

**Canadian Superior Courts Judges Association
and the Canadian Judicial Council**

**REPLY TO THE REPORT OF THE
WESTERN COMPENSATION AND BENEFITS CONSULTANTS**

**JUDICIAL COMPENSATION AND BENEFITS COMMISSION
2003**

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Summary

1. We were asked to comment upon the Western Compensation and Benefits Consultants "Report on the Earnings of Self-Employed Lawyers" (hereafter "the Consultants' Report").
2. In our opinion, the Consultants' Report suffers from two fatal deficiencies:
 - A. The data upon which the Report is based is flawed and unreliable;
 - B. Even if the data were correct, the analysis of the data is flawed.

A. The 2001 Data is Flawed and Unreliable

1. Introduction: Understanding the Data

3. In considering the Consultants' Report, it is extremely important that the Commission have an overview of the 2001 data. In this regard, it is our understanding that the Commission has not yet received all of the 2001 data which the Department of Justice requested from CCRA. In our view, only when all the 2000 data is considered in its totality can one understand the difficulties with the data.

4. It is our understanding that CCRA initially provided to Justice three sets of preliminary data (hereafter referred to as Preliminary Data Part A, Part B and Part C).¹ The composition of these three Preliminary Parts was defined by Justice as set out below.

"Part A was to capture self-employed lawyers who had non-zero net professional incomes, but reported zero net income from the practice of law.

Part B was to capture self-employed lawyers, regardless of their sources of income.

¹ Attached as Appendices 1, 2 and 3.

Part C was to capture self-employed lawyers who reported non-zero net incomes from the practice of law.”²

5. Preliminary Part A purports to include self-employed lawyers who had net professional income other than from the practice of law. These are very high income earners who were excluded by CCRA from the 2001 calculations and excluded from the Consultants' Report. We suspect that their exclusion may be the critical factor explaining the low incomes for 2001. Preliminary Part B includes the incomes of the Preliminary Part A lawyers, and the Preliminary Part C lawyers. When this data is compared to the 1997 data and the 2000 data in its totality, one can infer that there have been large increases in income from 1997 to 2001 and from 2000 to 2001. Preliminary Part C purports to be all the lawyers with incomes from the practice of law with zero filers excluded.

6. The Consultants did not submit Preliminary Parts A, B or C with their Report. They submitted two of five other data sets produced by CCRA for Justice. The first was in Section 1 of Appendix D of their Report, and contains all the filers set out in Preliminary Part B above (i.e., all filers in Preliminary Part A & C, plus zero filers), but excludes all of the income of the Preliminary Part A filers: thus it includes Preliminary Part A filers but not their income. Section 2 of Appendix D, which was also submitted by the Consultants, is the same data as in Preliminary Part C, less (ostensibly), an additional group of negative filers. The critical factor, however, is that none of the data in Section 1 or Section 2 of Appendix D includes the incomes of the Preliminary Part A lawyers.

7. CCRA produced 2001 data for five “conditions,” and presented this data in a variety of formats. We understand that the Consultants have produced data for only two of the five conditions, and have omitted the available data for all five conditions employing the \$50,000 income threshold and the 44-56 age range. In other words, they have omitted the

² Explanatory note prepared by Justice entitled “CCRA Data Requests & Attachments”, attached at Appendix 4.

comparator population employed by Drouin. We have attached this data as Appendix 5 of this Report.

2. Examining the Data in Detail

i) The Preliminary Part A Data

8. Preliminary Part A purports to define a group of self-employed lawyers who were identified as lawyers in the CCRA coding, but were considered, for some reason, to have reported zero net income from the practice of law. In our view, one explanation for the fact that the CCRA income figures for 2001 are so low may well be that none of these 7,198 individuals, and none of their income, has been included as income from the practice of law. Across Canada, this group of 7,198 lawyers earned over \$1.5 billion in 2001. To understand the dimensions of the difference that the exclusion of this group makes, the entire group that CCRA does treat as lawyers with income from the practice of law (including negative filers but not zero filers (Preliminary Part C)) are approximately 16,800 individuals, who in their totality earned just under \$1.5 billion.³ Thus, of the approximately 25,800 individuals identified as lawyers in 2001, most of the top income earners appear to have been excluded by CCRA.

9. To understand how this contrasts with the 1997/2000 data, the data that we submitted to the Drouin Commission for the 1997 tax year⁴ was for over 31,000 filers, (including zero and negative filers)⁵, with a total income of approximately \$3,301,000,000. Similarly, the 2000 tax data contained in our earlier report dated January 30, 2004 was in respect of approximately 28,700 filers who earned \$2,576,000,000. This data is summarized in Table 1.

³ Or in Section 2 of Appendix D to the Consultants' Report, the number of filers omitting negative filers, is 15,864 with 1.491 B of income (at p.5)

⁴ Attached as Appendix 6

⁵ We were unaware there were "zero filers" at the time.

TABLE 1

Total Income - Canada							
	1997	2000 ⁶	Preliminary B 2001	Preliminary C 2001	Appendix D/Section 1	Appendix D Section 2	Preliminary A 2001
No. of Filers	31,270	28,684	25,879	16,802	25,879	15,864	7,198
Net Prof. Income	3,031,993,000	2,575,897,759	3,084,504,493 (includes Preliminary A & C)	1,480,950,181 (excludes Preliminary A & zero filers)	1,480,950,181 (Prelim. B minus Prelim. A income)	1,480,950,181 (Prelim. C minus filers)	1,524,003,637

10. We consider it significant that when CCRA accumulated its data, these 7,198 individuals showed up as lawyers earning professional income on the CCRA data base. We believe there is a reason related to the practice of law why these individuals showed up as lawyers, and not as accountants or veterinarians, or some other profession.

11. We know that as a group these lawyers are very high earners: See Table 2.

⁶ Exhibit 2 to our January 30, 2004 Report: data which includes "zero filers".

TABLE 2⁷

2001 Preliminary Data - Part A		
	Average Income	No. of Filers
All Canada	\$212,000	7,198
Quebec	\$133,000	2,807
Ontario	\$309,000	2,790
Alberta	\$319,000	312
B.C.	\$207,000	606
Montreal	\$182,000	1,484
Toronto	\$361,000	2,038
Calgary	\$377,000	232
Vancouver	\$233,000	513

12. Even without an income exclusion and including negative and zero filers (the effect of both of these factors is to decrease average incomes significantly), Preliminary Part A filers earn on average \$212,000, (see above) and the age 44-56 comparator population group earns on average \$256,000: (See Table 3 below)

⁷ Toronto, in all the tables, includes Metropolitan Toronto plus Toronto combined, and we have treated Montreal, Calgary and Vancouver in a similar fashion.

TABLE 3

2001 Preliminary Data - Part A Ages 44-56		
	Average Income	No. of Filers
All Canada	\$256,000	3,461
Quebec	\$150,000	1,335
Ontario	\$363,000	1,397
Alberta	\$378,000	165
B.C.	\$239,000	326
Montreal	\$205,000	671
Toronto	\$415,000	1,052
Calgary	\$436,000	132
Vancouver	\$268,000	278

13. If one used a threshold of \$50,000, obviously average incomes would be even higher and, at the 75th percentile, incomes would be significantly higher.⁸

14. It can be seen from Table 2 that there are 7,198 people across Canada who earn high professional incomes, who somehow come up under the CCRA codes for lawyers, and yet supposedly do not have any professional income from the practice of law. These lawyers across Canada earn on average \$212,000, (including the zero filers and negative filers) compared to the \$119,200 earned on average by the 25,879 lawyers in Preliminary Part B or the \$57,000 average of the lawyers in Section 2/Appendix D of the Consultants' Report.

⁸ Justice did not request, nor did CCRA provide, data in Preliminary Parts A, B and C employing the \$50,000 threshold used to exclude part-timers.

15. On the other hand, both from an anecdotal point of view, and also from our direct knowledge of the economics of the legal profession, the incomes of these Preliminary Part A lawyers are what one would expect legal incomes to be in 2001 in the comparator group that the Drouin Commission utilized. Thus, from our knowledge of the practice of law, we know that the incomes of the Preliminary Part A lawyers shown above, at least in general terms, appear to accord with the existing high price for legal services, the expense levels of legal practice, and therefore the inferred income of busy, hard working, highly paid practising legal professionals. We are, therefore, highly skeptical as to the validity of the exclusion of this group.

16. We have great difficulty in determining who these individuals are, all of whom:

1. are lawyers;
2. have high incomes;
3. all the income is professional income;
4. none of the professional income is from the practice of law.⁹

17. Moreover, it does not accord with common sense or any of our knowledge of the legal world to conclude that these individuals are earning all of their income from some other source of professional practice.¹⁰ We simply have no basis in our experience to suppose that this other professional income is income from accounting or providing veterinary or architectural services, that it constitutes income other than from the practice

⁹ One possible small group of such lawyers may be arbitrators who likely earn their professional income in a corporation, and may well report their income differently. In our opinion, however, arbitrators should be included in the pool of lawyers who comprise the comparator group for appointment to the bench as they adjudicate cases and have an important role in the legal system. In our professional experience, there are not, however, 7,200 such persons across Canada or anywhere close to that number.

¹⁰ It is very clear that none of this other professional income from self-employment constitutes income from investments or other such sources. There has never been any confusion in the CCRA data with respect to self-employment professional income and other income, notwithstanding that there appears to be a confusion about the source of the professional income from self-employment.

of law.¹¹ In the absence of some study by CCRA that would definitively demonstrate that this group of lawyers does not earn professional income from the practice of law, the exclusion of the lawyers in Preliminary Data A is so inconsistent with the 1997 and 2000 data and so inconsistent with our knowledge of the real world of the economics of legal practice that it cannot be accepted as accurate. Without a full analysis of who these individuals are, what they do, or where their income comes from, we are simply not prepared to accept that those who would otherwise form part of the comparison group are not included in the pool of lawyers eligible for appointment to the bench.

ii) 2001 Number of Filers Inconsistent with Law Society Data

18. Another major reason for our suspicion that the exclusion of the Preliminary Part A filers is inappropriate is because the data does not accord with other independent data from the Law Society of Upper Canada indicating the number of self-employed lawyers practising in Ontario.

19. All of the CCRA data available concerns self-employed lawyers only (i.e. partners and sole practitioners). Lawyers who are employees, such as associates, academics and government lawyers, are not included in the data.

20. The Law Societies of the provinces keep a variety of statistics concerning the number of lawyers in practice across the country. Thus, one of the ways to verify the accuracy of the data is to compare the number of filers reported in the CCRA data, against

¹¹ In determining what professional income includes, it is our understanding that the term "professional income" is not defined in the *Income Tax Act*. However, in Form T2032, which is used to report professional income, other professions with codes available to input on that Form in "TaxPrep" (the professional computer software program used widely in Canada by professional tax preparers), are for accountants, bookkeepers, engineers, architects, veterinarians, physicians, dentists, psychologists, other professional scientific or technical services, other health practitioners, and other social services practitioners. In our experience, it would be extremely rare for lawyers to have income from these other sources, much less having all of their income from these other professional sources. The TaxPrep Form is attached in Appendix 7.

the number of self-employed lawyers we know to be practising law across Canada. Unfortunately, to our knowledge, only the Law Society of Upper Canada provides statistics that distinguish sole practitioners and partners from all other lawyers in the province of Ontario.

21. Table 4 below compares the number of lawyers identified as sole practitioners and partners by the Law Society of Upper Canada in 1997, 2000 and 2001, with the number of filers reported in the CCRA data for those years.

TABLE 4¹²

	1997	2000¹³	2001 Prelim. B	2001 Section 2 of Appendix D
LSUC # Practising Lawyers	12,331	12,399	12,422	12,422
CCRA No. of Filers	12,630	11,881	11,553	7,474

22. As seen in Table 4, the number of filers reported in the CCRA data for the years 1997, 2000 and in the Preliminary Part B Data for 2001 is relatively consistent with the number of self-employed lawyers registered with the Law Society. However, when one looks at the 2001 data relied upon in the Consultants' Report, there is a huge discrepancy: there are only 7,474 lawyers in Ontario according to the Report with income from the practice of law.¹⁴ This means there are 4,948 other lawyers (representing approximately 40% of the total number) registered with the Law Society as self-employed lawyers who are not reflected in this data. While some of these lawyers may be practising out of

¹² The Law Society data is in Appendix 8.

¹³ See Exhibit 2 of our January 30, 2004 Report: data which includes "zero filers".

¹⁴ This figure comes from Section 1/Appendix D. In fairness, we think the real CCRA number for lawyers practising law is higher than 7,474, and if one includes zero filers and negative filers the number is likely in the 8,000-9,000 range.

province or otherwise not earning legal income, it seems implausible that this would be the case for approximately 40% of all self-employed lawyers, all of whom are registered as practising lawyers with the Law Society, and are therefore required to pay annual fees and submit annual filings.

23. What, then, has happened to all these missing lawyers? We believe many of them can be found in the Preliminary Part A Data where there are a total of 2,790 Ontario lawyers. This may not account for every single lawyer, but it may account for the vast majority of them. Adding in these lawyers plus zero and negative filers would bring the number up to the 11,553 Ontario lawyers found in the Preliminary Part B Data and come close to the Law Society figure of 12,422.

iii) Preliminary Part B Data

24. This data purports to cover all lawyers, with all their professional income, including all the individuals set out in Preliminary Part A Data above and Preliminary Part C Data, plus zero filers. We set out below the average incomes for the selected geographic areas.

TABLE 5

2001 Preliminary Part B		
Geographic Area	Average Income	No. of Filers
Canada	\$119,000	25,879
Quebec	\$94,000	6,708
Ontario	\$148,000	11,553
Alberta	\$123,000	1,710
B.C.	\$96,000	2,860
Montreal	\$116,000	3,691
Toronto	\$188,000	6,419
Calgary	\$167,000	865
Vancouver	\$118,000	1,927

25. As can be seen, the average income of all of these individuals (for all ages with no threshold exclusions, including zero and negative filers) is just over \$119,000 for Canada.

26. If one assumed that Preliminary Part B Data is approximately equivalent to the same data (including zero and negative filers) that was presented by us to the Drouin Commission for tax year 1997, it is interesting to see the comparison.

TABLE 6

Geographic Area	1997		2001 Preliminary Part B	
	Average Income	No. of Filers	Average Income	No. of Filers
Canada	\$97,000	31,270	\$119,000	25,879
Quebec	\$65,000	8,850	\$94,000	6,708
Ontario	\$121,000	12,630	\$148,000	11,553
Alberta	\$110,000	2,210	\$123,000	1,710
B.C.	\$96,000	3,760	\$96,000	2,860
Montreal	\$75,000	5,220	\$116,000	3,691
Toronto	\$146,000	7,210	\$188,000	6,419
Calgary	\$140,000	1,220	\$167,000	865
Vancouver	\$112,000	2,580	\$118,000	1,927

27. If the data from 1997 and 2001 was more or less equivalent in terms of the relative proportion of high and low individual income earners (if not in absolute numbers), and we suspect it may be, it would appear that from 1997 to 2001, for all of Canada, incomes increased by almost \$22,000 - an increase of 22.6%. This does not even take into account the particular impact in the higher earning comparator group ages 44-56 or the impact if one used a \$50,000 threshold or looked for the 75th percentile.¹⁵

28. Thus far we have concluded that the effect of the exclusion of the 7,198 high income lawyers by CCRA is what may well account for the low average lawyer income figures for

¹⁵ If the 1997 data included paralegals, notaries and clerks as CCRA now claims it did, that could also explain the decrease in the number of filers from 1997 as compared to 2001. Further, if the Preliminary Part A lawyers are included in the calculation of lawyers incomes in 2001, the fact that paralegals and notaries have been removed helps explain the large increase. As discussed below, what the exclusion of paralegals and notaries cannot do is explain the precipitous decrease in incomes as CCRA has suggested it might.

2001 in the Consultants' Report. That this may be so can be demonstrated by comparing Preliminary Part B Data to Section 1 of Appendix D of the Consultants' Report.

TABLE 7

Lawyers: All Ages, All Incomes				
	Section 1 of Appendix D, Consultants' Report		Preliminary Part B Data	
Geographic Area	Average Income	No. of Filers	Average Income	No. of Filers
Canada	\$57,000	25,879	\$119,000	25,879
Quebec	\$38,000	6,708	\$94,000	6,708
Ontario	\$69,000	11,553	\$148,000	11,553
Alberta	\$61,000	1,710	\$123,000	1,710
B.C.	\$51,000	2,860	\$96,000	2,860
Montreal	\$44,000	3,691	\$116,000	3,691
Toronto	\$68,000	6,419	\$188,000	6,419
Calgary	\$63,000	865	\$167,000	865
Vancouver	\$54,000	1,927	\$118,000	1,927

29. In the two data sets, the number of filers across Canada, and in every province and city is exactly the same. What is different is that while the Preliminary Part B data for the 25,879 lawyers across Canada supposedly includes all the income from professional sources, the Section 1 of Appendix D figures for the same 25,879 filers purports to be in

respect of legal incomes only.¹⁶ Therefore, the \$57,226 figure excluded all of the income from the Preliminary Part A Data lawyers, while still including those same lawyers in the number of filers. What Table 7 purports to tell us is that the 25,879 lawyers in Canada in private practice earned on average a total of \$119,200 of professional income, but only \$57,226 of that on average was from the practice of law. Similarly it purports to tell us that 6,419 lawyers in Toronto earned an average of \$188,000 of professional income per year, of which only \$67,994 came from the practice of law, and in Montreal, 3,691 lawyers earned on average \$115,693 of professional income, but of that only \$44,433 was from the practice of law. This table shows clearly that the effect on lawyers' income of excluding the Preliminary Part A lawyers' income is to reduce the average income of Canadian lawyers by more than half. In every case, the exclusion of the Preliminary Part A filers income results in a conclusion about lawyers' incomes for 2001 that is so low as to be lacking in credibility.

iv) Preliminary Part C

30. The Preliminary Part C Data purports to be lawyers who are only reporting legal income, no zero filers, but including negative filers.

¹⁶ That the 7,198 individuals from Preliminary Part A are included, but their income is excluded, is difficult to understand, but the Consultants themselves misunderstood it when they analyzed the data on page 4 of their report which is set out below.

"2001 Net Income

	<u>All Income Sources</u>		<u>Income From Practice of Law</u>	
	<u>All</u>	<u>Positive</u>	<u>Non-Zero</u>	<u>Positive</u>
	<u>Income</u>	<u>Income</u>	<u>Income</u>	<u>Income</u>
Number of Lawyers	25,879	23,137	16,802	15,864
Average Net Income	\$57,266	\$64,338	\$88,141	\$94,005"

The Consultants have mistakenly described the first two columns as related to "All income Sources", when in fact all the reproduced data purports to be only income from the practice of law.

TABLE 8

Preliminary C		
Geographic Area	Average Income	No. of Filers
Canada	\$88,000	16,802
Quebec	\$71,000	3,555
Ontario	\$101,000	7,857
Alberta	\$88,000	1,199
B.C.	\$75,000	1,959
Montreal	\$76,000	2,024
Toronto	\$109,000	3,997
Calgary	\$97,000	561
Vancouver	\$83,000	1,262

31. This is the basic data upon which the Consultants' Report is premised. Section 2/Appendix D is in fact the Preliminary Part C data minus the negative filers. Table 8 only reports incomes of just under 17,000 lawyers in private practice earning income from the practice of law across Canada, and that they earn on average \$88,000.

32. Thus far we have analyzed the CCRA 2001 data showing that a likely reason for it being so much lower than the data for 1997 is the exclusion of any income from the 7,198 high income earners across the country. Now we examine the 2001 data directly in comparison to the 1997 and 2000 data.

33. Table 9 demonstrates the differences between the 1997, 2000 and 2001 data in the 44-56 age group earning more than \$50,000, which was the comparator group accepted by the Drouin Commission.

TABLE 9

Ages 44-56 >\$50,000						
	1997		2000*		2001	
	Average Income	No. of Filers	Average Income	No. of Filers	Average Income	No. of Filers
Canada	\$181,000	7,830	\$190,000	7,144	\$141,000	5,316
Quebec	\$158,000	1,540	\$164,000	1,598	\$130,000	884
Ontario	\$200,000	3,670	\$220,000	3,486	\$149,000	2,705
Alberta	\$197,000	500	\$200,000	501	\$149,000	387
B.C.	\$177,000	1,060	\$159,000	633	\$133,000	597
Montreal	\$185,000	900	\$195,000	922	\$142,000	499
Toronto	\$247,000	2,030	\$275,000	1,990	\$166,000	1,304
Calgary	\$246,000	290	\$253,000	273	\$173,000	174
Vancouver	\$201,000	770	\$179,000	457	\$145,000	401

* See Exhibit 1 to our January 30, 2004 Report: data which excludes zero filers.

34. When examining this data, it should be noted first that using a \$50,000 threshold immediately eliminates any issue regarding the inclusion of negative filers and zero filers, since even if they are included in the original data base, the effect of using the threshold is to exclude them.

35. It can also be seen immediately that there are approximately 700 fewer filers in 2000 than in 1997, and approximately 2,500 fewer filers in 2001 than in 1997. While net income went up, as one would have expected from 1997 to 2000, in 2001 it dropped precipitously from 2000 by an average of \$51,000 across Canada, by \$109,000 in Toronto, \$47,000 in Montreal, \$80,000 in Calgary, etc.

v) Conclusion on Section 2/Appendix D Data

36. It is obvious that had lawyers' incomes declined so precipitously in 2001 as compared to the years 1997 and 2000 levels, as the Section 2/Appendix D data suggests, there would have been massive layoffs in 2001 in legal offices across the country, with concomitant declines in the economic circumstances of a large variety of affected persons.

Such a drastic depression in the legal world could not have happened secretly without everyone knowing about it. That no such events took place is perhaps the best evidence that the CCRA 2001 data showing these low incomes is due to a clerical, or coding or statistical error, and does not reflect reality.

37. The question logically arises whether the 1997 data or the 2000 data included income other than from the practice of law. Exhibit 5 to our January 30, 2004 Report contains the correspondence in respect of the 1997 data and the 2000 data in which CCRA effectively warranted that the reported data was only income from the practice of law. Moreover, the 1999 and 2000 data in its totality accords with the common understanding and knowledge of legal incomes based on the price of legal services, the expense of legal offices, the heavy workload of lawyers, and therefore the inferred approximate incomes of legal professionals. The 2001 data does not meet that test.

vi) CCRA Explanations for the Discrepancy Between the 1997/2000 data and the 2001 Data

38. To this point, we have suggested that a likely explanation for the decline in legal incomes shown in the 2001 CCRA numbers is the exclusion of the Preliminary Data A filers. However, CCRA has given other explanations, and these must be examined. The CCRA explanations are set out in letters from them to Justice and to Ogilvy Renault, and are contained at Appendix 9. We consider each of the explanations in turn.

a) Changes Explained by Inclusion or Exclusion of Zeros or Negatives

39. CCRA explains the decline in numbers in part by stating that the 1997 data included zero filers, as well as negative filers, and that removing these would in fact lower the numbers of filers.

40. It is obvious that inclusion or exclusion of negative filers or zero filers is irrelevant if an income exclusion is applied.

41. However, even when an income exclusion is applied, there are still huge discrepancies between the 1997/2000 data and the 2001 data.

42. As can be seen from Tables 1 and 9 above, even using the exclusion, there is a massive decline in the number of lawyers and a massive decline in incomes, so the differences cannot be accounted for by the presence or absence of negative or zero filers.

43. Moreover, common sense dictates that excluding negative and zero filers will increase income, not decrease it as happened here.

b) Changing the Codes

44. Up until 2001, CCRA used SIC code definitions, and in 2001, these changed to NAICS code definitions. Essentially, insofar as we can determine, the chief difference between the codes is that the SIC codes would include notaries and potentially law clerks and paralegals, whereas the NAICS codes should exclude these. Given what is known anecdotally about income levels of notaries in Quebec being lower than that of lawyers, and also the incomes of law clerks and paralegals relative to lawyers across Canada, there is no question that the effect of not including these non-lawyers in tax year 2001, if they were included in 1997/2000, should be to increase incomes, not decrease them. However, the result is exactly the reverse. Only if one believes that notaries, paralegals and law clerks earn much more than lawyers does the CCRA change to NAICS codes explain the decline in income.

c) Confusion in the Codes

45. The CCRA SIC Code Definitions (2000 and prior) were as follows:¹⁷

776–Offices of Lawyers and Notaries
7761–Offices of Lawyers and Notaries
Establishments primarily engaged in the provision of legal advice or legal services.

Advocates
Attorneys, private practice
Barrister services
Lawyers, private practice
Legal services, lawyers and notaries
Notary services
Patent services
Solicitor services

46. The NAICS Codes are¹⁸:

5411 Legal Services

This industry group comprises establishments primarily engaged in providing legal and paralegal services. Examples of establishments in this industry group are offices of notaries and offices of paralegals

54111 Offices of Lawyers

This industry comprises offices of legal practitioners, known as lawyers, barristers and solicitors, primarily engaged in the practice of law. Establishment in this industry may provide expertise in a range of, or specific area of law, such as criminal law, corporate law, real estate law, family and estate law, and intellectual property law.

Exclusion(s):

-offices of notaries (54112, Offices of Notaries); and
-offices of legal and paralegal practitioners, except offices of lawyers and notaries (54119, Other Legal Services.)

¹⁷ Attached as Appendix 10.

¹⁸ Attached as Appendix 11.

541110 Offices of Lawyers

See industry description for 54111 above.

47. The definition of NAICS codes 54112 and 54119, which are excluded from Offices of Lawyers, are:

54112 Office of Notaries

This industry comprises establishments, except offices of lawyers, primarily engaged in drafting and approving legal documents, such as real estate transactions, wills and contracts, and in receiving, indexing and storing such documents.

Exclusions(s):

-offices of legal and paralegal practitioners, except offices of lawyers and notaries (54119, Other Legal Services); and

-offices of notaries public engaged in activities, such as administering oaths and taking affidavits and depositions, and witnessing and certifying signatures on documents, but not empowered to draw up and approve legal documents and contracts (54119, Other Legal Services).

54119 Other Legal Services

This industry comprises establishments of legal practitioners, not classified to any other industry, primarily engaged in providing legal and paralegal services.

Exclusions(s):

-offices of lawyers (54111, Offices of Lawyers); and

-offices of notaries (54112, Offices of Notaries).

Example Activities

Bailiff services

Immigration consultant

Land and/or title search, service

Notaries public, private practice (outside Quebec)

Paralegal services

Patent agent services (i.e., patent filing and searching services)

Process server

Settlement offices, real estate

48. 2001 was the first year that the NAICS codes were used and they are to some extent, confusing:

- i) It would appear that legal services other than lawyers would come under 54112 (notaries) and 54119 (offices of legal and paralegal practitioners except lawyers and notaries). However, 5411 seems to also be for notaries and paralegals as opposed to lawyers, whereas 54111 is for lawyers. 541110 is also for lawyers. Why there is a code 5411 for notaries and paralegals as well as 54119 and 54112 is unclear.

- ii) We do have a concern that filers may have used the wrong codes, or not used codes at all. 2001 was the first year the NAICS codes were used. It is our understanding that using the NAICS code is only mandatory if one is filing the tax return electronically. Further, it is our understanding that there are a large number of filers who file paper returns, even when electronic filing is easily available. Moreover, as CCRA implicitly concedes in its letters at Appendix 9, filers who file electronically could enter an incorrect SIC/NAICS code.

- iii) CCRA has said in its letter that “not all the industry codes are captured for paper filers,” and while we are unclear what this means, it is our understanding that many paper filers file without the codes. We understand that tax returns filed without the code are not returned. In short, a paper form would not be rejected if the NAICS code was left blank, and it is possible that many tax preparers might not bother to fill it out as it has no bearing on taxes payable.

- iv) In addition, we understand that there is considerable variation in the extent to which NAICS codes might be filled out in any individual case:
 - a) CCRA Form T2032 (Appendix 12) is generally used to report professional income and could be used either in the form of an income statement or to report income from a T5013 Form.

 - b) A T2032 Form has a box for a NAICS code, but as set out above, if the taxpayer is not filing the return electronically, it does not need to be filled out.

- c) A T2032 Form would typically be used by a partner where he/she has personal expenses to deduct in addition to that of the partnership. If there were no such expenses, and there often are not, then the Form may not be used at all, and therefore no NAICS code used.
- d) A T5013 Form (statement of partnership income) (Appendix 13) is required to be filled out by partners in firms with more than five partners, but not otherwise.
- e) In 2001, CCRA apparently asked sole proprietors and partners who did not receive a T5013 Form to fill out a T2032 Form. However, the CCH Publication¹⁹, which is typically used by professional tax preparers, indicated that the use of the T2032 Form was optional. Accordingly, some taxpayers may have simply attached their own financial statements to the return, and therefore not included a NAICS code.
- f) In addition, we are advised that the tax preparation program widely used by professional tax preparers called "TaxPrep" had a different Form, namely T2130P "Reconciliation of Net Income (Professional)" (Appendix 14), that may have been used by some lawyers (likely sole proprietors) instead of the T2032. The T2130P had no space for the NAICS code.
- g) The T5013 Form, which an individual partner taxpayer would receive from their firm (see Appendix 15) contains no box for a NAICS code. Accordingly, if the individual taxpayer was filing his or her own return, they would likely not use the code, or be uncertain as to what code to use, causing potential errors.

¹⁹ "Preparing Your Income Tax Returns – 2002 Edition for 2001 Returns".

- h) Where a taxpayer has more than one T5013 Form, as where there is, for example, tax shelter income, along with legal partnership income, there are the following possibilities:
- a) the filer has additional personal expenses, in which case the T2032 Form is used as set out above; or
 - b) there are no additional expenses and the taxpayer would only file a summary of T5013s as attached in Appendix 16, as a paper file, and it does not contain a NAICS code.
 - c) if there are no additional expenses, and the taxpayer files electronically, they would input their T5013s into the TaxPrep program which has an input cell for the NAICS code, as set out in Appendix 13, and the code would be included as part of the Efiled return.

49. However, it is our understanding that where an individual filer fails to self-code, CCRA will often assign a code during the processing of tax returns. We are concerned, however, with how CCRA itself may have coded returns that did not contain a NAICS code, what procedure it used and how it treated files where it could not determine whether they were income from the practice of law or not.

50. We are also concerned that CCRA itself may have used the wrong codes in producing the data. CCRA, in its letter²⁰, said it used code 54110 (5 digits) not 541110 (six digits). If 54110 is the same as 5411, which is the code for notaries and paralegals, then perhaps there have been coding errors. CCRA also said that it used code 54111, but it did not say that it used 541110, which was also for offices of lawyers. If it did not search for 541110, it is entirely possible that it missed many lawyers. Once again, it is noted that the

²⁰ Correspondence from CCRA to Justice, Appendix 9.

TaxPrep program (at Appendix 7) used the code 541110 for lawyers, and it appears particularly material, therefore, that CCRA said it searched for 54110 not 541110.

51. We are concerned that smaller firms and sole practitioners across Canada, but particularly in western Canada, may have had incorporated companies that operated their practice of law, and it is unclear whether those lawyers would have been found in these files.

52. To summarize, we do not find the CCRA explanations as to the reduced number of filers and/or the reduced income of lawyers in 2001 as compared to earlier years to be convincing for the following reasons:

- i) The elimination of zero filers would tend to increase income of the remaining group, not decrease it.
- ii) The elimination of negative filers would tend to increase the income of the remaining group, not decrease it.
- iii) The removal of clerks, paralegals and notaries would tend to increase the incomes of the remaining group of lawyers, not decrease it.
- iv) There appears to be general uncertainty, confusion and a variety of practices concerning the use or non-use of NAICS codes. Notwithstanding the general confusion over the use of NAICS codes, one would have thought it more likely that variations caused by that confusion would be spread relatively evenly amongst all levels of income earners. However, what appears to have happened in 2001 is that high income earners only appear to have been affected as they are the ones excluded by CCRA.

- (v) Thus, we are concerned that some general systemic factor may have resulted in the exclusion of 7,198 high income practising lawyers, and the inclusion of 16,800 lower income practising lawyers, such that the data for 2001 is flawed and unreliable.

B. Even if the Data is Correct, the Consultant's Analysis is Flawed

53. In our view, even if the data utilized by the Consultants were correct, the analysis utilized with respect to the data is flawed. Essentially, the primary analytical failure is not using either the methodology or the comparator group accepted by the Drouin Commission. This error has essentially two components: (1) the failure to use the \$50,000 threshold; and (2) the failure to use the same age 44-56 comparator group. Below we consider each of these in turn.

(1) The Failure to Use the \$50,000 Threshold

54. In all of their analysis, the Consultants have not used the \$50,000 threshold. Accordingly, they include lawyers in private practice whose relationship with private practice is so marginal that they would not accumulate the expertise, judgement, and experience necessary to be appointed to the bench, and are simply not part of the same group that is the real pool of candidates to the bench. Also, the Drouin Commission analysis accepted the use of the \$50,000 threshold, and ignoring it now undermines any meaningful comparison over time between the group the Drouin Commission found to be the comparator group, and any other comparator group.

55. The Consultant's reasons for departing from the \$50,000 exclusion are twofold, as far as we understand them. The first is that from a statistical point of view, if one eliminates the lower group of income earners, one should also eliminate the highest group. A second reason is that those who earn under \$50,000 because they have made a lifestyle choice to raise a family or take care of older family members, or for other personal reasons, are not necessarily unsuitable candidates for appointment to the bench.

56. We strongly disagree as to both reasons.

57. With respect to the first reason, one purpose of the entire Commission exercise, as we understand it, is to encourage outstanding candidates to put themselves forward for appointment. Given the nature of the legal profession and the economics of private practice, many outstanding candidates are high earners in large metropolitan areas. It undermines the objective of the exercise of being able to attract such candidates to ignore the reality of the earnings of the highest earners amongst lawyers. Moreover, disregarding the highest earners or the assumption that they will not be attracted to the judiciary because of a loss of income simply accepts that there will be a chilling effect on the highest income earners. Again this runs contrary to the objective of attracting outstanding candidates to the bench.

58. Moreover, while we agree that some lawyers who earn below \$50,000 in any particular year may do so for lifestyle choices in order to raise a family or take care of older family members, or for other personal reasons, we suggest that this would be a temporary choice for those who would successfully seek a judicial appointment. In order to be considered appropriate candidates for the bench, lawyers will very likely have to work full-time in order to gain the necessary experience, reputation and judgement. If these part-timers are lawyers who have worked full-time sufficiently to gain the necessary reputation, experience and judgment to be considered for an appointment to the bench, they would consider, for comparison purposes, their earning potential on a full-time basis in private practice, not what they are currently earning on a temporary basis because of the temporary lifestyle decision they had made. The lower income does not represent the true earning capacity or the competitive reality of the choices that individual would make to go to the bench or not. Thus, it is only reasonable to look at the income for full-time practitioners because permanent part-timers are very unlikely candidates for the bench. Perhaps even more fundamentally a judicial appointment is a full-time job and it is therefore inappropriate to compare judicial salaries to part-time income.

(2) Abandoning the Comparator Group

59. The second difficulty with the Consultant's approach is that they move away from using the age 44-56 comparator group, and instead construct a weighted 75th percentile based upon the weighted age of appointments of judges since 1997. In taking this new approach, the Consultants have not criticized as inappropriate or wrong the approach taken and accepted by the Drouin Commission. If nothing is wrong with the Drouin approach, why not follow it? And why invent another approach? The primary difficulty is that failing to use the age 44-56 comparator population utilized by the Drouin Commission, makes comparison between the same group over the years impossible. In other words, it is helpful to have a constant standard and to apply it over time. This is particularly true with the use of the 44-56 comparator where at the time it was developed the age 44-56 grouping represented approximately 70% of appointed judges in the previous ten years, and where since 1997, 85% of the new appointments have been made in that group. In other words, there is simply no basis to change from the use of the 44-56 comparator population.

(3) The Consultant's Methodology for Determining the Value of Judicial Annuities

60. We note that just as the Consultants took a different approach to determining the comparator group and the use of the threshold from that taken by the Drouin Commission, so too they took a different approach to the question of annuities. We requested that Eckler Partners Limited comment on this approach, and their comments are set out below:

"The approach used by the Government consultant (Western Compensation & Benefits Consultants) is to first determine the level percentage of salary required for judges appointed at various ages, in addition to the judge's own contributions, to fund (through a tax-sheltered arrangement) the annuity which the judge will receive at retirement. This cost ranges (based on the assumptions used by the consultant) from 17.2% of salary for judges appointed at ages 40-44 to 54.8% of salary for judges appointed at ages over 64. The second step was to weight those percentages of salary by the percentage of judicial appointments in 1997-2003 in the various age brackets (e.g., 6.9% of appointments in that period were at ages 40-44 and 0.6% were at ages over 64), to give a weighted average cost to the employer (and value to judges) of 24.0% of salary.

There is a flaw in the second step of this approach. While judges appointed at ages 40-44 may have represented only 6.9% of new appointments, one would expect such judges to represent a higher percentage of the current "population" of judges, given that judges appointed at lower ages can be expected to serve for longer periods than judges appointed at higher ages. Accordingly the percentage of the current population who were appointed at ages 40-44 is probably more than 6.9% and the percentage of the current population who were appointed at ages over 64 will be less than 0.6%, as more of the latter group will have retired. A more appropriate weighting would be based on the percentages of the current judicial population who were appointed at the various ages, and that would result in a lower total cost as a percentage of salary. Unfortunately it is not possible to say in the absence of actual data what the impact would be of weighting based on such percentages, but I would expect the weighted average cost to the employer to be materially lower than 24.0% of salary."

C. General Conclusions

61. In summary, we conclude as follows:

1. The 2001 data relied upon by the Consultants is so out of keeping with our knowledge of the realities of the economics of the private practice of law that it appears obviously flawed and unreliable.
2. The 2001 data is completely inconsistent with the 1997 and 2000 data, which was essentially warranted previously by CCRA as accurate.
3. Our knowledge of the realities and economics of the private practice of law lead us to conclude that the 1997 and 2000 data is accurate, not the 2001 data.
4. If the Preliminary Part B Data represented the incomes of lawyers in private practice in 2001, then those incomes would be significantly higher in 2001 than 1997 and 2000, and while we cannot perform an exact calculation, it is clear from the data that this would apply to the comparator group and to the 75th percentile in that group.

5. The exclusion of the 7,198 high income lawyers in the Preliminary Part A Data is inconsistent with the data from the Law Society of Upper Canada, the number of lawyers previously reported by CCRA in 1997 and 2000, and is also inconsistent with the realities of our knowledge of the legal profession. In particular, we cannot explain who these lawyers are who have no income from the practice of law, but with very high other professional income. Therefore we would require compelling, overwhelming evidence that these were not lawyers in private practice.
6. The explanations given by CCRA to explain the lower number of filers and lower incomes in 2001 as compared to 2000 and 1997 are not credible or persuasive with respect to negative and zero filers, or the use of new and different codes.
7. Even if the 2001 data were correct, the analysis carried out by the Consultants is flawed because it ignores the \$50,000 threshold relied upon by the Drouin Commission, and deviates from the approach of finding an appropriate comparator group, which was also accepted and utilized by the Drouin Commission. Moreover, the approach taken towards the calculation of judicial annuities is also flawed, because it exaggerates the weighted average cost to the employer as a percentage of salary.
8. As set out in our original report dated January 30, 2004, the 2000 data is credible and consistent with the 1997 data. It is also consistent with our general knowledge and understanding of the economics of the legal profession. Combined with reasonable assumptions about the growth in legal incomes since 2000, the conclusion that legal incomes by 2004 have risen significantly above 2000 levels as set out in our earlier report is credible and sustainable.