

Federal Court



Cour fédérale

Date: 20180719

Docket: T-1739-17

Citation: 2018 FC 761

Ottawa, Ontario, July 19, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MARTIN PROULX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant asks this Court to judicially review a decision of the Director General [the Pension Director] of the Government of Canada Pension Centre, Public Services and Procurement Canada [the Pension Centre] dated October 12, 2017. The Pension Director advised the Applicant that his request to buy back pensionable service with a former employer was void,

and that therefore his request for relief under paragraph 8(5)(a) of the *Public Service Superannuation Act*, RSC 1985, c P-36 [the Act] was refused [the Refusal].

[2] The Applicant alleges that the steps he took in 2011 to buy back pensionable service met the statutory preconditions for relief under paragraph 8(5)(a) of the Act.

[3] For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[4] The Applicant is currently an employee of the federal public service.

[5] The Applicant was employed by Nortel Networks Limited [Nortel] from December 1989 until he was laid off in January 2010. While employed by Nortel, he was enrolled in Nortel's benefit pension plan and paid into it for some 18 years. As a consequence he was entitled to a lump sum payment from the Nortel Pension of \$196,191.28, assuming a full payout.

[6] However, in January 2009, had Nortel obtained protection under the *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 [CCAA proceedings] because it was insolvent. The Applicant was laid off as a result of the insolvency.

[7] After September 2010, Nortel stopped contributing to its pension plan as result of its insolvency.

[8] The Superintendent of Financial Services of Ontario ordered that the Nortel pension plan be wound up effective October 1, 2010, and appointed an administrator to wind it up.

[9] As a result of the decision to wind up the pension plan in 2010, members of the Nortel pension plan could not elect whether to receive a deferred pension or transfer the commuted value of their pension to another investment vehicle until after that wind up was complete. In effect, the Applicant's Nortel pension money was frozen in a separate trust account. The wind up of Nortel's pension plan was not completed until December 2016.

[10] In September 2010, the Applicant obtained employment with the federal public service. Federal public servants are enrolled in the Public Service Superannuation Plan [the PSSP]. One of the terms of the PSSP is that employees who have prior pensionable service with another employer may pay a sum of money into the PSSP in exchange for being credited with some or all of their years of pensionable service with that previous employer. The ability to elect to buy back pensionable employment with another employer is set out in clause 6(1)(b)(iii)(F) of the Act.

[11] In 2011, the Applicant alleges he elected to buy back his pensionable service with Nortel in accordance with clause 6(1)(b)(iii)(F), which provides:

Pensionable service

6 (1) Subject to this Part, the following service may be counted by a contributor as pensionable service for the purposes of this Part:

[...]

(b) elective service, comprising,

[...]

Service ouvrant droit à pension

6 (1) Sous réserve des autres dispositions de la présente partie, le service qui suit peut être compté par un contributeur comme service ouvrant droit à pension pour l'application de la présente partie :

[...]

b) le service accompagné d'option, comprenant:

[...]

(iii) with reference to any contributor,

[...]

(F) any period of service in pensionable employment immediately prior to becoming employed in the public service, if he elects, within one year of becoming a contributor under this Part, to pay for that service,

(iii) relativement à un contributeur :

[...]

(F) toute période de service dans un emploi ouvrant droit à pension, immédiatement avant de devenir employé dans la fonction publique, s'il choisit, dans le délai d'un an après qu'il est devenu contributeur selon la présente partie, de payer pour ce service,

[12] It is also a given that to buy back a pension under the Act, the Applicant had to be able to surrender his existing pension entitlement. This requirement is imposed by subsection 4(3) of the Regulations under the Act to be discussed later. In the result, the Applicant was unable – through no fault of his own – to surrender his Nortel pension until it was wound up in 2016.

[13] The Applicant asked to buy back his pension by email dated July 10, 2011. He had been advised that the cost of buying back pensionable employment with Nortel to convert it into time under the PSSP was approximately \$371,388.43. He conceded the Nortel pension was underfunded and therefore he could only be certain that he would receive a portion of the amount owed, which he said was currently estimated at 69%. While it was not in his email, it was also the case that he could not surrender his Nortel pension plan because it was put out of his reach by the CCAA proceedings. His request for accommodation was sent by email; the Applicant did not make it on the form required by the Act for an election.

[14] On July 28, 2011, the Applicant was informed by a Policy and Legislation Officer for the PSSP [the Officer] that he was not permitted buy back his Nortel pension because he was not in a position to surrender his Nortel pension entitlement. He was advised, correctly, that he could reapply once the situation was resolved with Nortel if he was still employed in the federal public service at that time. The Officer stated:

[As previously stated], we have consulted the Treasury Board Secretariat on your particular situation. They have confirmed that in order to make a valid service buyback for outside employment, that person must be in a position to surrender his entitlement at the time the buyback is made. Since you are not in a position to surrender your pension entitlement at this time, the requirements of the *Public Service Superannuation Act* are not met to make a valid buyback. However, once the situation is resolved with Nortel, if you are still employed in the public service as an active plan member, you would be able to make a buyback at that time. The buyback would be based on the salary authorized on the day you make such a service buyback.

[15] In November 2016, the Applicant learned that the windup of Nortel's pension plan was imminent. He contacted the Public Service Pension Centre to finally implement the buy back of his Nortel service. In March 2017, he was informed that the cost of this buy back had increased from approximately \$371,388.43 in 2011 to more than \$720,000.00 in 2017 – it appears the increase was largely due to increases in his salary in the intervening years.

[16] In September 2017, the Applicant wrote to the Pension Director to ask that the Governor in Council validate his “2011 election” pursuant to paragraph 8(5)(a) of the Act:

Elections**Manner of making elections**

[...]

Election deemed valid

(5) Notwithstanding this Act or the Superannuation Act, where the Governor in Council is of opinion that a person

(a) has **made an election** under either Act in **purported compliance with such Act** and the regulations made pursuant thereto and that the purported election **was made in good faith** and was **invalid by reason only of circumstances not attributable to fault on the part of that person**, or

(b) was treated in error as being deemed to have elected pursuant to paragraph 51(2)(b),

that person shall be deemed to have made a valid election for the purposes of the relevant provisions of this Act or the Superannuation Act, as the case may be, on such date and subject to such terms and conditions as may be prescribed by the Governor in Council.

[Emphasis added]

Options**Manière d'exercer une option**

[...]

Choix réputé valide

(5) Nonobstant les autres dispositions de la présente loi ou de la Loi sur la pension de retraite, lorsque le gouverneur en conseil est d'avis qu'une personne a, selon le cas :

a) **fait un choix** en vertu de l'une de ces lois, **avec l'intention de se conformer aux dispositions de cette loi** et des règlements pris en vertu de celle-ci, que ce choix **a été fait en toute bonne foi** et **qu'il était valide seulement en raison de circonstances non attribuables à une faute de cette personne**;

b) été considérée par erreur comme étant censée avoir fait son choix en vertu de l'alinéa 51(2)b),

cette personne est réputée avoir fait un choix valide pour l'application des dispositions pertinentes de la présente loi ou de la Loi sur la pension de retraite, selon le cas, à une date et selon les modalités que le gouverneur en conseil peut prescrire.

[Soulignement ajouté]

[17] The Applicant said that his request that the Pension Director validate what he says was his 2011 election was based on the following: (1) he made the election in 2011 in accordance with the Act; (2) he made the election in good faith; (3) the election was invalid for reasons outside the Applicant's control – the election was only invalid because the pension plan administrator took over six years to wind up for the Nortel pension plan. The delay, of course, was caused by the CCAA proceedings. The Applicant also asked the Pension Director to waive the increased cost of his buy back.

III. The Refusal

[18] On September 21, 2017, the Pension Director replied to the Applicant's request to advise the Applicant that he would consult the Treasury Board Secretariat:

Thank you for bringing your case to my attention. The decision to invalidate your election to purchase service with Nortel was made in consultation with the Treasury Board Secretariat, as mentioned to you in a letter dated July 28, 2011. In order for us to determine if the remedy clause of 8(5)(a) can be applied in this case, we will require the guidance of the Treasury Board Secretariat.

We will make every effort to provide you with a response in a timely manner. Once the Treasury Board Secretariat provides their input, we will communicate with you.

[19] On October 12, 2017, the Pension Director refused the Applicant's request because the requested buyback made in 2011 was considered void, i.e., he had not made a valid election in 2011:

[...]

A review of the circumstances surrounding your case has now been completed. As part of the review process, the Government of Canada Pension Centre did forward your inquiry dated September 18, 2017, to the Treasury Board Secretariat for their review and consideration. The Treasury Board Secretariat is responsible for the pension legislation and the development of related policy.

Allow me to explain that paragraph 8(5)(a) can be used in cases where, **the member** “has made an election under either Act in purported compliance with such Act and the regulations... and that the purported election was made in good faith and was invalid by reason only of circumstances not attributable to fault on the part of that person”.

In your case, your buyback made in 2011 was considered to be void under 7(2)(a) [sic, this should be 8(2)(a)] and subsection 4(3) of the *Public Service Superannuation Regulations*. Essentially, under these provisions, a buyback made for periods of prior pensionable employment for which the member is entitled to a pension cannot be validated unless the pension rights can be forfeited. It was not until those rights forfeited in December 2016 did the service become eligible for purchase under the public service pension plan. As your buyback was, therefore, not in compliance with the regulations at the time it was made, it cannot be now validated under paragraph 8(5)(a).

I regret that this is not the response you were hoping for, however, I trust you will understand the Pension Centre is bound by the provisions of the pension legislation. [...]

[Emphasis in original]

IV. The Reconsideration Request

[20] Counsel for the Applicant wrote to the Pension Director on October 19, 2017, asking him to reconsider the Refusal [the Reconsideration Request]:

[...]

In your e-mail of October 12, you state that since [the Applicant’s] election was “not in compliance with the regulations at the time of was made, it cannot be validated under paragraph 8(5)(a).” With respect, you have missed the point of s. 8(5)(a) of the Act. That paragraph reads:

(5) Notwithstanding this Act or the Superannuation Act, where the Governor in Council is of opinion that a person

(a) has made an election under either Act in purported compliance with such Act and the regulations made pursuant thereto and that the

purported election was made in good faith and was invalid by reason only of circumstances not attributable to fault on the part of that person ...

That person shall be deemed to have made a valid election for the purposes of the relevant provisions of this Act of the *Superannuation Act*, as the case may be, on such date and subject to such terms and conditions as may be prescribed by the Governor in Council.

Paragraph 8(5)(a) of the Act thus has four requirements:

1. that the employee made an election;
2. that the election was in purported compliance with the Act;
3. that the election was made in good faith; and
4. the election was invalid for reasons not attributable to the employee.

The entire point of s.8(5)(a) of the Act is it applies when the initial election was invalid. Put another way, the entire purpose of s. 8(5)(a) is to validate elections that are not in compliance with the Act or Regulations. [The Applicant] does not dispute that his election in 2011 was invalid; however, that is the entire point of s. 8(5)(a) – that previously invalid elections can be validated.

As [the Applicant] has already explained in his correspondence to you, he meets all four elements of s.8(5)(a) of the Act:

1. He made an election to buy back his pensionable employment (while employed at Nortel);
2. He made this election in purported compliance with the Act;
3. He made his election in good faith;
4. His election was invalid because Nortel was under CCAA protection and the pension plan was being wound up, such that Nortel could not process [the Applicant's] attempt to withdraw from that pension plan. This was attributed solely to Nortel and not to [the Applicant].

I am therefore writing to request that you reconsider the decision set out in your e-mail of October 12, 2017.

[Emphasis in original]

[21] In response to the Reconsideration Request, the Pension Director replied to the Applicant's counsel:

The circumstances under which paragraph 8(5)(a) of the *Public Service Superannuation Act* (PSSA) could apply are limited to an election to count a period of prior service where such period of service is permissible under the PSSA to count as pensionable service. In the case at hand, [the Applicant's] election was not invalid by reason of circumstances not attributable to fault on his part. His election was void by application of 8(2)(a) of the [Act]; the period of service could not be counted as elective service because the condition prescribed by paragraph 4(3) of the *Public Service Superannuation Regulations* could not be met. In short, the remedy provided in paragraph 8(5)(a) of the PSSA does not extend to recognizing an election that is void further to a specific legislative provision.

[Emphasis added]

V. Void Elections under the Act

[22] There are a number of conditions placed on making a buy back pursuant to clause 6(1)(b)(iii)(F). Paragraph 8(2)(a) of the Act states that an election is “void” if the election is for a period of pensionable employment of a kind specified in subsection 4(2) of the *Public Service Superannuation Regulations*, CRC, c 1358 [the Regulations]. The result of paragraph 8(2)(a) of the Act and subsections 4(2) and 4(3) of the Regulations is that a public servant who is still eligible to receive a pension from a previous employer may not buy back that pensionable service. Paragraph 8(2)(a) states:

8 Void elections

(2) An election under this Part is void in so far as it is an election to pay for

8 Choix nul

(2) Un choix visé par la présente partie est nul, dans la mesure où il constitue une

décision de payer à l'égard, selon le cas :

- | | |
|--|--|
| <p>(a) any period of service on active service in the forces during World War I or World War II or any period of service in the public service or in pensionable employment that the elector is entitled to count for the purpose of any superannuation or pension benefit of a kind specified in the regulations, otherwise than under the provisions of this Part;</p> | <p>a) de toute période de temps passé en activité de service dans les forces pendant la Première ou la Seconde Guerre mondiale, ou de toute période de temps passé dans la fonction publique ou dans un emploi ouvrant droit à pension, que l'auteur du choix a droit de compter aux fins de toute prestation de pension de retraite ou de pension d'un genre spécifié dans les règlements, autrement qu'en vertu de la présente partie;</p> |
|--|--|

[23] Subsections 4(2) and 4(3) of the Regulations state:

- | | |
|--|--|
| <p>(2) The kind of superannuation or pension benefit referred to in paragraph 8(2)(a) of the Act is one that</p> | <p>2) Les prestations de pension de retraite ou de pension visées à l'alinéa 8(2)a) de la Loi sont celles qui :</p> |
| <p>(a) is provided in whole or in part as a result of contributions, grants or other payments made by the employer;</p> | <p>a) sont constituées en totalité ou en partie par des contributions, subventions ou autres paiements effectués par l'employeur;</p> |
| <p>(b) is related in amount to the period of service that may be counted by the person to whom the superannuation or pension benefit is payable; and</p> | <p>b) se rattachent par le montant à la durée de service qui peut être comptée par la personne à qui la prestation de retraite ou de pension est payable; et</p> |
| <p>(c) is payable in instalments during the lifetime of the recipient and thereafter if the superannuation or pension plan so provides.</p> | <p>c) sont payables par versements durant la vie du bénéficiaire et au-delà si le régime de retraite ou de pension le prévoit.</p> |
| <p>(3) Notwithstanding subsection</p> | <p>(3) Nonobstant le paragraphe</p> |

(2), where a contributor is receiving or will be entitled to receive a superannuation or pension benefit based upon a portion of a period of service in pensionable employment and the benefit cannot be surrendered by the contributor, only the portion of the period of service upon which the benefit is based shall be deemed to fall within the provisions of that subsection, and for that purpose

(a) the portion of the period of service shall be related to and deemed to be a period of service, regardless of how it is calculated by the employer;

(b) the Minister shall determine the length of the period of service on the basis of information received from the employer; and

(c) the period of service determined by the Minister shall be deemed to be that portion of the period of such service that is earliest in time.

[Emphasis added]

(2), lorsqu'un contributeur reçoit ou aura droit de recevoir une prestation de pension de retraite ou de pension fondée sur une partie d'une période de service dans un emploi ouvrant droit à la pension et que la prestation ne peut être cédée par le contributeur, seule la partie de la période de service sur laquelle est fondée la prestation sera censée tomber sous le coup des prescriptions de ce paragraphe, et à cette fin

a) la partie de la période de service doit se rattacher à une période de service et est censée être une période de service, quelle que soit la façon dont le calcul a été effectué par l'employeur;

b) le ministre doit déterminer la durée de la période de service sur la foi des renseignements reçus de l'employeur; et

c) la période de service déterminée par le ministre doit être considérée comme étant cette partie de la période la plus éloignée.

[Soulignement ajouté]

VI. Issues

[24] The Applicant submits two issues for determination:

- i. Does paragraph 8(5)(a) of the Act apply to the Applicant's circumstances? In particular, does an election that is "void" under paragraph 8(2)(a) of the Act constitute an election that is "invalid" under paragraph 8(5)(a) of the same Act?
- ii. Did the Pension Director have the jurisdiction to make the Refusal?

VII. Standard of Review

[25] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.” The parties agree, as do I, that this Court has determined reasonableness to be the standard of review for decisions of the Public Service Pension Centre: *Landriault v Canada (Attorney General)*, 2016 FC 664 at para 16 per Strickland J. In addition, I am guided by *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 which confirmed at para 27 that the standard of review of administrative decisions is presumptively reasonableness.

[26] While the parties agree reasonableness is the standard of review for the first issue, the Applicant submits that since the first issue is an issue of statutory interpretation, the range of reasonable outcomes is limited to a single reasonable interpretation, per *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38:

[38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the “range of reasonable outcomes” (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.

[27] The Supreme Court of Canada explained in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, what is required of a court reviewing on the reasonableness standard of review:

[55] In reasonableness review, the reviewing court is concerned mostly with “the existence of justification, transparency and intelligibility within the decision-making process” and with determining “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court’s preferred solution.

[28] The Applicant submits that the second question is a pure question of jurisdiction, reviewable on the correctness standard, per *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 59:

The presumption of deference is not rebutted here. The question at issue does not fall within one of the established categories of questions to which correctness review applies. In the present case, there is no issue of constitutionality or competing jurisdiction between tribunals.

[29] The Applicant submits that correctness continues to be the standard of review for true questions of jurisdiction; I agree generally although I will not be addressing the second question as discussed later.

[30] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VIII. Analysis

[31] In my view the determinative issue in this case lies in asking whether the Applicant has met the conditions set out in subsection 8(5) of the Act, repeated here for convenience:

Elections

Manner of making elections

8 (1) Every election made by a contributor under this Part shall be made by him while employed in the public service and shall be evidenced in writing, in the form prescribed by the Minister, and signed by the person making the election, and the original thereof shall be forwarded to the Minister in the manner prescribed by the regulations within the time prescribed by this Part for the making of the election or, in the case of an election that may be made by the contributor at any time before he ceases to be employed in the public service, within one month from the time of making

Options

Manière d'exercer une option

8 (1) Tout choix effectué par un contributeur selon la présente partie doit avoir lieu pendant que le contributeur est employé dans la fonction publique. Il doit être constaté par écrit, sous la forme que prescrit le ministre, et signé par la personne qui fait le choix. L'original doit en être adressé au ministre de la manière prescrite par les règlements dans le délai que fixe la présente partie pour l'établissement du choix ou, s'il s'agit d'un choix que le contributeur peut faire à tout moment avant de cesser d'être employé dans la fonction publique, dans le délai d'un

the election.

mois à compter de la date de l'option.

[...]

[...]

Election deemed valid

Choix réputé valide

(5) Notwithstanding this Act or the Superannuation Act, where the Governor in Council is of opinion that a person

(5) Nonobstant les autres dispositions de la présente loi ou de la Loi sur la pension de retraite, lorsque le gouverneur en conseil est d'avis qu'une personne a, selon le cas :

(a) has made an election under either Act in purported compliance with such Act and the regulations made pursuant thereto and that the purported election was made in good faith and was invalid by reason only of circumstances not attributable to fault on the part of that person, or

a) fait un choix en vertu de l'une de ces lois, avec l'intention de se conformer aux dispositions de cette loi et des règlements pris en vertu de celle-ci, que ce choix a été fait en toute bonne foi et qu'il était valide seulement en raison de circonstances non attribuables à une faute de cette personne;

...

...

that person shall be deemed to have made a valid election for the purposes of the relevant provisions of this Act or the Superannuation Act, as the case may be, on such date and subject to such terms and conditions as may be prescribed by the Governor in Council.

cette personne est réputée avoir fait un choix valide pour l'application des dispositions pertinentes de la présente loi ou de la Loi sur la pension de retraite, selon le cas, à une date et selon les modalités que le gouverneur en conseil peut prescrire.

[Emphasis added]

[Soulignement ajouté]

[32] I agree with the Applicant's submission that there are five preconditions to consider in this regard; therefore, I will deal with each. In my respectful view, the reasonable approach to this issue, i.e., the statutory interpretation of the Act in this regard, requires the Applicant to meet

all five preconditions. Failure to meet any one disentitles the Applicant to relief; the Court has no power to dispense with compliance.

A. *Mr. Proulx must have made an election*

[33] In my view, the Applicant did not make an election for the purposes of paragraph 8(5)(a) in the requests he and his solicitors submitted in the Fall of 2011. First of all, the Applicant did not use the statutory form required by subsection 8(1) as the Act requires him to do. He himself described his efforts in this regard not as making an election, but “recent attempts at buying back service,” and “my attempt to buy back previous service.” These are not the words of someone making an election, but of someone asking for consideration of something. The responses to his request likewise confirm the Respondent did not consider his email and letters to be elections. It is also evident the Applicant was not ready or able to actually purchase the buy back; while he had some \$230,000 to transfer immediately from his RRSP, there is no evidence the balance (some \$140,000) was available. As to these very substantial missing funds, the Applicant stated candidly that he “planned to buyback the rest of my available prior service once the pension monies from Nortel were received.” There is no doubt he could not surrender his Nortel pension as required by subsection 4(2) and 4(3) of the Regulations. I am unable to see how his correspondence may be treated as an election when the conditions of an election were nowhere close to being met. In my view, a person entitled to make an election is a person entitled to choose an option or between options. In 2011, the Applicant was not entitled to make any such choice. He only became capable of making an election when the Nortel plan was removed from CCAA proceedings in 2016. In my view, in 2011, the Applicant was asking for a dispensation from the Act and relevant subordinate legislation. While he was entitled to ask for anything that

he wanted, the request he made did not in law constitute the making of an election. I should add he was asking the Crown to commit to the payment to him of what could amount to substantial sums of public money.

[34] While the Court is sympathetic to the Applicant, because after all he is in the position he is in through no fault of his own, I am not able to alter the language of the Act to fit his case. With respect, in the absence of legislative authorization, he was not in a position to make an election, and what he did reflects that reality.

[35] The absence of an election decides this matter against the Applicant, because an election is a precondition of the remaining four preconditions of paragraph 8(5)(a). Nonetheless I will consider each.

B. *His election must have been in purported compliance with the Act*

[36] While the parties debated the meaning of “purported,” in my respectful view the Applicant failed to meet this requirement for reasons similar to those just set out. He was not asking or doing anything in compliance with the Act, purported or otherwise. He was requesting a private benefit. While his correspondence, and that of his solicitors the more so, mentioned the Act, in reality he was making a request for something outside the Act and subordinate regulations. Again, while I have sympathy for him, the Act does not assist him in this regard.

[37] To the Respondent’s point, I accept that the ordinary meaning of purport is to “have the often specious appearance of being, intending, or claiming (something implied or inferred),”

quoting from *Webster's Ninth New Collegiate Dictionary*, 9th ed, under “purport.” I agree as the Respondent submits that the Applicant did not “purport” or claim what he was doing was in compliance with the Act; he asked a question, that is, he made enquiries. In my view that was all he did.

C. *He must have made the election in good faith*

[38] No one questions the Applicant’s good faith. However, because he did not make an election, the other part of the third precondition, the Applicant does not fulfill this precondition either.

D. *The election must be invalid*

[39] Again, while the parties discussed the differences between void and invalid elections, there was no election to begin with. Therefore, the Applicant does not meet this precondition.

[40] While I accept generally speaking that the word void may be a synonym for invalid (see *American-Abell Engine and Thresher Co v McMillan* (1909), 42 SCR 377 at 396), I am not persuaded that is the case within the statutory scheme at issue here. I come to this conclusion because the Act recognizes three types of “void” elections: where pension rights cannot be surrendered [s. 8(2)(a)], where a medical examination has not been conducted [s. 31(1)], and where a medical examination has been failed [s. 31(2)(j)]. On the other hand, the Act describes two types of “invalid” elections [s. 8(5) and s. 62(4)]. For both types of “invalid” elections, an election has been made in “purported compliance” with the Act, which as already discussed, is

not the case in this matter. This case comes closest to a void election of the first category, i.e., where pension rights cannot be surrendered under paragraph 8(2)(a) having regard to subsections 4(2) and (3) of the Regulations.

E. *The purported election was invalid by reason only of circumstances not attributable to Mr. Proulx's fault*

[41] Because there was no election, purported or otherwise, this precondition is not met.

[42] I do wish to emphasize that I agree the Applicant finds himself in his current situation by reason only of circumstances not attributable to him, to track the language of subsection 8(5). His Nortel pension entitlements were entirely a consequence of the CCAA proceedings. In my respectful view, the CCAA proceedings are not in any way Mr. Proulx's fault or responsibility. That said, and unfortunately for the Applicant, and perhaps others situated like him, the Act and Regulations do not afford a remedy.

F. *Jurisdiction question*

[43] I wish to address one other issue and that is whether the Pension Director's Refusal was made without jurisdiction in that it was not made by the Governor in Council or such individual or entity with required delegated authority. This is what the Applicant alleges now on judicial review.

[44] The decision maker in this case was the Director General, Government of Canada Pension Centre. Both the Applicant and his solicitor addressed themselves to this decision maker

by name and by his title. Neither raised or even hinted that the Director General lacked the authority to make decisions of the nature the Applicant and his solicitor asked him to make.

[45] Indeed, this issue was raised for the first time on judicial review before the Court. It appears towards the end of the Applicant's affidavit, where the Applicant deposes that: "I have not been informed that the Governor in Council delegated its authority in s. 8(5)(a) of the Public Service Superannuation Act" to the named Director General.

[46] While the Court was attracted to this point, and as a consequence sought additional post-hearing submissions in that regard, upon reflection I have concluded that it is not appropriate to raise this entirely new issue on judicial review. I am now asked to review an Order in Council and one or more decisions of the Treasury Board with evidentiary gaps. The time to raise this issue was when dealing with the Director General.

[47] I should add as well that the Applicant's position in this regard directly contradicts the position he took when dealing with the Director General in the first place. Then, the Applicant undoubtedly considered the Director General had the authority *to give* him a positive answer; whereas now, the Applicant submits the Director General lacks the authority *to deny* him a positive answer.

[48] I was given no reason why this issue was not raised before the Director General where it could and in my view should have been raised in the first place.

[49] In my view, it is too late to add this as a new issue on judicial review, particularly given it entails a review of new evidence and the alleged lack of evidence concerning what has and what may have or may not have been delegated: see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22. And see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654 at paras 22-29, and in particular see para 23 where the Supreme Court of Canada said regarding raising new issues on judicial review: “[G]enerally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal” [citations omitted].

[50] In my respectful opinion, the Refusal was authorized by the Act, indeed mandated by it, and in addition it fell within the range of possible, acceptable outcomes that are defensible on the facts and law in this case, and was thus reasonable in terms of *Dunsmuir*. Therefore judicial review is dismissed.

IX. Costs

[51] I asked the parties to advise the Court of an agreed all-inclusive lump sum award of costs payable to the successful party; they advised they agreed to an all-inclusive lump sum award of \$4,000.00, which I find reasonable and will accordingly so order payable by the Applicant to the Respondent if demanded.

JUDGMENT in T-1739-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and
2. The Applicant shall pay the Respondent costs in the all-inclusive agreed upon lump sum amount of \$4,000.00, if demanded.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1739-17

STYLE OF CAUSE: MARTIN PROULX v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JULY 3, 2018

JUDGMENT AND REASONS: BROWN J.

DATED: JULY 19, 2018

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