

**IN THE MATTER OF AN INQUIRY
ON FEDERAL COURT PROTHONOTARIES' COMPENSATION**

**REPLY SUBMISSIONS OF THE PROTHONOTARIES OF THE FEDERAL
COURT TO THE JUDICIAL COMPENSATION AND BENEFITS
COMMISSION**

March 29, 2016

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The Government's Failure to Address the Findings of Special Advisors Adams and Cunningham

1. On January 11, 2016, the Prothonotaries gave notice to the Commission and the other parties of their intention to raise the issues of (i) salary, (ii) incidental allowance, (iii) supernumerary status and (iv) representational costs. The Prothonotaries' position on these four issues was well known to the Government, having been raised in previous compensation reviews and having been the subject of recommendations by Special Advisors Adams and Cunningham.

2. In its main submissions filed on February 29, 2016, the Government devotes only two of 48 pages relating specifically to the office of Prothonotary of the Federal Court (par. 161 to 168). In essence, the Government submits, without reference to any relevant factors or objective facts, that the Prothonotaries' salary and benefits are adequate, and that the onus is on the Prothonotaries to establish that the *status quo* should be changed. With respect, the Prothonotaries do not bear any such burden.

3. It is important to repeat some of principles set out by the Supreme Court of Canada in *Bodner*. The Court made it clear that the task of a judicial compensation commission is unique. The Court indicated that "*the process was neither adjudicative interest arbitration nor judicial decision-making.*" A judicial compensation commission must focus on what is appropriate remuneration for the judicial office in question in light of all the relevant factors, including most importantly those factors set out in the commission's mandate.

4. The Supreme Court of Canada affirmed in *Bodner* that "each commission must make its assessment in its own context". It held that the "starting point" for the work of each judicial compensation commission should be the date of the previous commission's report. The previous report forms the background and context in which the present Commission performs its function. The whole concept of compensation being "adequate" means it must be related to objective criteria.

5. The Commission has an obligation to assure a strong and independent judiciary by setting a fair and reasonable level of compensation. That goal remains at the forefront of the Commission's deliberations and the recommendations set out in its report. The parties' role in the process is to assist the Commission in its deliberations.

6. The Government was required to engage in a meaningful way with the process of the Commission. However, rather than dealing with the issues raised by the Prothonotaries in a principled manner, the Government simply restates its positions that were previously rejected by earlier commissions, without reference to all the factors set out in the Commission's mandate or taking into account any material change since the last process.

7. The Government's submission that the Prothonotaries' current compensation is adequate is purely conclusory and tautological. Its position is tainted by a refusal to consider the issues raised by the Prothonotaries on their merits. As a result, the Prothonotaries have been deprived of the opportunity to determine whether there are legitimate reasons for the Government's position and to respond intelligently. The Prothonotaries reserve the right to seek leave from the Commission to file additional material or make further submissions in response to any new matter that may be raised by the Government in its "responding" submissions, or that could not have been anticipated.

Reply Submissions on the Items Raised by the Prothonotaries

(i) Salary

8. At paragraph 164 of its main submissions, the Government submits that, because of recent changes to the Prothonotaries' salary and enhancement of their pension benefits, nothing more than indexation is required during this Commission process. The Government is essentially saying that because it finally got around to partially implement some of the recommendations made in the Cunningham Report issued in May 2013, the Prothonotaries should wait another 4 years, until 2020, before their compensation is reviewed once again. With respect, that is not how the process works.

9. It does not lie in the mouth of the Government, which has repeatedly failed over the past 15 years to provide an independent and periodic review process, to now raise how “recently” some changes to the Prothonotaries’ compensation have been made as an excuse not to act or engage the commission process. It is a constitutional requirement that there be periodic review of Prothonotaries’ compensation.

10. At page 54 of his Report, issued 8 years ago on May 30, 2008, Special Advisor Adams found that the Prothonotaries had had difficulty attracting the federal government’s attention to their concerns over the years. He made concrete recommendations to address long-standing issues relating to the Prothonotaries’ salary, pension and benefits, including a recommendation that a Prothonotary’s salary be fixed at 80% of a Federal Court judge’s salary (p. 57), that the linkage of a Prothonotary’s salary to 80% be made retroactive to April 1, 2004 (p. 65), and that subsequent reviews ought to track the timeframes of the quadrennial commission process for federally appointed judges (page 66). The Government invoked the economic climate as the “overarching” reason to reject virtually all the recommendations, leaving the Prothonotaries’ salary at 69% of a FC Judge’s salary.

11. The Government delayed a full 5 years before finally establishing a second ad hoc independent compensation review. In his report dated July 31, 2013, Special Advisor Cunningham recommended that the Prothonotaries’ salaries be fixed at 80% of the salaries of FC Judges (p. 23), noting that the percentage would be in acceptable range of the salaries of Provincial and Territorial Masters in relation to FC Judges’ salaries (p. 24). In its Response to the Cunningham Report, the Government did not take issue with the Special Advisor’s analysis relating to salary. It decided, however, to cap the Prothonotaries’ salary at 76% solely because “full implementation of the Special Advisor’s recommendation would result in the prothonotaries being paid more than military judges whose current salary, also reviewed by a separate independent process, is 76% of that of a Federal Court judge.”

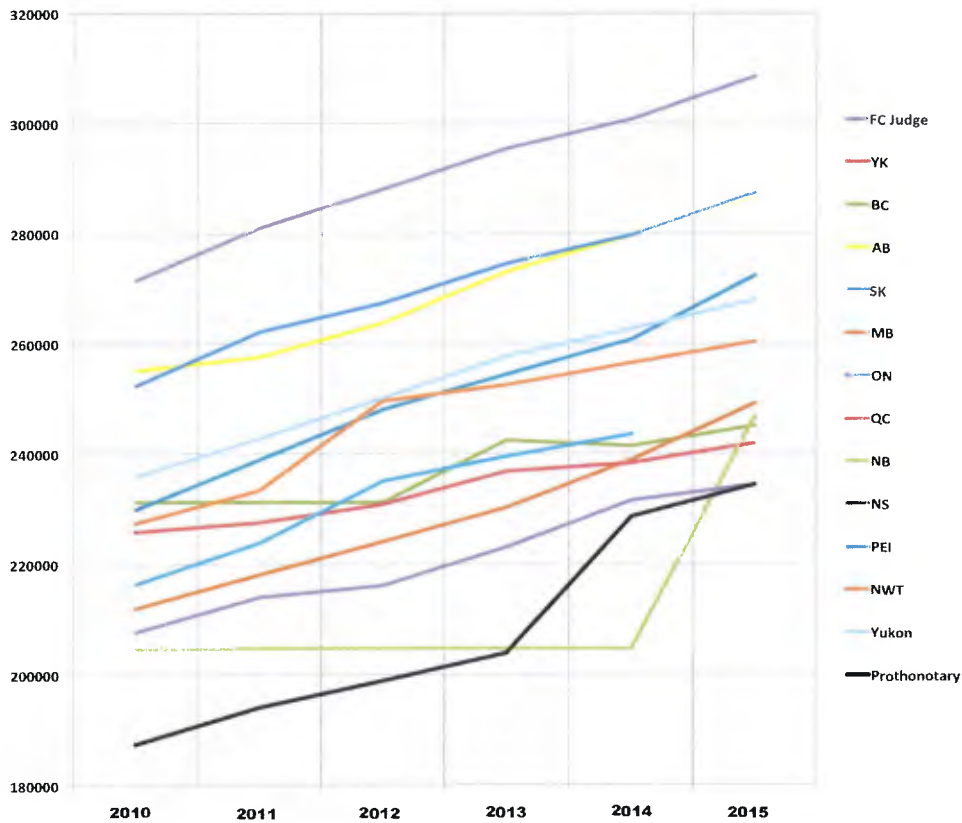
12. The level of compensation must be such to attract competent and highly qualified lawyers to seek judicial office. The level of compensation should be also be reviewed and adjusted on a regular, periodic basis to ensure that able and experienced Prothonotaries are retained.

13. The Prothonotaries' position, as adopted by two previous commissions, is that FC judges and their provincial counterparts are the best comparators to consider in assessing appropriate compensation. Such benchmarks are objective, relevant and justified. This stems from the uniqueness of the judicial role, as outlined in the Prothonotaries' main submissions. The Prothonotaries addressed the comparison with provincial court judges and masters in other jurisdictions in detail in their reasons for seeking the recommended increases.

14. The Prothonotaries agree with the submission of the Canadian Bar Association filed on March 11, 2016 that their salaries and benefits "must be commensurate with compensation for comparable judicial officers in other courts, such as traditional masters. And their compensation must reflect the respect with which the Federal Court is regarded, but at a level subordinate to Federal Court judges."

15. Maintaining approximate parity of salary with Masters and PC Judges reflects the pattern of fixing the Prothonotaries' salary over the past 30 years. There have been periods of time when one or more of these provincial comparators has diverged from the other; primarily because of the vagaries of the timing of compensation review processes in the different jurisdictions. However, overall, a strong linkage has been established between pay levels in these courts which the Prothonotaries submit should be maintained. Both Special Advisors Adams and Cunningham agreed that the Prothonotaries' salary should be fixed based roughly at a national average, however as a result of the arbitrary salary cap placed by the Government and substantial gains by the provincial comparators, the gap has grown once again, placing the Prothonotaries once again at the bottom, as reflected in the chart below.

Judicial Salaries (2010 to 2015)



(a) In New Brunswick, the Government determined in December 2015 that effective April 1, 2015, NB judges would be paid a salary equal to 80% of the salary paid to se. 96 judges.

(b) In PEI, successive commissions have recommended that PEI judges be paid a salary equal to the national average. The figure for 2015/16 has yet to be determined.

(c) In BC, the salary rates for 2014/15 and 2015/16 are those reflected in the Government's Response to the 2013 JJC Report, lower than the \$241,500 and \$245,122 recommended by the JJC. The BC judges have filed for judicial review of the the Government's Response.

(d) The Newfoundland & Labrador salaries are not reflected in the above chart as recommendations by the 2014 Salary and Benefits Tribunal for the period April 1, 2012 to March 31, 2017 released on December 21, 2015 remain confidential pending tabling in the Legislature.

16. The Government submits that the Prothonotaries' salary should remain frozen at 76% of a FC Judge's salary for the next 4 years. This ignores the fact that the basis for capping the salary no longer exists. It presupposes that military judges' salary will also remain frozen. Although the Military Judges

Compensation Committee was required to commence its inquiry on September 1, 2015 into the adequacy of the remuneration of military judges, the Government has yet to appoint any members.

17. The Government's position also does not take into account the salary gains made by the Prothonotaries' provincial counterparts after the hearing was conducted before Special Advisor Cunningham in May 2013. By way of example, on January 2015, the New Brunswick government recommended a salary increase of more than \$36,000 for provincial court judges to \$240,640 starting on April 1, 2015, accepting that they should be paid 80 per cent of what Court of Queen's Bench judges make. In British Columbia, the 2013 JCC recommended that the salary of PC Judges be increased for the years 2014/15 and 2015/16 respectively to \$241,500 and \$245,024. Although the BC government fixed the salaries at a lower level, the BC PC Judges have sought judicial review of the government's response. Moreover, in Ontario, a recommendation was recently made by Commissioner Banack to the Ontario government to increase the salary of Case Management Masters by over \$94,000, retroactive to April 1, 2011. The recommended salary is equivalent to salary earned by Traditional Masters and Ontario PC Judges, which represents 93% of the salary of a superior court judge.

18. At paragraph 5 of its submissions, the Government states that "there is no evidence of any difficulty in recruiting outstanding candidates to either office." The Prothonotaries express no view whether this is the case for judges. However, there is clear evidence that the Federal Court has experienced and continues to experience difficulty in attracting outstanding candidates with the necessary skills, experience and temperament to fill the present and anticipated vacancies.

19. As stated at paragraph 65 of the Prothonotaries' main submission, the Federal Court sought in 2013 to pre-assess candidates for appointment to potential future prothonotary positions in Ottawa, Montreal, Toronto and Vancouver. The process for creating pools of potential candidates was never finalized, as the previous government was considering phasing out the position. However, in light of the very small number of qualified bilingual candidates, the Chief Justice was required to change the language profile of the vacant position in Ottawa. Previously proficiency in both official languages was

required for the two positions in Ottawa. The profile was changed from mandatory bilingual to reflect that bilingualism would be an asset for the vacant position in Ottawa. (For positions in Toronto and Vancouver, although the sole language requirement is proficiency in English, a working knowledge of French would be considered an asset.)

20. Notwithstanding the changes to the Prothonotaries' compensation implemented in the *Judges Act*, the Federal Court has had difficulty attracting qualified candidates, let alone a sufficient pool of candidates from which the Government can select to satisfy its recently stated goal of diversity in appointments. As was stated by the Chief Justice of the Federal Court in his submissions filed on March 11, 2016, at page 4:

It is critically important for the Court to be able to attract outstanding candidates to become prothonotaries. However, I am concerned that the Court may be having difficulty doing so in some regions of the country.

Notwithstanding the fact that the Government of Canada substantially implemented the recommendations of the 2013 Report of the Special Advisor on Federal Court Prothonotaries' Compensation, the Federal Court did not attract a significant number of highly qualified candidates when it held a process during the fall of 2015 to establish a pre-cleared pool of candidates to staff future prothonotary positions in Montreal, Toronto and Vancouver.

(ii) Supernumerary Status

21. The Government has made no submissions on this issue in relation to Prothonotaries. The Prothonotaries agree, however, with the Government's submission at par. 89 (in relation to judges) that consideration of the third criterion – the necessity to attract outstanding candidates – must also factor in the option to elect supernumerary status. On the Government's argument, extending supernumerary status to Prothonotaries would assist in attracting and retaining the most able candidates.

22. On the matter of supernumerary status, the Prothonotaries adopt the submissions of the Chief Justice of the Federal Court.

(iii) Incidental Allowance

23. The Government has made no submissions on this issue.

(iv) Representational Costs

24. The Government states at paragraph 166 of its main submissions that “it is incumbent on the Prothonotaries to articulate how the current formula established by the *Judges Act* fails to meet the prescribed statutory criteria for the determination of the adequacy of amounts payable under the Act.” As set out above, the Prothonotaries bear no such burden. In any event, the Prothonotaries addressed in detail in their preliminary submissions dated January 19, 2016 the reasons why funding of representational costs at the 2/3 level is unfair in relation to the small group of five Prothonotaries. The Prothonotaries repeat and rely upon their preliminary submissions.

25. The Government further states that it will provide a more complete response to the issue of representational costs in reply to the Prothonotaries’ submissions. In response to the Prothonotaries’ preliminary submissions, the Government stated at paragraph 11 of its written submissions dated January 28, 2016 that: “...in the absence of all of the information and evidence which would only become available to the Commission in the course of a full inquiry, it is neither appropriate nor prudent to make such a recommendation at this juncture.” However, the Government has not adduced any information or evidence which would assist the Commission in its deliberations on this issue.

26. The Government argues that full funding of Prothonotaries’ representational costs would lead to “unchecked discretion” in deciding what costs would be incurred. There is no merit in this submission. Costs can always be assessed for reasonableness, as set out in the *Judges’ Act*, or otherwise monitored to ensure that they are incurred reasonably. Special Advisor Cunningham expressly recommended that the Prothonotaries be reimbursed for their *reasonable* costs, to a maximum of \$80,000 (based on being advised of the approximate amounts incurred) in the 2013 process. Moreover, the Government has provided no evidence that it experienced any undue difficulties arising from its provision of full funding of representational costs for Military Judges.

27. No Special Advisor or Commission has recommended that Prothonotaries be reimbursed only to the 2/3 level in any previous process. This level of funding effectively requires the Prothonotaries to shoulder a significant part of the burden of participating in the Commission process themselves, and thereby acts as a disincentive to attracting and retaining the most qualified candidates.

Reply Submissions on Issues Raised by the Government

(i) Prevailing Economic Conditions in Canada

28. The Prothonotaries repeat their submission that no aspect of the prevailing economic conditions in Canada argues against setting the remuneration of Prothonotaries at a level which is fair and reasonable taking into account the appropriate comparators. The simple fact is that the Prothonotaries' compensation must remain competitive in order to attract and retain outstanding candidates.

(ii) Statutory Indexation

29. The Government submits that judicial salaries should be adjusted annually based on changes to Consumer Price Index (CPI) rather than the Industrial Aggregate Index (IAI). The Prothonotaries respectfully submit that the Government has failed to establish that the CPI is a more appropriate statutory indexation measure than the IAI. As was stated by the Levitt Commission at par. 46: "the legislative history indicates that the IAI Adjustment was intended to be a key element in the architecture of the legislative scheme for fixing judicial remuneration without compromising the independence of the judiciary and, as such, should not lightly be tampered with."

30. The Prothonotaries otherwise adopt the positions of the CSCJA and CJC on the above issues.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 29, 2016



Andrew K. Lokan