



Citation: *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 6

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 [City] motion is granted in part as set out below. In addition, the Appellants are granted leave to amend paragraph 23 of the Appendices to the *Notices of Appeal*.

II. OVERVIEW

2. These proceedings involve an appeal of the Superintendent of Pensions' July 12, 2018 decision. On February 15, 2019, the City filed a pre-hearing motion challenging the Tribunal's jurisdiction to hear certain grounds of appeal set out in the *Notices of Appeal* and to order certain relief sought in the *Notices of Appeal*.
3. On March 19, 2019, we heard three motions: (1) the within motion; (2) the City's motion seeking orders in relation to the Appellants' expert witness; and (3) the Appellants' motion seeking production of documents by the City.
4. This decision deals with the City's jurisdiction motion. At the hearing of the motion, we accepted into evidence the Affidavit of Mrs. B.

III. ISSUES

5. We must determine whether the Tribunal has the jurisdiction to hear the grounds of appeal set out in paragraphs 20(c), (d), (e), (f) and (g.1) of the Appendices to the *Notices of Appeal*.
6. We must also determine whether we have the authority to order the relief sought in paragraphs 21(a), (b), (c), (e), 22 and 23 of the Appendices to the *Notices of Appeal*.
7. Finally, we must determine whether the Appellants should be granted leave to amend paragraph 23 of the Appendices to their *Notices of Appeal* to seek an order from the Tribunal that a full investigation be conducted by the Superintendent of Pensions' office with appropriate directions from the Tribunal.

IV. ANALYSIS

A. Jurisdiction over Grounds of Appeal

Positions of the Parties

8. The City submits that as an administrative decision-maker, the Tribunal cannot exceed the powers it is granted by statute. Further and according to the City, a complaint to the Superintendent of Pension, and the related appeal of the decision of that complaint, must be connected to a breach of the *Pension Benefits Act*, S.N.B. 1987, c P-5.1 [*Pension Benefits Act*]. The City contends that the grounds of appeal set out in paragraphs 20(c), (d), (e), (f) and (g.1) of the Appendices of the *Notices of Appeal* do not relate to a breach of the *Pensions Benefits Act* and are therefore beyond the jurisdiction of the Superintendent of Pensions and the Tribunal.

9. The Appellants are of the view that the Tribunal has a wide jurisdiction in administering its powers under the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30 [FCSC Act]. They also submit that the Superintendent of Pensions has a wide jurisdiction in administering her powers under the *Pension Benefits Act*. According to the Appellants, the grounds of appeal set out in paragraphs 20(c), (e), (f), 20(g.1) of the Appendices of the *Notices of Appeal* clearly come within the Tribunal's jurisdiction. As for paragraph 20(d), the Appellants admit that the Superintendent and the Tribunal do not have the authority to direct that the City engage an independent actuarial firm.
10. The Superintendent of Pensions submits that the grounds of appeal should not be struck given the long history of the dispute between the City and the Appellants surrounding the Police and Firefighters Pension Plans. The Superintendent adds that paragraphs 72(a), (b), (c), (f) and (g) require either a lack of compliance with or a violation of the *Pension Benefits Act* or its regulations before the Superintendent can intervene and order remedial action. However, according to the Superintendent, the failure to comply with or a violation of the *Pension Benefits Act* is not required for paragraphs 72(2)(d), (e), and (h).

Analysis

11. It is a matter of law that any action taken by an administrative decision-maker which exceeds the decision-maker's statutory grant of authority is without jurisdiction: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4.
12. The contested grounds of appeal, for which the City contends the Tribunal does not have jurisdiction, are the following:

20. The Appellants rely on the following reasons for the Appeal:

(c) Without limiting the generality of the foregoing, the Superintendent did not adequately investigate the basis for the increased discount rate, or Mercer's unfounded conclusion that the CRA would not have approved the higher level of contributions by members of the Police Union and Fire Fighters Association, levels that had been in place for many years and which are supported by language in the collective agreements between the City and the two unions.

(d) The Superintendent incorrectly and unreasonably failed to ensure that the City engaged an independent actuarial firm to advise the New Plan to ensure that the rights of members of the New Plan were adequately protected. Mercer, the same actuarial firm whose valuations were rejected by the Tribunal in its 2016 decision, was clearly acting only in the interests of the City, and were made to justify the City's diversion of pension assets from the New Plan to the Old Plan, without regard to the rights of members of the New Plan.

(e) The Superintendent incorrectly and unreasonably applied the law concerning the fiduciary and statutory duties of the City and its representatives of the Superannuation Board, as set out in the *Pension Benefits Act*, where such individuals had obligations to the New Plan and/or the Old Plan and/or the City.

(f) The Superintendent incorrectly and unreasonably failed to investigate the alleged complaints of conflict of interest and breach of statutory duties by the City and its members on the Superannuation Board.

(g) The Superintendent incorrectly and unreasonably applied the law pertaining to the City's unilateral decision to abolish the Superannuation Board, which was done to circumvent employee members of the Superannuation Board who were opposed to the City's attempts to unilaterally reduce contributions to the New Plan in order to divert additional funds to the Old Plan. The Superannuation Board's refusal to approve the Mercer valuations were relevant to the Superintendent's determination on August 28, 2017 to prevent the City from taking further action to refund contributions or to decrease employee contributions.

13. As a starting point, the Tribunal's authority to hear an appeal of a decision of the Superintendent of Pensions is set out in section 73 of the *Pension Benefits Act*. That section provides a broad right of appeal as follows:

73(1) If the Superintendent has made an order or decision under this Act or the regulations, the person against whom the order or decision is made or who is affected by the order or decision may appeal the order or decision to the Tribunal within 30 days after the date of the order or decision.

14. Section 73 does not limit the right to appeal to certain grounds of appeal. All that is required is an order or decision of the Superintendent. Standing to appeal is limited to a person against whom the decision is made or who is affected by the order or decision. These criteria are satisfied in the within matter.

15. Grounds of appeal are allegations as to why the Superintendent of Pensions' decision is wrong. We disagree with the City's contention that the grounds of appeal must be connected to a breach of the *Pension Benefits Act*. The authority of the Superintendent of Pensions to make decisions under the *Pension Benefits Act* does not determine rights of appeal under section 73 of the *Pension Benefits Act*.

16. If the City's contention were true, the Superintendent could make *ultra vires* decisions under the *Pension Benefits Act*, and so long as these did not involve a breach of the *Pension Benefits Act* by participants under the pensions scheme, that decision could not be appealed to the Tribunal. There is no such restriction of the appeal rights granted in section 73. In our view, the City's position would severely curtail the broad appeal rights set out in section 73 of the *Pension Benefits Act*.

17. In our view, the City is confounding the grounds of appeal with the relief which may be ordered under section 72 of the *Pension Benefits Act*. As is discussed in the section dealing with the relief sought, there must be a breach or non-compliance with the *Pension Benefits Act* in order for the Superintendent and the Tribunal to order certain remedial action under section 72 of the *Pension Benefits Act*. The Superintendent's ability to order remedial action under the *Pension Benefits Act* and the right to appeal the Superintendent's decision to the Tribunal are two very separate matters.
18. In our view, further evidence is required at the merits hearing to determine jurisdiction over the grounds of appeal. Suffice it to say that we are not satisfied at this pre-hearing motion stage, that there is clearly no authority for these allegations.

B. Relief Requested in the *Notices of Appeal*

Positions of the Parties

19. The City argues that the Tribunal's remedial authority is limited to section 76 of the *Pension Benefits Act*. According to the City, when the Tribunal substitutes its decision for that of the Superintendent pursuant to paragraph 76(1)(b) of the *Pension Benefits Act*, it is limited to rendering a decision that is in compliance with the remedial authority of the Superintendent under section 72 of the *Pension Benefits Act*. According to the City, the Tribunal does not have the authority to grant the relief sought in paragraphs 21(a), (b), (c), (e), 22 and 23 of the Appendices to the *Notices of Appeal* as set out below:

21. The Appellants request an order quashing the decisions of the Superintendent and directing the Superintendent to:

(a) Order the City to re-establish the Superannuation Board.

(b) Order the City to conduct new valuations for 2013, 2014, 2015, 2016 and 2017, with an independent actuarial firm to be selected by members of the New Plan and/or members of the reinstated Superannuation Board.

(c) Order the City to apply to the CRA for solvency exemptions on behalf of the New Plan, and to not finalize any valuations until the CRA has made a determination.

(e) Order the City to reimburse the New Plan for all contributions removed from the New Plan as a result of its reliance on the Mercer valuations, and to compensate individual Plan members for any losses incurred as a result of the City's improper actions, including any costs incurred by employees under the Income Tax Act.

22. The Appellants further request compensation for any and all losses incurred by the New Plan and/or individual New Plan members, and its costs of this Appeal, and such further and other relief as the Tribunal deems appropriate.

23. The Appellants further request that the Tribunal order a full investigation into the actions of the City, City managers and City appointed members of the Superannuation Board, to determine if there were violations of the Pension Benefits Act, and that such investigation be done by an individual or individuals at arm's length from the Superintendent, as the Superintendent has already pre-judged the complaints.

20. The Appellants agree that the Tribunal's remedial authority when substituting its decision is limited to what the Superintendent of Pensions could order under section 72 of the *Pension Benefits Act*. The Appellants contend the Tribunal has the jurisdiction to order the relief sought in paragraph 21(a) and portions of paragraph 21(b) but concede that the Tribunal does not have the jurisdiction to order the relief sought in paragraphs 21 (c), (e), 22 and 23 of the Appendices to the *Notices of Appeal*.

21. The Superintendent essentially espouses the position of the Appellants.

Analysis

22. Section 76 of the *Pension Benefits Act* sets out the Tribunal's authority to dispose of an appeal:

76(1) If a matter has been appealed to the Tribunal under section 73, after hearing and considering the matter the Tribunal may issue an order

(a) affirming the decision or order of the Superintendent,

(b) vacating the decision or order of the Superintendent and substituting the decision or order that, in its opinion, the Superintendent should have made, or

(c) remitting the matter to the Superintendent for further investigation, with such directions as the Tribunal considers appropriate,

and in every case the Tribunal shall in writing so advise all parties to the proceeding of its disposition and the reasons for the disposition.

23. We agree with the parties' that if the Tribunal decides to substitute its decision under paragraph 76(1)(b), it can only make a decision which the Superintendent should have made. In other words, the Tribunal can't make an order the Superintendent lacked the jurisdiction to make.

24. We also agree that section 72 of the *Pension Benefits Act* sets out the remedial action that may be ordered by the Superintendent of Pensions and therefore the Tribunal, when it substitutes its decision to that of the Superintendent of Pensions. Section 72 states:

72(1) The Superintendent, in the circumstances mentioned in subsection (2), by a written order may require an administrator, or any other person whom the Superintendent considers appropriate in the circumstances, to take or to refrain from

taking any action in respect of a pension plan, a pension fund or a retirement savings arrangement prescribed for the purposes of subparagraph 36(1)(a)(ii).

72(2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,

(a) that the pension plan, pension fund or prescribed retirement savings arrangement is not being administered in accordance with this Act, the regulations or the pension plan,

(b) that the pension plan or prescribed retirement savings arrangement does not comply with this Act and the regulations,

(c) that the administrator of the pension plan, the employer or any other person is violating a provision of this Act or the regulations,

(c.1) that the administrator of the pension plan, the employer or any other person is violating a provision of the multilateral agreement entered into under section 93.3, in the case of a pension plan that is subject to that agreement,

(d) that the assumptions or methods used in the preparation of a report required under this Act or the regulations in respect of a pension plan are inappropriate for a pension plan,

(e) that the assumptions or methods used in the preparation of a report required under this Act or the regulations in respect of a pension plan do not accord with generally accepted actuarial principles,

(f) that a report submitted in respect of a pension plan does not meet the requirements and qualifications of this Act, the regulations or the pension plan,

(g) that a report or form submitted in respect of a prescribed retirement savings arrangement does not meet the requirements and qualifications of this Act, the regulations or the prescribed retirement savings arrangement, or

(h) that there are or are likely to be insufficient funds available to pay the pensions and benefits under the plan.

72(3) In an order under this section, the Superintendent may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order.

72(4) An order under paragraph (2)(d), (e) or (f) may include, but is not limited to, requiring the preparation of a new report and specifying the assumptions or methods or both that shall be used in the preparation of the new report.

25. As a starting point, it is subsection 72(1) that grants the Superintendent the authority to make remedial orders. However, the Superintendent can only exercise this authority upon reasonable and probable grounds of the existence of one of the circumstances set out in subsection 72(2). If so satisfied, the Superintendent has a very broad authority to order an administrator or any other person to take or refrain from taking any action in respect of a pension plan pursuant to subsection 72(1).
26. The circumstances set out in subsection 72(2) do not deal with relief or remedies, but rather with conduct or situations, which, if there are reasonable and probable grounds to believe exist or occurred, trigger the Superintendent's ability to take remedial action under subsection 72(1). In our view, it is therefore the allegations and grounds of appeal in the *Notices of Appeal*, which set out conduct or situations which must come within the circumstances set out in subsection 72(2).
27. The City argues that there must be a breach of the *Pension Benefits Act* in order for the Superintendent and therefore the Tribunal to exercise the remedial authority found in section 72 of the *Pension Benefits Act*.
28. The Superintendent of Pensions' position is more qualified. She contends that paragraphs 72(a), (b), (c), (f) and (g) require either a lack of compliance with or a violation of the *Pension Benefits Act* or its regulations before the Superintendent can intervene and order remedial action. We agree with the Superintendent of Pensions' position on that point. Paragraphs 72(2)(a), (b), (c), (f) and (g) require either that something is "not administered in accordance with this Act", does not comply with this Act and the regulations", that someone is "violating a provision of this Act or the regulations", or that something does not meet the "requirements and qualifications of this Act, the regulations".
29. The Superintendent argues that the failure to comply with or a violation of the *Pension Benefits Act* is not required for paragraphs 72(2)(d), (e), and (h). Again, we agree with the Superintendent of Pensions' position on that point. These paragraphs require different findings and circumstances. Paragraph 72(2)(d) requires that the assumptions or methods used in an actuarial valuation report are inappropriate for a pension plan. Paragraph 72(2)(e) requires that the assumptions or methods used in the preparation of a report do not accord with generally accepted actuarial principles. Finally, under paragraph 72(2)(h), the Superintendent can make an order if there are likely to be insufficient funds available to pay the pensions and benefits under the plan.
30. Without commenting on the merits of the appeal, we find the contested grounds of relief set out in paragraphs 20(c), (d), (e), (f) and (g.1) of the Appendices to the *Notices of Appeal* could potentially fall within the circumstances set out in subsection 72(2) of the *Pension Benefits Act*. The grounds in paragraph 20(d) could potentially relate to paragraphs 72(2)(a), (c), (d), (e) and (f) of the *Pension Benefits Act*. The allegations in paragraphs 20 (e) and (f) could potentially relate to paragraphs 72(2)(a), (c), of the *Pension Benefits Act*. Finally, paragraph 20(g.1) could potentially relate to paragraph 72(2)(h) of the *Pension Benefits Act*.

31. In our view, the Superintendent's authority to order « an administrator, or any other person whom the Superintendent considers appropriate in the circumstances, to take or to refrain from taking any action in respect of a pension plan » could potentially include the contested relief set out in paragraphs 21(a), (b), and (c) of the Appendices to the *Notices of Appeal*. In those paragraphs, the Appellants seek orders that the City: (a) re-establish the Superannuation Board; (b) conduct new valuations for 2013, 2014, 2015, 2016 and 2017 with an independent actuarial firm to be selected by members of the New Plan and/or members of the reinstated Superannuation Board; and (c) apply to the CRA for solvency exemptions on behalf of the New Plan and do not finalize any valuations until the CRA has made a determination. Again, we are of the view that the hearing on the merits is required to fully canvass these jurisdiction issues.
32. As for paragraphs 21(e) and 22 of the Appendices of the *Notices of Appeal*, we agree that the Superintendent does not have the jurisdiction to order restitution, damages or costs [*Pension Law*, 2d (Toronto: Irwin Law, 2013) at 149]. While the Tribunal does have the jurisdiction to order costs pursuant to section 44 of the *Financial and Consumer Services Commission Act*, this authority is limited to ordering the payment of hearing and investigation costs incurred by the Commission. As a result, the Tribunal cannot order costs in favour of the Appellants in these appeal proceedings.
33. In addition, we are of the view that, in substituting its decision, the Tribunal's authority is not limited to the remedial authority in section 72 of the *PBA*. The wording of paragraph 76(1)(b) does not impose this limit. Rather, it states that the Tribunal can substitute the decision or order that, in its opinion, "the Superintendent should have made".
34. The City also argues that the Superintendent and therefore the Tribunal does not have the jurisdiction to order a full investigation by an arm's length investigator into the actions of the City, City managers and City appointed members of the Superannuation Board as requested in paragraph 23 of the Appendices to the *Notices of Appeal*. The City contends that the Tribunal's jurisdiction to order an investigation as set out in paragraph 76(1)c) of the *Pension Benefits Act* is limited to ordering an investigation by the Superintendent. The Appellants and the Superintendent agree with this position.
35. In our view, this view is too restrictive. Paragraph 76(1)c) of the *Pension Benefits Act* states:
- 76(1)** If a matter has been appealed to the Tribunal under section 73, after hearing and considering the matter the Tribunal may issue an order
- [...]
- c) remitting the matter to the Superintendent for further investigation, with such directions as the Tribunal considers appropriate,
36. Under the *Pension Benefits Act*, the Superintendent may make an order under section 78.3 for the production of information, books, records or documents as against an administrator, a former administrator, and an employer.

37. In our view, the Superintendent also has the authority, under section 78.31, to request that the Financial and Consumer Services Commission appoint an investigator to conduct an investigation for the administration of the *Pension Benefits Act* or the regulations. Section 78.31 reads:

78.31(1) The Financial and Consumer Services Commission may, by order, appoint a person as an investigator to make any investigation that the Financial and Consumer Services Commission considers expedient

(a) for the administration of this Act or the regulations, or

(b) to assist in the administration of similar legislation of another jurisdiction.

78.31(2) In its order, the Financial and Consumer Services Commission shall specify the scope of an investigation to be carried out under subsection (1).

2016, c.36, s.11

38. “Investigator”, as defined in section 1 of the *Pension Benefits Act*, “means a person appointed as an investigator under section 78.31”. This definition does not limit the investigator to the Superintendent nor her staff. Rather, an investigator can be a “person”, which can include an arm’s length investigator.

39. We are not prepared to strike paragraph 23 of the *Notices of Appeal* without the benefit of full arguments at the merits hearing surrounding the applicability of section 78.31 of the *Pension Benefits Act*.

C. Leave to Amend Paragraph 23 of the *Notices of Appeal*

40. The Appellants have also requested leave to amend paragraph 23 to request an order from the Tribunal that a full investigation be conducted by the Superintendent’s office with appropriate directions. The Superintendent does not oppose this request. The City also does not oppose this request, other than to request that the time allowed to amend the *Notices of Appeal* be short given the rapidly approaching hearing dates.

41. In our decision of *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 4, we cancelled the June 2019 hearing dates and adjourned this hearing to the week of September 23-27, 2019. We are therefore of the view that it is appropriate to grant leave to amend paragraph 23 of the *Notices of Appeal* as there will be no prejudice to the Respondents.

V. ORDER

42. Paragraphs 21(e) and 22 of the Appendices to the *Notices of Appeal* are struck.

43. The Appellants are granted leave to amend paragraph 23 of the Appendices of their *Notices of Appeal* and shall have 7 days from the date of issuance of this decision to file their amended *Notices of Appeal*.

DATED this 4th day of April, 2019.

Judith Keating, Q.C.

Judith Keating, Q.C. Tribunal Chair

Mélanie McGrath

Mélanie McGrath, Tribunal Member