CanLII

The City of Fredericton v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al., 2021 NBCA 30 (CanLII)

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COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

71-20-CA
78-20-CA

THE CITY OF FREDERICTON and SUPERINTENDENT OF PENSIONS

-

APPELLANTS

- and -

FREDERICTON POLICE ASSOCIATION, LOCAL 911 UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA and FREDERICTON FIRE FIGHTERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1053

RESPONDENTS

The City of Fredericton et al. v. Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America et al., 2021 NBCA 30

CORAM:
The Honourable Justice Drapeau
The Honourable Justice Quigg
The Honourable Justice French

Appeal from the decisions of the Financial and Consumer Services Tribunal:
December 3, 2019 and August 27, 2020

History of Case:

Decisions under appeal:
2019 NBFCST 12
2020 NBFCST 4

THE CITY OF FREDERICTON et SURINTENDANTE DES PENSIONS

-

APPELANTES

- et -

ASSOCIATION DES POLICIERS DE FREDERICTON, SECTION LOCALE 911, FRATERNITÉ UNIE DES CHARPENTIERS ET MENUISIERS D'AMÉRIQUE et FREDERICTON FIRE FIGHTERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, SECTION LOCALE 1053

INTIMÉES

The City of Fredericton et autre c. Association des policiers de Fredericton, section locale 911, Fraternité unie des charpentiers et menuisiers d'Amérique et autre, 2021 NBCA 30

CORAM :
l'honorable juge Drapeau
l'honorable juge Quigg
l'honorable juge French

Appel des décisions du Tribunal des services financiers et des services aux consommateurs :
les 3 décembre 2019 et 27 août 2020

Historique de la cause :

Décisions frappées d'appel :
2019 NBFCST 12
2020 NBFCST 4

Preliminary or incidental proceedings: 2020 N.B.J. No. 269	Procédures préliminaires ou accessoires : [2020] A.N.-B. n° 269
Appeal heard: January 21, 2021	Appel entendu : le 21 janvier 2021
Judgment rendered: June 17, 2021	Jugement rendu : le 17 juin 2021
Reasons delivered: October 28, 2021	Motifs déposés : le 28 octobre 2021
Reasons for judgment: The Honourable Justice French	Motifs de jugement : l'honorable juge French
Concurred in by: The Honourable Justice Drapeau The Honourable Justice Quigg	Souscrivent aux motifs : l'honorable juge Drapeau l'honorable juge Quigg
Counsel at hearing:	Avocats à l'audience :
For The City of Fredericton: Jamie C. Eddy and Jessica R. Bungay	Pour The City of Fredericton : Jamie C. Eddy et Jessica R. Bungay
For the Superintendent of Pensions: André G. Richard, Q.C. and Ari Kaplan	Pour la surintendante des pensions : André G. Richard, c.r., et Ari Kaplan
For the Fredericton Police Association, Local 911, United Brotherhood of Carpenters and Joiners of America: David Andrew Mombourquette	Pour l'Association des policiers de Fredericton, section locale 911, Fraternité unie des charpentiers et menuisiers d'Amérique : David Andrew Mombourquette
For the Fredericton Fire Fighters Association, International Association of Fire Fighters, Local 1053: Sean McManus	Pour la Fredericton Fire Fighters Association, International Association of Fire Fighters, section locale 1053 : Sean McManus
THE COURT	LA COUR
On June 17, 2021, the Court dismissed the appeal with reasons to follow. These reasons are set out in the accompanying text. Each appellant shall pay each respondent costs of $5,000.	Le 17 juin 2021, la Cour a rejeté l'appel et a indiqué que les motifs suivraient. Ces motifs sont exposés dans le texte qui suit. Chaque appelante devra payer à chaque intimée des dépens de 5 000 $.

TABLE OF CONTENTS

	Paragraph
I. Overview	
A. *Introduction*	1
B. *The Tribunal's first decision*	6
C. *Actions that led to the complaints made by the Unions to the Superintendent*	9
D. *Actions expanding the complaints to the Superintendent*	21
	26

E. *The Superintendent's decision regardin g the complaints* 27

F. *The Tribunal's decision*

II. Issues on Appeal 32

III. Background

A. *The City's decision to convert the Old Pl an to a Shared Risk Plan* 33

B. *The split of the Old Plan into two plans* 40

C. *The Tribunal's first decision* 47

D. *Actions leading to the complaints made by the Unions to the Superintendent* 55

E. *The complaints to the Superintendent* 86

F. *Actions that led to expanding the compl aints made to the Superintendent* 88

G. *The Superintendent's decision* 97

IV. Standard of Review of the Tribunal's Decisi ons 98

V. Analysis 100

A. *Did the Tribunal apply the wrong stand ard to the Superintendent's decision?* 108

B. *Did the Tribunal err by interpreting s. 7 5 as not conferring on the Superintendent unrestricted participatory rights in an ap peal of her decision?* 139

145

C. *Did the Tribunal err in dismissing the Ci ty's objection to the Unions' claim regard ing Mercer on the basis that it was not ra ised by their appeal of the Superintenden t's decision?* 153

D. *Did the Tribunal err in deciding the esta blished facts provided reasonable and pro bable grounds for the opinion that one or more of the circumstances enumerated in s. 72(2) existed, so as to justify making an order under s. 72(1)?* 170

182

190

(1) Did the Tribunal err in finding that Mercer was an agent of the Superann uation Board for the purpose of s. 18 (3)? 192

195

-

(2) Did the Tribunal err in applying the "two hats doctrine"?

-

(3) Did the Tribunal err in concluding s. 72(2)(h) applied?

-

(4) Did the Tribunal err in holding the Superintendent had a fiduciary duty to plan members?

-

E. *Does s. 72 provide the Tribunal with authority to make the impugned orders?*

VI. Conclusion

The judgment of the Court was delivered by

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FRENCH, J.A.

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I. Overview

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A. *Introduction*

[1] The City of Fredericton and the Superintendent of Pensions appeal decisions of the Financial and Consumer Services Tribunal rendered on December 3, 2019, and August 27, 2020. Leave to appeal was granted with the consent of the responding parties, Fredericton Police Association and Fredericton Fire Fighters Association (collectively, the "Unions").

[2] The decisions under appeal are the Tribunal's second and third decisions in relation to the defined benefit plan sponsored by the City and administered by the Superannuation Board for its police and fire fighters. A previous decision was rendered in March 2016.

[3] The appeals were dismissed with reasons to follow. These are the reasons that prompted me to join my colleagues in doing so.

[4] Before 2013, the City maintained a single defined benefit pension plan for its employees (the "Old Plan"). A deficiency that existed for a number of years prompted the City to take steps in 2013 to convert the Old Plan to a shared risk plan. The Unions successfully challenged the proposed change before the Labour and Employment Board. In response, the City split the Old Plan into two plans: it established a new defined benefit plan for its police and fire fighters (the "Police and Fire Plan") and it converted the Old Plan into a shared risk plan for its other employees (the "Shared Risk Plan"). This occurred as of March 31, 2013.

[5] To determine the value of the assets required to be transferred from the Old Plan to the Police and Fire Plan, the City had Mercer (Canada) Ltd., the actuarial firm for the Old Plan, prepare a "Report on the Actuarial Valuation for Purposes of the Transfer of Assets and Liabilities as at March 31, 2013" (the "Asset Split Report"). This report proposed transferring approximately $37,500,000 from the Old Plan, out of assets of approximately $200,000,000. In other words, about 18.75% of the Old Plan's assets would be transferred to the Police and Fire Plan. Mercer used a going concern apportionment methodology to determine the amount to be transferred. The Unions objected to this approach. They maintained it unfairly favoured the Shared Risk Plan since it resulted in an initial funding ratio (the proportion of assets to liabilities) for the Shared Risk Plan of 56.9% and only 47.9% for the Police and Fire Plan. Despite the views of the Unions, in February 2014, the City asked the Superintendent to consent to the Old Plan being apportioned as Mercer proposed. In November 2014, the Superintendent gave her consent to the proposed split, and the Unions appealed this decision to the Tribunal.

B. *The Tribunal's first decision*

[6] At a hearing in October 2015, the Tribunal heard expert opinion evidence that it would be preferable to use a solvency apportionment methodology as a basis for undertaking the split of the Old Plan. In its March 2016 decision, the Tribunal decided that methodology would be fairer to the members of both plans since it would result in their having the same funding ratio as of the effective date of the split. It set aside the Superintendent's decision and ordered the Old Plan be split on this basis (*Fredericton Police Association v. Superintendent of Pensions,* 2016 NBFCST 2 (the "Tribunal's first decision")).

[7] In May 2016, the City sought and obtained leave to appeal the Tribunal's decision to this Court.

[8] However, by late 2016, the City decided to abandon its appeal and act on the Tribunal's first decision. Mercer advised the Superintendent of the City's intentions by letter dated December 20, 2016, and explained that revising its Asset Split Report, using the solvency methodology, would result in the transfer of an additional $5,500,000 (estimated) to the Police and Fire Plan, as of March 31, 2013, thus increasing the plan's initial value to approximately $43,000,000.

C. *Actions that led to the complaints made by the Unions to the Superintendent*

[9] The City's decision to implement the split of the Old Plan as directed by the Tribunal was not, in and of itself, contentious. What became problematic was the City and Mercer's effort to follow and/or link the $5,500,000 (approx.) increase in the Police and Fire Plan, as of March 31, 2013, with a proposal to (1) retroactively reduce the annual contributions that had been made to the plan since April 1, 2013, and refund the excess; and (2) prospectively reduce the annual contributions to the plan to 9% of pensionable earnings. Under the Old Plan, the members and the City had each contributed approximately 11% (for a total of 22%) annually, and they both continued to contribute at that level until 2017, when this effort to reduce contributions began.

[10] In its December 2016 letter to the Superintendent, Mercer explained that the $5,500,000 increase to the initial funding of the Police and Fire Plan meant the annual contributions after April 1, 2013, were higher than necessary, and it requested the Superintendent's preliminary approval for the proposed retroactive reduction and refund of the excess. While the exact amount to be refunded is not clear from the record, as will be seen, it was estimated that it would be approximately $2,000,000 for the period from 2013 to 2016 and, going forward from 2016, the reduction in contributions would be approximately $700,000 each year thereafter. The assumptions upon which the City and Mercer would later rely to assert the retroactive reduction was necessary and/or justifiable, became contentious. Indeed, the actions taken by the City and Mercer in 2017 to implement these changes are at the centre of the issues addressed in the decision under appeal to this Court.

[11] Given that "Reports on the Actuarial Valuation for Funding Purposes" had been previously filed with the Superintendent for each of 2013, 2014 and 2015, Mercer advised the Superintendent that, to effect the proposed retroactive reduction in contributions (and the refund), it would be necessary for it to file: (1) Revised Actuarial Valuation Reports for Funding Purposes for each of 2013, 2014 and 2015 to reflect the increase in the initial value of the plan as of March 31, 2013, <u>and</u> the new, lower contribution amounts that it was proposing for those years; and (2) an amendment to the City's by-law respecting the Police and Fire Plan to establish (retroactively) the lower contributions for those years. While Mercer's letter explained that the plan members would benefit from receiving the expected refund, since they and the City contribute equally to the plan, the City would receive half of any refund.

[12] It is of no small significance that the City's intention to retroactively reduce contributions from April 2013 (and refund the excess) was <u>not</u> presented by Mercer to the Board of Administrators for the Police and Fire Plan, the plan's administrator, until March 2017. It is common ground that retaining and instructing an actuary, including in relation to the

filing of annual actuarial valuation reports for contribution purposes, are duties of the plan administrator, not the employer, the plan's sponsor. That the refund was developed and presented by Mercer on the instructions of the City, not the Board of Administrators (the "Superannuation Board"), fuelled the Unions' complaints to the Superintendent. These complaints form the basis for this appeal. In fact, the Unions argued before the Tribunal that "the City was usurping the Superannuation Board's authority." As will be explained, the City would later abolish the Superannuation Board as of November 27, 2017, making itself the administrator.

[13] The meeting of the Superannuation Board on March 17, 2017, was an "emergency" or special meeting of the Board called by the City for the purpose of addressing two agenda items: first, an update regarding the split of the Old Plan's assets, and, second, Mercer's recommendations regarding the initial actuarial valuation report for funding purposes for 2016.

[14] In relation to the update on the split of the Old Plan, the Superannuation Board was advised of the City's intention to abandon its appeal of the Tribunal's first decision and to split the Old Plan as directed. Mercer explained this would result in past contributions (made between 2013 and 2015) being higher than necessary, and they would be retroactively reduced to produce a partial refund of contributions to members. It was acknowledged at the meeting that the City intended to contribute its share of the refund (alleged to be in the range of $1,000,000) to the Shared Risk Plan. As an alternative to refunding contributions from the plan, Blair Sullivan, a Board member nominated by the Unions, asked about other possibilities, and suggested, instead, a reinstatement of pension indexing, a benefit that had been eliminated in 2014 because of the plan's deficiency.

[15] In relation to the initial 2016 actuarial valuation report for funding purposes, Mercer proposed that contributions to the plan be reduced to 9% (from approximately 11%), beginning April 2016. When questioned about this, Mercer explained that it was the maximum rate permitted (without an exemption) by the Canada Revenue Agency (CRA).

[16] While the Superannuation Board initially accepted Mercer's recommendations, the next day, Mr. Sullivan wrote to the Board's Chair raising both procedural and substantive concerns with the meeting and Mercer's presentation. He requested another emergency meeting of the Board. City officials asked Mercer to provide comments on the issues raised by Mr. Sullivan. In an email sent on March 21, 2017, Mercer made the following comments on these issues:

- We are proposing to drop the employee and employer contribution rates from around 11% of pensionable earnings to 9% of pensionable earnings which represents a reduction in annual contributions to the Plan of approximately $700,000 (Blair is correct with this statement). Blair is also correct that it would be preferable not to reduce contributions when the Plan has a large solvency deficit. However, the solvency deficit has been reduced by $5.5M as a result of the Tribunal decision which equates to about 8 years' worth of reduced contributions.

- In any case, the CRA maximum employee contribution requirements mean that the Plan must restrict employee contributions to 9% of pensionable earnings.

[…]

- […] If the Plan is to remain in its current form, there is a very real and likely possibility that Employer contributions will have to rise at some point in the not too distant future (unless we see a sustained period of good investment returns and/or material increases in Canadian interest rates).

- The alternative to higher employer contributions is reductions in future benefits. [Emphasis added.]

[17] As will be seen, whether contributions had to be restricted to 9% or CRA would grant an exemption to permit the continuation of contributions at 11% (or at some other level in excess of 9%) was an issue raised by the Unions in their complaints to the Superintendent and addressed in the decision of the Tribunal that is under appeal. While Mr. Sullivan's request for a second "special" meeting was denied, at the Superannuation Board's next regular meeting, on April 25, 2017, the Board resolved to "overturn" the decisions made at the March 17th meeting (minutes of Board meeting). The Board also adopted a motion to "obtain actuarial and legal advice independent of the City."

[18] Despite the Board's decision to overturn the approval of Mercer's proposals, at the request of City officials, Mercer presented its recommendations respecting the 2016 valuation report to City Council on May 8, 2017. Council approved the recommended 6.2% discount rate (the expected rate of return on the plan's capital) with 0% margin for adverse deviation (the factor used to account for the risk of not achieving the assumed rate of return). It also approved establishing a contribution rate of 9% and directed Mercer to file the 2016 report with the Superintendent.

[19] Disregarding the Superannuation Board's April 25, 2017, decision and without securing further approval from the Board, on July 11, 2017, Mercer filed with the Superintendent: (1) the *revised* Asset Split Report, as of March 31, 2013; (2) *revised* actuarial valuation reports for funding purposes for each of 2013, 2014 and 2015; and (3) an *initial* actuarial valuation report for 2016. At the same time, the City amended the pension by-law to provide for lower contribution rates from April 1, 2013, to March 31, 2016, and 9% from April 1, 2016.

[20] On July 31, 2017, the Unions filed complaints with the Superintendent, asking her to reject the reports that had been prepared and filed by Mercer, ostensibly on behalf of the Board as the plan's administrator. They maintained the actions taken to implement the City's plan to retroactively reduce contributions and refund the excess and the resulting reports prepared and filed by Mercer, all on the sole instruction of the City, violated the *Pension Benefits Act*, S.N.B. 1987, c. P-5.1 (the "*Act*").

D. *Actions expanding the complaints made to the Superintendent*

[21] In August 2017, before dealing with the substance of the Unions' complaints, the Superintendent questioned the discount rate (estimated rate of return) used in the 2016 actuarial report filed by Mercer. She noted that at 6.2% (with 0% for adverse deviation), it was greater, by about 1%, than the discount rate utilized in other plans filed with her office. In other words, the 2016 report's conclusion regarding the required contribution to the Fire and Police Plan for 2016 was based on an assumed rate of return that was higher than the rate used by other filed pension plans. Ultimately, she decided the 6.2% discount rate was too high and the 0% factor for adverse deviation was too low. Simplistically, the higher the discount rate, the lower the need for current funding and current contributions, all other factors being equal.

[22] To respond to the Superintendent's position regarding the initial 2016 actuarial report, Mercer sought input/instructions from the City respecting the preparation of a *revised* 2016 report. City officials were concerned that the Superannuation Board might approve a discount rate (assumed rate of return) for 2016 that was not high enough to justify contributions at 9%. On the direction of City Council, they advised the Board that, if it selected a discount rate and/or margin for adverse deviation that resulted in a funding deficiency, any such shortfall would have to be resolved by a reduction in member benefits under the plan; it could not be made up by an increase to contributions since the City had capped contributions at 9%.

[23] At a meeting of the Superannuation Board on October 13, 2017, Mercer presented for Board approval a range of discount rates for 2016, all of which were lower than the rate previously rejected by the Superintendent, with various factors for adverse deviation. After Mercer left the meeting, and despite the warnings from City officials at the meeting of the consequences of removing Mercer as the plan's actuary, a motion to do so was passed by the Board.

[24] Shortly thereafter, the City amended its by-law respecting the Police and Fire Plan to abolish the Superannuation Board and make itself the plan administrator. The City subsequently directed Mercer to file a revised 2016 report it had approved, as well as an initial report for 2017.

[25] The Unions expanded their complaints to include the claim that the revised 2016 valuation report was contrary to the *Act*, as was the abolition of the Superannuation Board, on the basis that it was retaliatory. They claimed these events were additional evidence that Mercer had taken instructions from and acted on behalf of the City, not the Superannuation Board.

E. *The Superintendent's decision regarding the complaints*

[26] In a decision issued on July 12, 2018, the Superintendent approved the split of the Old Plan based on the revised Asset Split Report. As noted, this decision was not contentious. The Superintendent accepted the revised actuarial valuations for funding purposes filed in July 2017 for 2013, 2014 and 2015, which reflected the reduced contributions to the Fire and Police Plan during those periods. She also accepted the revised report for 2016 filed by the City (in December 2017) after it became the plan administrator. She concluded there was no breach of conflict of interest rules or any other statutory obligations outlined in the *Pension Benefits Act*, by the City or its staff. She also dismissed the Unions' claim that the City's decision to abolish the Superannuation Board, as of November 27, 2017, was invalid.

F. *The Tribunal's decision*

[27] The Unions appealed the Superintendent's decision to the Tribunal. In its August 2020 decision (*Fredericton Police Association v. New Brunswick (Superintendent of Pensions),* 2020 NBFCST 4), the Tribunal noted that the Superintendent's investigation did not include much of the evidence that was entered before it:

> In our view, the Superintendent's investigation did not satisfy the criteria of thoroughness. The Unions' complaint raised serious allegations of conflict of interest and breach of fiduciary duties by Jane Blakely

> – a plan administrator. There were also serious allegations of misconduct by David Hughes – the plan's actuary. These will be discussed later in the decision. We are cognizant that the Superintendent was not required to leave no stone unturned in conducting her investigation. However, in our view and considering the history of the dispute, the nature of the allegations required the Superintendent to obtain evidence from the plan administrator – the Superannuation Board – during her investigation. This she did not do. She did not contact any Superannuation Board members to obtain information about the roles of both Jane Blakely or David Hughes. She also did not obtain the minutes of the Superannuation Board meetings. Obtaining these documents was not a fishing expedition. A less than thorough investigation would necessarily have included obtaining evidence from the Superannuation Board regarding the allegations pertaining to conflict of interest and breach of fiduciary obligations by a Board member and allegations of misconduct by the plan actuary. As is discussed further in these reasons, the evidence clearly points to conflictual behaviour and breaches of fiduciary obligations by both Jane Blakely and David Hughes.
>
> [Tribunal decision, August 27, 2020, para. 82]

[28] The Tribunal made the following general observation regarding the issues and circumstances of this case:

> Many of the issues in this appeal arise from a poor delineation of the respective authorities and roles of the Superannuation Board as plan administrator and the City as plan sponsor. There are multiple instances where the City, in its capacity as plan sponsor, usurped the authority of the Superannuation Board.
>
> [Tribunal decision, August 27, 2020, para. 75]

[29] From the balance of the Tribunal's decision, this observation would appear to be an intentional understatement. The Tribunal found that "[a]t no time after the April 25, 2017 meeting did the Superannuation Board approve the revised actuarial valuation reports for 2013 to 2015 or the initial actuarial valuation report for 2016" (para. 116). The Tribunal also made the following findings regarding the City's and Mercer's involvement in the preparation and filing of those reports with the Superintendent, none of which was challenged on appeal:

> The City did not have the authority to approve the discount rate for the 2016 actuarial valuation report. It further did not have the authority to direct Mercer (or David Hughes) as the Plan actuary to prepare and file the actuarial report. This was the Superannuation Board's responsibility as the plan administrator. The City conceded this at the hearing. Mr. Hughes' participation in the May 8 [City Council] meeting clearly depicts that he was taking his instructions from the City rather than the Superannuation Board.
>
> Mr. Hughes knew that the discount rate had to be approved by the Superannuation Board as plan administrator. He also knew that the Superannuation Board had revoked its approval of the 2016 actuarial valuation report. **We conclude that David Hughes knew he did not have the Superannuation Board's approval to submit the revised actuarial valuation reports for 2013 to 2015 and the initial actuarial valuation report for 2016. Despite this, Mr. Hughes filed the 2016 actuarial valuation report with the Superintendent on July 11, 2017.**
>
> [Tribunal decision, August 27, 2020, paras. 118-119]
> [Emphasis added.]

[30] The circumstances in which the Superintendent may make an order respecting a pension plan are set out in s. 72(2) of the *Act*, as follows:

72(2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,	**72(2)** Le surintendant peut rendre une ordonnance en vertu du présent article si, fondé sur des motifs raisonnables et probables, il est d'avis
(a) that the pension plan, pension fund or prescribed retirement savings arrangement is not being administered in accordance with this Act, the regulations or the pension plan,	a) que le régime de pension, le fonds de pension ou l'arrangement d'épargne-retraite prescrit n'est pas administré conformément à la présente loi, aux règlements ou au régime de pension,

(b) that the pension plan or prescribed retirement savings arrangement does not comply with this Act and the regulations,

b) que le régime de pension ou l'arrangement d'épargne-retraite prescrit n'est pas conforme à la présente loi et aux règlements,

(c) that the administrator of the pension plan, the employer or any other person is violating a provision of this Act or the regulations,

c) que l'administrateur du régime de pension, l'employeur ou toute autre personne enfreint une disposition de la présente loi ou des règlements,

[…]

[…]

(d) that the assumptions or methods used in the preparation of a report required under this Act or the regulations in respect of a pension plan are inappropriate for a pension plan,

d) que les hypothèses ou méthodes utilisées dans la préparation d'un rapport requis en vertu de la présente loi ou des règlements relativement à un régime de pension ne sont pas pertinentes,

(e) that the assumptions or methods used in the preparation of a report required under this Act or the regulations in respect of a pension plan do not accord with generally accepted actuarial principles,

e) que les hypothèses ou méthodes utilisées dans la préparation d'un rapport requis en vertu de la présente loi ou des règlements relativement à un régime de pension dérogent aux principes actuariels généralement acceptés,

(f) that a report submitted in respect of a pension plan does not meet the requirements and qualifications of this Act, the regulations or the pension plan,

f) qu'un rapport soumis relativement à un régime de pension ne répond pas aux exigences et conditions de la présente loi, des règlements ou du régime de pension,

[…] or

[…] ou

(h) that there are or are likely to be insufficient funds available to pay the pensions and benefits under the plan. [Emphasis added.]

h) qu'il y a insuffisance de fonds pour verser les pensions ou les prestations ou qu'une telle insuffisance est vraisemblable.

[C'est moi qui souligne.]

[31] The Tribunal was satisfied there were reasonable grounds for the opinion that the circumstances mentioned in s. 72(2) existed and it vacated the Superintendent's decision (except her determination that abolishing the Board was valid). The Tribunal made the order, under s. 72(1), it concluded the Superintendent should have made (s. 76(1)(b)). The Tribunal:

a) ordered Mercer and David Hughes be removed as the actuaries for the Police and Fire Plan and the administrator retain a new actuary to provide independent and impartial actuarial services for the plan;

b) ordered the new actuary to (i) conduct an analysis to determine the appropriate funding (contribution) levels for the Police and Fire Plan from its inception in 2013, including to determine whether a CRA exemption respecting such contributions is required; and (ii) redo the annual actuarial valuation reports for 2013 to present and submit them to the Superintendent; and

c) rejected the revised 2016 actuarial valuation report filed by the City as plan administrator in December 2017 and ordered a revised report be submitted to the Superintendent.

II. Issues on Appeal

[32] The grounds of appeal advanced by the City and the Superintendent claim the Tribunal erred by:

1) holding a *de novo* hearing, deciding no deference was owed to the Superintendent's decision and reviewing it on a correctness standard;

2) raising, on its own motion, the issue of the Superintendent's right to participate in the Unions' appeal to the Tribunal and not deciding that, under s. 75 of the *Act*, her participatory rights were unrestricted;

3) dismissing the City's claim that the Unions had not properly raised, as a ground of appeal, the assertion that Mercer was in a conflict of interest and acted contrary to its duty under s. 17(3);

4) forming the opinion there were reasonable and probable grounds to believe one or more of the circumstances enumerated in s. 72(2) existed (which entitled the Tribunal to make an order under s. 72(1)), because the Tribunal:

a) wrongly concluded Mercer was an "agent" of the plan administrator, for the purposes of s. 18(3), and, as a consequence, was subject to the same standards (regarding conflicts of interest) that apply to the member of a board (that is an administrator), under s. 17(3);

b) misinterpreted and misapplied the "two hats doctrine" in concluding Jane Blakely (the City's legal counsel for labour, employment and pension matters), as a member of the Superannuation Board, was in a conflict of interest, in violation of s. 17;

c) unjustifiably concluded there were likely to be insufficient funds available to pay the pensions and benefits under s. 72(2)(h) (because the plan was exempt from solvency special payments pursuant to s. 42.1 of Regulation 91-195); and

d) erroneously concluded s. 72 imposes fiduciary-like responsibilities on the Superintendent to look out for the best interests of plan members, when she is approving (i) pension plan amendments that set plan contribution rates, and (ii) discount rates in actuarial valuation reports; and

5) concluded the Superintendent's jurisdiction to make orders under s. 72 includes the ability to require the plan administrator to retain an independent actuary and require that actuary, when acting on the implementation of the Tribunal's order, to determine whether a CRA exemption respecting contributions in excess of 9% is warranted and/or possible.

III. Background

A. *The City's decision to convert the Old Plan to a shared risk plan*

[33] Before the split of the Old Plan, the City maintained a single defined benefits pension plan for all employees. It was established by by-law and administered by a board of administrators.

[34] The Collective Agreements between the City and the Unions provide that union members who have completed 25 years of service (or whose age plus years of service equals 75) will be eligible to retire with an unreduced pension. The language of the current Collective Agreements for the Unions is substantially the same. The Unions note that their members typically contribute more to the pension plan than other City employees because they generally retire earlier. The agreement for the police provides:

> 22.01 The Parties agree that a police officer that has completed twenty-five (25) years of service or whose age plus years of service equals at least seventy-five (75) will be eligible to retire with an unreduced pension.
>
> Service shall mean years or fractions thereof employed as a police officer with the City of Fredericton.
>
> The additional cost of this provision shall be shared equally between the Employer and the employee, to the maximum permitted by the Income Tax Act.
>
> 22.02 The Employer will provide 30 days written notice to the Union of all changes it intends to make to the terms of the City of Fredericton Pension Plan. The Employer and the Union will enter into meaningful discussions with a view to attempting to resolve any differences between them. At the end of the 30 day notice period, the Employer can proceed to implement the changes. [Emphasis added.]

[35] Ongoing deficits in the Old Plan prompted the City to make changes. In 2011, the City passed an amendment to the pension by-law that increased contributions to the plan, reduced indexing, and changed the definition of "pensionable earnings," among other things. In response, the Police Association filed a complaint of unfair labour practice with the New Brunswick Labour and Employment Board. The Fire Fighters Association similarly filed a complaint. In September 2011, the Labour and Employment Board found the City violated the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, and issued an order prohibiting it from making changes until the complaints were resolved or determined by arbitration.

[36] In October 2012, the City advised the funding deficit in the Old Plan had increased and a series of meetings began to discuss potential solutions, including the possibility of converting to a "shared risk" plan. The *Pension Benefits Act* had been recently amended, in 2012, to provide for shared risk plans. In January 2013, City officials presented a draft Memorandum of Understanding for the conversion of the Old Plan to a shared risk plan. The Unions did not agree to the MOU and opposed the change.

[37] On March 18, 2013, City Council approved the plan's conversion as provided for in the MOU, which had been accepted by the other employees of the City, including those represented by four unions. On the same day, the Police Association filed a complaint with the Labour and Employment Board. Two days later, the Fire Fighters Association also filed a complaint of unfair labour practice. Both requested an interim order to prevent the planned conversion pending a determination of their complaints.

[38] On March 19, 2013, the City sent a letter to the Superintendent of Pensions advising of its intention to convert the Old Plan as of March 31, 2013. It appears the City maintained the position, at least initially, that the Old Plan could be converted despite the opposition of the Unions.

[39] Before the Labour and Employment Board, the Unions maintained that the change proposed by the City was contrary to the Board's 2012 decisions. They also asserted it was a significant alteration of the conditions of their employment and was therefore properly the subject of negotiations respecting their collective agreements, failing which a resolution of the issue could be addressed by an interest arbitration board. The Labour and Employment Board issued an interim order restraining the conversion of the Old Plan as it related to the Unions.

B. *The split of the Old Plan into two plans*

[40] Following the Labour and Employment Board decisions, the City decided to exclude the members of the Unions from its plan to convert the Old Plan to a shared risk plan and it decided to (1) establish a new defined benefit pension plan for the police and fire employees; (2) transfer the assets and liabilities relating to those employees from the Old Plan to the

new Police and Fire Plan, as of March 31, 2013; and (3) convert the Old Plan into a shared risk plan for all remaining employees.

[41] The City established the Police and Fire Plan by by-law, the "By-law to Continue the Superannuation Plan for Certain Employees of the City of Fredericton." It provided for the plan to be administered by a "Board of Administrators" (the Superannuation Board), comprised of appointees by the City and the Unions. Since its inception, the Superannuation Board has been comprised of five persons appointed by the City and five nominated by the Unions (including a retiree). The City's appointees in 2016/2017 included three councillors, and two City officials. Relevant provisions of the By-law are:

2.2.4 "*Actuary*" means a Fellow of the Canadian Institute of Actuaries, or a firm of actuaries, at least one of whose members is a Fellow of the Canadian Institute of Actuaries, appointed by the Administrator to provide the actuarial services required under the Plan.

2.2.5 "*Administrator*" means the Board of Administrators, as described in Section 10.6.

4. CONTRIBUTIONS

4.1 *Member Contributions*

4.1.1 (i) Members of UBJC 911 shall contribute by payroll deduction as follows:

[see below]

(ii) Members of IAFF 1053 shall contribute by payroll deduction as follows:

[see below]

4.2 *Employer Contributions*

4.2.1 The Employer shall contribute an amount which is equal to the Members' contributions, as described under subsection 4.1.

2.2.4 « *actuaire* » Fellow de l'Institut canadien des actuaires, ou cabinet d'actuaires dont au moins un membre possède cette qualité, désigné par l'administrateur pour fournir les services actuariels qu'exige le régime.

2.2.5 « *administrateur* » La Commission d'administration décrite au sous-article 10.6.

4. COTISATIONS

4.1 Cotisations de salarié

4.1.1 (i) Les membres de la section UBJC 911 cotiseront, au moyen de retenues salariales, comme suit :

[voir ci-dessous]

(ii) les membres de la section IAFF 1053 cotiseront, au moyen de retenues salariales, comme suit :

[voir ci-dessous]

4.2 *Cotisations d'employeur*

4.2.1 L'employeur verse des cotisations égales aux cotisations de salarié prévues au sous-article 4.1.

4.2.2 Si, **de l'avis de l'actuaire**, les cotisations prévues aux paragraphes 4.1.1 et 4.2.1 sont insuffisantes pour couvrir les prestations constituées dans l'année du régime et assurer au moins l

4.2.2 If, **on the advice of the Actuary**, the contributions described in paragraphs 4.1.1 and 4.2.1 are insufficient to fund the benefits accruing in the Plan Year, and to provide at least the minimum funding, as required by Applicable Provincial Legislation, of any unfunded actuarial liability or solvency deficiency that may exist, then the Administrator may increase the contributions under paragraphs 4.1.1 and 4.2.1 so that contributions are sufficient.

a capitalisation minimale qu'exige la législation provinciale applicable pour couvrir tout déficit actuariel ou de solvabilité, l'administrateur peut augmenter les cotisations prévues aux dits paragraphes de manière qu'elles deviennent suffisantes à ces fins.

4.2.3 If:

(i) on the advice of the Actuary, and taking into account any funding excess that may exist, the contributions described in paragraphs 4.1.1 and 4.2.1 are more than sufficient to fund the benefits accruing in the Plan Year, and provide at least the minimum funding, as required by Applicable Provincial Legislation, of any unfunded actuarial liability or solvency deficiency that may exist;

or

(ii) the contributions described in paragraphs 4.1.1 and 4.2.1 would not be eligible contributions under the *Income Tax Act*,

then the Administrator may decrease the contributions under paragraphs 4.1.1 and 4.2.1 so that these contributions are eligible contributions under the *Income Tax Act* and still meet the minimum funding requirements under the Applicable Provincial Legislation.

4.2.3 Si :

(i) lorsque, de l'avis de l'actuaire, ces cotisations, compte tenu de tout excédent de capitalisation, sont plus que suffisantes pour couvrir les prestations constituées dans l'année du régime et assurer au moins la capitalisation minimale qu'exige la législation provinciale applicable pour couvrir tout déficit actuariel ou de solvabilités;

ou

(ii) lorsque ces cotisations ne seraient pas admissibles aux termes de la *Loi de l'impôt sur le revenu*,

l'administrateur pourrait alors réduire les cotisations en vertu des paragraphes 4.1.1 et 4.2.1 de sorte que ces cotisations soient admissibles aux termes de la *Loi de l'impôt sur le revenu* et qu'elles respectent encore les exigences minimales de capitalisation et vertu de la législation provinciale applicable.

10 ADMINISTRATION

10 ADMINISTRATION

10.2 Administrative Duties

10.2.1 The Administrator shall make reasonable efforts to ensure that the Plan and the Pension Fund are administered in accordance with Applicable Provincial Legislation and the *Income Tax Act*.

11.1 Right to Amend or Terminate

11.1.1 This Plan is established as a continuing policy, but the Employer reserves the right to amend, alter, modify, or terminate the Plan, either in whole or in part, without the consent of any other person, provided that such amendment, alteration, modification, or termination is not contrary to applicable Provincial Legislation, the *Income Tax Act*, or any other applicable law.

11.2 *No Reduction of Benefits*

11.2.1 No amendment, alteration, modification, termination, or partial termination of the Plan shall reduce the amount of benefits to which the Members, Former Members, Retired Members, their Spouses, and their Beneficiaries are entitled under the Plan up to the date of such amendment, alteration, modification, termination, or partial termination, and with respect to which the required contributions have been made. [Emphasis added.]

10.2 Fonctions administratives

10.2.1 L'administrateur déploie des efforts raisonnables afin de s'assurer que le régime et la caisse de retraite sont administrés en conformité avec la législation provinciale applicable et la *Loi de l'impôt sur le revenu*.

11.1 Droit de modification et d'abolition

11.1.1 Le régime est en principe permanent, mais l'employeur se réserve le droit de le modifier ou de l'abolir en tout ou en partie à sa seule initiative, sous réserve de la législation provinciale applicable, de la *Loi de l'impôt sur le revenu* et de toute autre loi applicable.

11.2 *Irréductibilité conditionnelle des prestations*

11.2.1 La modification ou l'abolition totale ou partielle du régime ne peut avoir pour effet de réduire le montant des prestations constituées à cette date auxquelles ont droit les participants, anciens participants, participants retraités, ainsi que leurs conjoints ou leurs bénéficiaires, et à l'égard desquelles les cotisations obligatoires ont été versées.

[C'est moi qui souligne.]

[42] Article 4.1.1 of the By-law sets out the contribution rates for the Police and Fire members of the plan. As of March 31, 2013, the By-law provided that the rates were fixed at:

- **Fire**: 9.59% of pensionable earnings less than $5,000, plus 11.19% of earnings over $5,000; and

- **Police**: 9.54% of pensionable earnings less than $5,000, plus 11.14% of earnings over $5,000.

[43] These rates, of approximately 11%, are a continuation of the contribution rates that existed under the Old Plan. Under Article 4.2.1, these are matched by the City, for a total of approximately 22% of pensionable earnings. Contributions continued at this rate until the City applied for approval to amend the By-law in August 2017. The Tribunal concluded the Superintendent should have rejected this amendment, which provided for lower rates, retroactively, from 2013.

[44] As mentioned, the City retained Mercer to assist in splitting the Old Plan and, by November 2013, it prepared the Asset Split Report. In December 2013, the City presented a summary of this report to the Unions. While Mercer would later prepare and file the annual reports as actuary for the Police and Fire Plan, it was never formally appointed by the Superannuation Board.

[45] I pause to note that, to address the deficit that continued from the Old Plan, the City amended the Police and Fire Plan, as of January 1, 2014, to remove post-retirement indexing of benefits accruing after January 1, 2014. As indicated, at the meeting of the Superannuation Board on March 17, 2017, Mr. Sullivan suggested that indexing be reinstated, as a possible alternative to retroactively reducing and refunding the contributions made between 2013 and 2016.

[46] On February 26, 2014, despite the Unions' concerns regarding the proposed asset transfer, the City applied to the Superintendent for approval to divide the Old Plan as proposed in Mercer's report. In November 2014, the Superintendent gave her consent, and the Unions appealed.

C. *The Tribunal's first decision*

[47] In the appeal to this Court, the Unions submit the Tribunal's first decision reinforces their current claim that Mercer was retained by the City and has been taking instructions from the City for some time, separate from the Superannuation Board, contrary to the interests of the members of the Police and Fire Plan and contrary to both the *Act* and the By-law. They note that, while a member of the Superannuation Board, Jane Blakely acted as counsel to the City before the Tribunal in 2016, and she has given directions to Mercer since that time, along with Tina Tapley, the City's Treasurer (and a trustee of the Shared Risk Plan). In 2014, Ms. Blakely, the City's Director of Strategic Direction and Consulting and a practising member of the Law Society, was appointed, by resolution of City Council, to "provide legal advice and/or opinions to" the City "with respect to labour, employment and pension matters."

[48] The Tribunal's first decision explains that the Unions' appeal proceeded by way of a hearing *de novo*, and the Superintendent, who was a party to the appeal pursuant to s. 75(1), took "no position regarding the merits of [the Unions'] appeal other than to provide an explanation of the context in which the decision was made and drawing the attention of the Tribunal to those considerations rooted in the Superintendent of Pensions' specialized jurisdiction and expertise in pensions law" (the Tribunal's first decision, at para. 13).

[49] As noted, the Unions' position was that the use of a going concern apportionment methodology resulted in Mercer recommending an inequitable division of the assets of the Old Plan, a division that preferred the Shared Risk Plan and all other City employees. The Unions maintained the split ought to be based on a solvency apportionment method, with both plans having the same transfer ratio at the time of the split. The City maintained the going concern apportionment methodology was appropriate because both plans benefited from a solvency exemption and, as a result, were annually funded, on a going concern basis.

[50] Brendan George, of George & Bell Consulting, an actuary, was qualified as an expert, and his report was entered into evidence on consent. A representative of Mercer was not called as a witness. In relation to Mr. George's evidence regarding the different valuation methods, the Tribunal summarized:

> Mr. George explained that a going concern valuation is generally used as the method to determine the contributions that should be going into a pension plan to fund the benefits. When employing this method, the actuary makes certain assumptions and then makes a recommendation to the plan sponsor on what is an appropriate contribution that should be going into the plan to fund the benefits over a long period of time […].
>
> […]
>
> Mr. George testified that the solvency valuation calculates the assets and liabilities of the pension plan if it were wound up on the date of the report. According to Mr. George, you determine the liabilities by determining the payout to pension plan members on that given day. Active members would receive a lump sum transfer value (the calculation of which is defined) and retirees would generally have an annuity purchased for them. Mr. George explained that when you divide the assets by the windup liability, you obtain the transfer ratio.
>
> [Tribunal decision, March 9, 2016, paras. 73, 75]

[51] The Tribunal noted Mr. George testified that, in a solvency apportionment, "there is really no subjectivity and discretion because the assumptions are mandated by legislation and actuarial standards set by the Canadian Institute of Actuaries" (para. 94), whereas a going concern apportionment methodology "relies on assumptions which are at the discretion of the actuary and as such it is quite subjective" (para. 93). Related to the subjectivity of a going concern apportionment method, the Tribunal also referred to Mr. George's other concern, namely the City's reliance on a single actuary. The Tribunal explained:

> […] The calculation of the transfer of assets was conducted by a single actuarial firm at the direction of the City and there was no actuarial firm representing the interests of the Police and Fire Plan. According to Mr. George, in every transfer in which he has been involved based on the going concern apportionment method, there were two actuaries, one for each plan, thus ensuring a negotiation process to ensure the interests of the members of both plans were represented.
>
> [Tribunal decision, March 9, 2016, para. 95]
>
> [Emphasis added.]

[52] In summarizing its reasons for rejecting Mercer's approach, which had been accepted by the Superintendent, the Tribunal stated:

> In our view, faced with an application for transfer of assets, the Superintendent of Pensions cannot discharge her duty under the *Pension Benefits Act* without having both the going concern apportionment and the solvency apportionment results. Without these results, the Superintendent of Pensions cannot determine what best protects the benefits of the plan members.
>
> In our view, the discrepancy of 9% in the asset transfer ratio between the Police and Fire Plan and the City Plan should have prompted the Superintendent of Pensions to further investigate the application.
>
> There was some suggestion at the hearing that all the Superintendent can do faced with an application for consent to a transfer of assets is to either consent or refuse consent.
>
> In our view, this position is too simplistic. In light of the 9% discrepancy in the asset transfer ratio set out in the solvency valuation of the Mercer report, the Superintendent could have done the following, which are all accessory to her authority to provide or refuse consent:
>
> - suggested that a second actuarial firm be retained as is normally done when the going concern apportionment is employed to ensure checks and balances between the two plans. This would have ensured the interests of the police and firefighters were represented. Again, we see this as accessory to her authority to provide or refuse consent;
>
> - requested further information; and
>
> - suggested that the solvency apportionment method be calculated to allow her to compare those figures with the going concern apportionment figures provided in the Mercer report.

> In our view, the solvency apportionment method clearly protects the interests of members of both plans as they maintain the same asset transfer ratio from the Old Plan into their new plans. An equal transfer ratio, in our view, fairly ensures the protection of benefits of members of the two plans.
>
> [Tribunal decision, March 9, 2016, paras. 110-114]
>
> [Emphasis added.]

[53] For these reasons, the Tribunal ordered the Old Plan be split using the solvency apportionment method. The City's motion for leave to appeal to this Court was granted in May 2016 and, while the Board of Trustees of the Shared Risk Plan had not been a party to the proceeding before the Tribunal, it was also granted leave to appeal.

[54] Before turning to the City's decision to withdraw its appeal and the proposal to retroactively reduce contributions to the Police and Fire Plan, I would note that, only months before so advising the Superintendent, City Council passed a resolution (on September 12, 2016) to have the Superannuation Board develop a funding policy that would avoid increasing contributions to the plan above 11% (approx.), the level that existed under the Old Plan and had continued thereafter, until the time of Council's motion:

> […] THAT Council directs City Staff to work with the Superannuation Board for By-law No. A-13, to develop a funding policy for the Police/Fire Define Benefit Plan to achieve the following:
>
> - No increase in **the City's contribution** to the Police/Fire Defined Benefit Plan beyond the level at March 31, 2013. […]
>
> [Emphasis added.]

D. *Actions leading to the complaints made by the Unions to the Superintendent*

[55] By December 2016, the City decided to withdraw its appeal and implement the Tribunal's first decision.

[56] In early December 2016, Mercer asked the Superintendent for an extension of time to file the Plan's 2015 and 2016 actuarial reports. It explained this was necessary due to the "uncertainty regarding the assets split" caused by the Tribunal's first decision and the pending appeals. However, Mercer also advised that it expected this "uncertainty regarding the asset split to be resolved very soon and we will be writing to you shortly regarding our proposed solution for this."

[57] By letter dated December 20, 2016, Mercer advised the Superintendent that the "City believes it is now in the best interests of both Plans (and its employees) to work towards implementing the Tribunal's decision" and to "outline our proposed approach" for doing so. Mercer also advised the appeals would be withdrawn.

[58] As a result of this change in the City's position, Mercer explained it would be necessary to redo the Asset Split Report, as of March 31, 2013. It also explained the increase in the Plan's initial funding as of March 31, 2013, meant the annual minimum contribution requirements in and after 2013 would be reduced:

> Using the solvency valuation method when the Fire and Police Plan was initially set up will result in the initial funded ratio for the Fire and Police Plan being higher. The knock on effect being that all subsequent actuarial valuations will now show a higher funded ratio and the minimum employee/employer contributions will be lower as the contribution requirements are lower. Note that the total required contributions to the Fire and Police Plan are split 50/50 between the City and the employees.
>
> We propose the following steps are taken to implement the Tribunal's decision in respect of the Fire and Police Plan[.]
>
> [Emphasis added.]

[59] In listing the steps necessary to "implement the Tribunal's decision," Mercer advised the Superintendent the "Employees will be refunded for contributions paid in excess of the amounts required in the new actuarial reports [to be] filed for 2013, 2014 and 2015." The steps Mercer set out are (albeit in a different order):

1. Recalculate the split of the Old Plan and file a new Asset Split Report as of March 31, 2013;

2. The assets be physically apportioned to the two plans on the "asset transfer date" "with Mercer, on behalf of the Fire and Police Plan, and Morneau Shepell, on behalf of the Share Risk Plan attesting to the value of the assets to be split" using a solvency split as of March 31, 2013;

3. Resubmit "plan text" as at April 1, 2013, that provides for lower contribution amounts for 2013, 2014 and 2015 (in other words, file an amendment to the City's pension by-law that retroactively reduces the contribution rates for those years), which Mercer's "initial estimates indicate[d]" would be reduced to:

   a) 10.19% of pensionable earnings from April 1, 2013, to March 31, 2014,

   b) 9.30% of pensionable earnings from April 1, 2014, to March 31, 2015, and

   c) 9.57% of pensionable earnings beginning April 1, 2015; and

4. File (i) *revised* actuarial valuation reports for 2013 and 2014, and (ii) an *initial* actuarial report for 2015 (the 2015 report would later be filed before this "plan" was implemented in July 2017); and

5. Refund employees for contributions paid in excess of what was required.

[60] While the letter indicates a refund was possible, because of the additional $5,500,000, Mercer does not indicate it was necessary or required and, as stated, the Unions challenge the idea that a refund was either necessary or in the best interests of the Police and Fire Plan. In addition, although not expressly underscored in Mercer's letter to the Superintendent, any refund of contributions would be divided equally between the employees and the City.

[61] Mercer advised the Superintendent that the proposed physical split of assets was planned for January 31, 2017, and it requested her response to the proposal before then. Mercer stated that, if it did not hear of any concerns by that time, it would proceed to implement "our proposed solution." None of these steps would be completed until July 2017.

[62] Although Mercer's letter implies it represents and is the actuary for the Police and Fire Plan, it does not expressly indicate upon whose instructions it is acting, nor does it identify a distinction between the Police and Fire Plan, as represented by the Superannuation Board, and the City. The letter begins:

> We are writing to you to advise you of the approach that we intend to adopt regarding the transfer of assets from the [Shared Risk Plan] to the [Fire and Police Plan]. We outline our proposed approach for implementing the Tribunal's decision further below but before doing so we think it is worthwhile recapping how the City has arrived at the position it finds itself in with regard to its pension plans.
> [Emphasis added.]

[63] Mercer advised the Superintendent that it intended to attest to the value of the split of the Old Plan, on behalf of the Police and Fire Plan. It closed the letter by advising the proposed plan for implementing the Tribunal's first decision had been discussed with and agreed to by the City and Morneau Shepell (the actuary for the Shared Risk Plan), implicitly representing to the Superintendent the approach outlined was acceptable to all parties. However, while the letter

indicates it was copied to the City and Morneau Shepell, there is no indication a copy was sent to the Superannuation Board, or any other party connected to the Police and Fire Plan.

[64] The Unions claim they did not learn of this letter until it was later disclosed, not as part of the Superintendent's adjudication of their July 2017 complaints, but later still, as part of the disclosure in response to the appeal of her decision to the Tribunal.

[65] The Unions point out that, notwithstanding the communication with the Superintendent in December 2016 and January 2017, the minutes of the January 2017 meeting of the Superannuation Board do not indicate there was any notice of, or discussion regarding, the change in the City's position respecting its appeal of the Tribunal's first decision or the plan submitted by Mercer regarding the intended retroactive reduction to the Plans' contribution rates (and the contribution refund).

[66] The Unions maintain Mercer's communication with the Superintendent on the direction of the City is undisputable evidence Mercer was taking instructions from the City, without the knowledge of the Superannuation Board, and it unacceptably continued to do so even after the plan was presented to the Board in March 2017. As the Tribunal noted in its decision, the City's instructions to Mercer included vetting and suggesting modifications to Mercer's planned presentation to the Board in March 2017.

[67] Mercer's presentation to the Superannuation Board was made at an "emergency" meeting of the Board on March 17, 2017. Not surprisingly, at the meeting, the decision to split the Old Plan as directed by the Tribunal's first decision was not problematic; however, the proposal to retroactively reduce contributions between 2013 and 2015 (and refund the excess) became contentious. Similarly, Mercer's advice that contributions to the plan should be capped at 9%, beginning in 2016, the same contribution rate established for the Shared Risk Plan, also became contentious. This was particularly so after the Board was told the City planned to transfer its share of the contribution refund to the Shared Risk Plan. While the record does not indicate the amount to be refunded, it was claimed at the time that approximately $1,000,000 would be refunded to the City. If accurate, the total amount refunded from the Police and Fire Plan would be approximately $2,000,000. In addition, it was acknowledged that the reduction to 9% would decrease contributions to the plan by $700,000 annually.

[68] The agenda circulated prior to this meeting identified two issues: (1) an update regarding the Asset Split of the Old Plan; and (2) a review of the 2016 actuarial results. It indicated Mercer would speak to both issues. No information respecting these issues was provided in advance. The proposal to retroactively reduce contributions was addressed as part of the 2013 split of the Old Plan. In relation to this asset split, the Board's minutes record the following:

> The plan sponsor has been directed to use the solvency basis approach to split assets between the Police & Fire Plan and the Shared Risk Plan. <u>All valuations since 2013 **need** to be recalculated. The restated deficit for 2015 since the asset split is 6.2 million dollars.</u>
>
> **<u>Contribution rates are higher than they need to be. Going forward the contribution rate needs to be dropped. Each plan member will receive a refund for their over contributions.</u>**
>
> **<u>Blair Sullivan asked why we would refund contributions and not reinstate indexing?</u>**
>
> **<u>David answered by saying CRA restricts contributions and the old plan was exempt from this rule.</u>** A new waiver would need to be put in place for any contributions over 9%. Where the Defined Benefit plan is now considered a new plan it does not meet the test. Contributions cannot be more than half the benefits. For the plan to be exempt it needs to meet these requirements and it does not. We are basically resetting the plan because the assets have changed. [Volume 9, pp. 2770-2771]
>
> [Emphasis added.]

[69] In his testimony before the Tribunal, Brendan George took a different position on the need to retroactively reduce and refund contributions as a result of the $5,500,000 increase to the initial funding of the Police and Fire Plan as of April 1, 2013. Further, as will be seen, even Mercer expressed the view that refunding contributions was not preferable given the plan had a large solvency deficit.

[70] While the minutes indicate the Board was advised that the contributions were higher than they needed to be, and each plan member would receive a refund, they do <u>not</u> record a request for approval to choose that as an option from among alternative recommendations. As will be seen, there would be a resolution to recommend to the City that it amend the pension by-law to provide for lower contribution rates for 2013-2015 and going forward from 2016.

[71] Following the second agenda item, namely Mercer's presentation regarding the actuarial valuation report for funding purposes for 2016, the following resolutions were passed:

> 1. Confirm the use of a 6.2% p.a. discount rate assumption (which implies an allowance for a margin of 0.0% p.a. for adverse deviations) for the ongoing funding basis for the actuarial funding valuation as at April 1, 2016).
>
> 2. Confirm that there are no changes to any Plan benefits foreseen at this time.
>
> 3. Confirm that from April 1, 2016, members and the City will pay contributions at one single flat rate of 9% of pensionable earnings which is to be applied to all pensionable earning (with no difference between fire and police members and no difference below/above the first $5,000 of pensionable earnings).
>
> […]
>
> 5. Prepare and file actuarial report as at April 1, 2016 for Bargaining Police and Fire Plan by June 30, 2017.
>
> 6. Recommend appropriate changes to the wording of the City's By-laws to reflect the changes agreed as part of the 2016 actuarial valuation process **and to reflect the changes *necessary* as a result of the need to refile the 2013, 2014 and 2015 actuarial funding valuations**.
>
> 7. **Refund the contributions to members to comply with CRA in respect of the period commencing April 1, 2013** (inception of the Plan) and up to the date the new employee contribution rates are implemented.
>
> [Emphasis added.]

[72] Tina Tapley, the City Treasurer (and a Trustee of the Shared Risk Plan) attended the meeting and, later that day, a memorandum she prepared was sent to the Unions to give them notice (under Article 11.1.1 of the Collective Agreement) of the City's intention to amend the City's pension by-law to retroactively lower contribution rates from the levels that had existed since March 31, 2013, and to fix them at 9% from 2016.

[73] The following day, Blair Sullivan, a Board member nominated by one of the Unions, raised a number of procedural and substantive concerns with John MacDermid, the Chair of the Superannuation Board (a City counsellor) regarding Mercer's presentation and sought to convene another emergency meeting of the Board. In response to a request from City officials for Mercer's comments on the issues raised by Mr. Sullivan, Mercer acknowledged the validity of Mr. Sullivan's concerns regarding the proposed retroactive reduction in contributions (of approximately $700,000 per year) and the 6% estimated rate of returns for 2016. Mercer also commented on the potential impact of these decisions on the "very real and likely possibility" of having to reduce benefits in the "not too distant future:"

> Blair is also correct to point out that the "new funding formula" is not able to withstand much in the way of market fluctuations and is dependent on a consistent rate of return annually (i.e. at least 6% p.a.). This is very valid concern and is a direct result of the Plan providing some of the most generous pension benefits in Canada and trying to do this for a combined contribution rate of just 18% of pensionable earnings. If the Plan is to remain in its current form, there is a very real and likely possibility that Employer contributions will have to rise at some point in the not too distant future (unless we see a sustained period of good investment returns and/or material increases in Canadian interest rates).
>
> The alternative to higher employer contributions is reductions in future benefits. [Emphasis added.]

[74] Mr. Sullivan's communication was followed by a letter to the City from the Unions dated March 31, 2017. The Unions alleged the recommendations made as part of Mercer's presentation to the Superannuation Board were made on the direction of the City; they claimed the Board required an independent actuary. The concerns raised in this letter form the basis for the issues in this appeal. It begins by noting:

> The March 17, 2017 decision recommends a reduction in pension contributions by fire fighters and police officers retroactive to April 1, 2013, and an increase in the estimated rate of investment return in spite of lower than expected returns in 2016. There are also serious concerns about the process that led to that decision.

[75] Addressing what the Unions inferred was an inadequate and misleading presentation on March 17, 2017, the letter stated:

> Mercer's representative explained the recommendations that were ultimately approved at the March 17th meeting, the key of which was the reduction of pension contributions (for both employees and the City) from 11.14% for police officers and 11.19% for fire fighters, to 9% each for all employees and 9% for the City. The basis for the recommended drop in contributions was based on Mercer's advice that there was a Canada Revenue Agency restriction on maximum employee contributions of 9% of earnings, and that the CRA was unlikely to grant an exemption.
>
> The powerpoint did not explain why fire fighters and police officers historically paid higher contribution rates than other City employees, did not mention the provisions of Article 18 of the Local 911 collective agreement and Article 22.02 of the Local 1053 collective agreement that refers to higher contribution rates, and did not give any information as to why it was necessary to obtain an exemption when this was not mentioned in any prior Mercer valuation. In addition, no details were given as to why the CRA was unlikely to grant the exemption, given that the Fire/Police plan remained underfunded even with the additional $5.5 million, and that the higher contribution rates had been in place for many years.

[76] Regarding the Unions' belief that Mercer was directed by the City to pursue the expected refund of contributions (alleged to be approximately $1,000,000) and reduce contributions on a go forward basis, they stated:

> It was clear during that meeting that at least one SuperBoard member, Jane Blakely, had prior knowledge of the Mercer recommendations. Ms. Blakely also advised SuperBoard members that the approximately $1 million in savings the City would realize through the retroactive decrease in the contribution rate would be given to the Sharedrisk plan.
>
> SuperBoard members were not advised of all options available to them and the Mercer recommendations were presented as a given. Ms. Tapley advised SuperBoard members that "this is not a negotiation."

[77] In relation to their concerns regarding conflicts of interest on the part of City officials and Mercer, the Unions stated:

> Given her role as a trustee of the Shared-risk pension plan and her fiduciary duty towards members of that plan, why was Tina Tapley permitted to make any representations to the SuperBoard about a decision that would impact the rights and benefits of the Fire/Police plan?
>
> Given her role as legal counsel opposing the appeals filed by Local 1053 and Local 911 to the November 2014 decision of the Superintendent of Pensions, her role in supporting the City's application for leave to appeal of the Tribunal's decision, and her role as Secretary to the Shared-risk Board of Trustees, why did Jane Blakely not recuse herself from any discussion and/or decision related to the split of pension plan assets?
>
> Given the comments made in paragraph 113 of the March 9, 2016 Tribunal decision, why was Mercer permitted to do the latest valuation? Is Mercer still involved in preparing valuations for the Shared-risk plan? How is Mercer paid and from whom does Mercer take instructions? Who advised Ms. Blakely that the City intended to transfer money received from a reimbursement of contributions (i.e. as a result of a retroactive reduction in contributions to the Fire/Police plan) to the Shared-risk plan?
>
> […]
>
> In light of the above, the position of Local 1053 and Local 911 is that the March 17, 2017 [decision] of the SuperBoard is fundamentally flawed and should be immediately vacated or held in abeyance. This conclusion is based on the following:
>
> […]
>
> The failure of Jane Blakely to recuse herself from the March 17th discussions and decisions is a violation of the conflict of interest provisions in section 17 of the *Pension Benefits Act*.
>
> Mercer was not sufficiently independent to provide advice to the SuperBoard and appears to be taking direction from the City – not the SuperBoard. The SuperBoard should have obtained independent actuarial advice, separate and apart from that provided to the Shared-risk Board of Trustees or the City of Fredericton. This would have required that all SuperBoard members be made aware of all communications between the SuperBoard and the actuary, and that the actuary report directly to the SuperBoard – not to City of Fredericton managers.

> The SuperBoard members were erroneously advised that the decision needed to be made on an urgent basis.
>
> There is no legal or factual foundation for Mercer's conclusion that an exemption to continue the higher contribution limits for fire fighters and police officers was necessary, or that an exemption would likely not be granted.
>
> […]
>
> It is the further position of Local 1053 and Local 911 that the SuperBoard should obtain independent actuarial and legal advice to review the information provided by Mercer in its March 17th powerpoint presentation, particularly with respect to the recommendation for a reduction in the contribution rates and the issue of whether an exemption is necessary and/or likely to be granted by the CRA.
>
> [Emphasis added.]

[78] At the next meeting of the Superannuation Board, on April 25, 2017, the Board "overturned" the decisions made on March 17, 2017. The Tribunal summarized the Board's actions as follows:

> […] They also brought a motion to "obtain actuarial and legal advice independent of the City" – the implication being that Mercer was the servant of the City. The Board adopted these motions, thus **revoking its approval of the revised actuarial valuation reports for 2013 to 2015 and the draft actuarial valuation report for 2016**. **At no time after the April 25, 2017 meeting did the Superannuation Board approve the revised actuarial valuation reports for 2013 to 2015 nor the initial actuarial valuation report for 2016.**
>
> [Tribunal decision, August 27, 2020, para. 116]
>
> [Emphasis added.]

[79] The minutes of this meeting indicate that some Board members held the view that City Council could and/or should make the decisions the Board had "overturned." They also record that the Board expected contributions would be left as they had been since April 1, 2013. They record:

> "John [MacDermid, Chair] stated that the decisions of March 17, 2017 have been overturned and there is a deadline of June 30, 2017 that has been set by the Superintendent. Dan Keenan stated that failing a decision by the committee, then Council needs to make the decision. John also stated that an actuary will have to be present at Council.
>
> Blair does not believe that the Superintendent has jurisdiction to make these decisions. They would like to leave contributions as they are, request an extension from the Superintendent and hire an independent actuary to investigate.
>
> Dan Keenan stated that all actuaries are independent.
>
> Blair stated that no decision should be made on a presentation. Mercer is not an independent party. He also said that he feels that City staff influenced the presentation by Mercer.
>
> Yves stated that everyone has a different role being elected by their union membership. His concern is with that they are dealing with people's future and he feels they did not have enough time to view the presentation prior to the meeting and had to make a decision. They didn't have enough time to ask questions of what they were voting on.
>
> John stated he agrees with Yves. Last meeting a vote didn't need to happen. He hopes in future they receive the valuation a month ahead of the meeting then they can vote a month later. At the March 17th meeting anyone could have voted against these motions but no one did.
>
> **Pension contributions will be left as they are currently (Police 9.59% <$5000, 11.19% >$5000 Fire 9.54% <$5000, 11.14% >$5000).** Moved by Blair Sullivan, seconded by Rodney Wadden. Motion carried.
>
> [Emphasis in original.]

[80] Despite the fact that the Board had "overturned" the decisions approving Mercer's proposals, Mercer made a presentation to City Council, on May 8, 2017, regarding the initial actuarial valuation report for 2016. The Tribunal summarized as follows Mercer's meeting with City Council and the actions that followed:

> […] City Council **approved the 6.2% discount rate** with 0% margin for adverse deviation employed in the 2016 actuarial valuation report and **instructed Mr. Hughes to file the 2016 actuarial valuation report with the Superintendent**. In her May 10, 2017 letter to the Police and Fire Unions, Tina Tapley confirms that City Council adopted the following resolutions:
>
> - that a 6.2% p.a. discount rate assumption is confirmed for the 2016 actuarial valuation;
> - the City confirms there are no changes foreseen at this time to the plan benefits;
> - a contribution rate of 9% will be used from April 1, 2016 onward;
> - **the Plan Actuary is directed to prepare and file** the Actuarial Report as at April 1, 2016 for the Bargaining Police and Fire Plan by June 30, 2017.
>
> The City did not have the authority to approve the discount rate for the 2016 actuarial valuation report. It further did not have the authority to direct Mercer (or David Hughes) **as the Plan actuary** to prepare and file the actuarial report. This was the Superannuation Board's responsibility as the plan administrator. **The City conceded this at the hearing. Mr. Hughes' participation in the May 8 meeting clearly depicts that he was taking his instructions from the City rather than the Superannuation Board.**
>
> Mr. Hughes knew that the discount rate had to be approved by the Superannuation Board as plan administrator. He also knew that the Superannuation Board had revoked its approval of the 2016 actuarial valuation report. We conclude that David Hughes **knew he did not have the Superannuation Board's approval to submit the revised actuarial valuation reports for 2013 to 2015 and the initial actuarial valuation report for 2016**. **Despite this, Mr. Hughes filed the 2016 actuarial valuation report with the Superintendent on July 11, 2017.**
>
> [Tribunal decision, August 27, 2020, paras. 117-119]
> [Emphasis added.]

[81] On July 10, 2017, City Council passed a resolution to amend the plan's by-law to provide for lower contribution rates from March 31, 2013. The application to the Superintendent for approval of this amendment was made by the City, not the plan administrator. In the "Application for Registration of Amendment to Pension Plan (Form 2)" (completed on August 10, 2017), the name of the administrator of the plan is inaccurately identified as "City of Fredericton."

[82] On July 11, 2017, Mercer filed, without the approval of the Superannuation Board, the various actuarial valuation reports with the Superintendent, ostensibly on behalf of the Board as the plan administrator, and requested they be approved. In his email to the Superintendent, David Hughes states:

> I am emailing you to confirm that at yesterday's Council Meeting, Fredericton City Council formally approved the changes to the City's By-laws necessary to [e]ffect the change in the level of employee/employer contributions to the Superannuation Plan for Certain Employees of the City of Fredericton ("The Fire and Police Pension Plan"). Note that the changes in contributions are in line with the changes previously disclosed to you in our letter, dated 20 December 2016 and acknowledged in your letter to the City, dated 13 January 2017.
>
> I am delighted to say that this means that we are now in position to submit and file the outstanding actuarial reports as follows:
>
> 1. Revised Report on the Actuarial Valuation for Purposes of the Transfer of Assets and Liabilities as at March 31, 2013
>
> 2. Revised Report on the Actuarial Valuation for Funding Purposes as at April 1, 2013
>
> [as well as Reports for 2014, 2015 and 2016.]
>
> […]
>
> Note, we will shortly be commencing work on the actuarial funding valuation as at April 1, 2017.

[83] To be clear on what the revised reports for 2013-2016 represented to the Superintendent in relation to the involvement and approval of the Superannuation Board, the following is a reproduction of portions of the Revised Report as at April 1, 2013:

1 – Summary of Results

-

	01.04.2013
Going-Concern Financial Status	
Going-concern assets	$42,977,000
Going-concern actuarial liability	$48,760,000
Funding excess (shortfall)	($5,783,000)
Hypothetical Wind-up Financial Position	
Wind-up assets	$42,877,000
Wind-up liability	$77,942,000
Wind-up excess (shortfall)	($35,065,000)

2 – Introduction

To the Board of Administrators
At the request of the Board of Administrators (the "Board") […] we have conducted an initial actuarial valuation of the Plan sponsored by the City of Fredericton (the "City") as at the valuation date, April 1, 2013. […]

The results of the actuarial valuation of the Bargaining Police and Fire Plan as at the valuation date, April 1, 2013 have already been provided in our previous initial actuarial valuation report, dated December 2013. The results are being reissued in this report following a decision taken by the Province of New Brunswick Financial and Consumer Services Tribunal […] (the "CoF Plan").

[…]

Purpose
The purpose of this valuation is to determine:

- the funded status of the Superannuation Plan […] on going concern, hypothetical wind-up and solvency bases.
- the minimum required funding contributions […]
- the maximum permissible funding contributions […]

The information contained in this report was prepared for the internal use of the Board of Administrators and for filing with the New Brunswick Superintendent of Pensions and with the Canada Revenue Agency.

[…]

Terms of Engagement
In accordance with our terms of engagement with the Board, our actuarial valuation of the Plan is based on the following material terms:

- It has been prepared in accordance with applicable pension legislation and actuarial standards of practice in Canada;

- As instructed by the Board, we have reflected a margin for adverse deviations in our going concern valuation by reducing the going concern discount rate by 0.40% per year; and

- We have reflected the Board's decisions for determining the solvency funding requirements, summarized as follows[.]

[…]

Assumptions
The actuarial basis and funding policy, that the Board accepted, balance the objective of limiting required increases in contributions while complying with the minimum requirements of applicable legislation and accepted actuarial practice. [Emphasis added.]

[84] Further, in the revised reports, the notes to the reader provide:

Note to reader regarding actuarial valuations:
[…] A valuation report is a snapshot of a plan's estimated financial condition at a particular point in time; it does not predict a pension plan's future financial condition or its ability to pay benefits in the future […]

The valuation results shown in this report also illustrate the sensitivity to one of the key actuarial assumptions, the discount rate. […] [Emphasis added.]

[85] On July 19, 2017, Mercer wrote to CRA requesting a waiver of the contribution limits from 2013 to 2017. CRA gave its approval by letter dated August 25, 2017:

[…] The waiver pursuant to subsection 8503(5) of the Regulations is hereby granted for the four-year period from April 1, 2013, to March 31, 2017. In order to extend the approval period beyond March 31, 2017, a new waiver request under subsection 8503(5) of the Regulations must be filed, along with an updated actuarial valuation report in support of the member contribution level required.
[Emphasis added.]

E. *The complaints to the Superintendent*

[86] On July 31, 2017, the Unions filed complaints with the Superintendent asking her to reject the reports filed by Mercer. They maintained the actions taken in the effort to reduce contributions (and refund past contributions), and the reports prepared and filed by Mercer, all on the sole instruction of the City, violated the *Pension Benefits Act*. In the Superintendent's decision respecting these complaints (dated July 12, 2018), she summarized them as asking that she:

1. "Refuse to accept the Police and Fire Plan changes set out in the recently filed valuations for 2013 and 2016, and order the City of Fredericton to continue making contributions […] at the same rate that applied prior to the split of assets" (under the Old Plan, and have continued to the present);

2. Order the City [until the determination of the complaints]: (a) not to split the assets of the Old Plan until this complaint is dealt with; (b) to not refund past contributions to members; (c) "to not refund the City's past contributions to the City and/or transfer those refunded contribution to the [Shared Risk Plan]"; and (d) "to continue making deductions from [Police and Fire Plan] members at the previously established contribution rates and hold those monies in trust until a final determination of these issues has been made;"

3. "Investigate the actions of the City of Fredericton, the management members of the [Police and Fire Plan] Superannuation Board, to determine if they breached their statutory obligations under Section 17 of the Pension Benefits Act and any other relevant section;"

4. "Investigate the alleged conflicts of interest by Jane Blakely and Tina Tapley;"

5. "Prohibit Jane Blakely and Tina Tapley from taking any role with or providing any advice or direction to the [Superannuation Board];" and

6. "Order that a new valuation be done by an independent actuarial firm that will be chosen by the Superannuation Board and report to the Board, not to the City of Fredericton" (emphasis added).

[87] On August 2, 2017, the Superintendent inquired as to the status of Mercer, Jane Blakely and Tina Tapley. In response, the City's outside legal counsel advised that Ms. Blakely's responsibilities in relation to pension matters were set out in a resolution of City Council made in May 2014, which directed that she provide "legal advice and opinions" to the City with respect to labour, employment and pension matters. In addressing the inquiry regarding Mercer's role as actuary to the Police and Fire Plan, legal counsel's letter stated:

> […] Our client has no record of the appointment of Mercer by the Superannuation Board since the formation of the new plan in 2013. Mercer carried on in their actuarial and advisory roles from the original Superannuation Plan (pre-split) with the consent of the City and the apparent consent of the Superannuation Board. There has not been a motion by the Superboard to remove Mercer from its plan actuary role. [Tribunal decision, August 27, 2020, para. 135]

It bears recalling the Tribunal's observations regarding the Superintendent's investigation in relation to this part of the Unions' complaints:

> In our view, the Superintendent's investigation did not satisfy the criteria of thoroughness. The Unions' complaint raised serious allegations of conflict of interest and breach of fiduciary duties by Jane Blakely – a plan administrator. There were also serious allegations of misconduct by David Hughes – the plan's actuary. […] the nature of the allegations required the Superintendent to obtain evidence from the plan administrator – the Superannuation Board – during her investigation. This she did not do. She did not contact any Superannuation Board members to obtain information about the roles of both Jane Blakely or David Hughes. She also did not obtain the minutes of the Superannuation Board meetings. […]
> [Tribunal decision, August 27, 2020, para. 82]

F. *Actions that led to expanding the complaints made to the Superintendent*

[88] What occurred during the months that followed would add to the complaints made by the Unions on July 31, 2017.

[89] In August 2017, before addressing the substance of the Unions' complaints, the Superintendent expressed concern over the initial 2016 actuarial report filed by Mercer. She did not do so based on the broad claims made in the Unions' complaints; she decided the assumed "discount rate" (the expected rate of return) used for 2016 was too high. She stated that a 6.2% rate of return with 0% for adverse deviation was greater than the rates utilized in other plans filed with her office, by about 1%. The Superintendent also opined that at 0%, the assumed factor for adverse deviation (to account for the risk of not

achieving the assumed rate of return) was too low. In other words, the 2016 report's assessment of the required contributions to the Fire and Police Plan was based on an assumed rate of return that was, in the opinion of the Superintendent, unjustifiably aggressive and/or optimistic. To be clear, the higher the discount rate, the lower the need for current funding through contributions from the employees and employer. In relation to the significance of the "discount rate," the Tribunal observed:

> The importance of choosing an appropriate discount rate for a pension plan should not be minimized. Brendan George, who was qualified as an expert witness in relation to actuarial services before this Tribunal, explained that the discount rate consists of setting the best estimate of the expected future return on investments and then deciding on a margin of conservatism (the margin for adverse deviation). He testified that the discount rate is the most important assumption in the actuarial funding valuation as the return earned on the investments has a massive impact on the long-term cost and sustainability of the pension fund. [Tribunal decision, August 27, 2020, para. 105]

[90] In response to the Superintendent's inquiry to Mercer regarding the basis for having increased the discount rate to 6.2% in 2016 (from 5.3% in 2015), Mercer explained that it had been instructed to reduce the margin for adverse deviation from 0.9% in 2015 to 0% in 2016. This instruction came from the City, not the Superannuation Board. Mercer's response to the Superintendent stated:

> The reason for the change in the discount rate assumption from 5.3% p.a. in 2015 to 6.2% p.a. in 2016 is purely down to the reduction in the optional margin for adverse deviations. For the 2015 valuation, we were instructed to use a margin of 0.9% p.a. whereas for 2016 we were instructed to use a zero margin.

[91] As a result of the Superintendent's concerns regarding the 2016 report, Mercer spoke with City officials in relation to the production of a *revised* 2016 actuarial report. Mercer prepared options for consideration that involved four lower discount rates, with a variety of factors for adverse deviation. As the Tribunal found, Mercer took instructions from the City on the contents of the presentation it would later make to the Board regarding these options:

> On September 22, 2017, David Hughes provided his presentation for the revised 2016 actuarial valuation report to Jane Blakely and Tina Tapley for review and comment. Mr. Hughes indicated in his email: *"Provided you are happy with the materials, they can be circulated to the members of the Superboard. If you have any questions or suggested amendments please let me know"*. Tina Tapley made the following suggestion regarding his presentation: "*My comments added are that whenever you say employer contribution rate can increase you should also note / or benefit reduction. Also*
>
> •
>
> *remove the caveat 'subject to union contract/collective agreement* [...]*'"*. Following receipt of these comments, Mr. Hughes revised his presentation accordingly.
>
> [Tribunal decision, August 27, 2020, para. 128]
> [Emphasis in original.]

[92] If it had not been clear before the complaints made in July 2017, it was now clear that instructions regarding the discount rate (and the margin for adverse deviation) to be used in the 2016 report had to come from the Superannuation Board. However, since it appeared there was a risk the Board might approve a rate at the low end of the options provided by Mercer – a rate that might result in a deficiency with a contribution rate of 9% – City officials recommended that City Council emphasize to the Superannuation Board that the City's contributions would not exceed 9%. Council gave this directive by resolution on October 2. Subsequently, Ms. Tapley, reporting on behalf of Council, sent an "Administrative Report" to the members of the Superannuation Board in advance of its October 13, 2017, meeting. In the report, under the subject "Directions from City Counsel to the SuperBoard," Ms. Tapley advised: (1) as a result of a Council meeting on May 23, 2017, Council resolved that contributions be paid at a rate of 9% (resulting in an amendment to the pension by-law that was passed on July 10, 2017); and (2) Council passed a further resolution (October 2, 2017) directing the City Treasurer to advise the Superannuation Board that:

> 1. Employer contributions to the Police/Fire DB Pension Plan will not exceed 9% of payroll.
>
> 2. For the 2016 Plan Valuation, the Superannuation Board should ensure that any change to the discount rate that would trigger the requirement for increased contributions **are offset by benefit changes**.

3. The Funding Policy developed by the Superannuation Board should reflect 9% contributions by the Employer (a change from the direction given in Council's September 2016 resolution). [Volume 9, p. 2862]

[93] At the Superannuation Board meeting on October 13, 2017, Ms. Tapley spoke to her Administrative Report. Also, Mercer presented a Power Point entitled: "*The Discount Rate Assumption for the Actuarial Valuation as at April 1, 2016.*" Mercer submitted the Board would need to decide the discount rate assumption, as well as give directions on the margin to include in that assumption, for adverse deviation. It reported the Superintendent had questioned the previously proposed rate of 6.2%, since it was higher than most other plans in New Brunswick, and she was seeking evidence/confirmation that the Board had agreed on the margin for adverse deviation. After Mr. Hughes was excused from the meeting, the Board resolved to remove Mercer as the plan's actuary. Prior to this motion being passed, Ms. Blakely asked if the Board could first consult with the Superintendent on taking such action and she cautioned that, if the Board was not going to do what was required under the *Act* (approve a revised report for 2016), Council could amend the pension by-law, since there was no requirement that there be a Superannuation Board.

[94] By letter to the Superintendent dated October 26, 2017, the Unions added to the complaints they had made in July 2017. In her response to the Unions dated November 10, 2017, the Superintendent stated:

> I have been contacted by legal counsel for the City of Fredericton who has indicated that the City will be filing submissions on this matter. As a result, I cannot address the substance of your complaints with regard to the actions of the City of Fredericton at this time prior to allowing time for the City to also make submissions.
>
> However, in the interim I do feel it necessary to clarify certain matters and remind all parties of their obligations as pension plan administrators. I have reviewed the Mercer presentation included with your letter and see no indication that the plan actuary was attempting to have a specific valuation report approved. Rather, in order to get directions from the Superannuation Board, they appear to have presented various options regarding discount rates and margins to the Board for the Board's decision and direction, so that the outstanding 1 April 2016 valuation report could be finalized and filed. A chart showing the financial impact of effective discount rates ranging from 6.2% with a zero margin to 5.3% with a 0.9% margin is included. The notices contained in the presentation clearly indicate the presentation is prepared exclusively for the Board to facilitate the Board's decision making in relation to the information contained in the presentation. It also indicates that the next step is to agree on either the original proposal, which I had already expressed concerns with and further evidence would be required to support, or to agree on another margin and lower discount rate. That decision was for the Board to make in their capacity as the pension plan administrator. However, rather than make a decision on the margin to utilize, your letter indicates that the Board instead decided to terminate the pension plan actuary, leaving the decision on discount rate outstanding and the overdue 1 April 2016 valuation report outstanding with no actuary in place to complete it.
>
> While I understand there is clearly mistrust between the City and the unions involved in this plan, I feel it necessary to remind all involved that a pension plan Board meeting is not a collective bargaining table. Neither party is there to advance their own interests. Rather, all trustees who comprise the Board have a fiduciary duty to make decisions with the best interests of the plan in mind. They also have a statutory duty to ensure the plan complies with the *Pension Benefits Act*, including ensuring the plan is reviewed by, and an actuarial valuation report prepared, by an actuary annually. The administrator must then file the report with the Superintendent within nine months of the review date.
>
> […]
>
> I would remind all parties involved in this matter of the order making powers of the Superintendent if the administrator of a pension plan is violating a provision of the *Pension Benefits Act*. These powers extend up to and including ordering a wind-up of the pension plan. While I would prefer not to utilize these powers, it is something I will have to consider should the pension plan remain without an actuary and the outstanding valuation report remain unfiled at 1 December 2017. […]
>
> [Emphasis added.]

[95] Soon thereafter, the City, with the assistance of Mercer, amended its by-law to abolish the Superannuation Board, and make itself the plan administrator.

[96] After becoming plan administrator, the City directed Mercer to file the *revised* 2016 report it approved, as well as an *initial* actuarial valuation for funding purposes report as at March 31, 2017. Mercer filed both with the Superintendent on December 18, 2017.

G. *The Superintendent's decision*

[97] On July 12, 2018, the Superintendent released her decision in response to the complaints. She accepted all reports filed by Mercer and concluded, from her investigation, there had been no breach of conflict of interest rules or other statutory obligations by the City or its staff. In concluding that no further investigation was required, the Superintendent stated:

> Furthermore, no evidence provided to me leads me to conclude that an investigation of the City's actions, and more specifically the actions of Jane Blakely and Tina Tapley, is warranted. They have been cooperative with my office throughout this process and did not offer any resistance to any of my requests. While the parties unfortunately appear to have a hostile relationship with each other, and could certainly benefit from improved communications with each other absent serving one another with legal proceedings, their relationship is not a matter for me to mediate. In my opinion, Police and Fire are attempting to use this office as a weapon in their continued battle with the City, which is something I simply will not entertain. While the *Act* provides me with very broad powers to investigate pension matters to ensure compliance with the *Act*, it would be ill-used if used to pursue an end outside of that mandate.
>
> [Superintendent decision, July 12, 2018, para. 44]
> [Emphasis added.]

IV. Standard of Review of the Tribunal's Decision

[98] It is common ground that, by providing for an appeal of Tribunal decisions (s. 48(1) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30), the Legislature intends for this Court to scrutinize such decisions "on an appellate basis" (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65 (QL), at paras. 36-37). Questions of law are to be reviewed on a correctness standard and questions of fact or mixed fact and law, from which a question of law is not extricable, are to be reviewed on a palpable and overriding error standard.

[99] The City and Superintendent assert their grounds of appeal raise only questions of law and engage the correctness standard; they do not challenge the factual findings made by the Tribunal.

-

V. Analysis

A. *Did the Tribunal apply the wrong standard to the Superintendent's decision?*

[100] Before the Tribunal, the Superintendent argued her decision was owed deference and subject to a reasonableness standard of review. The City took no position at that time.

[101] The Tribunal decided the appeal was by hearing *de novo* and it was to "review the Superintendent's decision for correctness with no deference" (para. 43). I note in passing that in its first decision, the Tribunal also concluded the appeal of the Superintendent gave rise to a hearing *de novo*.

[102] In the appeal to this Court, the City initially maintained that since the *Act* provided for an "appeal" of the Superintendent's decision, the Tribunal should have concluded its primary role was to review the Superintendent's decision and show it deference, and not hear the matter *de novo*. The City also maintained the Tribunal's interpretative analysis ought to have been guided by *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98, [2020] A.J. No. 291 (QL); and *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, [2010] A.J. No. 1463 (QL). The Superintendent's written submission similarly relies on *Yee* and *Newton* and maintains the Tribunal was wrong to conclude that case law dealing with the determination of the standard of review in an appeal from an administrative tribunal to a superior court is not applicable.

[103] At the hearing of the appeal, both the City and Superintendent conceded the Unions' appeal gave rise to a hearing *de novo* and acknowledged the record before the Tribunal is markedly different from the record considered by the Superintendent. Nevertheless, the Superintendent asserts in her written submission "the right or obligation to hold a *de novo* hearing does not necessarily dictate a correctness standard of review" (*Newton*, at para 44). This said, as Slatter J.A. also explained in *Newton*, a requirement to have such a hearing is an important indication of an intent to favour a correctness standard.

[104] The Unions maintain the Tribunal was correct to conclude their appeal resulted in a hearing *de novo*, and no deference was owed to the Superintendent's decisions. They point to a decision of this Court where it was determined that, in reviewing a decision of the Superintendent, the Labour and Employment Board served as "an adjudicative tribunal, with a *de novo* jurisdiction, that owe[d] no deference to the Superintendent's decisions or orders" (*Amalgamated Transit Union Local 1182 v. The City of Saint John et al.*, 2006 NBCA 70, 301 N.B.R. (2d) 1, at para. 97). At that time, the legislative scheme

provided for a review of the Superintendent's decisions by the Board. Under the current legislative scheme, there is an appeal to the Tribunal, and the focus of the determination of the standard must necessarily be on the current legislation.

[105] In addressing the standard of review, it is necessary to consider the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c. 30, as the Tribunal did. It establishes the Commission, as well as the Tribunal. Both have multi-disciplinary responsibilities under more than 20 statutes, with respect to a number of different areas and regulators, including, in the case of the Tribunal, hearing appeals of decisions of the Superintendent. The Financial and Consumer Services Commission Act defines a "hearing" as including "a review or an appeal." The Tribunal's Rules/policy refer to such appeals as hybrid appeals. At a hearing, "the Tribunal has the same power that the Court of Queen's bench has for the trial of civil actions" (s. 38(1)), and it is empowered to "decide all questions of fact or law arising in the course of a hearing" (s. 38(5)). It may receive in evidence "any statement, document, record, information or things that, in the opinion of the Tribunal, is relevant to the matter before it" (s. 38(6)), regardless of whether it was given or produced under oath or would be admissible as evidence in a court of law. The Tribunal acknowledged such powers are typical of first instance adjudicators and they reveal an intent for it to conduct a hearing *de novo,* with no deference to the regulator's decision. These observations are similar to those in *Amalgamated Transit Union*.

[106] The *Act* provides for the "appeal" of a decision or order of the Superintendent (s. 73(1)); however, it does not expressly identify the standard of review to be applied. A decision or order of the Superintendent that is appealed is stayed pending the disposition of the appeal by the Tribunal. In an appeal, the Superintendent is responsible for presenting a case in support of her decision (s. 75(1)). The Tribunal concluded this provision did not shed light on the standard of review. Section 76 provides that, "after hearing and considering the matter, the Tribunal may issue an order […] vacating the decision or order of the Superintendent and substituting a decision or order that, in its opinion, the Superintendent should have made." Alternatively, the Tribunal may make an order "remitting the matter to the Superintendent for further investigation, with such directions as the Tribunal considers appropriate." The Tribunal observed its broad powers, including the ability to substitute the Superintendent's decision with the decision that, "in its opinion," the Superintendent should have made, does not reflect a legislative intent to review the Superintendent's decision on a reasonableness standard. The Tribunal concluded the intent was "to have appeals […] conducted in a *de novo* manner with no deference to the regulators' decision" (Tribunal decision, August 27, 2020, at paras. 61 and 67).

[107] In my opinion, the Tribunal was correct. That said, unlike the Tribunal, I view the statutory obligation to present a case in support of the Superintendent's decision as shedding light on whether the Superintendent's decision is intended, in a hearing *de novo*, to be reviewed on a correctness standard. This is particularly so where, in situations like the present case, the hearing results in evidence and a record that was materially different from that identified by the Superintendent's investigation and upon which her decision was based. I would dismiss this ground of appeal.

B. *Did the Tribunal err by interpreting s. 75 as not conferring on the Superintendent unrestricted participatory rights in an appeal of her decision?*

[108] In advance of hearing the Unions' appeal, the Tribunal asked the parties to address the scope of the Superintendent's participatory rights (*Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 12). This was prompted by the Superintendent advising, during the process of setting dates for the appeal, that she might testify at its hearing. The Tribunal issued a Notice of Hearing and asked the parties to consider a decision the Tribunal issued earlier in the year respecting participatory rights on appeal: *Sellars v. New Brunswick (Superintendent of Insurance)*, 2019 NBFCST 2 (it also referred the parties to: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93; and *Caimaw v. Paccar of Canada Ltd.*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983, [1989] S.C.J. No. 107 (QL)). In *Sellars*, the Tribunal granted standing to the Superintendent of Insurance in an appeal of his decision and defined the scope of his participatory rights, having regard to the principles set out by the Supreme Court in *Ontario (Energy Board)*.

[109] The Tribunal also brought to the attention of the parties, the position taken by the Superintendent in relation to her participatory rights at the hearing of the Unions' first appeal to the Tribunal (*Fredericton Police Association v. Superintendent of Pensions*, 2016 NBFCST 2). As the Tribunal explained in its decision, in that earlier proceeding, the Superintendent took a diametrically opposed approach; she took the position that:

> […] in exercising her statutory obligation under section 75 to present a case in support of her decision, she should defend her decision by drawing the attention of the Tribunal to those considerations, rooted in the specialized jurisdiction and expertise of the Superintendent which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of pension law. The Superintendent viewed this as a limited role as she had to respect the prohibition against bootstrapping and the requirement to remain impartial, **especially in the context of a dispute between two adversarial parties such as is the case before us**.
>
> [Tribunal decision, December 3, 2019, para. 10]
> [Emphasis added.]

[110] In this proceeding, the Superintendent argued before the Tribunal that s. 75 conferred the unconstrained rights of a "full-fledged" party, which included an ability to present evidence, cross-examine witnesses, and make submissions as she saw fit. She explained that the law had changed since she advanced the position taken in the Unions' first appeal to the Tribunal, and, as a consequence of the decision in *Ontario (Energy Board)*, it was now clear an administrative decision maker could have unlimited participation in an appeal of her/his own decision. The City supported the Superintendent's interpretation of s. 75.

[111] The Unions maintained the Superintendent was made a party under the *Act* for the purpose of supporting her decision and she was not entitled, as of right, to introduce additional/new evidence or take an adversarial role in the process of supporting her decision. Her ability to participate further than this would depend on the circumstances and the discretion of the Tribunal.

[112] Section 75 provides:

Proceedings before the Tribunal	**Parties aux procédures devant le Tribunal**
75(1) The Superintendent is a party to a matter appealed to the Tribunal and is responsible to present a case in support of a decision or order made by the Superintendent.	**75**(1) Le surintendant est partie à toute affaire portée en appel devant le Tribunal et est responsable de la présentation de la preuve à l'appui de toute décision ou ordonnance qu'il a rendue.
75(2) In a matter appealed to the Tribunal under section 73, the appellant, the Superintendent and any other person who, in the opinion of the Tribunal, is interested in or affected by the proceedings have the right to be heard. [Emphasis added.]	**75**(2) Dans toute affaire portée en appel devant le Tribunal en vertu de l'article 73, le surintendant et toute autre personne qui, de l'avis du Tribunal, est touchée par les procédures ou y a intérêt, ont le droit d'être entendus. [C'est moi qui souligne.]

[113] The Superintendent has standing as a "party" in an appeal of her decision to the Tribunal. Less clear is whether s. 75 excludes the application of the common law principles of impartiality and finality and mandates that the Superintendent's participatory rights be unconstrained by such principles.

[114] The Tribunal rejected the submission that s. 75 intends the Superintendent to have, in all cases, the same unconstrained participatory rights as an aggrieved appellant. It determined there is no clear legislative intent to exclude the application of common law principles respecting adjudicative impartiality and finality, as described in *Ontario (Energy Board)*, and the statutory responsibility to present a case in support of her decision reflects an intent to have her participate in a manner consistent with her position.

[115] Additionally, the Tribunal defined the scope of the Superintendent's ability to participate in the appeal. It did so by addressing separately the evidence she could tender and the submissions she could make. In recognition of the Superintendent's statutory responsibility to support her decision, the Tribunal acknowledged she is to present all the evidence she considered in making the decision appealed. Further, and reflective of the need for fully informed adjudication, the Tribunal recognized an ability for the Superintendent to introduce new/additional evidence in two broad circumstances. It explained:

> […] In *Sellars* […], the Tribunal held that, as a general rule, on an appeal from the Superintendent of Insurance's decision under the *Insurance Act*, the Superintendent could not present additional evidence to that contained in the *Record*. The Tribunal recognized two exceptions: (1) where the appellant or the Tribunal raises a ground of appeal that is not covered by the contents of the *Record of the Decision-making Process*; and (2) where the Tribunal needs additional evidence in order to clarify and properly adjudicate an issue. […] [para. 61]
>
> [Emphasis added.]

[116] In relation to the submissions or arguments the Superintendent could make, the Tribunal decided that, while s. 75 does not grant the Superintendent "carte blanche to advance any arguments she wishes on the appeal," she was entitled to advance arguments that were explicit or implicit in her decision and make submissions in relation to any other matter where the Superintendent's expertise would be of importance to a proper adjudication of the appeal (paras. 71-73). Identifying broadly the types of areas where such participation would be appropriate, and its reasons for doing so, the Tribunal stated:

> The caselaw recognizes that an administrative decision-maker that is granted standing on appeal or judicial review may present arguments on the following:
>
> - Setting out its established policies and practices, even if they are not explicitly set out in their reasons for decision [*Ontario Power*, para. 68];
> - Responding to arguments raised by a counterparty. [*Ontario Power*, para. 68];
> - Providing interpretations of its reasons that are compatible with or implicit in its original decision [*Ontario Power* at para. 65]
> - Assisting the appellate body by the elucidation of the issues informed by its specialized position as opposed to aggressive participation typical of an adversary [*Ontario Power*, para. 61];
> - Drawing the reviewing court or tribunal's attention to aspects of the record for the purpose of creating a complete picture of what the decision-maker considered in reaching its decision [*The Hospital v. X.P.*, 2018 BCSC 2079 at para 51]; and
> - Explaining how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work [*Ontario Energy*, para. 53]
>
> This will allow the Tribunal to benefit from the Superintendent's expertise and familiarity with the pensions sector. This allows the Superintendent to provide arguments on areas that may be harder for other parties to present. In our view, it is precisely for this reason that the legislature granted the Superintendent standing on appeals of her decisions to the Tribunal.
>
> Finally, the Superintendent must also exercise caution and refrain from descending "too far, too intensely or too aggressively into the merits of the matter" as this may disable her from conducting an impartial redetermination of the merits of the matter if it is remitted back to her. [*Canada (Attorney General) v. Quadrini*, 2010 FCA 246, at para. 16 as cited in *Ontario (Energy Board)*, at para. 51].
>
> [paras. 72-74]
> [Emphasis added.]

[117] Lastly, in relation to the Superintendent's ability to present new evidence and/or make submissions in relation to a new ground of appeal or where the Tribunal required assistance, the Tribunal concluded such circumstances did not exist in this case. The Tribunal rejected the bald assertion that the Unions' appeal raised new issues that needed to be addressed, noting the Superintendent had not identified any specific new issues, as contemplated in *Sellars*. It suggested that if the Superintendent were to become aware of such issues, she should bring them to the Tribunal's attention in advance of the hearing of the appeal. The record does not indicate any subsequent request was made to present additional evidence or make further submissions in relation to a new issue.

[118] In my view, the Tribunal did not err in deciding s. 75 does not exclude the application of the common law principle of impartiality and fairness, nor does it mandate the Superintendent have the unfettered participatory rights of an aggrieved party in the appeal of her decisions.

[119] While a "party" by statutory imposition, the Superintendent is not a regular party; she is one whose decision has been challenged. This status is an important factor in relation to the determination of the participatory rights conferred under s. 75. First, unless the provision can be interpreted as excluding common law principles of adjudicative impartiality and finality, it stands to be interpreted and applied in view of those principles. Second, in recognition of her status as the maker of the decision appealed, the provision requires the Superintendent to discharge the responsibility "to present a case in support of" her decision. Either these are words of limitation, as the Tribunal determined was the case, or they impose an independent

responsibility that is intended to be in addition to the right, as a party, to participate without any constraints related to her being the maker of the decision appealed, which the Superintendent and City maintain is the correct interpretation of s. 75.

[120] In relation to its interpretative analysis and the principles of adjudicative impartiality and finality, the Tribunal noted the common law can form an important part of the context in which legislation was enacted and must be interpreted. It also correctly explained that a common interpretative assumption is that existing law, common law, is considered as part of the drafting process and "the exclusion of common law principles from a statute requires clear legislative intention" (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402). To identify the common law principles respecting impartiality and finality that would apply, unless excluded or modified by s. 75, the Tribunal turned to *Ontario (Energy Board)*.

[121] The Superintendent submits the Tribunal erred by relying on *Ontario (Energy Board)* because that case was decided under a statute which did not contain a provision that granted the Board standing, it simply had a right to be heard. Also, there was no obligation in that case to consider such factors as the mandate of the Superintendent. At the hearing of the appeal, the City argued the Tribunal misapplied *Ontario (Energy Board*). It noted that, unlike the situation in *Ontario (Energy Board*), which involved the review of an adjudicative decision of the Energy Board, in this case, the Superintendent is an investigatory administrative decision maker, and it is the Tribunal which holds the first level adjudicative hearing that flows from the Unions' complaints. The City also maintains that where the decision maker has the dual role to both investigate and make a decision, on an appeal of that decision, the common law principles of impartiality and finality do not fully apply. It maintains the Tribunal failed to ask: what are the participatory rights of a first level investigatory decision maker in the appeal of her decision?

[122] It is clear the Tribunal was aware of the distinction between the role of the Superintendent and a decision maker like the Board in *Ontario (Energy Board)*. The common law principles of impartiality and finality are not confined to situations where the decision appealed (or under review) is the product of a *viva voce* hearing or is a true appeal, where the record is confined to the record before the first level decision maker.

[123] The decision in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2005 CanLII 11786 (ON CA), [2005] O.J. No. 1426 (QL) (ONCA) ("*Goodis*") is an example of an appellate court applying these principles to an administrative adjudicator, similar to the Superintendent. In *Goodis,* the Children's Lawyer challenged the Commissioner's participation in a judicial review of the Commissioner's decision. After the Children's Lawyer had denied a request for information, under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. F.31 ("*FIPPA*"), the requester appealed the Children's Lawyer's decision to the Commission, as permitted under *FIPPA*. The Commissioner held a hearing by way of written submissions and in a 24-page decision, allowed the appeal and ordered disclosure of certain documents (*Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2003 CanLII 72347 (ON SCDC), [2003] O.J. No. 3522 (QL)). The Children's Lawyer sought judicial review of the Commissioner's order and the Commissioner opposed the application. The Children's Lawyer brought a motion seeking an order that the Commissioner be denied standing, or that her standing be limited. This motion and the application for judicial review were dismissed and the Children's Lawyer appealed to the Ontario Court of Appeal. Similar to s. 75 of the *Act*, in this case, s. 9(2) of Ontario's *Judicial Review Procedure Act* provides the person authorized to exercise a statutory power with party status on judicial review of the exercise of this power. And like the *Act*, the scope of the decision maker's standing is not expressly addressed in the legislation. Goudge J.A., for the Court, held:

> The legislation's silence [on the scope of participatory rights] necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interest of justice. Where the issue arises, the court must exercise this discretion to determine the scope of standing to be accorded to a tribunal that is a party to a judicial review proceeding. [para. 27]

[124] The Court in *Goodis* held this discretion should be guided by principles from *Paccar*, and *Northwestern Utilities Ltd. v. Edmonton (City)*, 1929 CanLII 39 (SCC), [1929] S.C.R. 186. The principle from *Paccar* is the "importance of having a fully informed adjudication of the issues before the court," recognizing the specialized expertise of administrative decision makers (para. 37). The second principle, from *Northwestern Utilities*, is the "importance of maintaining tribunal impartiality" (para. 38); this principle is particularly important where the matter could be referred back to the same administrative decision maker. The Court also raised the importance of avoiding "bootstrapping," which can undermine the tribunal's decision-making process. After considering these principles, the Court determined the Commissioner's full standing was appropriate in that case to "assure a fully informed adjudication of the issues without significantly compromising her impartiality or undermining the integrity of her decision-making process" (para. 59).

[125] *Ontario (Energy Board)* canvassed the decision in *Goodis* among other appellate decisions that have dealt with this issue and determined "[a] discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and

Quadrini, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and impartial information and analysis" (para. 52). The Ontario Energy Board had a statutory right to be heard on appeal of its decision (s. 33(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B). Despite this statutory right, the Supreme Court applied the discretionary approach to determine the scope of the administrative decision maker's participatory rights.

[126] In its oral submission, the City referred for the first time to other administrative decision makers under provincial legislation who, apparently as a matter of practice, are allowed to participate fully as parties to referrals or appeals of their decisions, including: the Director of Employment Standards under the *Employment Standards Act*, S.N.B. 1982, c. E-7.2; the Commission under the *Human Rights Act*, R.S.N.B. 2011, c. 171; and the Chief Compliance Officer under the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*, S.N.B. 1994, c. W-14. This submission is not helpful to the interpretative analysis in this case. First, the statutory schemes and contexts in which the administrative decisions are made are different. Even the example of the Director of Employment Standards, who, like the Superintendent, has a responsibility to present a case in support of the decision referred to the Board, is of no assistance in the absence of any judicial determination that such language intends to exclude the application of the common law principles of impartiality and finality.

[127] Although s. 75 grants standing as a "party" to the Superintendent, with a right to be heard that is common to all participants, it does not necessarily follow the legislative intent is to either oust entirely the application of the common law principles that would otherwise apply to determine the scope of her role or compel the Tribunal to view the Superintendent as indistinguishable from any other party. On the contrary, the same sentence that declares the Superintendent is a party in an appeal, imposes the responsibility to present a case in support of her decision. This is an explicit legislative recognition of her unique status as the administrative decision maker whose decision is being challenged through the process prescribed by the *Act*. It sets her apart from the other parties; s. 75 does not similarly prescribe the role of an appellant or other person affected by the Superintendent's decision.

[128] The refrain that the Superintendent is a party with a right to be heard, so she must have unconstrained participation rights, fails to take into account the common law principles of impartiality and finality (see, for example, *Goodis*), and there is nothing else in the words of s. 75 that suggests they are intended to be excluded. Section 75 does not contain express language that reflects an intention to confer on the Superintendent unrestricted participatory rights, including the right to adduce new evidence, testify or cross-examine witnesses.

[129] Nor do the words of s. 75, when read in their grammatical and ordinary sense, purport to exclude the application of the principles of impartiality and finality from guiding the determination of the Superintendent's participation in the appeal. This is not altered by reading the provision in context, harmoniously with the scheme and the object of the *Act*. The fact she must present the case in support of her decision or order suggests she is limited to presenting the basis for her decision or order. Both the English and French versions of s. 75(1) support this understanding. While the French version of that provision, considered only literally, equates "present a case in support" of the decision under appeal to "present evidence in support" of the decision, nothing turns on this. "Evidence" in this context must be understood as the record, including the evidence the Superintendent considered in making the decision under appeal. As explained by the Tribunal:

> The Superintendent contends that the use of the words "*présentation de la preuve à l'appui de toute decision*" in the French text of subsection 75(1) clearly permits the Superintendent to present additional or new evidence at the hearing of the appeal and to cross-examine witnesses.
>
> With respect, we disagree. It is trite law that both the English and French versions of a New Brunswick statute are equally authoritative [*Official Languages Act*, R.S.N.B. 1973, ch. 0-1]. When interpreting legislation, we must give effect to the common or shared meaning of a bilingual statute. This was reiterated by our Court of Appeal in *Saint John Port Authority et al. v. Kenmont Management Inc.*, 2002 NBCA 11. The Court added at paragraph 37 that "*if one [linguistic text] is ambiguous and the other plain and unequivocal, the latter will generally be preferred unless a contrary legislative intention is otherwise apparent*". Thus, it is only where a language version is ambiguous that the other version will be preferred.
>
> […]
>
> We find no ambiguity or inconsistencies between the French and English versions. There is no contextual difference between "to present a case in support of (her) decision..." and "présentation de la preuve à l'appui de (sa) décision..." To present a case in support of a decision necessarily includes presenting the evidence upon which the decision is founded. While the English text of subsection 75(1) does not employ the word "evidence", which would be the literal or direct translation of the word

> "preuve" employed in the French text, the words of both linguistic versions achieve the same purpose: to refer to the record of the Superintendent of Pensions' proceedings, which includes the evidence upon which the Superintendent's decision is founded.
>
> [Tribunal decision, December 3, 2019, paras. 53-54, 57]
> [Emphasis in original.]

[130] In the absence of a clear intent to oust the common law principles, the provisions must be interpreted in light of them.

[131] Viewed in context, s. 75 reflects an intention for the Superintendent's standing to include an important and involved, but not necessarily an unconstrained role, in an appeal. This is especially plain where the appeal is by hearing *de novo* and the evidentiary record may be far more expansive than that which formed the basis for the Superintendent's decision.

[132] While in such circumstances, concerns regarding finality are reduced, to interpret s. 75 as conferring upon the Superintendent unconstrained participatory rights, equal to those of an aggrieved appellant in a *de novo* hearing, could transform its statutorily defined role to support its decision into the role of an adversary to the aggrieved appellant. This is a result at odds with the wording of s. 75(1) and definitely inconsistent with common law principles, especially respecting impartiality, which is a telltale sign of legislative intent.

[133] Impartiality is undoubtedly implicated here because the issues raised in the appeal to the Tribunal could be referred back to the Superintendent for wholesale reconsideration. If she were not, at a minimum, constrained from adopting an adversarial role on appeal, she would be exposed to the very real risk of diminishing her impartiality. This concern is particularly compelling in this case, where there is no other decision maker, as may be the case with other administrative decision makers. If the Tribunal had ordered the matter back for further investigation and/or reconsideration of all or part of the underlying issues (or if this Court were to do so), the Superintendent would again adjudicate conflicting merits-related claims.

[134] Finally, because of the ongoing responsibility of the Superintendent, concerns regarding her impartiality extend beyond the issue in this case. As an example of the kind of ongoing involvement that increases the need to be mindful of impartiality, one need only consider the Superintendent's earlier decision respecting these parties, which was set aside by the Tribunal's first decision. Further, in this case, when the Unions expanded their complaints to the Superintendent in November 2017, she noted, in writing, the adversarial nature of this dispute and correctly reminded the representatives of the parties of their role on the Superannuation Board. Subsequently, in rendering the decision appealed to the Tribunal, the Superintendent again noted the level of animosity, expressing views that prompted the Unions to indicate she wrongly formed the view that their complaints were motivated by the hostile relationship between the parties. She said:

> […] While the parties unfortunately appear to have a hostile relationship with each other, and could certainly benefit from improved communications with each other absent serving one another with legal proceedings, their relationship is not a matter for me to mediate. In my opinion, Police and Fire are attempting to use this office as a weapon in their continued battle with the City, which is something I simply will not entertain. While the *Act* provides me with very broad powers to investigate pension matters to ensure compliance with the *Act*, it would be ill-used if used to pursue an end outside of that mandate.
>
> [Superintendent decision, July 12, 2018, para. 44]
> [Emphasis added.]

[135] In summary, I disagree the Tribunal erred in interpreting s. 75 as not extending an unconstrained ability to participate as a party to the appeal.

[136] Given the position taken by the Superintendent and City was that any restriction on her participatory rights was inconsistent with s. 75, there is no need to address the scope of those rights as defined by the Tribunal. Suffice it to say, for the Tribunal to benefit from the Superintendent's expertise and knowledge, which is well recognized in the decision rendered by the Tribunal, it was unnecessary for her to have unconstrained participatory rights. In a different case, where there is no other party with full entitlement to litigate with cross-examination, evidence and submissions on all contentious issues, as there was here, her participatory rights may be different and will stand to be determined based on the circumstances at that time (*Ontario (Energy Board)*, at para. 59).

[137] Moreover, the Superintendent has not identified any detriment or prejudice to the adjudicative process arising from the Tribunal's decision respecting her participatory rights. Recall the Tribunal concluded that the Unions' appeal of the Superintendent's decision did not raise any new issues, notwithstanding her submission to the contrary. At the hearing before this Court, the Superintendent indicated that, had she been permitted, she would have testified as to the orders she made and she would have responded to the report of Mr. George, the actuary called by the Unions. There was no indication as to how speaking to her orders would have benefited the adjudication before the Tribunal and it is difficult to imagine how it could have

assisted since the evidentiary record before the Tribunal was substantially greater than the evidence that resulted from her investigation. Similarly lacking was an indication of what the Superintendent would have addressed in connection with Mr. George's report. While a representative of Mercer was on the City's witness list, the City chose not to call him, and Mr. George was the sole actuary to testify. Notwithstanding the Tribunal's decision regarding the Superintendent's participatory rights, it was open to the Superintendent to obtain leave to present evidence or make arguments based on the framework described by the Tribunal's decision. No such request was made or denied.

[138] As a final matter, the City's grounds of appeal assert the Tribunal erred by raising, on its own motion, the issue of the Superintendent's rights under s. 75; however, the City withdrew this ground at the hearing before this Court. While the Superintendent did not take issue with the Tribunal raising the issue of her participatory rights, she noted this Court had recently decided the Tribunal should not have raised an issue on its own motion (see *Investment Industry Regulatory Organization of Canada v. Crandall*, 2020 NBCA 76, [2020] N.B.J. No. 287 (QL)). The circumstances in that case were quite different and it has no application here. The Tribunal simply brought the parties attention to a decision it had recently rendered respecting participatory rights and it asked to hear the parties on the issue. In doing so, the Tribunal noted that the Superintendent had abandoned the interpretation of its participatory rights under s. 75 taken at the hearing that led to the Tribunal's first decision. In my view, the City was right to withdraw this ground of appeal.

C. *Did the Tribunal err in dismissing the City's objection to the Unions' claim regarding Mercer on the basis that it was not raised by their appeal of the Superintendent's decision?*

[139] Before the Tribunal, the City objected to the Unions' right to assert Mercer had a conflict of interest and breached its fiduciary duty. According to the City, these claims were not raised by the Notices of Appeal. The Tribunal disagreed and dismissed the City's objection.

[140] In its appeal of this decision by the Tribunal, the City maintains the Tribunal erred in law and relies on caselaw which stands for the proposition that new issues cannot be raised on appeal except in limited circumstances. The law is not in dispute.

[141] The Tribunal's determination that the Unions' claims were not new is grounded in its assessment of the record and its determination that they were at the heart of the Unions' complaints to the Superintendent and their appeal of her decision to the Tribunal. The Tribunal stated:

> […] In our view, the conduct of Mercer is at the heart of the ground of appeal (i) and (iii) dealing with the revised 2016 actuarial valuation report and the need for an independent actuary. The Unions' complaint to the Superintendent and their *Amended Notices of Appeal* clearly contain allegations that Mercer did not act properly by submitting reports without the approval of the Superannuation Board and acting at the request of the City rather than pursuant to the instructions of the Superannuation Board.
>
> [Tribunal decision, August 27, 2020, para. 11]

[142] The record supports these findings. The Unions' claims regarding Mercer taking directions from the City, and not the Superannuation Board, and the factual basis for those claims, were first raised at, or immediately following, the March 17, 2017 meeting of the Superannuation Board. They were subsequently raised in the Unions' letter dated March 31, 2017, in their complaints filed in July 2017 (added to in October 2017) and in their Amended Notice of Appeal, which claimed David Hughes was not "independent" and "acting only in the interests of the City […] without regard to the rights of the members of" the Police and Fire Plan. The original complaint claimed a need for an independent actuary. All allege Mercer was not independent of the City and was acting only on the instructions of the City, not the Superannuation Board. These factual assertions are at the root of all claims.

[143] Alternatively, the City maintains the Tribunal erred by considering this claim because the Superintendent did not render a decision with respect to whether Mercer was in a conflict of interest or in a breach of its fiduciary duties. It submits the Tribunal's authority under s. 73 of the *Act*, extends only to orders or decisions made by the Superintendent. No authority was offered for this interpretation. It reflects an unreasonably restrictive reading of the provision, one that unjustifiably constrains the authority of the Tribunal to respond to an appeal in the manner contemplated by the *Act*. Moreover, s. 38(5) expressly provides the Tribunal may address all questions of fact or law.

[144] I would dismiss this ground of appeal.

D. *Did the Tribunal err in deciding the established facts provided reasonable and probable grounds for the opinion that one or more of the circumstances enumerated in s. 72(2) existed, so as to justify making an order under s. 72(1)?*

[145] Four grounds of appeal are advanced that challenge the Tribunal's determination it had the ability to make an order under s. 72(1).

[146] Section 72(1) provides that the Superintendent may, "in the circumstances mentioned in subsection (2)," make an order requiring a person to take or to refrain from taking any action in respect of a pension plan.

[147] The circumstances enumerated in s. 72(2) are established where the Superintendent "is of the opinion, on reasonable and probable grounds," that they exist. The range of circumstances that ground the ability to make an order under s. 72(1) is broad, and the threshold for determining their existence is low (the provision is reproduced above (at para. 28)).

[148] The Tribunal formed the opinion that the established facts fell within a number of the circumstances enumerated in s. 72(2).

[149] It concluded the City "usurped" the role of the Superannuation Board, on more than a few occasions, and Mercer and Jane Blakely, by acting on the directions of the City and in pursuit of its priorities, had violated the conflict of interest obligation that applied to them by virtue of s. 17(3) . The Tribunal explained:

> The City repeatedly usurped the Superannuation Board's authority by instructing Mercer to utilize a specific discount rate and to reduce contribution rates. As is discussed later in these reasons, both David Hughes and Brendan George stated that the capping of contribution rates was not in the best interest of the Plan given its significant solvency deficit. They further stated that if the cap was maintained, it would result in benefit reductions. The evidence detailed above clearly establishes that Ms. Blakely facilitated the City's usurpation of the Superannuation Board's authority by her interactions with Mercer and the nature of her participation on the Superannuation Board. We find that Ms. Blakely utilized her position as a Superannuation Board member to advance the City's interests. These interests clearly conflicted with the best interests of the Police and Fire Plan members.
>
> [Tribunal decision, August 27, 2020, para. 183]
> [Emphasis added.]

[150] These and similar findings that the City usurped the role of the Superannuation Board are a recognition the pension plan was "not being administered in accordance with […] the pension plan" (s. 72(2)(a)). Indeed, the characterization of the City usurping the authority of the Superannuation Board was repeated in connection with a number of actions, including in relation to the City directing the actuary to file the various actuarial reports after the Superannuation Board had revoked its approval of them. Similarly, such findings provided grounds for the Tribunal's conclusion that Ms. Blakely and Mercer violated the conflict of interest obligation imposed by s. 17(3) (s. 72(2)(c)).

[151] The Tribunal also concluded the City's filing of the amendment to the Police and Fire Plan in August 2017, and not the Superannuation Board, violated s. 11 of the *Act* (s. 72(2)(c)). Further, it concluded there were reasonable and probable grounds to believe that, if the amendment was accepted by the Superintendent there was "likely to be insufficient funds available to pay the pensions and benefits under the plan" (s. 72(2)(h)).

[152] In sum, the Tribunal concluded the established facts fell within a number of the circumstances enumerated in s. 72(2) and that the Superintendent had the authority to make an order under s. 72(1).

(1) Did the Tribunal err in finding that Mercer was an agent of the Superannuation Board for the purpose of s. 18(3)?

[153] The basis for the Tribunal's opinion that Mercer's conduct violated its conflict of interest obligation to the Superannuation Board, contrary to s. 17(3) of the *Act*, was further explained as follows:

> The actuary must take instruction from the plan administrator and avoid conflicts of interest. Brendan George testified that the plan actuary's client is the plan administrator. Mr. George testified that when a pension plan is administered by a Board, the actuary should communicate with all board members or to a designate of the Board, such as the Chair of the Board.
>
> From March 31, 2013 to November 27, 2017, the administrator for the Police and Fire Plan was the Superannuation Board. We find that during this period, David Hughes was obligated to take instruction from the Board and ought to have known to do so. Blair Sullivan, a fire fighter representative on the Superannuation Board, testified that the Board had not authorized Mercer or David Hughes to deal with a designate of the Board.

[…]

The City does not deny that David Hughes submitted the 2016 actuarial valuation report without the Superannuation Board's approval. They contend, however, that the issue is moot because the Superintendent rejected the initial 2016 valuation and it had to be revised and resubmitted. We disagree. As is discussed below, by submitting valuations without the Board's approval, Mr. Hughes was in breach of his fiduciary obligations.

[…]

We note that David Hughes did not testify at the hearing, despite being on the City's witness list. The City also did not provide any evidence to contradict or discredit the Unions' allegations of misconduct by Mr. Hughes.

The evidence overwhelmingly establishes that Mercer and Mr. Hughes were preferring the City's interests over those of the Police and Fire Plan members. In our view, irrefutable evidence supports the conclusion that David Hughes was in a conflict of interest and breached his fiduciary obligations to the Police and Fire Plan members under section 18 [17(3)] of the *Pension Benefits Act*. **This evidence goes well beyond the threshold of reasonable and probable grounds required to make an order pursuant to section 72(2)(c)** of the *Pension Benefits Act*.

[paras. 108-109, 126, 140-141]
[Emphasis added.]

[154] The City and the Superintendent maintain Mercer does not have a statutory obligation to avoid a conflict of interest with the Superannuation Board. They submit none of the s. 17 duties applies to actuaries since, they say, an actuary appointed by an administrator is not an agent of the administrator under s. 18(3).

[155] The duties established by s. 17 apply to a plan administrator and the members of a board of administrators. They also extend to employees and agents of an administrator, by operation of s. 18(3). The duties under s. 17 are commonly referred to fiduciary duties, as the Tribunal did on occasion; however, while there is some overlap with common law fiduciary duties, the s. 17 duties are to be applied according to their terms:

Duty of care, diligence and skill	**Devoir d'administrer avec soins, diligence et compétence**
17(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.	17(1) L'administrateur d'un régime de pension doit apporter à l'administration et aux placements du fonds de pension les soins, la diligence et la compétence qu'une personne d'une prudence normale exercerait pour la gestion des biens d'autrui.
17(2) The administrator or, if the administrator is a committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall use in the administration of the pension plan, and in the administration and investment of the pension fund, all relevant knowledge and skill that the administrator or member possesses or, by reason of that person's profession, business or calling, ought to possess.	**17(2)** L'administrateur ou, si l'administrateur est un comité des pensions ou un conseil des fiduciaires, un membre du comité ou du conseil qui est l'administrateur d'un régime de pension doit apporter à l'administration du régime de pension et à l'administration et aux placements du fonds de pension, toutes les connaissances et compétences pertinentes que l'administrateur ou ce membre possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.
	17(3) L'administrateur ou, si l'administrateur est un comité des pensions ou un conseil des fiduciaires, un membre du comité ou

17(3) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit that person's interest to conflict with the person's duties and powers in respect of the pension fund.

[Emphasis added.]

du conseil qui est l'administrateur d'un régime de pension ne doit pas sciemment autoriser que l'intérêt de cette personne entre en conflit avec ses fonctions et pouvoirs relatifs au fonds de pension. [Le soulignement est de moi.]

[156] Section 18 provides an administrator with the authority to employ one or more agents "to carry out any act required to be done in the administration of the pension plan." It also provides that an "employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections 17(1), (2) and (3):"

Employment of agents

18(1) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

18(2) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

18(3) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections 17(1), (2) and (3).

[Emphasis added.]

Emploi de représentants

18(1) L'administrateur d'un régime de pension peut employer un ou plusieurs représentants pour exécuter tout acte nécessaire à l'administration du régime de pension et à l'administration et aux placements du fonds de pension, lorsqu'il est raisonnable et prudent de le faire dans les circonstances.

18(2) L'administrateur d'un régime de pension qui emploie un représentant doit le choisir personnellement et être convaincu de son aptitude pour exécuter l'acte pour lequel le représentant est employé et l'administrateur doit exercer sur son représentant une surveillance prudente et raisonnable.

18(3) Un employé ou un représentant d'un administrateur est aussi soumis aux normes applicables à l'administrateur en vertu des paragraphes 17(1), (2) et (3).

[Le soulignement est de moi.]

[157] The Tribunal concluded that s. 18(3) made Mercer subject to the same duty to avoid conflicts of interest, pursuant to s. 17(3), as for example, Jane Blakely, in her role as a member of the Superannuation Board.

[158] The issue is whether an actuary is an agent for the purpose of s. 18(3) so as to subject the actuary to the same standards, under s. 17(2) and (3), as are applicable to the plan administrator, members of a board of administrators and all other employees or agents of the administrator.

[159] The Superintendent and the City argue the Tribunal erred by failing to consider the provisions of the *Act* and Regulations that reveal an actuary has an independent statutory obligation to perform certain mandatory tasks, which can only be performed by an actuary. They contend these duties and obligations give context to the interpretation of s. 18(3) and weigh against identifying an actuary as an agent of the plan administrator, even for the limited purposes of s. 18(3). They submit this context infers an actuary is not performing services on behalf of the administrator in the same sense or manner as an employee

or agent who performs duties that the administrator would otherwise perform itself. This suggests the appointment of an actuary by a plan administrator does not flow from its authority to employ agents under s. 18(1); it arises from the distinct statutory requirement for a plan to have an actuary to satisfy its obligations under the *Act*.

[160] Section 18(3) must be interpreted in accordance with the modern interpretative framework, which requires reading the words of the provision in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object and the intention of the Legislature.

[161] In addition to s. 18(1) providing the administrator with the ability to employ agents, the pension by-law similarly provides the administrator with such authority:

The Administrator may employ one or more agents to carry out any act required to be done in the administration of the Plan, and in the administration and investment of the Pension Fund. [Emphasis added.]	L'administrateur peut engager un ou plusieurs mandataires pour accomplir tout acte qui relève de l'administration du régime et de la caisse de retraite et du placement des fonds de celle-ci. [C'est moi qui souligne.]

[162] Actuary is defined in both a regulation under the *Act* and the pension by-law. Under the by-law it is:

"***Actuary***" means a Fellow of the Canadian Institute of Actuaries, or a firm of actuaries, at least one of whose members is a Fellow of the Canadian Institute of Actuaries, **appointed** by the Administrator **to provide the actuarial services required under the Plan**. [Emphasis added.]	« ***actuaire*** » Fellow de l'Institut canadien des actuaires, ou cabinet d'actuaires dont au moins un membre possède cette qualité, désigné par l'administrateur pour fournir les services actuariels qu'exige le régime. [Le caractère gras et le soulignement sont de moi.]

[163] Somewhat similarly, under Regulation 91-195 it is:

"**actuary**" means, in respect of a pension plan, a fellow of the Canadian Institute of Actuaries **who is appointed by the administrator**, either directly or as an employee of a firm, **to perform valuations and other functions required to be performed under the plan, the Act or the regulations**[.] [Emphasis added.]	« **actuaire** » désigne, relativement à un régime de pension, un Fellow de l'Institut Canadien des Actuaires **nommé par l'administrateur du régime**, directement ou à titre de salarié d'une entreprise, **pour effectuer des évaluations et autres tâches devant être accomplies en vertu du régime, de la Loi ou des règlements**[.] [Le caractère gras et le soulignement sont de moi.]

[164] As an example of the type of obligation that must be fulfilled by an actuary, s. 9(1) of the Regulation provides that an administrator "shall ensure that the plan is reviewed by and an actuarial valuation report respecting the plan is prepared by an actuary." In the Regulation, an "actuarial valuation report" is defined as:

"**actuarial valuation report**" means, in respect of a pension plan, **a report prepared by an actuary in a manner that is** consistent with the Recommendations for Valuation of Pension Plans adopted by the Canadian Institute of Actuaries and **containing the actuary's statement of opinion and the information required under the plan, the Act and the regulations** respecting a going concern valuation and a solvency valuation[.]	« **rapport d'évaluation actuarielle** » désigne, relativement à un régime de pension, **un rapport préparé par un actuaire d'une manière** conforme aux *Principes directeurs pour l'évaluation des Régimes de retraite* de l'Institut Canadien des Actuaires et qui **comprend la déclaration de l'actuaire et les renseignements exigés en vertu du régime, de la Loi et des règlements** relatifs à l'évaluation sur une base de permanence et à l'évaluation de solvabilité[.] [Le caractère gras et le soulignement sont de moi.]

[Emphasis added.]

[165] Plainly, there are obligations under the *Act* that can only be performed by an actuary. In my view, the administrator's ability to employ agents under s. 18(1) is the basis for the administrative authority to appoint an actuary. It is a power that is not confined to only employing agents to do tasks an administrator could do directly. It expressly extends to employing an agent to "carry out any act required to be done in the administration of the pension plan." This includes responsibilities under the *Act* and Regulations that can only be performed by an actuary.

[166] A purposive interpretation of s. 18(3) does not exclude an actuary from its application. If there are policy reasons for excluding an actuary from the application of the standards in s. 17(2) or (3), particularly the conflict of interest standard, they were not made clear before the Tribunal or this Court. Moreover, there is no indication the Legislature intended to exclude a plan's actuary from a standard that is applicable to all others. In *Ontario (Superintendent of Financial Services) v. Norton and Aon Consulting Inc.*, 2006 ONCJ 235, [2006] O.J. No. 2631 (QL), the Court came to a similar conclusion:

> The Applicants referred me to a 1991 Paper, Panel Discussion, General Meeting of the Canadian Institute of Actuaries, Actuaries Panel Paper, stating that actuaries were not agents, within the meaning of Section 22 of the *Act*. Ms. McPhail provided me with a 1994 article prepared by the Honourable Eileen Gillese (in her capacity at that time as Chair of the Pension Commission of Ontario) which took the opposite view. I recognize that neither of those papers are in any way binding on me, however I wish to refer to the reasoning of Ms. Gillese in that paper, and how I believe it applies here vis a vis Mr. Norton, and I will set out the applicable portion here:
>
> > "It appears from the broad language in Section 22(5) of the *Act*, that what was intended was that anyone hired by the administrator to perform a function that the administrator was responsible for performing would be treated as an agent. On this view, the actuary preparing a valuation report is performing the function of the administrator and is an agent. Those investing the funds are agents. So, even if there are other legal descriptions which can be applied to the relationships when considered from the perspective of a civil suit, for the purposes of Section 22, those performing functions that are rightly those of the administrator will be treated as agents."
>
> I agree with and adopt this reasoning on this issue.
>
> [paras. 70-71]

[167] I would dismiss this ground of appeal.

[168] Having rejected the submission that "given the statutory scheme in New Brunswick, actuaries are not agents for the purposes of" s. 18(3), I would also reject the bald assertion that the Tribunal erred in finding Mercer's conduct breached the standard imposed by s. 17(3). Simply put, on the record, the Tribunal was justified in concluding there were reasonable and probable grounds to form the opinion that Mercer's conduct was inconsistent with the conflict of interest obligation under s. 17(3); that conclusion is not the product of a reversible error.

[169] Lastly, I do not agree that the Tribunal's decision is, in any way, diminished by the fact it also found that, because Mercer had not been appointed by the Board, it did not meet the definition of "actuary." Mercer held itself out as the actuary for the Superannuation Board, as is plainly reflected in the reports it filed with the Superintendent. It is also reflected in its various letters and communications with the Superintendent, beginning at least as early as December 2016.

(2) Did the Tribunal err in applying the "two hats doctrine"?

[170] The Superintendent and the City assert the Tribunal erred by concluding the "two hats doctrine" did not operate to relieve Jane Blakely from the statutory obligation under s. 17(3) to avoid conflicts of interest.

[171] In dismissing the Unions' complaints that Ms. Blakely acted contrary to her conflict of interest obligation under s. 17(3), the Superintendent relied on this doctrine, as formulated by the Pension Commission of Ontario in *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198.

[172] The Tribunal concluded *Imperial Oil* did not apply to Ms. Blakely's role as a member of the Superannuation Board. *Imperial Oil* stands for the proposition that, where an employer is both a plan sponsor and administrator, the employer is not subject to s. 17(3) conflict of interest duty (s. 22(4) under the Ontario legislation at issue in *Imperial Oil*) when the employer deals with matters involving the pension plan in its capacity as employer/sponsor.

[173] The Tribunal went on to say that if it was wrong, the outcome would be the same since the doctrine would not apply to exclude the application of s. 17(3), from matters that were the responsibility of a plan administrator, in this case the Superannuation Board. The Tribunal concluded Ms. Blakely's conduct, which gave rise to the conflict of interest, related to duties and actions that were the responsibility of the Superannuation Board as plan administrator.

[174] The Tribunal also considered *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. No authority was provided that considers the role of an employer-nominated member of a board of administration.

[175] In my view, there is no merit to this ground of appeal.

[176] The Tribunal was correct; *Imperial Oil* is not directly applicable to the present case since the City was not at the relevant time, wearing "two hats" as both the plan sponsor and administrator. In *Sun Indalex*, the employer was the plan administrator; as a result, that case is factually distinguishable from the present case.

[177] That said, the City is currently the administrator; it is subject to s. 17(3) and the scope of its duties would be guided by the principles in *Sun Indalex*. In that case, Deschamps J. said the following on the subject of conflict of interest where an employer is an administrator, and specifically commented on the "two hats" metaphor:

> Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.
>
> When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case. [paras. 65-66]

[178] Also, in *Sun Indalex*, Cromwell J. explained:

> The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?
>
> […]

> Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal - those inherent in the employer's exercise of business judgment – cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.
>
> How, then, should we identify conflicts of interest in this context?
>
> In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at s. 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.
>
> In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect, that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly. [paras. 196, 199-202]
>
> [Emphasis added.]

[179] What the City and the Superintendent assert under this ground of appeal is that the principles upon which the "two hats" doctrine is based ought to have informed the Tribunal's application of s. 17(3) to Ms. Blakely.

[180] In my view, the Tribunal was correct to conclude the outcome would be the same even if those principles applied to conduct that formed the basis for its decision that Ms. Blakely violated s. 17(3). Neither *Imperial Oil* nor *Sun Indalex* relieve an employer from its conflict of interest obligation where it relates to a matter that falls within the scope of an administrator's responsibility (*Imperial Oil*) or "there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation" (*Sun Indalex*, at para. 201). The conduct giving rise to Ms. Blakely's conflict of interest both related to matters that were in the exclusive domain of an administrator and posed a substantial risk of materially and adversely affecting the interest of the plan beneficiaries.

[181] I readily agree with the appellants' submission that the *Act* does not exclude employer or employee candidates from membership in a plan administration Board. While the Tribunal did make observations about what it believes to be inherent conflicts, such comments must be viewed in context, and they reflect only an assessment of the factual circumstances in this case.

(3) Did the Tribunal err in concluding s. 72(2)(h) applied?

[182] This ground of appeal challenges the Tribunal's determination that the Superintendent should not have accepted the City's application for approval to amend the Police and Fire Plan to retroactively reduce contributions from 2013 (with the related refund). They assert the Tribunal erred in deciding there were reasonable and probable grounds to form the opinion that, if the amendment were allowed, there would likely be insufficient funds to pay the pensions and benefits under the plan, as contemplated by s. 72(2)(h).

[183] In my opinion, there is no merit to this ground of appeal; however, even if there were, it would not warrant setting aside the Tribunal's decision. The Tribunal's determination that the application filed by the City should not have been registered was also grounded in the fact the application had not been submitted by the Superannuation Board. This decision was not challenged on appeal. As the Tribunal explained:

> In our view, the Superintendent should not have registered the amendment because it was not submitted by the plan administrator as required by section 11 of the *Pension Benefits Act*. Contrary to what was indicated on Form 2, the plan administrator was the Superannuation Board and not the City. In addition, the Superannuation Board had revoked its acceptance of the decrease in contribution rates and the actuarial valuation reports at its April 25, 2017 meeting. Consequently, the Declaration signed by Ms. McDonald was inaccurate. In our view, the filing of the amendment was not an innocent mistake. It was clear evidence that the City was usurping the Board's authority given the Board's refusal to approve the City's plan.

> We find that the Superintendent should also have refused the amendment based on paragraphs 72(2)(c) and 72(2)(h) of the *Pension Benefits Act*. First, the filing of the plan amendment by the City, who was not the plan administrator, was a violation of section 11 of the Pension Benefits Act. **In addition, there were reasonable and probable grounds to conclude that the filing of the amendment would cause a situation where there are or are likely to be insufficient funds available to pay the pensions and benefits under the plan, thus justifying intervention pursuant to paragraph 72(2)(h).**
>
> [Tribunal decision, August 27, 2020, paras. 239-240]
> [Emphasis added.]

[184] Setting out its rationale for concluding the application should not have been registered because there were reasonable and probable grounds for the opinion there would likely be insufficient funds (s. 72(2)(h)), the Tribunal stated:

> In considering this issue, it is crucial to keep certain key facts in mind. First, police and firefighters have a normal retirement age of 60 and higher contribution rates were required as they contribute to their pension plan for a shorter period. Second, almost 20% of the plan membership would reach retirement age within five years of 2017. Third, the Police and Fire Plan had a significant solvency deficit of $56 million as of 2017. Fourth, the Plan has a solvency exemption meaning that there is no obligation to fund the solvency deficit in the short term. The Superintendent expressed concerns about the solvency exemption in her August 9, 2017 e-mail to David Hughes. Fifth, Brendan George, the expert witness, indicated that interest rates have been decreasing over the past 20 years such that returns on investments are lower. Finally, no evidence was submitted regarding how the plan has performed since 2017. The actuarial valuation reports for 2018 and 2019 were not entered into evidence. As such, we do not have any evidence indicating whether the funded status of the plan has improved or worsened since the 2017 valuation.
>
> The refund in the over-payment in contributions resulted in assets being removed from the Police and Fire Plan and injected into the City Plan. The exact amount was not provided to this Tribunal. Given the significant solvency deficit, removing the over-payment in contributions and capping contribution rates at 9%, resulting in approximately $700,000 less in contributions per year, should have warranted further investigation by the Superintendent.
>
> […]
>
> Mr. George was of the opinion that for the Police and Fire Plan to continue offering the same level of benefits, the Plan would need a CRA exemption. He indicated that there were times in the past where the required contribution rates to maintain the same level of benefits was above 18% (9% each for employees and employer). He cautioned there would be times in the future where the required contributions would exceed 18% to maintain the same level of benefits. Mr. George explained that typically in a defined benefit plan, the contribution rate is adjusted to ensure the benefits are maintained. Mr. George explained that "[w]ithout the exemption, the Plan will operate like a sharedrisk plan, i.e. fixed member and employer contribution rates of 9% (or lower if possible), with a reduction in benefits if the 18% total contribution rate cannot support Plan benefits, i.e. the Plan will be subject to benefit reductions instead of contribution increases when Plan experience is poor." Mr. George also indicated that future increases in funding requirements could come at a time when they are unaffordable and shift the onus of funding to future generations.
>
> We accept Mr. George's uncontested expert evidence. We conclude that if the contribution rates are maintained at 9% (18% overall), there are reasonable and probable grounds to conclude there will be insufficient funds to maintain the same level of benefits. We would add that the City appears to be doing by the back door what it could not do directly – transferring the police and firefighters to a shared risk plan. In a defined benefit plan, contribution rates are adjusted to ensure a defined benefit. Capping contribution rates at 9% and mandating benefit reductions if contributions are insufficient makes the Plan function like a shared risk plan.
>
> [Tribunal decision, August 27, 2020, paras. 243-244 and 249-250]
> [Emphasis added.]

[185] In arguing the Tribunal erred in law, the Superintendent contends the Tribunal failed to recognize the Plan was exempt from solvency special payments, pursuant to s. 42.1 of the General Regulation. This is not accurate; the Tribunal expressly addressed this fact. Indeed, the Tribunal also noted the plan's solvency exemption was referenced by the Superintendent when she expressed her concerns to Mercer over using an elevated discount rate in the 2016 report (over 2015), which she identified as having the effect of reducing the plan's going concern liability by $8,000,000 (the Superintendent's email of August 9, 2017, to David Hughes):

> We note the Plan had a negative investment return (-3.75%) from Apr 2015-Apr 2016. However, the assumed GC [going concern] rate of return was changed from 5.3% in the 2015 AVR to 6.2% in this AVR. How is this increase justified, as it is far too high in our opinion, particularly for a plan that enjoys a solvency exemption. Using this higher rate reduced the GC liability by approximately $8 million, which [raises] significant concerns. Generally we see an increase in GC liabilities year over year, particularly when there has been little change in plan membership such as here (only four less active members and four more retired members). As a consequence, the normal cost for the plan decreased from $3.2 million in the previous AVR to $2.67 million in this AVR. Please explain this change and the rationale for it.
>
> [Tribunal decision, August 27, 2020, para. 121]
> [Emphasis added.]

[186] The Superintendent also asserts the Tribunal erred by failing to consider "the reasons why section 72(2)(h) was added to the *PBA* in 2007, following the St. Anne-Nackawic bankruptcy;" she maintains the provision is not intended to permit her to constrain amendments to a plan in circumstances such as exist in this case. Other than make this bare assertion, the Superintendent does not advance a basis for interpreting s. 72(2)(h) in a manner that restricts the plain words of the provision, let alone in a manner reflective of the position she advances. There is no merit to this submission.

[187] Neither the City nor the Superintendent challenge the Tribunal's findings in relation to the large body of evidence that provided a basis for its opinion there would likely be insufficient funds to continue the existing pensions and benefits if there were a refund of past contributions and the reduction in future contributions, as was proposed. The Tribunal relied on the evidence of Brendon George and, as previously noted, David Hughes acknowledged that the refund of contributions and the reduction in future contributions, produced the "very real and likely possibility" of having to reduce benefits in the "not too distant future:"

> […] the "new funding formula" is not able to withstand much in the way of market fluctuations and is dependent on a consistent rate of return annually (i.e. at least 6% p.a.). This is very valid concern and is a direct result of the Plan providing some of the most generous pension benefits in Canada and trying to do this for a combined contribution rate of just 18% of pensionable earnings. If the Plan is to remain in its current form, there is a very real and likely possibility that Employer contributions will have to rise at some point in the not too distant future (unless we see a sustained period of good investment returns and/or material increases in Canadian interest rates).
>
> The alternative to higher employer contributions is reductions in future benefits.
>
> [Tribunal decision, August 27, 2020, para. 248]
> [Emphasis added.]

[188] While the record did not indicate the amount to be paid out as a refund, there was some indication it could be in the range of $2,000,000 for the three years from 2013 to 2015. Further, the reduction from 2016 was expected to reduce the contributions to the plan by approximately $700,000 per year. This is against the background of the City's maintaining in 2017 that the contribution rate was fixed at 9% and, if the discount rate was too low, any shortfall had to be made up by a reduction in benefits.

[189] There was no error in law. Further, in my view, although not argued as such, the Tribunal's determination that there were reasonable and probable grounds for the opinion that it was likely there would be insufficient funds is not the product of an identifiable, let alone palpable and overriding error.

(4) Did the Tribunal err in holding the Superintendent had a fiduciary duty to plan members?

[190] This ground of appeal is based on a misapprehension of the Tribunal's decision. While it does describe the Superintendent's duty under the *Act* as requiring her to protect the "best interest" of the Plan/its members, read in context, it is apparent the Tribunal did not determine the Superintendent had duties that exceeded her statutory obligations under the *Act*. I would dismiss this ground of appeal.

[191] Before leaving this issue, I would note it is not the only concern expressed by the Superintendent regarding the Tribunal's decision that, in my opinion, overstates what the Tribunal decided and/or the precedential implications of the decision. It was based on such concerns that the Superintendent sought a stay of the decision pending the disposition of this appeal. These concerns include the submission that the Tribunal's focus on the dispute over the proposed changes to contributions to the plan reveals the Tribunal allowed itself to get drawn into a "sponsor level" dispute – a dispute between the City and the Unions – which is not properly a matter for the Superintendent to adjudicate via complaints over alleged non-compliance with the *Act*. She argues the dispute relates to the rights and obligations under the collective agreement between the City and Unions and ought to be adjudicated elsewhere, possibly before the Labour and Employment Board. Similarly, while acknowledging in oral submissions the City and Mercer's actions were inconsistent with the plan and/or the *Act*, she submits, if there is an actionable wrong, it should be adjudicated in the Court of Queen's Bench, not by the Superintendent. In my opinion, such arguments have no application in the circumstances of this appeal. First, they were not raised before the Tribunal. Second, they do not form part of the Superintendent's grounds of appeal, or those of the City. Third, the focus of the hearing before the Tribunal was properly the issues raised by the complaints, namely non-compliance with the *Act* by the City and Mercer. The Tribunal's decision addressed those issues based on its determination of the facts relating to the City and Mercer's actions, none of which were challenged on appeal. Ultimately, the Tribunal made the orders that it concluded the Superintendent ought to have made. While the root issues might be capable of being addressed in another forum, the impugned actions in this case related to the non-compliance with the *Act* and they were well within the Superintendent's responsibility and authority to address. This case most certainly turned on its somewhat unique set of facts.

E. *Does s. 72 provide the Tribunal with authority to make the impugned orders?*

[192] The City and the Superintendent make substantially the same arguments, respecting the authority to make an order under s. 72, as they made to the Tribunal. In giving its reasons for rejecting their submissions and deciding it had the authority to make the order it did, the Tribunal stated:

> We reject the City's and Superintendent's argument that the Superintendent lacks the authority under the *Pension Benefits Act* to order a plan sponsor or plan administrator to apply for a CRA exemption. The Superintendent has the duty to approve contribution rates for a pension plan and to look out for the health of a pension plan and the best interests of the plan members. The Superintendent has a very broad authority under subsection 72(1) to order an administrator or any other person to take or refrain from taking any action in respect of a pension plan if she has reasonable and probable grounds of the existence of one of the circumstances in subsection 72(2).
>
> We further reject the argument that there is no requirement to fund a pension plan beyond the 9% contribution levels. The *Pension Benefits Act* makes no mention of a maximum contribution rate. The *Act* requires that a pension plan be adequately funded. In certain circumstances, this may include applying for a CRA exemption to allow member contribution rates in excess of 9%. In our view, the Superintendent has the authority, in the appropriate circumstances, to direct a plan sponsor or plan administrator to apply for a CRA exemption. Of course, the Superintendent cannot order CRA to grant an exemption. The most she can do is direct a plan administrator or a plan sponsor to apply for a CRA exemption. CRA will decide whether to grant the exemption.
>
> [Tribunal decision, August 27, 2020, paras. 251-252]

[193] Under s. 72(1), the Superintendent is authorized to require any person to "take or to refrain from taking any action" necessary to remedy the circumstances enumerated in 72(2). As an indication of the breadth of the scope intended, s. 72(4) provides the Superintendent's order may "include, but is not limited to, requiring the preparation of a new report and specifying the assumptions or methods or both that shall be used" (emphasis added). Further, where power is given to "a public officer to do, or enforce the doing of an act or thing, all such powers are also given as are necessary to enable him to do or enforce the doing of the act or thing" (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 22(b)). In my opinion, the Superintendent's authority undoubtedly extends to the orders that were issued in this case.

[194] I would dismiss this ground of appeal.

VI. Conclusion

[195] In rendering judgment, we did not address the issue of costs. Having reflected on this issue, including considering the status of the Superintendent and whether not making an order would contribute to improving the situation between the City and the Unions, I see no reason to do other than apply the usual principles applicable to costs, in particular,

that costs follow the event (see *Acadia Marble, Tile & Terrazzo Ltd. v. Oromocto Property Developments Ltd.* (1998), 1998 CanLII 12226 (NB CA), 205 N.B.R. (2d) 358, [1998] N.B.J. No. 412 (QL) (C.A.)). I would order that each appellant pay each respondent costs of $5,000.

TABLE DES MATIÈRES

	Paragrap he
I. Aperçu	
A. *Introduction*	1
B. *La première décision du Tribunal*	6
C. *Mesures qui ont donné lieu aux plaintes déposées par les syndicats auprès de la s urintendante*	9
D. *Mesures étoffant les plaintes déposées a uprès de la surintendante*	21
E. *La décision de la surintendante concern ant les plaintes*	26
F. *La décision du Tribunal*	27
II. Questions en litige en appel	32
III. Contexte	
A. *La décision de la Ville de convertir l'an cien régime en un régime à risques parta gés*	33
B. *La répartition de l'ancien régime en deu x régimes*	40
C. *La première décision du Tribunal*	47
D. *Mesures donnant lieu aux plaintes dépo sées par les syndicats auprès de la surint endante*	55
E. *Les plaintes déposées auprès de la suri ntendante*	86
F. *Mesures ayant mené à l'étoffement des plaintes déposées auprès de la surintenda nte*	88
G. *La décision de la surintendante*	97
IV. Norme de contrôle applicable à la décision d u Tribunal	98
V. Analyse	100
A. *Le Tribunal a-t-il appliqué la mauvaise norme de contrôle à la décision de la suri*	108
	139