JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSIONS

of the

CHIEF JUSTICE OF THE FEDERAL COURT

REGARDING COMPENSATION FOR

THE ASSOCIATE JUDGES OF THE FEDERAL COURT

January 10, 2025

On behalf of the Federal Court, I welcome the opportunity to make a submission to this Commission on an issue of significant importance to the Court.

In brief, I write to provide my full support for the submissions of the Associate Judges of the Federal Court, in which they advance their proposal for an increase in their compensation. As the submissions of the Associate Judges explain, and as further described below, the workload of the Federal Court is far greater now than it has ever been, both in caseload volume and complexity. A disproportionately large part of this increased workload has been shouldered by the Associate Judges of the Court.

Background

The critical role that the Associate Judges play in the Court was described in my *Submissions to the Special Advisor on Federal Court Prothonotaries' Compensation*, dated April 19, 2013, and annexed as Appendix 1 to this submission. That role is also summarized at paragraphs 19–34 of the Associate Judges' submissions to this Commission dated December 20, 2024.

The role of Associate Judges has continued to evolve as the Federal Court has adjusted to new and pressing challenges. This changing role is described at paragraphs 60–69 of the Associate Judges' submissions to this Commission.

As described below, one of the more significant challenges has been the consistent and substantial rise in the workload of the Federal Court over the last several years. In calendar year 2019, the last full year before the pandemic, a total of 9,493 proceedings were filed. After a brief and understandable dip in 2020, the total number of filings increased as follows:[1]

2021	11,325
2022	15,762
2023	18,999
2024	28,501

Beyond the substantial increase in the number of proceedings instituted at the Court, the average level of complexity of proceedings filed has also increased. In addition, the Court has placed a high priority on measures to increase access to justice, including

[1] A breakdown of these statistics is available at https://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics#cont.

greater use of case management and mediation, which are functions primarily performed by the Court's Associate Judges.

Self-represented litigants (SRLs)

The number of filings by SRLs, and the percentage of the Court's caseload that they comprise, has increased significantly in the last two years. In 2019, 1,335 of the 9,472 proceedings in the Court were filed by an SRL. This represented 14% of the Court's workload. That number then dropped and stayed relatively constant in 2020, 2021 and 2022 (10%, 10% and 11% of filings, respectively). In 2023, 3,267 proceedings were commenced by SRLs (17% of filings). As of October 18, 2024, 5,445 proceedings were commenced by SRLs (25% of filings).

SRLs place significantly increased demands on Court staff and the judiciary, relative to represented parties. SRLs typically lack knowledge about court procedures and often do not understand the law and legal terminology. Frequently, the burden of ensuring that the procedural steps to be taken by an SRL are properly performed falls on the Associate Judges, in their role as the Court's frontline judicial officers. This responsibility requires a substantial and increasingly greater expenditure of time on their part, on top of an already busy caseload.

The Court's principal work streams

As set out in the Court's Strategic Plan, the Court's workflow is comprised of three streams: (i) matters that are specially managed by a case management judge, (ii) requests for leave to apply for judicial review under the *Immigration and Refugee Protection Act*, SC 2001, c 27 and the *Citizenship Act*, RSC 1985, c C-29, and (iii) all other matters.

Associate Judges play a key role in each of these streams.

Case managed proceedings

The Court's Associate Judges are at the heart of the Court's proactive approach to case management. Active and engaged case management is an important part of the Court's Strategic Plan, particularly in connection with the objectives of reducing the time and costs associated with Court proceedings. Among other things, the Court pursues these objectives through greater proportionality and a more streamlined pre-trial process. In addition, resolving minor disputes outside the courtroom and setting schedules by way of informal case management conferences, as opposed to formal motions, results in significant efficiencies.

The Court's success with case management has resulted in more litigants seeking to use it. Consequently, the demand for case management has steadily increased and

shows no sign of abating. Currently, each Associate Judge has been assigned as case management judge for between 100–200 matters, the majority of which require attention on a regular basis. These files range from relatively straightforward applications for judicial review to the most complex intellectual property, Indigenous, class proceeding and administrative cases before the Court, as well as actions against the Crown. For class actions and cases falling under *Patented Medicines (Notice of Compliance) Regulations*[2] and the Court's *Practice Guidelines for Aboriginal Law Proceedings*[3]—all of which represent a significant and complex component of the Court's work—proactive case management is the norm.

As a result of the progressive and significant increase in the number of case managed files, I have had to assign more judges to case manage or co-case manage files than ever before. At the present time, judges as a group have the primary responsibility for case managing approximately active 215 files, which is approximately equivalent to the workload of two individual Associate Judges.[4] This is at a time when the Court requires the full attention of each of its judges to deal with the rapidly growing number of hearings on the merits.

Immigration and other non-case managed proceedings

Associate Judges do not determine applications for leave or applications on the merits in immigration matters. However, Associate Judges are heavily involved in resolving a range of procedural issues that arise in such cases during their "duty weeks." In those weeks, Associate Judges are responsible for dealing with virtually all procedural matters, including informal requests for interlocutory relief and formal motions in proceedings that are not case managed in a certain city or region. Much of this work is in immigration matters.

The number of immigration proceedings filed in the last several years has been at continuously increasing record levels:

[2] SOR/93-133. See also Federal Court, *Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the PM(NOC) Regulations* (last amended 28 November 2024), online: https://www.fct-cf.gc.ca/Content/assets/pdf/base/2024-11-28-Case-and-Trial-Management-Guidelines-for-Complex-Proceedings-and-Proceedings-under-the-PM-Regulations.pdf.

[3] (4th edition, September 2021), online: https://www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20Sept-2021%20(ENG)%20FINAL.pdf.

[4] Although the Associate Judges have been assigned as case management judge for between 100 – 200 matters, the number of active proceedings at any given time is approximately 90-100 for most of the Associate Judges.

2015	5,827
2016	5,313
2017	5,572
2018	6,522
2019	7,782
2020	6,424
2021	9,671
2022	13,487
2023	16,726
2024	24,784

Associate Judges routinely work evenings, weekends and vacation weeks in order to meet the increasing demands of their role and facilitate access to justice for Canadians.

The need to attract outstanding candidates

It is critically important for the Court to be able to attract outstanding candidates to become Associate Judges, and to retain these individuals once they are appointed.

Unfortunately, only a very small number of such candidates have applied for appointment to the Court in each of the recruitment processes that have occurred over the last decade.

As described in the remarks that I provided to the 2016 Commission, the Court attracted only two qualified candidates for a position in Montreal, two for a position in Toronto, and one for a position in Vancouver, in 2015: see Appendix 2 hereto at page 2.

Since that time, the Court's success in attracting excellent candidates has not materially improved. As indicated in Appendix 3 hereto, with one exception, only one or two such candidates applied for appointment to the Court in the various processes that took place over the period 2017–2024. The single exception is the process that occurred in April 2021, when three suitable candidates applied for a position in Toronto.

In my view, this unsatisfactory level of interest in being appointed to the position of Associate Judge of the Federal Court is likely attributable, at least in part, to the current gap in compensation between judges and Associate Judges.

As noted in the submissions of the Associate Judges at paragraph 56, four former Associate Judges—Justices Lafrenière, Furlanetto, Aylen and Duchesne—have opted to leave the office of Associate Judge in recent years to seek appointment as Justices of the Federal Court. While I believe that this is partially attributable to the perceived increased rank of a judge relative to that of an Associate Judge as well as the broader jurisdiction of a judge, I also believe that the aforementioned gap in compensation has played an important role.

In my view, the Court's ongoing ability to attract excellent qualified applicants will continue to be compromised if the level of remuneration does not keep pace with the remuneration available at other superior and provincial courts across the country. The qualifications for appointment to similar positions in these courts mirror those of the office of Associate Judge of the Federal Court. As the gap in compensation widens between Associate Judges of the Federal Court and analogous judicial officers in other jurisdictions, such as Alberta, British Columbia and Manitoba, the prospects for attracting excellent candidates diminish.

Associate Judges perform an indispensable role in the proper functioning of the Federal Court. The Federal Court has a strong interest in attracting the very best candidates to become and remain Associate Judges. This interest has only increased as the role played by the Associate Judges has become more important and, indeed, critical to the Court's ability to facilitate access to justice by reducing the time and costs associated with court proceedings through, among other things, case management and mediation.

Accordingly, I write to confirm that the Associate Judges have my full support in their submissions before this Commission.

January 10, 2025
Chief Justice, Federal Court

Appendix 1

Federal Court | Cour fédérale

IN THE MATTER OF AN INQUIRY
BY TH ESPECIAL ADVISOR ON
FEDERAL COURT PROTHONOTARIES' COMPENSATION

SUBMISSIONS OF THE CHIEF JUSTICE OF THE FEDERAL COURT

APRIL 19, 2013

On behalf of the Federal Court, I commend the Governor in Council [GIC] for establishing this independent review of the adequacy of the salary and benefits of Prothonotaries of the Federal Court. I also welcome the GIC's confirmation of its commitment to ensuring that these types of reviews are conducted on a periodic basis.

The Role of the Prothonotaries

The nature of the role and duties of Prothonotaries has been described in an agreed statement of facts filed jointly on behalf of the Prothonotaries and the Government of Canada.

In short, the Prothonotaries' functions are entirely judicial in nature. Their decisions are typically entitled to deference. Their cases are assigned through the Office of the Judicial Administrator in the same manner as the cases that are assigned to Judges. They have trial jurisdiction for monetary amounts equivalent to or greater than the small claims jurisdiction of the provincial judiciary. They routinely deal with sophisticated legal counsel in a wide variety of areas of the law. They participate in all of the Court's ceremonial special sittings and are members of many of the Court's committees. They have access to the same resources as Judges, including the Court's complement of law clerks. They attend many of the same internal and external education seminars as the Court's Judges. They wear robes that are very similar to those worn by the Court's Judges - only the colour of the trim differs. Their decisions often attract high profile media attention. Recent examples include:

- Bielli v. Attorney General of Canada, Marc Mayrand (Chief Electoral Officer of Canada) et al [a.k.a. the "Robo-calls" matter]
- Mohamed Zeki Mahjoub v. Minister of Public Safety et al.
- The Honourable Lori Douglas v. Attorney General of Canada
- Attorney General of Canada v. United States Steel Corporation
- Conrad Black v. The Advisory Council for the Order of Canada

- Kevin Page, Parliamentary Budget Officer v. Thomas Mulcair, Leader of the Opposition and the Attorney General of Canada, and the Speaker of the Senate of Canada and the Speaker of the House of Commons
- Hupacasath First Nation v. The Minister of Foreign Affairs Canada and AGC (a.k.a. the Chinese Investment Treaty case)
- Abdelrazik v. AGC and Cannon

The importance of the Prothonotaries to the Federal Court was succinctly described in the submissions made by my predecessor in connection with the 2007 review of the Prothonotaries' compensation [Initial Review]. For convenience, those submissions, which I endorse, are attached as Appendix 1.

By way of background, between 1985, when the first Prothonotary of the Court was appointed, and 2003 the number of Prothonotaries on the Court gradually increased. These increases reflected both the increased workload of the Court as a whole and the expanded range of responsibilities given to Prothonotaries, particularly in the wake of the major overhaul of the *Federal Courts Rules* in 1998, which introduced status review, case management and dispute resolution. To assist the Court with its increased case management workload, one supernumerary Judge was also primarily assigned to case management tasks from 2005 until his retirement in 2008.

Since 2007, the workload of the Court as a whole has continued to increase. To some extent, that is reflected by the 23% increase in the number of proceedings instituted annually since that time, from 31,254 to 38,438. However, what this figure fails to convey is that the average level of complexity of proceedings filed in the Court has also increased.

In large measure due to the efforts of the Prothonotaries, the Court has succeeded in achieving its goal, announced on May 1, 2009, of ensuring that patent infringement actions are tried within 24 months of their commencement.

The Prothonotaries have also played an increasingly important role in helping to settle or mediate disputes, in assisting to streamline the number of issues in dispute and in reducing the length of trials before the Court. This has been critical in making more scarce judicial resources available to the public.

While the total number of full time and supernumerary Judges has continued to increase over the years, the total number of Prothonotaries has remained at six since 2003. Notwithstanding this, the scope and volume of their work within the Court has increased.

The Prothonotaries' Judicial Independence

The Prothonotaries are judicial officers whose judicial independence is of fundamental importance to the Federal Court as a whole. Any compromising of their independence compromises the judicial independence of the Federal Court as an institution.

In *Valente v The Queen*, [1985] 2 SCR 673, the Supreme Court of Canada identified the three core characteristics of judicial independence as being 1) security of tenure, 2) financial security, and 3) administrative independence. Among other things, the Court discussed judicial independence in the context of the relationship of the judiciary to others, particularly the executive branch of government (pp. 685 and 687).

The mandate of the Special Advisor, as set forth in section 4 of the Schedule to Order in Council PC.2012-991, dated July 20, 2012, is virtually identical to the mandate that was established in connection with the Initial Review. That mandate focuses primarily on the financial security prong of judicial independence. In this regard, paragraph 4(2)(d) of that Schedule requires that consideration be given to "the role of financial security in ensuring the Prothonotaries' independence".

However, paragraph 4(2)(f) requires a consideration of "any other objective criteria that the Special Advisor considers relevant." The administrative independence of the Prothonotaries may be considered relevant in this respect. If the Special Advisor ultimately decides to make any recommendations in respect of the administrative

independence of the Prothonotaries, it would be helpful if those recommendations were as specific as possible, to reduce the scope for subsequent uncertainty, in the event that such recommendations are accepted by the Government.

Periodic Nature of Review

The Government has confirmed its commitment to reviewing the adequacy of the Prothonotaries' salary and benefits on a periodic basis. However, uncertainty remains regarding the timing of future reviews. This uncertainty has consumed a significant amount of energy and time within the Court.

The present review was initiated on July 20, 2012, slightly beyond the 3-5 year period established in *Reference re: Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997], 3 S.C.R., 3,at paragraph 174. It was launched after much time and effort was spent discussing the constitutional need for the review to take place. This time was diverted away from serving the public.

In the interest of preventing similar diversions of time and effort in the future, it would be helpful if a recommendation could be made for future reviews to be held at fixed intervals, perhaps contemporaneously with or shortly following the Quadrennial Commission process that has been established to review the compensation of judges.

The Need to Attract Outstanding Candidates

The Court has begun to take steps towards initiating a process to establish a pool of qualified candidates for the position of Prothonotary. This pool will include candidates for positions in Montreal, Toronto, Ottawa and Vancouver.

Among other things, the Court will be seeking to attract candidates who have at least 10 years of litigation experience, an in-depth knowledge of substantive areas of the law within the Federal Court's jurisdiction, and the skills necessary to mediate and case manage difficult disputes.

However, the prospects for attracting such candidates are diminished by virtue of the substantial gap that exists between the compensation earned by Prothonotaries at the present time and the compensation earned by other judicial officers. This is likely to be a particular issue for potential candidates from the private sector, who, for the most part, currently earn substantially more than Prothonotaries. The fact that Prothonotaries may be remunerated at a level commensurate with quasi-judicial decision-makers in the public service or on administrative tribunals may not be considered to be particularly relevant by such candidates.

I recognize that the last three Prothonotaries to be recruited to the Court were from major private sector law firms. However, my understanding is that, at the time those individuals were recruited, they were aware that efforts were being taken to establish an independent review process complying with the Government's constitutional obligations, and they were optimistic that those efforts would, at least in some measure, improve the Prothonotaries' salary and benefits. In the absence of a meaningful change in the Prothonotaries' salary and benefits as a result of this review, there would be little basis for similar optimism going forward.

Finally, to attract candidates who have the level of seniority and experience that the Court will be seeking, the pension benefits of Prothonotaries must be based on realistic assumptions regarding the length of time that persons appointed to that position will remain in that position. It is not realistic to base pension benefit calculations on the assumption that the average Prothonotary will be able to maintain the required level of performance for 35 years, having regard to (i) the fact that such persons likely will already have been practising law for at least 10 years, (ii) the high level of performance and stamina required to effectively fulfill the functions of the position, and (iii) the significant pressures associated with the position.

Costs of Review

The Prothonotaries are required to participate in these independent reviews, as they are the only mechanism by which they can have any input into their salaries and benefits. As with federally appointed Judges and Military Judges, to effectively participate in these reviews, the Prothonotaries need legal counsel.

As with the Initial Review, the Minister of Justice authorized the Chief Administrator to make an *ex gratia* payment not to exceed $50,000 to reimburse the Prothonotaries for their legal representation costs incurred in relation to this review.

Once again, this left the Prothonotaries in a position where they were required to undertake most of the research and drafting of their submissions to the Special Advisor. Given the complexity of the issues involved, and having regard to the importance of this review to the Court as a whole, this necessitated that significant time be made available in some of their schedules for this purpose. To achieve this, many of their assignments had to be shifted to several judges of the Court, whose assignments in turn had to be postponed to enable them to attend to the work of the prothonotaries in question.

In short, the amount of reimbursement authorized to be made to the Prothonotaries for legal costs incurred in connection with these periodic reviews of their compensation can have a significant impact on both the Court and the public.

It would be helpful for the Special Advisor to recommend that this fact be taken into account in determining the amount of such reimbursement to be authorized in connection with future periodic reviews of the Prothonotaries' salary and benefits.

Conclusion

The Prothonotaries are judicial officers of the Court. Their contribution to the Court is important, substantial and growing.

While I prefer to refrain from making submissions regarding what levels of salary and benefits would be adequate to constitutionally protect their judicial independence, I consider it to be appropriate to note that the matters that are the subject of this review have been "a continuing concern of the Prothonotaries, since at least the decision in *Reference re P.E.I. Judges* in 1997" (*Aalto v Canada*, 2009 FC 861, at paragraph 9(i)).

As the years have passed without any satisfactory resolution of these matters, the morale of the Prothonotaries has deteriorated and the Court as a whole has become increasingly affected. The situation has reached the point where a satisfactory resolution of these matters has become a high priority and an urgent concern for the Court. In this context, it bears underscoring the Federal Court of Appeal's observation that "[t]he current arrangements for [the Prothonotaries'] pensions and disability entitlement call for particularly prompt attention" (*Aalto v. Canada*, 2010 FCA 195, at paragraph29).

Appendix 2

Federal Court

CANADA

Cour fédérale

REMARKS FOR APPEARANCE BEFORE THE 2016 QUADRENNIAL COMMISSION

Chief Justice Paul Crampton

Ottawa, Ontario

April 29, 2016

On behalf of the Federal Court, I would like to thank you for this opportunity to address the Commission regarding one of the issues raised by the prothonotaries of the Court, that is, supernumerary status.

The Government graciously consented to an initial request that was made on my behalf to prepare a reply to one of the positions taken in its submissions dated March 29, 2016.

However, on reflection, it occurred to me that it would be best to appear in person. This is primarily because I thought it best to disclose certain facts to you more discretely, by way of oral testimony and an Exhibit, rather than by way of submissions that would be posted on the Commission's website.

Having reviewed the Government's submissions of February 29, 2016 and March 29, 2016, I consider it important to address the suggestion that there is no evidence of any difficulty in recruiting outstanding candidates to the office of prothonotary at the Federal Court.

This suggestion was maintained notwithstanding my written submissions to the contrary, and notwithstanding that similar information was communicated orally by Lise Henrie, the Court's Executive Director and General Counsel, to Kirk Shannon, counsel for the Government, at his request on March 17, 2016.

I acknowledge that the latter information was shared in a manner that did not provide the detail that I will be giving you here today.

At paragraph 5 of its initial submissions, the Government stated that "there is no evidence of any difficulty in recruiting outstanding candidates to either office", namely, superior court judges and Federal Court prothonotaries.

This position was essentially repeated at par. 110 of the Government's Reply submissions, where it asserted that "there is no evidence before this Commission that attracting individuals to the position of prothonotary is a challenge."

In my submission of March 11, 2016, I stated that 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.[1]

For your information, we have tentatively concluded that there were only two qualified candidates in Montreal, two in Toronto and one in Vancouver.

This is notwithstanding the fact that we received:

- 12 applications from persons interested in the position in Montreal;
- 20 applications from persons interested in the position in Toronto;
- 10 applications from persons interested in the position in Vancouver; and
- 17 applications from persons who did not specify which position(s) they were interested in.

With the greatest of respect to the applicants who participated in that process, there were very few who had both the breadth of experience in the Court and the gravitas required for the position.

In fact, some applicants even lacked the required 10 years call to the Bar.

Many had never appeared in Federal Court. Some had not even litigated.

Without getting into the particulars of each candidate, even those who had litigation experience before the Court were not deemed to have the qualities required.

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[1] At pages 4 and 5: "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. That process was held due to the Court's desire to minimize the delay that will be associated with replacing prothonotaries who are planning to or may retire in one or more of those cities in the coming years."

For the vacant Ottawa position, we received a total of 48 applications. This was by far the highest of any of the four cities concerned. **[Hand up Exhibit X]**

The Screening Committee, which included Me Henrie and Prothonotary Tabib, referred the five top candidates for the vacant position in Ottawa to the final panel consisting of Prothonotary Lafrenière, the Minister of Justice's then Chief of Staff, Kirsten Mercer, and me.

At the conclusion of our interviews, we unanimously agreed that there were only two qualified candidates and put forward their names for consideration. For your information, neither one of those candidates is fully bilingual.

As I explained in my written submission, Federal Court prothonotaries play a critical role, primarily through case management and mediation, in improving access to justice for those who turn to the Court for assistance in resolving their legal disputes.

We need to have the very best candidates in these positions, in part because the cases that most require their talents are those with very experienced legal counsel who are very adept at pushing the limits of what is permitted by our Rules of practice and what is contemplated by the principle of proportionality.

The pool we need to draw from is essentially the same as the pool of candidates who might be interested in a judicial appointment.

In my view, providing prothonotaries with the same ability as judges currently enjoy to elect supernumerary status, or to work part-time in some other capacity after working a minimum number of years, would significantly improve the Court's ability to attract outstanding candidates in those cities.

Thank you for your consideration of this matter.

Appendix 3

Appendix 3 - Summary of Selection Processes for Associate Judges 2017-2024

Deadline for application - selection process	Number of candidates	Number of interviews	Suitable candidates	Appointments
Spring 2024	96 (45 new applicants - 51 from previous processes)	2 – Ottawa/Montreal	1	0
Winter 2023	77 (40 new applicants - 37 from previous processes)	3 - Ottawa/Montreal 3 - Toronto	2 2	- A.J. Moore (30/04/2024) - A.J. Cotter (31/05/2023)
November 2021	38 (20 new applicants – 18 from previous processes)	4 - Ottawa/Montreal		- A.J. Duchesne (28/03/2022)
April 2021	18	5 - Toronto 2 - Western Canada	3 2	- A.J. Horne (04/08/2021) - A.J. Crinson (05/02/2023) - A.J. Coughlan (04/08/2021)
Summer/Fall 2017	28 for the position in Western Canada 18 for the position in Toronto 25 for the position in Ottawa 7 for the position in Montreal	5 – Vancouver/Edmonton 3 – Toronto 1 – Ottawa 1 - Montreal	2 1 or 2 1 1	- A.J. Ring (19/12/2017) - A.J. Furlanetto (07/03/2019) - A.J. Molgat (21/11/2018) - A.J. Steele (03/05/2018)