

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

**PROFESSIONAL INSTITUTE OF THE PUBLIC
SERVICE OF CANADA**

Plaintiff

and

PROVINCE OF NEW BRUNSWICK

Defendant

**REPLY
(Form 27B)**

1. Except as expressly admitted, the Plaintiff denies the allegations contained in the Statement of Defence and puts the Defendant to strict proof thereof. The Plaintiff repeats and relies upon the allegations in the Statement of Claim.
2. The Plaintiff admits the allegations contained in paragraphs 101, 102, 122, 123 and 126 of the Statement of Defence.
3. The Plaintiff has no knowledge of the facts alleged in paragraphs 36(c), 62, 63, 82, 83 84 and 136 of the Statement of Defence.
4. With regard to the various paragraphs in the Statement of Defence which purport to describe the provisions of the *Public Service Superannuation Act* ("PSSA") and the

Public Service Shared Risk Plan (“PSSRP”), the Plaintiff relies on the provisions of the *PSSA* and the PSSRP and denies the Defendant’s overall characterization of them.

5. The Plaintiff additionally states, regarding the Statement of Defence:

Differences between PSSA Plan and the PSSRP

6. With regard to paragraphs 19, 20, 21 and 77 to 87, the Plaintiff states as follows:
 - (a) Prior to its repeal, section 10(1) and 10.1 of the *PSSA* required the defined benefit calculated in accordance with the formula set out in section 7 to be paid to eligible employees and did not provide any mechanism for reducing that benefit in the event that the funding of the *PSSA* plan was insufficient. In pension terminology, these types of benefits are generally referred to as guaranteed benefits, particularly where the employer is a government entity like the government of New Brunswick, which is highly unlikely to become insolvent or to be unable to meet its funding obligations.
 - (b) The Province was required to pay the current service cost as set out in paragraph 78, but the Plaintiff denies that this was the Province’s only funding obligation.
 - (c) Contrary to the allegations in paragraphs 76 and 79, given the scheme of the *PSSA* as a whole, the Board of Management did not have the discretion to refuse to ask the Minister of Finance to make payments out of the Consolidated Fund where the pension trust fund was insufficient to make the payments required by the legislation and thus the Province was ultimately responsible for ensuring pensions were paid.

(d) To the Plaintiff's knowledge, prior to the repeal of the *PSSA*, there were no instances in which the pension trust fund was insufficient to make payments required by the legislation or where the Board of Management failed or refused to make a request to the Minister of Finance to make payments out of the Consolidated Fund.

Plan Changes were Detrimental

7. With regard to paragraphs 22(a) and (b) and 56, the Plaintiff states that the detrimental nature of the changes to the pension plan to the Plaintiffs, among others, are accurately described in paragraphs 28, 29, 33, 35, 36, 39, 44, 45, 46, and 47 of the Statement of Claim and in the 2014 Report of the Auditor General of New Brunswick ("2014 Report"). The 2014 Report contains many examples of highly detrimental changes for employees in a variety of different circumstances. The Plaintiff further states that the Office Auditor General of New Brunswick is highly respected and performs an important watchdog function regarding the financial operations of the province of New Brunswick and that the Defendant has provided no basis for questioning the methodology in the 2014 Report.

8. With regard to paragraphs 22(g)(i), 22(h)(iv), 33(c), 55(d) and 73(a), the Plaintiff states that the eligibility requirement for an immediate unreduced pension at age 60 under the *PSSA*, namely the completion of five years of pensionable service, was also an eligibility requirement for an immediate unreduced pension at age 65 under the *PSSA*. In pension statements received by members of the *PSSA* prior to January 1, 2014, age 60 was identified as the age for the "Earliest Unreduced Pension". The Defendant has

acknowledged in paragraph 22(h)(iv) that under the PSSRP, the eligibility for an unreduced pension was increased to age 65 for pensionable service from January 1, 2014.

9. Contrary to paragraph 22(g)(ii), the increased pension reduction under the PSSRP from 3% to 5% per year for early retirement, commonly referred to as a “penalty”, is accurately set out at subparagraphs 44 (d) and (e) of the Statement of Claim. This increased penalty for early retirement is also clearly set out at Article 3.1(l) of the Memorandum of Understanding Regarding the Public Service Superannuation Pension Plan dated November 20, 2013 between the Province and various other unions.
10. With regard to paragraph 22(h)(i) and 55(f), while there is protection for benefits accrued to January 1, 2014 under the PSSRP, many of the Plaintiff’s members tend to have their best salary at the end of the career and therefore this protection has a limited impact on the financial value of pensions for members who were in the early to middle stages of their careers on January 1, 2014.
11. With regard to paragraph 22(i)(iii), the Plaintiff denies that the *PSSA* COLA did not provide a benefit increase when the CPI was less than 1%. The Plaintiff states that the *PSSA* COLA deferred and aggregated increases of less than 1% to future years.
12. With regard to paragraphs 168 to 173, the Plaintiff strongly denies that its members pensions are more secure and better protected under the PSSRP than under the *PSSA* Plan. The Plaintiff further states that the commentary by certain selected organizations on the sustainability of the SRP model and/or the merits of a Netherlands pension model are irrelevant to the merits of this action.

Pensions are an Important Part of Province's "Total Rewards" Compensation Package

13. Contrary to paragraph 23(a),(b),(d) and (e), the Plaintiff states the Defendant has repeatedly acknowledged the importance of pensions to its employees as part of their total compensation/rewards package in its own documents and publications, including the fact that pensions are a significant component of compensation for its employees. For example, a document entitled, "Building Tomorrow's Public Service Today", the Corporate Human Resource Plan 2010-2013, states in part that,

"We're improving the communications of our employment offer by developing a comprehensive "Total Rewards" package. We strive to be competitive in rates of pay in line with similar organizations in Atlantic Canada, and offer a range of benefits including pension, dental, health and other insured benefits. By focusing on "Total Rewards", we will ensure that current and potential employees understand the combined value of what we offer...".

Similarly, in a report entitled, "Rebuilding New Brunswick: The Case for Pension Reform" date February 2013, the report states in part at page 7:

[A] good pension is an important component of the compensation package for public servants, and the maintenance of public services is a key consideration for governments in determining whether or not to bear these costs.

14. With regard to paragraph 23(c), the Plaintiff states that it is irrelevant whether other employees have employer sponsored pension plans or how other pension plans compare to the PSSRP.
15. With regard to paragraph 34, the Plaintiff denies that all of the Plaintiff's members would have the additional sources of retirement income listed.

The PSSA Plan

16. With regard to paragraph 74, the Plaintiff states that the large majority of the changes that were made to the *PSSA* Plan throughout the years were to improve benefits for members, and in any event the changes were not of a fundamental nature. The Plaintiff relies upon its submissions at paragraph 15 of the Statement of Claim.

17. With regard to paragraphs 89-99, the Plaintiff states as follows:
 - (a) Even assuming the information set out in these paragraphs is all accurate, which is not admitted, it does not provide a complete or accurate picture of the financial/actuarial position of the *PSSA* Plan including the position of the *PSSA* Plan immediately prior to January 1, 2014 or of the Province's financial position. The information is from selected periods, primarily focused on the time period following the financial crisis of 2008, and is misleading.

 - (b) The Plaintiff denies that it is inequitable for members of certain bargaining units to receive higher benefits than other Plan members because of faster increases in earnings.

 - (c) The Plaintiff denies that it was reasonable for the Province to conclude that the *PSSA* Plan was not sustainable, stable, affordable and equitable particularly when considering reform options such as increasing employee contributions such as was the case in other jurisdictions with similar pension plans.

 - (d) The Plaintiff denies the relevance of these paragraphs and in particular of paragraphs 94, 98 and 99.

No Meaningful Consultation or Bargaining Occurred

18. With regard to paragraph 41(d), the Plaintiff denies that the Task Force acted as representatives of the Province during the Consultative Process and notes that this claim is inconsistent with paragraph 44(b) which appears to claim that the Task Force was not a representative of the Defendant for certain purposes.
19. With regard to paragraph 45, the Plaintiff states that the Province was aware of the view of the Plaintiff and its members about the SRP model because the Plaintiff's representatives communicated its views and the views of its membership about the model to members of the Task Force and representatives of the Province. Despite being made aware of these views, the Task Force and Province did not demonstrate any willingness to address the Plaintiff's concerns or consider any model other than the SRP model.
20. With regard to paragraphs 46(a) and (b), the Plaintiff maintains its allegations at paragraphs 30 and 48 of the Statement of Claim
21. Contrary to paragraphs 46(c) and 150, the Plaintiff states that at a Task Force meeting, it specifically raised the possibility that the members of the Plaintiff be averaged over 20 years rather than the whole contributory periods in order to offset the difference (18% minus 5%) by which their pension is reduced by the PSSRP compared to the other groups who were covered by the PSSRP. However, the Task Force was not willing to consider this.
22. As well, the Plaintiff, in a letter dated June 17, 2015 from the Plaintiff's President, Debi Daviau, to Premier Brian Gallant, made a without prejudice proposal to the Province regarding changes to the Shared Risk Plan, to which no response was received.

23. With regard to paragraphs 108 and 144, the Task Force's call for submissions was issued in approximately March 2011, at which point in time, according to the Defendant, the Task Force's mandate was limited to private sector pension plans. Since none of the Plaintiff's members in New Brunswick were members of private sector or broader public sector plans, there was no reason for the Plaintiff to have made a submission to the Task Force in 2011.
24. With regard to paragraph 109, as set out in paragraphs 18-20 of the Statement of Claim, other unions had members in private sector pension plans which had very different characteristics than the *PSSA*, including that the Plan sponsors were not responsible for unfunded liabilities, the plans were more severely underfunded than the *PSSA* and the plans were subject to bargaining.
25. With regard to paragraphs 113-123, the Plaintiff has no knowledge of the details of the work conducted by the Task Force, particularly since the Task Force did not publish a report (unlike the task forces studying pension plans during a similar time frame in other Canadian jurisdictions). However, if the Task Force did give any serious consideration to any model other than shared risk model, this took place well before the Plaintiff first attended a meeting with the Task Force on approximately October 9, 2012. By this point in time the Task Force was not willing to seriously discuss any pension model for the *PSSA*, other than the shared risk model. At that initial meeting, the representatives of the Plaintiff were told that the meeting was not a bargaining session and that the topic of the meeting was the conversion of the *PSSA* Plan to a shared risk plan. As stated in paragraph 122, by May of 2012, the Province had already accepted the Task Force's

recommendation to allow for the SRP model for private and public sectors pensions, months before the Plaintiff ever attended a meeting with the Task Force.

26. With regard to paragraph 121, the Plaintiff maintains its allegation that the Chair of the Task Force mentioned on several occasions that if the Plaintiff did not agree to the shared risk model, a DC model could be imposed on them.
27. With regard to paragraphs 127- 151, the Plaintiff states as follows:
 - (a) The Defendant's account of the Task Force's "consultative" process as it concerns the Plaintiff is not complete or accurate and the Plaintiff repeats and relies on the description of its attendance at Task Force meetings set out in paragraphs 24-33 of the Statement of Claim.
 - (b) The Plaintiff has no knowledge of the number of times the Task Force met with representatives of the Unions or whether the Unions other than the Plaintiff met with representatives of the Task Force and the Province individually.
 - (c) With regard to paragraph 132, 146, and 147, the only times that the Plaintiff is aware of in which its representatives met with the Province directly during the relevant period (as opposed to meetings with members of the Task Force) was a meeting between a Government representative and the Plaintiff's representatives, André Lortie and Eric Boucher, on June 20, 2013, in which the Government representative discussed SRP governance and a meeting between the then President of the Plaintiff, Gary Corbett, and the Finance Minister, Blaine Higgs, on October 31, 2013. At this meeting, which lasted approximately 10 minutes,

Mr. Corbett again reiterated the Plaintiff's opposition to a Shared Risk Plan for the *PSSA*. Mr. Corbett was told by Minister Higgs that the "train has left the station" with regard to the implementation of the shared risk model.

- (d) With regard to paragraph 133, the presentations by the actuaries were generally part of the group meetings with the Task Force. As set out in paragraph 30 of the Statement of Claim, the Plaintiff did not participate in Task Force meetings after June 2013.
- (e) With regard to paragraph 149, at the Task Force meeting on May 21, 2013, Plaintiff's representatives advised the Task Force that it would not be signing the MOU. Susan Rowland, the Chair of the Task Force, advised the Plaintiff that, if it did not sign the MOU, the Task Force would move forward without the Plaintiff's involvement.
- (f) With regard to paragraph 135, while there may have been very minor tweaks made to the SRP model, the Plaintiff is unaware of any significant changes that were made to the SRP model as a result of any comments provided to the Task Force by unions generally, and by the Plaintiff more specifically.
- (g) With regard to paragraph 148, in early 2013, Bernard Dussault, a representative of the Plaintiff asked Conrad Ferguson, the *PSSA* Plan's actuary, for an assessment of an approach which could limit the unfavourable career average formula on the Plaintiff's members and also requested information on the cost of the new shared risk plan. To the Plaintiff's knowledge, no direct response was provided to either of these requests by the Province.

(h) With regard to paragraphs 137-143, the Plaintiff denies that there was any negotiation meaningful or otherwise (and certainly no collective bargaining or any opportunity to strike) over the terms of the Memorandum of Understanding. Rather the Memorandum of Understanding was imposed on the Plaintiff without its consent.

28. With regard to paragraphs 152-156, the Plaintiff denies that it was ever given an opportunity to make a proposal to the Province to implement a supplemental pension benefit plan and states that the Defendant has mischaracterized the letter dated May 27, 2013. In that letter, the Province indicated that it would consider a proposal from the Task Force on this issue but never indicated that it was open to a proposal from the Plaintiff. To the Plaintiff's knowledge, no such proposal was ever made by the Task Force and the Province has never raised this issue again with the Plaintiff.

Section 2(d) of the Charter

29. With regard to paragraphs 185, 187-190, the Plaintiff states that section 2(d) of the *Charter* has been infringed and relies upon paragraphs 37-50 of its Statement of Claim. The freedom of association as protected under s. 2(d) is engaged on the facts of the case and the impugned provisions substantially interfere with a meaningful process of collective bargaining.

30. With regard to paragraph 188 (e) and (f), the Plaintiff denies that any of its meetings with the Task Force and/or representatives of the Province provided a meaningful process to make collective representations to the Province or a meaningful substitute for collective bargaining, and relies on its submissions at paragraphs 48-50 of its Statement of Claim.

31. With regard to paragraphs 25(b), 54, 152 -156, 187 and 189, the Plaintiff states that at no time previous to the filing of the Statement of Defence in this matter has the Province stated or taken the position that any aspect of pensions, including a supplemental pension, could be the subject of bargaining with the Plaintiff. At all times, the Plaintiff, consistent with the actions of the Province and the language of s. 63(2) of the *PSLRA*, has understood that it is barred by statute from bargaining its members' pension plans. The Plaintiff states that the Province's novel position at paragraph 25(b), 54, and 152-156 of its Statement of Defence is not consistent with the position that the Province has adopted with the Plaintiff to date, either in discussions or bargaining.
32. In the alternative, if it is now the Province's official position that any bargaining agent that is governed by the *PSLRA* and dissatisfied with the PSSRP should table in bargaining proposals regarding supplemental pension plans and that the Province will not object to the legality of the inclusions of such provisions in collective agreements, the Plaintiff states that the ability to bargain a supplemental pension plan does not cure the violation of s. 2(d) resulting from the statutory bar in s. 63(2) of the *PSLRA* to bargaining the *PSSA* plan previously and the PSSRP currently. All of the Plaintiff's members' pension contributions and entire retirement pension income is in the PSSRP. As set out in paragraphs 41-43 of the Statement of Claim, the *PSSA* plan/PSSRP is essential to the future financial security of members and an important and significant part of employee compensation, a fact acknowledged by the Province itself as set out above in paragraph 12. This restriction on collectively bargaining, and by extension striking, over any aspect of the *PSSA* plan/PSSRP, substantially interferes with the Plaintiff's and its members

right to a meaningful process of collective bargaining, as protected by s.2(d) of the *Charter*.

33. With regard to paragraph 190, the Plaintiff states that it and its members have a right to strike protected by s. 2(d). Pursuant to sections 66-76 of the *PSLRA*, when bargaining is at an impasse, the Plaintiff's members can go on strike so long as the requirements of the statute are met. However, since the Plaintiff is statutorily barred from bargaining over any aspect of the *PSSA* plan/ *PSSRP*, it and its members are similarly statutorily barred from going on strike over any changes to or concerns with their pension plan. Specifically, the Plaintiff states that, despite the fact that its members were strongly opposed to the *PSSRP*, there was no means by which it could have legally taken its members out on strike over the conversion of the *PSSA* plan to the *PSSRP*. The Plaintiff further relies on paragraphs 37-40 of the Statement of Claim in reply.

34. With regard to paragraphs 26(b) and 191-192, the Plaintiff denies that the infringement of s. 2(d) is saved under s. 1. In particular:
 - (a) With regard to paragraph 26(b)(ii), the Plaintiffs deny that the *ARPS* and the *PSLRA* advance any pressing and substantial objectives or that the objectives listed in subparagraphs A, B and C are the true objectives of the legislation or are pressing and substantial.

 - (b) With regard to paragraph 192(a) the Plaintiff denies that implementing a more stable and sustainable pension plan for the Province's public service employees was the true purpose in enacting the *ARPS* as the *PSSA* already provided for a stable and sustainable pension plan.

- (c) The Plaintiff submits that the Province's true purpose in enacting the *ARPSP* was to save money. Securing fiscal savings does not constitute a pressing and substantial objective in the circumstances of this case.
- (d) With regard to paragraph 192(b), the Plaintiff denies that the Province's stated objective was pressing and substantial in the context of the case.
- (e) With regard to paragraph 192(c), the Plaintiff denies that the *PSSA* was unsustainable.
- (f) With regard to paragraph 192(d), the Plaintiff denies that the Province seriously considered alternatives to the SRP Model as an option for reforming the *PSSA*, prior to enacting the *ARPSP*.
- (g) With regard to paragraph 192(e), the Plaintiff denies that the *ARPSP* was rationally connected to the objective.
- (h) With regard to paragraphs 192(f)-(h), the Plaintiff denies that the infringement is minimally impairing. The Plaintiff states that the vast majority of other federal or provincial government public service pension plans in Canada use a defined benefit model, similar to the former *PSSA* plan, and that broader private sector pension trends are not relevant.
- (i) With regard to paragraphs 192(i)-(j), the Plaintiff denies that the salutary effects outweigh the deleterious effects.

35. With regard to paragraphs 193 to 196, the Plaintiff specifically denies the Province's allegation that the Plaintiff is not entitled to the remedies it seeks or that it would be limited to declaratory relief.

DATED at Ottawa, Ontario, this 19th day of August, 2016



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