

REPLY SUBMISSION

of the

CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

and the

CANADIAN JUDICIAL COUNCIL

to the

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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G. Veillette, CA, & J.-L. Beauregard, CA,

Letter dated January 25, 2008 regarding income-splitting among lawyers

INTRODUCTION

1. The following submissions are in reply to the Submission filed on behalf of the Government of Canada on December 14, 2007.
2. The Canadian Superior Courts Judges Association (the “**Association**”) and the Canadian Judicial Council (the “**Council**”) note two salient features of the Government’s Submission, namely:
 - a marked departure from established principles of comparison in the determination of judicial salaries, and
 - an unfortunate invitation to the Quadrennial Commission to, in effect, politicize the commission process.
3. The Association and Council address these two features under the various headings below.

ANALYSIS

- A. **Economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government**
4. The above is the first of four statutory criteria that the Quadrennial Commission must consider in formulating recommendations regarding adequate compensation for the judiciary. There is common ground between the Government and the judiciary regarding the general economic conditions in Canada and the financial position of the Government. The Canadian economy is doing very well: employment, household wealth, and corporate profits are at record levels.¹ The Government has confirmed that its current financial position is reflected in the data on surpluses found in the 2007 *Economic Statement*.²
5. While there have been developments in the world economy since the December 14, 2007 submissions of the parties, notably a downturn in the U.S. economy due to problems

¹ Submission of the Government of Canada, Appendix 4 at 1.

² Submission of the Government of Canada, Appendix 4 at 3.

arising from sub-prime mortgages, it is important for the Commission to be focused on what is presently known about Canada's current and projected economic conditions, as opposed to speculating on what might happen as a consequence of economic problems in the U.S. On this point, comfort can be derived from the Bank of Canada's Monetary Policy Report Update of January 2008,³ where the Bank said:

However, despite tighter credit conditions, domestic demand in Canada is expected to remain strong, supported by continued income growth associated with the increase in commodity prices seen since October, which has led to further gains in Canada's terms of trade.⁴

6. The Government has proposed in its Submission that when considering increases in judicial compensation the Commission should, under this first statutory criterion, consider the economic, social, and expenditure priorities of the Government's mandate.⁵ This approach is not in keeping with the provisions of s. 26 of the *Judges Act*. It is an invitation to politicize the process.
7. Section 26 does not provide for the balancing of adequate judicial compensation against other priorities of the Government. The Constitution of Canada and the *Judges Act* (to the extent that the latter enshrines constitutional obligations) speak in imperative terms as to the rank of judicial independence and adequate compensation for judges in the hierarchy of social and expenditure priorities. The Commission cannot, under the "current financial position" criterion, be influenced by a reference to other social and economic priorities of the Government to justify a compensation level that would compromise other statutory criteria, and, in particular, the third criterion: the need to attract outstanding candidates to the judiciary.
8. The questions may be asked: What if judicial independence happened not to be among the "social priorities" of the government of the day? What if attracting the calibre of candidates contemplated by the *Judges Act* were not an "expenditure priority" of that

³ This update is reproduced in **Appendix A**.

⁴ Appendix A at 1.

⁵ Submission of the Government of Canada at paras. 18, 23.

government? The Association and Council agree with the following comments concerning the first statutory criterion contained in the Submission of the Canadian Bar Association to this Commission:

[...] judicial independence is not just a government priority. It is, for the reasons expressed above, a constitutional imperative. Before competing priorities are used as a rationale to reduce what the Commission concludes to be appropriate compensation for judges, the Government must show conclusive evidence of other pressing government fiscal obligations of similar importance to judicial independence.⁶

B. The role of financial security of the judiciary in ensuring judicial independence

9. The Government points to the 41% rise of the judicial salary between March 31, 2000 and April 1, 2007 to assert that judicial salaries have not fallen below an acceptable minimum.⁷ What the Commission must bear in mind, however, is that prior to this period, there had been a persistent erosion of the judicial salary, in part because judges were made subject to a freeze in the public sector under the *Public Sector Compensation Restraint Act* between December 1992 and March 1997.⁸
10. The Government also fails to mention that DM-3s, who were also subject to this freeze, saw their total average compensation rise by 69% between the period of April 1, 1997⁹ and April 1, 2007, while judicial compensation rose by 52% during this same period, hence widening the gap between the two groups.¹⁰
11. The Government states in its Submission that annual statutory indexing and the statutory requirement for a quadrennial review of compensation operate to ensure that judicial

⁶ Submission of the Canadian Bar Association at 6.

⁷ Submission of the Government of Canada at para. 29.

⁸ See the Drouin Report at 20-21 for a review of the issue of the salary freeze.

⁹ This is the year in which the freeze seemed to have been slowly rescinded, see the graph in the Submission of the judiciary at 34 and Appendix F.

¹⁰ The total average compensation of DM-3s for the 1997 fiscal year was \$172,250 (information provided by the Privy Council Office, see **Appendix B**), while the compensation for the judiciary was \$165,500. The total average compensation of DM-3s for the 2007-2008 fiscal year is projected to be \$291,235 (see Submission of the judiciary at 32, using past trends to calculate the average at-risk to be awarded for the 2007 fiscal year), while the salary of puisne judges is currently \$252,000.

salaries do not fall below an acceptable minimum.¹¹ There are three flaws in this proposition. First, the purpose of annual statutory indexing is to ensure that the current level of judicial salary keeps pace with increases in the cost of living; its purpose is not to fix judicial salaries at an adequate level. The *Judges Act* acknowledges this by providing a quadrennial review process under s. 26, a provision separate from s. 25, which provides for the mechanism affording a protection against increases in cost of living.¹²

12. Second, the quadrennial review of compensation does not in and of itself ensure that judicial salaries do not fall below an acceptable minimum. The Government's proposition is circular: simply because a process exists to ensure that salaries are adequate must mean that the salaries are adequate.
13. Third, it is not the existence of the quadrennial review but rather the Government's implementation of the Quadrennial Commission's recommendations that ensures that an adequate compensation level is maintained. One need only look at the Triennial Commission process to make the point that a periodic review of compensation, on its own, provides no guarantee. It is the Government's respect for the process that will ensure that judicial salaries are adequate or do not fall below an acceptable minimum.

C. The need to attract outstanding candidates to the judiciary

1. Focusing on the quality of candidates, not their number

14. The Government states that there is no deficit of qualified candidates for the Bench.¹³ Yet, numerous commissions have made the point that focusing on the number of applicants for judicial positions is unhelpful if outstanding members of the Bar are discouraged to seek judicial appointments because of the level of judicial salaries. Moreover, the lack of relevance of the total number of applicants for a judicial

¹¹ Submission of the Government of Canada at paras. 29-30.

¹² As stated in the Submission of the Canadian Bar Association at 5: "Indexation to the cost of living ensures sitting judges do not experience erosion in their salaries and thereby encourages retention. But attracting candidates for judicial appointment requires that judicial salaries are competitive. To the extent that prevailing market conditions have increased relevant comparator salaries in excess of inflation, the Commission should ensure that judicial salaries are consistent with these market conditions."

¹³ Submission of the Government of Canada at para. 35.

appointment can be illustrated by the fact that, between January 2001 and October 2007, the Advisory Committees on Judicial Appointments were able to recommend only 43% of the applicants.¹⁴ This is significant. A preponderance of those who applied for a judicial appointment were considered unqualified to be judges.

2. Benefits other than salary

15. The Government suggests that a judge's desire to serve the public should be considered an intangible benefit to be factored into the determination of adequate compensation.¹⁵ To characterize public service as a benefit to the person engaged in public service demeans the concept, as does the notion that it should somehow be converted into a unit for the calculation of compensation and benefits.
16. The Government has gone to great lengths to describe the annuity available to judges. However, it is only in an appendix to its Submission that one can find a description of the retirement benefits available to deputy ministers.¹⁶ While the Government points out that judges contribute 7% of their salary to the annuity benefit, it should be observed that DMs contribute around the same level, 8.1%. Moreover, up to a salary level of \$126,500, the DMs' contributions are reduced by the amount they pay in CPP contributions.
17. In addition to their ordinary retirement plan, the DMs benefit from the Special Retirement Allowance Program, which is separate from and in addition to the ordinary pension benefits. Under this program, DMs accrue benefits at the rate of 2% per year of service in an eligible DM position, to a maximum of 10 years. For example, a DM who retires at the age of 56 with 33 years of pensionable service, assuming his/her best five-year average salary is \$158,000, would receive \$104,280 per year as part of the ordinary pension plan. However, under the Special Retirement Allowance Program, the DM would receive an additional \$15,800, in the scenario where he/she served five years as a DM, under the following formula: $(2\% \times 5 \text{ years as a DM}) \times \$158,000$.

¹⁴ See Submission of the Government of Canada, Appendix 8.

¹⁵ Submission of the Government of Canada at para. 9.

¹⁶ See Submission of the Government of Canada, Appendix 13.

18. The Government argues, based on calculations made by Mr. Pannu, that the value of the judicial annuity is 24% of salary. The McLennan Commission, for its part, relying on calculations made by its own independent expert, concluded that it was 22.5%.¹⁷ That value ought not to be re-litigated every four years.

3. Comparators

19. The Government argues that public-sector comparators are more relevant than private-sector comparators.¹⁸ This is a surprising contention in light of the repeated insistence by past commissions on the importance of private-sector income in ensuring the adequacy of judicial salaries. Most recently, the McLennan Commission said that the income of self-employed lawyers was “perhaps the most important comparator for our work”.¹⁹

20. A very strong representation from the private Bar is vital for an independent judiciary. These are lawyers whose practice has been conducted independently of Government. Furthermore, private practitioners operate in a competitive environment and normally interact with a diverse array of clients, thus providing experiences that are propitious for the task of adjudication, notably trial adjudication where an understanding of human nature and an application of common sense are essential in the fact-finding process.

21. The Government’s contention that public-sector comparators are more relevant would have credibility if the Government actually adhered to the time-honoured comparison of judicial salaries being roughly equivalent to the most senior deputy ministers. However, the Government seeks to depart from this comparison in two very significant ways. First, the Government contends that *increases* in public-sector salaries, rather than actual *levels* of salaries, should determine the increase to judicial compensation. Second, it proposes to expand the public-sector comparators to include employees who are significantly below the most senior deputy ministers in the executive hierarchy. These points are addressed below in turn.

¹⁷ McLennan Report (2004) at 58.

¹⁸ Submission of the Government of Canada at para. 46.

¹⁹ McLennan Report (2004) at 41.

22. Ever since the Triennial Commissions, the focus has always been on actual levels of compensation for senior deputy ministers, not their rate of increase from year to year. Now that judicial salaries have been allowed to fall significantly below the compensation of DM-3s, the Government would want to petrify that gap by tying judicial salary increases to overall public-sector increases rather than actual pay levels. This is unacceptable and bereft of any principle. Comparators measure equivalent value not equivalent rates of increase.
23. The traditional comparison with the most senior deputy ministers can be said to have as its bulwark defensible principles: the judiciary's salary should be roughly equivalent to the most senior public servant in the executive branch because the relationship is a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are qualities shared by deputy ministers and judges",²⁰ and because anything less would signify that the judiciary is inferior to the executive. In the Government's proposal, there are no such defensible principles, but rather a perfunctory reclassification of the judiciary as one of many segments of public employees.

a) Public-sector compensation trends

i) Comparators that are appropriate

24. The Government proposes to expand the public-sector comparator group to include all of the DM levels (DM-1 to DM-4), the executive levels below the DMs (EX 1-5), and the senior government lawyer cadre (Senior LA).²¹ In advancing this proposition, it seeks comfort from the McLennan Commission's suggestion that other classes of Government appointees could be used as comparators as well.²² Oddly, the Government disregards most of the other categories that the McLennan Commission proposed, and proceeds to add categories that the McLennan Commission never even suggested.

²⁰ McLennan Report (2004) at 25, Drouin Report (2000) at 31, Scott Report (1996) at 13, and Courtois Report (1990) at 10.

²¹ Submission of the Government of Canada at para. 47.

²² McLennan Report (2004) at 28-30.

25. For example, the McLennan Commission suggested that the upper echelons of the GC and GCQ categories (GC-9, GC-10, GCQ-9, GCQ-10), often consisting of posts that are quasi-judicial in nature, could be used as comparators.²³ The Government has not included these in its proposed expanded public-sector comparator group, nor has it given a reason for excluding them.
26. As for the proposed inclusion of the senior government lawyer cadre, it is inappropriate in view of the significance of the compensation gap between these public-sector employees and private-sector legal income levels, but also because of the fact that, quite appropriately, the vast majority of superior court judges has been, and will continue to be recruited from the private Bar.
27. In contrast to the Government's approach, the Association and Council, while noting and describing the categories of potential comparators referred to by the McLennan Commission, posited in their Submission that comparisons must be grounded in defensible principles. Comparisons, either by the judiciary or the Government, should not be made on the basis of self-interest, convenience, or expediency.
28. The traditional principle that has animated the comparison between judicial salaries and the compensation of the most senior deputy minister is that the relationship is a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are qualities shared by deputy ministers and judges."²⁴ As a complement to this principle, the Association and Council have submitted that the comparison of judicial salaries with the compensation of the most senior deputy ministers is required on the principled basis that the judiciary is not subordinate to the executive.²⁵ To expand the comparative exercise would create the risk of diluting the comparator to a point where there would be no underlying principled logic justifying the comparison.

²³ McLennan Report (2004) at 31; see also Submission of the judiciary, Appendix B.

²⁴ McLennan Report (2004) at 25, Drouin Report (2000) at 31, Scott Report (1996) at 13, and Courtois Report (1990) at 10.

²⁵ See Submission of the judiciary at para. 102.

ii) Comparisons that are credible

29. When the Government does refer to DM compensation, it presents an incomplete picture of that compensation. First, the Government relies on a weighted DM salary mid-point.²⁶ However, the mid-point given is the mid-point of the theoretical range of DM salaries, not a meaningful mid-point of the actual salaries paid to DMs. It is for this reason that the Association and Council submitted average figures for the DM levels in their Submission.²⁷
30. Another aspect of the incomplete picture of DM compensation is the Government's attempt, yet again, to re-litigate the inclusion of at-risk pay in DM compensation when comparing it with judicial compensation, as it has done before the Drouin and McLennan Commissions. The Drouin Commission came to the conclusion that the at-risk component of DM compensation is an integral part of that compensation and should be referred to when determining rough equivalence with judicial salary.²⁸ The McLennan Commission stated that at-risk pay is "simply a form of remuneration and cannot be ignored."²⁹ The Association and Council reiterate that any comparison that omits at-risk pay lacks any credibility and has no place in this process.
31. A further reason why at-risk pay should be considered an integral part of senior DM compensation is that the Government itself accords a value to the at-risk pay beyond simply the payment for the year in question. At-risk pay (including bonuses) is included in average salary for pension calculations.³⁰ If at-risk pay were really variable and truly at risk of not being given, the Government would not include it in the calculation for pensions. The fact that it is included in pension calculations indicates that it is quite permanent in character.

²⁶ Submission of the Government of Canada at para. 50 and Appendix 14.

²⁷ Submission of the judiciary at 32-33 and Appendix A.

²⁸ Drouin Report (2000) at 25-26.

²⁹ McLennan Report (2004) at 27.

³⁰ See 2007-2008 Performance Management Program Guidelines at 6, Submission of the Government of Canada, Appendix 15.

32. The Government also points to the unique security of tenure enjoyed by judges in an attempt to impugn the value of DM-3s as a comparator. If lack of security of tenure and variability of salary and at-risk pay are reasons for disregarding the comparison with senior DM at-risk compensation and DM compensation generally, as the Government argues,³¹ they are also reasons for disregarding any comparators proposed by the Government.
33. All of the categories proposed by the Government lack the kind of security of tenure enjoyed by the judiciary. All of the categories proposed by the Government earn a salary, let alone at-risk pay, whose increase is subject to achievement of “specific organization commitments”.³² The result is that there would be no group that could be compared to the judiciary.
34. Additionally, it is an aberration to treat security of tenure as a form of compensation. Security of tenure is a constitutional principle underlying judicial independence, forged in the struggle between the judiciary and the Crown in 17th-century England and originally enshrined in the *Act of Settlement, 1701*. Without security of tenure, there is no independent judiciary and no rule of law as Canadians understand it. Accordingly, security of tenure is not a component of adequate compensation.
35. In any event, the Government has omitted to mention how many DMs actually get dismissed from their posts. While the position is theoretically at pleasure, the Government has not shown that, on a practical basis, the position is anything but essentially permanent. There seems to be a *de facto* security of tenure for DMs such that the issue is irrelevant when comparing the judiciary with DMs.
36. There are two further points that need to be made regarding the comparison with DMs. First, the fact that there are many fewer DMs than judges is irrelevant. This has always been the case, including at the outset when the Government called for a rough equivalence between the two groups before the Triennial Commission.

³¹ Submission of the Government of Canada at para. 51.

³² Submission of the Government of Canada at para. 51.

37. Second, the fact that DMs have the heavy responsibility of running government departments involving a large number of personnel whereas judges do not is also irrelevant. It can be said by the same token that judges have some of the most onerous, and truly unique, public responsibilities in Canadian society: for example, they are the only ones who must decide whether an accused's liberty is to be taken away, whether a parent should be deprived of custody of his/her own child, whether an injunction should be issued to prevent a business from operating, and other similar decisions that impact significantly the lives and affairs of Canadians. With the advent of the *Canadian Charter of Rights and Freedoms*, these public responsibilities have simply increased.
38. The Association and Council submit that the relevant public-sector comparator should be the average total compensation of DM-3s and DM-4s. The Government has not provided convincing reasons why it should be otherwise.

b) Private-sector compensation trends

39. Under this heading, the Government relies heavily on the expert report of Haripaul Pannu (the "**Pannu Report**").³³ Mr. Pannu is not new to the quadrennial commission process. He also submitted two expert reports before the McLennan Commission. In his report before this Commission, Mr. Pannu mentions that he has decided not to compare the current CRA tax data available to the parties with the 2001 tax data that was the subject of much analysis by the parties before the McLennan Commission because the latter concluded that the 2001 tax data was unreliable. This Commission should know, however, that Mr. Pannu persistently defended the position before the McLennan Commission that the 2001 tax data actually *was* reliable,³⁴ even though the Government itself found it to be of limited use³⁵ and the McLennan Commission ultimately rejected it.³⁶

³³ Submission of the Government of Canada, Appendix 10.

³⁴ McLennan Report (2004) at 37, 40, footnote 28.

³⁵ McLennan Report (2004) at 36.

³⁶ McLennan Report (2004) at 42. In his first expert report dated January 2004, Mr. Pannu concluded that "the 2001 taxation data is reliable" (at 4). When faced with the criticisms of the 2001 taxation data made by the judiciary's experts, and their call for focusing on the 2000 data and comparing with the 1997 data, Mr. Pannu in his reply report

40. The Association and Council disagree with many aspects of the Pannu Report. So do the Navigant experts.³⁷ Mr. Pannu defends the position that there is no reason to apply the \$60,000 low-income cut-off to the private-sector lawyers' income data.³⁸ Both the Drouin Commission and the McLennan Commission applied such a low-income cut-off.
41. The Pannu Report states that it is a "common statistical practice" to exclude both very low and very high values in data analysis. However, this practice has a specific rationale, which is to eliminate outliers when trying to calculate a mean value. Outliers are data that are somehow erroneous or not part of the trend for some anomalous reason. They can be safely excluded because they simply do not have much in common with the bulk of the data.
42. In the present case, there is no issue in respect of outliers. Indeed, the low-income cut-off is not an instance of trying to eliminate outliers *per se*. The essential rationale for applying the cut-off is that a lawyer earning at such a low level is highly unlikely to be a qualified candidate for a judicial appointment. It is not just a question of excluding part-time workers. It is also to exclude those who are conducting a practice that is unlikely to make them qualified for the Bench. For example, they might not be very good lawyers and therefore do not attract very much business. This excludes them from being qualified for the Bench.
43. The Pannu Report claims that lawyers earning below \$60,000 may not necessarily be working on a part-time basis. Yet, the author goes on to give examples that are the epitome of circumstances where the lawyer's work would be characterized as being part-time work: working less in order to raise a family, taking care of older family members, or other personal reasons. It is difficult to see anything more than a distinction without a difference.

dated February 27, 2004 continued to insist that it would be "more appropriate" to use the 2001 data and not compare with the 1997 data (at 3) and that there were problems with the 2000 data (at 2). The McLennan Commission, assisted by its independent expert, concluded that the 2001 data was not reliable and that the 2000 data was consistent with the 1997 data and remained the "most credible and relatively recent source of information that we have on the net income of self-employed lawyers in Canada." (at 42)

³⁷ See Supplemental Report of Navigant dated January 28, 2008.

³⁸ Pannu Report at 3.

44. The so-called “parallel” rationale of Mr. Pannu to exclude lawyers earning in excess of a certain amount is not a parallel rationale at all. Those lawyers are most probably qualified for the Bench. The fact that they might decline an invitation to the Bench is a reason to include them, not the opposite, since doing otherwise will become a self-fulfilling prophecy: the judicial salary that does not take their salary into account will always be too low for such lawyers to accept an appointment. This would exacerbate the very problem that the Association and Council say the Commission must guard against, namely that high-income lawyers will decline invitations to the Bench if it involves a very significant reduction in income.
45. As for Mr. Pannu's entirely speculative point that a lawyer earning less than \$60,000 may simply have had many expenses to deduct from a very high gross salary, it begs the question: why were there so many expenses to deduct? If the gross salary of the lawyer is so high, as Mr. Pannu hypothesizes, an excessive level of expenses would indicate a flawed manner of conducting the practice. Is such a person qualified for the Bench?
46. The issue of the low-income cut-off is the basic point of divergence between the judiciary and the Government in the analysis of private-sector data. As it was seen in the Navigant Report submitted on December 14, 2007, when the CRA data is subjected to a low-income cut-off of \$60,000, it yields results that are comparable to Navigant's own survey results, especially if account is taken of the prevalence of income splitting among private-sector lawyers, a practice confirmed by the letter of Gilles Veillette, CA., and Jean-Luc Beaugard, CA.³⁹ Messrs. Veillette and Beaugard are of the opinion that income splitting constitutes “un élément significatif” (“a significant factor”) to explain the discrepancy between the CRA data and Navigant's survey results.⁴⁰
47. The Pannu Report proposes looking at income of self-employed lawyers at both the 65th and 75th percentiles. A similar approach was advocated by Mr. Pannu before the

³⁹ See Appendix C.

⁴⁰ Appendix C at 3.

McLennan Commission.⁴¹ However, the McLennan Commission *rejected* that view and instead came to the conclusion that the

75th percentile of income, calculated with an income exclusion, strikes a reasonable balance between the largest self-employed income earners and those in lower brackets, given the criteria that we must apply.⁴²

48. The Pannu Report is silent as to why this issue should be re-litigated. The burden is on Mr. Pannu and the Government to explain why the McLennan Commission was incorrect in concluding that the 75th percentile was the appropriate threshold. They have provided no explanation, other than for the Government to say that the application of all of the methodological parameters traditionally applied by Quadrennial Commissions results in consideration of a too small pool of lawyers.⁴³ This latter point is addressed below, in paragraphs 53-55.
49. The Pannu Report posits that the use of the age group of 44 to 56 does not properly reflect the entire pool of lawyers who may be appointed as judges.⁴⁴ Navigant and past commissions disagree. As a substitute, seven age bands are included by the Pannu Report, which then assigns weights to them reflecting the proportion of appointments within each band.⁴⁵ However, the Pannu Report's use of two of those seven age bands, "under age 44" and "older than age 64, is *prima facie* problematic. The appointment data reveal that the lowest age of appointment was 41 and the highest was 65.⁴⁶ Therefore, if the two age bands proposed by the Pannu Report are applied to the CRA data, which includes data for lawyers aged 35 to 69,⁴⁷ it will lead to lower comparator incomes than if

⁴¹ See McLennan Report (2004) at 37. It should be noted that at that time, Mr. Pannu proposed the 66th percentile, whereas now he seems to be proposing the 65th percentile, although within the same report, he uses both the 65th and the 66th percentiles, see Pannu Report at 7.

⁴² McLennan Report (2004) at 43.

⁴³ Submission of the Government of Canada, Annex A.

⁴⁴ Pannu Report at 4.

⁴⁵ Pannu Report at 6.

⁴⁶ Pannu Report, Appendix C.

⁴⁷ Submission of the Government of Canada, Appendix 19.

the age bands were restricted to “41-44” and “64-65” since incomes are lower at both ends of the age spectrum.⁴⁸

50. This fact is borne out when one analyzes the tables on page 7 of the Pannu Report. The difference between the first and second age bands, and the difference between the penultimate and last age bands, are greater than the differences between the other adjacent age bands.⁴⁹
51. The Pannu Report asserts that it is important to ascribe a value to the judicial annuity when comparing judicial compensation with the compensation of self-employed lawyers.⁵⁰ By the same token, it would be important to ascribe a value to the pension benefits of the DMs when comparing against DM compensation.
52. The Pannu Report takes the position that the value of the judicial annuity is 24.6% of salary. However, as already indicated, the McLennan Commission found that it was 22.5%, relying on its own independent expert.⁵¹ Again, neither Mr. Pannu nor the Government provides a reason why the McLennan Commission’s conclusion should be revisited.
53. In Annex A to its Submission, the Government has argued that only 33% of the judicial appointees between April 1, 2004 and March 31, 2007 meet the three criteria of being from private practice, being in the 44-56 age band, and residing in one of the 10 largest CMAs. It goes on to say that if the 75th percentile is applied, then the methodology refers only to one-twelfth (one-quarter of the 33%) of “the pool”.
54. As explained in Navigant’s Supplemental Report, the flaw in the Government’s reasoning is that “the pool” to which it is referring is judicial appointees between 2004 and 2007. However, the four criteria that have been applied by past Commissions have been applied not to judicial appointees but to the pool of eligible lawyers across Canada; it is *their*

⁴⁸ See Supplemental Report of Navigant at para. 13.

⁴⁹ See Supplemental Report of Navigant at para. 14.

⁵⁰ Pannu Report at 9.

⁵¹ McLennan Commission (2004) at 58.

income that is analyzed in the determination of adequate judicial compensation. There is no reason to apply those criteria to actual appointees; that pool is irrelevant.

55. In conclusion, it is submitted that the Pannu Report's methodological flaws and its rehashing of settled approaches to income-data analysis render the report distinctly unhelpful for this Commission.

D. Government proposal

56. The Government's proposal of a 4.9% increase as of April 1, 2008 represents, in effect, a 2.5% increase since the figure of 4.9% is inclusive of statutory indexation. This proposal is unacceptable because it is informed by the illegitimate considerations reviewed above, notably: treating judicial compensation as among many competing economic "priorities", a disregard for the total compensation of senior DMs, an expanded public-sector comparator bereft of any principle, a disregard for actual private-sector legal incomes, and a focus on the rate of increase in public-sector compensation as opposed to actual levels of compensation.
57. The Government proposes no further increases after April 1, 2008 until the next quadrennial review. Furthermore, it presents the annual statutory indexation already provided under the *Judges Act* as its own proposed increase, as if to suggest that it is making a concession in not asking for a recommendation that the indexation be rescinded. As already discussed above, this conflates two conceptually different forms of increases: indexation for cost of living under s. 25, to ensure that increases in the cost of living do not erode the existing judicial salary level; and increases under s. 26, to ensure that the level of judicial compensation is adequate in the light of the statutory criteria, including the need to attract outstanding candidates to the Bench.
58. The Association and Council agree with the Government that the assessment of the adequacy of judicial compensation is not a "formulaic exercise of mathematical analysis."⁵² However, it needs to be emphasized that the exercise is ultimately one that must be based on the consistent application of objective criteria that have withstood the

⁵² Submission of the Government of Canada at para. 8.

test of time. The expanded set of comparators proposed by the Government is increasingly subjective. Some of the proposed comparators are bereft of principled moorings. Finally, the fact that the Government re-litigates existing comparators and seeks to add new ones before each new Quadrennial Commission bespeaks a constant shifting of the goal posts and is indicative of subjectivity in the Government's approach to the exercise.

E. Position of the Association and Council on the submissions of other parties

1. Appellate differential

59. Certain judges of the courts of appeal have advocated for an appellate differential. A number of puisne judges have conveyed to the Commission their opposition to this request.
60. The Association and Council reiterate their neutrality on this issue, and add that it should not be permitted to affect the Commission's deliberations regarding the Association and Council's submission on salary, nor have an impact on the compensation levels sought in the judiciary's submission of December 14, 2007.

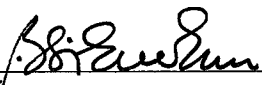
CONCLUDING REMARKS

61. In general, the Government's Submission does not reflect the rational, principled, and depoliticized approach commanded by the process over which this Quadrennial Commission presides. Rather than treating the process as the constitutionally mandated mechanism that it is for the determination of judicial compensation, the Government is pursuing a strategy of whittling down established criteria and comparators in a manner that is more characteristic of the labour negotiations it conducts with its employees.
62. The Government's Submission only adds to the judiciary's concern with the Government's approach to judicial matters ever since the issuance of the Second Response rejecting the salary recommendation of the McLennan Commission that had already been accepted in the First Response. The Constitution of Canada requires the Government to treat the quadrennial commission process as a unique and grave matter

underlying the equilibrium between the three branches of the State and ensuring judicial independence.

The whole respectfully submitted.

Montréal, January 28, 2008



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APPENDIX A



BANK OF CANADA
BANQUE DU CANADA

Monetary Policy Report Update

January 2008

This text is a commentary of the Governing Council of the Bank of Canada. It presents the Bank's updated outlook based on information received up to 22 January 2008.

Overview

The Canadian economy grew broadly in line with the Bank's expectations in the second half of 2007. Despite some slowing in growth in the fourth quarter, the economy continues to operate above its production capacity. Both total and core inflation have been lower than was projected in the October *Monetary Policy Report*, largely reflecting a price-level adjustment related to increased competitive pressures in the retail sector stemming from the level of the Canadian dollar.

Financial conditions have deteriorated since October, leading to a tightening of credit conditions in industrialized countries. Given this, and a deeper and more prolonged decline in the U.S. housing sector, the outlook for the U.S. economy in 2008 is now significantly weaker than it was in October. Growth is expected to be particularly weak in the first half of the year before recovering later in 2008 and 2009.

For Canada, the effects of the slowing U.S. economy will lead to additional downward pressure on export growth. However, despite tighter credit conditions, domestic demand in Canada is expected to remain strong, supported by continued income growth associated with the increase in commodity prices seen since October, which has led to further gains in Canada's terms of

trade. The Bank now projects that economic growth in 2008 will be weaker than was expected in October, averaging a little over 1 per cent in the first half of the year and a little over 2 per cent in the second half. On an average annual basis, the economy is projected to expand by 1.8 per cent in 2008 and by 2.8 per cent in 2009. This growth profile implies that the economy will move into modest excess supply in the second quarter of this year, and then return to balance in early 2010.

Highlights

- The Canadian economy continues to operate above its production capacity, despite a slowing of growth in the fourth quarter of 2007.
- The Bank projects average annual economic growth of 1.8 per cent in 2008 and 2.8 per cent in 2009.
- Both core and total CPI inflation are projected to fall below 1.5 per cent by mid-2008 before returning to 2 per cent by the end of 2009.
- Further monetary stimulus is likely to be required in the near term.

The inflation projection has also been revised down, particularly for 2008, primarily reflecting the price-level adjustment noted above and the recent one-percentage-point reduction in the GST. Both core and total CPI inflation are projected to fall below 1 1/2 per cent by the middle of this year before returning to the 2 per cent target by the end of 2009. Excluding the impact of the recent GST reduction, total CPI inflation is projected to average close to 2 per cent throughout 2008 and 2009.

Risks and Policy Outlook

There are a number of important risks to this base-case projection.

On the downside, the tightening in credit conditions globally and in Canada could be greater and more protracted than assumed, and there could be a more prolonged slowdown in the U.S. economy, exerting a greater drag on Canadian GDP growth and inflation. As well, competitive pressures in Canada's retail sector could put more downward pressure on prices than assumed.

On the upside, there are risks posed by the continued strong momentum in domestic demand growth, underpinned by firm commodity prices, improved terms of trade, and strong credit growth. Capacity pressures could be stronger than judged, especially if weak productivity growth were to persist, which would put upward pressure on costs and inflation.

The Governing Council judges that, overall, the risks to the base-case projection for Canadian inflation are roughly balanced.

On 4 December and on 22 January, the Bank lowered its target for the overnight rate by one-quarter of one percentage point, bringing it to 4 per cent. In line with the Bank's outlook, further monetary stimulus is likely to be required in the near term to keep aggregate supply and demand in balance and to return inflation to target over the medium term.

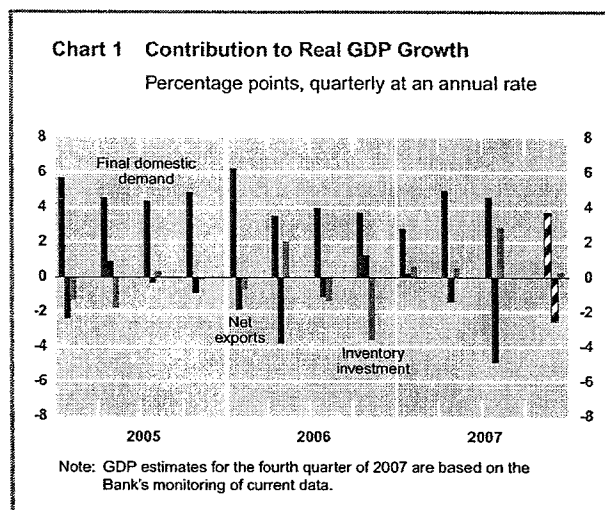
Recent Economic and Financial Developments

Global Developments

Global economic growth remained strong through the third quarter of 2007. During the fourth quarter, however, there was a slowing in the global economy, most notably in the United States. The ongoing repricing of risk and tightening of credit conditions in industrialized countries, largely stemming from problems in the U.S. sub-prime-mortgage market, contributed to the slowdown. Upward pressure on global inflation continued, exacerbated by large increases in the prices of energy and food.

Economic strength through the third quarter was broadly based across all major regions and was generally greater than expected. In the United States, economic growth in the third quarter was driven by unexpectedly high business spending and inventory accumulation, and by the rapid expansion of net exports in response to strong global demand and the depreciation of the U.S. dollar. Available information on the U.S. economy suggests that activity slowed in the fourth quarter as a result of the continued weakness in the housing sector, lower production to reduce inventory levels (particularly in the automobile sector), and the adverse effects of tighter credit conditions.

With continuing strong global demand for oil and little significant supply adjustment, crude oil prices have moved higher. Prices for grains and oilseeds have also continued to rise, reflecting both strong growth in demand from major emerging economies and unfavourable supply developments. Many other commodity prices have also remained high.



Canadian Economic Activity

In the second half of 2007, the Canadian economy grew broadly in line with the Bank's expectations. Economic growth in Canada eased in the third quarter, with real GDP growing at an annual rate of 2.9 per cent, slightly stronger than the 2.5 per cent projected in the *October Report*. Inventory investment was higher than expected, contributing importantly to overall growth, and, once again, there was a considerable rise in final domestic demand (Chart 1).

Both business investment and government spending on goods and services were boosted in the third quarter by large purchases of machinery and equipment from abroad. Real personal disposable income increased moderately, while household net worth rose further, and household credit continued to record substantial increases. As a result, household spending rose solidly, after a very strong gain in the second quarter.

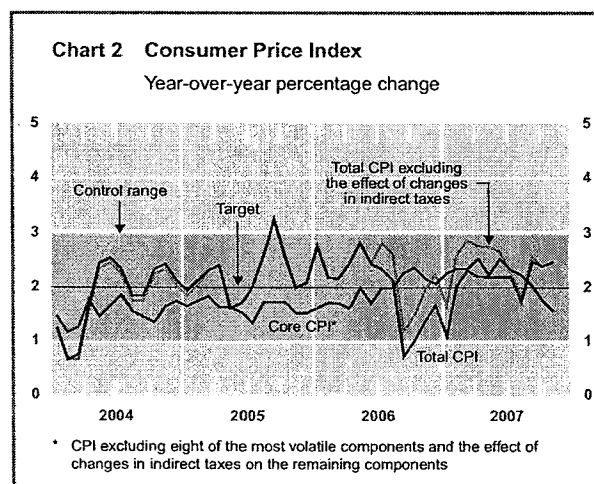
Net exports decreased markedly in the third quarter. Import volumes increased substantially in response to strong domestic demand and the past appreciation of the Canadian dollar. Export volumes rose modestly, however, as the exchange rate appreciation moderated the strong global demand for Canadian goods and services.

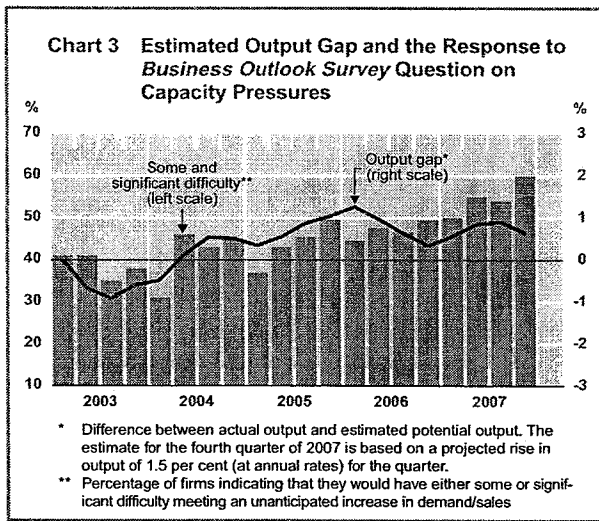
Current data for the fourth quarter point to another substantial gain in final domestic demand, supported by the rise in real incomes from a boost in the terms of trade that reflected strong commodity prices and the further appreciation of the Canadian dollar. However, there is likely to be a drag on GDP growth from net exports. Overall, real GDP is likely to have increased by 1.5 per cent in the fourth quarter.

Inflation and the 2 Per Cent Target

Inflation in October and November was lower than projected in the *October Report*. This appears to largely reflect a price-level adjustment related to increased competitive pressures stemming from the high level of the Canadian dollar.

The core rate of inflation averaged 1.7 per cent in October and November, 0.6 percentage points lower than projected for the fourth quarter in the *October Report* (Chart 2). It appears that the Canadian dollar's rise to close to parity with the U.S. dollar raised consumers' awareness of the considerable differences between Canadian and U.S. prices and led to a greater-than-projected downward adjustment of the prices of some goods, particularly automobiles. Additionally, increases in meat prices were lower than expected, driven by increased supply. The prices of core services also rose somewhat less than expected.





The 12-month rate of increase in the total CPI moved back up from 1.7 per cent in August 2007 to an average of about 2.5 per cent in October and November, reflecting the temporary reduction in gasoline prices in September and October 2006.¹ Nevertheless, the growth in total CPI inflation was significantly lower than the 3.0 per cent expected in the *October Report*, owing to the downward adjustment in core inflation.

Estimated Pressures on Capacity

Notwithstanding the easing in core inflation, the Canadian economy continues to operate above its production capacity.

The Bank's winter *Business Outlook Survey*, the conventional measure of the output gap,² and most labour market and wage indicators continue to suggest considerable tightness (Chart 3).

1. The upward pressure on gasoline prices coming from the recent rise in spot prices for crude oil was largely offset by the effect of the exchange rate appreciation and narrower margins.

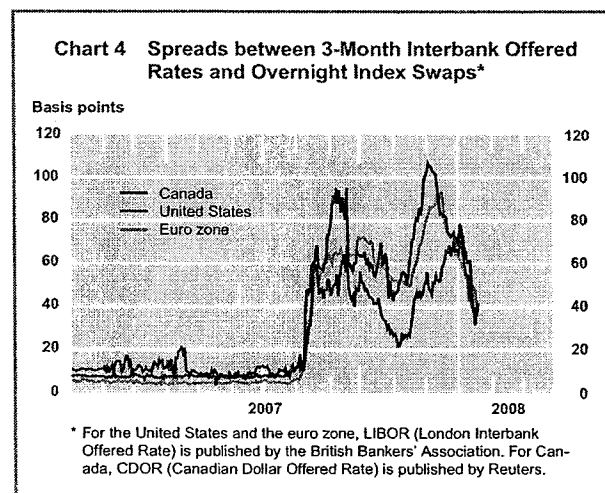
2. The Bank's conventional measure indicates that the economy was operating about 0.6 per cent above its production potential in the fourth quarter of 2007. The estimated level of excess demand in the fourth quarter of 2007 is about 0.1 percentage points higher than was projected in the *October Report*. This rise is mainly the result of a marginal decrease in the estimated level of production capacity.

After reviewing all the indicators of capacity pressures, the Governing Council judges that, overall, the economy was operating about one-half of a per cent above its production capacity in the last quarter of 2007.

Credit Conditions

Global financial markets remain volatile as difficulties related to the valuation of structured products and expected losses stemming from the U.S. subprime-mortgage market persist and, more generally, as concerns about the economic outlook have increased. Canada has been affected by these global developments, but to a lesser extent than the United States and Europe. While household and business credit have continued to grow robustly in Canada, there has been some tightening in the prices, terms, and availability of credit.

Since late July, *financial institutions* in Canada and other countries have been facing increased spreads between their money market borrowing rates and expected overnight policy rates. Although money market conditions worsened after the *October Report*, partly because of concerns about year-end funding pressures, they have now returned to their October levels (Chart 4).



At the same time, however, there has been a considerable widening in credit spreads in Canadian and global bond markets for financial and non-financial institutions. For example, for 10-year bonds, the spreads for “A”-rated Canadian borrowers over yields on Government of Canada bonds have widened from about 100 basis points to around 140 basis points since the *October Report*.

The spread between the effective *household* borrowing rate and the expected target overnight rate is estimated to have increased by about 20 to 25 basis points since October.

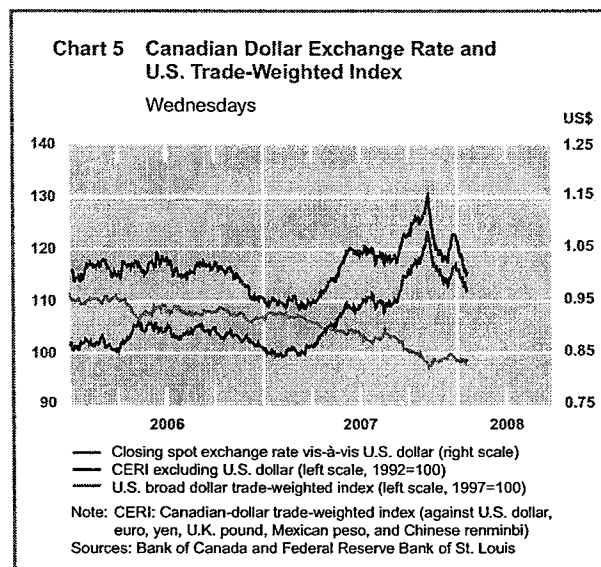
The spread between the rate at which *non-financial firms* can borrow from financial institutions and the expected overnight rate has increased by about 15 to 20 basis points since October. Given the increase in spreads in bond markets, and a tightening in the terms and conditions for bank loans and market debt, there has been a significant tightening in credit conditions faced by firms.

Policy Rates

Since the *October Report*, policy rates have been reduced in both the United States and Canada. With the weaker economic outlook and further tightening of credit conditions, market expectations in a number of industrialized countries, including Canada and the United States, now reflect significantly lower policy rates for 2008 than at the time of the *October Report*.

Exchange Rates

Against a background of significant volatility in currencies, commodity prices, and interest rates since the *October Report*, and a generally weakening U.S. dollar, the Canadian dollar has exhibited exceptional volatility. After spiking sharply early in November, the dollar has since declined to



trade around the level of 98 cents U.S. assumed in the *October Report* (Chart 5). This level is not inconsistent with fundamental factors.

The Economic Outlook

The Bank’s base-case projection incorporates the following key assumptions: energy prices evolving in line with current futures prices; as in the *October Report*, a Canada/U.S. exchange rate averaging 98 cents U.S.; and a gradual and orderly resolution of global imbalances.

The robust expansion of the global economy experienced over the past several years is expected to moderate over 2008–09. The adverse impact of the tightening of credit conditions in industrialized countries should be partially offset by more accommodative monetary policy than previously expected and by continued strength in emerging-market economies. Nevertheless, global economic growth is expected to slow somewhat faster than projected in the *October Report* (Table 1).

	Share of real global GDP ^a (per cent)	Expected growth (per cent) ^b			
		Projection			
		2006	2007	2008	2009
United States	20	2.9 (2.9)	2.2 (1.9)	1.5 (2.1)	2.5 (3.0)
European Union	19	2.9 (2.9)	2.7 (2.6)	1.8 (2.0)	1.9 (2.2)
Japan	6	2.4 (2.2)	1.9 (2.0)	1.6 (1.7)	1.8 (1.8)
China and Asian NIEs ^c	18	10.0 (10.0)	10.1 (10.0)	9.3 (9.4)	7.9 (8.0)
Others	37	6.3 (6.3)	6.3 (6.3)	5.7 (5.8)	5.0 (5.1)
World	100	5.4 (5.4)	5.3 (5.2)	4.6 (4.8)	4.3 (4.5)

- a. GDP shares are based on IMF estimates of the purchasing-power-parity (PPP) valuation of country GDPs for 2006. Source: IMF, WEO Database, April 2007. The World Bank recently published comprehensive revised estimates of purchasing-power parities, which will be reflected in the April 2008 *Monetary Policy Report*.
- b. Numbers in parentheses are projections used for the October 2007 *Report*.
- c. NIEs are newly industrialized economies. These include Hong Kong (Special Administrative Region), South Korea, Taiwan (Province of China), and Singapore.
- Source: Bank of Canada

Futures prices for crude oil are higher than those in the *October Report*, but futures prices for natural gas are largely unchanged. The price index for non-energy commodities is expected to remain firm, easing somewhat as global growth moderates.

The U.S. Outlook

The projection for U.S. GDP growth has been revised down significantly from that in the *October Report*. Declining activity in the U.S. housing sector suggests a deeper and more prolonged adjustment in U.S. residential investment and a reduction in home equity values. Credit conditions are expected to tighten further, reflecting continuing financial market concerns and the weaker

economic outlook. These factors, together with declines in the value of household wealth, are expected to reduce the growth of domestic demand relative to earlier projections. In this *Update*, which incorporates the effect of a significant easing in U.S. monetary policy (including some reduction in the policy rate beyond that announced on 22 January), the U.S. economy is projected to grow at a rate below that of potential output in 2008, before recovering gradually in 2009. Growth in 2008 is expected to be particularly weak in the first half of the year, averaging 0.5 per cent at an annual rate, because of weakness in household spending and residential investment. Annual U.S. GDP growth is projected to be 1.5 per cent in 2008 and 2.5 per cent in 2009.

The Canadian Outlook

For Canada, the Bank's base-case projection is weaker for 2008 but somewhat stronger for 2009 than in the *October Report*. Quarterly growth at annual rates is expected to average 1.3 per cent in the first half of 2008 and then move up to 2.3 per cent in the second half of this year, and to just over 3 per cent through 2009 (Table 2).

Final domestic demand is expected to remain the key driver of economic growth over the projection period, supported by high commodity prices, further robust growth in real incomes, and lower policy rates (Table 3). Growth of final domestic demand is a little stronger than in the last *Report*. But the major change is much weaker net exports. While import growth is expected to stay robust over the projection period, the outlook for Canadian exports has been marked down, reflecting the weaker U.S. economic outlook. With the pickup in U.S. GDP growth in 2009, the drag on Canadian economic activity coming from net exports diminishes.

	2007		2008			2009
	Q3	Q4	Q1	Q2	H2	
Real GDP (quarter-over-quarter percentage change) ^b	2.9 (2.5)	1.5 (1.8)	0.6 (2.0)	2.0 (2.2)	2.3 (2.5)	3.2 (2.6)
Real GDP (year-over-year percentage change)	2.9 (2.8)	2.9 (2.9)	2.2 (2.4)	1.7 (2.1)	1.7 (2.2)	2.8 (2.5)
Core inflation (year-over-year percentage change)	2.2 (2.2)	1.6 (2.3)	1.4 (2.2)	1.3 (2.1)	1.6 (2.0)	1.9 (2.0)
Total CPI (year-over-year percentage change)	2.2 (2.2)	2.4 (3.0)	1.7 (2.9)	1.4 (2.4)	1.5 (1.9)	1.9 (2.0)
Total CPI (excluding effect of changes in indirect taxes) ^c (year-over-year percentage change)	2.3 (2.3)	2.4 (3.0)	2.2 (2.9)	1.9 (2.4)	2.0 (1.9)	1.9 (2.0)
WTI ^d (level)	75 (75)	91 (81)	93 (78)	92 (77)	90 (76)	88 (74)

- a. Figures in parentheses are from the October *Monetary Policy Report*.
- b. For half and full years, the number reported is the average of the respective quarter-to-quarter percentage growth at annual rates.
- c. The combined effect of the 1 per cent GST reduction on 1 January 2008 and some other small changes in indirect taxes is estimated to reduce total CPI by about 0.5 per cent for a year.
- d. Assumption for the price of West Texas Intermediate crude oil (US\$ per barrel), based on an average of futures contracts over the two weeks ending 18 January 2008

With the weak near-term U.S. outlook and the tighter credit conditions in Canada, the economy moves into modest excess supply in the second quarter of this year. In this base-case projection, the subsequent strengthening of U.S. economic growth and further near-term reduction in policy interest rates in Canada bring aggregate supply and demand back into balance in early 2010.³

3. The assumption for potential output growth is 2.8 per cent in 2008 and 2.7 per cent in 2009, the same as in the last *Report*.

The projection for core inflation is lower than in the *October Report*. In 2008, this reflects the modest excess supply in the economy for much of the year and continued pressures from lower-than-expected prices for selected tradable goods. These lower prices are driven by the increased competition related to the high Canadian dollar. However, with the impact on measured inflation from price-level adjustments dissipating, with well-anchored inflation expectations, and with the economy moving back towards balance, core inflation should move up to 2 per cent by the end of 2009.

	2006	2007	2008	2009
Consumption	2.3 (2.3)	2.2 (2.1)	2.2 (2.1)	2.4 (2.0)
Housing	0.1 (0.1)	0.2 (0.2)	-0.1 (-0.1)	0 (0)
Government	0.8 (0.8)	0.6 (0.6)	0.7 (0.7)	0.6 (0.6)
Business fixed investment	1.2 (1.2)	0.6 (0.5)	0.5 (0.5)	0.5 (0.5)
Subtotal: Final domestic demand	4.4 (4.4)	3.6 (3.4)	3.3 (3.2)	3.5 (3.1)
Exports	0.3 (0.3)	0.6 (0.5)	-0.1 (0.2)	0.4 (0.4)
Imports	-1.6 (-1.6)	-1.7 (-1.2)	-1.3 (-1.2)	-1.1 (-1.0)
Subtotal: Net exports	-1.3 (-1.3)	-1.1 (-0.7)	-1.4 (-1.0)	-0.7 (-0.6)
Inventories	-0.3 (-0.3)	0.1 (-0.1)	-0.1 (0.1)	0 (0)
GDP	2.8 (2.8)	2.6 (2.6)	1.8 (2.3)	2.8 (2.5)

- a. Figures in parentheses are from the base-case projection in the *October Monetary Policy Report*.

The path for the 12-month rate of increase in the total CPI over the projection period reflects the revised outlook for core inflation, expectations for energy prices, and the effect of changes in indirect taxes. The projection for total CPI inflation in 2008 is lower than in the last *Report*, because of the reduced outlook for core inflation and the estimated direct effect of the one-percentage-point GST reduction (and small changes in other indirect taxes). This is partly offset by the effect of higher futures prices for crude oil. Total CPI inflation is expected to fall below the 2 per cent target in early 2008 and remain below the target for the rest of the year, before moving back to 2 per cent by the end of 2009. Total CPI inflation, excluding the impact of the recent GST reduction, is projected to average close to 2 per cent throughout 2008 and 2009.

The *Monetary Policy Report* and the *Update* are available on the Bank's website at: <http://www.bankofcanada.ca>.

Copies can also be obtained by contacting the Bank at:
 Telephone: 1 877 782-8248; email: publications@bankofcanada.ca

APPENDIX B

1997-1998 Performance Pay for DM-3s

The Advisory Committee on Senior Level Retention and Compensation, in its first report dated January 1998, recommended that the existing performance pay program continue to be applied for 1997-1998 with the proviso that the salary of fully satisfactory performers, to the extent possible, be moved to 90% of the maximum of the range. However, given the substantial salary range increase (19% at the DM-3 level) no performance related in-range salary increase was awarded and the maximum performance pay awarded as a lump sum was limited to 7.5% of salary for an 'outstanding' performance rating. Performance pay was payable effective April 1, 1998.

Distribution of Performance Pay (lump sums) for DM-3s (10 eligible)

Percentage of lump sum	Number of DM-3s (average \$ amount of at risk pay)
Between 0% and 4.5%	3 (\$4,000)
Between 4.5% and 7.5%	7 (\$8,871)

Overall average salary : \$164,840

Overall average lump sum: \$7,410

Overall average lump sum as % of average salary : 4.5%

APPENDIX C

PAR MESSAGEUR

Le 25 janvier 2008

Me Pierre Bienvenu
Ogilvy Renault S.E.N.C.R.L., s.r.l.
Bureau 1100
1981 avenue McGill College
Montréal QC H3A 3C1

Objet : Existence du fractionnement de revenu chez les avocats

Maître Bienvenu,

La présente a pour but de répondre à la demande que vous nous avez faite de vous présenter nos commentaires sur la possibilité qu'ont les avocats en pratique privée de fractionner leur revenu avec les autres membres de leur famille.

Le contexte

Dans le document de représentations à la Commission d'examen de la rémunération des juges que votre Cabinet a préparé pour l'Association canadienne des juges des cours supérieures et le Conseil canadien de la magistrature¹, vous commentez, aux paragraphes 133 à 135, les données que l'Agence du revenu du Canada a extraites de sa base de données pour l'année d'imposition 2005 de la façon suivante :

133. *CRA was mandated by the Government to assemble a database consisting of the 2005 tax returns of self-employed individuals who identified themselves as lawyers on forms T2032 "Statement of Professional Activities", or T2124, "Statement of Business Activities". This database was then used to generate tables based on certain parameters.*
134. *As discussed in the Navigant report, when CRA was asked to generate a table of net professional income of all self-employed lawyers in Canada for 2005, with low-income exclusion of \$60,000, the income of the 75th percentile was \$304,276. A similar table for the top ten Census Metropolitan Areas yielded income at the 75th percentile of \$362,944. These 2005 incomes are substantially higher than the 2007 salary of \$252,000 for puisne judges, higher even when taken together with the attributed value of the judges' annuity.*

¹ Ogilvy Renault LLP, Submission of the Canadian Superior Court Judges Association and the Canadian Judicial Council to the Judicial Compensation and Benefits Commission, December 14, 2007.

135. *There are two important caveats to note. First, the CRA data is 2005 incomes. Salary levels in the private sector have increased since then. There should therefore be an adjustment in line with increases in private-sector lawyers income, which in recent years have been significantly higher than inflation. Second, the CRA data does not necessarily show the full picture of the income-earning capacity of a lawyer and his/her family. Lawyers in private practice are in a position to 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.*

Pour bien comprendre l'affirmation que vous faites au paragraphe 134, il faut la remettre dans le contexte du report Navigant, préparé pour l'Association des juges des cours supérieures², que vous commentez ainsi au numéro 132 de votre document :

132. *...Navigant found that lawyer's income in the private sector at the 75th percentile for Canada as a whole in 2006 was \$366,216. In Ontario, the income at the 75th percentile was \$437,500. Only Saskatchewan had income at the 75th percentile which was less than \$252,000, the current salary of puisne judges.*

Votre demande

Vous demandez donc notre collaboration pour étayer l'affirmation que vous faites à la fin du paragraphe 135 comme quoi l'écart observé entre le revenu des avocats dans le rapport Navigant et celui provenant des données de l'ARC (le premier étant plus élevé que le second) pourrait provenir du fait que les avocats en pratique privée peuvent structurer leurs affaires de telle sorte qu'ils sont en mesure de fractionner leur revenu avec les autres membres de leur famille.

Le fractionnement de revenu

Dans la dernière édition du volume « *How to reduce the tax you pay* » que rédige notre Cabinet à l'intention du grand public, le fractionnement de revenu est décrit de la façon suivante :

Income splitting is achieved when income that normally would be taxed entirely in your hands is instead successfully transferred in whole or in part by you to another person with a lower marginal tax rate. Most often, the other person is either your spouse (including a common-law spouse) or your children. If the difference in marginal tax rates is 20%, the family's tax saving is \$200 for every \$1,000 of income transferred to the lower-rate individual. Successful income splitting also requires that the income transferred does not bump the lower-rate individual to a higher tax rate and that the attribution rules are observed³.

Les professionnels qui gagnent des revenus élevés, dont les avocats, sont donc parmi les premiers intéressés à voir leurs revenus fractionnés entre les membres de leur famille. De plus, comme les avocats ont, au sein même de leur Cabinet dans la plupart des cas, l'expertise légale et fiscale nécessaire, cela leur facilite grandement la mise sur pied de telles structures.

² Navigant Consulting, Inc., A Review of Canadian Private-Sector Lawyer Income, Submitted to the Canadian Superior Courts Judges Association, December 13, 2007

³ Deloitte, How to reduce the tax you pay, Key Porter, 2007, p. 25.

Depuis plusieurs années, nous avons effectivement observé, au sein de cabinets d'avocats canadiens pratiquant en société en nom collectif, qu'ils soient nos clients ou non, des structures ayant pour but de fractionner leur revenu d'associé avec les membres de leur famille. Le même phénomène a également été noté chez certains de nos clients avocats qui sont membres de sociétés en nom collectif non clientes. À notre connaissance, il en est de même pour plusieurs cabinets de comptables agréés.

Sociétés en commandite

Un des moyens utilisés pour fractionner le revenu est de mettre sur pied une société en commandite qui effectue la gestion du cabinet moyennant des honoraires. Dans plusieurs de ces cas, les associés détiennent leur participation dans la société en commandite par l'intermédiaire d'une fiducie familiale discrétionnaire.

Dans la mesure où la société en commandite exploite une entreprise et que les honoraires versés sont raisonnables, le fractionnement du revenu au niveau de la fiducie familiale est accepté par les autorités fiscales⁴.

Il est difficile de déterminer, de façon générale, le montant de revenu qui peut ainsi être fractionné par les avocats avec les membres de leurs familles. Toutefois, à la lumière de notre expérience, nous ne jugerions pas déraisonnable que le fractionnement porte sur des montants pouvant aller jusqu'à 60 000 \$ annuellement. Au-delà de ce montant, l'avantage fiscal est beaucoup moins intéressant, surtout si le fractionnement se fait avec une seule personne, à cause des taux d'imposition progressifs de notre régime fiscal.

Sociétés par actions

Dans les provinces où les avocats peuvent s'incorporer, la totalité du revenu de l'avocat peut se retrouver dans la société par actions, après quoi le revenu net de la société par actions peut être distribué sous différentes formes entre l'avocat et les membres de sa famille.

Explication de l'écart observé

Ces structures de fractionnement de revenu mises en place par les Cabinets d'avocats seraient, à notre avis, un élément significatif qui expliquerait l'écart observé dans la rémunération des avocats entre les résultats du sondage effectué par Navigant (ce que les avocats disent être leur rémunération brute) et les données extraites de la base de données de l'ARC (ce qu'ils inscrivent dans leurs déclarations de revenus).

⁴ Voir les interprétations techniques de l'Agence du revenu du Canada # 9603995 du 27 mars 1996 et # 9523635 du 15 novembre 1995.

Ogilvy Renault S.E.N.C.R.L., s.r.l.

Le 25 janvier 2008

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Nous espérons que cet avis rencontre vos objectifs et nous demeurons à votre disposition si vous désirez discuter de la présente.

Veillez agréer, Maître Bienvenu, l'expression de nos sentiments les meilleurs.

Samson Bélair / Deloitte + Touche s.e.n.c.r.l.

Gilles Veillette CA

Associé, Fiscalité

Samson Bélair/Deloitte & Touche s.e.n.c.r.l.

Jean-Luc Beauregard, CA

Directeur principal, Fiscalité

Samson Bélair/Deloitte & Touche s.e.n.c.r.l.

Source:

CCH Tax/Federal Income Tax/Tax Window Files/Tax Window Files/1990s/1996/March/[9603995] Management fees

Management fees

March 27, 1996

Window On Canadian Tax Commentary

Document number: 9603995

Income Tax Act: 18(1)(a)

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the Department. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle du ministère.

PRINCIPAL ISSUES:

Is the use of services partnership acceptable?

POSITION:

Yes, if partnership carries on a business and no abuse of the Act.

REASONS:

Question of fact.

5-960399

XXXXXXXXXX

G. Martineau

Attention: XXXXXXXXXXXX

March 27, 1996

Dear Sirs:

Re: Management and/or Technical Services Partnerships

This is in reply to your letter of January 15, 1996 wherein you refer to our letter 5-952363 (the "Letter") to you of November 15, 1995.

As stated in the Letter, it is not the Department's practice to determine whether or not subsection 245(2) of the Act would apply to a particular situation without examining all of the relevant facts. Furthermore, your request needs the interpretation of a large number of provisions of the Act which could not be made without an examination of all the relevant documentation. However, the views expressed in our opinion letters 5-8653 and 5-7772 remain applicable.

The Department considers that the use of a services partnership is not unacceptable to the extent the transactions involving such partnership respect the provisions of the Act and that such partnership carries on a bona fide business. Generally, the Department views that a

15% mark-up of the costs of providing the services would not be unreasonable. However, the reasonableness of a fee is a question of fact which can only be determined by a thorough review of the circumstances of each particular situation. Our position stated in answer to question 18 of the Thirty-Seven Canadian Tax Foundation Conference, 1985 Revenue Canada Round Table Questions & Answers would apply in the case of a services partnership.

The above comments reflect an expression of opinion only and are not binding on the Department, as explained in paragraph 21 of Information Circular 70-6R2. We trust, however, that they are of assistance.

Yours truly,

for Director
Financial Industries Division
Income Tax Rulings and
Interpretations Directorate

Source:

CCH Tax/Federal Income Tax/Tax Window Files/Tax Window Files/1990s/1995/November/[9523635] Management services partnership

Management services partnership

November 15, 1995

Document number: 9523635

Income Tax Act: 245(2)

Please note that the following document, although believed to be correct at the time of issue, may not represent the current position of the Department. Prenez note que ce document, bien qu'exact au moment émis, peut ne pas représenter la position actuelle du ministère.

PRINCIPAL ISSUES:

GAAR and Partnership Services

POSITION:

Question of fact

REASONS:

XXXXXXXXXX

5-952363
G. Martineau

Attention: XXXXXXXXXXXX

November 15, 1995

Dear Sir/Madam:

Re: Management and/or Technical Services Partnerships

This is in reply to your letter of August 30, 1995 in respect of management and/or technical services partnership established to perform management and/or technical, administrative and leasing services for professional practices. The partners of the service partnership would be persons not dealing at arm's length with the professional practitioners who could choose to be partners.

It appears that your enquiry relates to specific transactions, either proposed or completed. Where a transaction is proposed, confirmation of the tax implications arising therefrom should be sought by way of an advance ruling request submitted in the manner set out in Information Circular 70-6R2. Where a completed transaction is involved, the enquiry should be addressed to the relevant Tax Services Office. We offer, however, the following general comments.

In order to determine whether or not subsection 245(2) of the Act would apply to a particular situation, we would have to examine all of the relevant facts of the particular situation. Since all the relevant facts of a particular

situation can only be disclosed in the context of an advance tax ruling, we are not able to express an opinion as to whether or not subsection 245(2) of the Act would apply to the situations described in your letter and we are only prepared to give a definitive response in the context of an advance tax ruling.

We would assume that a services partnership would be created mainly to obtain tax benefits and would be considered as an avoidance transaction as defined pursuant to subsection 245(3) of the Act. However, pursuant to subsection 245(4) of the Act, subsection 245(2) of the Act would not apply to a transaction if it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of the Act or an abuse having regard to the provisions of the Act read as a whole.

Whether or not the general anti-avoidance provisions might apply, there may be other provisions in the Act which could apply. For instance, the amount of the service fee must be reasonable in the circumstances as stipulated under section 67 of the Act and might be subject to section 69 of the Act. The Act contains specific provisions which deal with the splitting of income between family members and other persons.

Generally, subsection 245(2) of the Act might not apply where a services partnership does not avoid one or more of the specific provisions mentioned above.

The above comments are an expression of opinion only and are not binding on the Department; nevertheless we hope this will be of assistance.

Yours truly,

for Director
Financial Industries Division
Income Tax Rulings and
Interpretations Directorate