



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

Submission to the Inquiry of the Special Advisor on Federal Court Prothonotaries' Compensation

**FEDERAL COURT BENCH AND BAR LIAISON COMMITTEE
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 37,000 lawyers, notaries, law students and academics.

This submission was prepared by the Canadian Bar Association representatives on the Federal Court Bench and Bar Liaison Committee (the CBA Committee), with the input of the CBA Judicial Compensation and Benefits Committee. The CBA Committee includes members from the Aboriginal Law, Administrative Law, Immigration Law, Intellectual Property, Maritime Law, and Taxation Law Sections. The representative from the Department of Justice Canada did not participate in the preparation of this submission. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association representatives on Federal Court Bench and Bar Liaison Committee.

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Submission to the Inquiry of the Special Advisor on Federal Court Prothonotaries' Compensation

I. INTRODUCTION

The Canadian Bar Association representatives of the Federal Court Bench and Bar Liaison Committee of the Canadian Bar Association (CBA Committee), are pleased to make submissions to the Special Advisor on Federal Court Prothonotaries' Compensation (the Special Advisor). Among the CBA objectives are improvements in the law and the administration of justice. This submission is based on the general principles to guide the Special Advisor in making recommendations for prothonotaries' compensation.

The CBA Committee is an independent voice that does not represent the interests of the Federal Court prothonotaries or the government¹. Our submission is intended to guide the Special Advisor, so the process of determining compensation and the outcome of that process maintain the constitutional imperative of judicial independence, recognizing the unique features of the prothonotaries' office.

The CBA Committee has reviewed the initial submission to the Special Advisor by the Government of Canada and the May 2008 report on Prothonotaries' Compensation. The CBA Committee also considered submissions to the Special Advisor in 2008² and the Federal Court of Appeal decision in *Aalto v. Canada (Attorney General)* 2010 FCA 195.

II. THE UNIQUE ROLE OF PROTHONOTARIES

Prothonotaries are judicial officers of the Federal Court. They exercise many of the same powers and functions as judges of the Court and have the same immunity from liability as a judge.³ The office of the prothonotary was created in 1971 to advance "the efficient

¹ The representative from the Department of Justice Canada on the CBA Committee did not participate in the preparation or consideration of this submission.

² These included submissions from Federal Court prothonotaries, the Government of Canada, the Chief Justice of the Federal Court and the Acting Chief Administrator of the Courts Administration Service.

³ Report of Special Advisor Adams, page 1

performance of the work of the Court”.⁴ Since then, the role and responsibilities of prothonotaries has accelerated dramatically, particularly with the 1998 amendments to the *Federal Courts Rules*.

Prothonotaries have a unique, important and expanding role that is “integral to the proper functioning of the Federal Court.”⁵ They have jurisdiction and discretion that, to some extent, mirrors those of Federal Court judges. This includes:

- full trial jurisdiction up to \$50,000;
- hearing and deciding motions on a wide range of matters, regardless of the relief sought or amount in issue, including final determinations such as motions to strike or dismiss proceedings;
- ruling on *Charter* issues and other general questions of law;
- adjudicating complex commercial matters;
- conducting references, pre-trial conferences and dispute resolution conferences;
- deciding cases or issues between private entities and the Federal Crown, or Ministers of the Crown and other officials.⁶

Prothonotaries also exercise case management functions analogous to that of masters. This may extend to management of class actions, as designated by the Chief Justice.⁷ Case management is a key factor in the effective and cost-efficient use of scarce judicial resources.

Acting as case management judges, prothonotaries complement the role of Federal Court judges by implementing procedures and schedules to get cases to a hearing before a judge as quickly and cost-effectively as possible, while not prejudicing the substantive rights of the parties. 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*.⁸

For some litigants, a prothonotary is the only judicial officer they will encounter in a Federal Court proceeding. A decision of a prothonotary is given significant deference. The standard of review is comparable to that of decisions by judges, particularly for motions requiring the

⁴ *Federal Courts Act*, s. 12

⁵ Report of Special Advisor Adams, pages 41-42

⁶ Report of Special Advisor Adams, page 2

⁷ *Ibid.*

⁸ R.S., 1985, c.F-7

exercise of judicial discretion. The Supreme Court of Canada has held 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 responsibilities of prothonotaries will likely continue to expand, evolve and become more complex, given the demands of case management and ADR initiatives.¹⁰

III. 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*,¹¹ judicial independence protects citizens against the abuse of state power. An independent judiciary is “the lifeblood of constitutionalism in democratic societies”.¹² “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”.¹³

Judicial independence has three components: security of tenure; administrative independence; and financial security. The third component, financial security, in turn embodies three constitutional requirements:

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

These requirements preserve the principle that the judiciary must be independent, and be *seen to be independent* from the executive and legislative branches. The process for determining judicial compensation can have a pivotal role in fostering or eroding judicial independence.

⁹ Z.I. Pompey Industrie v. Ecu-line N.V. 2003, SCC27

¹⁰ Report of Special Advisor Adams, page 42

¹¹ [1997] 3 S.C.R. 3 [*PEI Reference*]

¹² Beaugard v. Canada, [1986] 2 S.C.R. 56 at 70

¹³ Ell v. Alberta, [2003] 1 S.C.R. 857 at 29

The relationship must be depoliticized through a determination of judicial salary and benefits by an objective, independent person or body beholden to neither judiciary nor government.¹⁴ This process is frequently described as an “institutional sieve”¹⁵ and a “structural separation between the government and the judiciary”.¹⁶ The reason for this “institutional sieve” is to eliminate any perception that a decision made by a judicial officer may be a disguised attempt to curry favour with or avoid financial retribution by the executive.

IV. DETERMINING PROTHONOTARIES' COMPENSATION

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.¹⁷

The Special Advisor ought to apply these same general principles when determining an adequate level of compensation for prothonotaries. Their salaries and benefits, including benefits for their families, must be at a level to attract the most qualified candidates. They must also be commensurate with compensation for comparable judicial officers in other superior courts, such as traditional masters. Their compensation must reflect the respect with which the Federal Court is regarded, but at a level subordinate to Federal Court judges.

“The need to attract outstanding candidates to the office of Federal Court prothonotary” is one factor the Special Advisor must consider.¹⁸ The Special Advisor must also consider the salary and the benefits of appropriate comparator groups. Section 26 of the *Judges Act*¹⁹ requires the Judicial Compensation and Benefits Commission to consider similar factors in recommending compensation and benefits for federally appointed judges.

¹⁴ Provincial Judges Assn. of New Brunswick, *supra* note 2, at para. 10.

¹⁵ PEI Reference, *supra* note 1, at para. 170; Provincial Judges Assn. of New Brunswick, *supra* note 2, at para.

¹⁶ Provincial Judges Assn. of New Brunswick, *supra* note 2, at para. 14.

¹⁷ (Canadian Bar Association: Ottawa, 1985), at 18 [the de Grandpré Report].

¹⁸ Order in Council P.C. 2007-1316

¹⁹ R.S., 1985, c. J-1.

Indexation to the cost of living would ensure that salaries of prothonotaries are not eroded, encouraging retention. In comparing the compensation of lawyers in private practice, the Special Advisor should consider all forms of compensation, including pensions.

The Special Advisor has been asked to consider the prevailing economic conditions in Canada and the cost of living, as well as the current financial position of the federal government. The CBA Committee acknowledges that prothonotaries are paid from the government purse and that competing demands on public funds might mitigate the amount available for salaries.

V. ESTABLISH A FAIR PROCESS FOR REGULAR REVIEW OF PROTHONOTARIES' COMPENSATION

Prothonotaries should have the benefit of a fixed, independent review of their salaries. They should not be in the untenable position of having to negotiate with the government for salary and benefits. Judicial Compensation and Benefits Commissions ("Quadcom") are established pursuant to the *Judges Act* to provide an effective and non-partisan method of reviewing and setting remuneration for judges. Prothonotaries' salaries are linked, by Order-in-Council, to the salary of a Federal Court judge. Although judicial salaries are reviewed every four years by Quadcom, prothonotaries have no standing before Quadcom. The fixed, independent review for judges has no counterpart for prothonotaries, despite the partial overlap in judicial function. Fundamentally, this creates procedural unfairness for the prothonotaries.

The absence of a fixed, periodic review process creates uncertainty and compromises the judicial independence that prothonotaries should have. Judicial independence is further undermined by the fact that prothonotaries' salaries and benefits are funded through the budget of the Courts Administration Services. Unlike the security afforded to the payment of judicial salaries, financial provision for prothonotaries is dependent on the budget allocated to the Courts Administration Service, which may be subject to government cutback, undermining security of tenure for prothonotaries.

In 2005, the government recognized the need to safeguard the judicial independence of prothonotaries in 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 and any other amounts payable to them, retroactive or otherwise. Unfortunately, the Bill died on the Order Paper and has not been reintroduced.

An independent institutionalized body to recommend the salaries and benefits for prothonotaries is essential to avoid the potential for political interference. Any direct or indirect link between judicial decisions and compensation issues will erode judicial independence and should not be countenanced.

VI. RECOMMENDATIONS

The CBA Committee asks that the Special Advisor consider the following principles when determining prothonotaries' compensation:

- a) To maintain their independence from the executive and legislative branches, prothonotaries should no longer be placed in the untenable position of having to negotiate with the government for salary and benefits.**
- 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 be commensurate with that of similarly-placed judicial officials in Canada and must reflect the overall respect with which the Federal Court is regarded.**
- c) The Special Advisor should ensure that prothonotaries' compensation is consistent with prevailing market conditions and the appropriate comparators, considering the duties and judicial functions of prothonotaries.**
- d) Prothonotaries should have a fixed, independent review of their salaries similar to the Judicial Compensation and Benefits Commission, to provide an effective and non- partisan method of reviewing and setting remuneration.**