SUPPLEMENTARY REPLY SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

in respect of

THE CRA PRE-APPOINTMENT INCOME DATA OF JUDGES

Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP

February 12, 2008

TABLE OF CONTENTS

PREFACE

1.   The present Supplemental Reply Submission of the Association and Council relates to data collected by the Canada Revenue Agency ("**CRA**"), at the request of the Department of Justice, regarding the pre-appointment income of judges appointed between 1995 and 2007 (the "**pre-appointment income data**" or "**PAI data**").

2.   The Government agreed to redact the portions of its principal Reply Submissions dealing with the pre-appointment income data so as to give the Association and Council an opportunity to address the issue before either party's submissions in respect of this question would be released to the Commission and the public, including the members of the federal judiciary whose income had been inquired into by the Government. The unredacted version of the Reply Submissions of the Government was released only to the Association and Council pending the present Supplemental Reply Submission.

3.   It was agreed between the principal parties that the unredacted version of the Reply Submission of the Government and the Supplemental Reply Submission of the Association and Council relating to the pre-appointment income data would be filed simultaneously on February 12, 2008. The Association and Council consented to the Government having the option of filing a rejoinder to the present Supplemental Reply Submission by February 19, 2008.

OVERVIEW

4.   The Association and Council have serious concerns about the manner in which the Government has proceeded in obtaining the pre-appointment income data, and the appropriateness of gathering such data.

5.   The Association and Council also submit that serious due process concerns arise from the Government's reliance on this data in view of the judiciary's inability, because of the need to preserve confidentiality, to test the validity of the underlying raw data.

6.   In addition to these concerns, the following significant methodological and other problems are readily apparent and undermine the reliability and relevance of the data:

- significant variations in the year-to-year income of certain lawyers prior to appointment;

- unlikely low income levels for certain lawyers prior to appointment;

- conflation of different kinds of income inquiries;

- width of the pre-appointment income window of five years; and

- limitations of median values for pre-appointment information broken down by year.

These problems are discussed further below.

7.   Even if it were assumed that the pre-appointment income data is reliable, which it is not, it would be of very limited relevance to the Commission. This is so because the pre-appointment data relates not to the income level of eligible candidates for appointment to the Bench in the four years of the Commission's mandate, but to the income level of lawyers appointed during the mandates of previous Commissions, going back to 1990.

I.   DESCRIPTION OF THE PAI DATA

8.   The Navigant Report on the Canada Revenue Agency's Pre-Appointment Income Data (the "**Navigant PAI Report**"), in paragraphs 2 to 13, contains a description of the PAI Data which it is useful to reproduce herein.

CRA provided three sets of data:

a)   the original PAI data consisting of the ratio of the five-year income average to the salary earned as a judge for around 90% of the lawyers who were appointed as judges between 1995 and 2007;

b)   an amended PAI data set (the original PAI data set was amended because CRA found that it had applied a defective methodology to calculate the net-present-value adjustment); and

c)   data concerning the year-to-year income variations over the five-year period for each lawyer.

The CRA amended PAI data set and the data concerning the year-to-year income variations over the five-year period for each lawyer are reproduced, respectively, in Appendices A and B to the Navigant PAI Report.

9.   The Government gave to CRA a list of 627 judges who were appointed after 1994. CRA was able to match 567 of those judges (around 90%) with tax filings in its records and it proceeded to collect and report upon their pre-appointment income based on their tax returns.

10.   The PAI data is broken down into two employment categories: employed and self-employed. This categorization is based on the employment status of the lawyer in the year prior to appointment. Therefore, if, in the previous four years, there was a change in status from employed to self-employed, or vice versa, this change would not be reflected in the data.

11.   Appendix A to the Navigant PAI Report contains the ratio for each judge, the median ratio (as calculated by CRA) for appointees in each year between 1995 and 2007, technical notes provided by CRA in respect of the ratios, and the methodology used by CRA to generate the data. It should be noted that the ratio represents the proportion of the five-year average to the judicial salary one year after appointment. For example, a ratio of 100% means that the lawyer had a five-year pre-appointment average income that was 100% of what he/she went on to make as a judge in the first year after appointment.

12.   It is important to understand that there are two steps that lead to the calculation of the ratio about which the parties have no information. The first step is identifying the actual dollar values for each of the five years that served to generate the five-year average. Disclosure of these values was refused due to confidentiality concerns. The second step is arriving at the dollar-value five-year average. This dollar-value average for each of the lawyers was also withheld because of confidentiality concerns. What is available is only the third step: the ratio of that average to the first-year salary earned as a judge.

13. The ratio for each judge is not correlated to the year of appointment. The only information given based on years of appointment is the *median* ratio. The median ratio is the ratio of the individual judge whose ratio falls in the middle of the range of ratios for all appointees for the given year of appointment. Half of the ratios in that range are less than the median and half are more.

14. As explained by Navigant, a median value gives no sense of the kind of values that come before and after it. A far better measure than a median ratio would be an average ratio. CRA refused disclosure of that information on the basis that providing average ratios for each year would compromise anonymity.

15. Appendix B contains the percentage year-to-year income variations for each lawyer prior to appointment over the five-year period. While indicative of income variations over the five-year period, the percentages are still far removed from the actual annual income figures for the lawyers in question.

II. NON-DISCLOSURE AND INAPPROPRIATENESS

16. The Association and Council were first informed by the Government about the existence of the PAI data on November 21, 2007, less than one month before the filing deadline of December 14, 2007 for first-round submissions. The judiciary was never consulted about the proposed methodology to be applied by CRA. When concerns were raised in this regard, the judiciary was told – on two occasions – that the Government had only approached CRA about the possibility of collecting this information after June 8, 2007. Upon further inquiry by the judiciary, the Association and Council learned that the request to gather pre-appointment income data was made at a high-level meeting between CRA and representatives of the Department of Justice on March 7, 2007.

17. The Association and Council submit that the Commission should decline to consider the PAI data on the basis that the Government ought to have disclosed to the judiciary that it would be seeking to collect this data for use before the Commission, so as to give the judiciary an opportunity to comment on the proposed data collection and the methodology applied by CRA.

18. The judiciary also submits that it is inappropriate for the Government to collect and rely upon pre-appointment income data of sitting judges obtained from CRA without their consent in the context of the Quadrennial Commission process. The data relates to a small identifiable group of sitting judges. It is derived from individual tax returns, filed with an expectation of privacy, which reflect the personal financial affairs of the individuals in question.

III. DEFECTS UNDERMINING THE DATA

A. RELIABILITY

1. No access to underlying data

19. Due to confidentiality concerns, CRA refused to disclose the underlying PAI data to the judiciary or its experts. As a consequence, the data could not be tested directly for reliability or validity. For example, it is not possible, without the underlying raw data, to determine whether the income data sought to be captured is actually captured in the data provided, or whether extraneous elements unwittingly affect the data.

20. The data provided by CRA does not allow a correlation to be made between lawyers and their geographic provenance, gender, or age. Such correlation would greatly assist in analyzing and testing the data.

21. As pointed out in their PAI Report, Navigant would have needed to review and analyze the underlying data to test its validity and reliability.[1]

22. Accordingly, since the judiciary is prevented from comprehensively testing the underlying data provided by CRA, its use by the Government in the Commission process raises serious due process concerns.

---

[1] Navigant PAI Report at paras. 5, 14.

2. Significant variations in annual income within the five-year period

23. As noted above, CRA has produced, at the request of the judiciary, a table indicating the percentage year-to-year income variations for each lawyer prior to appointment over the five-year period.[2] Based on that information, Navigant has produced a table, reproduced in Appendix D of the PAI Report, setting out the percentage variance of the annual percentage changes in pre-appointment income for each lawyer over the five-year period prior to appointment.[3]

24. According to Navigant, the significant percentage variations in annual income within the five-year period prior to appointment for certain lawyers suggest some kind of problem in the data. Whatever the cause of the problem, it seems that those lawyers' actual income has not been captured.

25. In addition, there are two noticeable, and sometimes contradictory, trends in the income of certain lawyers who were appointed to the Bench: significant increases or decreases from year to year and consistent losses over the period in question.

26. For example, 75 of the 389 (19%) self-employed lawyers had an average negative income growth over the five-year period prior to appointment. Similarly, 25 of the 178 (14%) employed lawyers had an average negative income growth.[4] This is at odds with what is generally known about income change with increased seniority at the bar, whether in the employed or self-employed category.

27. Some of the negative income trends need to be explicitly depicted in order to understand fully the oddity of the data. One lawyer had a 10% increase at the outset of the five-year period, but then proceeded to suffer a 69.7% drop in income, followed by a further

---

[2] See Appendix B to Navigant PAI Report.

[3] Navigant PAI Report, Appendix D.

[4] Navigant PAI Report at para. 21.

154.5% drop, and then a colossal 728.4% drop in the year prior to appointment.[5] This defies logic.

28.   A more extreme example is that of a lawyer who posted a 16.4% loss at the outset of the five-year period, then lost another 8.2%, then lost 448.1%, and finally, lost 625.7% in the year prior to appointment.[6] Seemingly, this lawyer consistently lost income over the five years prior to appointment. The Commission should not use this kind of data to make recommendations as to adequate compensation.

3.   **Improbable income levels for self-employed lawyers**

29.   Putting aside trends for individual lawyers over the five-year period, it strains credibility that the data presented for certain lawyers is actually representative of their income. For example, one self-employed lawyer had a five-year pre-appointment average income of approximately 10% of the judicial salary.[7] If one assumes that the judicial salary of this lawyer was the 2006 level of $244,700, it means that the average pre-appointment income of this lawyer was approximately $24,470, and this in the private sector. This is either incorrect or reflects extraordinary factors that this data fails to take into account such as income splitting, maternity leaves, sabbaticals or the like.

30.   The CRA data does not allow verification of the impact of these factors, even though they are known to be present. To take one example: the use of management companies of which a practising lawyer's spouse, a personal corporation or a family trust is the shareholder has been prevalent in the legal profession as an income-splitting method throughout the period covered by the PAI data.[8] As confirmed by Deloitte, as much as $60,000 of a self-employed lawyer's income can be directed to the lawyer's family

---

[5] See line 33, Navigant PAI Report, Appendix B.

[6] See line 246, Navigant PAI Report, Appendix B.

[7] See i.d. 4405, Navigant PAI Report, Appendix A.

[8] See Deloitte's letter of January 25, 2008, attached as Appendix C to the Reply Submission of the Association and Council dated January 28, 2008.

members using this method. CRA's PAI data does not capture that income even though it is generated by the lawyer's practice, since it is paid to the lawyer's family members.

31. It will be noted that when the Government states that "19% of all appointees were earning less than half of a judicial salary,"[9] included in that figure is an appointee who had an average income of approximately 10% of judicial salary. The Commission must ask itself whether this makes any sense in the context of determining adequate compensation for the judiciary.

4. Conflation of different kinds of income inquiries

32. The Government relies on the figure of 19% of all appointees earning less than half of a judicial salary to conclude that this

> displaces the methodological assumption used by past Commissions and still advanced by the judiciary that no one who earns less than $60K [*sic*] per annum would apply for or be considered qualified to be appointed a judge.[10]

33. Putting aside the improbability that any appointee actually practising earned less than $60,000, and the probability that figures like the 10% ratio are defective or simply unreflective of actual income, the Government neglects one critical fact. When the Government states that 19% of all appointees were earning less than half of a judicial salary, this includes both employed and self-employed lawyers. Yet, the $60,000 exclusion has only been applied to self-employed lawyers.

34. The Government's comment, however, is indicative of a more profound misconception about the distinction between various kinds of inquiries to be made in determining adequate compensation. The application of first principles dictates that appointees to the Bench should continue to come largely from the ranks of self-employed lawyers. To the extent that a certain diversity of the makeup of the Bench is required, employed lawyers must also be appointed. Of necessity, the parameters to be applied to delineate an

---

[9] Reply Submissions of the Government of Canada at para. 21, second bullet.

[10] Reply Submissions of the Government of Canada, footnote 13.

appropriate comparator will be different when dealing with employed lawyers since the scale of compensation for these lawyers is generally lower compared to self-employed lawyers.

35.   However, for the Government to use the fact of the lower pay scale in the *employed* category as a justification for including those who earn less than $60,000 in the *self-employed* category is an example of the proverbial mistake of comparing apples and oranges.

5.   Pre-appointment window is too wide

36.   Another methodological problem noted by Navigant is that the five-year period prior to appointment is too wide.[11] It is really the last year prior to the year of appointment, perhaps in tandem with the year of appointment, that would be determinative in a lawyer's decision to accept an appointment to the Bench. Common sense suggests that only in rare circumstances would one consider what one earned five years ago in order to decide whether to accept an appointment to the Bench.

37.   Moreover, according to Navigant a five-year window is more likely to capture outlier years like maternity leaves, personal leaves, sabbaticals, secondments, etc.[12], none of which is taken into account in the Government's methodology. Any of these would obviously bring about a distortion in the data.

6.   Limitations of median values

38.   For each year of appointments, CRA has only given the median ratio, to the exclusion of the average ratio for that year. The median is simply the mid-point in a range of values from highest to lowest. The values before the median are lower than the median and the values after the median are higher. However, as Navigant points out, a median can easily be the watershed before a spike in the income levels. In other words, the ratios might rise significantly after the median value. The fact that values after the median are higher does

---

[11] Navigant PAI Report at paras. 15-16.

[12] Navigant PAI Report at para.15.

not reveal the magnitude of those values. There is no way of knowing if the ratios after the median are significantly higher than the median when all that is available is the median value. CRA withheld average values out of concern for confidentiality.

7.   Conclusion as to reliability

39.   By reason of the foregoing, and of the Navigant PAI Report, the Association and Council submit that the PAI data is uninformative, should not be relied upon by the Commission or, alternatively, that it should not be given much weight.

B.   RELEVANCE

40.   Assuming that reliable PAI data could be generated by a survey or through CRA data (provided that the latter would take account of the impact of income splitting, maternity leaves and other such factors), such PAI data would nonetheless be of little value to the Commission. The reason is that the PAI data relates not to the income level of eligible candidates for appointment to the Bench in the four years of the Commission's mandate, but rather to the income level of lawyers appointed during the mandates of previous commissions. To illustrate the point, the PAI data contains five-year pre-appointment income data of lawyers appointed in 1995, hence of income dating back to 1990.

41.   The purpose of the Government in relying on the PAI data is unclear. On the one hand, it asserts that compensation "is not the only, or even the predominant, attraction of judicial office".[13] On the other hand, it highlights from the PAI data that 62% of appointees among self-employed lawyers received a "significant increase" in income upon appointment.[14] If the Government's figure of 62% is to be relied upon, which it should not, the inference to be drawn would be that judicial salaries are an incentive to attracting judges who enjoyed low pre-appointment incomes and that compensation does play a salient role in attracting candidates to judicial office.

---

[13] Reply Submission of the Government of Canada at para. 24.

[14] Reply Submission of the Government of Canada at para. 21, first bullet.

42. If the intention of the Government is to influence the Commission's determination of an adequate salary level for 2008-2011, which is the period under consideration, the PAI data is not relevant. The PAI data cannot function as a comparator. It has neither the detail and currency of the Navigant survey or that of the 2005 CRA data on the income levels of self-employed lawyers, nor does it have the normative character of the comparison with the most senior DMs.

The whole respectfully submitted.

Montréal, February 12, 2008

Pierre Bienvenu
Azim Hussain
Ogilvy Renault LLP
1981 McGill College Avenue
Suite 1100
Montréal, Québec H3A 3C1