



Citation: *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 4

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

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 Appellants' motion for the production of documents by the City of Fredericton is granted as set out below.

II. OVERVIEW

2. These proceedings involve an appeal by the Appellants of the Superintendent of Pensions' July 12, 2018 decision. On February 15, 2019, the Appellants filed a pre-hearing motion seeking production of eight categories of documents by the City of Fredericton [City], which they claim are necessary to ensure a fair and equitable determination of the 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 City's motion challenging the Tribunal's jurisdiction.
4. This decision deals solely with the Appellants' motion for production of documents by the City. At the hearing of the motion, we accepted into evidence the Affidavits of Evan Gilks and the Affidavit of Jane Blakely.

III. ISSUE

5. The issue we must determine is whether the City of Fredericton should disclose the requested documents to the Appellants.

IV. ANALYSIS

A. Jurisdiction

Positions of the Parties

6. The Appellants submit that given its quasi-judicial role, the Tribunal has the authority to order parties to disclose arguably relevant information where necessary as an element of procedural fairness. They argue that documentary disclosure is a crucial part of a high level of procedural fairness, where a trial-like model is required.
7. The Superintendent of Pensions takes the position that the Tribunal does not have the jurisdiction to order a party to produce documents in advance of a hearing, nor to order a party to produce documents unless it intends to present witnesses at the hearing of the matter, in which case the Tribunal may compel those witnesses to produce documents at the hearing. The Superintendent relies on this Tribunal's decision in *Estate A.B.C. v Respondent 1 and Superintendent of Pensions*, 2015 NBFCST 3.

8. In its *Statement of Position*, the City takes the position that the Tribunal may not have the authority to order the production of certain categories of documents requested by the Appellants as these documents may be in relation to grounds of appeal that are not within the Tribunal's jurisdiction as argued in the City's motion filed on February 15, 2019 challenging the Tribunal's jurisdiction. At the hearing of the within motion, the City also adopted the jurisdiction arguments presented by the Superintendent of Pensions.

Analysis

9. We turn first to the City's position that the Tribunal may lack jurisdiction to order the production of certain categories of documents as it does not have jurisdiction over certain grounds of appeal set out in the *Notices of Appeal*. We find the City's argument is without merit. The dispute between the City and the Fire fighters and Police dates back to 2013. This history is key to understanding these appeal proceedings.
10. In addition, this Tribunal concluded in *Fredericton Police Association v New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 6 that it was premature at this stage to determine these jurisdictional issues and that we would only do so after hearing all the evidence at the merits hearing.
11. We agree with the Superintendent's position that paragraph 38(1) of the *Financial and Consumer Services Commission Act [FCSC Act]* does not grant the Tribunal the authority to order pre-hearing disclosure of information by the parties to a proceeding. Paragraph 38(1) reads:

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:

(c) compelling witnesses to produce books, records, documents and things or classes of books, records, documents and things.
12. However, we do not agree with the Superintendent's position that *Estate A.B.C. v. Respondent 1 and Superintendent of Pensions*, 2015 NBFCST 3 stands for the principle that the Tribunal does not have the authority to order the pre-hearing production of documents by parties to a proceeding. *Estate A.B.C.* is distinguishable on the facts. That matter dealt with the Tribunal's authority to order the production of documents by a non-party to the proceeding. The Tribunal concluded that its authority was limited to compelling a non-party who would be a witness at the hearing to produce documents at the hearing pursuant to paragraph 38(1)(c) of the *FCSC Act*. There is an important distinction between ordering non-parties to produce documents at a hearing and ordering a party to produce documents.
13. We note that an administrative tribunal must be given explicit legislative authority to issue a summons to witness [*Quebec (Attorney General) v Canada (Attorney General)* (1978), 90 D.L.R. (3d) 161 (S.C.C.)]. See also Robert W. MacCaulay & James L.H. Sprague & Lorne Sossin, "Practice and Procedure Before

Administrative Tribunals”, loose leaf edition, vol. 2 (Toronto: Thomson Reuters) at 12-81].

14. However, on this motion, the Appellants’ request is that the City, a party to these appeal proceedings, disclose documents.
15. As a starting point, it is important to set out that neither the Tribunal’s enabling legislation, the *FCSC Act*, nor the *Pension Benefits Act*, S.N.B. 1987, c P-5.1 [*Pension Benefits Act*] explicitly grant the Tribunal authority to order a party to a proceeding to produce documents to another party.
16. We agree with the Appellants’ arguments that it makes no sense for subsection 38(1) of the *FCSC Act* to be the Tribunal’s sole authority to order production of documents. We also agree that it makes no sense that the Tribunal would have the authority to order production of documents by non-parties, but not parties. Were subsection 38(1) to be the Tribunal’s sole authority to order parties to produce documents, this would mean the parties would need to file their Statement of Position listing witnesses who have control of the relevant documents, then file a motion seeking an order from the Tribunal compelling those witnesses to provide the documents. The documents would then only be produced by the party at the hearing, thus necessitating an adjournment to allow the parties to review the documents. This is not a fair, efficient nor cost-effective manner of proceeding.
17. The *FCSC Act* contains very little detail of the Tribunal’s powers. In fact, there are only six sections of the *FCSC Act* setting out the Tribunal’s hearing powers: sections 37, 38, 41, 42 43, and 44.
18. We also note that New Brunswick does not have legislation setting out the authority of all administrative tribunals, as for example the *Statutory Powers Procedure Act* in Ontario or the *Administrative Tribunals Act* in British Columbia.
19. The Appellants rely on a series of decisions from the Canadian Human Rights Tribunal for the proposition that administrative tribunals will require documentary disclosure in order to ensure that procedural fairness is respected: *Syndicat des communications de Radio-Canada v Canadian Broadcasting Corp.*, 2017 CHRT 5; *Guay v Canada (Royal Canadian Mounted Police)*, 2004 CHRT 34; and *Rai v Canada (Royal Canadian Mounted Police)*, 2013 CHRT 6.
20. The City argues that this caselaw is not applicable as the Canadian Human Rights Tribunal’s *Rules of Procedure* differ significantly from the Tribunal’s *Rules of Procedure*, namely in that they govern first instance hearings and their requirement in rule 6(1) that a party provide a list of all documents in its possession that relate to a fact, issue or form of relief sought in the case.
21. However, what is interesting with the Canadian Human Rights Tribunal is that neither its *Rules of Procedure* nor the *Canadian Human Rights Act* grant it the authority to order a party to produce documents. Rather, the Canadian Human Rights Tribunal has the same authority as we do to determine questions of law or fact (section 54) and to summon and enforce the attendance of witnesses and compel them to give evidence and to produce documents and things (section 55).

22. Despite this lack of explicit authority, the Canadian Human Rights Tribunal clearly considers it has the jurisdiction to order a party to produce documents as set out in *Syndicat des communications de Radio-Canada v Canadian Broadcasting Corp.*, [2017] CHR D 5, where it states at paragraph 27: “[w]hile the Rules do not specify the manner or form by which production is to take place, the purpose of the Rules and the principles of fairness in general dictate that the disclosure and production of documents be sufficient to allow each party the full and ample opportunity to be heard.”
23. In *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paragraph 38, the Supreme Court of Canada explains that administrative decision-makers obtain their jurisdiction not only by way of an express grant of jurisdiction in legislation but also implicitly by way of the common law application of the doctrine of jurisdiction by necessary implication.

(i) Jurisdiction by Necessary Implication

24. As stated in *Practice and Procedure Before Administrative Tribunals*, supra at p. 5-30:

Implied powers can also be determined from the mandate that an agency is given to accomplish.

A statutory authority is deemed to have all the authority required as a matter of practical (or reasonable) necessity to carry out the functions which have been entrusted to it to do. Thus function is of vital importance to the determination of implied powers. The courts will deem that in giving an agency a particular job the Legislature also intended to give the agency all of the powers reasonably necessary to accomplish the job. The idea is that an agency should not be frustrated in the performance of a statutory mandate by an overly technical interpretation of its statute. On the other hand, the implied jurisdiction must be required as a matter of practical necessity for the agency to effectively and efficiently accomplish its mandate.

25. The authors of *Practice and Procedure Before Administrative Tribunals* add at 12-66.97, regarding the implied grant of authority to order the pre-hearing production of documents:

The power to order pre-hearing filing or exchange of documents can also exist by way of an implied grant of authority to the extent that that authority is reasonably necessary for the performance of the agency’s mandate. [...] The authority can also flow from the mandate to hold a hearing to the degree that the pre-hearing disclosure or exchange of information can be seen as being required by natural justice.

26. In *Financial and Consumer Services Commission v Emond et al.*, 2017 NBCA 28 at para. 15-16, the *New Brunswick Court of Appeal* recognized that the Tribunal has the “inherent right” to control its processes, subject to legislative constraints and the principles of procedural fairness. The Court of Appeal found this includes the ability of the Tribunal to raise, of its own initiative, preliminary legal issues that should be dealt with before the hearing on the merits. This authority is not explicitly set out in either the Tribunal’s enabling legislation nor its procedural rules; it is an implied grant of authority.

27. The Tribunal is a quasi-judicial administrative tribunal whose sole function is to conduct hearings under financial and consumer services legislation. These include enforcement proceedings which are in the nature of disciplinary proceedings as well as appeals of regulators' decisions. These hearings are conducted in a trial-like fashion with the presentation of evidence, the testimony of witnesses, and legal arguments. In order for these hearings to proceed fairly and efficiently, the Tribunal must necessarily have the authority to order the pre-hearing production of documents by a party. We therefore conclude that the doctrine of jurisdiction by necessary implication grants the Tribunal the authority to order the pre-hearing production of documents by a party.

(ii) Express Grant of Jurisdiction

28. It bears repeating that administrative tribunals are the masters of their own procedures and are entitled to devise flexible procedures adapted to their needs in order to “*achieve a certain balance between the need for fairness, efficiency and predictability of outcome*”: *Knight v Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 685 and *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560.
29. Express grants of jurisdiction can be very precise or they can be broad. For example, in *Bishop, Re*, 2005 NSUARB 122, the Nova Scotia Utility and Review Board found its grant of authority to establish its practices and procedures gave it the authority to order the examination for discovery of a non-party. The Nova Scotia Court of Appeal upheld the decision [*Bishop v AGNS*, 2006 NSCA 114 (CanLII)].
30. Turning to the within matter, the Tribunal Chair also has the broad legislative authority to establish the practices and procedures of the Tribunal pursuant to subsection 38.1(1) of the *FCSC Act*. This provides the Tribunal Chair with a broad discretion of determining the practices and procedures of the Tribunal.
31. The Tribunal's *Rules of Procedure* were drafted in broad strokes and cannot stipulate a process for every imaginable scenario. This is because the Tribunal conducts four types of proceedings: enforcement proceedings, appeals and reviews, applications, and motions. In addition, the Tribunal currently hears matters under 16 statutes. These statutes cover a wide range of areas such as pensions, real estate agents, securities, loan and trust companies, credit unions, pre-arranged funerals and insurance. This context is key to interpreting the *Rules of Procedure*.
32. As a result of the Tribunal's broad mandate, certain mechanisms were inserted in the *Rules of Procedure* to allow the Tribunal the flexibility to tailor its procedures to the specific matter before it. 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*”.
33. 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.” In our view, given the Tribunal’s mandate, this rule grants the Tribunal the authority to devise procedures for the pre-hearing production of documents by a party.

34. We also note that while these proceedings are an appeal, the search for the truth and procedural fairness are not diminished. Most importantly, there was no formal documentary disclosure in the proceedings before the Superintendent of Pensions. It is not in the interest of justice that relevant documents be withheld from the parties nor the Tribunal.
35. We therefore conclude that section 38.1(1) of the *FCSC Act* and rule 1.3(2) of the *Rules of Procedure* grant the Tribunal the express authority to order the pre-hearing production of documents where this is required to ensure the fair and equitable determination of the matter before it.
36. Having concluded the Tribunal has the jurisdiction to order the pre-hearing production of documents by a party, we turn to whether we should order production of the requested documents.

B. Relevancy

Positions of the Parties

37. The Appellants contend that the requested documents are necessary to ensure the fair and equitable determination of the appeal. According to the Appellants, these documents are required to allow them to obtain a full understanding of the circumstances surrounding the City’s division of assets between the pension plans, including the circumstances surrounding the actuarial valuation that was approved in the Superintendent of Pensions’ decision. The Appellants contend that relevancy must be determined on the basis of whether the documents are arguably relevant as they do not know what the City has in its possession.
38. The City argues the Appellants have not established the relevancy of the requested documents and that the Appellants’ requests are very broad. The City of Fredericton contends that the Appellants must “*lead convincing evidence, as opposed to mere speculation, as to the existence and relevance of the documents sought*” [*White v Winfair Management Ltd.*, 2005 Carswell Ont 1535 (SC) at para. 9].
39. The Superintendent does not take a position with respect to the relevancy of the requested documents.

Facts

40. The dispute between the City and the Fire fighters and Police surrounding the pension plan has been ongoing since 2013. Some context is required to assess relevancy of the requested documents.
41. On March 31, 2013, the Superannuation Plan for the Employees of the City of Fredericton was split into two plans: a new defined benefit plan for Police and Fire fighters (the Police and Fire Plan) and a shared risk plan for the remainder of the City employees (the City Plan).

42. In order to accomplish the split of assets between the City Plan and the Police and Fire Plan, the City obtained an actuarial report from Mercer valuing the assets and liabilities of the original plan and proposing a split of assets and liabilities between the City Plan and the Police and Fire Plan.
43. The City filed an application with the Superintendent of Pensions seeking consent for the split of assets and liabilities between the Police and Fire Plan and the City Plan on the basis of the Mercer report.
44. On November 18, 2014, the Superintendent of Pensions consented to the split of assets and liabilities between the plans as set out in the Mercer report. Both the Fire fighters and Police filed appeals of that decision with the Tribunal.
45. On March 9, 2016, the Tribunal issued a decision vacating the Superintendent of Pensions' November 18, 2014 decision and directing that consent to the transfer of assets should be granted on the basis of the solvency apportionment method.
46. In response to the Tribunal's decision, the City and the Trustees of the Superannuation Plan for Employees of the City of Fredericton filed appeals with the New Brunswick Court of Appeal. In early 2017, the City and the Trustees withdrew the appeals without the appeals having been heard by the Court.
47. As a result, the City proceeded to implementing the Tribunal's decision by obtaining new actuarial reports from Mercer providing valuations on the basis of the solvency apportionment method.
48. In June or July 2017, the City filed four actuarial valuations for the pension plans prepared by Mercer with the Superintendent of Pensions, including revised actuarial valuations for 2013, 2014 and 2015 and an actuarial valuation for 2016.
49. According to the Appellants, these valuations unilaterally reduce pension contributions for Police and Fire fighter members retroactive to 2013.
50. According to the *Notices of Appeal*, on July 31, 2017, the Appellants presented a joint complaint to the Superintendent of Pensions requesting that the Superintendent prevent the City from implementing the reduction in contributions and forced reimbursement.
51. Again, according to the *Notices of Appeal*, on October 26, 2017, the Appellants sent another joint letter to the Superintendent of Pensions making additional allegations against the City in relation to what they perceive as the City's attempt to force the Superannuation Board members to approve Mercer's revised valuations and the City's decision to abolish the Superannuation Board as a result of the Board's opposition to the City's decisions.
52. According to the *Notices of Appeal*, sometime in 2017, the City of Fredericton abolished the Superannuation Board which administered the Police and Fire Plan, and became the new plan

administrator for the Police and Fire Plan.

53. On July 12, 2018, the Superintendent of Pensions issued her decision in relation to the Police and Fire fighters' complaints and the new Mercer valuations. She makes the following determinations:

a. pursuant to section 70 of the Pension Benefits Act, the transfer of assets between the Superannuation Plan for the Employees of the City of Fredericton to the Superannuation Plan for Certain Employees of the City of Fredericton is approved on the basis of the revised Report on the Actuarial Valuation for Purposes of the Transfer of Assets and liabilities as at 31, March 2013, filed on 11 July 2017;

b. the Superannuation Plan for Certain Employees of the City of Fredericton revised Report on the Actuarial Valuation for Funding Purposes as at April 1, 2013, as at April 1, 2014, and as at April 1, 2015, all as filed by Mercer on 11 July 2017, are hereby accepted and may be implemented;

c. the Superannuation Plan for Certain Employees of the City of Fredericton revised Report on the Actuarial Valuation for Funding Purposes as at April 1, 2016, as well as the Actuarial Valuation for Funding Purposes as at March 31, 2017, as filed by Mercer on 18 December 2017, are hereby accepted and may be implemented;

d. the acceptance of the reports mentioned in a-c above hereby vacates my 28 August 2017 direction to the City of Fredericton to not take any further actions regarding refunding contributions or decreasing employee contributions until a final determination was made in this matter;

e. no breach of the conflict of interest rules or of the other statutory obligations outlined in section 17 of the Pension Benefits Act has been committed by the City of Fredericton or their staff, and no further investigation is warranted; and

f. the plan amendment filed by the City of Fredericton on 15 December 2017 to change the plan administrator from the Superannuation Board to the City of Fredericton, effective 27 November 2017, was a valid amendment and was properly registered on 7 May 2018 by this office.

54. This July 12, 2018 decision is the subject of the current appeal before the Tribunal.

55. On October 17, 2018, counsel for the Fire fighters sent a letter to counsel for the City requesting the following categories of documents:

a. Copies of all internal City of Fredericton documents concerning the implementation of the previous Tribunal decision dated March 9, 2017 including, without limitation, any emails, letters, memos, or notes between or among Tina Tapley, Jane Blakely, the City of Fredericton representatives on the Superannuation Board for the Police/Fire Pension Plan, and/or any other City of Fredericton employee. This would include correspondence sent to or received from the Fredericton Police Union or IAFF Local 1053.

b. Copies of all documents sent to or received from Mercer by any employee of the City of Fredericton from March 9, 2017 until now, including any emails, letters, notes or other communications. Without limiting the generality of this request, this includes any communications with Mercer concerning the decision of the City of Fredericton to withdraw the appeals of the March 9, 2018 Tribunal decision, the decision to have Mercer prepare revised actuarial valuations back to 2013, the decision for Mercer not to apply to the Canada Revenue Agency for a waiver of the contribution limit, and the decision to accept the discount rate proposed by Mercer in its new and revised valuations of the Police/Fire Pension Plan.

c. Copies of all minutes of the Superannuation Board from March 2016 to the date the Superannuation Board was dissolved by the City of Fredericton.

d. Copies of all internal City of Fredericton documents concerning the decision of the City of Fredericton including, without limitation, any emails, letters, memos, or notes between or among Tina Tapley, Jane Blakely, the City of Fredericton representatives on the Superannuation Board for the Police/Fire Pension Plan, and/or any other City of Fredericton employee, as well as any communications with Mercer and/or the Superintendent of Pensions on this issue.

e. Copies of any correspondence, whether by email, letter or memo, between the City and Superintendent of Pensions (excluding any such documents that are contained in the Record filed with the Tribunal).

f. A copy of any contract or retainer letter between the City of Fredericton and Mercer, including any update or amendments to such contracts or retainer, including any such contract or retainer made by the City on behalf of the Superannuation Board for the previous comprehensive City pension plan and/or the Police/Fire Pension Plan.

g. A copy of any correspondence or documents authorizing officials or employees of the City of Fredericton to sign any Application for Registration of Amendment to Pension Plan in 2016, 2017 and/or 2018.

h. Any correspondence or documents, including any notes taken by any City employee, and any communications between the City and Mercer, concerning the decision of the City of Fredericton to implement the reduction of contributions to the Police/Fire pension plan in August 2018.

56. The City has not provided any of the requested documents.

57. In this motion, the Appellants seek disclosure of the documents requested from the City in their letter of October 17, 2018.

Analysis

58. The caselaw provided by the parties on the issue of relevancy is not applicable to these administrative proceedings. The entirety of the caselaw provided by the parties deals with civil litigation under the *Rules of Court*, which is not applicable to Tribunal proceedings.
59. In *Practice and Procedure Before Administrative Tribunals*, vol. 2 at 12-66.96, the authors caution administrative decision-makers against adopting “holus bolus the jargon and approaches of the courts in determining relevancy”. The authors state that administrative decision-makers that “wish to preserve the principle of their mastery over procedure [...] should conscientiously attempt to create procedures that reflect the needs of their processes”.
60. Neither the *FCSC Act*, the *Pension Benefits Act* nor the Tribunal’s *Rules of Procedure* set out a relevancy test for the production of documents by a party.
61. However, even where a statute is silent respecting procedural matters, the principles of natural justice and fairness may impose some duties on the administrative tribunal [*Practice and Procedure Before Administrative Tribunals*, vol. 2 at 12-57].
62. The admissibility of evidence in a proceeding does not appear to be a relevant factor respecting its disclosure under fairness principles [*Practice and Procedure Before Administrative Tribunals*, vol. 2 at 12-66.51].
63. The Appellants point out that in the present appeal proceedings, the City has not disclosed a single document. While that may not be unusual in appeal proceedings, the principles of fairness may require disclosure where there was no discovery of documents in the proceedings below.
64. The City argues that the *Record of the Decision-making Process* contains 870 pages. However, counsel for the City admitted at the motion hearing that a lot of the *Record* is comprised of actuarial reports prepared by Mercer. She was unable to say whether any of the documents requested by the Appellants were contained in the *Record*. The Appellants contend that this does not constitute disclosure by the City as the *Record* was prepared by the Superintendent of Pensions. We agree with the Appellants on this point.
65. The extent of disclosure required in administrative proceedings is to be determined according to the traditional contextual fairness analysis set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Practice and Procedure Before Administrative Tribunals*, vol. 2 at 12-66.54]. We agree that this is the test that should guide us, as fairness is the principle that underpins the *Rules of Procedure* [see rules 1.2(3) and 1.3(2)].
66. In *Baker*, Justice L’Heureux-Dubé comments on the values underlying the duty of procedural fairness:

28. [...] The values underlying the duty of procedural fairness relate to the principle

that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

67. Justice L'Heureux-Dubé also recognizes that the content of the duty of procedural fairness is flexible and variable and is to be determined in the specific context of each case [*Baker*, par. 21]. She sets out a non-exhaustive list of five factors that must be considered in assessing the level of procedural fairness required in a particular context. These are:
- a) The nature of the decision and the decision-making process employed;
 - b) The nature of the statutory scheme and statutory provisions pursuant to which the decision-maker operates;
 - c) The importance of the decision to the individual affected;
 - d) The legitimate expectations of the party challenging the decision; and
 - e) The choice of procedure made by the decision-maker.
68. In our view, a mid to high level of procedural fairness is required in these proceedings. The Tribunal is a quasi-judicial administrative tribunal that hears appeals, *inter alia*, under the *Pension Benefits Act*. The Tribunal has several court-like powers under section 38 of the *FCSC Act*. An appeal to the Tribunal of the Superintendent of Pensions' decision proceeds to a full oral hearing in an adversarial manner. Section 76 of the *Pension Benefits Act* provides the Tribunal several typical appellate powers such as affirming the decision, vacating the decision and substituting its own decision, and remitting the matter back to the Superintendent. Finally, the decision issued in this matter is of utmost importance to the Appellants as it will potentially affect their pension plans and their retirement income.
69. In *Practice and Procedure Before Administrative Tribunals*, vol. 2 at 12-66.8, the authors state that: "sufficient information as to the substance of a matter must be given such that an individual can know such information which is not before the agency but which is necessary for a party to fairly present his or her case".
70. One of the purposes of holding a hearing is to get the best evidence and arguments in order to make a decision. It is not in the public interest for the Tribunal to have an incomplete evidentiary basis, especially in appeal proceedings such as this one where the dispute dates back to 2013. We conclude that the Appellants are entitled to the information necessary to fairly present their case.
71. Of course, the Appellants bear the onus of establishing the requested documents are necessary to present their case. The *Notices of Appeal* and the historical context of this dispute, as set out in the facts above, serve as a guide for identifying whether the requested documents are necessary to the Appellants' ability to fairly present their case.
72. We turn now to our analysis of each of the categories of documents requested by the Appellants in order to determine whether they should be disclosed. We note, at the outset, that this is not a fishing expedition as the documents are necessary to the Appellants ability to fairly present their case. We

reiterate that the City has not yet disclosed any documents. The Appellants have identified specific categories of documents for well-defined date ranges.

- i. **Copies of all internal City of Fredericton documents concerning the implementation of the previous Tribunal decision dated March 9, 2017 including, without limitation, any emails, letters, memos, or notes between or among Tina Tapley, Jane Blakely, the City of Fredericton representatives on the Superannuation Board for the Police/Fire Pension Plan, and/or any other City of Fredericton employee. This would include correspondence sent to or received from the Fredericton Police Union or IAFF Local 1053.**

73. At the motion hearing, the Appellants agreed to withdraw their request for correspondence sent to or received from the Fredericton Police Union or IAFF Local 1053. They also narrowed their request to the period of March 9, 2017 to July 12, 2018, the date the Superintendent's decision was issued.

74. Paragraphs 11 to 15 of the Appendices to the *Notices of Appeal* contain allegations surrounding the Tribunal's March 9, 2016 decision and its implementation by the City.

75. We therefore find that the requested documents are necessary to the Appellants' ability to present their case regarding these allegations. The City must provide these documents to the Appellants.

- ii. **Copies of all documents sent to or received from Mercer by any employee of the City of Fredericton from March 9, 2017 until now, including any emails, letters, notes or other communications. Without limiting the generality of this request, this includes any communications with Mercer concerning the decision of the City of Fredericton to withdraw the appeals of the March 9, 2018 Tribunal decision, the decision to have Mercer prepare revised actuarial valuations back to 2013, the decision for Mercer not to apply to the Canada Revenue Agency for a waiver of the contribution limit, and the decision to accept the discount rate proposed by Mercer in its new and revised valuations of the Police/Fire Pension Plan.**

76. Paragraphs 1, 13–18, 20 and 21 of the Appendices to the *Notices of Appeal* contain allegations surrounding the actuarial valuation report prepared by Mercer at the City's request. In light of the above, the requested documents are necessary to the Appellants' ability to present their case regarding these allegations. The City must provide these documents to the Appellants.

- iii. **Copies of all minutes of the Superannuation Board from March 2016 to the date the Superannuation Board was dissolved by the City of Fredericton.**

77. At the motion hearing, the Appellants narrowed this request to the period of March 2016 to November 2018 when the Superannuation Board was dissolved.

78. Paragraphs 1, 5, 18, 20, and 21 of the Appendices to the *Notices of Appeal* contain allegations in relation to the dissolution of the Superannuation Board by the City of Fredericton. The requested documents are necessary to the Appellants' ability to present their case regarding these allegations. The City must provide these documents to the Appellants.

- iv. **Copies of all internal City of Fredericton documents concerning the decision of the City of Fredericton including, without limitation, any emails, letters, memos, or notes between or among Tina Tapley, Jane Blakely, the City of Fredericton representatives on the Superannuation Board for the Police/Fire Pension Plan, and/or any other City of Fredericton employee, as well as any communications with Mercer and/or the Superintendent of Pensions on this issue.**

79. At the motion hearing, the Appellants specified that the decision referenced in this category of documents is the City's decision to disband the Superannuation Board.

80. Paragraphs 1, 18, 20 and 21 of the Appendices to the *Notices of Appeal* contain allegations in relation to the City's disbanding of the Superannuation Board. We therefore find the requested documents are necessary to the Appellants' ability to present their case regarding these allegations. The City must provide these documents to the Appellants.

- v. **Copies of any correspondence, whether by email, letter or memo, between the City and Superintendent of Pensions (excluding any such documents that are contained in the Record filed with the Tribunal).**

81. At the motion hearing, the Appellants narrowed this request to the period of March 9, 2017 to July 12, 2018.

82. Paragraphs 15, 17 and 18 of the Appendices to the *Notices of Appeal* contain allegations in relation to correspondence between the City and the Superintendent of Pensions. The requested documents are necessary to the Appellants' ability to present their case regarding these allegations. The City must provide these documents to the Appellants.

- vi. **A copy of any contract or retainer letter between the City of Fredericton and Mercer, including any update or amendments to such contracts or retainer, including any such contract or retainer made by the City on behalf of the Superannuation Board for the previous comprehensive City pension plan and/or the Police/Fire Pension Plan.**

83. Paragraphs 9, 10, 11, 13, 14, 15, and 20 of the Appendices to the *Notices of Appeal* contain allegations in relation to the relationship between the City and Mercer. As a result, the requested documents are necessary to the Appellants' ability to present their case regarding their allegations in the *Notices of Appeal*. The City must provide these documents to the Appellants.

- vii. **A copy of any correspondence or documents authorizing officials or employees of the City of Fredericton to sign any Application for Registration of Amendment to Pension Plan in 2016, 2017 and/or 2018.**

84. Paragraphs 1 and 15 of the Appendices to the *Notices of Appeal* discuss the filing of actuarial reports or registration of amendments to the Police and Fire Plan. We find the Appellants' request is specific enough to allow the City to identify the documents. Consequently, the requested documents are necessary to the Appellants' ability to present their case and the City must provide these documents to the Appellants.

- viii. **Any correspondence or documents, including any notes taken by any City employee, and any communications between the City and Mercer, concerning the decision of the City of Fredericton to implement the reduction of contributions to the Police/Fire pension plan in August 2018.**

85. At the motion hearing, the Appellants narrowed this request to the period of March 2018 to present.
86. The reduction of contributions to the Police and Fire Plan in August 2018 is at the heart of the appeal. In addition, paragraphs 1, 13 to 18 and 20 of the Appendices to the *Notices of Appeal* relate to the proposition to reduce contributions to the Police and Fire Plan. The requested documents are necessary to the Appellants' ability to present their case. The City must provide these documents to the Appellants.

C. Proportionality

Positions of the Parties

87. The City argues that the proportionality principle weighs against ordering disclosure in this matter due to the significant burden and cost associated with conducting the search for the documents.

Facts

88. In her *Affidavit*, Jane Blakely indicates the search for the documents requested by the Appellants would take in excess of 1,000 hours and would cost between \$5,000 to \$10,000.

Analysis

89. The *Rules of Court* and the caselaw cited by the City is not applicable to these administrative proceedings. The decisions of *Peter Kiewit Sons Co of Canada Ltd. v British Columbia Hydro & Power Authority*, [1982] BCWLD 787 (SC), *White v Winfair Management Ltd.*, 2005 CarswellOnt 1535 (SC) and *Murphy v Bank of Nova Scotia*, 2013 NBQB 316 all deal with civil litigation under the *Rules of Court*. We also agree with the Appellants that this caselaw can be distinguished on the additional basis that it deals with requests for production where the parties have already exchanged relevant documents and a party seeks additional documents. As previously discussed, that is not the situation in this appeal, where there has been no exchange of documents either in the proceedings before the Superintendent of Pensions nor in these appeal proceedings.
90. The proportionality principle as enunciated in rule 1.02.1 of the New Brunswick *Rules of Court* requires that a court "provide directions that are proportionate to what is at stake in the proceeding and the importance and complexity of the issues". In considering the proportionality principle in a request for production of documents in civil proceedings, the court will balance the burden, cost, and delay of the production against the probability of yielding relevant documents [*Murphy v Bank of Nova Scotia*, 2013 NBQB 316].

91. While the proportionality principle may be applicable to administrative proceedings, there is no cogent evidence in this motion indicating that the burden, cost and delay of the production outweighs the benefit of yielding information relevant to the issues. We afford little weight to the evidence of Jane Blakely concerning the time and cost associated with producing the documents requested by the Appellants. Her evidence reflects gross estimates not supported by any real evidence, as counsel for the City admitted at the motion hearing. There is simply no information to back up Ms. Blakely's estimates.
92. We therefore conclude that the requested documents must be produced.

V. ORDER

93. The Appellants' motion is granted and the City of Fredericton must produce the below documents to the Appellants by May 15, 2019:
- a) Copies of all internal City of Fredericton documents concerning the implementation of the Financial and Consumer Services Tribunal's decision dated March 9, 2017 for the period of March 9, 2017 to July 12, 2018 including, without limitation, any emails, letters, memos, or notes between or among Tina Tapley, Jane Blakely, the City of Fredericton representatives on the Superannuation Board for the Police/Fire Pension Plan, and/or any other City of Fredericton employee;
 - b) Copies of all documents sent to or received from Mercer by any employee of the City of Fredericton from March 9, 2017 to the date of this decision, including any emails, letters, notes or other communications. Without limiting the generality of this request, this includes any communications with Mercer concerning the decision of the City of Fredericton to withdraw the appeals of the March 9, 2018 Tribunal decision, the decision to have Mercer prepare revised actuarial valuations back to 2013, the decision for Mercer not to apply to the Canada Revenue Agency for a waiver of the contribution limit, and the decision to accept the discount rate proposed by Mercer in its new and revised valuations of the Police/Fire Pension Plan;
 - c) Copies of all minutes of the Superannuation Board from March 2016 to the date the Superannuation Board was dissolved by the City of Fredericton in November 2018;
 - d) Copies of all internal City of Fredericton documents concerning the decision of the City of Fredericton to disband the Superannuation Board including, without limitation, any emails, letters, memos, or notes between or among Tina Tapley, Jane Blakely, the City of Fredericton representatives on the Superannuation Board for the Police/Fire Pension Plan, and/or any other City of Fredericton employee, as well as any communications with Mercer and/or the Superintendent of Pensions on this issue;

- e) Copies of any correspondence, whether by email, letter or memo, between the City and Superintendent of Pensions (excluding any such documents that are contained in the Record filed with the Tribunal) for the period of March 9, 2017 to July 12, 2018;
 - f) A copy of any contract or retainer letter between the City of Fredericton and Mercer, including any update or amendments to such contracts or retainer, including any such contract or retainer made by the City on behalf of the Superannuation Board for the previous comprehensive City pension plan and/or the Police/Fire Pension Plan;
 - g) A copy of any correspondence or documents authorizing officials or employees of the City of Fredericton to sign any Application for Registration of Amendment to Pension Plan in 2016, 2017 and/or 2018;
 - h) Any correspondence or documents, including any notes taken by any City employee, and any communications between the City and Mercer, concerning the decision of the City of Fredericton to implement the reduction of contributions to the Police/Fire pension plan in August 2018 for the period of August 2018 to the date of this decision.
94. The hearing dates of June 12-14, 2019 are canceled and the merits hearing is adjourned to September 23-27, 2019.
95. As a result of the adjournment of the hearing dates, we set the following timetable and filing deadlines:
- a) The Appellants shall provide their notice of expert testimony and expert witness report by June 14, 2019 in accordance with rule 10.6 of the *Rules of Procedure*;
 - b) The Respondents shall provide their notice of expert testimony and expert witness report by July 15, 2019 in accordance with rule 10.6 of the *Rules of Procedure*;
 - c) The Appellants shall provide any additional documents they intend to rely on at the hearing to all other parties and the Registrar by July 29, 2019 in accordance with rule 10.3 of the *Rules of Procedure*;
 - d) The Respondents shall provide any additional documents they intend to rely on at the hearing to all other parties and the Registrar by August 5, 2019 in accordance with rule 10.3 of the *Rules of Procedure*;
 - e) All parties shall provide their summaries of witnesses' testimony, which shall include a list of all witnesses the party intends to call, other than expert witnesses, together with a description of the anticipated testimony of each witness to all other parties and the Registrar by August 19, 2019;

- f) The Appellants shall file their *Statements of Position* by August 26, 2019; and
- g) The Respondents shall file their *Statements of Position* by September 9, 2019.

DATED this 4th day of April, 2019.

Judith Keating, Q.C.

Judith Keating, Q.C. Tribunal Chair

Mélanie McGrath

Mélanie McGrath, Tribunal Member