

Cause No.: F/M/38/14

IN THE COURT OF QUEEN'S BENCH
OF NEW BRUNSWICK

COUR DU BANC DE LA REINE DU
NOUVEAU-BRUNSWICK

TRIAL DIVISION

DIVISION DE PREMIERE INSTANCE

JUDICIAL DISTRICT OF FREDERICTON

CIRCONSCRIPTION JUDICIAIRE

B E T W E E N:

E N T R E:

**PENSION COALITION NB, CLIFFORD
KENNEDY JR, VIOLA SAVAGE,
DEBORAH MCCORMACK AND RITA
DUNNETT**

Applicants

demandeur

- and -

- et -

**HER MAJESTY THE QUEEN IN RIGHT
OF NEW BRUNSWICK as represented
by the ATTORNEY GENERAL OF NEW
BRUNSWICK and THE MINISTER OF
FINANCE and the BOARD OF
MANAGEMENT, the
SUPERINTENDENT OF PENSIONS, and
the TRUSTEES OF THE PUBLIC
SERVICE SHARED RISK PLAN**

Respondents

défendeurs

**NOTICE OF MOTION
(FORM 37A)**

**AVIS DE MOTION
(FORMULE 37A)**

TO: The Applicants
c/o Koskie Minsky LLP
Attn: Ari Kaplan
20 Queen Street W
Toronto, ON M5H 3R3

DESTINATAIRE:

AND TO:

Superintendent of Pensions
c/o Pink Larkin
Attn: Ronald Pink, Q. C.
1463 South Park Street
Halifax, Nova Scotia B3J 3S9

The Respondents, Her Majesty the Queen in Right of New Brunswick as represented by the Attorney General of New Brunswick, The Minister of Finance and the Board of Management, will apply to the Court at 427 Queen Street, Fredericton, New Brunswick, on the _____ day of _____ 2014 at _____ a.m./p.m. for the following relief:

La requérante demandera à la Cour au _____, le _____ jour _____, à _____, d'ordonner:

- a) an Order requiring that the Notice of Application filed on behalf of the Applicants on June 30, 2014 (the "**Notice of Application**") be struck on the ground that the relief requested is not appropriately sought on an application;
- b) an Order declaring that the Applicants have failed to provide notice of the within proceeding to the Crown as required by subsection 15(1) of the **Proceedings Against the Crown Act**, R.S.N.B. 1973, c. P-18 and that the within application is, therefore, a nullity and should be struck;
- c) an Order granting costs of the within motion in favour of the Respondents; and
- d) such other and further relief as this Honourable Court deems just.

The grounds to be argued upon the hearing of the within motion are as follows:

Application vs. Action

- (i) the relief sought in the within application is not included in any of the categories of relief contemplated by Rule 16.04 of the **Rules of Court** and, therefore, is not appropriately

sought on an application;

- (ii) the relief sought in the within application does not request the interpretation of a valid statute but, rather, a declaration of the invalidity of a statute, which relief is not authorized by Rule 16.04(e) of the **Rules of Court**;
- (iii) the within application involves a substantial dispute of fact which cannot be resolved by way of an application and must be resolved by way of an action which would include pre-trial proceedings and a trial;
- (iv) the within application involves a consideration of sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the "Charter") and a potential consideration of section 1 of the Charter (the "Charter Issues"). The Charter Issues will require the determination of questions of material fact which are substantially in dispute;
- (v) an application under Rule 16.04 is not the proper forum for determination of the Charter Issues which cannot be properly determined without allowing the parties the benefit of production and discovery and without permitting the assessments of credibility and findings of facts to be made based upon the hearing of viva voce evidence tested by cross-examination;
- (vi) these Respondents require

discovery of the Applicants for the purpose of, *inter alia*, examining the numerous areas in which there are substantial disputes of fact;

- (vii) the Applicants have asserted that they intend to rely upon facts which are not yet known, but which will allegedly be discovered by them through a fact-finding process, which is not appropriate or authorized in the context of an application;
- (viii) the within application will require extensive evidence of expert witnesses, which is beyond the scope of a proceeding brought by application as the expert evidence is required, in this instance, to address substantial factual and opinion evidence which is disputed by the parties;
- (ix) the claim by the Applicants for compensation for the loss of a benefit under their former pension plan (or for the payment of the same benefit under their new pension plan) is the equivalent of a claim for monetary damages which cannot be advanced by way of an application and must be advanced by way of an action;
- (x) the interests of justice would best be served if all issues arising in the within application were determined following the trial of an action instead of by way of application under Rule 16.04;
- (xi) the Applicants' election to proceed by way of Notice of Application, without providing

notice under subsection 15(1) of the ***Proceedings Against the Crown Act***, was improperly motivated by their desire to have this matter heard prior to the September 22, 2014 general provincial election as confirmed by the Applicants' own submissions. In fact, there is no urgency to this matter and no proper reason why it was not commenced by way of an action after having provided the required notice as mandated by subsection 15(1) of the ***Proceedings Against the Crown Act***,

- (xii) the within application should not be directed to proceed to trial pursuant to Rule 38.09 but, struck in its entirety. A direction that the within application be converted into an action and proceed to trial without first requiring compliance with the notice requirement prescribed by subsection 15(1) of the ***Proceedings Against the Crown Act*** would permit the Applicants to circumvent the notice requirement under subsection 15(1) of the ***Proceedings Against the Crown Act***,
- (xiii) litigants should not be permitted to circumvent the notice requirement under subsection 15(1) of the ***Proceedings Against the Crown Act*** by improperly commencing proceedings under Rule 16.04 and then being allowed to convert the proceeding to an action without requiring compliance with the notice requirement prescribed by

subsection 15(1) of the
***Proceedings Against the
Crown Act***,

Notice under Subsection 15(1)

- (xiv) given the nature and scope of the relief sought, the Applicants were required to have provided notice to the Crown as prescribed by subsection 15(1) of the ***Proceedings Against the Crown Act***, *supra*; and
- (xv) the Applicants failed to give the requisite notice to the Crown in accordance with subsection 15(1) of the ***Proceedings Against the Crown Act***, *supra*, and their failure to do so renders the within proceeding a nullity.

Upon the hearing of this motion, the following statutory provisions and Rules will be relied upon: subsection 15(1) of the ***Proceedings Against the Crown Act***, R.S.N.B. 1973, c. P-18, Rules 1.03(2), 2.04, 16.03(1), 16.04, 38.09 and 39.01(5) of the ***Rules of Court***, as well as the inherent jurisdiction of this Honourable Court.

Upon the hearing of the motion, the following affidavits or other documentary evidence will be presented:

- a) Affidavit of Leonard Lee-White sworn to on the 11th day of August 2014; and
- b) such further and other material as counsel may advise.

A l'audition de la motion, les affidavits ou les autres preuves littérales suivantes seront présentées:

You are advised that:

- (a) you are entitled to issue documents and present evidence at the hearing in English or French or both;
- (b) the Respondents, Her Majesty the Queen in Right of New Brunswick as represented by the Attorney General of New Brunswick, The Minister of Finance and the Board of Management, intend to proceed in the English language; and
- (c) if you intend to proceed in the other official language, an interpreter may be required and you must so advise the clerk at least 5 days before the hearing.

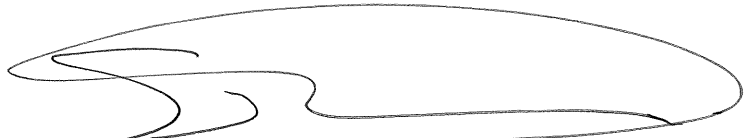
Sachez que:

- (a) vous avez le droit d'émettre des documents et de présenter votre preuve à l'audience en français, en anglais ou dans les deux langues;
- (b) le défendeur a l'intention d'utiliser la langue anglaise; et
- (c) si vous avez l'intention d'utiliser l'autre langue officielle, les services d'un interprète pourront être requis et vous devrez en aviser le greffier au moins 5 jours avant l'audience.

DATED at Saint John, New Brunswick this 11th day of August 2014.

STEWART McKELVEY

Solicitors for the Respondents,
Her Majesty the Queen in Right of New Brunswick
as represented by the Attorney General of New
Brunswick, The Minister of Finance and the Board of
Management



Per: Stephen J. Hutchison

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