THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Inquiry of the Special Advisor on Federal Court Prothonotaries' Compensation

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Canadian Bar Association, with assistance from the Judicial Compensation and Benefits Committee, the Federal Bench and Bar Liaison Committee, the Maritime Law Section, the Intellectual Property Law Section, and the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to make submissions to the Special Advisor on Federal Court Prothonotaries' Compensation (the Special Advisor). Among the CBA's objectives are improvements in the law and the administration of justice. This submission is based upon the general principles we believe should guide the Special Advisor in determining his recommendations for prothonotaries' compensation.

The CBA has reviewed the initial submissions made to the Special Advisor by the Federal Court prothonotaries, the Government of Canada, individual members of the intellectual property bar, the Chief Justice of the Federal Court and the Acting Chief Administrator of the Courts Administration Service.

The CBA does not take the position that Federal Court prothonotaries are equivalent to federally appointed judges of superior courts or courts of appeal. That said, the CBA recognizes the unique, important and expanding role that prothonotaries play in the Federal Court. While not judges by strict definition, prothonotaries have a jurisdiction and discretion that would otherwise be left to Federal Court judges. To the extent that the work of prothonotaries is judicial as opposed to solely administrative in nature, they too require a recognized independence from the executive. We discuss the requirements of this foundational constitutional principle of judicial independence as it relates to prothonotaries below.

II. PRINCIPLES OF JUDICIAL INDEPENDENCE AND PROTHONOTARIES

Independence of the judiciary from the executive and legislative branches is a cornerstone of Canada's justice system and, by extension, of democracy itself. As the Supreme Court of Canada noted in *Reference Re: Remuneration of Judges of the Provincial Court of Prince Edward Island*,[1] judicial independence protects citizens against the abuse of state power.

The CBA recognizes the pivotal role that the process for determining judicial compensation and benefits can have in fostering or eroding that independence. With this in mind, the CBA intervened in the *PEI Reference* and also in *Provincial Court Judges' Assn of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges Assn v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conference des juges du Québec v. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*.[2]

The CBA's core interest is to ensure that compensation and benefits for judicial officers are structured and maintained to fulfill a dual purpose: to protect and promote judicial independence through the institution and maintenance of appropriate safeguards for its members; and to strengthen and advance the judiciary through sufficient financial independence of its members and adequate compensation to attract the best and most qualified candidates for appointment. These principles are not necessarily confined to the judiciary, proper. They can, and in some cases should, be extended to judicial officers, who, like the Federal Court prothonotaries, combine court administrative functions with core jurisdictions and discretions to act as decision-makers with binding authority on the parties appearing before them, subject only to appeal.

The CBA is an independent voice and our sole concern is reflected in the two broad principles set out in the paragraph above. The CBA does not represent the interests of either the Federal Court prothonotaries or the Government, nor any of the other groups interested in this matter. Our submission is intended to guide the Special Advisor, so that the process

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1 [1997] 3 S.C.R. 3 [*PEI Reference*]

2 [2005] 2 S.C.R. 286 [*Provincial Judges Assn of New Brunswick*]

of determining compensation and the substantive outcome maintain the constitutional imperative of judicial independence, with recognition of the unique features of the prothonotaries' office.

An independent judiciary is a cornerstone of a democratic society, and "the lifeblood of constitutionalism in democratic societies".[3] "Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice".[4] Judicial independence has three components: security of tenure, administrative independence and financial security.

The third component, financial security, in turn embodies three constitutional requirements:

- that judicial salaries can be maintained or changed only by recourse to an independent commission;
- that no negotiations are permitted between the judiciary and the government; and
- that salaries may not fall below a minimum level.

These three constitutional requirements exist to preserve the principle that not only must the judiciary be independent, it must be *seen to be independent* from the executive and legislative branches of the government.

The relationship must be "depoliticized" through a determination of judicial salary and benefits by an objective, independent person or body that is beholden to neither the judiciary nor government.[5] This process is frequently described as being an "institutional sieve"[6] and a "structural separation between the government and the judiciary".[7] The reason for this "institutional sieve" is to eliminate any perception that a decision made by a judicial officer

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3 *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70.

4 *Ell v. Alberta*, [2003] 1 S.C.R. 857 at para. 29

5 *Provincial Judges Assn of New Brunswick*, *supra note* 2, at para. 10.

6 *PEI Reference*, *supra note* 1, at para. 170; *Provincial Judges Assn of New Brunswick*, *supra* note 2, at para. 14.

7 *Provincial Judges Assn of New Brunswick*, *supra note* 2, at para. 14.

may be a disguised attempt to curry favour with or avoid financial retribution by the executive. Given that the federal government appears as a litigant before prothonotaries, this rationale has obvious relevance to their circumstances.

As noted by Chief Justice Lutfy of the Federal Court, prothonotaries now play a role that is crucial to the efficient management and timely disposition of many proceedings before the Federal Court. The challenge from a constitutional standpoint is to recognize and protect their importance without at the same time creating, by virtue of the application of the principle of judicial independence, *de facto* judicial authority that was not intended by Parliament.

In this analysis, the following background information shows the significance of their role to the functioning of the Federal Court. While the office of the prothonotary was established when the Federal Court was created in 1971, the first prothonotaries were not appointed until 1985. In 1998, the Rules of the Federal Court of Canada[8] substantially expanded the jurisdiction of the prothonotaries. Their trial jurisdiction over monetary claims has increased from $5,000 to $50,000, exclusive of interest and costs, and their judicial powers have been enhanced considerably with the advent of case management. There has also been some preliminary discussion, as noted by the Chief Justice, of the possibility of further increasing their trial jurisdiction to an amount greater than $50,000. Furthermore, under new rules that came into effect in December 2007, the prothonotaries will have a significant role to play in the class action process before the Court.

Today, prothonotaries hear and decide motions on a wide range of matters, regardless of the relief sought or amount in issue, including final determinations. They decide *Charter* issues. They conduct pre-trial and dispute resolution conferences, amongst others, and routinely decide cases or issues between private entities and the federal Crown or Ministers of the Crown and other federal officials.

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[8] SOR/98-106

Indeed, for some litigants a prothonotary is the only judicial officer they meet in an action before the Federal Court. Experience has shown that a decision of a prothonotary is given significant deference. The Supreme Court of Canada has taken the position that discretionary orders of a prothonotary "… ought to be disturbed by a motion judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case".[9]

The Federal Court is Canada's Admiralty Court. In admiralty matters, prothonotaries can deal with such things as stays of proceedings based on an agreement to arbitrate or a forum selection clause and challenges to an arrest. In the process, they deal with the often complex question of the Court's *in rem* jurisdiction, as well as assessing the level and sufficiency of the bail required in order for the Court to release a vessel from arrest.

One of the more important aspects of the Court's admiralty jurisdiction is the sale of a ship under arrest. Determining whether a ship should be sold pending litigation is often a difficult and contentious issue. Prothonotaries deal with these issues and ultimately with the sequence of priorities flowing from an arrest and sale. In some cases, prothonotaries determine who gets paid first out of the proceeds of sale, meaning some may not get paid at all. These decisions often involve substantial amounts in excess of $50,000 and, as a result, have a significant financial impact on the parties involved.[10]

In the area of intellectual property, prothonotaries adjudicate patent, copyright and trade mark matters, including a large volume of litigation involving pharmaceuticals. As noted in the submission by individual members of the intellectual property bar, these disputes more often than not involve complex issues which can be procedurally demanding on the Court and the parties, often requiring interlocutory matters to be determined under unreasonable pressure of time.

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9 *Z.I. Pompey Industrie v. Ecu-line N.V*. 2003 SCC 27.

10 See the decision of Prothonotary Hargrave in *Royal Bank of Scotland v. Golden Trinity (Ship)* 2004 FC 795.

Prothonotaries manage complex *Patented Medicines* (*Notice of Compliance*) proceedings, which, according to the submission of the Chief Justice, have tripled in the Federal Court since 2002. In January 2008, the Federal Court implemented a Practice Direction making Notice of Compliance proceedings subject to early case management. It is anticipated that the prothonotaries will handle the majority of this increased workload for the Court. The prothonotaries, in addition to their case management role, also have jurisdiction to dismiss the proceedings summarily on the merits, taking into account factual and expert evidence.

Like judges of the Federal Court, the prothonotaries enjoy the same immunity from liability by virtue of subsection 12(4) of the *Federal Courts Act*.[11]

On the other hand, part of the prothonotaries' role remains administrative in nature. They fulfill most case management functions. They assist with scheduling. They impose deadlines with respect to filings, interlocutory proceedings, and pre-trial discovery. They do not have exclusive authority over these matters, but are subject to the direction of the Federal Court generally, and cannot be said to be independent with respect to those functions.

III. DETERMINING PROTHONOTARIES' COMPENSATION

As noted above, the principle of judicial independence requires that salaries not fall below a minimum level. This requirement is explained in the *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada*:

> [I]t is difficult to state precisely what is an adequate level for judges' salaries. The amount must be sufficient that neither the judge nor his dependents suffer any hardship by virtue of his accepting a position on the bench. It must also be sufficient to allow the judge to preserve the mien of his office. And it should be sufficient to reflect the importance of the office of judge ...[12]

Prothonotaries' salaries and benefits should not be excluded from the application of these general principles, meaning that the Special Advisor ought to determine an adequate level

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11 R.S., 1985, c. F-7.

12 (Canadian Bar Association: Ottawa, 1985), at 18 [the de Grandpré Report].

for their compensation. Their salaries and benefits, including the benefits for their families, must be at a level to attract the best and most qualified candidates to the position. They must also be commensurate with the position of similar judicial officers functioning within other superior courts, such as Masters and Presiding Justice of the Peace. They must reflect the respect with which the Federal Court is to be regarded, recognizing that they must nevertheless be subordinated to some substantial degree to Federal Court judges.

"The need to attract outstanding candidates to the office of Federal Court prothonotary" is one of the factors that the Special Advisor must consider.[13] The Special Advisor must also consider the salary and the benefits of appropriate comparator groups. Section 26 of the *Judges Act*[14] requires the Judicial Compensation and Benefits Commission to consider similar factors in recommending compensation and benefits for federally appointed judges.

The CBA acknowledges that financial benefits are not – and should not be – the only factor aimed at attracting the most gifted and accomplished candidates for appointment as prothonotaries. An appropriate gauge to determine the level of prothonotaries' salary is that of mid-level to senior private practitioners and mid-level to senior public servants, who form the pool from which candidates for appointment of prothonotaries are selected.

Indexation to the cost of living would ensure that salaries of prothonotaries are not eroded, thereby encouraging retention. But attracting candidates for the office requires competitive salaries. To the extent that prevailing market conditions have increased relevant comparator salaries in excess of inflation, prothonotaries' salaries should be consistent with these market conditions.

Considering private practice comparables does not, of course, mean considering the salaries of practitioners from only the largest and most profitable firms in the country. The Special Advisor should, however, keep in mind that the locales to which most prothonotaries are

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13 Order in Council P.C. 2007-1316

14 R.S., 1985, c. J-1.

appointed have the highest cost of living in the country (Vancouver, Toronto, Montreal and Ottawa).

Furthermore, in conducting the comparison with the compensation of lawyers in private practice, the Special Advisor should consider forms of compensation other than salaries. Specifically, prothonotaries' pensions are not the same as judges' pensions but are more favourable than private lawyers' retirement arrangements. Upon retirement, judges are entitled to an annuity under the *Judges Act* whereby they are able to retire on 2/3 final year salary after 15 years of service. In comparison, the six prothonotaries currently participate in the Public Service Superannuation Plan established under the *Public Service Superannuation Act*[15] and regulations and accordingly are subject to the restrictive requirement that requires 35 years of service for a full pension. This means that unless prothonotaries start out their career in the public service, they are highly unlikely to receive a full pension. However, their pension is a defined benefit calculated on the number of years of service, which is indexed, and for which prothonotaries fund only a part. On the other end of the spectrum, lawyers in private practice fund their own retirement by purchasing RRSP's or other investments, thereby reducing their disposable income. Upon retirement, they must rely upon their savings and the vagaries of the sometimes aggressive and volatile securities market.

We recognize that there may be some disparity between the compensation some prothonotaries receive on appointment and what they received in their pre-appointment practice or employment. The objective however is not to provide the prothonotaries with the same level of financial benefit that they would have enjoyed prior to appointment:

> At the same time, though, it is neither necessary nor desirable to establish judicial salaries at such a level as to match the judge's earnings before appointment to the bench. The obvious reason for this is that such a policy would tend to attract people to the bench for purely financial reasons. The sort of person who would accept a position on the bench because it paid well is not the sort of person who would make the best judge. Rather, the sort of person we would wish to see on the bench are those who appreciate the honour of being a judge and who see as part of their reward the satisfaction of serving society on the bench.[16]

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15 R.S., 1985, c. P-36

16 De Grandpre Report, at 18.

The Special Advisor has been asked to consider the prevailing economic conditions in Canada and the cost of living, and the overall economic and current financial position of the federal government. The CBA accepts that prothonotaries are paid from the government purse and that the competing demands on public funds can mitigate the amount that might otherwise be paid for salaries. The CBA further accepts that a dollar spent on prothonotaries' salaries or benefits is a dollar that cannot be spent on another priority. That said, we emphasize that the judicial functions of the prothonotaries' role do require a measure of real and perceived independence from government, especially as that independence relates to compensation and benefits. This is part of the constitutional imperative that should require the government to demonstrate that when competing priorities are used as a rationale to reduce what the Special Advisor concludes to be appropriate compensation for prothonotaries, the Government must show conclusive evidence of other pressing government fiscal obligations of similar importance to judicial independence.[17]

After determining the appropriate level of salary and benefits for prothonotaries, the CBA urges the Special Advisor to remind the parties that the Constitution requires the setting of salaries and benefits to be objective, dispassionate and rational. Prothonotaries should no longer be placed in the untenable position of having to negotiate with the government regarding their salary and benefits. The Judicial Compensation and Benefits Commissions are established to provide an effective and non-partisan method of reviewing and setting remuneration for judges. The same should be the case for prothonotaries.

The submission of the Acting Chief Administrator of the Courts Administration Service notes that only two of the six current prothonotaries have permanent secure funding. Without secure funding, the Courts Administration Service must prepare a "business case" for consideration by the Treasury Board of Canada. Through these business cases, temporary funding for the four prothonotaries to cover salaries, benefits and other costs, such as travel, has been provided on an annual case-by-case basis from the Treasury Board "Management Reserve". This Reserve however is restricted to temporary situations only,

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17 *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 provides an example of the fiscal constraints upon government that justified departing from the constitutional imperative of equality under *Charter* s.15.

which puts the four prothonotaries in a completely inappropriate position. The process for determining compensation should be based on objective criteria and not government discretion.

In 2005, the federal government recognized the need to safeguard the judicial independence of the prothonotaries in legislation introduced in the House of Commons, as Bill C-51. The Bill proposed to establish a committee to enquire on a periodic basis into the adequacy of the salary paid to prothonotaries, their benefits generally and any other amounts payable to them, retroactive or otherwise. Unfortunately, the Bill died on the Order Paper in November 2005 and these provisions have not been reintroduced to date.

An independent institutionalized body to recommend the salaries and benefits for prothonotaries is essential to avoid the possibility of political interference through economic manipulation. Any links whatsoever between judicial decisions, either specifically or generally, and compensation issues would erode judicial independence and should not be countenanced. While the CBA accepts the premise that governments must work within the objective of balancing limited financial resources for numerous and widely varied programs, the importance of judicial independence cannot be overstated.

IV. CONCLUSION

In summary, the CBA makes the following recommendation.

RECOMMENDATION:

The Special Advisor should use the following principles to guide the work in making recommendations on prothonotaries' compensation:

a) **Federal Court prothonotaries by strict definition are not judges of the Federal Court of Canada but the nature and character of their work includes judicial decision-making. Accordingly, they must be treated as independent from the executive and legislative branches in the same way as Federal Court judges.**

b) **The proper functioning of the Canadian justice system depends on a high level of judicial competence. Prothonotaries' salaries and benefits, including benefits for their families, must therefore be at a level to attract the**

best and most qualified candidates. They must also be commensurate with the position of other similarly-placed judicial officials in Canada and must reflect the overall respect with which the Federal Court is to be regarded.

c) **The Special Advisor should ensure that prothonotaries' compensation is consistent with prevailing market conditions and should use "comparables" of lawyers who are mid-level to senior private practitioners and mid-level to senior public servants.**

d) **Appropriate compensation levels are such that prothonotaries and their dependents do not experience significant financial disparity (both positive and negative) between pre-appointment and post-appointment.**

e) **Before competing priorities are used as a rationale to reduce what the Special Advisor concludes to be appropriate compensation for prothonotaries, the government must show conclusive evidence of other pressing government fiscal obligations of similar importance to protecting prothonotaries' independence in judicial decision-making.**

f) **The prothonotaries should no longer be placed in the untenable position of having to negotiate with the government regarding their salary and benefits. The intention in establishing Judicial Compensation and Benefits Commissions is to provide an effective and non-partisan method of reviewing and setting remuneration for judges. The same should be the case for the prothonotaries.**

We trust that these remarks will be of assistance to the Special Advisor in considering the adequacy of the salaries and benefits of the prothonotaries of the Federal Court.