

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

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

February 29, 2016

Paliare Roland Rosenberg Rothstein LLP
Barristers
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Andrew K. Lokan
Tel.: 416.646.4324
Fax: 416.646.4301
Email: andrew.lokan@paliareroland.com

Lawyers for the Prothonotaries
of the Federal Court

INTRODUCTION

1. Prothonotaries are part of the Federal Court judiciary; they are full judicial officers who hold office during good behaviour until age 75, have the same immunity from liability as a judge of the Federal Court, and exercise many of the same powers and functions as a judge of that court (FC Judge). It is common ground that the office of Prothonotary attracts the guarantee of judicial independence under the Constitution.

2. Over time, the office of Prothonotary has evolved significantly. Their functions increasingly resemble those of members of the provincial judiciary with civil jurisdiction - Masters and Provincial Court Judges. The office of Prothonotary has evolved to become a *de facto* (albeit subordinate) interlocutory and small to intermediate claims court “for the better Administration of the Laws of Canada”¹. Prothonotaries hear and decide complex cases and motions on a wide variety of matters, including *Charter* issues, commercial matters, specialized areas such as pharmaceutical regulation, intellectual property, Aboriginal law and maritime law, and judicial review. They routinely decide cases or issues as between private entities and the Federal Crown, and/or Ministers of the Crown.

3. In 1985, 1993 and 2001, the Prothonotaries’ salary (but not other terms) was set in a series of *ad hoc* Government decisions – in each case with reference to the salaries of Masters and Provincial Court Judges.

4. In May 2008, after the first ever independent review process, Special Advisor Adams issued a report² setting out comprehensive recommendations regarding the Prothonotaries’ compensation and benefits. He recommended, in particular, that the Prothonotaries salary be increased to 80% of a FC Judge – the average of Masters and Provincial Court judges at the time. He also recommended that the Minister of Justice and the Chief Justice of the Federal Court should consider establishing the opportunity for Prothonotaries to elect supernumerary status upon retirement, that Prothonotaries receive an annual non-taxable allowance of \$3,000 to assist in the payment of costs associated

¹ *Constitution Act, 1867*, s.101

² Report of Special Advisor on Prothonotaries’ Compensation, dated May 30, 2008 (“Adams Report”),

with carrying out their duties, and that the representation costs of the Prothonotaries should be paid entirely by the Government. However, the global financial crisis intervened, and the Government declined to implement those recommendations.

5. In June 2013, following a second independent review process, Special Advisor Cunningham issued a report³ consistent with the findings of Special Advisor Adams and making similar recommendations. He recommended, in particular, that the Prothonotaries' salary be fixed at 80% of the salary of a FC Judge, that they receive an annual non-taxable allowance of \$3,000 to assist with the payment of expenses related to their work, and that the Government reimburse the Prothonotaries for all reasonable legal costs relating to compensation process, up to a maximum of \$80,000.

6. In response to the Cunningham Report, the Government undertook to make compensation improvements for the Prothonotaries consistent with the objectives of ensuring adequacy of compensation appropriate to the nature of their judicial office and responsibilities, including an improved pension system and long term disability and sick coverage. However, not all of the recommendations were accepted. The Government decided to fix the Prothonotaries' salary at 76% rather than 80% of a FC Judge as recommended by the Special Advisor, and signaled its intention to establish their salary and benefits under the *Judges Act* (clarifying that it was not proposing that Prothonotaries be entitled to elect supernumerary status.) The Government also declined to implement the recommendations relating to incidental allowances and legal representational costs.

7. In November 2015, Commissioner Larry Banack issued a report on compensation for Ontario's Case Management Masters.⁴ The Banack Report traced the history of the office of Master in the provincial courts, and expressly noted the parallels to the federal court Prothonotaries, drawing upon the Adams and Cunningham Reports. The Banack Report recommended that Ontario's Case Management Masters be paid at the same rate as Ontario's Provincial Court Judges, which is approximately 92% of the salary of a FC Judge. Three of the five current Prothonotaries are based in Ontario.

³ Report of Special Advisor on Prothonotaries' Compensation, dated July 31, 2013 ("Cunningham Report"),

⁴ Report of the First Case Management Masters Remuneration Commission, L. Banack, Nov. 30, 2015 ("Banack Report").

8. The purpose of this compensation review process is to identify the appropriate level of remuneration for the judicial office of Prothonotary from April 1, 2016 to March 31, 2020.

9. These Submissions are organized as follows:
 - Part I contains an overview of the legal and legislative framework and the role of judicial compensation commissions generally;
 - Part II gives a brief overview of the Federal Court's jurisdiction and role within the Canadian justice system, the nature of the office and the role performed by the Prothonotaries;
 - Part III provides an overview of the current compensation of the Prothonotaries;
 - Part IV addresses the factors for consideration, and the findings and recommendations contained in the Adams and Cunningham Reports; and
 - Part V details the Prothonotaries' request for recommendations with respect to salary, supernumerary status, incidental allowances and representational costs.

10. As described below, the Prothonotaries request the following recommendations:
 - That their salary be set in the range of 83 – 86% of the salary of a FC Judge, retroactive to April 1, 2016;
 - That the Minister of Justice and the Chief Justice of the Federal Court consider establishing the opportunity for Prothonotaries, once eligible to retire, to elect some form of supernumerary status;
 - That they be provided with an allowance of \$5000 per year for costs associated with carrying out their duties; and
 - That they be reimbursed for all reasonable representation costs and expenses relating to the present compensation review, and that subsection 26.3(2) of the *Judges' Act* be amended to provide that Prothonotaries shall be entitled to be paid, out of the Consolidated Revenue Fund, all of their reasonable costs determined under subsection (3) in respect of their participation in an inquiry by the Quadrennial Commission.

PART I. JUDICIAL COMPENSATION COMMISSIONS: AN OVERVIEW

11. Every federal, provincial and territorial jurisdiction across Canada has some form of constitutionally established administrative body responsible for making recommendations to government about what is appropriate compensation for judges for the period of that commission's mandate ("Judicial Compensation Commission", or "JCC").⁵

12. Each jurisdiction has designed its JCC process slightly differently with respect to such things as the timing of the commissions, the length of its respective mandates, the persons eligible for appointment to the commission and to what degree the commission's recommendations are binding on government. However, all must meet certain constitutional requirements.

13. While some jurisdictions had some form of a commission process in place prior to 1997, the JCC processes as they now exist largely came into being as a direct result of *PEI Judges Reference*.⁶ In that decision, then Chief Justice Lamer commented on the "national scope" of the issues before the Court, which demonstrated that the "proper constitutional relationship between the executive and the provincial court judges ... has come under serious strain".⁷

14. *PEI Judges Reference* was a major turning point in the history of the courts in Canada, as it underscored the importance of judicial independence and, in particular, financial security of the judiciary. Lamer CJC outlined the three aspects of judicial independence which include financial security, administrative independence and security of tenure. According to Lamer CJC, a JCC process is necessary to ensure financial security for judges.

⁵ At the provincial level, such administrative body is generally called a judicial compensation commission or committee (JCC). At the federal level, the Quadrennial Judicial Compensation and Benefits Commission established pursuant to the *Judges Act* makes recommendations for federally appointed Judges and Prothonotaries of the Federal Court (Quadcom), and the Quadrennial Military Judges Compensation Committee established under the authority of the *National Defence Act* makes recommendations for Military Judges (MJCC).

⁶ *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3 (*PEI Judges Reference*).

⁷ *PEI Judges Reference*, para. 7.

15. As the Supreme Court of Canada reiterated in its 2005 decision in *Bodner*:⁸

... financial security embodies three requirements. First, judicial salaries can be maintained or changed only by recourse to an independent commission. Second, no negotiations are permitted between the judiciary and the government. Third, salaries may not fall below a minimum level.

16. In *PEI Judges Reference*, as well as in *Bodner*, the Supreme Court of Canada outlined the flexible requirements for JCC processes, which must be independent, objective and effective. With respect to the requirement of independence, Lamer CJC explained in *PEI Judges Reference*:⁹

The rationale for independence flows from the constitutional function performed by these commissions - they serve as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.

17. The requirement of objectivity is described as follows:¹⁰

They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" ... I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.

18. Lamer CJC went on to discuss the requirement of effectiveness which he suggested must be guaranteed in a number of ways:¹¹

First there is a constitutional obligation for government not to change (either by reducing or increasing) or freeze remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a

⁸ *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Confédération des juges du Québec v. Québec (Attorney General); Minc v. Québec (Attorney General)*, 2005 SCC 44 (*Bodner*), para. 8.

⁹ *PEI Judges Reference*, supra, para. 170.

¹⁰ *PEI Judges Reference*, supra, para. 173.

¹¹ *PEI Judges Reference*, supra, paras. 174-175.

period of three to five years. Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries.

19. And at paragraph 287 (2), Lamer CJC wrote:

Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional. [emphasis and underlining added]

20. Lamer CJC explained that while the effectiveness requirement could mean that the JCC's report is binding on government, a variety of models would be consistent with judicial independence. Where the JCC recommendations were not binding, the government could refuse to implement the recommendations if it gave legitimate reasons and could justify its decision, if necessary in a court of law.¹²

21. The effectiveness of JCC's across Canada became an issue almost from the very moment the *PEI Judges Reference* decision was released. In many jurisdictions, governments decided for various reasons not to follow the recommendations. The relevant judges' associations (or association of justices of the peace) then challenged those government decisions based on the principles outlined in *PEI Judges Reference*.

22. *Bodner* involved cases from Alberta, Ontario, Quebec and New Brunswick. In all of the cases, issues had arisen from the failure of a government to implement a JCC report. The Supreme Court of Canada reiterated that the JCC process is necessary in order to ensure the financial security of the judiciary. The Court described the focus of a JCC as being "on identifying the appropriate level of remuneration for the judicial office in question." The Court clearly enunciated that the task of a JCC is unique, emphasizing, "the process is neither adjudicative interest arbitration nor judicial decision making".¹³ It follows that the Commission must focus on what is appropriate remuneration for the office of Prothonotary in light of all the relevant criteria set out in section 26 of the *Judges Act*.

¹² *PEI Judges Reference*, supra, paras. 180-183.

¹³ *Bodner*, supra, para. 14.

PART II. THE FEDERAL COURT - A BRIEF OVERVIEW

Jurisdiction of the Federal Court

23. The Federal Court of Canada (now the Federal Court) was established in 1971 to replace the Exchequer Court. Section 3 of the *Federal Courts Act*, RSC 1985, c.F-7 provides that the Federal Court is a court of law, equity and admiralty, and a superior court of record having both civil and criminal jurisdiction.

24. The Federal Court is Canada's national trial court which hears and decides legal disputes arising in the federal domain, including claims against the Government of Canada, civil suits in federally-regulated areas and challenges to the decisions of federal tribunals.

25. The Federal Court is a bilingual court where proceedings may be taken in either or both of Canada's official languages. It is also a bi-judicial court applying both the common law and the civil law. The Court sits regularly across Canada and its judgments have force and effect across the country.

26. Unlike the Superior Courts established by the provinces, the Federal Court does not have inherent, general jurisdiction. The jurisdiction of the Federal Court derives primarily from the *Federal Courts Act* and is conferred by almost one hundred federal statutes. These give the Court authority to hear and decide cases in a number of broad categories, including national security, intellectual property, and maritime and admiralty disputes.

27. The Court consists of a Chief Justice and 36 other Judges, along with supernumerary judges and (currently) five Prothonotaries.

Qualifications for Appointment

28. The statutory qualifications for appointment as Prothonotary are set out in subsection 12(1) of the *Federal Courts Act*. Generally, a Prothonotary must be a barrister or

advocate of a provincial or territorial Bar in good standing with a minimum of ten (10) years professional experience, the same basic qualification required of a superior court judge. A thorough knowledge of the Rules of practice of the Court is a prerequisite. Moreover, the incumbent must possess a depth of knowledge to facilitate adjudication of complex matters and have extensive experience in analyzing and evaluating a variety of disputes argued before the Court.

29. Depending on the location of the office, knowledge of English or French or both English and French is a requirement. The incumbent must also be willing to travel within Canada as required by the Chief Justice.

30. The nature of the role and the duties of Prothonotaries was agreed upon by the Government and the Prothonotaries in an Agreed Statement of Facts filed before Special Advisor Cunningham, which was appended to his report.

Nature of the Office of Prothonotary

31. There are currently five Prothonotaries in office – two in Toronto, and one each in Ottawa, Montréal and Vancouver. One position in Ottawa has been vacant since April 2015. Each Prothonotary is assigned to a specific location as part of his or her appointment.

32. The Prothonotaries are the front-line judicial officers of the Court in their respective regions. In most proceedings commenced by way of action, they are the initial contact, and may be the only contact between litigants and the justice system.

33. The office of Prothonotary has evolved into a small and intermediate claims court, with greater monetary jurisdiction (claims up to \$50,000) than most provincial courts.

34. Prothonotaries have similar “trappings” of office as FC Judges:

- They are sworn into office by the Chief Justice at special sittings of the Court.

- They hold office during good behaviour until age 75.
- They have the same immunity from liability.
- They are entitled to the protection of judicial independence, including the requirement to have their compensation determined by an independent judicial compensation review process, conducted on a periodic basis.
- Each Prothonotary is assigned a judicial assistant and has access to a pool of law clerks.¹⁴
- Lawyers and litigants address the Prothonotary as “Your Honour”.¹⁵
- Administrative and operational support for the Court’s Judges and Prothonotaries is provided by the Courts Administration Service (CAS) and the Registry.¹⁶
- Decisions of Prothonotaries are final, subject only to appeal.¹⁷
- Prothonotaries are required to conduct themselves in accordance with the Ethical Principles for Judges published by the Canadian Judicial Council.¹⁸

¹⁴ A law clerk, under the direction of the Judge or Prothonotary for whom the clerk works, researches points of law, prepares memoranda of law and generally assists the Judge or the Prothonotary in the work of the Court.

¹⁵ Notice to the Parties and the Profession dated September 3, 2009 - <http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/Notice%20-%20Form%20of%20Address%20ENG%20sept-3-2009.pdf>. A special committee of the Federal Court was struck and made the recommendation to change the title to “Associate Judge”.

¹⁶ The role of CAS is to provide administrative services to four courts of law: the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada. These services permit individuals, companies, organizations and the Government of Canada to submit disputes and other matters to the courts, and enable the courts to hear and resolve the cases before them fairly, without delay and as efficiently as possible. The Registry is responsible for processing, recording and directing the flow of all documents filed by the parties to members of the Court, as well as recording all steps and events during the life of the case. The Registry also provides assistance in scheduling hearings and providing support during sittings.

¹⁷ Paragraph 72(2)(e) of the *Immigration and Refugee Protection Act* (IRPA) provides that in an application for leave and judicial review of a decision made under the IRPA, no appeal lies against an interlocutory judgment, rendered by either a FC Judge or Prothonotary.

¹⁸ The *Conflict of Interest Act* sets standards to maintain and enhance public confidence in the integrity of public office holders. In her written Submission dated January 30, 2013 to the Parliamentary Standing Committee on Access to Information, Privacy and Ethics, Conflict of Interest and Ethics Commissioner Mary Dawson that prothonotaries of the Federal Court be excluded from the definition of public office holder and the application of the Act. <http://ciec.ccie.gc.ca/%5Cresources%5CFiles%5CEnglish%5CPublic%20Reports%5CSpecial%20Publications%5CFive-Year%20Review%20Act.pdf>.

Role of the Office of Prothonotary

35. Prothonotaries are judicial officers appointed by the Governor in Council under the *Federal Courts Act*. Their functions are outlined at section 12 of the *Federal Courts Act*, and set out in the *Federal Courts Rules*.

36. When the Federal Court was created in 1971, the then Masters of the Exchequer Court were renamed “Prothonotaries”. In 1998, the rules of practice of the Federal Court were comprehensively revised for the first time since the creation of the Federal Court of Canada. The jurisdiction of the Prothonotary was significantly enhanced by virtue of amendments to the *Federal Court Act* and the *Federal Court Rules, 1998*.¹⁹

37. Rules 50 and 51 of the *Federal Courts Rules* expanded the jurisdiction of the Prothonotaries by granting trial jurisdiction over monetary claims up to \$50,000. There is a pending proposal to expand this jurisdiction further to at least \$100,000.²⁰

38. Part 9 introduced case management²¹ and dispute resolution services, specifically contemplating that Prothonotaries would carry out these new duties.

39. As noted earlier, the Prothonotaries exercise many of the same powers and functions as a judge of the Federal Court. In particular:

- (a) they exercise full trial jurisdiction for monetary claims up to \$50,000;
- (b) they hear and decide 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;

¹⁹ Now the *Federal Courts Act* and the *Federal Courts Rules*.

²⁰ A Sub-Committee on Procedural Amendments of the Federal Courts Rules Committee recently considered whether to increase the monetary limits for Simplified Proceedings and for Prothonotaries from \$50,000 to a minimum of \$100,000; however, no recommendation has yet been made.

²¹ Case management involves the transfer of responsibility for management of the pace of litigation from the litigants to the judiciary. It entails a more active form of management and intervention by the court in the various phases of litigation, with a view to promoting the earlier resolution of cases, to eliminating unacceptable delays, and, ultimately, to reducing costs and enhancing the quality of justice.

- (c) in the context of the Court's admiralty jurisdiction, as well as in exercising jurisdiction over the enforcement of any of the Court's judgments, they make substantive determinations as to the ownership or beneficial interests of parties in vessels and other property that are often worth millions of dollars, direct the manner and amount of their judicial sale, rule on the substantive validity of claims made against the proceeds of sale that can equal or exceed the value of the property, and determine the claimants' respective priorities. In doing so, they apply the general laws of the provinces, as well as highly specialised admiralty and conflicts of interests laws.
- (d) they decide questions such as Charter issues and other general questions of law, and adjudicate complex commercial matters;
- (e) they can make substantive determinations, akin to judicial review, as to the decision of Government officials to list patents against drug products under the *Patented Medicines (Notice of Compliance) Regulations*²². Such determinations can bring an early, substantive determination to prohibition proceedings under the Regulations, where every day of delay can be worth hundreds of thousands of dollars to the pharmaceutical companies involved;
- (f) they conduct references, pre-trial conferences, dispute resolution conferences and case management of proceedings, including class actions, as designated by the Chief Justice; and
- (g) they routinely decide cases or issues as between private entities and the federal Crown, and/or Ministers of the Crown and other federal officials, including decisions made by quasi-judicial tribunals.

40. In the exercise of their trial jurisdiction, as well as the adjudication of interlocutory matters within their jurisdiction, Prothonotaries have the same powers and functions as FC

²² *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, s.6(5)(a).

Judges. They routinely weigh and assess the credibility of evidence adduced by affidavit or through witnesses, rule on questions of evidence, and make factual and legal determinations.

41. The early intervention of a Prothonotary is crucial since the great majority of actions before the Court are resolved at the interlocutory stage without reaching trial. The nature and scope of the work of Prothonotaries was described by the Honourable Mr. Adams as follows:

Prothonotaries are integral to the proper functioning of the Federal Court and both their actual and perceived independence are vital to that Court's integrity. They deal with a broad range of exceedingly complex and sometimes arcane matters unique to the Federal Court's jurisdiction. A prothonotary requires considerable judgment and patience in dealing with such important matters. This is why a minimum of ten years experience as a lawyer has been required. The job's requirements are demanding in terms of volume and front-line pressure....

The responsibilities of the prothonotaries have expanded over the years and this likely will continue given the modern demands of case management and court sponsored alternative dispute resolution initiatives throughout Canada. Pre-trial motions, no matter the nature of the litigation, can be complex and fundamental to the direction of a matter regardless of the standard of review. A prothonotary requires a deep grasp of not only procedural issues but also the substantive law governing the proceedings and the subtle strategies of counsel and their clients who regularly litigate in the Federal Court. A prothonotary must implement all this required knowledge in real time and in a manner that produces confidence in the administration of justice and the Federal Court of Canada.²³

42. The Prothonotaries participate alongside FC Judges in judicial education programs organized by the National Judicial Institute.²⁴

43. The Prothonotaries are members of committees of the Court, including the Executive Committee, Education Committee, Social Committee, Communications Committee, Judges' Technology Committee, and the Federal Courts Rules Committee.²⁵ They are also members of the various bar liaison committees of the Court: Canadian Bar Association Liaison Committee, Indigenous Bar Association - Aboriginal Law Bar Liaison

²³ Adams Report, pp. 41-42.

²⁴ The National Judicial Institute (NJI) is an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally.

²⁵ Pursuant 45.1(b) of the *Federal Courts Act*, the Federal Courts Rules Committee is composed of members of the judiciary, including one prothonotary designated by the Chief Justice of the Federal Court.

Committee, Maritime Law Bar Liaison Committee, Intellectual Property Law Bar Liaison Committee and Montréal Bar Liaison Committee.

44. Some of the most senior counsel in Canada, with particular expertise in constitutional and administrative law, intellectual property, aboriginal law, and admiralty, routinely appear before Prothonotaries.

45. The Prothonotaries' jurisdiction has expanded substantially over the years. Because of this, and the choice exercised by counsel and unrepresented litigants, it is increasingly the Prothonotaries who have the greatest day-to-day contact with litigants who come before the Federal Court.

PART III. HISTORY AND OVERVIEW OF COMPENSATION OF THE PROTHONOTARIES OF THE FEDERAL COURT

46. At page 54 of his report, Special Advisor Adams stated that: "...the prothonotaries, as a very small group of Federal Court judicial officers, have had difficulty attracting the federal government's attention to their concerns over the years." Their remuneration history is reviewed extensively in the Adams Report at pp. 31 to 41.

47. Until recently, subsection 12(4) of the *Federal Courts Act* provided that each prothonotary would be paid a salary to be fixed by the Governor in Council. Subsection 12(5) further provided that, for the purposes of the *Public Service Superannuation Act*, a prothonotary was deemed to be employed in the public service.

48. The first independent and comprehensive review of the Prothonotaries' compensation was held in 2008, 11 years after *PEI Judges Reference*. Before then, there were, broadly speaking, three distinct periods in the history of how the Prothonotaries' compensation was fixed. The Government consistently agreed in 1985, 1993 and 2001

that the Prothonotaries' salary should be fixed by reference to the salaries paid to provincial Masters and/or Provincial Court Judges.²⁶

49. Following the issuance of the Cunningham Report, amendments were made to the *Judges Act* and the *Federal Courts Act*. Section 10.1 of the *Judges Act* set the Prothonotaries' salary at 76 percent of that of a FC Judge²⁷. Sections 26 to 26.3, 34 and 39, paragraphs 40(1)(a) and (b), subsection 40(2), sections 41, 41.2 to 42, 43.1 to 56 and 57, paragraph 60(2)(b), subsections 63(1) and (2) and sections 64 to 66 of the *Judges Act* also now apply to Prothonotaries.

50. The legislative amendments bring the Prothonotaries under the same annuity and administrative processes that apply to federally-appointed judges. The Prothonotaries are not entitled, however, to certain benefits extended to judges under the *Judges Act*, including an allowance payable to a judge for reasonable incidental expenditures that the fit and proper execution of the office of judge may require (incidental allowance) and an option to elect supernumerary status instead of retirement after having serving 15 years in judicial office with a combined age and number of years in office is not less than 80, or having attained the age of 70 and continued in judicial office for at least 10 years (supernumerary status).

²⁶ The matter of the appropriate pensions, disability benefits, incidental allowances and other benefits for the office were not considered by the Government during the *ad hoc* reviews in 1985, 1993 and 2001. The benefits remained tied to that government classification and the terms and conditions of employment of all other full-time Governor-in-Council appointments.

²⁷ Section 10.1 of the *Judges Act*

PART IV. FACTORS FOR CONSIDERATION

51. The mandate of the Commission is set out in section 26 of the *Judges Act*, which reads, in part, as follows:

Commission

26 (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

- (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- (b) the role of financial security of the judiciary in ensuring judicial independence;
- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

52. The Supreme Court of Canada affirmed in *Bodner* that "each commission must make its assessment in its own context".²⁸ The Court held that the "starting point" for the work of each judicial compensation commission should be the date of the previous commission's report.²⁹ 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 or compared with compensation received by other comparable groups. This section explores both the factors which should inform the recommendations and the comparisons which are submitted to be appropriate.

²⁸ *Bodner*, para.14-15.

²⁹ *Bodner*, para. 14.

A. *The prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government*

53. For the sake of brevity and to avoid duplication, the Prothonotaries adopt the written submissions of the Canadian Superior Courts Judges Association and the Canadian Judicial Council as they relate to this factor. In summary, the Prothonotaries submit 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.

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

54. Judicial independence is a fundamental tenet of our constitutional and the rule of law. It flows “as a consequence of the separation of powers” of the three branches of government - the executive, the legislature and the judiciary. It operates to insulate the courts from interference by parties to litigation and the public generally, as Lamer CJC set out at para 130 of his reasons in *PEI Judges Reference*. Lamer CJC went on to quote from Professor Shetreet, who stated:³⁰

Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements but also that he should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions.

55. *PEI Judges Reference* clearly articulates that the purpose of the constitutional guarantee of financial security as an aspect of judicial independence is not to benefit the judges who come within its scope. Rather, the benefit that judges derive is purely secondary. Judicial independence is important because it serves important societal goals. It is a means to secure these goals, which include maintaining public confidence in the impartiality of the judiciary, including the perception that justice will be done in individual cases.

56. The challenge identified by Lamer CJC in *PEI Judges Reference* is to ensure that judicial compensation is set in a manner that fulfills the so-called “structural requirement of

³⁰ *PEI Judges Reference*, supra, para. 130.

the Canadian Constitution”, which is that the relationship between the judiciary and the other branches of government must be depoliticized. As Lamer CJC pointed out, the difficulty is that the setting of remuneration from the public purse is “inherently political” and, at the end of the day, the judicial compensation must be fixed by one of the political organs of the Constitution.³¹

57. The solution identified by Lamer CJC, and confirmed by the Court in *Bodner*, was to require recourse to an independent, objective and effective commission, which would identify and consider objective criteria upon which to base recommendations about appropriate judicial compensation. As the Supreme Court of Canada stated in *Bodner*:

The commission process is an ‘institutional sieve’ (*PEI Judges Reference*, at paras 170, 185 and 189) – a structural separation between the government and the judiciary.³²

58. It is apparent from *PEI Judges Reference* and *Bodner* that the protection and preservation of judicial independence is the very *raison d’être* of the JCC. As such, it must be fundamental to the Commission’s considerations. This underscores the need for recommendations which should be understood to be independent and objective or, in other words, based on objective criteria rather than primarily political considerations.

59. One aspect of this factor is that it invites particular comparison with other judicial officers who have similar jurisdiction. In *Bodner*, the Supreme Court determined that a JCC would be misdirecting itself if it focused on a comparison with only one comparator to the exclusion or virtual exclusion of other relevant factors.³³ To be clear, the Prothonotaries do not propose parity with FC Judges or any particular Master or Provincial Court Judge, but rather that the compensation paid to other judicial officers is a relevant and predominant consideration.

60. Consistent with the reasoning in the Adams Report and the Cunningham Report, consideration must be given to the fact that the nature and function of judicial work shows great similarities among the various levels of courts. While certain judges may have

³¹ *PEI Judges Reference*, supra, para. 146.

³² *Bodner*, supra, para. 14.

³³ *Bodner*, supra, para. 72.

broader jurisdiction, the same qualities of judicial temperament, legal knowledge, and an abiding sense of fairness are required of all judicial officers. It is necessary that judicial officers at all levels of court have the ability to make decisions that will greatly affect people's lives, without bending to improper influence, the pressure of public demands and expectations, or a consideration of inadmissible material. The key factor is that judicial decision-making is common to all judicial officers. Any substantial salary differential between FC Judges and Prothonotaries can only be perceived by the public and potential applicants for the judicial office as diminishing the value and importance of the Prothonotaries' work and decisions.³⁴

61. While the Prothonotaries maintain that provincially appointed Masters and Judges are the most relevant comparators, it is particularly important to note that the Government has also supported a comparison with these provincial judicial officers in the past and that two previous independent commissions have adopted this approach.

C. *The need to attract outstanding candidates to the judiciary*

62. In considering the above criterion, it is submitted that the Commission should weigh the following points: the relevance of the independent compensation review process itself; the dearth of appointments of Prothonotaries since 2007; the need to attract highly qualified candidates; and the competition for applicants from other courts. We discuss these in turn.

63. First, the very existence of a periodic compensation review process contemplated by the Supreme Court of Canada as being both (a) meaningful and effective and (b) grounded on good faith on the part of government, in and of itself attracts applicants to the bench.

64. It is not merely the level of compensation which attaches to the judicial office at the time of appointment which will attract qualified candidates; it is the legitimate

³⁴ Response of the Government of Canada to the Report of the 2011 Judicial Compensation and Benefits Commission <http://www.canada.justice.gc.ca/eng/dept-min/pub/jcbc3-cerj3/index.html>.

expectation that compensation will be regularly, meaningfully, and effectively reviewed, and adjusted by government acting in good faith. Without this assurance, qualified applicants will not be attracted or, at best, a significantly reduced number of them will be attracted. It is noteworthy that appointments of applicants from outside the civil service prior to 2007 were only made when the compensation matched that of Masters, or when an independent, periodic review process was pending.

65. Second, unlike the process for the appointment of a Superior Court Judge, there is currently no pool of qualified candidates from which to draw. In the past, the Federal Court advertised any vacancy setting out the location of the vacant office and the selection criteria for the position. The applications were initially screened to ensure that the applicants satisfied the selection criteria. No determination was made at the screening stage whether an applicant was qualified or suitable for appointment. A selection committee, consisting of the Chief Justice, another member of the Court and a representative of the Minister of Justice, subsequently interviewed a limited number of applicants. The candidates' professional competence and experience, personal characteristics, and suitability for the bench were assessed during the interview by the selection committee and subsequently verified through reference checks. The selection committee then forwarded the list of recommended name(s), and from there, the Government selected and made the appointment.

66. In 2013, the Federal Court sought to pre-assess candidates for appointment to potential future prothonotary positions in Ottawa, Montreal, Toronto and Vancouver. However, the process for creating pools of potential candidates was never finalized as the previous government was considering phasing out the position. Since then, one prothonotary has retired, and an appointment process is currently underway to fill the position, but to date no appointment has been made.

67. The only empirical data available from these processes is the number of applicants. However, the mere number of persons who apply in a given competition does not establish how many of the applicants were qualified. Moreover, it does not indicate

whether the applicants consist mainly of lawyers from the civil service, or include a sufficient number of highly qualified applicants from the private bar.

68. Third, it is not enough that the recommended level of remuneration attract qualified applicants, it must be at a level which attracts outstanding qualified applicants. What has been said about the assertion of numbers as to qualified applicants applies equally to outstanding qualified applicants. The importance of judicial remuneration to the recruitment of highly qualified applicants in private practice was commented on in Ontario's Fourth (1999) Triennial Report of the Provincial Judges Remuneration Commission (the "Beck Report") on May 20, 1999³⁵ at page 46:

Another factor that we think is important is the attraction of the Provincial bench to a cross section of the best of the men and women practising at the criminal bar, or with some experience at the criminal bar. For many, appointment to the Provincial Division would see little, if any, increase in salary. For others, such an appointment would constitute a fall, in some cases a very sharp fall, in remuneration. What is absolutely essential is that the level of remuneration (including pension, which will be dealt with below), be set at such a level that it will be attractive, or at least not a disincentive, to the ablest men and women at the bar. We are of the opinion that the current level of \$130,810 is a disincentive, and a substantial increase is justified.

69. Fourth, in endeavouring to attract outstanding qualified applicants, the Federal Court must compete with other superior and provincial courts. It bears noting that the qualifications required to be appointed as a Prothonotary are the same as those required for appointment as a FC Judge, any Provincial Court Judge or a Master in a Superior Court. A practical challenge for the Federal Court is attracting a litigator who is familiar with Federal Court practice, preferably bilingual, and willing to travel extensively for court business. Bearing in mind that remuneration must be adequate to continue to attract outstanding candidates to the office, any remuneration which is fixed at a level significantly lower than that of judicial officers who exercise directly comparable jurisdictions (such as Masters and Provincial Court Judges' civil jurisdiction) is bound to detract from the interest of qualified individuals in the position of Prothonotary. Such individuals are more likely to seek appointment as their better paid closest comparators.

³⁵ Ontario's Fourth (1999) Triennial Report of the Provincial Judges Remuneration Commission ("Beck Report").

70. It is the applicant, and only the applicant, who decides to which Court he or she will seek an appointment. Self-exclusion from potential for appointment as Prothonotary is a real risk if the gap in remuneration is significant.

D. Any other objective criteria that the Commission considers relevant

71. Since the Cunningham Report, the Prothonotaries have lost ground in terms of salaries paid to their provincial counterparts (both Masters and Provincial Court Judges).

72. The gap in the respective base salaries of Prothonotaries and Provincial Court Judges and Masters³⁶ is reflected in the table below. As we detail in Part V below, the Prothonotaries' salary proposal would establish a base salary within the range of what is adequate, such that no financial disincentive exists for potential applicants to the position of Prothonotaries.

	April 1, 2013	April 1, 2014	April 1, 2015
Ontario	\$274,574	\$279,791	\$287,345
Alberta	\$273,000	\$279,825	\$286,821
NWT	\$252,414	\$256,606	\$260,302
Yukon	\$257,606	\$262,758	\$268,013
Saskatchewan	\$254,458	\$260,819	\$272,295
PEI	\$239,472	\$243,538	National average
British Columbia ³⁷	\$242,464	\$236,950	\$240,504
Quebec ³⁸	\$236,722	\$238,379	\$241,955

³⁶ Masters in BC, AB and MB and Traditional Masters in ON are paid the same salary as Provincial Court Judges in their province. Case Management Masters in ON are currently paid less, but the Banack Report recommended that their salary be increased to the salary of Provincial Court Judges. There is no direct equivalent to Masters in the remaining provinces, but Provincial Court Judges exercise some of the same functions.

³⁷ Salary rate for 2014//5 and 2015/16 as set out in the BC Government's Response to the 2013 JCC Report, which is being judicially reviewed.

³⁸ Quebec salaries are effective on July 1st of each year, and not April 1 as in other jurisdictions.

Manitoba	\$230,155	\$239,000	\$249,205
Nova Scotia	\$222,993	\$231,500	\$234,510
Nfld & Labrador³⁹	\$215,732	2014 JCC	2014 JCC
New Brunswick⁴⁰	\$204,700	\$204,700	\$246,880
Prothonotary	\$203,900	\$228,600	\$234,500

73. The disparity may soon become even wider in relation to one of the Prothonotaries' provincial counterparts – Case Management Masters in Ontario. On November 30, 2015, Commissioner Larry Banack issued a report of the First Case Management Masters' Remuneration Commission entitled "A Way Forward" ("Banack Report"). Commissioner Banack recommended that Ontario Case Management Masters, given their judicial role in the Superior Court of Justice, their greatly expanded jurisdiction, and the adjudicative skill and ability that they exercise on par with Superior Court and Provincial Court Judge, receive the same salaries pensions and all benefits of Traditional Masters and Provincial Court Judges in the province. The salary recommendation represents roughly 92% of a FC Judge's salary. The Ontario government has yet to respond to the recommendations.

74. As detailed below in the salary section, it is important that the Prothonotaries be adjusted to take into account material change in their comparator's compensation. The greater the gap in compensation between Prothonotaries and other judicial officers, the greater the likelihood highly qualified applicants will refrain from applying when there is a vacancy.

³⁹ In Newfoundland & Labrador, the 2014 Salary and Benefits Tribunal conducted its hearings in May 2015. A report making recommendation for the period of April 1, 2012 to March 31, 2107 was released on December 21, 2015 but remains confidential pending being tabled in the Legislature. The salary of PC Judges for this province has accordingly been excluded in the calculation of average salaries in these submissions

⁴⁰ In New Brunswick, the Government responded to 2012 JRC Report dated June 5, 2015 in December 2015 and determined that effective April 1, 2015, NB judges would be paid a salary equal to 80% of the salary paid to s.96 judges.

1. Salary

75. The Commission's mandate is to recommend an adequate level of remuneration for the office of Prothonotary in light of all relevant criteria. The concept of what is adequate is based on all of the relevant factors and ultimately is that which is commensurate with the status and responsibility of the office.

76. The Commission's task is shared by JCCs in all Canadian jurisdictions and was identified in the *PEI Judges' Reference* - to safeguard judicial independence by acting as an "institutional sieve" between government and the judiciary, in recognition of the imperative that no negotiations can take place between them over compensation. In fulfilling this important role, the Commission must be able to rely on the assistance of the judiciary and Government to bring forward relevant information and analysis in a fair and responsible manner, to ensure that the public's interest in maintaining and safeguarding judicial independence is achieved. A JCC is neither interest arbitration nor adjudication of an adversarial dispute.

77. The Prothonotaries submit that their salary should continue to be fixed or expressed as a percentage of that of a FC Judge. The issue to be determined is what should be the appropriate percentage.

78. The Prothonotaries submit that, aside from the FC Judges in proportion to whose remuneration their salary is to be set, the most relevant comparators are Masters of the Superior Court in British Columbia, Alberta and Manitoba, the Traditional Masters in Ontario and PC Judges, particularly those who exercise civil jurisdiction. Common sense dictates that regard should be had primarily to judicial comparators who do similar work, have similar qualifications or are otherwise similar in other respects.

79. To understand the relevance and/or weight to be given to these comparators, it is necessary to review briefly how the Prothonotaries' remuneration was initially fixed and adjusted over the years.

(a) Historical approach of the Government

80. The Prothonotaries' salary was fixed in 1985 and in 1993 by reference to the salary of an Ontario Traditional Master. For administrative reasons, the resulting salary was translated by the Government to the top of the GIC-6 scale, and the Prothonotaries' salary was pegged to that level. That GIC "classification" also determined the level of benefits (insurance, health...) provided to Prothonotaries.

81. In 1998, the Associate Chief Justice of the Federal Court requested that the compensation paid to Prothonotaries be reviewed following amendments to the *Federal Courts Rules*. As a result of this request and of the submissions of the Federal Court, urging that the remuneration of Prothonotaries be set as a percentage of that of federally appointed judges, approximately equal to the average of the remuneration of a Provincial Court judge in Alberta, British Columbia and Ontario, the Privy Council Office submitted a written proposal on May 7, 2001 to settle the issue of the Prothonotaries' salary, offering to fix the salary of prothonotaries at 69% of the salary of a FC Judge, based on the average salary of all provincial and territorial Masters.

82. The Government evidently concluded at the time that the role and responsibilities of Prothonotaries were comparable to those of Masters and Provincial Court Judges and that they were more onerous or added a greater value to the Canadian public than the role and responsibilities of GCQ-6 appointees, and that a substantial differential was appropriate.

(b) The Adams Review

83. Six years passed before the first independent review of the adequacy of the Prothonotaries' compensation was conducted by Special Advisor Adams in 2008.

84. Special Advisor Adams found that the Prothonotaries' salaries had, since at least 2004, fallen well below the appropriate level and recommended significant salary adjustments, retroactive to April 2004. He considered both Masters and PC Judges in his analysis, then translated the suggested salary into percentage terms, arriving at a recommendation that Prothonotaries' salaries be fixed at 80% of an FC Judge's salary. In his Response to the Adams Report, the Minister of Justice rejected all but one of the

recommendations relating to vacation entitlement, citing as the overarching concern, the intervening extraordinary deterioration of the economy.

(c) *The Cunningham Review*

85. A second independent review of the adequacy of the Prothonotaries' compensation was conducted by Special Advisor Cunningham in 2013.

86. Special Advisor Cunningham rejected the Government's position that the senior federal tribunal community was an appropriate comparator group and concluded that "a more appropriate comparator ought to be Provincial Masters (not any remaining Ontario traditional Masters)" and that "the best comparator may well be the judges of the Federal Court".⁴¹ After a careful determination of the responsibilities of Prothonotaries and their status, he determined that "at 80% they would be in acceptable range of the salaries of Provincial and Territorial Masters in relation to Federal Court judges' salaries."

87. In its Response to the Cunningham Report, the Government declined to fully implement the salary recommendation because it would result in the Prothonotaries being paid more than Military Judges whose salary at the time was 76% of that of a FC Judge.

2. The Prothonotaries' Submissions on Salary

(a) *Masters and Provincial Court Judges*

88. Following the 76% linkage of the Prothonotaries' salary, the salaries of Masters in BC, Alberta and Manitoba, Traditional Masters in Ontario and PC Judges across the country have increased substantially. The disparity between the salaries of Prothonotaries and Provincial and Territorial Masters, if continued, will make it increasingly difficult to attract the best candidates for the office. Many of the best lawyer candidates for judicial appointment would opt instead for positions on the superior or provincial courts.

89. The gap in compensation is not justified upon any reasonable analysis. Two independent Special Advisors have already determined that Provincial and Territorial Masters and Judges are the most relevant comparators in terms of their judicial role. For

⁴¹ Cunningham Report, page 22

the additional reasons set out below, the Prothonotaries submit that their salaries should fall within the middle of the range of these Masters' and Judges' salaries.

90. The average salaries of all provincial Masters (BC, AB, MB and ON Traditional Masters) in 2015 is \$265,968, or 86.2% of a FC Judge salary. The average salaries of all provincial and territorial judges in 2015 is \$258,783, or 83.9% of a Federal Court Judge salary.

91. Further, in the event the salary recommendation of the 2013 Judges Compensation Commission of British Columbia for PC Judges and Masters is implemented (\$245,122 for April 1, 2015), the average salary of Masters would jump to \$267,123 or 86.6%, and the average salary of PC Judges would be \$259,283 or 84%.

92. The pool of qualified candidates for the office of Prothonotaries includes all provincial and territorial lawyers, regardless of their province of residence or call to the Bar. Accordingly, the national average of all provincial and territorial Judges and Masters is relevant to the analysis.

93. However, while the salary and remuneration should be sufficient to attract outstanding candidates from any province or territory, it should be noted that Prothonotaries are assigned to reside, and primarily sit, only in the four largest urban centres in Canada: Vancouver, Toronto, Ottawa and Montreal. These cities are also among the most expensive places to live. Also, these are the major labour markets for legal talent in Canada – salaries for lawyers in private practice in these centres are among the highest in Canada.

94. Arguably, because the candidates the Federal Court would seek to attract for the office of Prothonotary either already reside in those major centers or would relocate there, the salary must take into account both the cost of living in these cities and the competing opportunities those outstanding candidates would otherwise find.

95. A straight averaging between the current salaries of Masters and PC Judges in Ontario, British Columbia and Quebec, the three provinces where the Prothonotaries are currently assigned, would produce a ratio of 83.1% to a FC Judge's salary in 2015.

96. Special Advisor Adams recommended that Prothonotaries' salaries be set at 80% of FC Judges' based on the average salaries for provincial and territorial court Judges and Masters across Canada, which then represented 79% of an FC Judges' salary, and the average salary for Masters in three jurisdictions (Alberta, British Columbia and Manitoba), which then represented 79.4% of an FC Judge's salary. Before Special Advisor Cunningham, the same averages, as of April 1, 2012, represented 82.4% and 83.2% of an FC Judge's salary. As of April 1, 2015, these averages both represent 83.9% of a FC Judge's salary.

97. The Prothonotaries' submit that their salaries should be set within a range of 83% to 86% of an FC Judge's salary taking into account the analysis conducted in the two previous reports and the evolution of the salaries of the comparators that influenced them.

(b) Relationship to FC Judges' salary

98. JCCs throughout the country have generally accepted the utility of comparisons with the compensation of other judicial officers, and an analysis of the common elements of the judicial function that make the profession unique.

99. The concept of reasonableness compels an analysis of the extent to which the nature of the work and responsibilities of a judge or judicial officer may exceed those of another judge or judicial officer.

100. The Prothonotary's primary reference is to the salary of FC Judges, who were paid \$308,600 per year effective April 1, 2015.⁴² Effective April 1, 2015, the Prothonotaries were paid \$234,500 per year, at a level of 76% of the federal salary.

101. Masters in Provincial Superior Courts stand in the same relationship to Judges of their Courts as Prothonotaries stand to FC Judges. As seen above, the average of the salaries of all Provincial Masters bears a ratio of at least 83% of a federal Judge's salary, even where Masters do not, as Prothonotaries do, share with the Judges a substantive

⁴² Judicial salary levels for all federally appointed judges are prescribed in Part I of the *Judges Act*. Salaries are adjusted annually on the basis of the lesser of the percentage change in Statistics Canada's Industrial Aggregate Index (IAI) or 7%. The judges' salary will be adjusted automatically effective April 1, 2016

small and intermediate claims jurisdiction in their own Court. The difference between Provincial Court Judges and Superior Court Judges' salaries also bears a similar ratio.

102. The substantial disparity between the salaries of Prothonotaries and FC Judges, as compared with the relationship between the salaries of Masters and PC Judges and the salaries of Superior Court Judges within the provinces, leads to a perception of second-class status for the office of Prothonotary and will contribute to the increasing difficulty in attracting the best candidates to this office.

(c) Military Judges

103. In its Response to the Cunningham Report, the Government declined to fully implement the salary recommendation of 80% because it would result in the Prothonotaries being paid more than Military Judges whose salary at the time was 76% of that of a FC Judge.

104. The nature, role and functions of the military justice system and its military judges is described in detail by the Court Martial Appeal Court in *Leblanc v. R.*, 2011 CACM 26.⁴³ The military judges are for all intents and purposes the federal version of a Provincial Court Judge exercising criminal jurisdiction, with the additional jurisdiction to deal with serious offences, such as murder, manslaughter and kidnapping, committed abroad by military personnel.

105. The 2008 MJCC recommended that the salary of Military Judges be fixed at \$225,000 as of September 1, 2007, and then indexed based on the IAI. The Government had previously agreed to pay Military Judges based on an average of the salaries of Provincial and Territorial Court Judges. The Committee's recommendation was rejected by the Government in light of the economic circumstances at the time and the measures provided in the *Expenditure Restraint Act*.

106. On September 28, 2012, the 2012 MJCC issued a report recommending that Military Judges receive the same remuneration as Superior Court Judges. The

⁴³ *Leblanc v. R.*, 2011 CACM 2 <http://decisions.cmac-cacm.ca/site/cmac-cacm/cmac-cacm/en/item/7750/index.do>.

Government rejected the salary recommendation on March 28, 2013, citing various errors by the majority members of the Committee, including:

- (a) Giving undue weight on superior court judges as the sole benchmark;
- (b) Significantly departing and disregarding the conclusions of earlier MJCCs;
- (c) Failing to adequately consider that Military Judges have a lesser workload than that of superior court judges;
- (d) Failing to adequately consider that the only pool of candidates eligible for appointment consists of Canadian Forces officers who are barristers of a least ten years standing.

107. None of factors cited above by the Government apply to the Prothonotaries. In any event, the Government used circular logic in rejecting the recommendation by Special Advisor Cunningham to adjust the Prothonotaries' salary to 80% of a FC Judge's salary. Further, the Prothonotaries do not consider the Military Judges to be robust comparators, because their affiliation with the Armed Forces dictates that a distinct pool of qualified candidates (military or JAG lawyers) be considered and distinct retirement arrangements apply to them as military officers.

3. Recommendation on Salary:

That Prothonotaries be paid a salary in the range of 83% to 86%⁴⁴ of the salary of a Federal Court Judge, retroactive to April 1, 2016.

(a) Supernumerary Status

108. The supernumerary scheme implemented under the *Judges Act* allows a judge who had reached retirement status to work on a part time basis on full salary in lieu of retiring. The supernumerary status can provide numerous advantages to the judicial system while at the same time provide considerable financial benefits to judges.

109. Most Provincial Court Judges and Masters have the opportunity upon retirement to become supernumerary (also referred to in certain jurisdictions as part-time or senior

⁴⁴ \$256,138 to \$265,386 based on the FC Judge's salary effective April 1, 2015

judges). Usually, supernumerary status allows a judge who is in receipt of a pension to continue working part-time (typically, 30 to 50% of the time of a puisne Judge), receiving a proportionate salary, and of course, accruing no further pension entitlement.

110. As the opportunities for retired judicial officers to be employed and earn revenue after retirement are extremely limited, the ability to opt for supernumerary status is an important benefit of holding a judicial office in terms of future financial security. The availability of supernumerary Judges is also understood to be of substantial value and benefit to the Courts and the public.

111. The Prothonotaries submit that supernumerary status, or another arrangement similar to Senior Judge Programs created in most provincial jurisdictions, would enhance their financial security and be of benefit to the Court. Such a program would provide flexibility to Chief Justice of the Federal Court to assign Prothonotaries who are eligible to retire to temporarily perform judicial duties as necessary to foster the prompt disposition of judicial business in lieu of retirement. This would avoid interrupting court business to the detriment of the litigants due to the illness or unexpected absence of a judge or prothonotary, judicial vacancy, judicial training and education or an overscheduled docket.

112. Recognizing however, that the need to be met by a proposed supernumerary status and the parameters thereof are matters that would require consideration by the Chief Justice and the Minister of Justice, the Prothonotaries submit that the Commission may not be in a position to recommend that such a program be instituted. Rather, it should make a recommendation that the Minister of Justice and the Chief Justice of the Federal Court consider the opportunity of establishing such a program for Prothonotaries.

113. The Prothonotaries understand that the Chief Justice of the Federal Court intends to make submissions on this issue.

4. Recommendations on Supernumerary Status

That the Minister of Justice and the Chief Justice of the Federal Court consider the opportunity of granting the Prothonotaries supernumerary status under the Judges Act or create a senior prothonotary program for Prothonotaries upon eligibility for retirement.

(a) Incidental Allowance

114. Currently, Prothonotaries have no entitlement to an annual expense allowance of any sort to pay for the ordinary type of expenses that judicial officers typically incur in order to carry out their duties and to improve their skills. These expenses include items such as payment of dues for membership in professional organizations, payment for attendance at legal conferences, hardware and software, telecommunications expenses, and the like. Some expenses are currently paid or reimbursed for by the Courts Administration Service on an *ad hoc* basis, subject however to the discretion of the Chief Administrator and budgetary constraints.

115. Federally appointed Judges receive annually a non-taxable allowance which affords them the opportunity to pay for memberships in law-related organizations, attend functions, conferences or meetings of significance to the legal community served by the Court, both to learn and to represent the Court, to participate in the events and functions that foster the collegiality of the Court, and to pay for amenities and tools that best enable them to accomplish and carry out their duties efficiently given the demands and rigors of their workload and travel, and that are not otherwise funded.

116. Section 27(1) of the *Judges Act* (the Act) states:

27. (1) On and after April 1, 2000, every judge in receipt of a salary under this Act is entitled to be paid, up to a maximum of \$5,000 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

117. Listed below are examples of expenditures that may be reimbursed, as determined by the Commissioner of Federal Judicial Affairs:

Home Office Equipment

The cost of a computer and printer, a laptop and laptop bag, tablet device, software and accessories for same, for a home office or while travelling may be claimed.

The cost of office supplies for use at home may be claimed.

Office equipment and supplies for a judge's chambers or court are the responsibility of court administration and may not be claimed under this allowance.

Internet

The cost of home internet service required for the performance of judicial functions may be claimed.

Security System

The cost to acquire and the monthly cost of a home security monitoring system may be claimed.

Cell Phone

The cost of a cell phone or similar device, including subscription and air time, required for the performance of judicial duties may be claimed.

Continuing Legal and Judicial Education

The cost of continuing legal and judicial education, including attendance at seminars or conferences and the cost of training materials may be claimed, provided that such amounts are not reimbursable under section 41 of the Judges Act.

If a conference or seminar is approved under section 41, reasonable expenditures not reimbursed under section 41 may be claimed under section 27 provided that such expenditures do not exceed any limits on expenditures established in the section 41 approval and are not upgrades to the class of accommodation or travel approved or arranged by the conference organizer.

The cost of books or periodicals for legal and judicial education may be claimed.

Participation in Judicial Outreach or Public Education

The cost of attendance at events to which a judge is invited in the capacity of judge, such as an invitation to speak at a school or university, to attend a meeting of the Bar, or to judge a moot may be claimed.

Fees of Professional Associations

Membership fees paid to law-related professional associations such as the Canadian Bar Association or the Canadian Superior Courts Judges Association may be claimed.

Court Attire

The cost of judicial court attire, being judicial robes, waistcoat, jacket, wing collar shirts or blouses, pants or skirt, tabs, and studs may be claimed.

Repairs to and cleaning of judicial court attire may be claimed.

Luggage

A judge may claim the reasonable cost of luggage required for travel relating to the execution of the office of judge.

118. Special Advisor Cunningham, as well as his predecessor, recommended that Prothonotaries receive an annual non-taxable annual allowance of \$3,000. The Government rejected the recommendation on the grounds that “all reasonable travel and related living expenses attendant to the exercise of the office of prothonotary, including education and training costs, will continue to be paid.”

119. However, travel and living expenses, and training and education delivered through the National Judicial Institute, have nothing to do with incidental expenses and are reimbursed under separate provisions of the *Judges Act*. The incidental allowance is meant to cover a much broader range of expenses that the fit and proper execution of the judicial office may require.

120. As a result of recent amendments to the *Judges Act*, the compensation and benefits of Prothonotaries are now administered by the Officer of the Commissioner of Federal Judicial Affairs. To be reimbursable, an expenditure must meet the following requirements: (a) the expenditure and its cost is reasonable; (b) the expenditure is an incidental expenditure that the fit and proper execution of the office of judge may require; and (c) the expenditure is not reimbursable under any other provision of the Act. It is inappropriate that such costs be borne by Prothonotaries personally.

121. There is no principled reason why the Prothonotaries should not benefit from the same allowance available to FC Judges, to a maximum of \$5,000. The allowance would be expected to cover the same things that it does for FC Judges and be subject to the same oversight. It is submitted that any arbitrary pro-rating of the allowance may result in some basic needs not being met.

5. Recommendation on Allowances

That Prothonotaries receive an annual non-taxable allowance of up to a maximum of \$5,000 to assist in payment for memberships in law related organizations, and other costs associated with carrying out their duties as Prothonotaries.

(a) Reimbursement of Representational Costs

122. The Commission has already received preliminary submissions from the parties regarding the Prothonotaries' request for full representational funding.

123. The "starting point" regarding this issue is not and cannot be section 26.3 of the *Judges Act*. No independent commission ever determined whether it would be appropriate to apply the funding formula of "two thirds of the costs determined under subsection (3) in respect of his or her participation" to Prothonotaries. This Commission, in conducting its review, is not fettered in any way by s.26.3. As the Supreme Court of Canada has held, where a particular aspect of judicial remuneration has not previously been considered in detail by a commission, the commission has greater scope to assess the appropriate scale of funding. Past Quadrennial Commissions have considered this issue only in relation to superior court judges, not prothonotaries, whose circumstances are quite different.

124. The constitutional requirement that judicial compensation be subject to a periodic, independent review process was identified as essential to safeguard judicial independence. In turn, the principle of judicial independence is for the benefit of the public, not the judges. In declaring this fundamental concept, the Supreme Court in *PEI Judges Reference* contemplated and encouraged the participation of the judiciary in the process.⁴⁵

⁴⁵ *PEI Judges Reference*, para. 173.

[173] ... Although s. 11(d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature....

125. The Prothonotaries' meaningful participation in this process is therefore required if the goals of ensuring judicial independence are to be met.

126. There are currently only five Prothonotaries, yet they play a crucial role in the administration of justice and the proper functioning of the Federal Court. The importance of the constitutional principles involved in setting their remuneration cannot and should not be diminished or compromised simply because they are few in number.

127. The task of marshalling, presenting and analyzing all the factors, considerations and evidence required to assist the Commission, and ensuring that it is fully informed in deliberating and making its recommendations, places a disproportionate burden on the Prothonotaries, both in terms of time and financial resources, because they are such a small group.

128. The Government unilaterally determined in July 2012 that it would authorize and direct the CAS to provide \$50,000 to the Prothonotaries to cover their costs of participating in the review process before Special Advisor Cunningham. The Government was aware that the Prothonotaries' reasonable expenses and disbursements in the Adams process significantly exceeded that amount. The Government rejected the Honourable Mr. Adams' recommendation that all legal fees and costs of the Prothonotaries in that process be reimbursed (beyond the amount of \$50,000 previously advanced to them), in these terms:

This is not reasonable. As the Government has repeatedly said in relation to judicial legal costs in the context of the Quadrennial Commission process, there should be a financial incentive to ensure that representational costs are prudently incurred. It is for this reason that superior court judges are only entitled to 66% of their legal costs. The Government has already paid the prothonotaries on an ex gratia basis the amount of \$50,000 to support their participation in the process. This is in excess of 66% of their total representational costs. No additional reimbursement is necessary.

129. The Government also rejected a similar recommendation by Special Advisor Cunningham's because it did not regard it as reasonable. With respect, the Government's position that five Prothonotaries can bear the same proportion of their costs as a group of over 1,000 Superior Court Judges is patently illogical. It is even more so when one considers that Superior Court Judges benefit from an incidental allowance that may be used to pay membership dues to their respective associations, from which such costs may be paid, which the Government has denied to Prothonotaries.

130. Indeed, in all jurisdictions where the judiciary's representational costs are shared by the Judges, these Judges benefit from a discretionary allowance, such that they are not required to pay from their own pockets the costs of a constitutionally mandated process intended for the public's benefit.

131. Further, the Government has in the past committed to covering all reasonable representational costs of the Military Judges in their participation in a similar process, in view of the small size of their group.⁴⁶ It is important to avoid any perception of favouritism in the Government's treatment of judicial officers with similar resources.

132. The Prothonotaries submit that it is not only reasonable, but necessary to ensure the achievement of the goals of this review process, that the Commission recommend that the Prothonotaries be reimbursed all reasonable costs they have incurred in participating in this process and moving forward.

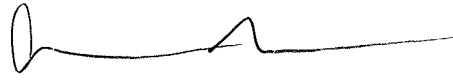
6. Recommendation on representational costs

That Prothonotaries be reimbursed for all of their reasonable legal fees and disbursements incurred in the current process, beyond the amount already advanced to them by the Government, and in subsequent processes.

⁴⁶ 2012 MJCC Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 29, 2016

A handwritten signature in black ink, consisting of a large loop on the left, followed by a horizontal line, a small peak, and a long horizontal tail.

Andrew K. Lokan

Doc 1743097 v1