

IN THE MATTER OF THE *JUDGES ACT*, RSC 1985, c J-1, as amended

2015 JUDICIAL COMPENSATION  
AND BENEFITS COMMISSION

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SUBMISSIONS OF THE GOVERNMENT OF CANADA  
RE: INQUIRY UNDER SECTION 26(4) OF THE *JUDGES ACT*

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## I. OVERVIEW

1. An independent judiciary is the “lifeblood of constitutionalism in democratic societies”.<sup>1</sup> This Commission’s role as an “institutional sieve” in ascertaining the adequacy of federal judicial compensation and benefits helps to protect judicial independence and uphold public confidence in the judiciary and in the administration of justice.

2. The Minister of Justice is proposing amendments to the *Judges Act* that would freeze the pensionable service time of a judge whose removal has been recommended by the Canadian Judicial Council (“CJC”). Through the application of the factors set out in section 26(1.1) of the *Judges Act*, this Commission is tasked with considering the effects, if any, of the proposed amendments on the adequacy of federal judicial compensation and benefits. The Commission’s work in turn supports the independence of the judiciary.

3. The application of those criteria demonstrates that the proposed amendments have no impact on the adequacy of federal judicial compensation and benefits. The proposed amendments would, however, enhance public confidence in the integrity of Canada’s federally appointed judiciary.

## II. COMMISSION MANDATE

4. The Commission’s mandate is informed by both constitutional principles and statutory provisions. In *Reference re remuneration of the Judges of the Provincial Court (PEI)*,<sup>2</sup> the Supreme Court of Canada held that any change to judicial compensation or benefits must be considered by an independent, objective and effective commission before it can be enacted. This Commission was established pursuant to this requirement and empowered by the *Judges Act* to inquire into the adequacy of “the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally”.<sup>3</sup>

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<sup>1</sup> *Beauregard v Canada*, [1986] 2 SCR 56, p 70, **Government’s Book of Documents, Tab 1**

<sup>2</sup> *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, para 133, **Government’s Book of Documents, Tab 2**

<sup>3</sup> *Judges Act*, RSC 1985, c J-1, s. 26(1), **Government’s Book of Documents, Tab 3**

5. By letter dated May 31, 2019,<sup>4</sup> the Minister of Justice requested this Commission to undertake an inquiry into the effects, if any, on the adequacy of judicial compensation and benefits of proposed amendments to the *Judges Act* that would freeze pension accrual for judges whose removal has been recommended by the CJC.

6. The lens through which this Commission is to assess the amendments' potential impact is found in subsection 26(1.1) of the *Judges Act*. That provision mandates that the Commission conduct its quadrennial inquiry with reference to the following prescribed criteria: (1) the prevailing economic conditions in Canada; (2) the role of financial security of the judiciary in ensuring judicial independence; (3) the need to attract outstanding candidates to the judiciary; and (4) any other objective criteria that the Commission considers relevant.<sup>5</sup> Outside the quadrennial inquiry, the Minister of Justice may at any time refer to the Commission a matter that potentially affects judicial compensation or benefits.<sup>6</sup> The criteria to guide the Commission's inquiry on such a matter are the same.

### **III. THE PROCESS FOR REMOVING A JUDGE FROM OFFICE**

7. The CJC is a federal body composed of the 41 federally-appointed Chief Justices and Associate Chief Justices of courts from across the country, chaired by the Chief Justice of the Supreme Court of Canada.<sup>7</sup> As set out in section 63 of the *Judges Act*, complaints regarding the conduct of sitting federally-appointed judges and prothonotaries of the Federal Court are made to the CJC.<sup>8</sup> Serious complaints are then investigated and reviewed by a sequence of CJC panels. At each stage, the judge against whom the complaint is filed is afforded important procedural fairness safeguards, including opportunities to make

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<sup>4</sup> Letter to Judicial Compensation and Benefits Commission from Minister David Lametti, Minister of Justice, May 31, 2019, **Government's Book of Documents, Tab 4**

<sup>5</sup> *Judges Act, supra*, s. 26(1.1), **Government's Book of Documents, Tab 3**

<sup>6</sup> *Ibid*, s. 26(4) **Government's Book of Documents, Tab 3**

<sup>7</sup> Canadian Judicial Council, About the Council (online: [https://www.cjc-ccm.gc.ca/english/about\\_en.asp?selMenu=about\\_main\\_en.asp](https://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp)), **Government's Book of Documents, Tab 5**

<sup>8</sup> *Judges Act, supra*, ss. 63-71, **Government's Book of Documents, Tab 3**

representations through counsel. Ultimately, the CJC can issue a report to the Minister of Justice recommending the removal of a federally-appointed judge from office.

8. Following the CJC's recommendation, a judge can be removed from office by the Governor General after an address of both the House of Commons and the Senate.<sup>9</sup>

9. However, in the period between the CJC's recommendation and the Governor General's removal of the judge from office, the judge may remain in office and may seek judicial review of the CJC's recommendation before the courts.<sup>10</sup>

#### IV. THE PROPOSED AMENDMENTS

10. The *Judges Act* entitles federally-appointed judges to an annuity equal to two-thirds of their salary upon retirement.<sup>11</sup> A judge automatically becomes eligible for a full annuity by meeting one of three statutory conditions setting out minimum age and years of service.<sup>12</sup> Where judges do not qualify for a full annuity, they may qualify for a reduced or pro-rated annuity upon fulfilling certain other minimum eligibility criteria.<sup>13</sup> The amount of the reduced annuity will vary depending on the judge's age and how long they have been in office, but the annual amounts at stake are substantial. Judges who leave office before meeting these minimum requirements are only entitled to a return of their contributions.<sup>14</sup>

11. Where the CJC recommends the removal of a judge, a judge may be perceived to have an incentive to prolong the removal process in order to qualify for either a full or pro-rated judicial annuity. Even where this is not the judge's intention, the public perception may be that the judge has challenged the CJC's recommendation with a view to benefiting financially. This presents a serious risk to the public's confidence in the integrity of Canada's federally-appointed judiciary and the justice system as a whole.

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<sup>9</sup> *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 99, **Government's Book of Documents, Tab 6**

<sup>10</sup> *Canada (Judicial Council) v Girouard*, 2019 FCA 148, paras 108, 111-12, **Government's Book of Documents, Tab 7**

<sup>11</sup> *Judges Act, supra*, s. 42, **Government's Book of Documents, Tab 3**

<sup>12</sup> *Judges Act, supra*, s. 42(1), **Government's Book of Documents, Tab 3**

<sup>13</sup> *Judges Act, supra*, ss. 42(2) & 43.1, **Government's Book of Documents, Tab 3**

<sup>14</sup> *Judges Act, supra*, s. 51, **Government's Book of Documents, Tab 3**

12. The Government of Canada therefore proposes amendments to the *Judges Act* that would suspend the counting of years of service for purposes of calculating the judge's eligibility for an annuity as of the date on which the CJC issues its recommendation to remove the judge from office.

13. However, the amendments would also include a provision to restore the full calculation of years of service<sup>15</sup> as if it had never been interrupted should the recommendation for removal be:

- rejected by one of the Houses of Parliament;
- rejected by the Minister of Justice where the matter of removal is not put before either of the Houses of Parliament; or,
- overturned by a court whose decision is final.

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

15. In fairness to a judge whose removal has already been recommended when the amendments come into force, the amendments would only operate prospectively. Put another way, the judge's years in judicial office for purposes of calculating eligibility for an annuity would be frozen from the day of coming into force onward. The amendments would not operate to claw back pensionable service time accrued between the date of the CJC's recommendation and the date of coming into force of the amendments.

16. Furthermore, when a judge's pensionable time in office is frozen by a recommendation for removal, the amendments would suspend the judge's obligation to contribute 7% of their salary to the judicial annuity.

17. Under these amendments, if a judge remains in office after the recommendation for removal is made, 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

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<sup>15</sup> I.e. years "continued in judicial office" per *Judges Act, supra*, ss. 42 & 43.1, **Government's Book of Documents, Tab 3**

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.

#### **V. The Proposed Amendments Have no Appreciable Impact on the Adequacy of Judicial Compensation or Benefits**

18. The impact, if any, of the proposed amendments on the adequacy of judicial compensation and benefits is to be assessed through section 26 (1.1) of the *Judges Act*. Of the four criteria to be applied, only (2) the role of financial security of the judiciary in ensuring judicial independence; and (3) the need to attract outstanding candidates to the judiciary, are directly relevant in this specific context. The other criteria - the prevailing economic conditions in Canada and other "objective criteria" - have no impact on these specific proposed amendments. It is difficult to see how the economic conditions in Canada would be relevant to whether and when the CJC recommends removal of a judge, which is the trigger for the application of the proposed amendments. Further, no other "objective criteria" relevant to this matter have been identified.

19. In respect of the second criterion, the proposed amendments do not impact the principle of financial security of the judiciary which in turn ensures judicial independence. The proposed amendments do not apply at the discretion of the Executive. It is only where the CJC, a quasi-judicial body operating at arm's length from both the Executive and Legislative branches, recommends the removal of a judge for reasons of conduct that the accrual of his or her pensionable service time is frozen. The judge will be credited with all lost pensionable time as if there had been no interruption, where the removal recommendation is rejected or overturned by a court. Therefore, the financial security of the Judge is protected.

20. As to the third criterion, it is difficult to see how the proposed amendments will deter qualified candidates from applying for judicial appointments. The full array of the compensation package for judges is not affected in any appreciable way by the amendments. As noted above, it is only upon the recommendation of removal as a judge by the CJC (not the Executive) that the accrual of pensionable service is frozen. It is

difficult to imagine that qualified candidates will not apply for judicial office because they are concerned that the accrual of their pensionable time may be frozen.

21. Even if the Commission were to broadly characterize the amendments as impacting judicial compensation, the Supreme Court of Canada has ruled that reductions in judicial remuneration are permitted if they do not take salaries below a basic minimum level of remuneration which is required for the office of a judge.<sup>16</sup> This is certainly not the case here as only the accrual of pensionable time is frozen when removal as a judge is recommended. The salary of the judge is not affected by that recommendation.

22. There is presently one judge challenging a CJC recommendation for removal from office, and who may be impacted by the proposed amendments. It is not unusual for amendments to legislation to impact those whose rights are rooted in the pre-amendment version of legislation. It is impossible to predict when the CJC may be called upon next to deal with an allegation concerning a federally-appointed judge that could warrant removal from office. Consequently, there can be no assurances or guarantees of a period in which the legislation could be amended without affecting one or more individuals.

23. The proposed amendments would, however, remove any possible perception or allegation that a judge is challenging a CJC recommendation in order to extend his/her pensionable time in judicial office. Accordingly, like other justice system reform or modernisation efforts, these amendments would contribute to and enhance public confidence in the judiciary and the justice system.<sup>17</sup>

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<sup>16</sup> *Reference re Remuneration of Judges of the Provincial Court (PEI)*, *supra*, paras 10, 147, **Government's Book of Documents, Tab 2**

<sup>17</sup> *Conférence des juges de paix magistrats du Québec v Québec (Attorney General)*, 2016 SCC 39, paras 39-40, **Government's Book of Documents, Tab 8**; *Ell v Alberta*, [2003] 1 SCR 857, paras 37-38, **Government's Book of Documents, Tab 9**

VI. CONCLUSION

24. To maintain public confidence in the federally-appointed judiciary, the Government of Canada is proposing amendments to the *Judges Act* that will freeze the accrual of a judge's pensionable time when the CJC recommends the removal of that judge from office. These amendments are prospective in nature and protect the right of any judge to challenge the CJC's recommendation.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at Ottawa, Ontario, this <sup>h</sup>18 day of July, 2019



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