

*Judicial Compensation  
and Benefits Commission*



*Commission d'examen de  
la rémunération des juges*

**REPORT AND  
RECOMMENDATIONS**

**SUBMITTED TO**  
**the Minister of Justice of Canada, pursuant to section 26(4) of the**  
***Judges Act, R.S.C. 1985, c. J-1***

**October 28, 2019**

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***Judicial Compensation  
and Benefits Commission***



***Commission d'examen de la  
rémunération des juges***

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Ottawa, Ontario K1A 1E3

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October 28, 2019

Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario  
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Dear Minister:

Pursuant to Subsection 26(4) of the *Judges Act*, and the request made to the Commission on May 31, 2019, I am pleased to submit the report and recommendations of the Judicial Compensation and Benefits Commission.

Yours truly,

A handwritten signature in black ink, appearing to read 'G. Rémillard', written over a horizontal line.

Gil Rémillard  
Chair

Encl.

## Introduction

1. On June 30, 2016, this Commission delivered to the Minister of Justice and Attorney General of Canada (“the Minister”) its Report and Recommendations on judicial compensation pursuant to subsection 26(2) of the *Judges Act*, R.S.C. 1985, c. J-1.
2. By letter dated May 31, 2019, the Minister requested, pursuant to subsection 26(4) of the *Judges Act*, that the Commission conduct an inquiry and report on the 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 (the “Request”).
3. The letter is reproduced in Annex A, and the text of the Request is set out immediately below:

I am writing pursuant to s. 26(4) of the *Judges Act* to ask you to undertake an inquiry on a matter I consider important and urgent: the 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).

As you know, the *Judges Act* entitles federally-appointed judges to an annuity equal to two-thirds of their salary upon retirement. A judge automatically qualifies for a full annuity by meeting one of three statutory conditions setting out minimum years of service. Where judges do not qualify for a full annuity, they may qualify for a reduced (pro-rated) annuity upon fulfilling certain other minimum eligibility criteria. 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.

In the context of judicial conduct proceedings, the nature of these arrangements 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.

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.

However, the amendment would also include a provision to restore the calculation of years continued in judicial office as if it had never been interrupted, in the event that the recommendation for removal is either overturned by a court or rejected, such that the judge is able to continue in office.

Such an amendment would protect a judge seeking to challenge a CJC recommendation for removal from the allegation that the challenge was being launched simply with a view to benefiting financially. It would also ensure that a judge is not penalized for launching such a challenge, where that challenge is ultimately upheld.

#### Fixing a reporting date

Section 26(4) of the *Judges Act* gives the Minister of Justice the ability to initiate an inquiry on any matter, outside the full compensation review process that marks the beginning of each quadrennial cycle. The provision authorizes the Minister to determine the timelines for such an inquiry, in consultation with the Commission. Officials from my Department have been in touch to seek your views in this regard.

Since this matter is relatively narrow in scope, it is my hope that it can be dealt with expeditiously - ideally by late summer. In your exchanges with my officials, you have indicated that, subject to certain caveats, a 90 day period should suffice. However, you have also indicated your preference not to report while the federal election scheduled for this fall is under way. I appreciate your concerns.

Section 26(5) of the *Judges Act* requires extensions to a reporting date that has already been fixed to be granted by the Governor in Council. Should unforeseen delays require a longer reporting period, granting an extension once the House of Commons has adjourned for the summer may prove challenging. Accordingly, I am fixing the date for your report as no later than October 31, 2019, but would welcome receiving it prior to the beginning of the writ period, if reasonably possible.

4. As a result:

- (a) The Commission issued a Notice and News Release on June 18, 2019, advising of the Request and setting a date for the receipt of submissions by no later than July 18, 2019;
- (b) On the same day, the Notice and News Release were published on the Commission website and sent to a wide list of potentially interested parties;
- (c) The Commission received submissions from:
  - (i) the Government of Canada (“the Government”);
  - (ii) the Barreau de Quebec (“the Barreau”);
  - (iii) the Canadian Superior Court Judges Association (“the CSCJA”);
  - (iv) the Honourable Michel Girouard, a Justice of the Superior Court of Quebec (“Justice Girouard”); and
  - (v) the Prothonotaries of the Federal Court

**Matters for Determination**

5. In this report, the Commission will:

- (a) address its jurisdiction to consider and report on the Request;
- (b) address the question posed by the Minister in the Request as to the effects on the adequacy of federal judicial compensation and benefits from the proposed amendment; and

- (c) address any additional considerations relevant to its deliberations.

## **Jurisdiction**

6. The jurisdiction of the Commission to consider the Request flows from the language of subsection 26(4) of the *Judges Act* which reads as follows:

26 (4) In addition to its quadrennial inquiry, the Minister of Justice may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.

7. Of the submissions received by the Commission, only one contests the jurisdiction of the Commission to consider the Request, that of Justice Girouard.

Justice Girouard:

- (a) cautions the Commission that its role requires it to adhere to the highest standards of independence;
- (b) cautions against the Commission entering into an adjudicative interest arbitration or “judicial decision making” that would have to assess the merits of a Canadian Judicial Council (“CJC”) recommendation to remove a judge from office, its compliance with constitutional requirements of judicial independence and of respect for the rules of procedural fairness;
- (c) cautions against the Commission short-circuiting the jurisdiction of the courts with respect to decisions of the CJC;
- (d) cautions that, should the Commission assume jurisdiction, it cannot go beyond the factors enumerated in subsection 26(1.1) of the *Judges Act*, namely:

26 (1.1) In conducting its inquiry, the Commission shall consider

- (a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- (b) the role of financial security of the judiciary in ensuring judicial independence;
- (c) the need to attract outstanding candidates to the judiciary; and
- (d) any other objective criteria that the Commission considers relevant.

8. Although the Commission has considered these arguments and acknowledges the additional submissions made on behalf of Justice Girouard specific to his situation, the Commission is satisfied that it has the jurisdiction under subsection 26(4) of the *Judges Act* to consider the Request.

9. The Commission had no intention of considering the Request in the specific context of proceedings involving any particular judge whether as to the merits of any complaint initiating such a proceeding, the process followed during the proceeding or its ultimate result.

10. Rather, the Commission considered the Request in light of its mandate under subsections 26(1) and 26(1.1) of the *Judges Act*, that is it considered the Request in light of the criteria that the Commission is charged to consider in inquiring into the adequacy of compensation payable under the *Judges Act* and into the adequacy of judges' benefits generally.

11. Pensions are an important part of judicial compensation and the conditions related to the accrual and payment of such pensions have an impact on the financial security of judges, the independence of the judiciary and the integrity of the judicial system.

12. An important feature of the Request is that the proposed amendment would restore the calculation of years continued in judicial office as if never interrupted in the event that the recommendation for removal is either overturned by a court or rejected, such that the judge is able to continue in office.

13. The Commission has proceeded on the basis that such a feature will be an integral component of the drafted legislation, as the Commission does not have the benefit of draft legislation, which would have been helpful.

14. Given that the approach taken by the Minister has been to seek recommendations from the Commission before proceeding with its proposed amendment, the Commission is comforted by the fact that any material change to what is proposed would result in the Minister following the same approach, affording the Commission the opportunity to consider and report on the impact of any further change to the proposal on the adequacy of judicial benefits.

15. Accordingly, the Commission believes it has jurisdiction to consider the Request within the confines of section 26 of the *Judges Act* and without venturing into matters beyond its purview.

**Analysis of the Request in light of section 26 of the *Judges Act***

16. The Government noted the importance of the role of the Commission in protecting judicial independence and upholding public confidence in the judiciary and the administration of justice. The Government submitted that the amendment would have no impact on the adequacy of federal judicial compensation and benefits but would however enhance public confidence in the integrity of the judiciary. The proposed amendment would 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.

17. The CSCJA submitted that the proposed amendment would not compromise judicial independence. That view was informed by the Minister's stated objective of addressing the risk that public confidence in the integrity of the judiciary might be undermined if there is a perception that a judge subject to a removal recommendation launched proceedings challenging the recommendation primarily to benefit from the judicial annuity regime. It also noted that the proposed amendment will include a provision to restore calculation of pensionable time if the recommendation were overturned or rejected and that it would not be applied retroactively to



claw back years of pensionable service accrued between a removal recommendation and the date of coming into force of the proposed amendment.

18. The Barreau supported the proposed amendment, arguing that it would not be discretionary or subject to arbitrary action by the executive or legislature. A judge subject to a CJC report would retain his/her right to contest that recommendation before the courts. Public confidence in the administration of justice will be preserved.

19. Counsel for Justice Girouard opposed the proposed amendment on a number of grounds. First, with respect to the jurisdictional question, they argued that this proposal would allow for an additional sanction against a judge arising from a CJC recommendation and would require the Commission to adjudicate on the merits of the case or alternatively abdicate jurisdiction to the CJC. Alternatively, the Commission should not determine whether an individual judge should receive different compensation based on a CJC report and such a report is not a relevant factor to consider under section 26. The submission also questions the triple role of the Minister – complainant before the CJC, objective reviewer of the CJC report and requestor to the Commission on the Request.

20. The Prothonotaries confirmed their support for the Minister's proposed amendment.

21. Judicial independence is a key foundation of the justice system and public confidence in the integrity of that system is essential, not just to the proper functioning of our system of justice, but to the fundamentals of the functioning of our democratic system. Security of judicial tenure and financial security are core tenets of that independence. We agree with the Barreau that the purpose of these two fundamental components of judicial independence is not to benefit the members of the judiciary, but rather to serve important societal goals, one of which is public confidence in the impartiality of the judiciary.

22. The proposed amendment will not be discretionary; it will not be imposed by the executive or the legislature. Rather, the conditions and circumstances will be clearly spelled out in legislation in accordance with the specifics spelled out by the Minister in his letter to the

Commission, and fleshed out in the Government's submissions. It will not remove any rights of recourse that individual judges may have. And it will be applied to all to whom the conditions apply.

23. We do not see that this additional condition to accruing of pensions will affect the overall adequacy of the pension regime for judges. Nor do we see how it would have any impact on the ability to recruit outstanding candidates for the judiciary.

24. Suspending the accrual of pensionable years upon the issuance of a report by the CJC recommending a judge's removal is in our view a reasonable measure to contribute to continued public confidence in the judicial system, especially as it will also provide for resumption of that accrual as of the same date as its suspension if such a recommendation for removal is overturned or rejected.

#### **Additional Considerations**

25. The Minister has proposed that the amendment would apply on Royal Assent to any judge whose removal has been recommended by the CJC. The SCJA and the Barreau agree with this proposal.

26. The Commission has reviewed the Request through the lens of the criteria it applied in its report of June 30, 2016.

27. The Commission notes that the full dimension of the amendment proposed by the Request implicates not only a feature of judicial compensation, but a component of the inquiries process contained in Part II of the *Judges Act*.

28. It is the view of the Commission that if the proposed amendment with respect to the judicial compensation package at the heart of Part I of the *Judges Act* is put forward as a behaviour modification measure, that end might be better addressed through amendments to the procedures of the CJC to streamline that process.

29. The Commission has concluded that the proposed amendment would not impact the adequacy of the salaries and other amounts payable under the *Judges Act* or the adequacy of judges' benefits generally when assessed in accordance with the criteria set out in subsection 26(1.1). However, the Commission makes no comment on the timing of the application of the proposed amendment, other than to note that it would be unfortunate if the making of the Request and the results of this report negatively affected those whom are already the object of deliberations and recommendations by the Canadian Judicial Council, and who have yet to complete the process of exercising recourses available to them within the law.

### **Costs**

30. The SCJA requested that the Commission make a recommendation that it be reimbursed its full representational costs to participate in the inquiry. We are not persuaded that there is any basis upon which to make a recommendation that costs other than those contemplated by subsection 26.3(2) of the *Judges Act* be payable.

Minister of Justice  
and Attorney General of Canada



Ministre de la Justice  
et procureur général du Canada

Ottawa, Canada K1A 0H8

MAY 31 2019

Mr. Gil Rémillard  
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Dear Members of the Commission:

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as no later than October 31, 2019, but would welcome receiving it prior to the beginning of the writ period, if reasonably possible.

I thank you in advance for undertaking consideration of this important matter.

Respectfully,

Original signed by /  
Original signé par

The Honourable David Lametti, P.C., Q.C., M.P.  
Minister of Justice and Attorney General of Canada

c.c.: Justice Julie Dutil  
President, Canadian Superior Courts Judges Association

Me Norman Sabourin  
Executive Director and General Counsel, Canadian Judicial Council

Prothonotary Mandy Ayles,  
Representative of the Prothonotaries of the Federal Court

Louise Meagher  
Executive Director, Judicial Compensation and Benefits Commission