IN THE MATTER OF THE JUDGES ACT, R.S.C. 1995, c. J-1, as amended.

QUADRENNIAL JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUPPLEMENTARY REPLY SUBMISSIONS OF THE GOVERNMENT OF CANADA

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INTRODUCTION

1. The Government regrets that it and the Judiciary have been unable to resolve what appear to be the misunderstandings regarding the circumstances in which the pre-appointment income (PAI) study was prepared. The exchange of correspondence, attached as Annex A, demonstrates that the suggestions at paragraphs 16-18 of the Judiciary's Supplementary Reply are unfounded.

2. In particular with respect to paragraph 16, on March 7, 2007, CRA proposed to the Department of Justice the potential for a pre-appointment study in response to the recommendation of the McLennan Commission that such a study would be of assistance. No decision was made to conduct such a study, and no instructions were given to CRA to proceed with its March proposal, until after June 8, 2007, as set out in the correspondence at Annex A. It is unfortunate that this misunderstanding regarding the March meeting appears to have resulted in the inaccurate suggestion that the Government instructed CRA to commence the study prior to June 8.

3. The foregoing being said, the Government makes several principal submissions in response to the Judiciary's Supplementary Reply Submission to the effect that the pre-appointment income data ("PAI") is reliable. The relevance and reliability of a study of pre-appointment income data was recognized by the McLennan Commission:

> This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the incomes of those lawyers who are appointed to the judiciary.
>
> There are many ways this could be done: ...statistical evidence could be gathered over time from those who are appointed to the Bench in a way that would preserve their anonymity and privacy...[1]

[1] *Judicial Compensation and Benefits Commission Report*, May 31, 2004 (Report), p. 92. See Annex B.

RELIABILITY OF PAI

4. There is no foundation to the Judiciary's assertions that the PAI study is unreliable.

5. The first reason stated in the Judiciary's Supplementary Reply in support of the unreliability of the PAI is that the judiciary does not have access to the underlying data - the individual tax returns - upon which the study is based. That is true. The Government, outside of CRA itself, and in particular the Department of Justice for purposes of this Commission also had no access to the underlying data. Such access is prohibited by law. The *Income Tax Act* permits the aggregation of taxpayer information only where to do so does not permit the identification of individual taxpayers. Section 241(4)(g) provides that a CRA official may:

> (g) use taxpayer information to compile information in a form that does not directly or indirectly reveal the identity of the taxpayer to whom the information relates;

6. It is also noteworthy that the Judiciary did not provide the Government with access to the individual surveys completed by participants of the Navigant Survey, but only to some of the aggregated raw survey results.

7. The Government survey design expert, Dr. Cam Davis, was nevertheless able to identify significant methodological weaknesses which are clear on the face of the design and execution of the Navigant Survey. The Navigant Survey is not unreliable merely because the Government was denied access to the underlying data.

8. The Judiciary also suggests that the pre-appointment income study is unreliable because some appointees had significant variations of annual incomes during the five-year period.

9. Variability in incomes from year to year can be expected. The CRA Masterfile Database, which tracks self-employed lawyers' incomes through to 2005, confirms that these incomes indeed vary widely from year to year. The practice of law is susceptible to peaks and valleys in the business cycle of the broader economy. In fact, that is one of the attractions of judicial office where judges are insulated from such income variability.

10. A five-year window was selected to smooth out the effect of fluctuations in self-employed lawyers' incomes. If the reference point was only the year prior to appointment, the

variability would be higher. For example, if the appointee in question had taken a maternity leave in the year prior to appointment, it is possible that the appointee's income would be nil. Consequently, the methodology used (the five-year window) averages the effects of events such as maternity leaves whereas reliance on a single reference year might yield zero incomes.

11. The suggestion that some incomes for self-employed lawyers are "improbable" is without merit. Among the entire population of self-employed lawyers in 2005, the CRA Masterfile Database demonstrates that 28% had net incomes under $60,000. It is not improbable that an appointee to the Bench could have a pre-appointment income of less than $60K.

12. The PAI study establishes that 19% of all appointees had pre-appointment net incomes that were less than half of a judicial salary. The statistical breakdown for appointees who had been self-employed lawyers is 18%, and for appointees who had been employed lawyers is 21%. Both employed and self-employed lawyers with modest incomes are appointed to the Bench in similar proportion.[2]

13. The Government does not agree with the following statements in the Judiciary's Supplementary Reply:

> 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 makeup of the Bench is required, employed lawyers must also be appointed. (para. 34)

The fact is that 22% of judges are appointed from the ranks of lawyers who are not in private practice.

[2] At paragraph 38 of the Judiciary's Supplementary Reply, the Judiciary also takes issue with use of median values. But in fact the principal findings of the pre-appointment income study were expressed in terms of mean values, not medians.

CONCLUSION

14. In conclusion, the PAI study was properly undertaken, and is both reliable and relevant to the question of adequacy of judicial compensation.

All of which is respectfully submitted this 19th day of February, 2008.

Neil Finkelstein per CBF

Neil Finkelstein

Catherine Beagan Flood

Blake, Cassels & Graydon LLP
Counsel for the Government of Canada

ANNEX A

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December 12, 2007

Our File Number: 2-367209

VIA EMAIL
(ORIGINAL TO FOLLOW BY REGULAR MAIL)

Ogilvy Renault, LLP
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Attention: Pierre Bienvenu

Dear Mr. Bienvenu:

Re: Quadrennial Judicial Compensation and Benefits Commission

I refer to our conversation on Monday, December 10, wherein you outlined the deeply held concerns of your clients with respect to the Government's intention to rely on the pre-appointment income of superior court judges appointed after 1994 before the 2007 Quadrennial Commission. In the course of our discussion you also advised as to the long-term negative consequences the use of this data might have for the relationship between the judiciary and Government. These are weighty and serious matters, and I assure you that they, and the Government's approach throughout this process, have been given close and serious consideration.

Relevance

Let me begin with the question of relevance of this information to the Commission process. The 2003 Quadrennial Commission identified pre-appointment income as one of the most accurate and reliable sources of information available to the Commission:

> This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the incomes of those lawyers who are appointed to the judiciary.
>
> There are many ways this could be done:...Statistical evidence could be gathered over time from those who are appointed to the Bench in a way that would preserve their anonymity and privacy....(*Judicial Compensation and Benefits Commission Report*, May 31, 2004, p. 92.)

Similarly, the judiciary's independent survey of income levels seeks, in some measure, to establish the very information that is the object of the CRA pre-appointment income exercise. Given that both parties believe that this information is relevant, it is incumbent on counsel to explore the feasibility of adducing it in a principled and fair manner.

Appropriateness/Legality

Relevance aside, the core of our discussion turned on the propriety of CRA's collection of this information. You expressed to me that your clients feel that the fact that CRA examined individual tax returns of all appointees since 1994 constituted a breach of their privacy interests and that it was inappropriate for them to do so. The Government does not agree.

The Department of Justice would not, ever, nor would I personally, permit the use of evidence that was collected in a manner inconsistent with the legislative, regulatory and policy framework governing the use of taxpayer information. All CRA officials operate under strict legislative and policy controls governing access and use of taxpayer information, the breach of which can result in dismissal and criminal sanctions, including fine or imprisonment. The suggestion that the use of the information is inappropriate, is therefore, a serious issue.

We have been assured that the collection and provision of this data in its aggregated form is within the express scope of the CRA's statutory authority and has been done in a manner consistent with applicable requirements. We have also been advised that the collection and production of this kind of information is integral to CRA's operations, and that CRA, as a matter of long-standing practice, prepares profiles of narrow occupational groups on request by external clients from both private sector and governments.

As a result of your concerns, we have revisited the issue with CRA and are satisfied that the disclosure of this information in this form is a fully acceptable practice consistent with the provisions of the *Income Tax Act* and the *Privacy Act.* As part of our invitation to open a dialogue between the judiciary and the Government on this issue, which I will elaborate upon below, I would be pleased to provide you with an appropriate contact within CRA should you wish to explore the legal and policy framework governing the use of taxpayer data more fully.

Disclosure

The second major concern which you identified was the absence of early disclosure between counsel. You indicated that the data was not developed in a full and collaborative matter as was the case for the CRA master file data. However, the pre-appointment study was a completely separate exercise from the creation of the Master File and undertaken as an additional means of providing information relevant to the Commission.

In this regard, you will recall that we were surprised at the disclosure on June 8th, of your clients' decision to proceed with an independent survey of lawyers to determine income levels. When we expressed concern that this was not consistent with our vision of the shared and collaborative process, you advised that the parties were free to pursue any other additional means of adducing relevant data. Indeed, I recall that you had discussed this with M. Yves Fortier who said that he did not think that the collaborative nature of our work was exclusive of other independent initiatives by the parties. I indicated in several subsequent discussions that our principals remained disappointed in this position which was seen as a departure from what was understood to be the nature of our collaboration. We nevertheless undertook from the CSJA's decision to survey income levels that there were clear limits to collaboration.

The Government had given some thought to the kind of mechanisms that might be used to determine pre-appointment income early in the process. Indeed, at our meeting with the Deputy Minister and your clients on February 9, 2007, Judith Bellis specifically mentioned that it might be useful to respond to the 2003 Commission's expressed interest in having pre-appointment income information. Subsequent to the June 8 meeting and partly in consequence of the judiciary's decision to conduct an income survey, we asked CRA to advise whether the pre-appointment income of superior court judges could be identified and produced in a manner consistent with CRA's legislative and policy framework governing the use of tax information.

In terms of specific advice of our intentions, on October 5, 2007, I advised you that we had asked CRA to consider the feasibility of their undertaking this kind of work in a reliable manner consistent with its statutory obligations, but that no decision had been taken on whether or how it might be used.

In terms of actual timing, because the pre-appointment study was a separate exercise which we understood could be prepared fairly quickly, and the Master File was the clear priority, we asked CRA to finish that work. The Master File was delivered on October 16, 2007 and CRA then moved to address and complete the pre-appointment study. CRA delivered the study on November 6, 2007. Following some clarification of the data, the pre-appointment study was transmitted to you on November 21, 2007. A revised report was sent to you on December 11 to correct a minor technical error.

Resolution

In sum, it is the Government's position that the evidence on pre-appointment income of judicial appointees is relevant, reliable and has been collected and produced in a principled manner.

That said, you and I have, from the outset of our collaboration on this case, attempted to ensure that this process be conducted in a manner consistent with the important public interest that the process is designed to serve. Our communications throughout have been cordial, transparent and professional. It is my desire, and intention, that they should remain as such. Because of the importance the Government places on the Commission

process and that the Department places on the highest level of professionalism in its dealings, we accept that you and your clients feel that the issue of pre-appointment income has not been fairly raised. Therefore, consistent with the Government's commitment to this process and consistent with my approach to the practice of law, we will not make any reference to pre-appointment income in our opening Submission, but reserve our right to do so in our Reply submission. This will provide an opportunity for you to make such further inquiries of us with respect to methodology and to engage in such further dialogue with counsel or between the parties themselves as may be necessary.

Subject to what discussions may subsequently ensue between counsel, we would exchange submissions on the pre-appointment income data on January 28, the date fixed for Reply. Within the context of that discussion, we are open to considering mechanisms by which this information might be brought before the Commission in Reply submissions in a manner that mitigates your clients' concerns about public disclosure of pre-appointment income.

I look forward to hearing from you.

Yours truly,

Donald J. Rennie
A/Assistant Deputy Attorney General (Litigation)

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ORIGINAL BY MAIL

Montréal, December 28, 2007

Donald J. Rennie
Assistant Deputy Attorney General
Department of Justice
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Mr. Rennie:

RE: CRA income data of superior court judges

I write in response to your letter of December 12, 2007 regarding the above-captioned matter.

Allow me first to thank you for the promptness and seriousness with which you have addressed this pressing and important matter.

Your letter sets out three issues: relevance, appropriateness/legality, and disclosure. I will address these in turn, but I would add methodology and due process to the list of issues arising from the Government's collection and proposed use of CRA data concerning the pre-appointment income of superior court judges.

1. Relevance

In your letter, you state that "the judiciary's independent survey of income levels seeks, in some measure, to establish the very information that is the object of the CRA income exercise." While it is true that both endeavours seek to establish the income of, among others, self-employed lawyers, there is a significant distinction between the relevance of the judiciary's independent survey and that of the CRA income data. The former attempts to determine current income levels among private-sector lawyers who are eligible to be appointed to the judiciary, whereas the latter attempts to determine historical income levels among lawyers who were actually appointed to the judiciary.

To the extent that the latter exercise seeks to show that a number of those who accept appointments earn less than judges, it simply proves that higher-earning lawyers are not attracted to the judiciary. Accordingly, if one were to rely on this data to support the argument that the current judicial salary level is adequate, there is a risk, assuming the data accords with reality, that the existing pattern will be self-perpetuating and that higher-earning lawyers will continue to be disinclined from accepting appointments.

In short, and notwithstanding the comment that you quote from the McLennan Report, the relevance of the income data is limited since it does not speak comprehensively to the statutory requirement of having a salary level that is adequate to attract outstanding lawyers to the judiciary.

2. Appropriateness/Legality

Your letter's discussion of the appropriateness and legality of the collection of the income data conflates the two concepts. There is a difference between appropriateness and legality, and our clients disagree with the contention that if the data collection is legal, such collection, as well as the eventual disclosure and use of the data before the Commission, are necessarily appropriate.

Having already indicated that our clients' primary objection is based on appropriateness not legality, I defer discussion of legality to another day. For present purposes, I can only reiterate that our clients feel strongly that the collection of the data was inappropriate. Our instructing judges have discussed the matter among the leadership of both the Superior Courts Judges Association and the Canadian Judicial Council. The reaction has been one of utter incomprehension as to how the Government could permit itself to submit a list of specific appointees and ask CRA to generate data regarding those specific individuals' income.

There is a critical difference, we believe, between preparing profiles of "narrow occupational groups", as you describe one of CRA's mandates, and preparing profiles of actual, identifiable individuals. In the present case, a list of 627 names was submitted to CRA so that it could look into the tax history of those particular individuals and compare their incomes with the incomes they went on to earn as judges.

The perceived inappropriateness of the exercise extends beyond the fact that specific names were handed over to CRA. There is also the reality that the party handing over the list to CRA is the Government itself, and that CRA is a State organ that is part of the Government and that has coercive powers to collect the data now being sought by the Government. The imbalance between the Government and the judiciary further fuels the sense that the collection of the income data was inappropriate.

The Government should also give serious consideration to the way the income data will be received by the public and by politicians, bearing in mind the Supreme Court of Canada's

caution against the danger of politicization of judges' compensation. Even if the judiciary is ultimately successful in casting doubt on the reliability and validity of the data, that can of course only occur after the data has been made public. There is a significant risk that the data will in the meantime acquire a life of its own in the public domain, with certain politicians and members of the public twisting the data to advance the notion that appointments are accepted by those who seek to increase their salary but are unable to do so on their own as self-employed lawyers. The Government needs to consider what this will do to the administration of justice and how litigants will perceive judges.

The concern arising from the collection and contemplated use of this data can perhaps be conveyed by putting it in comparative context. What would the reaction of members of Parliament be if their pre-MP income was collected as part of the exercise of determining adequate compensation for MPs? Not only would this be irrelevant as a determinant of adequate compensation, it would also be seen, we submit, for the violation of privacy that it is.

3. Disclosure

Your letter's discussion of disclosure equates disclosure with collaboration. You seem to imply that since the judiciary chose to conduct a survey of self-employed lawyers' income (the "**Navigant survey**") independently of the Government's research endeavours with the CRA, that this somehow justified non-disclosure of those endeavours. Yet, as you acknowledge in your letter, regardless of the judiciary's decision to conduct the Navigant survey independently, I nonetheless disclosed to you on June 8, 2007 the fact that the judiciary intended to do so. Therefore, the Navigant survey was non-collaborative but disclosed. In contrast, the Government's pre-appointment income data collection was both non-collaborative and non-disclosed.

I think it is worthwhile to provide greater detail about our meeting of June 8 since it sheds some light on the issue of disclosure. You will recall that you were quite pressing in your request that the results of the Navigant survey be shared with the Government. I made the point that we would only share them if Navigant came to the conclusion that they were reliable. If we turn the tables, I was not even in a position to press you about sharing the Government's results on pre-appointment income data since I was not informed, either on June 8 or afterwards, that the Government intended on collecting this data. The Government's failure to give us prior notice of its intention to collect the CRA income data was inconsistent with the kind of transparency that was expected from us on June 8.

You write that you informed me over the telephone on October 5, 2007, that the Government had asked CRA "to consider the feasibility of their undertaking this kind of work" but that no decision had been taken on whether or how it might be used. As I indicated to you recently, while I recall your mentioning that the Government was in the process of collecting salary information of public-sector lawyers, I do not recall any mention of pre-appointment income data

of judges. Although I would not, and do not, question the statement that you made mention of it, the fact is that the type of disclosure referred to in your letter would be inadequate and certainly insufficient to allow us to react to the intended collection and possible use of such data.

Finally, the fact of the matter is that we received the income data from you on November 21, 2007. It would be one thing to receive such data some 3 weeks before the filing deadline with the Commission if there had been prior notice that this data was on its way. It is another thing altogether for this data to have been unsuspectingly sprung upon us without having had any opportunity to comment upon the methodology developed to collect and report on this data, and without being in a position to make prior arrangements with our experts to analyze the data.

4. Methodology

As Mr. Kwasi Tuafo of CRA is aware already, we have questions about the methodology used in collecting and reporting the income data. You will find in an annex to this letter a list of the questions we currently have regarding methodology and the data collection process. Some of these questions have already been posed to CRA, but no response has yet been received. Please feel free to share the annex with the CRA representative charged with answering them, and kindly impress upon him the need to deal with our questions promptly.

5. Due Process

The fundamental substantive objection to the proposed use of this data before the Commission relates to due process. We suspect that CRA will decline to respond to some of the questions on our list of methodological questions because of confidentiality concerns. This highlights the intractable position in which the Government has put the judiciary: it has collected data that the judiciary considers to be in violation of its members' confidentiality, and when the judiciary seeks further information to test the validity and reliability of that data, it is met with the shield of confidentiality. The judiciary is put in a double-bind: it is being told that the current data passes whatever statutory confidentiality test is applicable, but any attempt to understand the data by isolating its component parts will be considered off-limits.

This results in a violation of due process. The nature of information proposed to be used by one party is such that the other party is deprived of the ability to test its accuracy. The only alternative for the judiciary would be to turn to the 566 judges whose incomes have been aggregated by CRA, and seek from them voluntary disclosure of their pre-appointment income. That is not an investigation that the Association and Council should be compelled to embark upon, and even if they were inclined to do so, the reality is that it is now too late in the game for the results to be used before this Commission.

Conclusion

I have tried to set out in as succinct a manner as possible our clients' response to your letter of December 12 as well as their continuing concerns about the Government's collection of the pre-appointment income data.

As I have conveyed to you already, our clients have instructed me to request an urgent meeting with the Deputy Minister so that the judiciary's concerns can be expressed directly to him.

Yours truly,

Pierre Bienvenu

Encls.

OGILVY RENAULT

LLP / S.E.N.C.R.L., s.r.l.

ANNEX

Methodological questions in relation to the CRA income data

(Some questions listed below were the subject of e-mails sent directly to CRA, and are reproduced here for the sake of completeness.)

1. Breakdown by province, territory and CMAs.

   Please provide a breakdown of the data based on province, territory and the top 10 CMAs.

2. Gender breakdown.

   Please provide a gender breakdown of all the self-employed lawyers covered in the table on income salaries, and provide

   a) an average income for the female self-employed lawyers,
   b) an average income for the male self-employed lawyers, and
   c) the gender proportions (% men, % women) for the appointees.

3. Calculation of the income average for each appointee.

   a) For negative income in any given year, was that negative figure added to the other income figures when calculating the average? If so, what is the rationale behind such an approach?
   b) Is it correct to say that no distinction was made between professional income and business income, such that if a well-paid self-employed lawyer lost money on stocks in a given year, that loss would be included for the purposes of the present results and would serve to bring down the total income of that lawyer?

4. Last year before appointment.

   Please provide a comparison with the last year prior to appointment rather than the 5 years prior to appointment.

5. Income splitting.

   How has CRA taken into account the fact that lawyers in private practice are in a position to, and often do, structure their affairs to achieve a measure of income-splitting with other family members or family-owned entities such that a portion of the consolidated profit from a professional business often accrues to taxpayers other than the lawyer in question?

6. Cutoff dates.

   What is the significance of having two cutoff dates: "active as of 18 May 2007 or 13 July 2006"? Why not just have one date?

7. Averages for the self-employed category for each of the years of appointment.

   For 1995, we are told that the median figure for the 5-year average income of the 41 appointees was 72%, i.e. the midpoint judge had an average income in the 5 years prior to appointment that was 72% of post-appointment salary. Instead of the median, please provide the average. So instead of the midpoint judge, please calculate how much the average judge in 1995 earned as a percentage of post-appointment salary.

8. Process to collect the data.

   a) When did the Government first contact CRA with regard to the collection of income data?
   b) How was the request made for the collection of income data?
   c) Who made the request?
   d) How was the methodology developed?
   e) Who developed the methodology for the Government and for CRA?
   f) Were there discussions regarding the methodology? When did they take place and who participated in the discussions?
   g) How many meetings took place between CRA and the Government regarding the exercise of collecting the income data and the analysis of the data, once obtained?
   h) When was the first set of income data provided by CRA to the Government?
   i) Was that first set the same as the data provided in the letter of November 21, 2007? If not, please provide the first set.
   j) Prior to the communication of the data on November 21, 2007, was the Government allowed to comment upon the data? Was the data re-worked by CRA following these comments? In what way?

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January 10, 2008

Our File Number:

SENT VIA EMAIL

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Attention: Pierre Bienvenu

Dear Mr. Bienvenu:

Re: Quadrennial Judicial Compensation and Benefits Commission

Thank you for you letter of December 28, 2007 in which you elaborate on the basis for your client's concerns with respect to the CRA study of pre-appointment income of judges. As much of your reply is essentially responsive to my letter of December 12, 2007, I will simply offer some points of clarification at this time.

Under the heading "Relevance", and your observations as to the relevance of the income data on actual appointees as opposed to eligible candidates, I can only say that we remain of the view, as did the 2003 Commission, that evidence of this nature is both relevant and probative. Ultimately, the relevance of this data is an issue for the Commission to consider and assess.

I would make two points in terms of the comments under the heading "Appropriateness/Legality". First, specific judges were not identified through an arbitrary or discretionary process. Rather the inquiry was framed on the basis of publicly available data with respect to an objective question: what judges were appointed to the bench during the specified time-frame. No private identifiers were relied on, and no

privacy interests were affected. We therefore continue to fail to see the basis for your client's objection to the assembling of that information.

You have also characterized the CRA as a "State organ" with coercive powers. We assume that this implies that your client does not accept the assurances that have been provided as to the legality and appropriateness of the CRA actions. More troubling, it appears to infer that there may have been some inappropriate interference in the exercise of CRA's statutory functions. The Government is fully satisfied that this inquiry, both in its formulation and methodology, is unremarkable and consistent with CRA's strict legal and policy framework governing the use of taxpayer information. Nor has there been preferential access by the Department of Justice to CRA services. Indeed your client or the Commission could have commissioned the exact same study from the CRA.

We do not agree that otherwise relevant information should be withheld from the Commission based on speculation that it might be misunderstood by the public and/or misused by politicians. We have confidence that the parties before the Commission and the Commission itself will be in a position to debate and assess the probity of this study in an objective and reasonable fashion and ensure it is properly characterized in its written recommendation to the Government. We do not share your fear or scepticism as to how it may be perceived by the public. Furthermore, your client is, of course, free to make submissions to the Commission to mitigate against any perceived risk of potential misuse of the information.

In respect of your observations under "Disclosure", we have already provided to you in our December 12, 2007 letter an explanation of the process leading up to the disclosure of the pre-appointment income data. We do not accept that there is anything improper in respect of that process. That being said, we have acknowledged your concerns and interests in this regard and have provided reasonable extension of time for you and your client to analyse the data. I would however note that the Government did not receive the raw data of the Navigant Survey until December 04, 2007.

With respect to the Annex "Methodological questions in relation to the CRA income data", which you requested be forwarded to CRA, we note that Questions 1 to 7 appear to be directed at understanding the parameters and methodology underlying the pre-appointment study. For this reason, CRA is well placed to answer these questions and we would, therefore, ask you to put those questions directly to the CRA. We have stated in a number of prior email exchanges, we do not consider it our role to act as an intermediary between your office and CRA officials. This is particularly important in light of the inferences that may be drawn form some of your comments about the role of Justice officials in their analysis. May we propose then, that instead of acting as intermediary, we simply apprise each other of all of our significant communications with CRA with respect to all matters going forward.

With respect to your questions in Section 8, Process to collect data, we point out that most of these questions were addressed by our December 12, 2007 letter. We reiterate those paragraphs for your ease of reference:

The Government had given some thought to the kind of mechanisms that might be used to determine pre-appointment income early in the process. Indeed, at our meeting with the Deputy Minister and your clients on February 9, 2007, Judith Bellis specifically mentioned that it might be useful to respond to the 2003 Commission's expressed interest in having pre-appointment income information. Subsequent to the June 8 meeting and partly in consequence of the judiciary's decision to conduct an income survey, we asked CRA to advise whether the pre-appointment income of superior court judges could be identified and produced in a manner consistent with CRA's legislative and policy framework governing the use of tax information.

In terms of specific advice of our intentions, on October 5, 2007, I advised you that we had asked CRA to consider the feasibility of their undertaking this kind of work in a reliable manner consistent with its statutory obligations, but that no decision had been taken on whether or how it might be used.

In terms of actual timing, because the pre-appointment study was a separate exercise which we understood could be prepared fairly quickly, and the Master File was the clear priority, we asked CRA to finish that work. The Master File was delivered on October 16, 2007 and CRA then moved to address and complete the pre-appointment study. CRA delivered the study on November 6, 2007. Following some clarification of the data, the pre-appointment study was transmitted to you on November 21, 2007. A revised report was sent to you on December 11 to correct a minor technical error.

With respect to the other matters you raise, they appear to be based on an inference of improper conduct by the CRA and the Department of Justice – a premise that the Government rejects. The parameters of the data being sought were provided to the CRA by David Murchie and the methodology was developed by the CRA. The data provided to you in November 21, 2007 was the first set of data provided to us by the CRA. The Government remains confident of its actions, and does not understand why questions inferring improper dealings with the CRA are being asked. This does not assist the process.

I would observe that the issues that you have raised under the rubric of "due process" about your inability to access the base CRA data applies equally to the base data that was assembled and is being held by Navigant pursuant to confidentiality assurances. I should also add that we too, and quite appropriately, are unable to access the base CRA data. This does not, however in our view, negate its relevancy or probity as evidence. These, however, are issues for the Commission to assess and determine.

Thank you again for this opportunity to better appreciate your client's perspective on this study and to reply to some of the key points you raise. I will convey once again your

client's request to meet with the Deputy Minister. Given the importance of this matter to the judiciary and to the Commission process as a whole, I expect that he will also find an early opportunity to apprise the Minister of Justice with respect to your clients' concerns.

Yours truly,

Donald J. Rennie
A/Assistant Deputy Attorney General (Litigation)

/cw

ANNEX B

Judicial Compensation and Benefits Commission

REPORT

SUBMITTED TO THE
Minister of Justice of Canada

May 31, 2004

method of obtaining this important information. As we have seen, both principal parties decried the usefulness of the information that was available, but to the extent they did use it, they had very different approaches as to how it could be used and what it meant.

As a result, we strongly recommend that some joint method (in conjunction with the Government and the Association and Council) be sought to provide an appropriate and common information and statistical base, the accuracy of which can be accepted by both parties as reliable. This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the income levels of those lawyers who are appointed to the judiciary.

There are many ways in which this might be done: a study by an independent consultant retained by this Commission to report to the principal parties could be commissioned. Statistical evidence could be gathered over time from those who are appointed to the bench in a way that would preserve their anonymity and privacy. There may be other ways.

There could be a clearing house for information, whereby some independent authority – such as the Quadrennial Commission – could obtain information from judges upon their appointment, by means of which their income for the three previous years could be ascertained and other useful information obtained from them with respect to their motives and expenses incurred on accepting their appointment. While this information might not be useful immediately, over a period of the next two Quadrennial Commissions it could be very useful indeed, having regard to the expected turnover of judges during that period of time.

We could meet with CRA and determine what information they would be able to extract from the income tax returns filed with the Agency.