

**FEDERAL COURT**

BETWEEN:

**KEVIN R. AALTO, ROZA ARONOVITCH,  
ROGER R. LAFRENIÈRE, MARTHA MILCZYNSKI,  
RICHARD MORNEAU AND MIREILLE TABIB**

Applicants

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

**APPLICATION UNDER** section 18.1 of the *Federal Courts Act*.

**NOTICE OF APPLICATION**

**TO THE RESPONDENT:**

**A PROCEEDING HAS BEEN COMMENCED** by the Applicants. The relief claimed by the Applicants appears on the following page.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard at the Federal Court, Toronto, Ontario.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitor, or where the Applicants are self-represented, on the Applicants, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Date: March 12, 2009

Issued by: \_\_\_\_\_  
Registry Officer  
Federal Court  
180 Queen Street West  
Toronto, Ontario  
M5V 3L6

TO: John H. Sims Q.C.  
Deputy Attorney General of Canada  
Department of Justice  
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## **APPLICATION**

This is an application for judicial review by the Applicants, Kevin R. Aalto, Roza Aronovitch, Roger R. Lafrenière, Martha Milczynski, Richard Morneau and Mireille Tabib, all of whom are Prothonotaries of the Federal Court (Prothonotaries), in respect of the Response of the Minister of Justice of Canada (Minister) on behalf of the Government of Canada rendered February 11, 2009 (Response). The Response was made to the Report of The Honourable George W. Adams Q.C. dated May 30, 2008 regarding Federal Court Prothonotaries' Compensation (Adams Report). The Adams Report made specific recommendations regarding the salary, pensions and other benefits of the Prothonotaries (Recommendations).

### **The Applicants make application for:**

- (a) An order declaring that the Response is not supported by reasons which are rational, legitimate, reasonable, or sufficient to justify departure from the recommendations of The Honourable Mr. Adams.
- (b) An order declaring that the Minister has not respected the process set out by Order-in-Council P.C. 2007-1015 (OIC) or achieved its purposes, and has thereby breached the principles of judicial independence.
- (c) An order declaring that the Minister is in breach of the OIC and his constitutional obligations by failing to provide a response to the Adams Report within the time frame prescribed by the OIC.
- (d) An order:
  - (i) setting aside the decision of the Minister as contained in the Response, and

- (ii) referring the matter back to the Minister with such directions as this Court may deem just.
- (e) An order that interest be paid on any amounts that are payable as a result of the implementation of the Recommendations, on such terms as the Court may deem appropriate.
- (f) An order that the Court shall remain seized of the issue of the implementation of the remedy imposed.
- (g) An order that the Respondent pay the costs of the application on a full indemnity basis.
- (h) Such further and other relief as this Honourable Court may deem just.

**The grounds for the application are:**

1. Prothonotaries of the Federal Court are judicial officers subject to the guarantee of judicial independence as enunciated by the Supreme Court of Canada.
2. The principles governing the process of establishing judicial compensation require the following:
  - judicial compensation must be established by recourse to an independent and objective commission that makes recommendations to the government (in this case, Her Majesty in Right of Canada (Government));
  - (b) the Government must justify any decision to depart from such recommendations;

- (c) in making its justification, the Government must provide rational reasons for departing from the recommendations that are included in its response;
- (d) the response must be complete, and the Government must show that it has given due consideration and weight to the recommendations; it cannot simply express disapproval or disagreement with the recommendations;
- (e) the Government must respond to the recommendations themselves and not simply reiterate earlier submissions that were already made in the commission process and substantively addressed in the commission's report;
- (f) the response must show an appreciation of the Government's constitutional obligations, which require that judicial compensation be determined in a manner that preserves judicial independence and the depoliticization of the remuneration process, in good faith, and with fair dealing and respect for the process; and
- (g) the response must reveal consideration of the judicial office and an intention to deal with it appropriately.

3. The adequacy of the salary and benefits of Prothonotaries of the Federal Court had never been independently or comprehensively considered prior to the promulgation of the OIC. The Honourable Mr. Adams was appointed as Special Advisor on Federal Court Prothonotaries' Compensation pursuant to the OIC to review and provide recommendations to the Minister respecting the salary and benefits of Prothonotaries, whether current or past, and in so doing to consider:

- (a) the nature of the duties of a Prothonotary;
- (b) the salary and the benefits of appropriate comparator groups;

- (c) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- (d) the role of financial security in ensuring the independence of Prothonotaries;
- (e) the need to attract outstanding candidates to the office of Federal Court Prothonotary; and
- (f) any other objective criteria that the Special Advisor considers relevant.

4. The OIC required The Honourable Mr. Adams to deliver his report to the Minister by May 31, 2008, and required the Minister to respond to the Adams Report and Recommendations within six months of the delivery of the Adams Report.

5. The Honourable Mr. Adams delivered his report on May 30, 2008. The Report included 16 specific recommendations which comprehensively addressed the salary, pension, and other benefits of Prothonotaries.

6. The Minister did not deliver the Response until February 11, 2009, in breach of his obligation under the OIC, and without rational justification. The Response was that the Government of Canada was not prepared to implement any of the Recommendations (except for a single recommendation regarding harmonization of vacation).

7. The Response, viewed globally, is entirely dismissive of the Recommendations and of the commission process as a whole. It does not reflect an intention to deal with the judicial office appropriately, nor does it reflect an understanding of the underlying purposes of the commission process, which are to preserve judicial independence and depoliticize the remuneration process.

8. The Minister fails to articulate legitimate or rational reasons for departing from the Recommendations. In particular:

- (a) The Minister cites current economic conditions (which admittedly have significantly deteriorated since the Adams Report was issued in May, 2008) for his refusal to implement the Recommendations, without providing any analysis of whether such reason was relevant to each particular recommendation (many of which would not entail significant or any costs to implement), or whether the unique requirements of judicial compensation - preserving judicial independence - might be violated in rejecting the Recommendations.
- (b) In invoking the current economic climate as the “overarching” reason to reject all of the Recommendations, the Response does not disclose any analysis of the actual costs of the Recommendations, other than those related to the payment of retroactive salary. The need for retroactive adjustment, which was contemplated by the OIC, flows from the delay by the Government of Canada in establishing an objective and independent review process to determine the appropriate level of compensation for Prothonotaries.
- (c) The Response improperly relies upon restraint measures applied to certain civil servants after November 30, 2008 in the Government’s Budget (Budget 2009) and, in any event, fails to take into account the numerous exemptions to the “across-the board” restraint measures granted by the Treasury Board and contained in Budget 2009, and fails to consider the particular circumstances of the Prothonotaries in light of the exemptions.
- (d) The Minister’s refusal to implement the Recommendations is permanent, while current economic conditions would logically only justify a temporary delay in implementation at most. The

Response does not address or provide for future periodic review, despite this being one of the recommendations.

- (e) The Response improperly relies upon political considerations in seeking to validate the Minister's refusal to implement the Recommendations and his failure to respect the deadline and his choice for the timing of the Response.
- (f) The Response fails to give due consideration to the facts that this is the first commission process to consider remuneration for Prothonotaries, and that the Recommendations were determined by The Honourable Mr. Adams to be required to guarantee their financial security and judicial independence.
- (g) The Response misconstrues the reasons given in the Adams Report, and also fails to explain how the alleged flaws justify the Minister's departure from the Recommendations.
- (h) The Minister's position regarding comparators as reflected in the Response was argued before and fully addressed by The Honourable Mr. Adams and is simply being reiterated, contrary to the principles to be applied in a response to a judicial compensation commission.
- (i) The Response fails to articulate any legitimate reason or rational factual basis to depart from the recommendations regarding pension. It raises new arguments regarding the reasonableness of the recommendations and alleged difficulty in implementation that were not advanced before the Honourable Mr. Adams and are not supported by a rational factual foundation.
- (j) The Response denies financial security to the Prothonotaries by rejecting any short or long term disability benefits beyond age 65.

- (k) The Response denies the Prothonotaries a periodic, independent and objective process to review the Prothonotaries' compensation.
- (l) In denying the payment of representational costs, the Response raises an argument which was not argued before The Honourable Mr. Adams and is not supported by a rational factual foundation. The Response also fails to give any consideration or weight to the reasons provided by The Honourable Mr. Adams in making his recommendation.
- (m) The Response fails to articulate any legitimate reason or rational factual basis to depart from the recommendation to deal with the two widows and one retired Prothonotary who was disabled.
- (n) The Minister's refusal to acknowledge and address other recommendations, including the administration of benefits by the Government and the requirement to adhere to Government standards and procedures on conflict of interest, violates the principles of financial security and administrative independence.

9. Such further and other grounds as the Applicants may raise and this Honourable Court permit.

**This application will be supported by the following material:**

10. The affidavit of Roger R. Lafrenière and the exhibits therein referred.

11. Such further and other materials as counsel may advise and this Honourable Court permit.

**Request for Material in the Possession of the Tribunal**

The Applicants request the Minister of Justice of Canada to send a certified copy of the record that was before him and the Government of Canada in preparing and delivering the “Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries’ Compensation”.

March 12, 2009

“Andrew Lokan”

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