

Court File No. **FC-24-24**

No. du dossier :

IN THE COURT OF KING'S BENCH OF
NEW BRUNSWICK

COUR DU BANC DU ROI DU
NOUVEAU-BRUNSWICK

TRIAL DIVISION

DIVISION DE PREMIÈRE INSTANCE

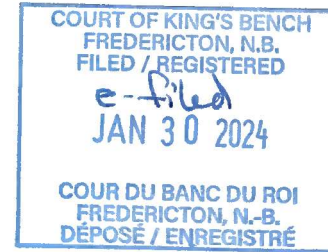
JUDICIAL DISTRICT OF FREDERICTON

CIRCONSCRIPTION JUDICIAIRE DE
FREDERICTON

BETWEEN:

ENTRE:

NEW BRUNSWICK COUNCIL OF
SCHOOL DISTRICT UNIONS (CANADIAN
UNION OF PUBLIC EMPLOYEES, LOCAL
1253), CANADIAN UNION OF PUBLIC
EMPLOYEES, LOCAL 2745 and NEW
BRUNSWICK COUNCIL OF NURSING
HOME UNIONS



Plaintiffs

Demandeur

-And-

- Et -

THE PROVINCE OF NEW BRUNSWICK

Defendant

Defendeur

**NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED
(FORM 16A)**

**AVIS DE POURSUITE ACCOMPAGNE
D'UN EXPOSÉ DE LA DEMANDE
(FORMULE 16A)**

TO: The Province of New Brunswick
C/O The Attorney General for New
Brunswick
Chancery-Place, Floor 2
P.O. Box 6000
Fredericton, NB E3B 5H1

DESTINATAIRE:

LEGAL PROCEEDINGS HAVE BEEN
COMMENCED AGAINST YOU BY FILING
THIS NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED.

PAR LE DÉPÔT DU PRÉSENT AVIS DE
POURSUIE ACCOMPAGNÉ D'UN
EXPOSÉ DE LA DEMANDE, UNE
POURSUIE JUDICIAIRE A ÉTÉ
ENGAGÉE CONTRE VOUS.

If you wish to defend these proceedings, either
you or a New Brunswick lawyer acting on your

Si vous désirez présenter une défense dans
cette instance, vous-même ou un avocat du

behalf must prepare your statement of defence in the form prescribed by the Rules of Court and serve it on the plaintiff or the plaintiff's lawyer at the address shown below and, with proof of such service, file it in this court office together with the filing fee of \$50,

(a) if you are served in New Brunswick, within 20 days after service on you of this notice of action with statement of claim attached, or

(b) if you are served elsewhere in Canada or in the United States of America, within 40 days after such service, or

(c) if you are served anywhere else, within 60 days after such service.

If you fail to do so, you may be deemed to have admitted Any claim made against you, and without further notice to you, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.

You are advised that:

(a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;

(b) the plaintiffs intend to proceed in the English and French Languages; and

(c) your statement of defence must indicate the language in which you intend to proceed.

Where the claim is for a liquidated demand or to recover a debt, with or without interest, insert the following notice:

If you pay to the plaintiff or the plaintiff's lawyer the Amount of the plaintiff's claim, together with the sum of \$100 for the plaintiff's costs, within the time you are required To serve and file your statement of defence, further Proceedings will be stayed or

Nouveau-Brunswick chargé de vous représenter devrez rédiger un exposé de votre défense en la forme prescrite par les règles de procédure, le signifier au demandeur ou à son avocat à l'adresse indiquée ci-dessous et le déposer au greffe de cette cour avec un droit de dépôt de \$50 et une preuve de sa signification:

a) DANS LES 20 JOURS de la signification qui vous sera faite du présent avis de poursuite accompagné d'un exposé de la demande, si elle vous est faite au Nouveau-Brunswick ou

b) DANS LES 40 JOURS de la signification, si elle vous est faite dans une autre région du Canada ou dans les États-Unis d'Amérique ou

c) DANS LES 60 JOURS de la signification, si elle vous est faite ailleurs.

Si vous omettez de le faire, vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, JUGEMENT POURRA ÊTRE RENDU CONTRE VOUS EN VOTRE ABSENCE.

Sachez que :

a) vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;

b) le demandeur a l'intention d'utiliser les langues anglais et français; et

c) l'exposé de votre défense doit indiquer la langue que vous avez l'intention d'utiliser.

Si la demande a pour objet la perception d'une somme déterminée ou le recouvrement d'une créance avec ou sans intérêts, ajouter le paragraphe suivant:

Si, dans le délai accordé pour la signification et le dépôt de l'exposé de votre défense, vous

you may apply to the Court to have the action dismissed.

payez au demandeur ou à son avocat le montant qu'il réclame, plus \$100 pour couvrir ses frais, il y aura suspension de l'instance
Ou vous pourrez demander à la cour de rejeter l'action.

THIS NOTICE is signed and sealed for the court of King's Bench by Mandy Guay, Deputy Clerk of the court at Fredericton, New Brunswick, this ^{30th} day of January, 2024.

CET AVIS est sign et scene au nom de la Cour au Banc du Roi par greffier de la Cour a justice, Fredericton, New Brunswick, ce , jour de 2024.

original signed by
Mandy Guay

Deputy

Clerk of the Court of King's Bench of New Brunswick

Greffier

Justice Building
427 Queen Street, Room 207
P.O. Box 5001
Fredericton NB E3B 5111

STATEMENT OF CLAIM

A. Parties

1. The Plaintiffs are two Local unions and a Council of Unions of the Canadian Union of Public Employees (“CUPE”), and are bargaining agents and trade unions within the meaning of the *Industrial Relations Act*, RSNB 1973, c I-4 (“IRA”), the *Public Service Labour Relations Act*, RSNB 1973, c P-25 (“PSLRA”), and the *Pension Benefits Act*, SNB 1987, c P-5.1 (“PBA”). Their core purpose is to represent their members in their employment, including through collective bargaining, which aims to advance members’ interests in securing and maintaining fair and decent working conditions, especially through terms relevant to their economic security.
2. The Plaintiff New Brunswick Council of School District Unions Local 1253 (“Local 1253”) is a chartered Local of CUPE. Local 1253 represents 1,857 active bus driver, custodian, and trade worker members; another 2,298 individuals are non-active members, retirees, and survivors. Local 1253 has a Collective Agreement with the Treasury Board of the Province that will expire on March 31, 2024. Local 1253 gave notice to bargain on September 29, 2023, and the terms of its existing Collective Agreement will therefore remain in force during bargaining pursuant to the statutory freeze under s. 46 of the *PSLRA*. The average salary of active members of Local 1253 who were enrolled in the pension plan was approximately \$35,790, and the average amount of pension benefits for retired members of Local 1253 was approximately \$11,504 (as of January 2021).
3. The Plaintiff Canadian Union of Public Employees, Local 2745 (“Local 2745”) is a chartered Local of CUPE, representing nearly 4,400 members who are educational and

clerical support staff in New Brunswick schools and School District offices for the Department of Education and Early Childhood Development. Local 2745's membership includes Educational Assistants, School Administrative Assistant and School Clerks, School Library Workers, District Administrative Support Workers, School Intervention Workers, Speech Therapy Assistants and Student Attendants. Approximately 99% of active members of Local 2745 are women. Local 2745 has a Collective Agreement with the Treasury Board of the Province that expired on February 28, 2023 and is currently in active bargaining with the Province's Treasury Board. The terms of Local 2745's existing Collective Agreement remain in force during bargaining pursuant to the statutory freeze under s. 46 of the *PSLRA*. The average salary for active members of Local 2745 who were enrolled in the pension plan was approximately \$40,787, and the average amount of pension benefits for retired members of Local 2745 is approximately \$8,725 (as of January 2021).

4. The Plaintiff New Brunswick Council of Nursing Home Unions ("NBCNHU") is a Council of Unions chartered under the CUPE Constitution, to which 51 Locals of the Canadian Union of Public Employees are affiliated. The Locals forming NBCNHU represent approximately 4,565 nursing home workers. NBCNHU has a Provincial Collective Agreement with an association of employers, the New Brunswick Association of Nursing Homes Inc., which applies to NBCNHU members across fifty-one (51) individually certified or voluntarily recognized nursing home bargaining units, which expired on October 15, 2022. The association of employers represents nursing home employers that receive their funding from the Province. NBCNHU is currently in active bargaining with the employers' association, and the terms of its existing Provincial Collective Agreement

remain in force during bargaining. NBCBHU has 4,565 active members; another 1,708 individuals are deferred members or in receipt of an outstanding refund, and a further 3,226 individuals are retirees and survivors. Approximately 86% of NBCNHU active members are women. The average salary of active members of NBCNHU who were enrolled in the pension plan was approximately \$35,896, and the average amount of pension benefits for retired members of NBCNHU was approximately \$7,416 (as of December 2021).

5. The Defendant is the Province of New Brunswick (the “Province”), and is by reason of s. 11 of the *Proceedings Against the Crown Act*, RSNB 1973, c P-18, herein designated as the Province of New Brunswick. The Province is the employer of the members of Local 1253 and Local 2745 but is not the direct employer of the members of NBCNHU.

B. Overview

6. Pursuant to s. 22 of the *Judicature Act*, RSNB 1973, c J-2, the Plaintiffs are challenging the constitutional validity and operation of the *Pension Plan Sustainability and Transfer Act*, SNB 2023, c 42 (“*PPSTA*” or the “*Act*”), and the regulation *Transfer of Prescribed Pension Plans Regulation – Pension Plan Sustainability and Transfer Act* (the “*Transfer Regulation*”), NB Reg 2024-3, on the basis that the impugned *Act* and the *Transfer Regulation* are unconstitutional and violate the Plaintiffs’ and their members’ rights under s. 2(d) of the *Canadian Charter of Rights and Freedoms*, and that this violation is not justified under s. 1 of the *Charter*.
7. The *PPSTA* received Royal Assent on December 13, 2023, and came into force on that day, other than sections 26 and 27 of the *Act*, which come into force on a day to be fixed by

proclamation. The *Transfer Regulation* was filed under the *PPSTA* on January 25, 2024, and comes into force on February 1, 2024.

8. Through the enactment of the *PPSTA* and the *Transfer Regulation*, the Province has unilaterally overridden the terms of the Plaintiffs' Collective Agreements, by requiring the conversion of their defined benefit pensions to a "shared risk" pension plan.
9. All of the Plaintiffs' Collective Agreements provide for defined benefit pensions, which provide a specific amount of monthly retirement income (pension benefits) based on a formula that takes into account factors such as length of service, age, and pensionable income. Defined benefit pension plans provide significant retirement security and certainty to employees and retirees because the amount of the pension benefit in retirement can be determined based on the relevant formula, rather than factors that vary over time and over which the employee/retiree has no control (e.g. interest rates, investment performance). The Plaintiffs' members have, over the course of their careers, contributed to these pension plans through salary deductions, and have made career and lifestyle decisions based on the terms of their retirement compensation, including the "defined benefit" nature of their pensions.
10. By contrast, so-called "shared risk" pension plans do not guarantee the level of pension benefits that will be received in retirement, and instead use a system of "base benefits" which are based on a targeted pension formula, which is usually a conditionally-indexed career average salary rather than a calculation based on the employee's best years. Such plans will typically only provide indexing or protection against inflation in a variable *ad hoc* manner when there are sufficient funds in the plan to do so based on plan performance.

Not only are the employees' pension benefits which they can expect to receive in retirement unpredictable, even after retirement, members remain at risk of their pension benefits being unexpectedly reduced at any time due to plan funding. The nature of the risk inherent in such plans is not a risk shared as between employers and plan members at all, but rather a risk that is borne entirely by current employees and retired members. In other words, the transition from a defined benefit model to a "shared risk" model transfers the risks associated with maintaining pension benefits from employers and the Province to the plan members, many of whom have modest incomes and will suffer hardship due to the erosion of their economic and retirement security.

11. The requirement under the *Act* and the *Transfer Regulation* to transition from a defined benefit model to a "shared risk" model affects all members of the pension plans, even those who are already retired and in receipt of accrued and vested pension benefits. Moreover, for active members, the transition to a "shared risk" model applies to all benefits, those already earned and future benefits, and in doing so has retroactive effect to benefits that were already earned under the terms of the existing pension plans. The *Act* and *Transfer Regulation* require this to take place under a process that fails to require a wind-up of the plans in a manner that would require their funding of pension benefits accrued and vested to date.
12. The move from a defined benefit model to a so-called "shared risk" model in this case, and the conversion of accrued defined benefits to pensions in the shared risk plan, represents a potential significant diminution of members' total compensation which they have earned

to date and can expect to earn in the future, and an erosion of their economic and retirement security.

13. In doing so, the *PPSTA* is in clear contravention of the terms of the Plaintiffs' collective agreements, which were freely and fairly negotiated between the Plaintiffs and their respective employers. In the case of Local 1253 and Local 2745, the employer is the Province itself. Moreover, the *PPSTA* and the Transfer Regulation provide that if the parties are unable to negotiate an agreement for the conversion of their defined benefit pension plans into a "shared risk" plan, any disputes will be resolved by a decision-maker appointed by the Province, whose mandate is to decide disputes about the terms of the transfer "in accordance with and subject to the provisions of this *Act*."
14. Pensions are an integral and vital component of total employee compensation, and are a fundamental component of retirement security, sought by and obtained through collective bargaining by the Plaintiffs on behalf of their members. By imposing significant and detrimental changes to the Plaintiffs' members' pensions, the *PPSTA* and the Transfer Regulation substantially interfered with meaningful collective bargaining in violation of s. 2(d) of the *Charter*.
15. The infringement of s. 2(d) does not constitute a reasonable limit demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Charter*, as it does not advance a sufficient important government objective and fails to meet the three proportionality requirements of s. 1 of the *Charter*.

16. The Plaintiffs seek declarations, damages and ancillary remedial orders for these violations, under s. 52(1) of Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

C. Background

i. The Plaintiffs' Defined Benefit Pension Plans and Collective Agreements

17. The Plaintiffs' members all benefit from existing defined benefit pension plans, the continuation of which are guaranteed by the terms of their freely and fairly negotiated collective agreements.

18. Members of Local 1253 participate in the Pension Plan for General Labour, Trades and Services Employees of NB School Districts – Custodians, Bus Drivers & Maintenance Workers. Members of Local 2745 participate in the Pension Plan for Full-Time CUPE Local 2745 of NB School Districts (S&C). These are both stand-alone pension plans that are governed by the *Pension Benefits Act*, SNB 1987, c P-5.1. The pension administrator is the Provincial Government, and the plans of Locals 1253 and 2745 are administered by an administrative agent, Vestcor Corp., a not-for-profit pension administration and investment services provider established by the *Vestcor Act*, SNB 2016, c. 31.

19. The Pension Plan for General Labour, Trades & Services Employees of New Brunswick School Districts had approximately 4,027 active, inactive and retired members from a variety of employers across the province (as of January 2021). Employees under the plan contribute 5.5% of their earnings up to the yearly maximum pensionable earnings. Pension benefits are determined with reference to the highest five consecutive years average salary, years of pensionable service, age, and type of pension selected. The benefit “accrual rate”

under the plan – the rate at which the pension benefit is built up through years of service – is 1.4%. Unreduced early retirement is permitted under the plan at age 60. There is an additional “bridge” benefit for retirements before age 65. Pension benefits in retirement are adjusted annually based on the consumer price index to a maximum of 2% per year. These indexation improvements are not conditional on the funded status of the plan.

20. The Pension Plan for Full-Time CUPE Local 2745 of NB School Districts (S&C) has approximately 1,611 active, inactive and retired members from a variety of employers across the province (as of January 2021). Employees under the plan contribute 5% of their earnings up to the yearly maximum pensionable earnings. Pension benefits are determined with reference to the highest five consecutive years average salary, years of pensionable service, age, and type of pension selected. The benefit “accrual rate” under the plan is 1.3%. Unreduced early retirement is permitted under the plan at age 60. There is an additional “bridge” benefit for retirements before age 65. Pension benefits in retirement are adjusted annually based on the consumer price index to a maximum of 2% per year. These indexation improvements are not conditional on the funded status of the plan.

21. NBCNHU members participate in the Pension Plan for General and Service Employees of New Brunswick Nursing Homes, which is governed under the *Nursing Homes Pension Plans Act*, SNB 2008, c N-12 and the *Pension Benefits Act*. The Pension Plan for General and Service Employees of New Brunswick Nursing Homes is jointly funded by employers and members. Contribution rates for each side are currently 8.125% of earnings, notwithstanding the funding levels or true current service / normal cost of the plan. The plan provides retirement benefits on an indexed “career average” basis. Each year plan

members earn a pension of 1.4% of earnings up to the year's maximum pensionable earnings (YMPE), as defined by the Canada Pension Plan. That cumulative amount is subject to annual indexation improvements prior to retirement based on the consumer price index to a maximum of 2% per year. Unreduced early retirement is permitted under the plan at age 60 or at the "85 factor" (when the sum of age and years of continuous service equals 85). There is an additional "bridge" benefit for retirements before age 65. Pension benefits in retirement are adjusted annually based on the consumer price index to a maximum of 2% per year. These indexation improvements (with respect to both pre and post retirement indexation) are not conditional on the funded status of the plan.

22. The Plaintiffs have bargained provisions that guaranteed the terms of their pension plans into their respective Collective Agreements for decades:

- a. The Local 1253 Collective Agreement guarantees in article 24 the right of their members to "retire in accordance with the Pension Plan presently in effect" and provides that "[t]he Pension Plan presently in effect shall continue to apply to all full-time employees of the Bargaining Unit." It provides for a range of specific guaranteed terms concerning retirement age, benefit rates and contribution rates, and a guarantee that surplus funds will not be withdrawn by the employer, the Province. It further provides for the creation of a Pension Committee, half of whose members are appointed by CUPE, and explicitly provides in Article 24.05 that:

The Pension Plan text shall be subject to collective bargaining. Changes may be made to the Pension Plan text through the collective bargaining process as agreed to by the parties, or through the Pension Committee when there is mutual agreement.

- b. The Local 2745 Collective Agreement includes similar guarantees in article 24 of the right of members, which has been in the Collective Agreement since approximately the late 1970s. Article 24 guarantees the right to “retire in accordance with the Pension Plan presently in effect” and provides that “[t]he Pension Plan presently in effect shall continue to apply to all full-time employees of the Bargaining Unit.” It provides for a range of specific guaranteed terms concerning retirement age, benefit rates and contribution rates. The Local 2745 Collective Agreement equally provides for a Pension Committee, to which CUPE appoints 3 of 7 members, and includes a Letter of Intent to the Collective Agreement, which set out terms concerning voluntary retirement age within the defined benefit pension.

- c. The NBCNHU Collective Agreement provides in article 26.01 that “[t]he Pension Plan in effect on the date of signing of this Agreement shall continue as amended from time to time during the life of this Agreement.” Article 26.02(b) is clear that the parties meet annually to ratify amendments recommended by the Joint Board of Trustees of the plan, and otherwise, “[a]ll other amendments to the Pension Plan shall be negotiated during collective bargaining.” Article 26 further sets out provisions around amendments to the pension plan, the use of a surplus in the pension fund, contribution rates, the right to buy back pensionable service, and an obligation on the parties to “meet immediately to negotiate amendments to the Pension Plan” in the case of an unfunded liability.

Several Letters of Agreement (“LOA”) to the NBCNHU Collective Agreement dealing with pensions were signed on February 10, 2021. One LOA provided that “[f]or greater clarification, it is agreed that the present pension benefits provided in the existing Pension Plan shall not be changed without mutual agreement.” A second LOA set out

changes to the pension plan negotiated between the parties, dealing with retirement age, benefits on early retirement, and use of available surplus in the pension plan. A third LOA committed the parties to ensuring that the plan would be amended to prevent members from withdrawing their commuted pension funds at retirement. A final LOA dealt with the retroactive application of changes to contribution rates.

23. Beyond the explicit language of the Plaintiffs' Collective Agreements guaranteeing the continuation of their defined benefit pension plans, there is extensive evidence of the longstanding agreement between the parties that pension plans were subject to negotiation, set out in letters from the employer, legal briefs, bargaining notes, videos of the Premier speaking to workers on picket lines, and statements made in the legislature.

ii. The Province's Conversion of Other Public Sector Pension Plans to "Shared Risk" Plans

24. In 2011, the Province set up a Task Force to examine the long-term stability and security of private pensions in New Brunswick, but the Task Force's mandate was later extended to include public pensions.

25. The Task Force began by examining two hospital pension plans. The hospital pension plans at issue were contractual plans negotiated with hospital unions. These plans provided for defined pension benefits, but were severely underfunded and, pursuant to the contractual terms, the Plan Sponsors for the Hospital plans had no responsibility for any unfunded liabilities. Accordingly, the hospital unions involved in these consultations entered into negotiated agreements with the Province to convert their defined benefit pension plans to a "shared risk" model, which took effect July 1, 2012.

26. In 2012, the Province amended the *Pension Benefits Act*, SNB 1987, c P-5.1, to allow for private and public-sector pension plans to adopt a “shared risk” model, while also permitting the transfer of existing pension plans to a “shared risk model” without the protections associated with a wind-up under s. 65 of the *PBA*. It became clear in 2012 that the Province intended on extending the application of the “shared risk” model of pension plans to the entire public sector. The Task Force began examining the *Public Service Superannuation Act*, RSNB 1973, c P-26 (*PSSA*), which set out a statutory defined benefit pension plan for many of the Province's public service employees, along with employees of certain other employers. The Task Force equally invited unions subject to the *PSSA* to discussions about changes to that legislation, during which the Task Force threatened that if the unions involved did not agree to the conversion of their defined benefit pension plans to the “shared risk” model, it would impose an even less-beneficial defined contribution benefit plan. In these circumstances, on November 20, 2013, some unions agreed to a Memorandum of Understanding setting out the terms for the conversion of the *PSSA* to a “shared risk” pension plan. Several of the unions subject to the *PSSA* refused to consent to the conversion of the defined benefit pension plan to a “shared risk” plan.
27. The Province enacted *An Act Respecting Public Service Pensions*, SNB 2013, c. 44 (*ARPSP*), which came into force on January 1, 2014, and converted the defined benefit pension plan set out in the *PSSA* to a “shared risk” pension plan: the Public Service Pension Plan (“PSPP”). A number of other pension plans in New Brunswick were converted to the PSPP between 2012 and 2014, including the City of Saint John plan, the City of Fredericton plan, the University of New Brunswick Academic Employees plan, the Saint John Energy

plan, the NB Pipe Trades plan, the Co-op Atlantic plan and the Members of the Legislative Assembly plan.

28. Several of the unions who refused to sign the Memorandum of Understanding with the Province, including nine CUPE locals, initiated an Action alleging that the enactment of the *ARPSP* violated s. 2(d) of the *Charter*, which is ongoing (court file No. FC-349-15).

iii. Efforts by the Province to Undermine the Plaintiffs' Members' Pension Plans and Compel the Conversion to a "Shared Risk" Plan

29. The Plaintiffs allege that once the province decided to adopt the "shared risk" model in 2012, it made a deliberate decision to not make special payments to the pension plans applying to the members of the Locals 1253 and 2754. With respect to the pension plan applying to members of NBCNHU, the Defendant was fully aware of and failed to take any action to address the underfunding of the plan.

30. Indeed, Local 1253 filed a grievance on July 7, 2018, alleging that that the Province had violated Local 1253's Collective Agreement by deliberately under-funding its defined benefit pension plan. In a decision dated June 28, 2021, Adjudicator Elizabeth MacPherson granted Local 1253's grievance, finding that the Province had breached the collective agreement and the plan text by under-funding the pension plan. Arbitrator MacPherson ordered the Province to remedy any deficits in the pension plan funding. The Province failed to make special payments pursuant to Arbitrator MacPherson's order until February 2022, and only following a clarification decision by Arbitrator MacPherson on June 9, 2023, the Province made a special payment of \$5,528,900 into the plan on November 17, 2023.

31. Local 2745 has filed a similar grievance challenging the under-funding of its pension by the Province, which is currently being held in abeyance.

32. NBCNHU filed a successful complaint alleging under-funding of its pension plan with the New Brunswick Superintendent of Pensions. In a decision dated January 30, 2023, the Superintendent found that the pension plan had not been properly funded, required that contributions be increased to fully fund the pension plan, and required the Province to report to her office on implementation. The Province has failed to do so to date.

iv. 2021 Strike and Memoranda of Agreement

33. In 2021, certain CUPE Locals, including Local 1253 and Local 2745, went on strike for 16 days. During the strike, the Province asked that all Locals participate in a central bargaining table on wages and, towards the end of the strike, the Province took the position that Local 1253 and Local 2745 needed to sign Memorandums of Agreement (“MOA”) resolving their pension issues as a key part of a negotiated settlement for all CUPE Locals.

34. While the first drafts presented by the Province were designed to endorse the transfer of existing pension plans to a “shared risk” pension plan, this was not agreed to by Local 1253 and Local 2745. Moreover, the final MOA language included provisions protective of the members’ pension plans, such as specific representations that contribution rates be fair and equitable for both the province and plan members, and that there be no loss of the accrued pension amount for plan members.

35. Local 2745 and Local 1253 signed their MOAs in November 2021 and March 2022, respectively.

36. The MOAs with the Province provided that “the parties agree to negotiate in good faith the specific terms and conditions of a new pension plan” no later than June 30, 2022 (for Local 2745) or August 31, 2022 (for Local 1253). These deadlines could be mutually extended by the parties.
37. The MOAs explicitly provided a required dispute resolution mechanism should the parties be unable to agree to the amendment of the current plan. The parties would submit outstanding issues to a Board made up of two actuaries, one appointed by each party, and a chairperson designated by the appointed actuaries. The Board’s decision would be final and binding.
38. From that point, Local 1253 and Local 2745 engaged in good faith negotiations with the Province, during which they have advocated for the adoption of a specific existing defined benefit plan: the CAAT Pension Plan, which serves more than 360 participating employers in 17 industries including the for-profit, non-profit, and broader public sectors. There was significant back and forth between the Local 1253 and Local 2745 and the Province, with the parties agreeing to multiple extensions to the timelines in the MOAs.
39. On September 22, 2023, Locals 1253 and 2745 indicated through their counsel that the parties were at an impasse and suggested that the parties initiate the dispute resolution process contemplated in the MOAs. The Province did not respond.
40. On November 22, 2023, the Province advised Local 1253 and Local 2745 of its position that the parties had reached an irreconcilable impasse and that the Province was considering introducing legislation that would unilaterally establish a framework that would lead to the

transfer of the pension plans of Local 1253 and Local 2745 to an existing “shared risk” plan, and suggesting that the parties should move forward with an alternate dispute resolution process allowing for selection of an appropriate existing shared risk plan as the destination shared risk plan for the two locals. In response, the Presidents of Local 1253 and Local 2745 wrote that the agreed-upon process in the 2021 MOAs was the Province’s own proposal, and that any new legislation imposing a “shared risk” plan contrary to the wishes of their members constituted “dictating, not collective bargaining.”

v. Introduction of Bill 17

41. The *PPSTA* was tabled at first reading in the New Brunswick Legislature November 29, 2023 and received Royal Assent on December 13, 2023. To NBCNHU’s surprise, it was also included in the scope of Bill 17, despite not having been involved in the prior negotiations that followed the 2021 strike. The *PPSTA* applies to approximately 11,000 of the Plaintiffs’ active members. It will equally affect the pension benefits of approximately 5,550 retirees and members who ceased working for the employers prior to retirement and are thus no longer represented by CUPE, but who remain plan members having retained an entitlement to commence their pensions when they reach eligible retirement age (“deferred members”).

42. Among other things, the *PPSTA*:

- a. Applies to all pensions plan prescribed in the *Transfer Regulation* (s. 3);
- b. Requires any affected bargaining units to transition their pensions to a “receiving plan”, which is defined as a “shared risk” pension plan, and to negotiate a

memorandum of understanding setting out the terms of that transfer, on matters set out in the *Act*. While the parties are permitted to negotiate some aspects of the transfer, they do so under constrained conditions, as the *PPSTA* is clear that the eventual pension plan must be a “shared risk” pension plan (ss. 1, 4-5);

- c. Provides that any disputes as to the negotiation of a memorandum of understanding are referred to the Sustainable Pension Authority, which is appointed solely by the Province (ss. 1, 6(3), 12). The Sustainable Pension Authority is directed under the *PPSTA* to conduct a mediation process, followed by arbitration and the issuance of a final and binding decision on the parties, under a process in which the arbitrator must decide the matters in question related to the transition of the plans in accordance with and subject to the provisions of the *Act* (s. 15);
- d. Transfers all accrued benefits belonging to affected bargaining unit members to a “shared risk” plan, even if the administrator of the shared risk plan does not agree to such transfer (s. 9), and converts them to base benefits under the new plan (s. 10);
- e. Overrides the provisions of any Collective Agreement (s. 20);
- f. Declares as null and void the order of the Superintendent dated January 30, 2023, issued following the complaint made by NBCNHU, as well as any orders of Tribunals or Boards made in respect of the Superintendent’s order (ss 24(a) and 24(b)); and
- g. Declares null and void any decision of an arbitrator or arbitration board under a collective agreement with respect to the transfer of a pension plan, which would

include Arbitrator MacPherson's order requiring the Province to remedy the deficit in Local 1253's existing pension plan (s. 24(c)).

43. The *Transfer Regulation* accompanied the enactment of the *PPSTA* and comes into force on February 1, 2024. It confirms the *PPSTA*'s application to Local 1253, Local 2745 and NBCNHU and requires the parties to endeavour to negotiate and enter into one of three prescribed "shared risk" pension plans within 90 days after the commencement of the Regulation.

D. Breach of *Charter* Rights

44. Section 2(d) of the *Charter of Rights and Freedoms* guarantees the freedom of association. This includes a right to collectively bargain the terms and conditions of employment and the right to strike. A law that interferes with collective bargaining and the right to strike, including by overriding the explicit terms of collective agreements reached through free and fair collective bargaining, violates s. 2(d) of the *Charter* and would need to be justified under s. 1.

45. Pensions are a vital component of employee total compensation and retirement security. Employer and employee contributions to pension plans not only impact on current compensation but are an important form of deferred compensation. For most employees, the pension benefits they receive from employer sponsored workplace pension plans will be their primary source of income upon retirement. As members of our society live longer and poverty among the elderly is a growing concern, pension benefits are essential to the future financial security and well-being of the Plaintiffs' members. Pension considerations can also affect employees' career decisions at all stages.

46. The nature of a pension plan, and the nature of the ‘pension promise’ are key to individuals’ economic security over their lifetimes. Individuals contributing to a pension plan during their employment (active employees), individuals who have contributed to a pension plan during earlier periods of employment and expect to receive a pension when they retire (deferred members), and retired individuals who are in receipt of pension benefits (retirees) all reasonably expect that they will receive their pensions to which they have contributed over their working lives. There are significant differences in the degree of economic security provided by pensions with a defined benefit structure, and other forms of retirement compensation, such as so-called “shared risk” pensions, where the amount of the pension benefit payable on retirement is not guaranteed or predictable because it varies based on the plan’s economic performance and other factors.
47. As a result, employees have a vital interest in the design and functioning of their pension plans, including matters such as eligibility to participate, contribution rates, the amount and structure of benefits, and the funding of the plan. Any reduction in pension benefits – including the loss of the security provided by a “defined” benefit that is certain and knowable in advance and earned over the course of an employee’s career – is a reduction in total compensation.
48. Collective bargaining necessarily involves trade-offs. In securing collective agreement language protecting their members’ pension benefits, the Plaintiff locals have traded off or foregone improvements they would have negotiated in other areas, including in other monetary items (e.g. wages, other forms of non-pension benefits) and non-monetary items (e.g. provisions related to a range of matters such as promotions, layoffs, and leaves of

absence). The unilateral alteration of the pension benefits therefore undermines the collective agreements as a whole and the unions' role in negotiating the terms and conditions of employment on behalf of its members.

49. Given the importance of pensions to their members' economic security, including the importance of the defined benefit aspect of pension plans, unions expect that changes to the structure of pension plans will be the subject of negotiations, consistent with their role in representing members in their employment. The *PPSTA* and the *Transfer Regulation*, by overriding the Plaintiff's negotiated protections and terms for their members' pension plans, and by legislating a conversion to a "shared risk" plan that will impose significant detrimental changes to the Plaintiffs' members' pension benefits and pension security, have negatively impacted and will continue to negatively impact the Plaintiffs' affected members for many years to come. These changes have also interfered with the plaintiffs' ability to represent their members and removed their ability negotiate on their members' behalf respecting fundamental components of their compensation. The breach both imposes and overrides existing terms of employment and precludes meaningful collective bargaining with respect to pensions in future. In doing so, the *PPSTA* and the *Transfer Regulation* have clearly interfered with the activity of collective bargaining and therefore infringe on s. 2(d) rights.

50. Moreover, the process by which the *PPSTA* and the *Transfer Regulation* were enacted does not constitute meaningful collective bargaining as required by s. 2(d) of the *Charter*. Nor does the negotiation process set out in the *PPSTA*, which is constrained by the limitations in the *Act*, must result in the conversion to a "shared risk" pension plan, and is required to

be conducted under the shadow of potential mandatory arbitration before a decision-maker appointed solely by the Province, constitute a meaningful process of collective bargaining as required by s. 2(d) of the *Charter*. The negotiation and arbitration process imposed by the Province eliminates the right to strike over pensions, despite their importance to members' total compensation and retirement security, while failing to provide a dispute resolution mechanism that is fair and impartial or that would allow a decision maker to consider the union's submission that the pension plans should not be converted to a "shared risk" model. The arbitration process is instead limited to deciding the transition of pension plans to the "shared risk" model "in accordance with and subject to the provisions of this *Act*."

51. As a result, the *PPSTA* and the Transfer Regulation have substantially interfered with the Plaintiffs' and their members' s. 2(d) *Charter*-protected right to a meaningful process of collective bargaining and the right to strike over significant terms and conditions of employment.
52. The Plaintiffs CUPE, Local 1253, and Local 2745 further assert that, in addition to the breach of s. 2(d) arising from the *Act* and *Transition Regulation*, the Defendant has also breached s. 2(d) in its capacity as employer. In this regard, the Province as employer is obligated to engage in good faith bargaining and respect the right to strike and is precluded from acting unilaterally. Instead of fulfilling these obligations, the Province has unilaterally imposed and overridden existing collective agreement terms and precluded meaningful bargaining in the future related to pensions.

53. Moreover, the concerns raised by the Province in connection with its desired move to shared risk pensions – pension stability and the protection of plan members – are belied by the approach it has taken, including since 2012, to deliberately underfund public sector pensions, manufacturing the crisis that it now seeks to rely upon to unilaterally convert pension plans to a so-called “shared risk” model.
54. Prior to the *Act* and *Transfer Regulation*, the Plaintiffs were able to engage in negotiations with the Province, or in the case of NBCNHU their employers, concerning the future of their members’ pensions, and did so, under a process agreed to and/or established by the Province that built in an arbitration framework for the resolution of disputes and respected the unions’ protected associational rights. The effect of the *Act* and *Transfer Regulation* is to undermine the balance of power and remove any right to a meaningful and fair process to determine the future of its members’ pensions. The process introduced is lopsided and its outcome is predetermined: the only outcomes are variations of a so-called “shared risk” pension model.
55. The *Act* and *Transfer Regulation* operate to prevent the Plaintiffs and their members from engaging in meaningful collective bargaining to address the future of the pensions, including any possibility of bargaining trade-offs to preserve existing pension entitlements, or bargaining for a wind-up in accordance with minimum standards under pension benefits legislation to preserve pension benefits accrued to date, or taking strike action to address the future of vitally important terms and conditions of employment.

i. The *PPTSA* and the Transfer Regulation Overrides the Explicit Terms of Freely and Fairly Negotiated Collective Agreements

56. The Plaintiffs' collective agreements include explicit provisions protecting their existing defined benefit pensions and setting out specific terms for those pensions, as set out above. Their collective agreements equally include provisions setting out specific terms of those defined benefits pension plans. Moreover, following a strike and difficult bargaining in 2021, Local 1253 and Local 2745 negotiated Memorandums of Agreement to negotiate revisions to their pension plans, but did so on the clear mutual understanding that any changes would be freely bargained and that any disputes would be referred to an impartial decision-maker jointly named by both parties. For its part, in 2021, NBCNHU negotiated a Letter of Agreement to its Collective Agreement that reaffirmed the already explicit commitment that the existing defined benefit pensions would not be changed without mutual agreement.

57. The *PPSTA* and the Transfer Regulation, by both imposing and overriding existing negotiated protections and terms for their members' pension plans and requiring the negotiation of a transfer to a "shared risk" plan, within a process and on terms dictated by the Province, has clearly interfered with the activity of collective bargaining, precluding meaningful future bargaining related to pensions. They therefore infringe on the Plaintiffs' s. 2(d) *Charter* rights.

ii. Significance of the Impact of the *PPSTA* and the *Transfer Regulation* to the Plaintiffs' Members

58. By requiring that the Plaintiffs negotiate the conversion of their members' defined benefit pension plans to "shared risk" pension plans, the *PPSTA* will result in a number of

significant and detrimental changes to pension benefits that will negatively impact the Plaintiffs' members. These include, but are not limited to the following:

- a. **An effective reduction in wages for the Plaintiffs' members:** Currently, Local 1253 and Local 2745 contribute 5-6% of their wages to their pension plans, and NBCNHU members contribute about 8% to their pension plan. Forced participation in the Province's existing "shared risk" plans will require employee contributions of about 7.5-9%. All of the Plaintiffs' members will be affected, with some losing 2.5-4% of their wages to make up the difference in contributions.
- b. **A significant loss in wages for part-time members of Local 2745 as well as increased financial uncertainty upon retirement:** The part-time workers in Local 2745 (estimated at 70% of the bargaining unit), who largely have not opted to participate in a voluntary workplace pension plan, will immediately face new deductions from their wages of 3-9% if forced to participate in the Province's existing "shared risk" plans. Part-time members who have opted out to date may become ineligible for certain provincial health plan benefits and may face increased out-of-pocket costs in retirement.
- c. **Changes in eligible retirement ages:** Retirement criteria under the Province's three existing "shared risk" plans have different and less advantageous ages and higher penalties than those in the Plaintiffs' members' existing pension plans. Moreover, there is no unreduced early retirement in the province's "shared risk" pension plans, as allowed under the Plaintiffs' members' existing plans.

- d. **Reduction in security of pension entitlements for current retirees:** Existing retirees from the Plaintiffs' bargaining units will no longer have their retirement benefits guaranteed, exposing them to considerable risk to their livelihood and well-being in retirement.
 - e. **Reduction in security of pension entitlements for active employees:** Current members of the Plaintiffs' bargaining units will similarly no longer have their retirement benefits guaranteed and will receive inferior benefits on retirement than what they had been entitled to under their existing plans. Notably, the conversion to a "shared risk" plan will apply both to pension benefits already accrued in the past, under the terms of the previous pension plans, and to benefits accrued in the future.
59. By legislating a conversion to a "shared risk" plan that will impose significant detrimental changes to the Plaintiffs' members' pension benefits, the *PPSTA* and the Transfer Regulation have negatively impacted and will continue to negatively impact the Plaintiffs' affected members for many years to come, further infringing on s. 2(d) rights.
- iii. **The Negotiations Conducted Prior to the Introduction of the *PPSTA*, and the Negotiations Dictated by the Legislation Are Not Collective Bargaining or, in the Alternative, Meaningful Consultation**
60. Negotiations that fail to lead to a freely and fairly negotiated agreement between the parties are no substitute for meaningful collective bargaining. As a result, none of the negotiations between the parties engaged in prior to the enactment of the *PPSTA* or those contemplated under the *PPSTA* are compliant with the requirement of meaningful collective bargaining under s. 2(d) of the *Charter*.

61. The negotiations contemplated under the *PPSTA* similarly do not qualify as meaningful collective bargaining as required by s. 2(d) of the *Charter*. Among other things, the negotiation process in the *PPSTA*:

- a. Is determined and dictated by the Province;
- b. Must result in conversion of the Plaintiffs' defined benefit pension plans to "shared risk" plans;
- c. Is engaged in under the shadow of a mandatory dispute resolution process before a decision-maker unilaterally appointed by the Province, whose mandate is limited to determining the terms of the transfer of the plans to various forms of the "shared risk" model;
- d. Explicitly ignores and overrides the provisions of freely and fairly bargained Collective Agreements;
- e. Explicitly ignores and overrides the decisions of the Superintendent of Pensions and those of arbitrators or arbitration boards; and
- f. Allows for a mandated transfer of the Plaintiff's defined benefit plans to a receiving "shared risk" plan even if such "shared risk" plan refuses to accept a transferring plan.

62. For these reasons and others, the negotiations contemplated under the *PPSTA* are not a substitute for a meaningful process of collective bargaining and violates s. 2(d) of the *Charter*.

iv. The Violation of *Charter* Rights was not Justified Under Section 1 of the *Charter*

63. The violation of s. 2(d) in this case does not constitute a reasonable limit demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*, as it does not advance a sufficiently important government objectives, and it fails to meet the three proportionality requirements of s. 1 of the *Charter*. The Plaintiffs hold the Defendant to the strictest proof of any purported justification for the violation of *Charter* rights.

E. Relief Sought

64. The Plaintiffs claim:

- a. A declaration that the *Pension Plan Sustainability and Transfer Act*, SNB 2023, c 42, and the regulation *Transfer of Prescribed Pension Plans Regulation – Pension Plan Sustainability and Transfer Act*, NB Reg 2024-3, violate s. 2(d) of the *Canadian Charter of Rights and Freedoms* and that this violation is not justified under s. 1 of the *Charter* because it cannot be demonstrably justified in a free and democratic society and, as such, the *PPSTA* and the *Transfer Regulation* are of no force or effect;
- b. An interlocutory and permanent injunction restraining the Defendant from unilaterally transferring the affected pension plans to a “shared risk” model;
- c. An order pursuant to s. 24(1) of the *Charter* requiring the Defendant to restore the defined benefit pension plan, as guaranteed in the Plaintiffs’ collective agreements and as existed prior to the coming into force of the *Transfer Regulation*, retroactive to February 1, 2024, and to make any necessary payments into the pension trust fund and adjustments to the entitlements of the Plaintiffs’ affected members so that they are in the

same position as they would have been if the *PPSTA* and the *Transfer Regulation* were never enacted;

- d. General damages in an amount to be determined at trial;
- e. Punitive and exemplary damages in an amount to be determined at trial;
- f. In the alternative, damages under s. 24(1) of the *Charter* to put the Plaintiffs' affected members into the position that they would have been had the *PPSTA* and the *Transfer Regulation* never been enacted in an amount to be determined at trial;
- g. Costs of this Action on a substantial indemnity basis;
- h. Interest pursuant to the provisions of the *Judicature Act*, R.S.N.B. 1973, c. J-2, and *Rules of Court*, N.B. Reg. 82-73; and
- i. such further and other relief as this Honourable Court deems just, including such ancillary orders that are necessary to give just effect to the foregoing orders and declarations.

F. Legislative provisions relied on

65. *Pension Plan Sustainability and Transfer Act*, SNB 2023, c 42


66. *Transfer of Prescribed Pension Plans Regulation – Pension Plan Sustainability and Transfer Act*, NB Reg 2024-3;

67. *Industrial Relations Act*, RSNB 1973, c I-4;

68. *Public Service Labour Relations Act*, RSNB 1973, c P-25;

69. *Pension Benefits Act*, SNB 1987, c P-5.1;
70. *Nursing Homes Pension Plans Act*, SNB 2008, c N-12;
71. *Proceedings Against the Crown Act*, RSNB 1973, c P-18;
72. *Canadian Charter of Rights and Freedoms*, ss. 1, 2(d) and 24(1), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11;
73. *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11;
74. *Judicature Act*, RSNB 1973, c-J-2;
75. Rules 37, 39 and all other applicable provisions of the *Rules of Court*, NB Reg 82-73; and
76. Such further and other grounds as counsel may advise and this Honourable Court may permit.

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