

Citation : *Estate A.B.C. v. Respondent 1 and the Superintendent of Pensions*, 2015 NBFCST 3

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: 2015-02-11
Docket: PE-001-2014

BETWEEN:

Estate A.B.C.,

Applicant,

-and-

Respondent 1 and Superintendent of Pensions,

Respondents.

REASONS FOR DECISION AND ORDER

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: -Monica L. Barley, Panel Chair
 -Enrico Scichilone, Panel Member
 -Gerry Legere, Panel Member

DATE OF HEARING: February 9, 2015

WRITTEN REASONS: February 11, 2015

APPEARANCES: -Marylène Pilote and Chantal Moreau for Estate A.B.C.
 -Robert J. Peters and Jennifer Hanson for Respondent 1
 -Brian Maude for the Superintendent of Pensions
 -Brian Barnett, for the Office of the Attorney General and Minister of Social
 Development

I. OVERVIEW

- [1] The Applicant filed a motion on January 21, 2015 asking the Financial and Consumer Services Tribunal [Tribunal] to order:
 - a) a change in the location of the hearing on the merits from Saint John, New Brunswick to Edmundston, New Brunswick ; and
 - b) the Department of Social Development of the Province of New Brunswick to disclose and/or produce for examination their complete file, along with all information touching the Respondent 1's application for public housing for low income persons.
- [2] At the start of the hearing of the motion, the Applicant amended her motion to request that the order for production of the Department of Social Development's file be against the Respondent 1 and/or the Department of Social Development.

II. FACTS

A. CHANGE OF LOCATION OF THE HEARING

- [3] The Tribunal normally sits in Saint John, New Brunswick. Its hearing room and staff are in Saint John.
- [4] The members of Estate A.B.C. as well as Respondent 1 live in the Edmundston area.
- [5] The Respondent, the Superintendent of Pensions, is employed by the Financial and Consumer Services Commission which has offices in Fredericton and Saint John.
- [6] In his Affidavit in support of this motion, Witness J.L. states that Estate A.B.C. has the intention of potentially calling 9 witnesses. Of these 9 witnesses, all but one live in the Edmundston area. Witness G.L. who does not reside in Edmundston lives in Moncton, New Brunswick.
- [7] Respondent 1 indicates in her Affidavit that she has the intention of potentially calling 12 witnesses. Of these 12 witnesses, 8 live in Pennfield, New Brunswick. Another witness, Witness T.H., lives in Oromocto, New Brunswick. Respondent 1 indicates in her Affidavit that two other witnesses, Witness D.L. and Witness J.L.P., live in the Province of Québec, but have made arrangements to travel to Saint John and stay with family in this region during the hearing.
- [8] The Applicant has asked the Registrar of the Tribunal to execute Summons to Witness for five witnesses, all of whom live in the Edmundston area.
- [9] Respondent 1 has asked the Registrar of the Tribunal to prepare Summons to Witness for six witnesses. Of these witnesses, one lives in Edmundston, two live in Pennfield, two live in the Province of Québec and the other lives in Oromocto.

- [10] According to the Affidavit of Witness J.L., Witness L.H. is the executor of the late A.B.C.'s will and is 81 years of age and awaiting a hip operation, which could occur at any time. His spouse was examined in Québec and is awaiting imminent open heart surgery.
- [11] According to the Affidavit of Respondent 1, the mother of the late A.B.C. is 86 years of age and would like to testify at the hearing. It is indicated in the Affidavit that the mother of the late A.B.C. will stay with family in Pennfield for the month of February 2015. It should be noted that the Registrar of the Tribunal has not executed a Summons to Witness for the mother of the late A.B.C.

B. DISCLOSURE

- [12] The Department of Social Development is not a party to this proceeding and takes no position on this motion.
- [13] The Applicant has asked the Registrar of the Tribunal to execute Summons to Witness for Don Marmen and Rickie Bois who are employed by the Department of Social Development.
- [14] Respondent 1 admits in her Affidavit that she received public housing for low income persons from 2007 to 2009.

III. ISSUES

- [15] The issues on this motion are the following :
- (a) Should the Tribunal change the location of the hearing on the merits from Saint John, New Brunswick to Edmundston, New Brunswick?
 - (b) Should the Tribunal order Respondent 1 and/or the Department of Social Development to disclose and/or produce for examination the complete file along with all information touching the Respondent 1's application for public housing for low income persons?

IV. POSITION OF THE PARTIES

- [16] The Applicant submits, regarding the change in location of the hearing, that Edmundston is the fairest and most convenient location for the hearing. In support of this position, the Applicant indicates that : (1) the parties live in Edmundston; (2) a greater number of witnesses live in Edmundston; (3) the executor of Estate A.B.C. who provides instruction to the Estate's solicitors is elderly and waiting for surgery; and (4) the cost to the parties would be lower if the hearing were held in Edmundston.
- [17] At the hearing of this motion, Respondent 1 indicated that she opposed the change in location of the hearing if the change of location would cause any delay in the hearing of this appeal. The Superintendent of Pensions also opposes any delay in this appeal.
- [18] With respect to the issue of production of the file of the Department of Social Development, the Applicant contends that it would be unfair for her to proceed to the hearing without first having the

opportunity to review the Department of Social Development's file in relation to Respondent 1. According to the Applicant, this file contains information which is relevant to Respondent 1's financial situation and the determination of whether Respondent 1 was dependent upon the late A.B.C., which according to the Applicant is at the heart of this appeal.

- [19] Respondent 1 submits that the Tribunal does not have the jurisdiction to order the production of documents in the possession of third parties. Respondent 1 also submits that the file of the Department of Social Development is not relevant. Finally, Respondent 1 admits that she benefitted from public housing for low income persons and that she will be able to respond to several of the Applicant's questions during her testimony at the hearing on the merits.

V. ANALYSIS

A. CHANGE OF LOCATION OF HEARING

- [20] The Tribunal's enabling legislation is the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30 [Act]. Subsection 38(3) of the Act stipulates that the Tribunal may hold hearings within or outside New Brunswick. The Tribunal therefore has the jurisdiction to change the location of a hearing.
- [21] The Act does not provide criteria for determining in which circumstances a change in location of a hearing is appropriate. A similar situation occurred in the decision of *Westfair Food Ltd. v. United Food and Commercial Workers, Local 401 (Loxam Grievance)*, [2005] A.G.A.A. No. 67 [*Westfair Food*] which involved an arbitration under the Alberta *Labour Code*.
- [22] While the Tribunal is not bound by the decision in *Westfair Food*, this decision can guide the Tribunal in arriving at a decision. In this decision, the arbitrator states that the factors to be considered in determining whether it is appropriate to order a change in location of a hearing are the cost and the convenience for the parties and their witnesses. In relation to the convenience factor, the arbitrator added certain elements to be considered, namely : (a) the places where the parties and witnesses reside and work ; (b) the length of time for which witnesses may be required at the hearing; (c) the need to have the hearing close to the worksite, so that witnesses may return to work after testifying; (d) the subject matter of the dispute – for example, does the dispute involve a group or individuals; (e) the evidence required, such as the requirement of a site visit during the hearing; and (f) the time frame, where a hearing may be held at an earlier date, if the parties do not have to spend time travelling.
- [23] When analyzing the cost to the parties, the Tribunal concludes that the cost to the parties will be greater if the hearing remains in Saint John. The Applicant and Respondent 1 will have to travel from Edmundston and potentially have to stay in a hotel. With respect to the Applicant, the executor of the will as well as the three children of the late A.B.C. intend to remain present for the length of the hearing in order to provide instructions to the Estate's solicitors. The Applicant has also caused to be prepared five Summons to Witness for witnesses in the Edmundston region. If the hearing remains in Saint John, this will bring about travel and lodging costs for these witnesses. Respondent 1 caused to be prepared six Summons to Witness. Of these six witnesses, half are in the Edmundston area or closer to Edmundston than Saint John.

- [24] With respect to the convenience factor, an analysis of the elements set out in the *Westfair Food* decision reveals that it would be more convenient for the parties and witnesses if the hearing is held in Edmundston:
- (a) The places where witnesses reside and work : As indicated above, the parties as well as the majority of the witnesses reside in the Edmundston region.
 - (b) The need to have the hearing close to work : If the hearing is in Edmundston, four witnesses will be able to return to work after their testimony, namely Rickie Bois and Don Marmen who work for the Department of Social Development as well as Witness G.B. and Witness L.L.
 - (c) The subject matter of the dispute: This dispute is between individuals. However, it is important to note that Estate A.B.C. is comprised of three individuals who appear to live in the Edmundston region.
 - (d) The time frame if the parties do not travel: This element is not applicable. The dates of the hearing will not change whether the hearing is in Saint John or Edmundston. The Registrar has made the necessary arrangements to have the hearing proceed in either Saint John or Edmundston from February 16 to 19, 2015.
- [25] The Tribunal is also factoring into its analysis the fact that the executor of Estate A.B.C., Witness L.H., who according to the Applicant must provide instructions to the Estate’s solicitors, is 81 years of age and awaiting hip surgery. In addition, Witness L.H.’s spouse is awaiting imminent open heart surgery.
- [26] Given all of these factors, the Tribunal concludes that Edmundston is the most appropriate location for the hearing on the merits.

B. ORDER FOR DISCLOSURE

- [27] In her Notice of Motion, the Applicant asks the Tribunal to order the Department of Social Development to disclose and/or produce for examination its complete file, along with all relevant information touching the Respondent 1’s application for public housing for low income persons.
- [28] At the hearing of the motion, the Applicant amended her motion to request that the order for production of the Department of Social Development’s file be against Respondent 1 and/or the Department of Social Development.

(i) Order for Production Against Respondent 1

- [29] The Applicant bases her motion on subsection 7(4) of the Financial and Consumer Services Commission’s Local Rule 15-501: *Proceedings Before the Tribunal*. Subsection 7(4) of Local Rule 15-501 states:

7(4) Disclosure order – At any stage in a Proceeding, the Panel may order that a Party:

(a) provide to another Party and to the Panel any particulars that the Panel considers necessary for a full and satisfactory understanding of matters in issue in the Proceeding; and

(b) make any disclosure required by this Rule within the time limits and on any conditions that the Panel may specify.

- [30] There is no indication in the Affidavits of Witness J.L. and Respondent 1 that Respondent 1 has a copy of the Department of Social Development's file. The Tribunal concludes that the Department of Social Development's file is in its possession.
- [31] The Applicant argued during the motion that the Department of Social Development's file is in Respondent 1's control. Respondent 1 made an analogy with a plaintiffs' medical file in a personal injury action and cited the decisions of *Clements v. Fougère*, 2007 NBCA 4 and *Stone v. Sharp*, 2008 NBCA 55 in support of this argument.
- [32] The decisions of *Clements v. Fougère* and *Stone v. Sharp* deal with the interpretation of New Brunswick's Rules of Court. The Tribunal notes that the Court of Appeal's decisions in these two matters are based on the Rules of Court. These Rules of Court do not apply to the Tribunal and consequently these decisions are not applicable to the within matter.
- [33] In addition, the Tribunal is of the view that there is an important distinction between a medical file and the file of the Department of Social Development. A medical file contains a physician's notes regarding the patient's state of health. The information contained in the medical file originates in large part with the patient. The Tribunal is of the view that ownership of the Department of Social Development's file belongs to the Department and not the Respondent because this file contains Respondent 1's application for public housing, the investigation and/or analysis of the Department to determine entitlement to public housing, and an annual analysis by the Department to determine ongoing entitlement to public housing.
- [34] The Tribunal concludes that Respondent 1 does not have possession of the Department of Social Development's file in her regard and consequently an order under subsection 7(4) of Local Rule 15-501 is not possible.

(ii) Order for Production Against the Department of Social Development

- [35] As previously indicated, the Applicant bases her motion on subsection 7(4) of Local Rule 15-501. Subsection 7(4) applies solely to parties to a proceeding and does not authorize the Tribunal to order production of documents in the possession of a person not a party to the proceedings.
- [36] In order to determine whether the Tribunal has the authority to order the production of documents in the possession of a non-party, we must analyze the Tribunal's enabling statute - the *Financial and Consumer Services Commission Act*. Subsections 37(1) and 37(2) of this Act state that the Tribunal may exercise any powers imposed on it under financial and consumer services legislation and shall perform any duties imposed on it under financial and consumer services legislation. Consequently, the Tribunal must also analyze its powers under the *Pension Benefits Act* S.N.B. 1987, c P-5.1 [*Pension Benefits Act*] pursuant to which the present appeal is brought.

[37] We turn now to the *Financial and Consumer Services Commission Act*. Division B of Part II of this Act sets out the powers and duties of the Tribunal. Section 38 sets out the Tribunal's powers in respect of hearings. Subsections 38(1), 38(5) and 38(6) are relevant to this motion and state :

38(1) With respect to the following matters, when the Tribunal holds a hearing under financial and consumer services legislation, the Tribunal has the same power that the Court of Queen's Bench has for the trial of civil actions:

(a) summoning and enforcing the attendance of witnesses;

(b) compelling witnesses to give evidence under oath or in any other manner;
and

(c) compelling witnesses to produce books, records, documents and things or classes of books, records, documents and things.

[...]

38(5) The Tribunal may decide all questions of fact or law arising in the course of a hearing.

38(6) The Tribunal may receive in evidence any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it, regardless of whether the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law.

[38] In addition, section 77 of the *Pension Benefits Act* confers the authority upon the Tribunal to issue a summons requiring the person named in the summons to appear before the Tribunal. That section reads as follows :

77(1) On the application of the Superintendent or any other interested person, the Tribunal may issue a summons requiring the person named in the summons to appear before the Tribunal to show cause why an order of the Superintendent or of the Tribunal has not been complied with and why a further order should not be made.

77(2) A summons issued under this section by the Tribunal may be served outside the Province, and a failure to appear by any person summoned shall not affect the ability of the Tribunal to act.

[39] The determination of whether the Tribunal can order the Department of Social Development to produce its complete file pertaining to Respondent 1 brings the Tribunal to consider its jurisdiction.

[40] Similar provisions were considered in the decisions of *Halifax Shipyard Ltd. v. Marine, Office and Technical Employees Union, Local 28*, 1996 (CanLII 5191) by the Nova Scotia Supreme Court and in *Warman v. Harrison*, 2006 CHRT 19 (CanLII) by the Canadian Human Rights Tribunal. The following excerpt from the *Warman* decision illustrates the limitations to an administrative tribunal's jurisdiction:

[4] Subsection 50(1) of the *Act* requires the Tribunal to hold an inquiry into complaints that are referred to it by the Canadian Human Rights Commission. Subsection 50(2) provides the Tribunal with the authority to determine all questions of law and fact necessary to determining the matter. Subsection 50(3) grants the Tribunal additional powers to enable it to conduct a thorough inquiry. In particular, subsection 50(3)(a) authorizes the Tribunal to summon and enforce the attendance of witnesses to give oral or written evidence and to produce any documents considered necessary. Subsection 50(3)(c) allows the Tribunal to receive and accept evidence whether or not it would be admissible in a court of law. These provisions do not provide the Tribunal with the authority to compel people who are not witnesses or parties to the proceedings to produce documents. Mr. Lemire has not been listed as a witness in this case.

- [41] In contrast to the *Halifax Shipyard* and *Warman* decisions, in the present matter, the Applicant has the intention of calling Don Marmen and Rickie Bois of the Department of Social Development to testify at the hearing on the merits. The Applicant has also asked the Registrar of the Tribunal to execute Summons to Witness for these two witnesses. As such, Don Marmen and Rickie Bois become witnesses in the within matter.
- [42] The Tribunal is of the view that it has the authority, pursuant to paragraph 38(1)(c) of the *Financial and Consumer Services Commission Act*, to order that the witnesses Don Marmen and Rickie Bois bring the complete file of the Department of Social Development pertaining to Respondent 1 to the hearing. However, given the use of the words "when the Tribunal holds a hearing" in subsection 38(1), this authority does not extend to ordering these witnesses or the Department of Social Development to produce documents in advance of the hearing. Such an order would amount to ordering a non-party to produce documents, for which the Tribunal does not have the jurisdiction.
- [43] There remains the question of the relevance of the file of the Department of Social Development. Subsection 38(6) of the *Financial and Consumer Services Commission Act* states the following with respect to relevance: "The Tribunal may receive in evidence any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it, regardless of whether the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law."
- [44] The Tribunal is of the view that the use of the words "may receive in evidence" in subsection 38(6) of the *Act* limit the application of this subsection to a hearing and do not grant the Tribunal the authority to order witnesses to produce documents in advance of the hearing.
- [45] Given its conclusion that it has the power to order the witnesses Don Marmen and Rickie Bois to bring the Department of Social Development's file to the hearing, and subject to any arguments regarding the admissibility of that file, the Applicant will have access to the Department's file during the hearing and will also be able to examine the witnesses Don Marmen and Rickie Bois and cross-examine Respondent 1 regarding the content of the Department of Social Development file.
- [46] This decision does not deal with the admissibility of the Department of Social Development's file. Any objection regarding the admissibility of that file may be brought when Don Marmen or Rickie Bois take the witness stand.

VI. DECISION AND ORDER

[47] The Tribunal orders as follows:

- (a) The motion to change the location of the hearing on the merits is granted and the Registrar shall issue an Amended Notice of Hearing along with Amended Summons to Witness indicating the new location of the hearing in Edmundston;
- (b) The motion seeking an order that Respondent 1 produce the file of the Department of Social Development is rejected; and
- (c) The motion seeking an order that the Department of Social Development produce its file regarding Respondent 1 is rejected. However, the Tribunal will issue amended Summons to Witness for Rickie Bois and Don Marmen ordering them to bring the Department of Social Development's complete file for Respondent 1 to the hearing on the merits.

DATED at Saint John, New Brunswick, this 11th day of February, 2015.

"original signed by"
Monica L. Barley, Panel Chair

"original signed by"
Enrico Scichilone, Panel Member

"original signed by"
Gerry Legere, Panel Member