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THE NATURE OF A PROTHONOTARY

[1] I have been asked to consider with the nature of a prothonotary. This topic, arrived at in consultation with the members of this panel, is not straight forward. Prothonotaries know where they came from and, with the benefit of cases such as *Canada v. Aqua-Gem Investments Ltd.* [1993] 2 F.C. 425 (F.C.A.), *Iscar Ltd. v. Karl Hertel GmbH et al.* (1989), 27 F.T.R. 186, *Cardinal et al. v. Canada* (1997), 118 F.T.R. 114 and *James River Corp. of Virginia v. Hallmark Cards Inc. et al.* (1997), 126 F.T.R. 1, and the *1998 Federal Court Rules*, where they stood. However, *Vaughan v. Canada*, an unreported 10 March 2000 decision, in action T-133-99, has resulted in some uncertainty as to the future.

ORIGINS

[2] Prothonotary Aronovitch advises me that prothonotaries originated as Court officials in Constantinople, back when it was known as Byzantium: she ought to know, for she was born there. Initially a prothonotary held the office of the chief recording officer of the Court of the Byzantine Empire. Subsequently prothonotaries held the office of the principal secretary of the Patriarch of Constantinople. Prothonotaries were later Papel envoys. The Pope has twelve apostolic prothonotaries who deal with beatifications and canonizations: this is the only other group of operational prothonotaries of which I am aware, a point to which I will return.

[3] In England prothonotaries were, at one time, the registrars of various Courts including Chancery, Common Pleas, and King's Bench. Current prothonotaries tend to keep their spirits up, on bad days, by the thought that Burke's Peerage lists them as one of twelve classes in England who were gentlemen and were entitled to use the suffix "Esquire".

[4] Today the jurisdiction of the Federal Court prothonotary may be compared with that of a master. Chief Justice Isaac, who wrote one of the sets of reasons in *Aqua-Gem* (*supra*), quotes at length from Sir Jack Jacob's (Q.C.) Hamlyn Lectures, The Fabric of England and Justice, Stevens & Sons of London, 1987, in which the evolution of the master, in the English Court system, is set out. Masters began in the three common law courts as judicial assistants in 1837. In 1867 masters became separate, distinct and independent judicial officers with original jurisdiction, before whom, with a few exceptions, virtually all pre-trial and post-trial proceedings now take place.

[5] As early as 1866 masters, in what is today Canada, were recognized as having a "larger discretion" than in England: *Sculthorpe v. Burn* (1866), 12 Gr. 427 (U.C.Ch.).

[6] Turning to our predecessor Court, the Exchequer Court of Canada, that Court employed a registrar or master to assist the Court with its work: see footnote 5 to the decision of Chief Justice Isaac in *Aqua-Gem* at pages 438-439. Madame Justice McGillis, in *Vaughan*

(*supra*), sets out the further evolution of the Exchequer Court registrar or master into the Federal Court Prothonotary, when the Federal Court was created in 1970.

[7] In *Aqua-Gem* Chief Justice Isaac observed that "The office of prothonotary is designed to aid in the efficient performance in the work of the Court": see *Aqua-Gem* at page 450 and also page 454. He also considered the view that, at least in New South Wales, masters were not merely officers of the Court, but were the Court (page 455), but was concerned with the fact that there was an appeal from prothonotaries to the Trial Division of the Court. However he was unconvinced that prothonotaries were not a part of the Court for he refers, in footnote 11, to *Iscar* (*supra*) in which Associate Chief Justice Jerome seems to have had few reservations about the position of the prothonotary as a part of the Court. Associate Chief Justice Jerome pointed out in *Iscar* that the jurisdiction of the prothonotary comes from section 46(1)(h) of the *Federal Court Act* and the prothonotaries drew from this section of the *Act* a jurisdiction of a judicial nature. In the result the jurisdiction of prothonotaries included the jurisdiction that could be exercised by the Court, subject to certain specific reservations. In the Associate Chief Justice's view, Rule 336, now Rule 50, empowered the prothonotaries to exercise the judicial jurisdiction granted by section 46(1) of the *Act*.

[8] Prothonotaries enjoyed a broad jurisdiction under section 336 of the *1970 Federal Court Rules* and as those Rules interpreted by the case law. The current 1998 Rules have

generally enhanced this jurisdiction. Section 50 of the 1998 Rules provides that prothonotaries may hear any motion under the Rules, with some limited exceptions, including the reservations of injunctive relief, of contempt hearings, and of matters involving the liberty of a person, to judges. The prothonotary now has an enhanced small claims jurisdiction extending to monetary relief, both *in personam* and *in rem*, to $50,000 exclusive of interest and costs. Rule 387, which allows a prothonotary to conduct mediations, early neutral evaluations and mini-trials, has been a particularly successful addition to the jurisdiction of prothonotaries.

CURRENT STATUS OF PROTHONOTARIES

[9] To think of the jurisdiction of the prothonotary as one limited to procedural interlocutory matters is misleading and indeed no longer valid.

[10] For example, from time to time in the past, a plaintiff has questioned whether a prothonotary might strike out a statement of claim for want of a cause of action on an interlocutory motion, for the result, from the plaintiff's point of view, can be a final termination of an action. The answer, as put by Mr. Justice Muldoon in *Tribro Investments Ltd. v. Embassy Suites, Inc.* (1992), 40 C.P.R. (3d) 193, was that when a prothonotary struck out for want of a cause of action he or she was not interfering with anyone's substantive rights, but merely removing a nullity, or in more colourful language, it was the removal of "... an excrescence in which substantive rights are simply not articulated.": *Tribro* at page

201. The reasoning in *Tribro* perhaps did not deal with the instances in which a prothonotary struck an apparently substantive right and here I have in mind, for example, dismissing what might be a perfectly good claim by reason of delay. The answer to this may well have been that "... an interlocutory application is simply an application in the course of an action which may well result in the "final" disposition of an issue.": *Symbol Yachts Ltd. et al. v. Pearson et al.* (1996), 107 F.T.R. 295 at 304.

[11] The 1998 Rules do not in any way limit the prothonotary merely to interlocutory matters. Specifically, Rule 50(1) provides that "a prothonotary may hear and make any necessary orders relating to, any motion under these Rules other than a motion ... (various exceptions)...". Further, there has been an amendment to the definition of "Court" in Rule 2. Formerly it was defined in a circular manner to mean the Federal Court of Canada and, in the appropriate context, to the Court of Appeal, or to both. Now Rule 2 defines the "Court" to include a prothonotary acting within the jurisdiction of the Rules.

[12] Madame Justice Reed revisited this area, in the context of the 1998 Rules and of striking out, in *Creighton v. Franko et al.* (1999), 155 F.T.R. 303. There, the applicant, having had his originating notice of motion struck out by a prothonotary, argued that the prothonotary had no jurisdiction to strike out, it became affected substantive rights. Madame Justice Reed, perhaps having in mind a reference to interlocutory applications in former Rule 336, conceded that at one time there had been jurisprudence indicating that prothonotaries

might not have had the jurisdiction to strike out originating documents, but observed that under Rule 50 of the 1998 Rules, which replaced old Rule 336, it was no longer a matter of debate as to whether a prothonotary had the requisite authority.

[13] Clearly the removal of any reference to interlocutory matters, in Rule 50, the Rule empowering prothonotaries to exercise their judicial discretion, and the definition in the Rules of the Court, as including a prothonotary, have laid to rest a number of doubts as to the jurisdiction that might be exercised by prothonotaries. Now, for the most part, one need only look at the exceptions to jurisdictions set out in Rule 50 and to any specific Rules relevant to the proceeding to make certain that the subject matter is not reserved to a judge.

[14] You will note I have said that for the most part one can be governed by the apparent wording of the Rules when it comes to the jurisdiction of a prothonotary. However, there are instances in which the case law touches on the position of prothonotaries under the new Rules.

[15] For example, a prothonotary may strike out an application for judicial review, in very exceptional circumstances, where it has no chance of success (being the exception to the general rule referred to in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* [1995] 1 F.C. 588 (F.C.A.) at 600) for such an outcome is a pure striking out and not the determination of the judicial review application itself: see *Starlight Foundation v. Brain*

Tumour Foundation of Canada, an unreported 7 December 1999 decision of Mr. Justice MacKay in action T-773-99.

[16] One might think that the broad approach in *Starlight Foundation*, that of looking at the essence of the motion, as being a motion to strike out, rather than at the result, that of bringing an end to a judicial review application, might have carry-over to consent motions and to motions for judgment in default of defence, where relief includes injunctive relief. Under 1970 Rule 336, consent of the parties gave a prothonotary a broad jurisdiction which, in practice, seemed to stretch to injunctive relief, for example in intellectual property matters, where both parties had agreed it ought to be granted. Similarly, under the 1970 Rules, prothonotaries granted default judgments, notably in copyright matters, in which there was peripheral injunctive relief, on both the rationalization that at stake was primarily a default judgment with an injunctive facet and on the rationalization that some judges might feel it a waste of judicial resources to be involved in a routine judgment in default of defence. This *de facto* procedure of granting injunctions, where either consent was involved or in a default situation, came to an end in August of 1999 when the Associate Chief Justice made an oral direction that motions involving injunctive relief were to go before a judge. This area is now further circumscribed by *Manufacturer's Life Insurance Co. v. Guaranteed Estate Bond Corp.*, an 8 February 2000 decision of Mr. Justice Dubé in action T-1436-96. There the defendants were served with material giving notice of an application for judgment for default of defence, but failed to attend. A prothonotary gave judgment in default which contained

injunctive relief. Mr. Justice Dubé noted that the new Rules made it quite clear that a prothonotary might not issue an injunction. I now turn to the issue of appeals from decisions of prothonotaries.

[17] Rule 335 makes it clear that the section of the Rules dealing with appeals generally does not apply to appeals from decisions of prothonotaries. Appeals from the orders of prothonotaries are governed by Rule 51. The notice of appeal, which must be served within 10 days of the order under appeal, at least four days before the day fixed for the hearing of the motion and filed not less than two days before the hearing of the motion, no longer needs to set forth the grounds of objection. When a prothonotary is acting as a referee, appeals are governed by section 163. The Rules do not set a standard of review of decisions of prothonotaries. That standard was established by the Court of Appeal decision in *Aqua-Gem* (*supra*).

[18] Rather than discuss *Aqua-Gem* itself, I will refer to Mr. Justice Campbell's decision in *Cardinal v. Canada* (*supra*), for that decision offers a useful summary of *Aqua-Gem*. Mr. Justice Campbell points out that while the Chief Justice wrote in dissent, what he had to say as to the standard of review was approved by Mr. Justice of Appeal MacGuigan, who wrote for the majority of the Court. Chief Justice Isaac was of the view that orders of prothonotaries "... ought to be disturbed on appeal only where it has been made to appear that":

> a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
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> b) in making them, the prothonotary improperly exercised his discretion on a question vital to the final issue of the case.
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> In each of these classes of cases, the motions judge will not be bound by the opinion of the prothonotary; but will hear the matter *de novo* and exercise his or her own discretion.
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> [*Cardinal* at page 116, quoting *Aqua-Gem* (*supra*) at page 454]

Mr. Justice Campbell, after considering additional case law, noted that ".... a high degree of respect should be accorded the decisions of prothonotaries." (page 117). This observation is in keeping with the fact that *Aqua-Gem,* with its less interventionist approach, has prevailed over *Ship Jala Godavari et al. v. Canada et al.* (1992), 135 N.R. 316 (F.C.A.).

[19] Madame Justice Reed pointed out in *James River Corporation of Virginia v. Hallmark Cards Inc.* (*supra*), that while *Aqua-Gem* provides for the exercise of discretion *de novo* on an appeal, it must be on the material that was before the prothonotary and not on new or supplemented material (pages 9 and 10).

[20] Finally, having touched upon the prothonotary as referee, I would note that the standard of review of a prothonotary's discretion is the same whether sitting as a prothonotary or as a referee: *Reading & Bates Construction Co. v. Baker Energy Resources Co. et al.* (1995) 175 N.R. 225 at 229-230 (F.C.A.).

PROTHONOTARIES AFTER VAUGHAN

[21] The 10 March 2000 decision in *Vaughan* (*supra*) introduces some uncertainty into the jurisdiction of the prothonotary.

[22] In *Vaughan*, the plaintiff tried to appeal a decision of a prothonotary directly to the Court of Appeal. The registry refused to accept the notice of appeal. This resulted in a motion to, among other things, transfer the appeal to the Court of Appeal on the basis that an order of a prothonotary, striking out the statement of claim, was a final judgment as defined in section 27(1)(a) of the *Federal Court Act*, or alternatively, was an interlocutory order falling within section 27(1)(c) of the *Federal Court Act* and thus appealable directly to the Court of Appeal.

[23] In *Vaughan*, Madame Justice McGillis touches upon the development of the office of prothonotary and there brings up the interesting fact that under the pre-1998 Rules an appeal, of a prothonotaries decision, might go to the Court of Appeal if the matter was in the Court of Appeal initially: there is no longer that option, for Rule 50(1)(b) now prohibits prothonotaries from hearing motions in the Court of Appeal.

[24] In any event the plaintiff in *Vaughan* submitted that on the plain wording of section 27(1) of the *Federal Court Act*, the final or interlocutory order of a prothonotary ought to go

to the Court of Appeal directly, rather than to the Trial Division pursuant to Rule 51, for the *Act* must prevail over the *Rules*.

[25] The view of Madame Justice McGillis was that by reason of section 12(3) of the *Act* which specifies that the duties and functions of prothonotaries are determined by the Rules and by reasons of section 46(1)(h) of the *Act*, by which the Rules committee of the Court may make rules and orders empowering a prothonotary to exercise any authority or jurisdiction, the powers, duties and functions of the prothonotary are determined by the Rules and are subject to the supervision of the Court. Now this may be somewhat at odds with the decision of Associate Chief Justice Jerome, in *Iscar* (*supra*), who was of the view that the jurisdiction of the prothonotary came from section 46(1) of the Federal Court Act. Be that as it may, the view of the Court in *Vaughan* is that an appeal of a prothonotary's order to a judge of the Trial Division pursuant to section 51 of the Rules, constitutes the "supervision of the Court" which is mandated by section 46(1)(h) of the *Federal Court Act*. Further, until a decision of a prothonotary is supervised by the judges of the Trial Division, that is by an appeal to a judge of the Trial Division, it is not a final or interlocutory order of the Trial Division. It is only after an appeal that an order of a prothonotary becomes a final or interlocutory order of the Trial Division and only then may it be appealed to the Court of Appeal. Madame Justice McGillis concludes that "... this interpretation of section 27(1) best furthers the goals of the *Federal Court Act* and the *Federal Court Rules, 1998*." and does not result in an inconsistency between section 27(1) of the *Act* and Rule 51(1).

[26] This emphasis on the supervision of prothonotaries by the judges is, hopefully, limited to appeals. Indeed, it is counter both to the English historic development of the position of master, from that of assistant to a judge, to that of a separate and independent legal officer, and to the practice of this Court where interaction between prothonotary and judge, outside of the appeal process, is very much one of cooperation and sharing of knowledge and ideas for, as Sir Jack Jacob points out in The Fabric of English Civil Justice, (*supra*) at pages 110-111, "... in the High Court the Master is the equivalent of the judge in Chambers and his decision, order or judgment is made or given in his capacity as "the court" itself.".

[27] Perhaps more interestingly, Madame Justice McGillis adds to her decision in *Vaughan* an alternative, in case her interpretation of section 27(1) of the *Federal Court Act* is incorrect. The alternative is that while "... prothonotaries are judicial officers who assist the Court in performing certain aspects of its work.", prothonotaries are not judges and thus, by virtue of sections 4 and 5 of the *Federal Court Act,* which provide that the Court is made up of a roster of judges and supernumerary judges, prothonotaries are not members of the Trial Division. From this it flows that a prothonotary's order is neither a final order nor an interlocutory order of the Trial Division and therefore there is no direct appeal to the Court of Appeal.

[28] It also flows from all of this that if the Court consists only of a certain number of judges, as is set out in section 5(1) of the *Act*, there is tension between the *Act* and Rule 2 which defines the Court as including the prothonotaries.

[29] My concern here is whether inventive counsel may be able to capitalize on *Vaughan.* In doing so they might insist on being able to utilize a judge's time in matters presently dealt with in a completely satisfactory manner by prothonotaries in their role, under the Rules, as a part of the Court. This would run counter to the concept, set out in *Aqua-Gem* and to which I have already referred, that "The office of prothonotary is designed to aid in the efficient performance of the work of the Court."

[30] There may, of course, be an answer to this potential underemployment, an answer involving a delegation of jurisdiction between prothonotaries. I expect that the twelve Papel Prothonotaries would like the jurisdiction to strike out: imagine the terror of that sanction to a heretic, not merely excommunication, but being struck out. In turn, the Federal Court Prothonotaries are intrigued by the jurisdiction to canonize and beatify: those commodities should be far more valuable than a mere Q.C.

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