



Citation: *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 5

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *PENSION BENEFITS ACT*, S.N.B. 1987, c P-5.1

Date: 2019-04-04
Docket: PE-001-2018

BETWEEN:

**Fredericton Police Association, Local 911 United Brotherhood
of Carpenters and Joiners of America and Applicant 2,
Fredericton Fire Fighters Association, International Association
of Fire Fighters, Local 1053 and Applicant 4,**

Applicants,

-and-

Superintendent of Pensions and The City of Fredericton,

Respondents.

DECISION

Restriction on publication: This Decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c R-10.6.

PANEL: Judith Keating, Q.C., Chair of the Tribunal
Mélanie McGrath, Member of the Tribunal

DATE OF HEARING: March 19, 2019

WRITTEN REASONS: April 4, 2019

APPEARANCES: Sean McManus for the Appellants
Jessica Bungay for the City of Fredericton
Michel Boudreau for the Superintendent of Pensions

I. DECISION

1. The City of Fredericton's motion to obtain a copy of Brendan George's file is granted with the specifications set out below. The City of Fredericton's motion for leave to examine for discovery Brendan George is denied.

II. OVERVIEW

2. These proceedings involve an appeal by the Appellants of the Superintendent of Pensions' July 12, 2018 decision. On March 4, 2019, the City of Fredericton [City] filed a pre-hearing motion seeking the following relief:
 - a) That the Appellants provide a copy of the report prepared by their expert no later than April 15, 2019;
 - b) That the Appellants provide a copy of their expert's complete file, including, but not limited to, all correspondence between the Appellant and the expert witness, all documentation provided to the expert by the Appellants, all documentation reviewed by the expert in preparing his/her report, and all draft reports;
 - c) That the Respondents obtain permission to conduct an examination for discovery of the Appellants' expert and that such examination take place no later than April 30, 2019;
 - d) That the Appellants provide a copy of their *Statement of Position* in relation to the hearing of the appeal scheduled to commence on June 12, 2019 no later than April 30, 2019.
3. It is no longer necessary for us to deal with the City's request for deadlines as set out in a) and d) above. In our decision referenced as *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 4, we adjourned the June 2019 hearing dates and set a new timetable and filing deadlines for the appeal proceedings.
4. On March 19, 2019, we heard three motions: (1) the within motion; (2) the Appellants' motion for production of documents by the City; and (3) the City's motion challenging the Tribunal's jurisdiction.
5. This decision addresses the City's motion in relation to the Appellants' expert witness. At the hearing of the motion, we accepted into evidence the *Affidavit* of Mrs. B. Counsel for the Appellants also advised that Brendan George is the actuary they have retained to provide an expert report and expert testimony.

III. ISSUES

6. The remaining two issues that we must determine on this motion are:

- a) Should the Appellants be ordered to provide a copy of Brendan George's complete file, including, but not limited to, all correspondence between the Appellant and Mr. George, all documentation provided to Mr. George by the Appellants, all documentation reviewed by Mr. George in preparing his report, and all draft reports?
- b) Should the City be granted leave to examine for discovery Brendan George?

IV. ANALYSIS

A. PRODUCTION OF EXPERT'S FILE

Positions of the Parties

7. The City contends that the crux of the Appellants' case will be established through their expert, Brendan George. Thus, Mr. George's evidence is germane to the basis of the appeal. The City submits that the Appellants should produce Brendan George's complete file because it would be inequitable to require it to proceed to the hearing without the benefit of this file.
8. The Appellants oppose the City's motion on the basis that neither the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30 [FCSC Act] nor the Tribunal's *Rules of Procedure* grant the Tribunal the authority to order the Appellants to produce their expert's file.
9. The Superintendent does not take a position on this motion.

Analysis

(i) Jurisdiction

10. The Appellants contend the Tribunal does not have the authority to order them to produce a copy of their expert's file to the City. What is sought here by the City is an order compelling the Appellants to produce their expert's file; it is not an order compelling the expert, Brendan George, to produce his file.
11. We find there is no merit to the Appellants' argument. A detailed analysis of this jurisdictional issue is not required. In *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 4, we determined that the Tribunal has the implicit authority to order the pre-hearing production of documents by parties to a proceeding. We found the Tribunal also has the explicit authority by virtue of rule 1.3(2) of its *Rules of Procedure* to devise procedures for the pre-hearing production of documents by a party.

(ii) Should Brendan George's Complete File be Produced

12. The City relies on *Stone v Sharp*, 2008 NBCA 55, *MacKenzie v Davis*, 2008 NBCA 85, and *Browne*

(Litigation guardian of) v Lavery, 2002 CarswellOnt 496 (SC) in support of its request for production of Brendan George's complete file. The caselaw provided by the City is not applicable to these administrative proceedings as it deals with requests for production of experts' files in civil litigation under the *Rules of Court* of New Brunswick and the Ontario *Rules of Civil Procedure*.

13. In *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBF CST 4 at paragraphs 57 to 68, we discussed the test applicable in considering a pre-hearing request for production of documents by a party. We concluded that a mid to high level of procedural fairness is required in these proceedings and that, as such, the parties are entitled to the information necessary to fairly present their case.
14. While the decision of *Browne (Litigation guardian of) v Lavery*, 2002 CarswellOnt 496 (SC) is not applicable to these proceedings, we find Justice Ferguson's comments at paragraph 58 regarding the purpose of production of an expert's file useful:

[58] The Supreme Court in Stone said that the purpose of the production is to permit opposing counsel to test the expert's opinions. It contemplated that the content of a report might contradict the opinion given in testimony. So might other information in the expert's possession. An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel -- for instance, by removing damaging content.

15. It is probable Brendan George's file likely contains information necessary to the City's ability to fairly present its case. We accept the City's contention that the crux of the Appellants' case will be established through Mr. George. As such, it would be inequitable to require the City to proceed to the hearing without the benefit of this file.
16. We turn now to what should be produced from Mr. George's file.
17. Rule 10.6(2)(d) of the Tribunal's *Rules of Procedure* requires that the expert's report list any documents that the expert will refer to.
18. Subsection 50(2) of the *Evidence Act*, R.S.N.B. 1973, c E-11 stipulates that in order to be admissible at a hearing, the party offering the report or finding "has also afforded the adverse party a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based". The *Evidence Act* applies to administrative tribunals given the definition of "court" in section 1 which includes a "tribunal". We conclude that the Appellants must comply with subsection 50(2) of *Evidence Act* if they want to introduce the report of Brendan George into evidence at the merits hearing.

19. We do not find it appropriate for the Appellants to produce draft reports prepared by Brendan George. Mr. George's final report detailing his opinion, when it is eventually produced, will not be based on his draft reports, but rather on data, the instructing letter, and his research. The production of an expert's draft reports was refused in *Browne (Litigation guardian of) v Lavery*, 2002 CarswellOnt 496 (SC), *Cheaney v Peel Memorial Hospital* (1990), 73 O.R. (2d) 794, and *Kelly v Kelly* (1990), 42 C.P.C. (2d) 181.
20. We conclude that the Appellants' should produce the following from Brendan George's file: (1) all correspondence between the Appellants and Brendan George; (2) all documents provided to Brendan George by the Appellants; (3) all documents, including research, reviewed by Brendan George in preparing his report, whether relied upon or not.
21. On a final note, should the City decide to retain an expert witness, they will also be required to produce the contents of their expert's file to the Appellants as detailed in this decision.

B. EXAMINATION FOR DISCOVERY OF EXPERT WITNESS

Positions of the Parties

22. The City contends that it would be inequitable to require it to proceed to the merits hearing without having an examination for discovery the Appellants' expert witness, Brendan George.
23. The Appellants contend that absent legislative authority, the Tribunal cannot make orders binding third parties. According to the Appellants, the Tribunal does not have the jurisdiction to order an examination for discovery of an expert witness as this is not authorized by the *Financial and Consumer Services Commission Act* nor the *Rules of Procedure*. The Appellants further contend that the requirements of procedural fairness do not require an examination for discovery of Brendan George as he will provide a written report and testify at the merits hearing. The City will also have the opportunity to cross-examine Mr. George at the hearing.
24. The Superintendent does not take a position on this motion.

Analysis

25. As a starting point, neither the *FCSC Act*, the *Pension Benefits Act*, nor the Tribunal's *Rules of Procedure* allow examinations for discovery, either of the parties or of non-parties.
26. The City relies on *Stewart v Cam-Steam Ltd.*, 1998 CarswellNB 368 (Q.B.), *Fougere v Acadia Drug (1969) Ltd.*, 1993 CarswellNB 54 (Q.B.), *Jardine Lloyd Thompson Canada Inc. v Western Oil Sands Inc.*, 2006 ABCA 18 and *Bishop, Re*, 2005 NSUARB 122 in support of its request for an examination for discovery of Brendan George. The first two decisions are not applicable to these administrative proceedings as they deal with rule 32.10 of the *Rules of Court*, which governs the examination for discovery of non-parties with leave of the Court of Queen's Bench.

27. As for the *Jardine* decision, it too can be distinguished on the basis that it deals with the authority to order an examination for discovery under article 27 of the *Model Law on International Commercial Arbitration*.
28. As for the *Bishop* decision, that was a matter before the Nova Scotia Utility and Review Board, and is not binding on the Tribunal. We do, however, find this decision provides a useful analysis of an administrative tribunal's authority to govern its practice and procedure and the distinction between procedural and substantive law.
29. In *Bishop*, the Nova Scotia Utility and Review Board concluded it had authority, pursuant to its legislative authority to control its practice and procedure, to order the examination for discovery of a non-party. The Board concluded that ordering discovery is a matter of practice and procedure relating principally to prehearing disclosure. In rejecting the Respondents' argument that examinations for discovery were substantive law, the Board stated at paragraph 26 that: "[d]iscovery does not operate to increase the jurisdiction of the Board or to create, terminate or extend rights which are not procedural in nature. It simply extends prehearing disclosure consistent with practices already adopted by the Board." The Board, in closing, cautioned at paragraph 30 that it would be cautious in permitting discovery.
30. The Nova Scotia Court of Appeal upheld the Board's decision and agreed that the examination for discovery of a non-party came within the Board's jurisdiction to control its practice and procedure [*Bishop v AGNS*, 2006 NSCA 114].
31. Turning to the within matter, the Tribunal Chair also has the broad authority to establish the practices and procedures of the Tribunal pursuant to subsection 38.1(1) of the *FCSC Act*. In addition, the *Rules of Procedure* grant the Tribunal broad discretion to tailor its processes to the matter before it. As discussed in *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBF CST 4, the *Rules* were drafted in broad strokes given the Tribunal's broad mandate and mechanisms were inserted in the *Rules* to provide the Tribunal flexibility in determining the appropriate processes. For example, rule 1.2(3) stipulates that the *Rules of Procedure* "shall be broadly interpreted to ensure the fair and equitable determination of each matter". Rule 1.3(2) provides: "[w]here procedures are not provided for in these Rules, the Tribunal may identify any procedure it deems necessary to ensure the fair and equitable determination of the matter before it."
32. In our view, section 38.1(1) of the *FCSC Act* and rule 1.3(2) grant the Tribunal the authority to grant leave to a party to conduct an examination for discovery of an expert witness if this is necessary to ensure the fair and equitable determination of the matter before it.
33. The issue is whether the examination for discovery of Mr. George is necessary to ensure the fair and equitable determination of the appeal proceedings. In our view, it is not. The City will have Mr. George's report, his complete file as detailed above, and will have the opportunity to cross-examine

him at the merits hearing. This will ensure the City knows the case against it and has the opportunity to respond.

V. ORDER

34. The City's motion to compel the Appellants to produce Brendan George's complete file is granted in part. The Appellants shall produce to the Respondents, by no later than June 14, 2019, a copy of Brendan George's file which shall include (1) all correspondence between the Appellants or their legal counsel and Brendan George; (2) all documents provided to Brendan George by the Appellants or their legal counsel; and (3) all documents, including research, reviewed by Brendan George in preparing his report, whether relied upon or not. The Appellants are not required to produce any draft reports prepared by Brendan George.

35. Should the City decide to retain an expert, this same order shall apply to them.

36. The City's motion seeking leave to examine for discovery Brendan George is denied.

DATED this 4th day of April, 2019.

Judith Keating, Q.C.

Judith Keating, Q.C. Tribunal Chair

Mélanie McGrath

Mélanie McGrath, Tribunal Member