

IN THE MATTER OF THE *JUDGES ACT*, R.S.C. 1985, C. J-1

**2015 QUADRENNIAL JUDICIAL COMPENSATION
AND BENEFITS COMMISSION**

**SUBMISSIONS OF THE HONOURABLE J.E. (TED) RICHARD, RETIRED JUDGE,
REGARDING A PROPER JUDICIAL ANNUITY PURSUANT TO S. 43(1) OF THE
*JUDGES ACT***

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INTRODUCTION

Commissioners:

Let me introduce myself. I am a retired judge of the Supreme Court of the Northwest Territories. I was appointed a judge of the court in September 1988. In April 1996 I became Senior Judge of the Court (a position equivalent to Chief Justice of the southern superior courts). In December 2007 I elected supernumerary status, and served as a supernumerary judge of the court until my retirement on May 1, 2012. Since my retirement I have been in receipt of a judicial annuity pursuant to the *Judges Act* and Order-In-Council P.C. 2012-628, but it is not in the correct amount. I respectfully seek the Commission's assistance by way of a recommendation to the Government of Canada to correct a legislative drafting error which resulted in the Governor in Council granting my judicial annuity in an incorrect amount. I am the only person affected by this drafting error.

CHIEF JUSTICES AND SENIOR JUDGES

Parliament decided many years ago that Senior Judges of the northern superior courts were to receive the same salary and benefits as the Chief Justices of the provincial superior courts. This decision followed a recommendation of the 2004 McLennan Commission that the northern senior judges receive "equivalent compensation" to that of a Chief Justice.

The intention of Parliament in 2004 was to put the northern senior judges on an equal footing with chief justices. This required amendments to s. 22 (salaries of northern superior court judges) and to s. 43(1) and 43(2). These latter subsections (and the context of s. 42), then read as follows:

42. (1) The Governor in Council shall grant to

- (a) a judge who has continued in judicial office for at least fifteen years, whose combined age and number of years in judicial office is not less than eighty and who resigns from office,

...

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.

43. (1) If a supernumerary judge, before becoming a supernumerary judge, 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 previously held by him or her of chief justice, senior associate chief justice or associate chief justice.

(2) If the Chief Justice of the Federal Court of Appeal or of the Federal Court or the Chief Justice or Associate Chief Justice of 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, 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.

The appropriate amendments to s. 22 were enacted. The necessary amendments to s. 43 were overlooked in error (i.e., adding “senior judges” to the two subsections).

CORRECTING THE ERROR

This drafting oversight was pointed out to the Office of the Commissioner for Federal Judicial Affairs in 2004, and my recollection is that the Commissioner’s response was that it was a matter for the Minister of Justice to deal with.

This drafting oversight was addressed by the 2007 Block Commission. In its Final Report, in Recommendation #5, the Commission recommended that:

“The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.”

(see Block Report at p. 59-61)

This was one of fifteen recommendations of the Block Commission.

In its formal Response to the Block Report, the Government of Canada stated it would not implement the Commission’s recommendations “due to the prevailing economic situation”. It did not address the specifics or the merits of Recommendation #5. In view of the *de minimus* sums involved in Recommendation #5, I respectfully submit this was not a fair or equitable treatment of that simple recommendation. (It is arguable that the Government of Canada’s response to Recommendation #5 did not satisfy the constitutionally mandated public explanation and justification for its decision in the context of the standard established by the Supreme Court of Canada in *Bodner v. Alberta*.)

On to 2011. The 2011 Levitt Commission agreed with the earlier recommendation of the Block Commission. The Levitt Commission recommended at pages 27-28 and Recommendations #4 and #5 that the *Judges Act* (ss. 43(1) and (2)) be amended accordingly.

The Government of the day accepted Recommendations #4 and #5 of the Levitt Commission and in December 2012 ss.43(1) of the *Judges Act* was amended. It now reads:

43. (1) If a supernumerary judge, before becoming a supernumerary judge, held the office of chief justice, senior associate chief justice or associate chief justice, **or served in the position of senior judge, as defined in subsection 29(6), of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of 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 or

position previously held by him or her of chief justice, senior associate chief justice, associate chief justice or senior judge.

MY PROPER JUDICIAL ANNUITY

After the legislation was FINALLY amended in December 2012 to correct the drafting oversight in 2004, I requested the Office of the Commissioner for Federal Judicial Affairs to adjust my judicial annuity to be equal to two-thirds of the salary annexed to the position of Senior Judge at the time of my resignation, i.e., May 1, 2012.

Although the Commissioner of FJA was sympathetic to my request in all of these circumstances described above, his Office took the position (in February 2013) that it was unable to make the requested adjustment, by reason that the December 2012 amendment did not explicitly state that it was retroactive. The Commissioner took the view that either an amended Order-in-Council was required, or a further, explicitly retroactive amendment to ss. 43(1) of the *Judges Act* was required. The suggestion was that I contact the Minister's office.

I wrote a detailed letter to Minister Nicholson on June 26, 2013, and a similar letter to his successor, Minister MacKay on July 16, 2013.

By letter of November 26, 2013 the Minister replied that a statutory amendment would require the support of his Cabinet colleagues, and that he would ask his officials to undertake discussions in that regard.

I wrote the Minister's office on five separate occasions in 2014 and once in early 2015, requesting an update. I received responses from the Minister in two letters dated September 16, 2014 and April 20, 2015, each letter stating "the matter remains under consideration".

CONCLUSION

In my discussions with the Office of the Commissioner for FJA in early 2013, the Commissioner seemed to agree that I ought to be receiving an annuity based on the higher salary of Senior Judge; however the Commissioner takes the position that he is unable to correct my annuity because the December 2012 amendment to ss. 43(1) was not made expressly retroactive to the date of the original drafting error, or to the date of my retirement. (It is a fact that there is no other person, other than the writer who is affected by the 2004 drafting error from 2004 to the date of correction in December 2012.)

At the time I stepped down as Senior Judge in December 2007 after serving in that position for eleven years, rather than take full retirement, I elected to serve as a supernumerary judge for a few years. At that time (December 2007) I had entitlement to an annuity based on the salary of a senior judge (and had been making contributions towards that annuity, contributions calculated on the higher salary of senior judge). Yet by the wording of the present Order-in-Council P.C. 2012-628, I am being told that I became "disentitled" to that vested annuity by serving as a supernumerary judge for a few years! This is illogical and unjust.

If an expressly retroactive provision is required then so be it. The present ss. 43(1) ought to be retroactive to the date of the original drafting error in 2004, or, at a minimum to April 1, 2012, which is the effective date of other changes included in the December 2012 amending legislation.

I am being unjustly and unfairly denied my proper judicial annuity. The reality is that I had an earned or vested annuity at the higher rate more than eight years ago and I ought to be receiving it now in my retirement years.

I respectfully request that this Commission recommend to the Government of Canada that this injustice be remedied.

RESPECTFULLY SUBMITTED

HON. J.E. (TED) RICHARD
FEBRUARY 2016