection between white-
15 collar criminals and traditional organized
16 criminal, money and resources are there. I mean,
17 the profit is the goal of these criminals, and if
18 we take the profit out of their pocket, probably,
19 they will complain.

20 And then, also, the legal personal and
21 responsibility of legal person, so the way in which
22 we can make legal person responsible for offenses
23 committed by people administering them. And I think
24 also this is something that could be useful but,
25 given the time, I will move on.

1 In terms of criminal, procedural criminal
2 laws so investigative tools or institutional
3 buildings against organized crime, always in
4 European countries and in Italy. Again, I think,
5 at least in Europe, from our study, we know that
6 the most effective investigative tools are, from
7 the most to the least effective, interception of
8 communication, surveillance, informants and covert
9 investigation.

10 All over Europe, these four instruments are
11 recognised by prosecutors and police officers as
12 the most effective and those they use most in terms
13 of getting evidence on organized crime. This is a
14 perceived usefulness, of course, by them but,
15 still, also in this case, the real impact of these
16 instruments that are in all criminal code of
17 western society so we cannot say that there is,
18 there are, I suppose, huge differences in terms of
19 the way in which we write this kind, I mean, our
20 procedural codes, criminal procedural codes. The
21 difference is the way which we use them, again, and
22 we can use them in a more or least effective way,
23 depending on the system.

24 The systems and the institutional actors
25 who are using these instruments in Europe and also

1 in Italy, these instruments are particularly
2 effective because they are using different ways by
3 different actors and, because they are specialised
4 actors in the fight against organized crime. It's
5 the case of Italy, it's the case of France, it's
6 the case of Belgium. What I'm saying is that it's
7 very useful when dealing with organized crime,
8 corruption, infiltration in the economy of
9 traditional and non traditional organized criminals
10 to centralise investigations, prosecutions of these
11 criminal activities. Coordinate more than
12 centralise, to be honest, which can be something
13 different. I mean, you can coordinate and
14 centralise and you can coordinate without
15 centralising the system, but coordinate means that
16 the actors involved in the fight against organized
17 crime are specialised, that they are unique and
18 that they have a unique vision of the problem
19 because they work together even if belonging to a
20 different system: police, prosecutors and why not,
21 administration and something which is not linked to
22 the law enforcement system.

23 I can give you, to simplify and be also
24 faster, I can give you the Italian example but
25 there are similar examples in order to understand

1 also the history of a country which dealt,
2 unfortunately with problems of organized crime and
3 the final achievements connected to the history.

4 When we were in Italy in the eighties
5 (80s), there was a big problem of traditional
6 organized crime families, especially in the south
7 but also in the north because they were investing
8 their money in the north. There were a lot of
9 violence in the south of Italy connected to
10 organized crime and several prosecutors honestly
11 devoting their entire life and risky because
12 several of them were killed.

13 One of the main problems of these
14 prosecutors, they felt, was that the information on
15 the prosecution and the investigative activities
16 all over the country were scattered and they
17 couldn't understand, and they couldn't have a clear
18 view of the system of the criminal activities going
19 on. I give you an example: they were prosecuting
20 some bosses in Palermo and they knew that something
21 was probably happening also in Milan but they do
22 not know how to put together, in terms of
23 intelligence, in terms of investigation and
24 prosecution of all the system so they were asking
25 for a unique and unified vision. We have to

1 coordinate what we are doing. The result was, after
2 a couple of killings like Borsellino and Falcone,
3 they were probably the minds of the system, let's
4 try to have a coordination of all the criminal
5 activities in twenty (20) specialized prosecutor's
6 offices all over the country, not only in Sicily,
7 not only in Calabria, not only in Puglia where we
8 think that these traditional organized criminals
9 are working. That's not true. They're working all
10 over the country and also beyond. And we need to
11 understand what is going on in terms of
12 investigation.

13 So, two things were done. I put in a... I
14 tried to be brief. First, specialized offices, like
15 pyramid, at the head of this office, there is this
16 "Direzione nazionale antimafia" which is a central
17 prosecutor's office working with the twenty (20)
18 and trying to coordinate their activities. In terms
19 of intelligence gathering, in terms of clues, in
20 terms of evidence, in terms of boosting
21 investigations, in terms of connecting the work of
22 different prosecutors all over the country. And,
23 together with this, a centralized system...
24 informative system, so let's say a database, and
25 connected database, were set.

1 This database... in this database, both
2 the... all the investigative activities of these
3 prosecutor's offices and of the police offices
4 working with them, police... official police
5 investigation, were... all this information was put
6 into the database. And this database was connected,
7 and put in a simple way, with all the databases all
8 over the country. The databases... I am talking
9 about administrative databases, fiscal databases,
10 criminal records databases, and whatever you might
11 think be interested in terms of intelligence. Of
12 course, privacy rules or whatever or, of course...
13 but these two institutional changes radically
14 improved the quality of the fight against organized
15 crime in Italy, which is what is happening also in
16 other countries in Europe, like Austria, like
17 Finland, like Portugal, like UK, which adopted
18 similar coordination systems.

19 This is also very useful in terms of
20 cooperation. And this is very useful in terms of
21 quality of information and forward looking. And one
22 of the negative aspects was that these systems
23 allowed to discover political corruption, and
24 scandals, and connections between... more than
25 before between politics and traditional organized

1 criminals, exactly what probably dealing... the
2 problem that you're facing now here. Of course,
3 these changes were not done alone. There were other
4 legislative changes, but it's not time to...

5 Basically, it was a simple idea. Since
6 these criminals are... their work is built on
7 networks... they work in networks, they coordinate
8 their action, they spread across the country, they
9 influence politics, they corrupt officials, they
10 sometimes are capable to influence elections, their
11 power is not only violence, but is also knowledge
12 and capacity of understanding the vulnerabilities
13 of our nation's systems, of our legislation of the
14 construction industry, on the way we deal with
15 procurement in our country; well, if we want to
16 fight them effectively, we have to organize
17 ourselves in a better way. We have to unify this
18 vision and we have to have a vision.

19 And the result was that, you may consider
20 that in these vingt (20) prosecutor's offices in
21 Italy, there are something like ten (10), fifteen
22 (15) specialized public prosecutors. They deal only
23 with organized crime and organized criminal
24 activities in a very broad sense.

25 This, in Europe, as I told you... or

1 similar experiences are present in another added
2 value. This is also very useful in terms of
3 cooperation, you have investigative and judicial
4 cooperation amongst countries. Before you have
5 referent point, you have points in which the
6 information is concentrated and the system is
7 forward looking because imagine a central authority
8 with all this information and the possibility of
9 looking forward I understand in patterns and
10 trends, what we call preemptive investigations.

11 So we use all these informations, which is,
12 information is power or so for criminal and for
13 people fighting criminal, and we can use these
14 informations in order to make the work more
15 effective. So you and your prosecutors you can work
16 back altogether because we are working on the same
17 problem or you can give clues in terms of patterns,
18 patterns to be followed. This is taken from the
19 Italian experience which of course I know better,
20 but is similar also in other countries and this
21 coordination can be prosecutors coordination,
22 police and the law enforcement coordination, but I
23 think that these, let's say, examples, these
24 historical, these are more historical facts, can
25 make us understand that a country has to work as an

1 unique body against this kind of phenomena and rely
2 on all the possibilities.

3 One of the weaknesses of the system, one of
4 our weaknesses, is that one of the prosecutors'
5 office is working alone and does not want to share
6 information with the other and it is still
7 happening, also in my country and these kinds of
8 problems are dealt with by the Supreme Court but,
9 what I want to say is that in order to get the
10 information we may use for investigation, we have
11 to use all the routes that we have all over the
12 countries, all the systems, all the information
13 that we have, all the administrative offices or the
14 databases that we have because all are connecting
15 dots. Imagine these criminals: they buy a car, they
16 buy a boat, they went and invest in a bank in the
17 North of the country, they have contacts, these
18 contacts are in a way present in some of these
19 databases. They made declarations about their
20 fiscal... what they have to pay, sometimes nothing
21 or almost nothing in terms of fiscal taxes and so
22 on.

23 This is linked also to practical aspects,
24 you know, law in action and law in the books are
25 always connected and this is also a very European

1 problem is that sometimes, in Europe, as I told you
2 this is the area which I know better, we have the
3 legislation, we have the institution electors, we
4 lack the resources and the specialization to make
5 them work. And sometimes there are lacking in terms
6 of, let's say, individual acts or actors which one
7 to control the entire system, you know, it's
8 similar everywhere.

9 So, one of the main, once you have all
10 these informations, once you have all the systems,
11 and in order to move from legislation to practices,
12 training, specialization, resources, changes, I
13 don't know how to say cultural attitude, social
14 attitude, the way in which we interpret problems,
15 this is something that should be recommended.

16 Then there are, I'm trying to be
17 provocative now, there are systems that can be
18 totally different like the one we have in Italy.
19 Have you ever heard about the special regime,
20 present regime for mafia criminals? No. Okay. What
21 we do basically, I know that this is happening also
22 in Canada anyway. People from prison, mafia bosses,
23 are calling their lawyers, are calling their
24 professional helping them, saying... giving
25 instruction from the prison. This is typical in all

1 countries of the world. I mean these kind of bosses
2 want to be bosses also when they go to jail. And
3 they rule their organization from inside the
4 country. This was something happening so many times
5 in my country until a special regime, a prison
6 regime for these guys were established, which is
7 very tough, which went also several times under the
8 Human Rights Court of, the European Human Rights
9 Court. And it was evaluated as we no problems, in
10 terms of human right violation. It can be tough or
11 less tough, but anyway, controlling also the
12 information coming from prisons can be very useful.
13 Also, in terms of investigation, because some clues
14 and evidence come also from this prison.

15 Then let's move to the preventive approach,
16 the prevention approach, the one here I could, of
17 course, I skipped so many things, but we can talk
18 that later on. Preventing organized crime, I would
19 say that in general, as a criminologist, I am in
20 favor or prevention. It's the only way the criminal
21 system should act, only, a freely necessary, and
22 should act like an extreme ratio, you know extreme
23 ratio, even if it's not like that in all our
24 countries.

25 So what we can do in terms of prevention,

1 especially connected to infiltration in the
2 construction industry and all the procurements.

3 Let's talk about screening systems, how to
4 screen actors asking for licenses, contracting with
5 the public administration. In many country of
6 Europe, I don't know how it is in Canada, what
7 usually the administration does, public
8 administration is looking at the criminal
9 backgrounds, criminal records of the people, which
10 is... If you're not bankrupt plus you are not an
11 organized criminal plus you've never been convicted
12 in trafficking weapons, plus bla bla bla, okay,
13 you're a good guy. You can have the... Which is one
14 possibility, but it which is totally bound to fail,
15 because organized criminal are using strong men,
16 are using professionals, are using a systems, a
17 network of friends, let's call it as they call
18 them, helping them, in order to get into the
19 construction industry, in order to receive
20 licences, to get something from the State.

21 So what we did in Italy for instance, which
22 is not probably the most effe..., which is a way of
23 trying solving this problem, but still, it's a
24 system with several problems still, is what we call
25 "Certificazione antimafia", anti-mafia

1 certification. Andrea Di Nicola is asking for, as a
2 business, asking for a licence or wants to contract
3 with the public administration for building, paving
4 road, I don't know. They look at my criminal
5 records. And my criminal records, I never committed
6 any offense. Okay. So, in several European system,
7 that would be enough.

8 In Italy, is different. What they do is
9 that I have to, I have to have a certification from
10 the prefect, with is the representative of the
11 minister of interior, in every province. This guy
12 here has the possibility of connected itself with
13 the direction national anti-mafia and different
14 anti-mafia districts. And what is asking to the
15 prosecutor is, "Do you know if there are any links
16 between Andrea and some problems that we are
17 facing? Let me check within our system of, -- it's
18 called SYDNA, System Informativo, Informative
19 Systems of the Direzione nazionale antimafia. -- Oh
20 my God! Andrea had been working with this guy and
21 guy and this one, and probably his enterprises have
22 been, is using money from traditional organized
23 criminal, there are some links, there is something
24 strange."

25 This is not a proof. There's no conviction.

1 This is a system that can be, in may country, can
2 be consider unfair. But still, the result is that
3 Andrea Di Nicola has had a lot of businesses with
4 traditional organized criminal and his enterprises
5 are doing business since a lot of time with
6 organised criminals. Then, it's better to avoid and
7 say with this certificate, anti-mafia certificate,
8 that we are not going to work with Andrea Di Nicola
9 in this enterprises. Which is an administrative
10 system and it's a way of coping, it's much more
11 than this, still I'm going very fast, it's a system
12 we try to take considering the fact that sometimes
13 you don't have evidence, you don't have conviction
14 but you smell the "Mafiosity", I don't know how to
15 call it, it's not an English way but, anyway, you
16 don't understand what I'm saying, of certain guys
17 and certain enterprises, and you had to protect the
18 legal ones and you had to protect the market and
19 you had to, especially in countries where this is
20 very widespread like mine. These similar things
21 exist in other countries of Europe.

22 Then, another possibility is to give more,
23 let's say, power to the administration in terms of
24 the capacity of assessing risks. What I'm saying is
25 that, you know, public administration is not a, a

1 prosecutor is not a police officer but, still,
2 sometimes, he can enter into contact with criminals
3 and very, also, very risky criminals and there are
4 some red flags, I don't know how to call them, but
5 red flags maybe that can be important when dealing
6 with the, when doing businesses with private
7 enterprises and with other persons in terms of
8 licences, in terms of public procurement.

9 Vulnerabilities in terms of sectors in
10 which you are operating, in terms of the owner of
11 the business, in terms of contact the businesses,
12 in terms of the type of public procurement you are
13 using and, in some countries, they are constructing
14 also like software, dealing with the risk and
15 identifying these red flags. "Come on! This is the
16 amount of money you are dealing with? This is the
17 sector you are dealing with? This is the
18 enterprises, blah, blah, blah. This and this and
19 this." There's a high risk that something could be
20 wrong, increase your level of attention. This is
21 something, I mean, it's not the... I mean, it's not
22 solving everything but can contribute because we
23 are dealing also with the capacity of the system to
24 be less vulnerable.

25 Then one possibility it's what the American

1 criminology, US criminology calls "situation of
2 prevention" - preventing crime through the
3 reduction of opportunities the environment is
4 producing. And when I uses the word "environment",
5 I speak in terms of cultural environment,
6 legislation. For instance, in my country, one of
7 the legislation producing more infiltration of
8 organized crime into the construction industry was
9 the possibility of how is it, "subappaltatore",
10 subcontracting for a very high sum to other people.
11 So I give the contract to perfect enterprises, what
12 I think a clean enterprise and the enterprise is
13 subcontracting to ten (10) other enterprises which
14 are managed and owned by traditional or non
15 traditional organized crime.

16 So this is a loophole, a vulnerability of
17 the system which is exploited. Vulnerabilities can
18 also be in terms of the markets themselves, I give
19 you another example: one of things that you need
20 when you are constructing something is earth
21 moving, you have to move earth. If traditional
22 organized criminals are controlling this market,
23 they are controlling the business. Otherwise, you
24 cannot work. This is a vulnerability given, I mean,
25 by the system, it's in terms of the way these

1 markets operate. You have to excavate, you have
2 to... So, let's control this kind of area. What I
3 am saying is that, the more we understand they way
4 in which the market works, the way in which our
5 legislation works, and we use our knowledge, past
6 knowledge, to understand the loopholes and the
7 vulnerabilities and the occasions and
8 opportunities, we can work, in terms of legislation
9 and practices, to close these vulnerabilities.
10 This action will be more effective, the more we
11 really understand the problem and the more we
12 control the knowledge in this area. So, the
13 screening of... the systematic screening of
14 opportunities can be a way, or a farther way, to
15 approach the system.

16 Then, I think - and that is something that
17 is similar in all the countries of the world - that
18 the quality of the people working in certain areas
19 is the most powerful antidote against corruption
20 and organized crime, and infiltration by organized
21 crime, into legitimate businesses, which is
22 something very difficult to cope with. Quality
23 means... let's give an example. Sometimes in... in
24 many European countries, including mine, if you're
25 a law enforcement official, not a very high rank

1 enforcement official, they put you to control the
2 borders. Now the borders are open in Europe but it
3 has happened for years. You earn not that much.
4 You're young. You are facing probably a lot of
5 corruption offers. You should put the best there,
6 because there is the area in which the opportunity
7 is. And you have to control the quality of your
8 guys there more than in other places. So,
9 sometimes, the system, the State, without willing
10 it, is producing opportunities for crime,
11 unintended opportunities for crime, legislative,
12 systemic... And the more we are... which mean, we
13 don't have to blame anyone because this thing might
14 happen also without a direction, someone directing
15 it, but still they happen. So, we have to work. And
16 the quality of the people in strategic places doing
17 particularly important, relevant, jobs are
18 important. Then, since I probably... Do I have
19 three minutes more?

20 Me GENEVIÈVE CARTIER :

21 Yes, you do.

22 M. ANDREA DI NICOLA :

23 Okay. I'll give you another Italian example. During
24 the nineties (90's), we faced this "Mani Pulite"
25 scandal, "clean hands" scandal operation. There

1 were eight, nine years of thousands of prosecutions
2 against politicians and entrepreneurs corrupted,
3 politicians and entrepreneurs. And the level of the
4 fight against corruption was very high. And the
5 system... there was something like the idea that
6 something could really change in our country. But
7 the idea came from the press, the prosecutors and
8 the citizens. And there was such a urge, such
9 tendencies towards... we want to change something,
10 that something then changed. How to involve
11 citizens to be more responsible... This is
12 something... to be more transparent, to understand
13 that certain types of problems affect the entire
14 community and reduce the social welfare. This is
15 something that I think, in any country, we should
16 think about. While I was getting this prize a
17 couple of weeks ago, I said that I was very proud
18 because I think that I have a responsibility which
19 is teaching other people to behave well, because
20 the university, and the knowledge itself, is a way
21 to change people. I don't know, this is a very
22 probably theoretical approach, but I don't think
23 so.

24 While we deal with organized crime and we
25 deal with corruption in general, understanding how

1 to involve people and giving them powers in terms
2 of tools to understand the problems is probably the
3 most effective way, even if it's the, probably not
4 the way, I mean not the most rapid way to see the
5 light, but probably in the long run it is the only
6 way. So, this is for instance, what is happening in
7 many European countries which are facing organized
8 crime problems and in which the level of
9 consciousness of people is totally changing. Thank
10 you for your attention, by now.

11 Q. **[84]** Well, thank you very much. You ended up your
12 presentation with a very inspiring line and I hope
13 we can eventually translate that into our own
14 action. So, there are a number of thoughts in your
15 presentation. I will perhaps begin by saying that
16 from what you've said, I understand that the legal
17 texts in Canada are very good actually. The wording
18 of the Criminal code or the wording of the specific
19 provisions relating to organized crime are not
20 intrinsically problematic to the extent that they
21 live up to the standards that you have noticed in
22 Europe for instance, and you said that this isn't
23 necessary a guarantee that in practice those texts
24 will be concretely applied or very efficiently
25 applied, hence the importance of understanding what

1 organized crime means in order to orient or to
2 translate law in the books into law in practice,
3 right? So, from your point of view, given the
4 mandate of the Commission, I think we are part of
5 this endeavour to change or to contribute to the
6 better understanding of organized crime and to move
7 away from a mafia type traditional understanding of
8 organized crime to a more, I would say, twenty-
9 first (21st) century conception of organized crime.

10 In concrete terms, how do we do that? How
11 do we express what the conception of organized
12 crime should be? Is it something that we should
13 indicate in our report to the extent that we have
14 reflected on this, given the experience that we've
15 had on a number of problems or allegations? There's
16 a need for the entire legal community, of the
17 community at large, to change this mind set. So
18 should we send a clear message or is this something
19 that comes from the bottom up, that is, you know,
20 better training of the investigators, changing the
21 way we train lawyers or so, how do we do with that?
22 Simple, simple question.

23 A. Not, but anyway, hum... I was re-reading the text
24 of the offense of participation in a criminal
25 organization plus you also have the offense of

1 conspiracy which comes, that can also be used. But
2 anyway, let's stay on participation in a criminal
3 organization. Maybe I'm wrong so correct me if I'm
4 wrong.

5 If I am a police officer, or a prosecutor,
6 and I think that mafia or organized crime is the
7 Italian family or the, I will use these offenses
8 only for these. This is law in practice but this
9 offense is very general. It states that, it states
10 that when you are three people or more, that they
11 act for a prolong period of time, they work
12 together, with a view of command a share blah,
13 blah, blah, with a view of committing serious
14 offenses which are the offenses punished by over
15 certain thresholds; organized criminal are also
16 five corrupt officials plus I don't know who
17 working together for and indeterminate... because
18 corruption is a serious offense I suppose here in
19 Canada like in any country of the world, so I'm not
20 saying something strange. But still I think,
21 because it's the same everywhere that we are not
22 using these offenses for corrupt officials working,
23 or corruption, officials corruption, people
24 corrupting for an indetermine... for a long period
25 of time. Why?

1 When we were facing this "mani pulite"
2 scandal it was the same. No one were convicted for
3 "associazione per delinquere" no one. But all the
4 lawyers said but this are criminal organizations,
5 there are networks. They need power. They worked
6 for years together. They corrupt, they infiltrate
7 the economy. Why are not using these? It was
8 written there. I mean, we had these offense.

9 So, I think that there are two ways of...
10 First, a cultural approach. When I want to be very
11 boring with my students, I speak about the theory
12 of crime; why crime, causes of crime, and they say:
13 « This is useless. My God, why? ». And I play with
14 them, to let them understand that the way in which
15 they interpret the causes will totally and
16 radically changes the criminal system and the
17 application of the criminal system. And it works,
18 as a game.

19 Because any pattern we take in terms of
20 interpretation of causes, we end up in different
21 ideas. The same is for laws. The same is,
22 especially related to crime. Because we are facing
23 something which is written, and something which is
24 read by our mind, and then interpreted. So, I think
25 that one of the changes in Europe have been made by

1 the factor that more specialized agencies, more
2 specialization, more people, more close to that
3 kind of problem, institutional buildings, actors,
4 only devoting to these, were done. And this, step
5 by step, probably in years and not in months,
6 change also the interpretation of the legislation.
7 But in several country, in Europe at least, it's
8 still like this.

9 Someone says: « We don't never organized
10 crime. ». How is this possible? Look at the
11 definition. How is this possible? Three people
12 working together with a view of committing... for a
13 long period of time, with the view of committing
14 serious offenses. How is this possible? You are
15 thinking about my organized crime, the Italian one.
16 Yes. You don't have it. Don't be so sure. They are
17 also in your country. But be sure that you have
18 serious form of organization of crime.

19 This starts also from, I mean, the way
20 which with each criminology at the university. If
21 there's no, you know, the magic one...

22 Q. [85] That's right.

23 A. ...the bastille, probably, what they think also,
24 correct me if I'm wrong, but this is something that
25 happened in Europe, you know, that when you have

1 different actors, several different actors, the one
2 is dealing with corruption, the other with traffic
3 in weapons, the other one specialize in drug
4 trafficking, the other one is the prosecutors, to
5 other, anyone. Look at the picture from his angle,
6 an angle of perspective. Then, we run the risk of
7 missing the...

8 Q. **[86]** The whole.

9 A. ... entire picture.

10 Q. **[87]** Yes.

11 A. So, it's not easy. Because anyone has his own
12 resistance, in any country, because, you know, I
13 had the more important. I want this is the
14 organized crime. No. There should be one, giving
15 this vision. And so, I think that this, you know,
16 the ball passes to the government, to the
17 parliament, to the idea, bastille; I don't want to
18 be impolite, but I think that your mission should
19 be also the, probably more than, you know, giving
20 concrete clues sometimes is different, but giving a
21 vision can be very very helpful.

22 Q. **[88]** So, changing the mind set in terms of what
23 organized crime means is something important, but
24 then, suppose that we can do that, you also say
25 that it does not guarantee the way in which it can

1 be concretely detected in practice. So there's also
2 a change in the way we lead investigations, right,
3 you said that.

4 A. Yes, I said that.

5 Q. **[89]** So you were talking about the importance of
6 coordination...

7 A. Uh, huh.

8 Q. **[90]** ... so not necessarily centralisation, it
9 might be but not necessarily so the importance of,
10 they say, connecting the dots...

11 A. Yes.

12 Q. **[91]** ... and making sure that we have a concrete
13 picture and in those, in that idea of coordination,
14 you were saying that it is important to adapt the
15 structures and to also have specialised prosecutors
16 or properly trained people working within those
17 organisations. So, specialisation, in a sense, is a
18 factor of effectiveness if people... so how should
19 we do that? How should we then recruit the
20 investigators? How should we train them? How, what
21 is the best way to make sure that the main players
22 in those institutions are the ones that will ensure
23 effectiveness of the system?

24 A. I think that the answer to this question depends on
25 the system, on legislation and rules of a country.

1 So, probably, I won't answer in the most effective
2 way for Canada because I don't know enough of the
3 system but, still, I'm trying to answer.

4 There could be two ways of doing this. The
5 first one is institution, starting from the
6 institutional buildings, institutional actors,
7 changing things. So you first change the way which
8 the fight against organized crime is carried out in
9 your country in terms of actors. This could be
10 something very difficult to be done, that in my
11 country has been done in one year because two
12 public prosecutors were killed. You know, sometimes
13 it happens and the government says "We have to
14 change." but, of course, it's something that
15 shouldn't happen.

16 If you change the institution, let's say,
17 for instance that the system radically changes and
18 we have a police force and some prosecutors office
19 or a series of prosecutors office only dealing with
20 organized crime and working closely together and
21 coordinated by other institutions and connected to
22 other institutions working in a peripheral way or
23 marginal way against organized crime, if you have
24 this institutional building, things will come
25 because I'm sure that there are so good police

1 officers, so good investigators and prosecutors in
2 your country as in any country of the world because
3 we are probably lucky, in the public administration
4 in any country, there are so specialised persons.

5 Then you start from, if you look, for
6 instance, in my country, this is the one of course
7 I know most, and if you look at the qualities and
8 skills that the public prosecutors against or
9 specialised or organized crime must have, sometimes
10 you know that it is also by chance that he got his
11 skills or her skills. But, still, the ones that
12 have these skills are called to work in this
13 system.

14 So, first of all, I will say the easiest
15 way is to change the systems in terms of building
16 actors. Plus, you know, here I don't know the
17 Canadian system and the Québec, the system in
18 Québec enough but we, in many countries of Europe,
19 we have a special school for investigation, a
20 special school for prosecutors and public
21 prosecutors and law enforcement officials. There
22 are, let's say, there is specialised training and
23 during this training, one can have the possibility
24 also to show different angles of perspective but,
25 still, I will start from the institutional

1 building.

2 Q. [92] Just related to that, if we change the way in
3 which we understand organized crime, we would also
4 need to change the way we train those people, that
5 is...

6 A. It could be.

7 Q. [93] ... so they would need to be more... to
8 understand how economic relationships can turn into
9 criminal activities. So, I suppose that this
10 integration or this new way of viewing organized
11 crime implies different kinds of training, but also
12 taking into account kinds of offenses or criminal
13 activities that are not usually part of the...

14 A. Of course.

15 Q. [94] ... work... the regular workings of police
16 officers. So, it's a new way of working, actually.

17 A. You know, there could be some resistance too.
18 Another... Falcone, I mean, the one who invented
19 the system in Italy, was for a long period a
20 commercial judge, judging commercial and
21 bankrupt... and then... And, once he became public
22 prosecutor in Palermo in eighty something, late
23 seventies (70's), he applied what he knew to the
24 investigation of organized crime. And what he
25 understood - it was for sure a long time ago - that

1 it was useless, at the time, to do certain kinds of
2 investigations. It was very easy to understand
3 networks by understanding flows within banks...
4 among banks. So, there were trails and he could
5 understand the networks and the patterns through
6 these trails.

7 Q. **[95]** Hmm, hmm.

8 A. So, this was done by chance, almost. But still,
9 that kind of specialization now is probably very
10 important if you want to understand certain forms
11 of organized crime, which are the most rooted in
12 our economic systems.

13 Q. **[96]** Yes.

14 A. And probably, if you need... you know, when you
15 take about offshore and money laundering, sometimes
16 I read these kinds of cases and... investigative
17 cases, and you don't understand anything. They are
18 so complex; all these boxes, all these
19 legislations, all over the world, you know these
20 havens... fiscal havens which enterprises and
21 corporations, and boxes and like one owning the
22 other, probably in order to follow this kind... to
23 investigate this kind of phenomenon, you have to be
24 very skilful and sometimes it's even difficult.
25 It's mor... it could be easier to investigate drug

1 trafficking, could be, not always, certain forms...

2 Q. **[97]** Both are risky but it's not the same kind of
3 risk.

4 A. And... and... not risky, sorry, I was... both are
5 risky, I wanted to say "can be easier."

6 Q. **[98]** I know.

7 A. In terms of, you know... not easier, in terms of...
8 you know, you already know, you had the
9 knowledge...

10 Q. **[99]** That's right.

11 A. ... and you feel comfortable.

12 Q. **[100]** Yes. It's closer to what you're used to, to
13 be doing...

14 A. Exactly.

15 Q. **[101]** It can be difficult.

16 A. I was trying to say that.

17 Q. **[102]** Yes.

18 A. And then, sometimes, you also have to... to give
19 the tools to investigators and prosecutors to go
20 behind the surface.

21 Q. **[103]** Yes, and that's... that's the point I wanted
22 to discuss with you, the... In a number of cases,
23 when one deals with organized crime, a number of
24 people have this ability to disappear behind
25 structures and companies. So, we have straw men, or

1 straw women, but I don't think there are that
2 many...

3 A. Less, of course.

4 Q. **[104]** So, we have empty shells or... and it's very
5 difficult to know who is the effective owner of a
6 company, sometimes. So, how... are there any
7 techniques that you know of, that you have
8 developed in... that Italy has developed or that
9 European countries have developed to actually
10 detect who is behind those structures? Or what
11 sources of information would we need to... or do we
12 need to actually know who is behind those empty
13 structures? So, if we had to set-up a system in
14 which we can collect information, what kind of
15 information would we need to reach our goal?

16 A. This is a problem all our countries are facing. And
17 sometimes... sometimes, especially when these straw
18 men or enterprises are based in offshore countries
19 and in other jurisdictions, I would say, that
20 unfortunately it is almost impossible. Why I am
21 saying that? Not always, there are some ways to,
22 but sometimes it is very difficult because these
23 offshore countries and these... are selling
24 opacity, I don't know if I'm clear, and live off
25 this, for different reasons and I'm not saying that

1 they want to protect criminal but still, when a
2 rogatory letter is sent to, I don't say, I'm not
3 blaming any of these offshore countries, imagine
4 one, in the Pacific, the answer is, could be yes,
5 my dear judge of Canada. I will help you. What do
6 you want? I would like to know who is the owner of
7 the enterprise which has the following bank account
8 in your country. Let's go and see. Ah! This bank
9 account is owned by Andrea Di Nicola Limited, which
10 is not, otherwise I wouldn't be very...

11 Q. **[105]** Clever.

12 A. ... clever but anyway, blah, blah, blah Limited and
13 we want to help you but unfortunately here is the
14 possibility to have bearer shares and we don't know
15 who is behind, so our commercial law is protecting
16 someone. We want to help you in terms of
17 cooperation and judicial cooperation. We open our
18 bank but still, when we go and see the bank
19 account, we don't know who is behind and when we go
20 and see the corporation, we don't know who is the
21 beneficial, the real beneficial owner. We know that
22 there are people owning the shares somewhere in the
23 world. So it means that you have to, and it's
24 very... it's a classical problem.

25 Some years ago I was speaking with the

1 Latihan, the Lituanian authorities which were
2 saying that their politicians were corrupted and
3 they were putting money all over the world and they
4 couldn't do anything. How can we do? It's very
5 different. Probably you have to, in these cases,
6 triangulate evidence, use different ways of
7 collecting evidence and using four-months
8 investigations in terms of wire-tapping,
9 surveillance, rather than trying to go in offshore
10 countries and covert investigation. I will start in
11 the country rather than...

12 Then there are some, I mean, it's difficult
13 to generalize, sometimes evidence are found,
14 sometimes through rogatory letters there are some
15 information coming from banks so, on corporations,
16 so, it can be different. So a mixture of ability in
17 collecting evidence in terms of borders, cross-
18 borders, and using very well other classical ways
19 of collecting evidence in the country. I would do
20 like that. But this is a black hole and one of
21 the...

22 Q. [106] Yes everywhere. We are not the only one.

23 A. ... vulnerability of the global system since we
24 were speaking about vulnerability.

25 Q. [107] Yes. There's another point that you've

1 touched in your presentation. It is the fact that
2 you were talking about the administrative, I try to
3 remember the expression you used, but the
4 administrative approach to prevention and... and
5 you described a stage...

6 A. The anti-mafia certification.

7 Q. **[108]** ... well, that as well but we'll get to that.
8 But there was this database that you were talking
9 about...

10 A. Yes.

11 Q. **[109]** ... and I would like to learn more,
12 understand and learn more about that because from
13 what I understand is that you think that, well, it
14 would be very useful to have a database in which we
15 collect a number of information that we can then
16 use to have a picture of what is going on actually
17 because when we have dots that are not connected,
18 it's not easy to know what is actually going on. So
19 what kind of information should we collect, in that
20 kind of database, and what use could we make of
21 that information?

22 A. Yes. These database can be used in terms of
23 investigation and prosecution, but also in terms
24 of, let's say, administrative screening or... Then
25 it can change from country to country. But anyway,

1 I'm starting from an example which is more linked
2 to criminal investigation.

3 Imagine that, in a country, there are
4 twenty (20) prosecutors working on twenty (20)
5 different cases. In this country very big, and they
6 are working on their cases. They are working on a
7 traditional type of mafia in their country, they
8 are intercepting communication, they are using a
9 log of public money in order to get evidence, and
10 in many of these prosecutions, for some reason,
11 there is my name.

12 But you know. There could be a traditional
13 organized criminal that was one of my students at
14 the university, and said that professor Di Nicola
15 was terrible, and paf! So the prosecutor say :
16 « Who cares? ». Can it be possible that in twenty
17 (20) prosecutors, prosecutions all over the country
18 in twenty (20) different places, these traditional
19 criminals are using or spreading my name? Is there
20 a difference in this kind of information? Yes. If
21 you don't connect these dots, my name has a totally
22 different...

23 Q. [110] Meaning.

24 A. ...meaning. So, it would be enough to put in the
25 same database all the information you are

1 collecting, during your trial and prosecution, and
2 giving the possibility to have a specialized judge
3 or agencies to go and mine into these database, to
4 boost the fight against organized crime. And see
5 things that have not been seen until that moment.
6 So, imagine everything; car plates numbers,
7 telephone numbers, all the text of the acts, of the
8 judicial acts, anything, in terms of information
9 that have been collected, these, in terms of
10 criminal investigation. So, all the text and the
11 information, the added value is to fuse them,
12 rather than loose them.

13 Q. [111] So you would not go for those informations
14 specifically for the database, but you would
15 collect the information already obtained through...

16 A. Already obtained through trials, through
17 prosecution, to... This is what is happening in
18 some country, also in Italy, of course. Then, there
19 could be an authority, hey, who has the power to
20 mine into this database, and to understand patterns
21 and say, and to say : « Oh my God. Twenty (20)
22 times, Andrea Di Nicola, in different prosecution,
23 and you think there's not a problem? Go and
24 understand why this distinguish researcher, is
25 implicated in a certain way in this. Go and see

1 better than you did. ». This is the example.

2 But then, imagine to connect these
3 databases with other public database which are in
4 each country of the world; probably not of the
5 world, but in our country, yes. Speaking about
6 fiscal databases, speaking about databases of
7 registries or cars, of lands, of properties, of
8 whatever. Imagine all the database disconnected
9 that you have, the criminal record database.
10 Imagine to have them all connected. Of course,
11 under certain strict rules of privacy or whatever,
12 and, okay, but this is another issue. I give it for
13 granted. And this can be used...

14 Imagine that a criminal, he's always using,
15 an organized criminal, a certain car, and is not
16 the owner of the car. How can you understand it?
17 Connecting dots. And then, the next question is:
18 who is the owner of the car and why he's driving
19 the car and blah, blah, and go on.

20 Q. **[112]** So, for instance, in Italy, do you have that
21 kind of database in Italy?

22 A. Of course.

23 Q. **[113]** Okay. And is it used for, given our mandate,
24 would it be used, could it be used as a way of
25 screening people who actually want to have public

1 contracts with public institutions or is it only
2 used for criminals?

3 A. No, it can be used. It can be used, it depends,
4 anyway, in this case, I think you should change
5 some laws and this is, I mean, it's up to the
6 government of Québec but, because then, you should
7 tell to the authorities, public authorities...

8 Q. **[114]** Yes.

9 A. ... that they can use hints of Mafia, of being an
10 organized criminal rather than a conviction.

11 Q. **[115]** Yes.

12 A. And this is a choice...

13 Q. **[116]** That's right.

14 A. ... that only a country can make and there's
15 always, you know, there are always pros and cons
16 and benefits and a balance of interests and this is
17 a choice. But, still, you could.

18 Q. **[117]** Yes.

19 A. You can say "Since Andrea Di Nicola for twenty (20)
20 times has had contact with very dangerous organized
21 criminals maybe... At least, be very careful."

22 Q. **[118]** If we take your experience, like, for
23 instance, the Italian experience or the European
24 one because you know a number of experiences at
25 that level, are there any specific measures that

1 have been taken about the infiltration of organized
2 crime specifically related to public procurement?

3 Are there specific measures that have been taken on
4 that topic in relation to organized crime?

5 A. Yes and no, which means... It depends on what you
6 mean by specific, you mean for the construction
7 industry or for the infiltration of...

8 Q. **[119]** Well, the hypothesis I have in mind is: are
9 there specific measures that were taken in order to
10 know whether a member of an organized crime is
11 actually trying to have a contract with a public
12 institution in a context of public procurement? Or
13 is it rather the case that we have general laws
14 relating to...

15 A. Okay, for...

16 Q. **[120]** ... combatting infiltration of organized
17 crime generally and then...

18 A. There are general laws, there are some in Europe,
19 there is a directive on this with some general
20 principles for the screening of backgrounds of
21 people that are applied but still are very general
22 and honestly not that much effective.

23 Q. **[121]** Uh, huh.

24 A. In some experiences, I think the only possibility
25 is to grant the public administration sometimes and

1 to connect the activity of the public
2 administration with a system of investigation and
3 which is already going on.

4 Q. **[122]** Uh, huh.

5 A. Which is the only way because this is true in few
6 countries, possible in a few countries of Europe
7 like Italy. It's the only possibility. I mean,
8 otherwise, you have to use other possibilities in
9 terms of vulnerability reduction, in terms of
10 becoming less vulnerable to infiltration but which
11 are not related to screening people, rather to
12 making the system less vulnerable...

13 Q. **[123]** Yes.

14 A. ... for any... in front of any activity of
15 infiltration.

16 Q. **[124]** Uh, huh.

17 A. And here, it's more simple. When you go to
18 screening people and screening their background,
19 screening businesses I think, honestly, that given
20 the balance between rights of entrepreneurship and
21 the fight against organized crime, I mean, it
22 depends on the country and the way which they
23 perceive the dangerousness of organized crime in
24 the country.

25 Q. **[125]** Uh, huh.

1 A. Because someone can say "Why do you have to screen
2 me if I am a normal citizen." and referring to
3 investigators which is possible, no?

4 Q. **[126]** Yes.

5 A. I think as an approach. So, I think this is the
6 only approach that I know in terms of screening,
7 that relies on investigation, that relies on...
8 which gives me the possibility - if I can, just two
9 minutes - to underline the fact that whatever is
10 the system against organized crime, it has to be a
11 system. So, all the actors have to work together,
12 in connection.

13 Q. **[127]** Yes.

14 A. Resistance and personal resistance to change, "I am
15 doing the best," "I am the one dealing with
16 this..."

17 Q. **[128]** Is not a good way of...

18 A. ... these are just tools for criminals. I mean, you
19 give them chances.

20 Q. **[129]** Okay.

21 A. But still this... I think this is one of the main
22 problems that countries face.

23 Q. **[130]** And perhaps just one more... one last
24 question...

25 A. Yes.

1 Q. **[131]** ... before I turn to the commissioners. You
2 were talking about the certification...

3 A. Yes.

4 Q. **[132]** ... anti-mafia certification, I would like to
5 know more about that. I guess it's relevant in the
6 screening process or...

7 A. Yes, it is.

8 Q. **[133]** Yes, so just...

9 A. It's exactly.

10 Q. **[134]** Yes.

11 A. It's... but honestly, it's still weak, honestly. I
12 mean, probably, this is the most advanced
13 experience in terms of screening businesses and
14 people when they deal with public administration
15 but, still, it's very weak. You...

16 Q. **[135]** So, perhaps, just tell us a little bit how it
17 works.

18 A. Yes. I am an entrepreneur. I have a business. And,
19 in order to... in order to... if I want the public
20 administration work with me, I have to present this
21 certificate. This certificate is just a system of,
22 let's say, accreditation for business, credit... It
23 takes some time. During this - I don't remember if
24 it is a month or something but anyway - during this
25 time, there's an authority, a public authority

1 which screens my background, not in terms of
2 convictions or... but in terms of, especially, in
3 order to assess whether my businesses - so, it's
4 more relevant for corporations in terms of limited
5 liability - if my businesses have been infiltrated
6 in some way by organized crime. This is the goal.

7 Q. **[136]** Okay.

8 A. So, not... more... not much on people, but more on
9 the legal entity.

10 Q. **[137]** Okay.

11 A. And during this period, the prefect, the
12 representative of Ministry of Interior in every
13 province in my country, has the possibility to use
14 the database of the Ministry of Interior to use the
15 connection with the "Direzione nazionale antimafia"
16 direction to ask for information and to see whether
17 there have been clues of evidence of infiltration
18 in this business by organized crime, and refuse the
19 certificate.

20 Q. **[138]** Hmm, hmm.

21 A. In this case, then it's an administrative problem.
22 Probably you can ask administrative tribunal for
23 something else, but you are not in... you have not,
24 anymore, the possibility to do that business with
25 the administration.

1 Q. **[139]** So, in that case, it's because you want to
2 have a contract with the public institution...

3 A. Yes. You are...

4 Q. **[140]** ... that this sort of...

5 A. Yes.

6 Q. **[141]** ... investigation is...

7 A. Yes.

8 Q. **[142]** It's not the case...

9 A. Not anyone.

10 Q. **[143]** It's not as if anyone can investigate your...

11 A. No. No.

12 Q. **[144]** It's only when you want to make business with
13 the public institutions.

14 A. For sure.

15 Q. **[145]** So, it's sort of the price to pay for doing
16 business...

17 A. Yes. You could say, "I'm not doing business with
18 the public administration," and nobody will screen
19 you.

20 Q. **[146]** Okay. So, are the... Do you have any
21 questions? Perhaps just one last, because I was
22 struck by your last comment in your presentation, I
23 would like just to come back briefly to that. You
24 say that there... in your case, in Italy's case,
25 actually, that there have been situations of very

1 severe crisis in terms of relationship with the
2 mafia and organized crime, and we can understand
3 that under... when a society is under stress, I
4 mean, there's a kind of sense of solidarity that
5 makes people want to change. But from what you've
6 said, I think what you mean is that it's almost
7 impossible to change that kind of mind set or the
8 mind set that we have towards organized crime,
9 unless there is, to some extent, a crisis, a social
10 crisis, and that becomes an incentive to change.

11 Well, one question would be, do you think
12 that we have such a crisis, but I won't ask you
13 that question, but how can we, as a Commission, try
14 to reach out to this citizenship engagement and
15 make them a part of the solution or the better way
16 of dealing with organized crime? What role should
17 we ask the citizens to play? We want them to be
18 more alert, more conscious of the gravity, of the
19 seriousness of what organized crime means for
20 everyone? Is it a question of education, of... So,
21 what do you think we could do in terms of small
22 steps or big steps as a Commission and the report
23 that we are about to write?

24 A. One of the reasons why I think that the task is
25 difficult is that probably the forms of organized

1 crime in your country are not violent enough. Sorry
2 for being so rude -- I may be wrong, but I have to
3 tell the truth, so it's what I think, -- one of the
4 reasons why something changed but not much in a
5 country like mine is that the violence was too
6 much. So suddenly, someone realized that we had
7 enough. So through, one of the reasons why the
8 situation is even worse now, I'm joking but, is
9 that mafia realized that the best way to proceed is
10 to infiltrate the economy, corrupt people, doing
11 business with construction industry -- I'm talking
12 about my country -- and being less, less violent.
13 And if you really want to be violent, better that
14 you kill another mafioso rather than a citizen or,
15 but even in this case, do it with caution.

16 What I want to say is that the task is
17 difficult because some of the -- as I perceive
18 them, -- of the criminal problems that you might
19 face, are not so evident. It is very difficult to
20 realize the impact, the social impact and the
21 social cost of this problem and then there is also
22 the neat natural attitude of people to say,
23 everything works, the country is so beautiful. We
24 have resources, we stay... what do... we have
25 everything. Why should we say that there is crime?

1 We don't see it. This is, which is a typical
2 probably attitude of, it doesn't involve me, I
3 don't see it.

4 So that's why I think that the task is
5 difficult and, but, and raising awareness is a
6 simple way to say, it's to say but it is very
7 difficult to be achieved and to be performed. I
8 would say that making people to understand social
9 costs of this kind of crimes is an effective way to
10 proceed, if you can. I don't know, if you have
11 numbers, if you can, if you can make people realize
12 how much it costs for Canada.

13 If you, if I, as a criminologist, I mean I
14 can be wrong of course and I've been in this
15 country for 10 days of my life so I'm probably
16 wrong, but I perceive a lot of opportunities for
17 criminals which are clever. If I were a clever and
18 organized criminal, I would come here. As I say to
19 my people in Trentino, which is a very wonderful
20 region of Italy, they think that there's no crime
21 there, which is so beautiful and so resourceful and
22 so full of resources into economic and not only.
23 And I say to my people there, "If I were a criminal
24 in Italy, I'll come here." Why? I won't kill, I
25 won't commit any kind of violence, I will exploit

1 these resources. So, we don't make any, we don't
2 have to make any terroristic, have a terror
3 approach. But still, I think there might be
4 opportunity for criminal in these country,
5 organized criminal.

6 How to do that? It's easier when there is a
7 crisis, you're right. I don't know if the level you
8 reach is a crisis or has to be. It is up to you.
9 Tell me if it is. I don't have any clues about
10 that, and I cannot express any judgment on these
11 that would be... but still, it's easier when there
12 is already a crisis.

13 The transparency of the media, the freedom
14 of the press, is a value in this kind of... The
15 quality of the press, the, also the partnership
16 with the press can be an instrument. And probably
17 also just speaking, speaking publicly about this
18 problem. It's not easy. I'm coming from a country
19 in which sometimes still now, we tend to forget
20 this problem. We want to forget this problem. And
21 sometimes it is also for politicians. So many
22 honest in all our country deserves an honest and
23 transparent approach. This is what I tell my
24 students, "You all have your own responsibility in
25 discovering, in being critic, in expressing your

1 free judgment, in understanding. Go and use your
2 report in schools and universities. Involve
3 professors of university.". Involve, not saying
4 that Canada is the most corrupt and organized crime
5 country of the world, it's not true. But just say,
6 "We might have a problem. We can not... Maybe we
7 are still on time. Maybe this is an opportunity."
8 This is an opportunity. You don't have. You don't
9 have to feel guilty or it happens in several
10 country, let's use these opportunity. Don't lose
11 it. Because in several country of Europe that I
12 know, these opportunity have been lost. And then,
13 after twenty (20) years, it was really worse than
14 before.

15 Q. **[147]** So we'll take it as an opportunity, as you
16 say. Well, thank you very much...

17 A. You're welcome.

18 Q. ...for coming here, for taking lots of your
19 precious time. And so, a number of your writings,
20 not just what you have told us today, but your
21 writings are very useful for us.

22 A. Thank you.

23 Q. **[148]** So... Peut-être un mot pour souligner le fait
24 que nous terminons maintenant, donc, les audiences
25 d'experts, et pour dire que tous ceux que nous

1 avons entendus depuis les quelques jours derniers
2 ont largement contribué à la réflexion de l'équipe
3 de recherche, et donc à la réflexion de la
4 Commission, donc. Alors voilà.

5 A. Thank you.

6 LA PRÉSIDENTE :

7 So grazie mille professore Di Nicola. Et simplement
8 pour dire que maintenant, effectivement, que les
9 témoins experts ont terminé, nous reportons les
10 audiences à lundi prochain, le dix (10), où
11 débuteront les plaidoiries des parties.
12 Alors voilà. Merci beaucoup.

13

14 AJOURNEMENT DE L'AUDIENCE

15

16

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2

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5 certifions sous notre serment d'office que les
6 pages qui précèdent sont et contiennent la
7 transcription fidèle et exacte des notes
8 recueillies au moyen de l'enregistrement numérique,
9 le tout hors de notre contrôle et au meilleur de la
10 qualité dudit enregistrement, le tout, conformément
11 à la Loi.

12 Et nous avons signé,

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17 **ROSA FANIZZI**

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24 **ODETTE GAGNON**

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