JUDICIAL COMPENSATION AND BENEFITS COMMISSION
IN THE MATTER OF A REFERRAL DATED MAY 31, 2019 BY THE MINISTER UNDER S. 26(4) OF THE *JUDGES ACT*

Submission of the Canadian Superior Courts Judges Association

July 18, 2019

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Background and Overview

1. This Submission of the Canadian Superior Courts Judges Association ("**Association**") is filed further to the notice by the Judicial Compensation and Benefits Commission (the "**Commission**") dated June 18, 2019. The notice related to the referral by the Minister of Justice ("**Minister**") of an inquiry to be undertaken by the Commission under s. 26(4) of the *Judges Act*.

2. The inquiry concerns a proposed amendment to the *Judges Act* ("**Proposed Amendment**") described in a letter of the Minister dated May 31, 2019 and addressed to the Commission, with copy to the Association, the Canadian Judicial Council ("**Council**"), and the Prothonotaries of the Federal Court. The Minister asked the Commission to undertake an inquiry on the following matter:

> [T]he effects on the adequacy of federal judicial compensation and benefits, if any, of an amendment to the *Judges Act* that would stop the accrual of pensionable service for any judge whose removal from office has been recommended by the Canadian Judicial Council (CJC).[1]

3. The underlying rationale for the Proposed Amendment is explained in the Minister's letter of May 31, 2019. He said that the nature of the arrangements for the judicial annuity regime

> may give rise to a perceived incentive for a judge who is the subject of a judicial conduct complaint to prolong the proceedings in order to reach their date to qualify for either a full or reduced judicial annuity. Even where this is not the judge's intention, the perception may remain that the judge launched the challenge primarily with a view to benefiting financially. This risks undermining public confidence in the integrity of Canada's federally-appointed judiciary.[2]

4. Counsel at the Department of Justice provided useful supplementary details about the Proposed Amendment in response to a request from counsel for the Association through subsequent correspondence.[3] The Association's understanding of the essential elements of the Proposed Amendment is as follows:

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[1] Letter of the Minister of Justice to the Commission dated May 31, 2019, at 1.
[2] *Ibid* at 2.
[3] Email of Kirk G. Shannon to Pierre Bienvenu dated June 28, 2019, attached hereto as Annex I.

(i) If in the future the Council issues a recommendation that a judge be removed from office, the accrual of pensionable service, *i.e.* the years counting towards eligibility for the judicial annuity, will be suspended as of the date of the recommendation.

(ii) If the removal recommendation is set aside in court proceedings challenging the recommendation, or if the removal recommendation is rejected by the Minister or by Parliament, the suspension will be deemed never to have occurred (the "**Snapback Provision**").

(iii) The Proposed Amendment is intended to come into force upon Royal Assent. It would apply as of Royal Assent to all sitting judges, and it would freeze and suspend the accrual of pensionable service as of that date for any judge who is at that time subject to a removal recommendation by the Council. However, it would not be applied retroactively to claw back the years of pensionable service accrued between a removal recommendation and the date of Royal Assent.

(iv) If a judge's accrual of pensionable service is suspended, there will be a corresponding suspension of the requirement imposed on judges by the *Judges Act* to contribute 7% of the judicial salary toward the judicial annuity. The judge would receive any salary increases that come into effect during the period of the suspension. However, if the judge was already eligible for an annuity on the date of the removal recommendation, these increases in salary would not be taken into account in calculating the judge's annuity entitlement unless the Snapback Provision operates.

5. The context in which the Proposed Amendment would operate is found in ss. 63 and following of the *Judges Act*, which set out the rules governing inquiries by the Council. In particular, under the heading "Report and Recommendations", s. 65 provides as follows regarding the power of the Council to issue a removal recommendation:

65 (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or	65 (1) À l'issue de l'enquête, le Conseil présente au ministre un rapport sur ses conclusions et lui communique le dossier.

investigation to the Minister.

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(a) age or infirmity,

(b) having been guilty of misconduct,

(c) having failed in the due execution of that office, or

(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :

a) âge ou invalidité;

b) manquement à l'honneur et à la dignité;

c) manquement aux devoirs de sa charge;

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

6. The heading after s. 65 is "Effect of Inquiry", a section which contains ss. 66(2) and (3). The Proposed Amendment has some affinity with s. 66(3) of the *Judges Act* in that the latter also addresses the issue of annuity in the context of a removal recommendation:

Leave of absence with salary

(2) The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Congé avec traitement

(2) Le gouverneur en conseil peut accorder au juge reconnu inapte pour l'un des motifs énoncés au paragraphe 65(2) un congé, avec traitement, pour la période qu'il estime indiquée en l'espèce.

Annuity to judge who resigns	Pension au démissionnaire
66 (3) The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the time when the finding was made by the Governor in Council.	66 (3) Si le juge dont il a constaté l'inaptitude démissionne, le gouverneur en conseil peut lui octroyer la pension qu'il aurait reçue s'il avait démissionné dès la constatation.

7. The wording in s. 66(3) is not without ambiguity. However, the key to understanding s. 66(3) is s. 66(1). The latter provision, which was repealed in 1985, provided as follows:

Effect of Inquiry	**Conséquences de l'enquête**
Disentitlement to salary	Déchéance du droit à traitement
66 (1) [Repealed] A judge who is found by the Governor in Council, on report made to the Minister, to have become incapacitated or disabled from the due execution of the office of judge shall, notwithstanding anything in this Act except subsection (2), cease to be paid or to receive or to be entitled to receive any further salary if the Council so recommends.	66 (1) [Abrogé] Par dérogation aux autres dispositions de la présente loi, mais sous réserve du paragraphe (2), le juge ne cause perd son droit à traitement, sur recommandation du Conseil en ce sens, si le gouverneur en conseil, au vu du rapport transmis au ministre, constate qu'effectivement il est inapte à remplir utilement ses fonctions.

8. What becomes clear when the repealed s. 66(1) is read together with s. 66(3) is that the latter existed in order to confirm that even if the judge's salary was terminated under s. 66(1), the annuity could still be granted. Section 66(1) also clarifies that a condition precedent to the Governor in Council's finding of incapacity or disability under s. 66(3) is the Council's own finding to that effect under s. 65(2).

9. The Association has assessed the Proposed Amendment through the lens of the constitutional requirement of judicial independence and, specifically, financial security, one of the three characteristics that define it. The applicable test to determine whether a given legislative measure passes constitutional muster is to ask if a reasonable person who is fully informed of all the circumstances would consider that the federally appointed

judiciary is independent of the legislative and executive branches both in fact and perception.[4]

10. The question before the Commission is therefore whether a reasonable and well-informed person would conclude that the judiciary's financial security is being interfered with by the Proposed Amendment, including its intended application to sitting judges at the date of its coming into force (immediate application of the Proposed Amendment), and the suspension of accrual of pensionable service as of that date for any sitting judge who is already subject to a removal recommendation (retrospective application).

11. The Association is of the view that the Proposed Amendment would not compromise judicial independence. This view is informed by the Minister's stated objective of addressing the risk that public confidence in the integrity of the federally appointed judiciary might be undermined if there is a perception that a judge who is subject to a removal recommendation launched proceedings challenging that recommendation primarily with a view to benefiting financially from the judicial annuity regime. The Association's view is also informed by the fact that the Proposed Amendment will include the Snapback Provision and will not be applied retroactively to claw back the years of pensionable service accrued between a removal recommendation and the date of coming into force of the Proposed Amendment.

12. The Association expresses the caveat that a draft text of the Proposed Amendment has not been made available to it or to the Commission. The Association's submission is therefore based only on the Minister's description of the intended content of the Proposed Amendment, as amplified in counsel's subsequent exchange of correspondence.

I. Consistency of the Prospective Application of the Proposed Amendment with Financial Security

13. The question of whether the Proposed Amendment is consistent with financial security is first addressed assuming a purely prospective application of the Proposed Amendment. Issues surrounding the temporal application of the Proposed Amendment are discussed

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[4] *Ell v Alberta*, 2003 SCC 35 at para 23; *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at para 38 [***Mackin***]; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3 at para 113 [***PEI Reference***].

in the next section. Considering that the rights affected by the Proposed Amendment are accruing rights, we discuss in a separate subsection the question of whether accruing rights may be affected in the manner proposed. There then follows an analysis of the immediate and retrospective effect of the Proposed Amendment, and whether the latter is consistent with judicial independence.

14. As stated by the Supreme Court in *Valente v. The Queen*, financial security is one of the core characteristics of judicial independence.[5] Financial security has both an individual and an institutional dimension. In *Valente*, the Supreme Court held that financial security was required to ensure that individual judges are not perceived as susceptible to external interference.[6] A majority of the Supreme Court subsequently stated in the *PEI Reference* that institutional financial security must be guaranteed to avoid politicization between the judiciary and the other branches of government.[7]

15. The Court in *Valente* stated, in relation to pensions, that financial security

> means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive.[8]

16. Financial security was one of the issues before the Supreme Court of Canada in the case of *Mackin*.[9] As in the present case, *Mackin* concerned a situation where the existing compensation and benefits regime for judges was modified in order to remove a benefit. Unlike the present case, the legislation at issue in *Mackin* was not preceded by a commission inquiry.

17. Justice Gonthier for the majority of the Supreme Court of Canada (Binnie and L'Heureux-Dubé JJ. dissenting) held that the New Brunswick *Act to Amend the Provincial Court Act* ("**Bill 7**") was unconstitutional because it violated the principle of judicial independence. Bill 7 abolished the system of supernumerary judges and

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[5] *Valente v The Queen*, [1985] 2 SCR 673 at 694, 704, 708 [***Valente***]; *PEI Reference*, *supra* note 4 at para 115.
[6] *Valente*, *ibid* at para 43.
[7] *PEI Reference*, *supra* note 4 at para 131.
[8] *Ibid.*
[9] *Supra* note 4.

replaced it with a panel of retired judges. Justice Gonthier concluded that the elimination of this "clear economic benefit" required the consultation of an independent body.

18. In the present case, the Government is consulting the Quadrennial Commission. That constitutional requirement is therefore met, subject to the caveat expressed above about the text of the Proposed Amendment not being made available.

19. The Supreme Court dealt with the constitutionality of a provision affecting financial security in *The Queen v. Beauregard*.[10] In that case, a Quebec Superior Court judge challenged the validity of s. 29.1 of the *Judges Act*, enacted by Parliament on December 20, 1975. Until then, judges were not required to contribute to their pension plan.

20. Chief Justice Dickson held in his majority reasons that s. 29.1 did not violate the principle of judicial independence (Beetz and McIntyre JJ. dissenting in part). He mentioned that Parliament could not change the salaries and pensions of superior court judges "for an improper or colourable purpose" or in a way that "[discriminates against] judges *vis-à-vis* other citizens".[11] Section 29.1 did not have an improper purpose as it subjected judges to "standard, widely used and generally accepted pension schemes in Canada."[12] Importantly, the provision did not constitute an impairment of the superior court judges' financial security. Section 29.1 was "introduced as part of a complementary package which included a 39 per cent salary increase and a 50 per cent increase in pension to dependants", and the comprehensive package "did not diminish, reduce or impair the financial position of federally-appointed judges."[13]

21. Although the legislation created a distinction between judges appointed before and after February 17, 1975, Chief Justice Dickson stated that s. 29.1 could have imposed changes "on all superior court judges, including those appointed before 1975."[14] While this statement was *obiter* and the factual context of the case in *Beauregard* was different, the statement from Chief Justice Dickson is of some relevance to the present case. Where a legislative change is otherwise considered not to be "for an improper or colourable purpose", that change may not be in breach of judicial independence even if it affects the entitlements of sitting judges upon coming into force of the legislative change.

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[10] 1986 2 SCR 56.
[11] *Ibid* at para 40.
[12] *Ibid* at para 38.
[13] *Ibid* at para 41.
[14] *Ibid* at para 69.

22. There are two key factors that lead the Association to conclude that the prospective application of the Proposed Amendment is consistent with financial security. First, the stated objective of the measure is proper in that it seeks to address the risk that public confidence in the integrity of the federally appointed judiciary might be undermined if there is a perception that a judge who is subject to a removal recommendation launched proceedings challenging that recommendation primarily with a view to benefiting financially from the judicial annuity regime. In that regard, it is noteworthy that the Proposed Amendment would come into play following a removal recommendation resulting from a process presided over by the judiciary itself. This should reinforce the reasonable and informed person's perception of judicial independence.

23. Second, the Association considers that any risk that judicial independence might be seen as compromised because of the suspension of pensionable service upon a removal recommendation is adequately counter-balanced by the Snapback Provision. That provision operates to restore the suspended pensionable service if the removal recommendation is set aside by court judgment, or in the event the Minister or Parliament rejects the recommendation.

24. In sum, the Proposed Amendment, applied prospectively, will either: (1) prevent the further accrual of pensionable service of a judge who is found by his or her own judicial peers to be unfit to continue in office; or (2) suspend the accrual but restore it as if there had never been a suspension in the case of a judge who is subject to a removal recommendation that is subsequently set aside by a court, or rejected by the Minister or Parliament. In both cases, the measure is, in the submission of the Association, consistent with financial security.

II. The Temporal Application of the Proposed Amendment

25. Even if the prospective application of the Proposed Amendment is consistent with financial security, the Commission must concern itself with the temporal application of the Proposed Amendment and the nature of the rights affected by the measure. That is because judicial independence could be violated by the manner in which the measure is introduced or by the nature of the rights affected.

1. Prospective, Immediate, Retrospective, and Retroactive Effects of Legislation

26. Statutes can have prospective, immediate, retrospective, and retroactive effects, or a combination thereof. The Proposed Amendment can be described as having prospective, immediate, and retrospective effects, but not retroactive effects.

27. Pierre-André Côté explains in his book, *The Interpretation of Legislation in Canada*,[15] that a statute has a prospective effect when it applies to future situations.[16] With respect to immediate effects, the author asserts that "a statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation."[17]

28. As for retroactivity and retrospectivity, these are sometimes used interchangeably in the case law, but there is an important conceptual difference between the two. Prof. Côté defines a retroactive law as a law that is "deemed to operate in the past."[18] The author refers to retrospectivity as a "particular method of applying the law temporally, according to which the law modifies only future effects of past facts while the past consequences of those facts remains [*sic*] intact."[19] In other words, "a retrospective law is, substantially, a law with prospective effect which affects vested rights."[20]

29. Elmer Driedger describes the distinction between retrospective and retroactive effects as follows:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards* but it looks backwards in that it attaches new consequences for *the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes

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[15] Pierre-André Côté, *The Interpretation of Legislation in Canada* (Carswell: Scarborough, 2011) at 108ff.
[16] *Ibid* at 117.
[17] *Ibid* at 162.
[18] *Ibid* at 133.
[19] *Ibid* at 142.
[20] *Ibid* at 143.

> the law from what it otherwise would be with respect to a prior event.[21]

30. The Supreme Court of Canada summed up the distinctions between the principles of retroactivity, immediate application and retrospectivity in *Épiciers Unis Métro-Richelieu Inc., division Économgros v. Collin*:

> [46] The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force. If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation. If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date. When new legislation modifies those prior effects, its effect is retroactive.[22]

31. For greater clarity, the timelines below illustrate the scenarios of prospective, immediate, retrospective, and retroactive effects of the Proposed Amendment:

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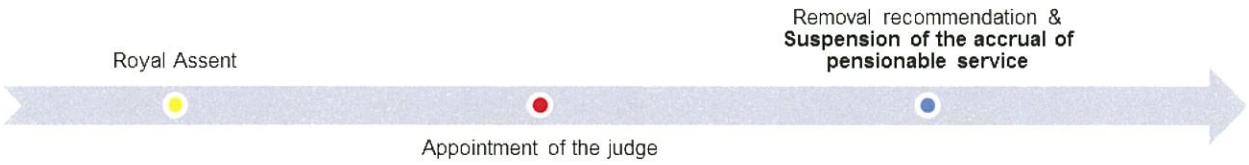
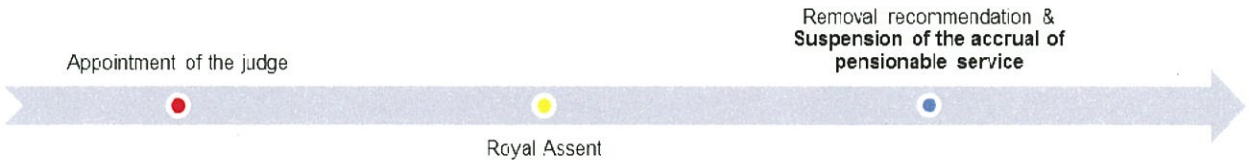
[21] Elmer A. Driedger, "Statutes : Retroactive Retrospective Reflections" (1978) 56 Can Bar Rev 264 at 268-269 [emphasis in the original].

[22] *Épiciers Unis Métro-Richelieu Inc., division Économgros v. Collin*, 2004 SCC 59 at para 46 [references omitted].

- **Prospective effect**: the new rule applies to judges appointed after the date of Royal Assent and who are subject to a removal recommendation in the future.

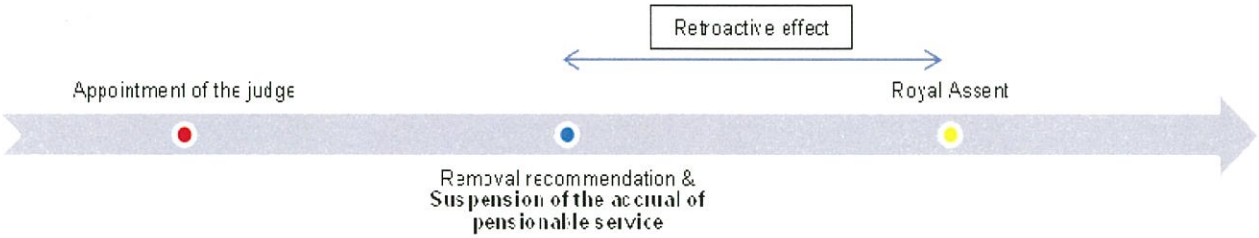


- **Immediate effect**: the new rule applies to judges in office at the date of Royal Assent and who are subject to a removal recommendation in the future.



- **Retrospective effect**: the new rule applies to judges in office at the date of Royal Assent and who are the subject of a removal recommendation made <u>prior</u> to the date of Royal Assent. The effect is retrospective in that it applies to situations where the removal recommendation was made prior to Royal Assent, but the suspension of the accrual of pensionable service operates only as of the date of Royal Assent.

- **Retroactive effect**: the new rule applies to judges in office at the date of Royal Assent who are the subject of a removal recommendation made prior to the date of Royal Assent, <u>and</u> the years of pensionable service accrued between the date of the removal recommendation and the date of Royal Assent are clawed back.

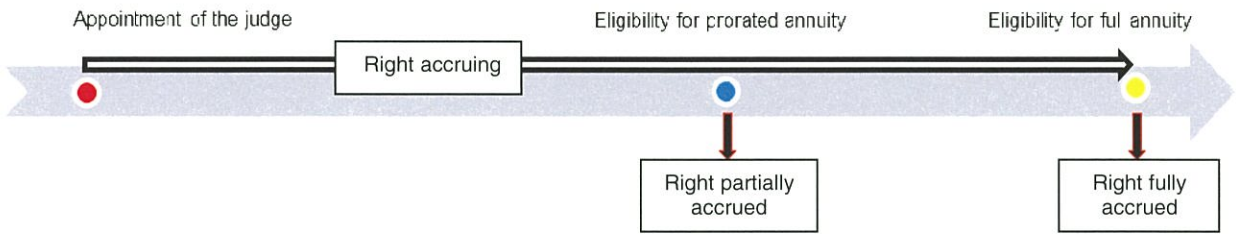


32. In sum, retroactivity not being an issue in the present case, the Proposed Amendment will have an immediate application to all sitting judges, and a retrospective application to any sitting judge who is subject to a removal recommendation. For the purpose of this

reference, the question is whether the immediate and retrospective application of the Proposed Amendment is consistent with judicial independence. Before addressing this question, however, consideration must be given to the nature of the rights affected by the Proposed Amendment.

2. The Effect of the Proposed Amendment on Accruing Rights

33. The rights affected by the Proposed Amendment are in the nature of accruing rights. The following timeline illustrates how a judge's right to annuity eligibility[23] evolves with the passage of time:



34. The retrospective application of the Proposed Amendment will have an impact on the accruing rights of any judge in office who is subject to a removal recommendation at the time of coming into force. While Parliament is sovereign and can in principle adopt laws affecting accruing (as well as accrued) rights, for reasons already canvassed the principle of judicial independence constrains Parliament's ability to make such laws applicable to judges when they pertain to judicial compensation and benefits.[24]

35. The elimination of accruing rights related to judicial compensation and benefits can be problematic as it involves interfering with rights that have sufficiently materialized to be considered vested.[25] In the Association's submission, the accruing rights of judges in office to the current annuity regime meet the criteria for the recognition of vested rights.

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23 The relevant provisions from the *Judges Act* governing the three possible scenarios for judges in relation to eligibility for the judicial annuity are reproduced in annex. These scenarios are: 1) return of contributions where the judge does not have enough years of pensionable service to qualify for a prorated annuity attached to early retirement; 2) prorated annuity attached to early retirement; 3) full annuity.

24 *Valente, supra* note 5; *PEI Reference*, *supra* note 4 at para 115.

25 It should be noted that there is some interchangeability of terminology when speaking of vested rights since the Supreme Court's caselaw, the federal Interpretation Act, and writers like Prof. Côté treat vested rights, accruing rights, accrued rights, acquired rights, and substantive rights on the same

36. In *Dikranian v Quebec (Attorney General)*, a majority of the Supreme Court (Deschamps J. dissenting) adopted the test articulated by Prof. Côté for the recognition of vested rights: "(1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement".[26] Quoting Prof. Côté, the majority pointed out that the concept of vested rights is distinct from questions about the retroactive effect of legislation since a purely prospective law can also have the effect of interfering with vested rights.[27]

37. Judges in office benefit from the qualification process for the judicial annuity as soon as they are appointed because every completed year in office counts as the accrual of pensionable service. With respect to the first criterion applied in *Dikranian*, the legal situation is tangible and concrete since the annuity regime applies individually to every judge from the date of his or her appointment. With respect to the second criterion, the legal situation is sufficiently constituted as no condition outside of a judge's control could prevent him or her from becoming eligible to the judicial annuity. The entitlement to the judicial annuity upon retirement only requires being in office for a certain period of time – which in principle can only be interrupted at the judge's discretion, or exceptionally upon his or her removal by Parliament.

38. While the concept of vested rights is generally referred to in the context of statutory interpretation, its relevance in the present analysis comes from the reality that the very nature of the benefit at issue, the judicial annuity upon retirement, has a qualifying period that begins from the moment of appointment. Moreover, given that the Proposed Amendment suspends the accrual of the right before eligibility, it neutralizes the accrual of pensionable service prior to its coming into force, as from the date of the removal recommendation. In that sense, the Proposed Amendment engages financial security in a way that is different from a benefit that exists solely in the future, for example, an entitlement to the reimbursement of an allowable expense to be incurred in the future.

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footing: see *R v Dineley*, 2012 SCC 58 at paras 45-52; *Interpretation Act*, RSC 1985, c I-21, s 43(c); *The Interpretation of Legislation in Canada, supra* note 15 at 175: "the federal statute goes further and covers those that are 'accruing' at the time of repeal. This distinction has been made on several occasions, and could justify a relatively more liberal interpretation of vested rights where federal statutes are concerned." [emphasis added]

[26] *Dikranian v Quebec (Attorney General)*, 2005 SCC 73 at para 38.

[27] *Ibid* at paras 30-31.

39. Given the relationship between the accruing rights of judges to a judicial annuity and financial security, in principle interference with those rights sits uneasily with judicial independence. For the reasons discussed below, however, in the case of the Proposed Amendment, the Association considers that interference with these accruing rights is not inconsistent with financial security.

3. Analysis of the Immediate and Retrospective Effect of the Proposed Amendment

40. In the context of the *Judges Act*, the Proposed Amendment, as seen, would apply 1) prospectively to all judges appointed after coming into force of the Proposed Amendment, who are subject to a removal recommendation in the future, and 2) with immediate effect to all judges already in office as at the date of coming into force, who are subject to a removal recommendation in the future.

41. With respect to judges in office, the Proposed Amendment would also apply retrospectively to those who are already subject to a pending removal recommendation, even if that recommendation predates the date of its coming into force. The measure is retrospective because the Proposed Amendment will govern the future consequences (suspension of accrual) of an event (removal recommendation) that happened before it came into force. The suspension of the accrual of pensionable service will begin as of the date of the coming into force, which is intended to be upon Royal Assent.

42. The Minister has confirmed that the Proposed Amendment will not apply retroactively, that is to say, the years of pensionable service accrued between the date of the removal recommendation and the date of coming into force will not be clawed back.[28] Therefore, the problems that arise from a retroactive application of statutes are not of concern in the present case. In effect, this assurance is only of consequence for a judge subject to a removal recommendation who, immediately prior to the coming into force of the Proposed Amendment, would be eligible to a prorated annuity.

43. The Association understands that, as of the time of writing, the Proposed Amendment's retrospective effect would be limited to the case of Mr. Justice Michel Girouard of the

[28] Email of Kirk G. Shannon to Pierre Bienvenu dated June 28, 2019.

Superior Court of Quebec.[29] Justice Girouard is currently subject to a removal recommendation by the Council. Judicial review proceedings are pending before the Federal Court.[30]

44. For the reasons set out below, the Association is satisfied that the immediate application of the Proposed Amendment and its retrospective application to judges who are already subject to a removal recommendation would not undermine judicial independence.

45. Whether the accrual of pensionable service is seen as a "clear economic benefit" for sitting judges (to borrow Justice Gonthier's expression), an accruing right, or generically as a vested right, the test remains whether a reasonable and informed person would arrive at the conclusion that federally appointed judges enjoy judicial independence.[31] In the present case, for the test to be satisfied, a reasonable and informed person must conclude that the Proposed Amendment does not create a susceptibility on the part of the judiciary to economic manipulation by Parliament.

46. As noted already, the curtailment of vested rights, or clear economic benefits, sits uneasily with the principle of judicial independence. However, in the present context, the retrospective effect of the Proposed Amendment upon its coming into force only operates against judges whose tenure is already uncertain due to a pending removal recommendation against them, issued by a body composed of federally appointed judges. Crucially, the Snapback Provision eliminates any adverse effect on the accruing right in the event the removal recommendation does not survive.

47. In fact, if a removal recommendation is overturned by a court or rejected by the Minister or Parliament, the effect of the Snapback Provision is such that there is no interference with the accruing right of the judge towards annuity eligibility. Consequently, the Proposed Amendment only interferes with the accruing rights of those judges who do not succeed in setting aside the removal recommendation.

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[29] See the Report of the Council to the Minister of Justice regarding Justice Michel Girouard, dated 20 February 2018:https://www.cjc-ccm.gc.ca/cmslib/general/Girouard2_Docs/2018-02-20%20Girouard%20Report%20Minister.pdf.

[30] *Girouard v Canada (Attorney General)*, 2018 FC 865; *Canada (Judicial Council) v Girouard*, 2019 FCA 148.

[31] *PEI Reference*, *supra* note 4 at para 113.

48. In these very specific circumstances, the Proposed Amendment should not affect the perception of a reasonable and informed person that the federally appointed judiciary enjoys the necessary independent status.

49. If the retrospective effect of the Proposed Amendment does not pose a problem at the constitutional level, its immediate effect on sitting judges is also unproblematic. Given that the Association takes the view that the Proposed Amendment is justified by a proper and important objective, namely to avoid giving the impression to the public that a judge who is subject to a removal recommendation has an interest in prolonging court proceedings challenging the removal recommendation, it cannot be said that financial security requires that judges who were appointed before the coming into force of the Proposed Amendment be grandfathered against the application of the Proposed Amendment where a future removal recommendation suspends the accrual of pensionable service.

4. Conclusion

50. The Association therefore concludes, and submits to the Commission, that the Proposed Amendment is consistent with the principle of judicial independence.

III. Costs

51. The Association asks the Commission to recommend that the Proposed Amendment include provisions providing for reimbursement of the Association's full costs to participate in the present inquiry. These costs consist in the main in the costs of preparing and translating this submission.

52. The Association is a voluntary, non-profit organization. The financing of its activities, in pursuance of its public interest objects, entirely depends on the annual membership dues of its members.

53. The Association's participation in the quadrennial inquiry of the Commission is a significant item of the Association's budget, which is built on an annual basis so as to accumulate sufficient funds to meet that expense. That is because, pursuant to s. 26.3 (2) of the *Judges Act*, only two-thirds of the Association's representational costs are reimbursed out of the Consolidated Revenue Fund.

54. The Minister's referral of the Proposed Amendment to the Commission, even though it was constitutionally required, was unexpected. The Association considers that the judiciary has a legal duty, under the *Judges Act,* to participate in the work of the Commission, and to identify considerations relevant to a Commission inquiry. In such circumstances, it is submitted that fairness requires that the Association be fully reimbursed for what was necessarily an unbudgeted expense item.

55. The cost recommendation that the Association is seeking can take one of two forms. The Commission can recommend that the Proposed Amendment provide for reimbursement of the Association's full costs to participate in the present inquiry, as requested above. Alternatively, the Commission can recommend that the *Judges Act* be amended so as to provide that notwithstanding the provisions of s. 26.3(1) and (2), a representative of the judiciary who participates in an inquiry of the Commission pursuant to a referral under s. 26(4) of the *Judges Act* is entitled to be paid the full costs of his or her participation in the inquiry, as determined under s. 26.3(3).

IV. Recommendations sought by the Association

56. For these reasons, the Association invites the Commission to find that the Proposed Amendment, as described by the Minister in his letter of May 31, 2019 and as its temporal application was subsequently clarified by counsel for the Government, is consistent with financial security, one of the three core characteristics of judicial independence.

57. The Association also requests that the Commission recommend that the Association be reimbursed its full representational costs to participate in this inquiry.

The whole respectfully submitted.

Montréal, July 18, 2019

Pierre Bienvenu, Ad. E.
Azim Hussain
Norton Rose Fulbright Canada LLP
1 Place Ville-Marie, Suite 2500
Montréal, Québec H3B 1R1

Annex I: Email from Kirk G. Shannon dated June 28, 2019

Bienvenu, Pierre

De: Shannon, Kirk <Kirk.Shannon@justice.gc.ca>
Envoyé: 28 juin 2019 12:33
À: Bienvenu, Pierre; 'mandy.aylen@fct-cf.ca'
Cc: Hussain, Azim; Kelly, Sandra; Rupar, Christopher
Objet: RE: Quadrennial Commission -2019

Good afternoon Mr. Bienvenu and Prothonotary Aylen:

In responding to your question, I am sure you understand that draft legislation is a cabinet confidence under s. 39 of the *Canada Evidence Act* and therefore I cannot provide the wording in the draft legislation to you. I should also note that until legislation is passed by Parliament and given Royal Assent, the exact scope of the legislation cannot be presumed.

That said, I can advise you as follows:

It is proposed that the amendments would come into force on the day of Royal Assent, and they would be immediately applicable to any recommendation for removal that has already been made concerning a judge who remains in office, as well as to any future recommendations.

However, in the case of a judge whose removal has already been recommended when the amendments come into force, the amendments would only operate prospectively. This means that they would freeze the judge's annuity entitlement from the day of coming into force onward, and would not operate to claw back pensionable service time accrued between the date of the recommendation for removal and the date of coming into force.

When a judge's annuity entitlements are frozen by a recommendation for removal, the requirement to contribute 7% of salary toward the judicial annuity will be suspended. Further, if a judge remains in office for a time after the recommendation for removal is made because they have, for example, elected to challenge the recommendation, the judge would receive any salary increases that come into effect during this period. However, if the judge was already eligible for an annuity on the date the recommendation for removal was made, these increases in salary would not be taken into account in calculating the judge's annuity entitlement unless the recommendation for removal is rejected or overturned by a court.

Also, the counting of years continued in judicial office for purposes of calculating a judge's entitlement to a judicial annuity frozen would resume as if it had never been interrupted if the recommendation for removal has been rejected by one of the Houses of Parliament, or by the Minister of Justice where the matter of removal was not put before either of the Houses of Parliament or has been nullified by a court whose decision is final.

I trust this responds to your request for clarification. I hope you both have an excellent weekend.

Kind regards,

Kirk Shannon

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From: Bienvenu, Pierre [mailto:pierre.bienvenu@nortonrosefulbright.com]
Sent: Sunday, June 23, 2019 10:35 AM
To: Rupar, Christopher <Christopher.Rupar@justice.gc.ca>
Cc: andrew.lokan@paliareroland.com; Shannon, Kirk <Kirk.Shannon@justice.gc.ca>; Hussain, Azim <azim.hussain@nortonrosefulbright.com>; Kelly, Sandra <sandra.kelly@nortonrosefulbright.com>
Subject: Re: Quadrennial Commission -2019

Dear Mr. Rupar,

I am writing to obtain a clarification to the letter of the Minister of Justice dated May 31, 2019, in the above-captioned matter.

On page 2 of his letter, in the second paragraph, the Minister says:

The amendment I propose would suspend the counting of the judge's years continued in judicial office as of the date on which the CJC issues a report recommending the judge's removal. The amendment would be made applicable on Royal Assent to any sitting judge whose removal has already been recommended, or is recommended in the future.

My question relates to the second sentence above. Will the proposed amendment seek to suspend the counting of the judge's years retroactively from the Royal Assent? In other words, for a judge whose removal has already been recommended before Royal Assent, will the amendment subtract the years that already elapsed between the date of the recommendation and the date of the Royal Assent? Alternatively, will the amendment suspend the counting of such a judge's years only as of the date of the Royal Assent?

It would also be useful to know whether the Government intends to present the actual text of the proposed amendment when it makes its submission to the Commission. If so, we would appreciate receiving that text before the submission deadline of July 18. In order to properly advise our client and make helpful submissions to the Commission, we would appreciate receiving the text by June 28.

I look forward to your response. In light of the deadline for submissions fixed by the Commission, a response at your earliest convenience would be greatly appreciated.

Sincerely,

Pierre Bienvenu

Sent from my iPhone

Annex II: Annuity eligibility rules under the *Judges Act*

Annuities for Judges

42 (1) A judge shall be paid an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years, has a combined age and number of years in judicial office that is not less than 80 and resigns from office;

(b) has attained the age of retirement and has held judicial office for at least 10 years; or

(c) has continued in judicial office on the Supreme Court of Canada for at least 10 years and resigns from office.

Grant of annuities

(1.1) The Governor in Council shall grant to a judge an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years and resigns his or her office, if in the opinion of the Governor in Council the resignation is conducive to the better administration of justice or is in the national interest; or

(b) has become afflicted with a permanent infirmity disabling him or her from the due execution of the office of judge and resigns his or her office or by reason of that infirmity is removed from office.

Prorated annuity

(2) If a judge who has attained the age of retirement has held judicial office for less than

Versement de la pension

42 (1) Une pension égale aux deux tiers de leur dernier traitement est versée aux juges qui :

a) démissionnent après avoir exercé des fonctions judiciaires pendant au moins quinze ans dans le cas où le chiffre obtenu par l'addition de l'âge et du nombre d'années d'exercice est d'au moins quatre-vingt;

b) ont exercé des fonctions judiciaires pendant au moins dix ans et sont mis à la retraite d'office;

c) démissionnent après avoir exercé des fonctions judiciaires à la Cour suprême du Canada pendant au moins dix ans.

Octroi par le gouverneur en conseil

(1.1) Le gouverneur en conseil accorde une pension égale aux deux tiers de leur dernier traitement aux juges qui :

a) démissionnent après avoir exercé des fonctions judiciaires pendant au moins quinze ans et dont la démission sert, de l'avis du gouverneur en conseil, l'administration de la justice ou l'intérêt national;

b) démissionnent ou sont révoqués pour incapacité par suite d'une infirmité permanente.

Pension proportionnelle

(2) La pension du juge qui est mis à la retraite d'office après avoir exercé des fonctions

10 years, an annuity shall be paid to that judge that bears the same ratio to the annuity described in subsection (1) as the number of years the judge has held judicial office, to the nearest one tenth of a year, bears to 10 years.

Duration of annuities

(3) An annuity granted or paid to a judge under this section shall commence on the day of his or her resignation, removal or attaining the age of retirement and shall continue during the life of the judge.

Definition of judicial office

(4) In this section, *judicial office* means the office of a judge of a superior or county court or the office of a prothonotary of the Federal Court.

Annuity payable to supernumerary judge

43 (1) If a supernumerary judge, before becoming one, held the office of chief justice, senior associate chief justice or associate chief justice, the annuity payable to the judge under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity for former supernumerary judge

(1.1) If a supernumerary judge to whom subsection (1) applies is appointed to a different court to perform only the duties of a judge, the annuity payable to the judge under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity — election under section 31, 32 or 32.1

(2) If the Chief Justice of the Federal Court of

judiciaires pendant un nombre d'années inférieur à dix est calculée au prorata de ce nombre d'années, au dixième près.

Durée des pensions

(3) Le juge touche la pension à compter de la date à laquelle il cesse d'occuper son poste, et ce, jusqu'à son décès.

Définition de fonctions judiciaires

(4) Au présent article, fonctions judiciaires s'entend des fonctions de juge d'une juridiction supérieure ou d'une cour de comté ou des fonctions de protonotaire de la Cour fédérale.

Pension du juge surnuméraire

43 (1) Le juge surnuméraire qui exerçait, avant d'être nommé à ce poste, la charge de juge en chef, de juge en chef associé ou de juge en chef adjoint a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de juge surnuméraire par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait avant sa nomination dans ce poste.

Pension du juge surnuméraire auquel s'applique le paragraphe (1)

(1.1) Le juge surnuméraire auquel s'applique le paragraphe (1) qui est nommé simple juge à une autre cour, a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait avant d'être juge surnuméraire.

Pension – exercice de la faculté visée à l'article 31, 32 ou 32.1

(2) Le juge en chef de la Cour d'appel fédérale

Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada, in accordance with section 31, or a chief justice of a superior court of a province, in accordance with section 32, or the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, in accordance with section 32.1, has elected to cease to perform his or her duties and to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attainment of the age of retirement, to the office held by him or her immediately before his or her election.

ou le juge en chef ou juge en chef adjoint de la Cour fédérale ou de la Cour canadienne de l'impôt, ou le juge en chef d'une juridiction supérieure d'une province, qui exerce la faculté visée à l'article 31 ou 32, selon le cas, pour devenir simple juge — ou le juge en chef de la Cour suprême du Yukon ou des Territoires du Nord-Ouest ou de la Cour de justice du Nunavut qui exerce la faculté visée à l'article 32.1 pour devenir simple juge — a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait avant d'exercer cette faculté.

Annuity — election under section 31.1

(2.1) If the Chief Justice of the Court Martial Appeal Court of Canada, in accordance with section 31.1, has elected to cease to perform his or her duties as such and to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office held by him or her immediately before his or her election, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for a total of at least five years.

Pension : juge en chef de la Cour d'appel de la cour martiale du Canada

(2.1) Le juge en chef de la Cour d'appel de la cour martiale du Canada qui, conformément à l'article 31.1, abandonne sa charge de juge en chef pour exercer celle de simple juge reçoit une pension en fonction du traitement de juge en chef de la Cour d'appel de la cour martiale du Canada, s'il a occupé ce poste pendant au moins cinq ans ou a occupé ce poste et tout autre poste de juge en chef d'une autre cour pendant au moins cinq ans au total; il a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait comme juge en chef de la Cour d'appel de la cour martiale du Canada.

Annuity payable to chief justice

(2.2) If a chief justice is appointed to a different court to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, if he or she had continued in that office for at least five years or had continued in that office and any other

Pension : juge en chef

(2.2) Le juge en chef qui est nommé simple juge à une autre cour reçoit une pension en fonction du traitement de juge en chef s'il a occupé un poste de juge en chef pendant au moins cinq ans; il a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la

office of chief justice for at least five years.

Definition of chief justice and chief justice of a superior court of a province

(3) In subsections (2) to (2.2), chief justice or chief justice of a superior court of a province means a chief justice, senior associate chief justice or associate chief justice of that court, or, if that court is constituted with divisions, of a division of that court.

Application of subsections (1) and (2)

(4) Subsections (1) and (2) are deemed to have come into force on April 1, 2012.

Prorated Annuities — Early Retirement

55 years of age and 10 years in office

43.1 (1) A judge who has attained the age of 55 years, has continued in judicial office for at least 10 years and elects early retirement shall be paid an immediate annuity or a deferred annuity, at the option of the judge, calculated in accordance with this section.

Calculation of amount of deferred annuity

(2) The amount of the deferred annuity shall be two thirds of the amount of the salary annexed to the judge's office at the time of the election multiplied by a fraction of which

(a) the numerator is the number of years, to the nearest one tenth of a year, during which the judge has continued in judicial office, and

(b) the denominator is the number of years, to the nearest one tenth of a year, during which the judge would have been required to continue in judicial office in order to be eligible to be paid an annuity under paragraph 42(1)(a) or (b).

Immediate annuity

charge qu'il occupait comme juge en chef.

Définition de juge en chef et juge en chef d'une juridiction supérieure d'une province

(3) Aux paragraphes (2) à (2.2), sont assimilés au juge en chef ou au juge en chef d'une juridiction supérieure d'une province le juge en chef associé ou le juge en chef adjoint de la juridiction ou d'une section de celle-ci.

Application des paragraphes (1) et (2)

(4) Les paragraphes (1) et (2) sont réputés être entrés en vigueur le 1er avril 2012.

Pension proportionnelle — retraite anticipée

Juges âgés de cinquante-cinq ans et ayant dix ans d'ancienneté

43.1 (1) Une pension immédiate ou différée, selon le choix effectué par le juge, calculée conformément au présent article est versée au juge ayant atteint l'âge de cinquante-cinq ans, ayant au moins dix ans d'ancienneté dans la magistrature et ayant choisi une retraite anticipée.

Calcul de la pension différée

(2) La pension différée correspond aux deux tiers du traitement attaché à la charge du juge au moment où il exerce son choix, multiplié par la fraction dont le numérateur est son nombre d'années d'ancienneté, au dixième près, au sein de la magistrature et dont le dénominateur est le nombre d'années d'ancienneté, au dixième près, qui lui aurait été nécessaire pour avoir droit à une pension en vertu de l'alinéa 42(1)a) ou b), selon le cas.

Pension immédiate

(3) If a judge exercises the option to receive an immediate annuity, the amount of that annuity is equal to the amount of the deferred annuity, reduced by the product obtained by multiplying

(a) five per cent of the amount of the deferred annuity

By

(b) the difference between sixty and his or her age in years, to the nearest one-tenth of a year, at the time he or she exercises the option.

(3) Si le juge choisit une pension immédiate, celle-ci est égale à la pension différée diminuée du produit obtenu par la multiplication de cinq pour cent du montant de cette pension par la différence entre soixante et son âge en années, au dixième près, au moment où il exerce son choix.

Second exercise of option

(4) A judge whose option was to receive a deferred annuity may, between the date of that option and the date on which the deferred annuity would be payable, opt for an immediate annuity. An immediate annuity shall be paid to the judge from the date of the second option.

Modification du choix

(4) S'il choisit une pension différée, le juge peut changer son choix entre la date où il l'a exercé et la date à laquelle la pension différée lui serait à verser. Une pension immédiate lui est alors versée à compter de la date de modification du choix.

Survivor's annuity

(5) On the death of a judge who has been paid an immediate annuity or a deferred annuity under subsection (1) or (4), the annuity paid to a survivor under subsection 44(2) shall be determined as if the judge were in receipt of a deferred annuity.

Pension

(5) Au décès d'un juge à qui une pension immédiate ou différée était versée, en vertu des paragraphes (1) ou (4), la pension de réversion à verser au survivant en vertu du paragraphe 44(2) est calculée comme si le juge était prestataire d'une pension différée.

Definitions

(6) The definitions in this subsection apply in this section.

deferred annuity means an annuity that becomes payable to a judge at the time that he or she reaches sixty years of age and that continues to be paid during the life of the judge. (pension différée)

immediate annuity means an annuity that becomes payable to a judge at the time that he or she exercises an option to receive the annuity and that continues to be paid during

Définitions

(6) Les définitions qui suivent s'appliquent au présent article.

magistrature Sont assimilés à la magistrature les protonotaires de la Cour fédérale. (judicial office)

pension différée Pension qui devient payable au juge lorsqu'il atteint l'âge de soixante ans et lui est payable sa vie durant. (deferred annuity)

pension immédiate Pension qui devient payable au juge au moment où il choisit une

the life of the judge. (pension immédiate)

judicial office includes the office of a prothonotary of the Federal Court. (magistrature)

pension immédiate et lui est payable sa vie durant.(immediate annuity)