



**RESPONSE OF THE GOVERNMENT OF CANADA
TO THE REPORT OF THE JUDICIAL COMPENSATION
AND BENEFITS COMMISSION**

February 2020

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RESPONSE OF THE GOVERNMENT OF CANADA TO THE REPORT OF THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION ON THE MATTER OF FREEZING PENSION ENTITLEMENTS FOR JUDGES WHOSE REMOVAL FROM OFFICE HAS BEEN RECOMMENDED BY THE CANADIAN JUDICIAL COUNCIL

This is the Response of the Government of Canada to the Report of the Judicial Compensation and Benefits Commission dated October 28, 2019, and tabled in both Houses of Parliament in December 2019. This response is issued pursuant to subsection 26(7) of the *Judges Act*.

The Government wishes to thank the Chair of the Commission, Mr. Gil Rémillard, and the Commission Members, Ms. Margaret Bloodworth and Mr. Peter H. Griffin, for their service and commitment, and for their able stewardship of the first inquiry conducted pursuant to subsection 26(4) of the *Judges Act*. Their thoroughness and thoughtfulness in reviewing the Minister of Justice's proposal and the submissions of the participants, and their effective management of this procedural first, are greatly appreciated.

BACKGROUND

In recognition of the unique nature of the Quadrennial Commission and the important constitutional principles its process furthers, this Government Response, like its predecessors, begins with a brief overview of the context in which judicial compensation and benefits are established.

In *Reference re Remuneration of the Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, the Supreme Court of Canada held that before any changes can be made to judicial compensation and benefits, they must first be considered by an "independent, objective and effective" commission. Following this decision, the *Judges Act* was amended to create the Judicial Compensation and Benefits Commission, informally called the "Quadrennial Commission", to help set the compensation and benefits of all federally-appointed judges and judicial officers, regardless of the court on which they sit.

Subsection 26(1) of the *Judges Act* requires that the Quadrennial Commission undertake a comprehensive review of the adequacy of judicial compensation and benefits every four years. Each Commission is composed of three members who are appointed for a four year term prior to each quadrennial review. In addition to quadrennial reviews, the *Judges Act* provides a mechanism for putting specific issues to the Commission at any time. Subsection 26(4) authorizes the Minister of Justice to trigger an inquiry on a specific matter and to determine the inquiry's timelines, in consultation with the Commission. Whether the inquiry is a full quadrennial review or initiated pursuant to subsection 26(4), the criteria the Commission must use to conduct its inquiry are the same, namely those set out in subsection 26(1.1) of the Act:

- (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.

At the end of an inquiry, the Commission is required by the *Judges Act* to issue a report to the Minister of Justice setting out its recommendations, and the Minister is required by the Act to make the report public by tabling it in Parliament (within the first 10 sitting days after it is received), and to issue a public response to the report within four months of receiving it.

THE GOVERNMENT'S RESPONSE

The Government fully accepts the recommendations made by the Commission in its report of October 28, 2019, and will introduce the necessary legislative amendments at the earliest opportunity.

For the first time, the Commission's inquiry was initiated following a request from the Minister of Justice under subsection 26(4) of the *Judges Act*. By letter to the Commission dated May 31, 2019, the Minister requested that the Commission consider a proposal to amend the *Judges Act* so as to freeze a judge's pension entitlements as of the date the Canadian Judicial Council (CJC) recommends the judge's removal from office. The Minister noted that this would ensure that if the judge chooses to challenge the recommendation through the courts, the resulting delay will not have the effect of increasing the judge's pension entitlements. The Minister's proposal also included measures to ensure that the judge's pension entitlements would be fully restored, as if they had never been frozen, if the judge is successful in challenging the recommendation for removal through the courts by obtaining a final decision (not subject to appeal) that allows the judge to continue in office.

The Minister further proposed that in the case of a judge who is already subject to a recommendation for removal when the changes come into force, pensionable service already accrued would not be clawed back, but pension entitlements would be frozen as of the date of coming into force.

The Minister requested an inquiry on this matter pursuant to subsection 26(4) of the *Judges Act* because he was, and remains, of the view that this matter is urgent to preserve public confidence in the integrity of Canada's judiciary and justice system.

Pursuant to section 99 of the *Constitution Act, 1867*, federally-appointed judges can only be removed from office by the Governor General on address of both Houses of Parliament. In its decisions in *Therrien (Re)*, 2001 SCC 35 and *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11, the Supreme Court of Canada further determined that judicial independence requires that a judge be given an opportunity to be heard at a fair, judge-led hearing before removal can take place. The *Judges Act* makes the CJC responsible for ensuring that this fair hearing requirement is met. Once it is, the Act requires the CJC to provide the Minister of Justice with a report and recommendation as to whether the judge should be removed from office. The report is public, and the judge has the right to challenge the report and its recommendation through the courts.

By way of pension, 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: at least 55 years of age and 10 years on the bench. 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.

Where removal from office is recommended by the CJC, the nature of a judge's pension arrangements may give rise to a perceived incentive for a judge to challenge a recommendation for removal from office 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 with a view to benefiting financially. This risks undermining public confidence in the integrity of Canada's federally-appointed judiciary.

In its report of October 28, 2019, the Commission generally agreed with the Minister's proposal, recommending in favour of its implementation.

The Commission began by noting that the Canadian Superior Court Judges' Association, the prothonotaries of the Federal Court and the Barreau du Québec all supported the Minister's proposal. The only participant to oppose it was a judge who is currently subject to a CJC recommendation for removal from office, and whose legal challenge to that recommendation remains before the courts.

After underscoring the vital importance of public confidence in the integrity of the judiciary and justice system to our democratic system of government, the Commission noted at paragraph 22 that, under the Minister's proposal, freezes in pension entitlements will not be imposed at the discretion of the executive or legislative branch. Rather, they will come into effect automatically upon the fulfillment of certain preconditions that will be clearly set out in legislation, and they will not affect a judge's right to challenge a recommendation for removal from office. As a result, the Commission concluded at paragraph 23, that the Minister's proposal would have no impact on the adequacy of judicial compensation or benefits. Indeed, the Commission went on to note at paragraph 24 that the proposal "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."

However, despite these conclusions, the Commission went on to express reservations about the Minister's proposal to apply these changes on the day they come into force to judges who are already the subject of a recommendation for removal. It stated at paragraphs 28 and 29 of its report:

[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.

To the extent that the Commission suggests the Government should consider streamlining the judicial conduct process, particularly as it concerns judges who wish to challenge recommendations for their removal, the Government is in full agreement. The Minister of Justice's mandate letter from the Prime Minister includes a commitment to develop proposals for reform of the federal judicial conduct process.

However, the Government does not view the proposal to freeze pension entitlements at issue here as a behavior modification measure, or more specifically, as a measure intended to discourage legal challenges to recommendations for removal from judicial office. The right of a judge to seek review by a court of the fairness of the process used by the CJC to arrive at a recommendation on removal cannot be abrogated. Even if it could be, doing so would be highly inadvisable. A Minister of Justice who considers a CJC recommendation on removal must be satisfied that the process used to arrive at that recommendation was fair. He or she cannot be expected to adjudicate claims of procedural unfairness, nor can the Houses of Parliament. Such a task must necessarily fall to the courts, and to the courts alone. As a result, even once the efficiency of the process for adjudicating allegations of procedural unfairness brought by judges against the CJC is improved through legislative amendments and related changes, the concerns that motivated the Minister's proposal to the Commission would remain. They can only be addressed by implementing the changes proposed by the Minister and recommended by the Commission.

Nevertheless, the Commission's remarks at paragraph 29 of its report may be taken to mean that the Commission is concerned that it may be unfair to apply the proposed changes on the day they come into force to judges who are already subject to a recommendation for removal. While the Commission refrained from labeling these concerns "a recommendation" (perhaps because they fall outside the Commission's remit as defined by subsection 26(1.1) of the *Judges Act*) the Government is of the view that it would be appropriate to implement the proposed amendments so as to respect their spirit. The proposed amendments will therefore be

implemented so as to apply to judges whose removal is recommended on or after the day it comes into effect.