Federal Court  Cour fédérale

Date: 20170801

Docket: T-311-15

Citation: 2017 FC 749

Ottawa, Ontario, August 1, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

LORETTA BEMISTER, RICHARD FERGUSSON, PETER KERR, OREST TORSKY, NANCY WILSON AND THE NATIONAL ASSOCIATION OF FEDERAL RETIREES

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are retirees from various facets of the federal public service, and are voluntary participants in the Public Service Health Care Plan [PSHCP]. The PSHCP is the health care plan established pursuant to the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*]

which provides coverage for active federal employees and retirees from the federal public service. The National Association of Federal Retirees [NAFR] is a non-profit organization who advocates on behalf of federal retirees.

[2] In this judicial review application pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7, the Applicants seek declarations that the Respondent, acting through the Treasury Board [TB], breached their contractual rights and infringed upon their *Charter of Rights and Freedoms* [*Charter*] with respect to the process followed and the changes made to the PSHCP cost sharing ratio in 2014. At that time it was announced that the cost sharing ratio would be moved from a 75-25 % split, where it had been held for a number of years, to a 50-50 % split. Meaning that retirees pay 50% of the premiums for coverage under the PSHCP and the federal government pays the other 50%. Prior to this, the retirees paid 25% of the premiums. Active federal employees currently do not pay premiums for PSHCP coverage.

[3] This judicial review application is not about pension benefits. It is about the increase in the cost of PSHCP coverage for retirees, and it is about the course of conduct followed by the TB to achieve that increase. The retirees had input into the PSHCP changes as announced in 2014, by virtue of having a representative of the NAFR on the PSHCP oversight Committee. Although, they disagreed with the move to a 50-50% cost-sharing ratio, they obtained other concessions, and obtained agreement that the new ratio would not apply to lower income retirees. They had recourse to an alternative dispute resolution process in the event of an impasse, but they choose not to trigger that process.

[4] For the reasons that follow, I conclude that the retirees and the NAFR agreed, albeit reluctantly, to the 50-50% cost sharing ratio on PSHCP premiums. I also conclude that there were no violations of the Applicants' *Charter* rights.

[5] This application for judicial review is therefore dismissed. The parties did not seek costs.

II. Background

A. *PSHCP*

[6] The PSHCP is established under section 7.1 (1) of the *FAA* which allows the TB to "establish or modify any group insurance or other benefit programs for employees of the federal public administration and any other persons […]".

[7] The PHSCP provides coverage for various health care benefits including: prescription drugs, medical supplies, vision care, medical practitioner services, hospital coverage and travel coverage. Members of the PSHCP include current employees, as well as retired federal public servants, and their eligible dependants. Upon retirement, employees may choose to continue coverage under the PSHCP. Because participation in the PSHCP is voluntary, retirees are free to withdraw from the plan at any time.

[8] Currently, the PSHCP provides coverage for over 600,000 members. Of the estimated 239,000 retirees from the federal public service, approximately 174,500 participate in the PSHCP. The PSHCP is funded through contributions from the TB, participating employers, and

PSHCP members. Retiree contributions for PSHCP premiums are deducted from their pension payments.

[9] The PSHCP has undergone various changes including changes to coverage, co-pays and the cost-sharing percentages. Although it is the changes in 2014 that are in issue on this judicial review application, some background to the governance of the PSHCP is necessary for context.

(1) 1999-2005

[10] On December 1, 1999, a Memorandum of Understanding [MOU] and a Trust Agreement [Trust] were entered into between the TB, the National Joint Council [NJC] of the Public Service of Canada (representing various public service bargaining agents), and the retiree association, which was then known as the Federal Superannuates National Association [FSNA], and is now known as the NAFR.

[11] The MOU was for the period of April 2000 to March 31, 2005, and outlined the financial and management framework of the PSHCP.

[12] During the 2005 renewal negotiations, the TB, the NJC and FSNA agreed to replace the PSHCP Trust with a corporation to be known as the Federal Public Service Health Care Plan Administration Authority and a collaborative forum known as the Public Service Health Care Plan Partners Committee [Partners Committee].

(2) 2006-2011

[13] A new MOU was entered into for the period of April 1, 2006 to March, 2011. This MOU states it purpose as follows:

> "The purpose of this MOU is to set out changes that will be made to the Public Service Health Care Plan (PSHCP) with regard to benefits, cost-management measures, the introduction of a pay direct drug card (PDDC), as well as changes to its governance framework."

[14] With respect to retirees' (referred to as pensioners) contributions, the 2006 MOU states as follows in Appendix B "Cost Management Measures":

> Pensioner contributions will be based on the principle of 75/25 percent cost sharing; and pensioner contribution rates will be fixed for the period April 1, 2006 to March 31, 2011. Effective April 1, 2011 contribution rates will be recalculated to once again reflect the 75/25 principle.

[15] Appendix D of the MOU outlines "The PSHCP Governance Structure" as follows:

> A final detailed governance proposal will be developed by the representatives of the Parties and submitted to the President of the Treasury Board for approval. The main elements of the new governance framework would be as follows:
>
> - The current PSHCP Trust to be terminated.
> - A corporation would be created under subsection 7.2 (1) of the *Financial Administration Act* (FAA) through the issuance of letters patent of incorporation by the President of the Treasury Board, on the recommendation of the National Joint Council. The corporation would be charged with oversight of the administration of the Plan.
> - A corporation would begin its operations on April 1, 2006.

- A collaborative committee to be known as the Partners Committee, to be established made up of representatives of the Parties to allow for a joint problem-solving process where the Parties will work together to reach consensus on plan development and cost-management issues.

- The Partners Committee to be mandated to develop recommendations for approval by the Treasury Board on changes to the terms of the PSHCP to deal with cost pressures and other matters; and

- The terms of reference of the Partners Committee will include a dispute resolution process to be developed by the representative of the Parties. Should the representatives of the Parties fail to reach an agreement on a dispute resolution process, the process set out in the Memorandum of Understanding in respect of the 2011 Renewal will apply.

[16] A dispute resolution process was outlined in Appendix A to the 2006 MOU "Concerning the 2011 Renewal of the PSHCP" as follows:

- In the event that the parties fail to reach a new agreement by June 2010, a mediation process may be initiated by either the representatives of the Treasury Board Secretariat or by the representatives of the certified bargaining agents of the National Joint Council or by the representatives of the pensioners.

- Should mediation not be successful by October 2010, a Dispute Resolution Process may be initiated by the Treasury Board Secretariat representatives or by the representatives of certified bargaining agents of the National Joint Council, or by the representatives of pensioners.

- The Dispute Resolution Process shall consist of hearings conducted by and decisions rendered by a Dispute Resolution Panel made up of three persons, one chosen by the Treasury Board Secretariat representatives, one to be chosen by the representatives of certified bargaining agents of the National Joint Council, and the representatives of pensioners, and a third person selected by those who will act as the chair of the panel.

- A decision of the Dispute Resolution Panel is a decision of the majority of the members, or if there is no majority decision, the decision of the chair of the panel.
- The decision of a Dispute Resolution Panel shall form part of the renewal agreement unless
    - the parties agree to reject the decision, and
    - the parties agree to other conditions within 30 days of the decision of the Dispute Resolution Panel.

[17] The 2006 changes led to the creation of two bodies involved in the PSHCP governance, a corporation called the Administrative Authority [AA] and the Partners Committee.

[18] The AA Board of Directors, pursuant to section 7.3 of the *FAA*, is composed of members appointed by the President of the TB, as well as the bargaining agents of the NJC. The Board of Directors includes one director representing the retirees who is appointed by the President, on recommendation of the NJC.

[19] The Partners Committee consists of seven (7) members: three employer representatives appointed by the TB President; three employee representatives appointed by the bargaining agents of the NJC; and one representative for the retirees appointed by the NJC.

[20] The Partners Committee works on a consensus basis, and when all members agree to the terms of the renewal of the PSHCP, a joint submission is signed by all Partners and presented to the TB President for ratification. If no consensus is reached, the dispute resolution process can be triggered. Regardless, the TB has the final approval authority.

(3) MOU Renewal

[21] Renewal of the MOU for the period beyond 2011 was a topic of discussion at the regular Partner Committee meetings.

[22] As early as 2009, the Partners Committee was advised by the TB representatives on the Committee that the "arguably unprecedented" economic situation in Canada and the necessity for a period of economic restraint would be a factor in the 2011 MOU renewal (Sametz Affidavit para 53).

[23] In December 2011, a two-year extension to the 2006 MOU was approved which included maintaining the 75-25 cost sharing ratio. The renewal period was June 1, 2012 to March 2013.

[24] In the interim, meetings continued with respect to developing a proposal for the period following the renewal. Following a series of meetings, on February 13, 2012, the NJC on behalf of the Partners Committee made a joint recommendation to the TB President. This recommendation included extending the MOU then in effect and maintaining the 75-25 cost-sharing ratio for retirees. This recommendation acknowledges that the Partners Committee took into consideration "…the effect on cost and cost-effectiveness of the Plan, its comparability to health plans of other employers and the consequences for plan members...".

[25] The TB President did not respond to the February 2012 recommendation until June 2013. In his response the TB President asked the Partners Committee to address moving to a 50-50 cost-sharing ratio for retirees, in addition to other changes.

[26] The NAFR says it was surprised by this response. Following the response, the Partners Committee met on a number of occasions to discuss the implications to the retiree members of the PSHCP on a move to a 50-50 cost sharing model. A meeting with the TB President was requested, it did not happen.

[27] On October 8, 2013, the TB President wrote to the Partners Committee and reiterated his position regarding the need to move to a 50-50 cost-sharing ratio to ensure that the PSHCP remained affordable and comparable to other public and private health care plans. In this letter, the TB President explained that his response was delayed in order to "fully assess the implications of the recommendation".

[28] At a Partners Committee meeting on January 23, 2014, the TB representatives indicated that if no recommendation was reached, changes to the PSHCP could be imposed by the government.

(4) 2014 Budget Announcement

[29] On February 12, 2014, in conjunction with the Federal Budget, it was announced that there would be a move to a 50-50 % cost sharing ratio for retiree members of the PSHCP as a cost saving measure.

[30] Following this announcement, the Partners Committee met on numerous occasions to formulate a recommendation.

[31] On March 21, 2014, the NJC on behalf of the Partners Committee made a reformulated recommendation to the TB President on changes to the PSHCP. The "Record of Decision" states "The Partners Committee at its March 21, 2014 meeting reached consensus on the elements of a reformulated Joint Recommendation to the Treasury Board."

[32] The reformulated joint recommendation included expanded vision care benefits, expanded reimbursement for certain medical devices, increased coverage for psychological services, elimination of the annual deductible, and the implementation of the 50-50 cost sharing ratio for retiree members to be phased in over a four-year period. However the 50-50 cost sharing ratio would not be applied to certain low income retirees who would remain at the 75-25 cost sharing ratio. This joint recommendation was signed by Dennis Jackson on behalf of the NAFR.

[33] By letter dated March 26, 2014, the TB President wrote to the Partners Committee formally announcing the approval of their March 21, 2014 joint recommendation, stating:

> I would like to thank the Public Service Health Care Plan Partners Committee for its letter of March 21, 2014, outlining a reformulated Joint Recommendation for renewing the Public Service Health Care Plan. The 2014 Joint Recommendation represents an important commitment to ensuring the Public Service Health Care Plan and pensioner benefits remain current, relevant, and aligned to the principles of comparability, affordability, and sustainability.

B. *The Evidence*

[34] The parties relied upon Affidavit evidence on this application. Written cross examination was conducted on the Affidavits.

(1) Applicants' Evidence

[35] The individual Applicants, who are also members of the NAFR, filed Affidavits in support of this Application summarized as follows:

Loretta Bemister - worked for the Federal Government for approximately thirty (30) years as a Certified General Accountant and as an employee of Canada Post. She retired from the Public Service in 2011, in an executive position at age 56. As of April 2018, the changes in the PSHCP premiums will increase her monthly premium from $42.76 to $85.00.

Richard Fergusson - served in the Armed Forces for twenty-four (24) years as a Non-Commissioned Officer in the Meteorological classification and as a training development instructor. He retired as a Master Warrant Officer in 1992 at age 45. Mr. Fergusson's monthly PSHCP premium in 2014 was $59.32 per month.

Peter Kerr - is a director of the NAFR and served in the Armed Forces for thirty-three (33) years in the Electrical and Mechanical Engineering field. He retired as Lieutenant Colonel in 1996 at age 49. In March 2015, Mr. Kerr's monthly PSHCP premium changed from $38.34 to $49.98.

Orest Torsky - was a member of the RCMP for thirty-four (34) years. He retired for health reasons in 2005 at the age of 57. After retirement, he continued to work in the RCMP as a

civilian on contract for approximately five (5) years. In 2014, Mr. Torsky's monthly PSHCP premium was $52.93.

Nancy Wilson - worked as an administrative clerk for the Canadian Forces Base, in London, Ontario for nineteen (19) years. She retired due to the closure of the base in 1996, but continued working part-time as an administrative assistant for the Canadian Coast Guard. In 2012, at age 73, cutbacks resulted in the termination of her part-time position. In 2014, Mrs. Wilson's monthly PSHCP premium was $21.78.

[36] The Applicants also relied upon Affidavits from Sylvia Ceacero, the CEO of the NAFR, and Louise Bergeron, a health officer employed with the NAFR.

[37] Dennis Jackson, the NAFR representative on the Partners Committee since 2006, filed an Affidavit. In his Affidavit, he details the governance background of the PSHCP and provides details of the meetings of the Partners Committee regarding the 2012 joint recommendation to the TB, as well as the events of 2013 and 2014 leading to the "agreement" announced in March 2014.

[38] The Applicants filed an Affidavit from Bernard Dussault, an actuary and a pension benefits officer at the National Office of the Processional Institute of Public Service Canada.

[39] The Applicants also filed an Affidavit from an expert witness, Douglas Hyatt. Mr. Hyatt is a Professor of Business Economics at the Rotman School of Management. He is offered as an expert on industrial relations, income security and income replacement programs. Mr. Hyatt

expresses the opinion that in 2014 the TB President may not have engaged in good faith bargaining. Mr. Hyatt states that with meaningful collective bargaining, the legitimate concerns of employees are "required to confront the equally legitimate concerns of employers" (para 19). Mr. Hyatt explains that even though the unilateral changes in the case only affect retirees, this can affect existing active employees because many of them will eventually become retirees (para 20). Mr. Hyatt explains that an "employer who abrogates that arrangement and requires a 50% copayment is effectively expropriating what the employees had already paid for their tenure with the organization" (para 26). A retiree cannot go back and negotiate for higher wages in order to compensate for the less generous pensions arrangement (para 26-27). He states that the increase in cost of retirement benefits amounts to expropriation without compensation because retirees have already paid for the benefits while they were employed (para 29).

[40] He argues that retirement benefits are a form of deferred compensation. He explains that deferred compensation arrangements usually involve individuals being underpaid relative to their productivity in their early years with an organization in return for being overpaid relative to their productivity in their later years with the organization (para 37-39). Deferred compensation fosters a positive work environment by ensuring that employees remain with the employer to receive their vested benefit, which leads to a longer-term employment relationship (para 41). "The vested benefits from a health plan on retirement provide workers with the security that is highly valued during retirement" (para 42).

(2) Respondent's Evidence

[41] The Respondent relies upon the Affidavit of Tracey Sametz, who has worked for the Federal Government since 1985. Between March 2009 and January 2015, she was a Senior Director with the Pensions and Benefits Sector at Treasury Board. Between March 2009 and January 2015, she attended the Partners Committee meetings as the TB technical advisor.

[42] The Respondent also filed an Affidavit from an expert witness, Dr. Richard P. Chaykowski, who is a Professor at Queens University with expertise in industrial and labour relations. Attached to his Affidavit, is a report he prepared titled: "The provision of Health Care Benefits to Federal Public Service Retirees under the PSHCP". In this report he makes various conclusions, including:

- federal government employees have a substantial and ongoing pay advantage relative to other comparable workers in the private sector (page 6)
- the majority of workers in Canada are not covered by a registered pension plan (page 6)
- a large proportion of employees in Canada (about 50%) do not have a supplemental medical insurance plan, essentially all employees working in the federal public service are covered (page 6)
- the average age of retirement of retirees from the federal public service was consistently and substantially lower than the average retirement age in either the public or private sectors (page 7)
- overall, retirees from the federal public service have a pension plan that is more valuable than most other pension plans. (page 7)

[43] Dr. Chaykowski also states that collective bargaining rights apply only to employees who are in a bargaining unit where a labour union is the bargaining agent. For this reason, the retirees, who are former employees of the federal government, fall outside this framework. The PSHCP is a health care plan that is entirely distinct and separate from the federal Public Service Pension Plan and was implemented through a National Joint Council (NJC) directive. For this reason, reimbursement provided to federal public service retiree under the PSHCP do not form any part of the pension income that a retiree may be eligible to receive as a result of their participation in the federal Public Service Pension Plan. Retirees also have the choice whether or not to enroll in the PSHCP. He also states that it is the TB who retains final decision-making authority in determining the cost-sharing for the PSHCP.

III. Issues

[44] The Applicants raise two (2) main issues:

1) Was there a breach of contract?
2) Was there a breach of the retirees section 2(d), section 7 and section 15 *Charter* rights?

IV. Analysis

A. *Standard of review*

[45] Although not addressed by the parties, the applicable standard of review must be considered. Here the Applicants seek review of the changes to the PSHCP announced in 2014 and they also seek review of the TB's course of conduct in the events leading up to that announcement. The Applicants are not attacking the constitutionality of a law.

[46] The statutory mandate of the TB with respect to the PSHCP is outlined in the *FAA* as follows:

Group insurance and benefit programs	**Programmes d'assurances collectives et autres avantages**
7.1 (1) The Treasury Board may establish or modify any group insurance or other benefit programs for employees of the federal public administration and any other persons or classes of persons it may designate to be members of those programs, may take any measure necessary for that purpose, including contracting for services, may set any terms and conditions in respect of those programs, including those relating to premiums, contributions, benefits, management, control and expenditures and may audit and make payments in respect of those programs, including payments relating to premiums, contributions, benefits and other expenditures.	**7.1 (1)** Le Conseil du Trésor peut établir ou modifier des programmes d'assurances collectives ou des programmes accordant d'autres avantages pour les employés de l'administration publique fédérale et les autres personnes qu'il désigne comme cotisants, individuellement ou au titre de leur appartenance à telle catégorie de personnes, prendre toute mesure nécessaire à cette fin, notamment conclure des contrats pour la prestation de services, fixer les conditions et modalités qui sont applicables aux programmes, notamment en ce qui concerne les primes et cotisations à verser, les prestations et les dépenses à effectuer ainsi que la gestion, le contrôle et la vérification des programmes, et faire des paiements, notamment à l'égard des primes, cotisations, prestations et autres dépenses y afférentes.

[47] The statutory language affords the TB significant discretion in the operation of the PSHCP with the use of the words "may establish or modify", "may take any measure necessary", and "may set any terms and conditions".

[48] Previous decisions of this Court have concluded that discretionary decisions of the TB are reviewed on the reasonableness standard (see: *Brauer v Canada (Attorney General)*, 2016 FC 124).

[49] In *Brauer v Canada (Attorney General)*, 2014 FC 488, Justice Mosley states:

> [32] The Supreme Court has given direction that where the question is one of the exercise of discretion or policy, deference will usually apply: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] SCJ no 36 at para 50. On that basis, and not without doubt about the matter, I find that the standard of review is reasonableness. […]

[50] With respect to the *Charter* arguments, the applicable standard of review was outlined by the Supreme Court of Canada in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] as follows:

> [36] […] the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual […]. When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference […]
>
> [Citations omitted.]

[51] The issues raised by the Applicants relate to the conduct of the TB with reference to the process followed and the changes implemented to the PSHCP in 2014.

[52] The applicable standard of review is therefore reasonableness (*Doré* at para 7). Reasonableness requires that a decision be justifiable, transparent and intelligible, and fall within a range of acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[53] *Doré* also states that in reviewing the reasonableness of an administrative decision a "margin of appreciation, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives" will be afforded (para 57).

[54] In the context of the *Charter*, if the changes to the PSHCP proportionately correspond to the ultimate goal of ensuring a sustainable future program for employees and retirees, while being fair to the Canadian public (who fund some of the benefits under the PSHCP), the decision would fall within a range of reasonable outcomes.

B. *Was there a Breach of Contact?*

[55] The Applicants raise two (2) related issues with respect to their breach of contract arguments. First, they argue that the changes to the PSHCP announced in 2014 to be implemented starting in 2015, fail to respect the retirees vested rights to a guaranteed cost sharing ratio of 75-25. Second, they argue that the conduct of the TB in 2013 and 2014 failed to respect their rights to a meaningful process of negotiation for any changes to the MOU as outlined in governance documents. These issues will be addressed below.

(1) Vested rights

[56] With respect to vested rights, the Applicants argue that the TB President unilaterally imposed changes to the PSHCP and in so doing, breached their contractually vested rights. They claim these rights were acquired through their employment contracts or applicable collective agreements and that PSHCP benefits are a form of deferred compensation.

[57] The Applicants argue that effective 1999, when they got representation as part of the PSHCP negotiations, they also got a default contribution rate of 75-25 % and they got the right to a process that had to be followed for any future changes to the PSHCP. The Applicants argue that the MOUs which replaced the Trust arrangement were intended to preserve the rights which the Applicants had acquired.

[58] This position is explained in the Affidavit of Sylvia Ceacero who states as follows:

> 55. The rights of retirees vested when they retired and any subsequent changes to their benefits requires acceptance from the retirees, as occurs when the Partners Committee consents to a unanimous joint recommendation that is ratified by the President of the TB. Without acceptance or consideration of these changes, the contractual rights of the retirees, and all members of the Association, have been breached.

[59] The Applicants rely upon *Dayco (Canada) Ltd. v CAW-Canada*, [1993] 2 SCR 230 [*Dayco*] to argue that a pension or other benefits negotiated during the course of employment represent deferred compensation for services performed and they are an incentive to remain employed. Hence, when a person retires, retirement benefits crystallize into a form of vested rights. The Applicants also rely on *Ontario v Ontario Crown Attorneys' Assn (Retiree Benefits Grievance)*, [2015] OLAA No 511 [*OCAA*] to argue that retiree benefits are part of a compensation package for active employees. Both of these cases are in the union context and deal with rights pursuant to a collective agreement.

[60] While these cases stand for the proposition that certain benefits earned through employment enjoy protected or vested status on retirement, the issue here is if access to the

benefits provided by the PSHCP fall into that category of employment benefits. And if it does, were unilateral changes made to the PSHCP by the TB.

[61] The inescapable fact here is that the PSHCP is a program created pursuant to section 7.1(1) of the *FAA*. It is not a program administered pursuant to a collective agreement. The terms and conditions of the PSHCP are outside the collective bargaining process. Furthermore, the benefits of the PSHCP are available to union and non-union employees.

[62] The Applicants rely upon case law developed in the collective bargaining context as being applicable to their participation in a voluntary health care benefits scheme. Even if some of the retirees gained entry to the PSHCP through the collective bargaining process, that is not the case for all of the retirees as some were non-unionized employees. Therefore, I conclude that the collective bargaining case law relied upon, and the rights recognized in those cases, do not apply to the rights of the Applicants with respect to the PSHCP in this context.

[63] For retirees, the PSHCP is not a pension plan or a benefit tied to a pension plan. The fact that the PSHCP premiums are collected from the retiree's pension funds does not alter the essential character of the plan. This is an administrative convenience and does not change the fundamental nature of the plan to a "pension" benefit. The PSHCP is an insurance scheme created by legislation.

[64] The Applicants' vested rights argument is, in essence, an argument that they were entitled to have their contribution rates frozen. However, this argument is not tenable as the very reason

for the existence of the Partners Committee is to provide input in recognition that there will be changes to the PSHCP. There is no evidence to support the argument that the rates were locked in perpetuity and that they were not subject to future adjustment.

[65] Further, the Applicants did not provide evidence in the form of employment contracts to establish that the health benefits afforded as part of the PSHCP were an essential part of the employment bargain, such as it became a vested right on retirement. They also failed to provide any applicable collective agreements which contain language to support this position. They rely on the past course of conduct and the wording of the MOUs to support this position. This, however, is insufficient to support the vesting argument.

[66] For these reasons, I conclude that the "vesting" arguments made by the Applicants are not applicable to their rights under the PSHCP and do not support their argument that they are entitled to a 75-25 cost sharing ratio.

(2) Duress

[67] The related breach of contract argument made by the Applicants is that the "agreement" reached in 2014 was reached under duress. They request a declaration that the TB letter of March 26, 2014 not be recognized as an agreement.

[68] The Partners Committee in their deliberations throughout 2011 and 2012 and leading up to the proposal made to the TB on February 13, 2012, recognized that they needed to make PSHCP recommendations that allowed the plan to be cost sustainable and comparable.

[69] The Applicants assert that the proposal provided to the TB on February 13, 2012, was based upon reliable evidence that the ratio could be maintained at 75-25 and still provide a stable, cost effective, and comparable plan. They argue that the TB President's response that it was necessary to move to a 50-50 model was without any justification and without any reasons.

[70] Therefore, the Applicants argue that the changes made in 2014 were not the result of good faith negotiations or a consensus as required by the terms of the MOU. They state that when the TB President notified the Partners Committee that he was insisting on a move to a 50-50 cost sharing ratio for retirees, that was proof that the TB was no longer bargaining in good faith and was not going to honour the terms of the MOU.

[71] Further, the Applicants argue that when the announcement was made as part of the 2014 Budget that there would be a move to a 50-50 cost sharing for retirees, this was further proof that the TB was no longer negotiating. This and the suggestion that the 50-50 cost sharing ratio could be imposed by legislative action if the Partners Committee did not come to an agreement is the evidence relied upon by the Applicants to argue that the TB President was imposing his will on the process.

[72] Dennis Jackson, the NAFR retiree representative on the Partners Committee, states as follows in his Affidavit:

> 55. After the Federal Government's budgetary announcement of February 11, 2014, the Partners attempted to negotiate with the President of the TB. The President made it clear that if the Partners did not come to an "agreement", legislation would be enacted providing for, among other important changes, a contribution rate of 50% - 50% between employer and retirees.

> 56. The threat of a legislated response exerted immense pressure on the Partners Committee to reach an "agreement." The President was only open to discussions on minor issues, such as the phasing in of the changes, or potential exemption for retirees on a very low income. If no agreement was achieved, none of these mitigating measures would be adopted in legislation.
>
> 57. In order to mitigate our losses and avoid the more severe consequences that could come with a legislated response, the Partners Committee decided to accede to the unilaterally imposed terms.

[73] The argument that the TB had an obligation to bargain in good faith is premised on the assumption that the rights which have been recognized in the collective bargaining process are applicable to the PSHCP and the retiree members. As indicated above, as the PSHCP is outside the collective bargaining process as it relates to the retirees, those principles are not applicable to this situation.

[74] To establish duress, the Applicants must demonstrate that the pressure amounted to coercion of the will; that the pressure was illegitimate and that they have taken steps to avoid the act complained of (see *Stott v Meir Investment Corp* (1988), 63 OR (2^{nd}) 545.)

[75] The Affidavit of Ms. Sametz (paras 63-82) details the numerous meetings held and the information discussed by the Partners Committee following the direction in June 2013 that the TB intended to move to a 50-50 model.

[76] Here, based upon the evidence, I am not satisfied that there is evidence of the nature necessary to establish coercion. Clearly based upon the evidence of Mr. Jackson, the retirees did not like the position taken by the TB. But there is evidence that discussions, meetings and

negotiations at the Partners Committee continued after the announcement by the TB of the move to a 50-50 model. They ultimately agreed to the change in premiums in exchange for other changes to the PSHCP and for protection of the lower income retirees. A consensus was reached which saw increases in psychological services, elimination of deductibles and protections for low income retirees.

[77] The diverse membership of the retiree group of participants within the PSHCP means that at times, differing interests, and perhaps even conflicting interests, have to be balanced. Here, in the context of these negotiations, the NAFR choose to protect the interests of the "most vulnerable".

[78] Despite the circumstances under which the agreement was reached, it ultimately remains that the Applicants signed on to the agreement. Furthermore, concessions were made to the Applicants in the form of increased services and the elimination of deductibles as well as a staged phasing-in of the increase in premiums.

[79] Finally, the retirees had a dispute resolution process available to them if they felt the negotiations had reached an impasse. They chose not go that route. Presumably, that was a calculated decision which the Applicants must accept.

[80] In the circumstances, I do not find any evidence of duress or coercion.

(3) Conclusion – Breach of Contract

[81] There is no evidence that the 75-25 % split on premiums, or any set formula for that matter, was guaranteed as a term of employment or a was a term of any applicable collective agreement. Therefore I conclude that the Applicants have not established that they have a vested right to a default cost sharing ratio of 75-25.

[82] I also conclude that there was no evidence of duress with respect to the process leading to the PSHCP changes announced in 2014.

C. *Was there a breach of the retirees section 2(d), section 7 and section 15 Charter Rights?*

(1) Section 2 (d) – Freedom of Association provisions

[83] The Applicants argue that their right to a meaningful process of collective negotiation in the context of the PSHCP was breached by the TB's actions. They argue that the fact the TB failed to negotiate in good faith frustrated the NAFR's ability to negotiate on behalf of the retirees, thereby violating the retirees' rights to association as guaranteed by section 2(d) of the *Charter*.

[84] The Applicants argue that because of their retirement status, they have no recourse against their former employer(s) and they argue that there is a power imbalance between them and current employees (who can exercise the right to strike). The Applicants argue that in effect,

they have no voice in the process and this is a substantial interference with their rights of association.

[85] Section 2(d) of the *Charter* protects three types of activities: "(1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities" (see *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 [*MPAO*] at para 66).

[86] The Applicants argue that they are entitled to the benefits recognized in the collective bargaining process as a necessary precondition to the meaningful exercise of the right of association (see *MPAO*).

[87] For the reasons outlined above regarding the Applicants' breach of contract arguments, I am not satisfied that the individual Applicants or the NAFR can bring themselves within the collective bargaining context with respect to their rights as part of the Partners Committee concerning the PSHCP.

[88] Furthermore, retired public servants are excluded from the terms of the *Federal Public Service Labour Relations Act* (SC 2003, c 33, s 2) by the definition of an employee under subsection 2(1). The NAFR does not represent employees with collective bargaining rights. Unlike trade unions, the NAFR has no formal statutory mandate to represent all federal government retirees. It is not a bargaining unit like the unions that make up the NJC.

[89] However, even if the NAFR could bring itself within the collective bargaining sphere, the Supreme Court of Canada in *MPAO* held that the right to a meaningful collective bargaining process "is one that guarantees a process rather than an outcome or access to a particular model of labour relations" (emphasis added; see para 67). In other words, section 2(d) of the *Charter* protects a "process" rather than a "particular outcome" (*Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 47).

[90] The NAFR is an association of retired public servants and, with respect to the PSHCP, as a member of the Partners Committee they are given the opportunity to have input and make representations to the TB on changes to the PSHCP. The process permits collaboration with the NJC and the employer representatives, with the common goal of maintaining a stable, cost-effective and sustainable healthcare benefits plan for all participants. This is the process contemplated by the MOUs and it was the process followed here. The evidence shows that the NAFR had the opportunity to make representations and they had input to the process.

[91] Here, even after the TB indicated that the move to a 50-50 model was the direction they needed to move to, there is evidence of multiple meetings with the Partners Committee with various options and models being considered.

[92] With respect to the NAFR itself, the Applicants have the freedom to be part of the NAFR, to pursue common goals, and to decide upon the structure of the NAFR and its leadership. The NAFR is independent of the government and is free to decide what interests to pursue and how those interests should be pursued in the Partners Committee forum. There was no evidence of

interference with the NAFR by the TB. The evidence of Mr. Jackson is that the NAFR created its own bylaws and has a board of directors, and it operates independently of the TB or government.

[93] Therefore it cannot be said that the TB substantially interfered with the process by which the retirees pursue their associational activity within the NAFR and within the Partners Committee. The evidence is that there were multiple meetings of the Partners Committee to reformulate the proposal within the parameters set by the TB.

[94] In these circumstances, I conclude there is no section 2(d) *Charter* breach of the Applicants' rights.

(2) Section 15 – Equality provisions

[95] The Applicants argue that the TB's decision was discriminatory pursuant to section 15(1) of the *Charter* as it imposed a burden on the retirees which burden was not also imposed upon active federal employees, thus creating a distinction based on age and on retirement status.

[96] Section 15(1) provides:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15. (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[97] The Supreme Court in *Withler v Canada (Attorney General)*, 2011 SCC 12 [*Withler*] at para 30 set out the two-part test to be applied under section 15 of the *Charter* as follows: (1) whether the law creates a distinction that is based on an enumerated or analogous ground, and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

[98] The first step in the analysis is if the Applicants can establish a distinction on an enumerated or analogous ground. They argue that it is the combination of age and retirement status which creates the distinction.

[99] Given the range of ages of the Applicants at the time of retirement (between ages 45 – 73) and considering there is no mandatory age of retirement, they cannot rely upon "age" as an enumerated ground. It is therefore the retirement status that is the trigger. The question then becomes: is "retirement status" "immutable or changeable only at unacceptable cost to personal identity" (*Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbière*] at para 13).

[100] Here retirement is a chosen status which is changeable, albeit perhaps with more difficulty with age. However, it is nonetheless a changeable, and therefore not immutable. Furthermore, retirement status has not been identified in case law as a ground of discrimination analogous to those enumerated in section 15(1) of the *Charter*. Additionally, retirement status cannot be deemed to constitute an integral "personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity" (see *Corbière* at para 13).

[101] However, even assuming the Applicants can establish that the PSHCP creates a distinction or an enumerated or analogous ground, where the provisions at issue also created a distinction based on age, the Court in *Withler* stated that the reduction provisions did not violate section 15, because all public service employees suffer a reduction, which is inevitably compensated in some way. In *Withler* the Court concluded that the distinction, although based on age, is neither discriminatory in its effect nor purpose. It is simply a policy choice to ensure the viability of a larger benefit conferring scheme.

[102] In *Withler* the Court states:

> [67] In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not

> required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

[103] In this case, the distinction made does not undermine the "presumption upon which the guarantee of equality is based" (see *Corbière* at para 16) and it was appropriate in order to maintain a plan that is fair, competitive and sustainable which all the while respects Canadian taxpayers' dollars.

[104] Here, the change in the cost sharing ratio does not impose a burden on retirees in a manner which reflects stereotypical applications to an already disadvantaged and vulnerable group in society, nor does it have the effect of reinforcing, perpetuating or exacerbating this disadvantaged group (see *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20).

[105] Further, the Respondent's expert, Dr. Chaykowski, states that federal service retirees cannot be said to be marginalized or economically disadvantaged as their private pension income generally exceeds the average retirement income among all seniors in Canada and because approximately 50% of the Canadian population does not have a supplemental medical insurance plan.

[106] In any event, prior to the move from a 75-25 to a 50-50 cost sharing ratio, the contribution rate between active employees and retirees was different as well. Active federal employees have not paid health insurance premiums for a number of years. Whereas retirees have always paid a portion of their premiums. Therefore I do not accept that the change to 50-50

cost sharing ratio has somehow changed the nature of the PSHCP such that the plan now violates the retirees *Charter* rights.

[107] That change was not of sufficient magnitude to support a section 15 *Charter* argument.

(3) Section 7 – Life, liberty and security of person

[108] Under section 7 of the *Charter*, the Applicants argue that the changes to the PSHCP interfered with their ability to afford healthcare, thereby infringing their right to life, liberty and security of the person. They argue that they only had the option of paying the increased premium or giving up the benefits.

[109] They rely upon *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, where the Supreme Court of Canada states that if a "law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out" (see para 93).

[110] They also rely upon *Chaoulli v Quebec (Attorney General),* 2005 SCC 35 [*Chaoulli*], where the court stated that the "state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person" (see para 129).

[111] However, the Court in *Chaoulli* also stated that the *Charter* "does not confer a freestanding constitutional right to health care".

[112] Here the Applicants have not adduced sufficient evidence on how the change in the cost sharing ratio constitutes a barrier to accessing health care. Nor have they produced evidence to establish psychological harm such as to establish a deprivation of the right to security of the person.

[113] The positive changes to the PSHCP which occurred simultaneously with the increase to a 50-50 cost sharing ratio were not addressed by the Applicants. It may be that for some retirees the other changes, such as the elimination of deductibles and increase in coverages for certain treatments, may have resulted in a net benefit even with the increase in premiums.

[114] Furthermore, I would not characterize the increase in the cost sharing ratio as overbroad, grossly disproportionate or arbitrary (*Canada (Attorney General) v Bedford*, 2013 SCC 72, at para 107). The Supreme Court of Canada has stated that an arbitrary law is a law that "bears no relation to, or is inconsistent with, the objective that lies behind [it]" (*AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 103). Here, the increase in ratio contribution was done in connection with the TB-stated goal of ensuring the PSHCP remains sustainable and comparable with plans of other large employers in both the public and private sectors.

[115] Fundamentally, at the core of the Applicants' case is the increase in the cost of PSHCP premiums. However, the Applicants have not established by evidence that the increased cost in premiums constitutes a barrier to access PSHCP coverage. The retirees also have the freedom to leave the PSHCP altogether and obtain coverage through a private insurer.

[116] Finally, economic interests are not protected by section 7 (*Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 at 1003-4 and *Chaoulli* at para 201).

[117] I conclude that the arguments made by the Applicants with respect to section 7 are broad and general. There is no evidence to support the claims that the TB's decision has brought restrictions to the Applicants' life, liberty and security of the person. There is no evidence of deprivation of rights (see *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at paras 78-79).

[118] As a result, I conclude that the Applicants have not established that they have been deprived of their right to life, liberty or security of the person, or that the deprivation has been contrary to a principle of fundamental justice.

[119] In light of this conclusion it is unnecessary to do a section 1 determination.

V. Conclusion

[120] I conclude that the Applicants have not established any breach of the *Charter*. Further, had I concluded there had been a breach of *Charter* rights, I would have also found that the actions of the TB reflect a proportionate balancing of *Charter* values against the broader statutory objectives, and therefore that the TB's actions and its decision were reasonable.

[121] This application for judicial review is dismissed.

VI. Directed Verdict

[122] The Applicants have requested relief by way of a directed verdict. However, given my findings above, it is not necessary to address this relief.

VII. Costs

[123] Costs were not sought by the parties and therefore none are awarded.

JUDGMENT in T-311-15

THIS COURT'S JUDGMENT is that the judicial review application is dismissed without costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Law Guy Régimbald	FOR THE APPLICANTS
Christopher Rupar Jennifer Lewis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT