

## **I. INTRODUCTION**

1. At the public hearings of this Commission, on February 4, 2004, the Commission agreed to receive further submissions from the Government of Canada, and the Canadian Judicial Council and the Canadian Superior Courts Judges Association concerning their respective expert's reports on private sector income. The following are the Government's submissions addressing the *Report on the Incomes of Canadian Lawyers Based on Income Tax Data* which Sack Goldblatt Mitchell submitted to the Commission on January 30, 2004 ("SGM Report").
2. The report of Government's expert, Haripaul Pannu of Western Compensation & Benefits Consultants ("Pannu Report #2"), in response to the above report, is annexed to these submissions.<sup>1</sup>

## **II. METHODOLOGY**

### **(a) Drouin Commission Analysis**

3. At paragraph two of the SGM Report it is submitted that the Drouin Commission found that the appropriate comparator population for judicial salaries among the self-employed private sector lawyers reported in the Data was lawyers ages 44–56, earning more than \$50,000, at the 75<sup>th</sup> percentile. The SGM Report indicates that the Drouin Commission found that in 1997, the income for lawyers in this group, at the 75<sup>th</sup> percentile was \$230,000 for all of Canada, and was "dramatically higher" within the seven large metropolitan areas.<sup>2</sup>
4. Since the Commission ultimately recommended a judicial salary of \$198,000, it is clear that it did not directly apply these findings in reaching its conclusion as to what was

---

<sup>1</sup> Letter from Haripaul Pannu, Western Compensation and Benefits Consultants, to Paul Vickery, Senior General Counsel, Department of Justice, dated February 2, 2004 ("Pannu Report #2") (see Appendix 1 to the Government's Reply Submission, Volume 3).

<sup>2</sup> *Report on the Incomes of Canadian Lawyers Based on Income Tax Data to the Judicial Compensation and Benefits Commission 2003*, Sack Goldblatt Mitchell, January 30, 2004 ("SGM Report").

an adequate judicial salary. It appears that the Drouin Commission gave the private sector income analysis relatively little weight in coming to its recommendation on salary.

**(b) Methodological Weaknesses**

5. The Pannu Report #2 identifies a number of weaknesses in the methodology employed in the SGM Report. In particular, it is noted, at page 3 of the Pannu Report #2 that:

The methodology employed by SGM in analysing the data is exactly the same methodology used by them for the Drouin Commission. That is, SGM uses the incomes of self-employed lawyers earning in excess of \$50,000 who were 44 to 56 years old.

The weaknesses of this methodology were highlighted to the previous commission as well as in our report prepared for this commission. We have summarized the major points below:

- The use of an earning threshold eliminates lawyers who for lifestyle reasons or business reasons do not achieve an income in excess of the earnings threshold. There is no reason that these lawyers could not be candidates for the bench and should be eliminated from the data.
- The use of an earnings threshold is one-sided. That is the lower income values are eliminated but not the higher income values. It could be argued that lawyers earning in excess of a certain income level would not consider an appointment to the bench.
- The inclusion of only lawyers who are age 44 to 56 does not take into account the entire spectrum of self-employed lawyers who may be appointed to the bench. There are more appropriate statistical techniques that can be used which would give a greater weighting to the group from which the majority of judges are appointed but still include the other age bands.
- The value of the judicial annuity is not reflected in their analysis. The judicial annuity is a significant benefit available to judges. It would not represent a fair comparison of the incomes of lawyers to that of judges if the value of the judicial annuity was not included as part of the compensation of judges. In our report prepared for the commission we estimated that the judicial annuity had a value of 24% of

compensation. This would indicate that judicial salaries should be increased by 24% to take into account the value of the annuity.<sup>3</sup>

6. The Government adopts the above comments and submits that, in the absence of actual information as to the incomes of lawyers in the tax year prior to judicial appointment, there is no empirical justification for excluding data as to incomes of less than \$50,000.

7. Similarly on the question of age, data from the Commissioner for Federal Judicial Affairs previously submitted show that age at appointment ranges from 41 to 66.<sup>4</sup> The Government submits that the age-weighted analysis conducted by its expert represents a more balanced and appropriate approach than that contended for by SGM.

**(c) Methodology to Update Data**

8. The Pannu Report #2 identifies several methodological weaknesses in the approach adopted in the SGM Report to “update” its proposed methodology.<sup>5</sup> The Government relies on the Pannu Report #2 analysis in this regard, and states that given the identified weaknesses and errors within the SGM Report, no reliance can be placed upon the conclusion that private sector incomes have increased by 14% between 1997 and 2004.

**III. VALIDITY OF THE DATA**

9. The SGM Report refers to the tax year 2000 data as being “partially verifiable”,<sup>6</sup> while it characterizes the 2001 data as “unreliable”.<sup>7</sup> This partial verifiability is said to be demonstrated by the fact of the similarity of the data to a second set of tax year 2000 data supplied by CCRA to the Government of Ontario. The Government’s expert notes,

---

<sup>3</sup> Pannu Report #2, page 3 (see Appendix 1, Government’s Reply Submission, Volume 3).

<sup>4</sup> Letter from the Office of the Commissioner of Federal Judicial Affairs, dated December 3, 2003, with Tables (see Appendix 8 to the Government’s Main Submission, Volume 2).

<sup>5</sup> Pannu Report #2, pages 4-6 (See Appendix 1, Government’s Reply Submission, Volume 3)

<sup>6</sup> SGM Report, para. 33.

<sup>7</sup> SGM Report, para. 74.

however, the fact that data can be reproduced does not make the data correct, just consistent.<sup>8</sup>

10. SGM's case for exclusive dependence on 2000 data rests primarily on its apparent consistency with 1997 data.<sup>9</sup> But these are only *two* data points. The fact that a third data point (tax year 2001) is at variance with the first two is, given what is now known about the general frailties of the CCRA data base,<sup>10</sup> not in itself sufficient reason to conclude that it is the third data point which is inaccurate.

11. The SGM Report contains no discussion of the factors known to affect the accuracy of the identification of lawyers and their sources of income from year to year. The Government, having considered these factors, was led to the conclusion that it is difficult to choose between the import of the 2000 and the 2001 data.<sup>11</sup>

12. CCRA supports the reliability of the 2001 data and has stated that they have a greater likelihood of being accurate than the 2000 data, by reason of the improved fidelity of the occupational coding system employed in 2001.<sup>12</sup>

13. SGM's selective rejection of the "January 2004" tables on the tax year 2000 data because of apparent inconsistencies with previous 2000 data tables supports the view that existing CCRA data are too volatile to permit the drawing of statistical inferences with sufficient accuracy for use by this Commission.<sup>13</sup>

14. Far from being "logically impossible",<sup>14</sup> some variability in data tables from one report to the next within the same tax year is to be expected, given their continuing

---

<sup>8</sup> Pannu Report #2, page 2 (See Appendix 1, Government's Reply Submission, Volume 3).

<sup>9</sup> SGM Report, paras. 56 and 72.

<sup>10</sup> See Government Reply, Part II, paras. 8-10

<sup>11</sup> See Government Reply, Part II, paras. 8-11.

<sup>12</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).

<sup>13</sup> SGM Report, para. 70.

<sup>14</sup> SGM Report, para. 65.

modification through the audit process. It is to be noted that the observed changes in the tables from one report to the next are the *net* results of all changes involving an unknown volume of tax records. For example, a net increase of two cases may be the result of 25 cases being added and 23 cases being removed. The effect of auditors' ongoing decisions as to individual files on any number of cases may be expected to increase the apparent volatility of the data.

#### **IV. NET PROFESSIONAL INCOME & RELATIONSHIP TO \$50,000 THRESHOLD**

15. The SGM Report states that the \$50,000 threshold is to be preferred because it eliminates "zero" and "negative" incomes, income levels of lawyers who, in its view, would be the least likely to be appointed to the bench.<sup>15</sup> The SGM Report defines "Net Professional Income" as follows:

...income from self-employment as a lawyer only, to the exclusion of other income. Furthermore, this figure represents net professional income *before deduction of other items for income tax purposes*. [emphasis added]<sup>16</sup>

16. The Government agrees that "Net Professional Income" includes only income that self-employed lawyers derive from the practice of law, but denies that net income, as referenced in the data under review, is "*before deduction of other items for income tax purposes*".<sup>17</sup>

17. In fact, the net incomes shown are reduced from gross incomes through subtraction of various business expenses, capital allowances and losses. These various categories of deduction are listed in CCRA's Statement of Professional Activities, Form

---

<sup>15</sup> SGM Report, paras. 25 and 26.

<sup>16</sup> SGM Report, para. 20.

<sup>17</sup>The SGM Report refers in this regard to two sources of confirmation of this definition by CCRA. The first source is a cursory agreement with a group of statements made by SGM, and in any case, applies to the data from tax year 1997 (see Exhibit 5, Report Exhibit Book, Volume III).<sup>17</sup> The second, more recent source indicates that Net Professional Income was taken from Line 137 of the T1 Return (see Exhibit 8, third page, Report Exhibit Book). Line 137 records "Net" professional income, versus Line 164 which records "Gross" professional income.

T2032, which self-employed lawyers complete with their income tax returns.<sup>18</sup> CCRA has confirmed that “Net Professional Income” is income net of expenses in a recent letter to the judges’ counsel.<sup>19</sup>

18. The \$50,000 threshold exclusion proposed by SGM would have the effect of eliminating from the analysis net incomes under \$50,000, arising from gross incomes that have been reduced to \$50,000 or less, following deduction of business expenses and capital losses.

### **Process**

19. Beginning at paragraph 75 of its report, SGM complains of a lack of cooperation from the Government in obtaining data for this Commission. The Government notes that the proposal for a joint approach was first raised in correspondence of October 22, 2003<sup>20</sup> and discussed at the Commission’s initial meeting with the parties on October 29, 2003. SGM had at all times been free to make contact with the representatives of CCRA as it had done previously. After October 29<sup>th</sup>, the Government worked cooperatively with judges’ counsel and experts in an effort to obtain the best data available from CCRA. The Government rejects the proposition that it in any way hindered SGM in the collection of data relevant to this Commission.

20. The Government also rejects any inference found in paragraph 71 of the SGM Report that the Government did not share the 2001 tax data in a timely fashion, or that the Government expressed satisfaction with data that it believed to be in error.

---

<sup>18</sup> Form T2032, Statement of Professional Activities (See Appendix 2, Government’s Reply Submission, Volume 3). Line 9946 of this form indicates that “your net income” is to be entered on Line 137 of the T1 Return.

<sup>19</sup> Letter from L.G. McElroy, Director, Statistics Division, CCRA to Azim Hussain, Ogilvy Renault, dated January 14, 2004 at Point 2 (see Appendix 7, Report Exhibit Book, Volume III).

<sup>20</sup> Letter from L. Yves Fortier, C.C., Q.C., Ogilvy Renault to Judith Bellis, General Counsel, Department of Justice, dated October 22, 2003 (see Exhibit 17, Report Exhibit Book, Volume III).

21. To the correspondence that is referenced in paragraph 71, the Government would add its October 31, 2003 communication to the judges' counsel.<sup>21</sup> This communication forwarded the "2001 Preliminary Tables" and identified the purpose for which they had been obtained; namely, as exploratory tables to determine the most appropriate way to identify lawyers who have income from the practice of law, as opposed to other professional or business income. This communication also advised that the Government expected to replace the preliminary tables with final tables in approximately two weeks.

22. The "2001 Final Tables" were forwarded to the judges' expert on November 18, 2003, with the caution that CCRA was investigating an inconsistency between the preliminary tables and the final tables.<sup>22</sup> On November 25, 2003, the Government advised the judges' counsel that CCRA had fulfilled its request for final 2001 data, because it had adequately explained the inconsistency between the two data sets.<sup>23</sup>

23. The Government states that the chronology of events and communications discloses that the Government conducted itself in a timely and responsible manner in sharing the 2001 data with the judiciary's representatives.

---

<sup>21</sup> Email message from Paul Vickery, Senior General Counsel, Department of Justice to Pierre Bienvenu, Ogilvy Renault, dated October 31, 2003 (Appendix 3, Government's Reply Submissions, Volume 3).

<sup>22</sup> Email message from David Murchie, Senior Policy Advisor, Department of Justice to Eli Gedalof, Sack Goldblatt Mitchell, dated November 18, 2003 (see Exhibit 15, Report Exhibit Book, Volume III).

<sup>23</sup> Email message from David Murchie, Senior Policy Advisor, Department of Justice to Azim Hussain, Ogilvy Renault, dated November 25, 2003 (see Exhibit 16, Report Exhibit Book, Volume III).