

**REPLY SUBMISSION OF THE GOVERNMENT OF CANADA**

**TO**

**THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION**

**(SECOND PART)**

**I. INTRODUCTION**

1. The following submissions address the issue of income trends in the private sector as well as the submission of Mssrs. Poitras and Bisson.

**II. JUDICIAL SALARIES – INCOME TRENDS IN THE PRIVATE SECTOR**

2. The Government submits that data obtained from Canada Customs Revenue Agency (“CCRA”) on the incomes of self-employed lawyers are of limited use to the Commission in establishing comparisons with current judicial salaries. The unreliability of the data for such a purpose results from a number of factors more fully described below. It should be noted that the frailties of the data are not due to any failure of effort or expertise on the part of CCRA officials, who have worked diligently to refine and clarify the available data. It is necessary to explain how the problems with the data came to light.

3. The Drouin Commission relied on the 1997 data provided by CCRA as valid on its face.<sup>1</sup> Neither the Commission, the Government nor the judiciary had any basis to question the reliability of the data at that time. It was only in the course of preparations for this Commission, through efforts to compare the 1997 to 2000 CCRA data, that questions arose for the first time as to the reliability of the 1997 data for the purpose of permitting comparisons to judicial income levels.

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<sup>1</sup> Counsel for the Joint Submission filed an analysis of the 1997 income tax data for self-employed lawyers prepared by its consultant Sack, Goldblatt, Mitchell (“SGM analysis”). The Government responded with a letter from Phil Johnson of Hay Group which commented on the SGM analysis. The Commission retained its own consultant, Morneau Sobeco, to analyze the 1997 data.

4. The Government's efforts to acquire and analyse up-to-date income information for consideration by the present Commission began in early 2003. The initial objective was to compare the 1997 to the 2000 data to determine whether they would disclose any trend in levels of self-employed lawyers' incomes. The same analysis was planned with respect to 2001 data when they became available.

5. The first critical indicator of concern was the fact that the 2000 data suggested that there had been a significant decline in the overall number of self-employed lawyers in Canada since 1997. This led Government officials to undertake a more detailed inquiry into how CCRA had compiled the data.

6. While this inquiry was in progress, the 2001 data became available in September 2003. They disclosed further anomalies in relation to the 2000 data. For example, from 2000 to 2001, the overall number of self-employed lawyers who filed income tax returns declined by 10% (from 28,684 to 25,879) and their average net income from the practice of law declined by 36% (from \$89,803 to \$57,226, taking into account net incomes which were negative or zero as well as positive).<sup>2</sup>

7. CCRA officials were asked to provide an explanation of the apparent volatility of income tax data from year to year.

8. CCRA officials have explained that the problems with the data arise from the fact that the system which is being used to capture and generate the data has not been designed for the current purpose. They have described how the volatility has arisen from year to year, essentially from the interaction of three factors:<sup>3</sup>

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<sup>2</sup> Data for the 2000 tax year (see Appendix 10 to the Government's Reply Submission, Volume 2) and data for the 2001 tax year (Appendix 11 to the Government's Reply Submission, Volume 2).

<sup>3</sup> Letter from Larry McElroy, Director, Statistics Division, CCRA to Paul Vickery, Senior General Counsel, Department of Justice, dated January 14, 2004 (see Appendix 12 to the Government's Reply Submission, Volume 2).

- (a) The fact that lawyers self-identify their occupations on their income tax returns leaves room for error.
- (b) Errors can occur in the way sources of income for self-employed lawyers are identified.
- (c) There have been modifications to the occupational coding system between 2000 and 2001.

9. CCRA has indicated that as a result of the interaction of these factors, only 70% of the individual self-employed lawyers in the 2000 database were also in the 2001 database. Thus, the error rate associated with the identification of lawyers in any given year, for whatever reason, is in the order of 30%.

10. The interaction of the three factors highlights that the process of collecting and coding such data is complicated and error-prone. All of this suggests that any annual “snapshot” of the incomes of lawyers derived from the CCRA data may be, as it were, “out of focus”.

11. According to CCRA, the new occupational coding system employed in 2001 should provide a more accurate representation of the actual pool of self-employed lawyers in Canada. On the assumption that the 2001 data are at least as reliable as previous years’, the Government requested an independent analysis from a compensation specialist of Western Compensation and Benefits Consultants.<sup>4</sup> The analysis in this report follows the technical recommendations of CCRA.

12. While the Government has reservations about the reliability of the raw data generated by CCRA, the Government maintains that the analytic approach employed by its expert is appropriate and sound, and recommends that the Commission utilise that methodology in reviewing data from each of the tax years provided, recognizing, however, that the results generated will continue to be impacted by the limitations of the raw data being analyzed. While

the current expert's report focused only upon the 2001 data, it is understood that a similar review of the corresponding 2000 data could be produced should the Commission request this be done.

13. Unfortunately, what has become clear is that the CCRA data currently available may be of limited usefulness to the Commission's inquiry. It may be that further review of CCRA's data collection system would permit the usefulness of the data to be assessed more thoroughly. In particular, such a review could consider alternate methods which might be used to identify self-employed lawyers and their various sources of income. Such a review would also ideally determine the feasibility of improving the accuracy of income data in future, for the specific purpose of providing appropriate private sector comparisons in the context of establishing judicial compensation. The provision of such data is not, however, a core function or responsibility of CCRA and the costs of such a review may well be significant.

14. On balance then, it is the submission of the Government that little weight can be placed upon comparisons to earnings of self-employed lawyers as a means of determining the adequacy of judicial salaries and benefits at the present time.

### **III. SUBMISSION OF THE HONOURABLE LAWRENCE POITRAS AND CLAUDE BISSON**

15. The Honourable Lawrence Poitras and Claude Bisson both retired in 1996, during the period when all public-sector salaries were frozen.<sup>5</sup> Federally appointed judges did not receive statutory indexation during this restraint period. These former judges ask that the Commission recommend that their annuity be increased to the level it would have achieved but for the effect of the freeze ("Poitras/Bisson Submission"). The Canadian Judicial Council and the Canadian

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<sup>4</sup> Report on the Earnings of Self-Employed Lawyers for the Department of Justice for the 2003 Judicial Compensation and Benefits Commission, Western Compensation & Benefits Consultants, January 2004 ("Pannu Report") (see Appendix 13 to the Government's Reply Submission, Volume 2).

<sup>5</sup> All salaries paid by the federal government were frozen from December 1992 to March 1997. The Government of the day decided that pensions should not be frozen.

Judges' Conference (as it was then called) made the same submission to the Drouin Commission in respect of all judges who retired during the freeze.

16. The Government opposes this proposal. Before the Drouin Commission, the Government argued that the overall effectiveness of any economic restraint program would be placed at risk if the program is viewed as merely a temporary event, with "catch up" to occur at a later date. It also argued that there is no principled reason to treat judicial pensioners differently from other federal pensioners in the same position.

17. The Drouin Commission agreed with the Government. It stated:

The Commission recognizes that the freeze has had an adverse impact on some individual judges and their survivors. However, the judges were not singled out as targets of wage restraint and the adverse impacts of the wage freeze were experienced by other Canadians as well. As a matter of principle we do not accept that the adverse impact of the freeze should be redressed and we are not prepared to recommend the adjustment of pensions for those annuitants who retired during the freeze, or their survivors.<sup>6</sup>

18. The Poitras/Bisson Submission provides no information which would suggest that the decision of the Drouin Commission needs to be revisited. The Government adopts its earlier submissions on the point and submits that this Commission reiterate the Drouin Commission's position.

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<sup>6</sup> Judicial Compensation and Benefits Commission Report, May 31, 2000, Section 4.11 page 88 (see Appendix 14 to the Government's Reply Submission, Volume 2).