FINANCIAL AND CONSUMER SERVICES tribunal DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 12

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *PENSION BENEFITS ACT, S.N.B. 1987, c P-5.1*

Date: 2019-12-03
Docket: PE-001-2018

BETWEEN:

Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America and Applicant 2, Fredericton Fire Fighters Association, International Association of Fire Fighters, Local 1053 and Applicant 4,

Appellants,

-and-

Superintendent of Pensions and the City of Fredericton

Respondent.

DECISION

PANEL:	Judith Keating, Q.C., Chair of the Tribunal
	Raoul Boudreau, Vice-Chair of the Tribunal
	Mélanie McGrath, Member of the Tribunal
DATE OF HEARING:	September 26, 2019
WRITTEN REASONS:	December 3, 2019.

I. DECISION

1. There are limits on the Superintendent of Pensions' participatory rights under section 75 of the *Pension Benefits Act*, S.N.B. 1987, ch. P-5.1., as set out in our reasons below.

II. OVERVIEW

2. This proceeding involves an appeal by the appellants of the Superintendent of Pensions' July 12, 2018 decision. Section 75 of the *Pension Benefits Act*, S.N.B. 1987, ch. P-5.1 [*Pension Benefits Act*] makes the Superintendent of Pensions a party to an appeal of her decision to the Tribunal.

3. In the context of providing available dates for the rescheduling of the hearing of the appeal, counsel for the Superintendent of Pensions indicated that the Superintendent might testify at the hearing of the appeal. Counsel indicated that he was awaiting the receipt of documents and expert reports of the parties before making this determination.

4. To avoid further delays in the disposition of this appeal, on August 23, 2019, the Tribunal issued a *Notice of Hearing of Motion* requesting that the parties address, in the context of a pre-hearing motion, a preliminary legal issue being the scope of the Superintendent of Pensions participatory rights on appeal of her decision. The parties were asked to consider section 75 of the *Pension Benefits Act* and the following four decisions: *Ontario (Energy Board) v. Ontario Power Generation Inc*., [2015] 3 SCR 147, 2015 SCC 44; *Bransen Construction Ltd. v. C.J.A., Local 1386*, 2002 NBCA 27; *Caimaw v. Paccar of Canada Ltd*., [1989] 2 SCR 983; and *Sellars v. New Brunswick (Superintendent of Insurance),* 2019 NBFCST 2. The parties were also advised to bring any other relevant caselaw to the attention of the Tribunal.

5. On September 25, 2019, we also asked the parties to consider the position taken by the Superintendent of Pensions in a Pre-hearing submission filed in the previous appeal between the parties and which culminated in the Tribunal's decision of *Fredericton Police Association v. Superintendent of Pensions*, 2016 NBFCST 2. The Superintendent took a diametrically different position in that matter than the one she takes on this motion. The Tribunal did not address the scope of the Superintendent of Pensions' participatory rights in that decision as it was not an issue on the appeal.

III. ISSUES

6. The issues raised on this motion are questions of statutory interpretation:

    a) Does section 75 of the *Pension Benefits Act* allow the Superintendent of Pensions to introduce evidence, including oral testimony, at the hearing of the appeal of her own decision?

b) Pursuant to section 75 of the *Pension Benefits Act,* are there any constraints on the type of legal arguments that may be made by the Superintendent of Pensions on an appeal of her own decision?

IV. ANALYSIS

A. Positions of the Parties

7. The Superintendent submits that section 75 of the *Pension Benefits Act* grants her full-party rights with no restrictions. According to the Superintendent, this includes making written submissions before trial, raising and arguing preliminary issues, presenting witnesses and documentary evidence at trial, cross-examining opposing witnesses, and making closing arguments. The Superintendent also contends that making distinctions between the participatory rights of parties would create an absurd result. She also submits that applying any interpretation to section 75 which limits her participatory rights requires importing new meaning into section 75, which is impermissible.

8. According to the Superintendent, on appeal of her decision to the Tribunal, her role is to advocate for the public interest to ensure other New Brunswickers do not "get a raw deal" and that the interests of all other New Brunswickers are represented at the hearing of the appeal. [Transcript, pp. 11-12] According to the Superintendent, her duty to protect the public interest supersedes the common law principles of finality (bootstrapping) and impartiality which typically apply to administrative decision-makers on appeal of their decisions. The Superintendent contends that this unique role affords her unique participatory rights in an appeal before the Tribunal. The Superintendent submits that section 75 is found only in the *Pension Benefits Act* and not in other financial and consumer services legislation due to her unique role in the administration of over 750 pension plans representing important matters to New Brunswickers, such as their retirement and financial security in old age.

9. Finally, the Superintendent argues that the appellants have raised new issues in this appeal, which could affect the state of pensions in New Brunswick. According to the Superintendent, she should be allowed to present evidence and cross-examine witnesses in the public interest regarding these new issues.

10. We note here that in a Pre-hearing submission filed on October 16, 2015 in Tribunal matter PE-002-2014, the Superintendent of Pensions took an entirely different approach to her participatory rights under section 75 of the *Pension Benefits Act.* At that time, the Superintendent 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 pensions 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.

11. In the within motion, the Superintendent now contends that the Supreme Court of Canada's decision in *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 [*Ontario Power*] has changed the state of the law and allows an administrative decision-maker to participate as a full party on appeal of their decisions. While the *Ontario Power* decision was released shortly before the filing of the Superintendent's October 16, 2015 Pre-hearing submission, the Superintendent contends that it was not addressed in those submissions.

12. The City of Fredericton reiterates the Superintendent's position. The City further submits that the matters raised in this motion are intrinsically linked to the duty of procedural fairness, and the Superintendent's participatory rights. The City submits that the caselaw in New Brunswick is replete with examples where the Superintendent of Pensions testified as witness in the hearing of an appeal of her decision before another administrative decision-maker or court. The City also argues that the caselaw setting out parameters on an administrative decision-maker's participatory rights is not applicable as it deals with judicial reviews and not appeals.

13. The Appellants submit that the Superintendent's responsibility under section 75 of the *Pension Benefits Act* to "support" her decision is restricted to providing the Tribunal with the information and rationale she relied on in reaching her decision or order. On appeal, the Superintendent may not introduce new evidence that was not before her at the time she reached her order or decision. Any attempt to introduce new evidence would fall outside of the "support" role set out in section 75 and would instead allow the Superintendent to stray into an adversarial role by introducing additional evidence and arguments to defend her decision. According to the Appellants, this constitutes impermissible bootstrapping, and would transform the Superintendent's participation on an appeal from a support role to an adversarial role.

B. Modern Method of Interpretation

14. As is clear from the positions taken by the parties, section 75 appears, at least at first glance, to offer more than one interpretation. Standing, as a principle, concerns the types of arguments a tribunal may make on appeal or judicial review of its decision: *Ontario Power, supra,* at paragraph 63. However, as we explain below, there is only one interpretation that is compatible with the entire scheme and object of the *Act*, the intention of the Legislature, and administrative law principles. Section 75 reads as follows:

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.*	***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.*
1994, c.52, s.4; 2013, c.31, s.23	*1994, ch. 52, art. 4; 2013, ch. 31, art. 23*

15. It is trite law that the correct approach to statutory interpretation is the modern method of interpretation according to which "*the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the act, and the intention of Parliament".* [E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 as cited in *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para. 18]

16. In *Northrup v. Windsor Energy Inc. et al.*, 2017 NBCA 37 at paragraphs 43 to 45, the *New Brunswick Court of Appeal* recently set out several principles to be considered when applying the modern method of statutory interpretation. First, every word has a meaning and no word is superfluous. However, one must not read in words that are not included in the text. Second, both the English and French version of the statute are equally authoritative and, in the event of ambiguity between them, the preferred interpretation is that which gives effect to the shared meaning of both versions. Third, when the statutory provision being interpreted is a regulatory provision, the scheme and purpose of the enabling legislation is of critical importance.

17. We note at the outset that section 75 is not a regulatory provision as its purpose is not to regulate the pensions sector. For example, in *Northrup,* the question on appeal was whether it was a violation of the *Oil and Natural Gas Act* to conduct geophysical exploration within municipal boundaries, through which there is a provincial right of way, without obtaining the municipality's consent in writing. That being said, the scheme and purpose remain an integral part of the modern method of interpretation, as will be discussed below.

18. We turn now to the application of the modern method of interpretation.

C. Purpose of the *Pension Benefits Act*

19. In *Fredericton Police Association v. Superintendent of Pensions*, 2016 NBFCST 2, we discussed as follows the object or purpose of the *Pension Benefits Act:*

> *[65] In Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), 2004 SCC 54, the Supreme Court of Canada was called upon to interpret the Ontario Pension Benefits Act. It stated the following regarding the purpose of the Ontario Pension Benefits Act:*

> *38 The Act is public policy legislation that recognizes the vital importance of longterm income security. As a legislative intervention in the administration of voluntary pension plans,* ***its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans*** *(see GenCorp, supra; Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1990 CanLII 6833 (ON CA), 1 O.R. (3d) 122 (C.A.), at p. 127). […]*
>
> *[66] We also glean insight from Villani v. Canada (Attorney General), 2001 FCA 248 at par. 27, where the Federal Court of Appeal stated that benefits-conferring legislation "ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant."*
>
> *[67] We are of the view that the Supreme Court and the Federal Court of Appeal's comments are equally applicable to New Brunswick's Pension Benefits Act.* [Our emphasis]

20. The Superintendent's role under the *Pension Benefits Act* is an important one. In *Pension Law*, Kaplan and Frazer, 2nd edition, at page 130-1 the authors describe the Superintendent's role as being to "supervise generally" the pensions sector.

D. Context

21. The modern method requires that we read the words of section 75 in their entire context.

22. Section 75 of the *Pension Benefits Act* is situated in the part of the *Pension Benefits Act* entitled « Orders and Appeals » and which spans from sections 72 to 78. Section 72 deals with orders made by the Superintendent. Sections 73 through 76 deal with appeals of the Superintendent's decisions to the Tribunal. Section 73 allows a person against whom the order or decision of the Superintendent is made or a person who is affected by same to appeal the order or decision to the Tribunal.

23. Section 76 sets out the Tribunal's authority to dispose of an appeal. This includes affirming the decision or order; vacating the decision or order and substituting the decision or order that, in its opinion, the Superintendent should have made; or remitting the matter back to the Superintendent for further investigation with such directions as the Tribunal considers appropriate.

24. Sections 73 to 76 of the *Pension Benefits Act* do not deal with the regulation of the pensions industry by the Superintendent. In our view, the legislature intended, by the appeal provisions found in sections 73 to 76, to provide for the independent oversight of the Superintendent's decisions and orders by the Tribunal.

25. It is this legislative context that guides our interpretation of section 75. Added to this is the legal

context created by the common law. The common law "forms an important and complex part of the context in which legislation is enacted and operates and in which it must be interpreted." [R Sullivan, Sullivan on the Construction of Statutes (6th ed. 2014), at §17.1.] This ties in with the related principle of stability in the law. Two important common law principles typically restrict the scope of an administrative decision-maker's participation on judicial review or appeal: the requirement to maintain impartiality and the principle of finality. [*Ontario Power*]

26. A common interpretation assumption is that the legislative drafters have considered the existing law and jurisprudence as part of the drafting process and that the exclusion of common law principles from a statute requires clear legislative intention. [*R. v D.L.W.,* 2016 SCC 22]

27. One of the cornerstones of administrative law and a legal value of our Canadian society is that people should be treated fairly by adjudication systems. There is a long line of jurisprudence from the Supreme Court of Canada that recognizes that a hallmark of procedural fairness is the requirement of an unbiased or impartial decision-maker. In *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817, Justice L'Heureux-Dubé stressed the values underlying the duty of procedural fairness, and, in particular, the requirement of an impartial decision-maker:

> *28 […] The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.*

28. In *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 at paragraph 50, the majority of the *Supreme Court of Canada* reiterated that the principle of impartiality is implicated by decision-maker argument on appeal because decisions may in some cases be remitted to the decision-maker for further consideration. The Supreme Court cautioned that submissions by a decision-maker that descend "too far, too intensely, or too aggressively into the merits" may disable the tribunal from conducting an impartial redetermination of the merits should the matter be remitted back to it. Finality, on the other hand, dictates that once a tribunal has provided reasons for its decision, 'absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done'. Under the principle of finality, tribunals cannot use an appeal or judicial review to remedy, vary, qualify or supplement its reasons. [*Ontario Energy*, para. 65]

29. The Superintendent and the City argue that section 75 demonstrates a clear intent to exclude the common law principles of impartiality and finality (bootstrapping).

30. To exclude the application of the common law, clear legislative intent in express and clear language is required. [*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20; *R. v D.L.W.,* 2016 SCC 22 at paragraphs 14 and 21; and *Maxwell, Interpretation of Statutes* (12th ed.), p. 116]

31. In our view, there is no express and clear language in section 75 demonstrating an intention of the

legislature to exclude the application of the common law principles of impartiality and finality. They are not expressly mentioned in section 75. In addition, section 75 does not contain express language conferring on the Superintendent the ability to adduce new evidence, testify or cross-examine other witnesses. Such language could have indicated an intent of the legislature to exclude the common law principles of impartiality and finality.

32. There is also no merit to the City's and Superintendent's argument that the caselaw raised by the Appellants is distinguishable as it deals primarily with judicial review and the within matter involves a statutory appeal. In our view, the City and the Superintendent are creating an artificial distinction between a judicial review and an appeal.

33. The appeal and judicial review have the same purposes: (1) upholding the rule of law by correcting errors of administrative decision-makers; (2) serving as a process for clarifying and interpreting the law; and (3) ensuring that powers delegated to administrative decision-makers are not abused.

34. In *Ontario Power*, the majority of the *Supreme Court of Canada* applied the general common law principles of impartiality and finality in the context of a statutory appeal of an administrative decision-maker's decisions to a court. In that matter, a statutory provision granted the Board the right to be heard by counsel upon the argument of an appeal to the Ontario Divisional Court. At paragraph 41 of his reasons, Justice Rothstein clearly lumped the appeal and judicial review together stating: "In *Northwestern Utilities Ltd. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684 ("Northwestern Utilities"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality."

35. We therefore conclude that the common law principles of impartiality and finality form an important part of the context in which section 75 must be interpreted. [R Sullivan, Sullivan on the Construction of Statutes (6th ed. 2014), at §17.1.]

36. Additional context is also required to understand how appeals before the Tribunal proceed. The Superintendent of Pensions does not hold oral hearings with the testimony of witnesses. It is our understanding from the pensions matters that have been appealed to the Tribunal, that she provides various opportunities to be heard, such as the presentation of sworn Affidavits or the presentation of correspondence. Her proceedings do not follow a formal process such as procedural rules for the exchange of documents between the parties to her proceedings. A review of the *Record of the Decision-making Process* in the within matter confirms that a very informal process was employed by the Superintendent. This is not a criticism of the Superintendent's processes; it provides necessary context into the evidentiary issues that arise on appeals before the Tribunal.

37. Appeals before the Tribunal are generally hybrid appeals given the applicable statutory framework. Part 5 of the Tribunal's *Rules of Procedure* deals with appeals of certain decision-makers' decisions to the Tribunal. Rule 5.3 imposes an obligation on the decision-maker whose decision is appealed, to

prepare and file a *Record of its Decision-making Process*, as is typical of appeals.

38. However, the *Rules of Procedure* also allow "parties" to submit additional evidence to that contained in the *Record of the Decision-making Process*, either by the presentation of additional documents or by the testimony of witnesses. Rules 5.5 and 5.6, in relation to the presentation of evidence, apply to « the parties ». The use of different terminology was deliberate and affords the Tribunal flexibility to hear appeals under the whole of financial and consumer services legislation.

E. Public Interest Mandate

39. The Superintendent contends that her role on an appeal is to advocate for the public interest to ensure other New Brunswickers do not "get a raw deal" and that the interest of all other New Brunswickers are represented at the hearing of the appeal. According to the Superintendent, this duty to protect the public interest grants her "carte blanche" on an appeal of her decision. At the oral hearing of this motion, counsel for the Superintendent elaborated on this argument. He stated that if the Superintendent is not permitted to testify at the hearing, this would pose a great danger as the Tribunal could make a decision that is not in the public interest given that it did not benefit from the Superintendent's expertise.

40. In our view, on an appeal, the Superintendent's role is not to ensure the Tribunal reaches the same decision as her in the name of the public interest. This completely disregards the Tribunal's role in an appeal to provide independent oversight of the Superintendent's decisions. If the Superintendent feels the Tribunal's decision is wrong, its recourse is to file an application for leave to appeal the decision to the *Court of Appeal* pursuant to section 48 of the *Financial and Consumer Services Commission Act,* S.N.B. 2013, ch. 30.

41. To accept the Superintendent's contention, we would have to read words into section 75 that are not there. This is contrary to accepted statutory interpretation principles: *Northrup v. Windsor Energy Inc. et al*., 2017 NBCA 37 at paragraphs 43 to 45. Section 75 does not mandate the Superintendent to protect the public interest on appeals of her decisions; rather it mandates her to "*present a case in support of [her] decision or order*". In addition, the protection of the public interest is not the object of the *Pension Benefits Act*, nor is it the Superintendent's role, as we discussed at paragraphs 19 and 20 above. As stated by the *Supreme Court of Canada* in *Monsato Canada Inc. v. Ontario (Superintendent of Financial Services)*, *supra*, the purpose of pensions legislation is to "*establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans*". In New Brunswick, this also includes the public sector plan. Pensions legislation is remedial in nature. It is not public interest legislation of the same nature as the *Securities Act*, the *Real Estate Agents Act* or the *Insurance Act*, where the regulator is tasked with protecting the public by ensuring only suitable persons are licenced or registered. The Tribunal will not embark upon clarifying the difference between protecting the public and upholding the "public interest". Suffice it to say that upholding the "public interest" is not the role of the Superintendent.

42. As a result, we cannot accept the Superintendent's argument that section 75 is in the *Pension Benefits Act* and not other financial and consumer services legislation due to her unique public interest mandate. Counsel for the Superintendent of Insurance made a similar argument in *Sellars v. New Brunswick (Superintendent of Insurance)*, 2019 NBFCST 2, which was an appeal under the Insurance Act and in which there was no equivalent to section 75 of the *Pension Benefits Act.*

43. Finally, we are unable to reconcile the Superintendent's position with the caselaw previously discussed regarding the principles of impartiality and finality. The Superintendent's position completely disregards the fact that she is an administrative decision-maker whose own decision is being appealed. As will be explained below, there are other ways in which the Tribunal can receive the benefit of the Superintendent's expertise without the Superintendent testifying and cross-examining witnesses.

F. Grammatical and Ordinary Sense

44. Having established the applicable context, we turn to the analysis of the grammatical and ordinary sense of the text of subsection 75(1).

45. At the outset, the word "party" is clearly intended to grant the Superintendent of Pensions standing on appeal of her decisions or orders. The issue, as previously indicated, is the scope of the participatory rights granted by section 75.

46. The standing of a decision-maker on appeal is not automatic. Standing may be granted by statute or by the body to which the decision is appealed. In *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 at paragraphs 53 and 54, the majority discussed the reasons why an administrative decision-maker may be granted standing on an appeal, where there is no grant of standing in a statute. The Court recognized that an administrative decision-maker is well positioned to help the reviewing court or tribunal reach a just outcome, for example, by explaining how the interpretation of one statutory provision may impact other provisions within the regulatory scheme or the factual and legal realities of the specialized field in which they work. Another reason may be where there is no other party to stand in opposition to the appeal.

47. The Court's reasons help elucidate why the Superintendent was granted statutory standing under the *Pension Benefits Act.* In our view, the Legislature's intention in granting statutory standing to the Superintendent was a recognition of her expertise in the highly technical sector of pensions. The issue, as previously indicated, is the scope of these participatory rights.

48. The Superintendent also contends that any interpretation that does not grant her full party status would produce an absurd result. Similarly, the City contends that creating distinctions between parties is absurd.

49. There is no merit to this argument. On appeal, the Superintendent is not a regular party. She is an administrative decision-maker whose decision is under scrutiny. The caselaw recognizes that limits must be imposed on the participation of these administrative decision-makers on appeal. As stated by Justice Robertson, as he then was, in *Bransen Construction Ltd. v. C.J.A., Local 1386,* 2002 NBCA 27 at paragraph 35*, "tribunals accept that the principle of impartiality limits their ability to engage fully in the adversarial process.* [our emphasis] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684, Estey J. noted that *"active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties*" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions and that it: "[…] *abuses one's notion of propriety to countenance its participation as a full-fledged litigant"* on appeal. (p. 709).

50. The Superintendent is not an adversary on the appeal of her decision and should not act in a way that places her in an adversarial position. It is difficult to conceive how the Superintendent's cross-examination of witnesses on an appeal will not put the Superintendent's impartiality at jeopardy. Cross-examination is a hallmark of an adversarial process – it allows an adversary to test another party's evidence, to test credibility and to obtain admissions. In our view, the Superintendent should not place herself in an adversarial position when a potential outcome of the appeal is to have the matter remitted back to her. Allowing the Superintendent to cross-examine witnesses on an appeal of her decision could irreparably damage her impartiality.

51. In our view, the words "and is responsible to present a case in support of a decision" in section 75, when read harmoniously with the legislative context and the common law principles of impartiality and finality, demonstrate a clear intent by the legislature to set parameters on the Superintendent's participation as a party.

52. We cannot accept the Superintendent's interpretation as it completely disregards the context which includes the common law principles of impartiality and finality. In addition, the fact that section 76 of the *Pension Benefits Act* permits a matter to be remitted back to the Superintendent should come with safeguards to guarantee the Superintendent's impartiality in the appeal proceedings. This is especially so given that the matter will not be remitted back to another decision-maker as can be the case with other administrative tribunals, but rather to the same decision-maker.

53. The Superintendent contends that the use of the words "*présentation de la preuve à l'appui de toute décision*" 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.

54. 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. O-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.

55. The text of subsection 75(1) must be closely scrutinized within its legislative and legal context and keeping the purpose of the *Pension Benefits Act* in mind. It must be read consistently with the principles of impartiality and finality. It cannot be read in a vacuum. Section 75 applies to appeals of the Superintendent's decision. Typically, in an appeal, the decision-maker must submit a record of its proceedings to the appellate body. Part 5 of the Tribunal's *Rules of Procedure* imposes on the Superintendent of the obligation to prepare and submit the *Record of the Decision-making Process* relating to her decision that is the subject of the appeal. Rule 5.3 of the *Rules of Procedure* details the content of this *Record* as follows:

    a) A cover page
    b) A table of contents
    c) The decision or order under appeal
    d) The application or other document by which the decision-maker's process was commenced
    e) <u>All evidence and documents provided to the decision-maker during the decision-making process, subject to any privilege or any limitation expressly imposed by any statute or regulation</u>
    f) Any written submissions made to the decision-maker by the parties before the decision or order was made,
    g) <u>Subject to any privilege, all written or digital communication exchanged in the course of the decision-making process between the decision-maker or staff assisting the decision-maker and the applicant,</u>
    h) Any transcript of oral evidence given at the hearing before the decision-maker, and
    i) Any interim orders made in the decision-making process or the proceeding. [<u>our emphasis</u>]

56. The content of the *Record of the Decision-making Process* is exhaustive. This allows the Tribunal to have a full picture of the Superintendent of Pensions' proceedings.

57. We find no ambiguity or inconsistencies between the French and English versions. There is no contextual difference between "to <u>present a case in support</u> of (her) decision…" and "<u>présentation de la preuve à l'appui</u> 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.

58. As such, section 75 places a temporal limit on the evidence that can be presented by the Superintendent in that it limits the evidence to that which the Superintendent had before she made her decision.

59. Our primary difficulty with the Superintedent's contention that section 75 permits her to present new evidence is that it offends the principle of finality. The presentation of new evidence can serve no other purpose than to augment, bolster, or qualify her reasons. As stated in *Ontario (Energy Board),* a tribunal cannot defend its decision on a ground that it did not rely on in its decision. [*Ontario (Energy Board),* para. 64] This clearly constitutes impermissible bootstrapping. In *Bransen Construction Ltd. v. C.J.A., Local 1386,* 2002 NBCA 27, Justice Robertson was unequivocal in stating that bootstrapping applies to all administrative decision-makers:

> *33 No tribunal should be permitted to bootstrap its decisions. If the tribunal fails to provide a rational explanation for its interpretative decision, why should it be given a second opportunity to do so? Those that fail to provide sufficient reasons to support their interpretative decisions run the risk of having the matter remitted to them for reconsideration. […]*

60. We conclude that the Superintendent's responsibility under subsection 75(1) is to bring to the Tribunal's attention, in the *Record of the Decision-making Process*, the evidence she considered in making her decision. This interpretation is compatible with the common law principles of impartiality and finality. Subsection 75(1) does not allow the Superintendent to introduce new evidence either by testimony, the bringing of witnesses, the presentation of additional documents, or the cross-examination of witnesses.

61. In our view, two exceptions should be recognized. In *Sellars v. New Brunswick (Superintendent of Insurance),* 2019 NBFCST 2, 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. In the *Sellars* matter, the Tribunal had raised three procedural fairness issues that could have required additional evidence from the Superintendent of Insurance.

62. The City submits that the caselaw in New Brunswick is replete with examples of the Superintendent presenting evidence before other administrative decision-makers and the courts.

63. We have reviewed the four decisions of the Labour and Employment Board: *Miramichi Association of Police Professionals v City of Miramichi*, 2012 Canlll 12645 (NB LEB); *Gallant v. Superintendent of Pensions*, 2012 Canlll 78813 (NB LEB); *Fraser Papers Inc. v Superintendent of Pensions*, 2011 Canlll

6665 (NB LEB); and *Nickerson v. Superintendent of Pensions*, 2008 Canlll 71437 (NB LEB). First, we are not bound by the decisions of another administrative tribunal. More importantly, the Labour and Employment Board did not discuss the Superintendent's participatory rights in any of these decisions.

64. These decisions also pre-date the Tribunal's creation in 2013 and the legislative scheme was significantly different. Before that date, section 73 of the *Pension Benefits Act* was also significantly different. A party dissatisfied with the Superintendent's decision could ask the Superintendent to refer the matter to the Labour and Employment Board. For the reasons enunciated above, we find the caselaw of the Labour and Employment Board not applicable to the issues before this Tribunal.

65. As for the decisions of *Melanson v. New Brunswick (Attorney General)*, 2006 NBQB 73 and *Melanson v. New Brunswick (Attorney General), 2006 Canlll 42522* (NB CA), these do not involve an appeal of the Superintendent of Pensions' decision. Rather, these decisions involve civil litigation brought by the Plaintiff against the Superintendent alleging failure to properly monitor the St. Anne Pension Fund. These decisions do not stand for the proposition that the Superintendent can bring any evidence on appeal of her decision.

66. This brings us to the Superintendent of Pensions' argument that this appeal raises new issues which could affect the state of pensions in New Brunswick such that she should be allowed to present evidence and cross-examine witnesses in the public interest. We note that the Superintendent has not identified these new issues. The Superintendent's reference to new issues is a reference to the *Sellars* decision.

67. The Superintendent's decision, which is under appeal, at its core, deals with the transfer of assets between two specific pension plans, both involving employees of the City of Fredericton. In her July 12, 2018 decision, the Superintendent authorized the transfer of assets between the plans pursuant to section 70 of the Act. When considering a transfer of assets, subsection 70(5) stipulates*: "[t]he Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members <u>of the original pension plan</u> and of any other person entitled to benefits or payments under the plan or that does not meet the prescribed requirements and qualifications."*

68. In the within matter, the Tribunal has not raised any new issues. In addition, the grounds of appeal raised in the *Notices of Appeal* all relate to alleged errors by the Superintendent in making her decision. These grounds of appeal do not, in our view, raise new issues requiring additional evidence from the Superintendent. These grounds of appeal are set out in Appendix "A" to this decision. It appears the Superintendent equates grounds of appeal with new issues. This was not the intent of our reasons in *Sellars*. If the Superintendent is able to identify new issues within the meaning of *Sellars,* she should bring these to the attention of the Tribunal in advance of the hearing.

69. In our view, the introduction of <u>new</u> evidence by a decision-maker on appeal that is limited to the exceptions set out in *Sellars* does not offend the principle of finality as it is not tendered to augment,

bolster, or qualify her reasons. Rather, it is tendered, at the Tribunal's request, to allow it to fulfill its adjudicative functions and determine the outcome of the appeal.

70. We turn now to the issue of whether there are any restrictions that must be imposed on the arguments that can be made by the Superintendent on the appeal of her decision. In our view, subsection 75(1) does not grant the Superintendent carte blanche to advance any arguments she wishes on the appeal. Again, the words "present a case in support of her decision" are limiting words. In our view, these words capture the common law principle of finality (or bootstrapping).

71. As Justice Rothstein stated in *Ontario (Energy Board)*, decision-makers do not have an « unfettered ability to raise entirely new arguments on judicial review. » They are limited to arguments that were explicit or implicit in their decision. [para. 69] The Superintendent cannot present arguments that qualify, bolster or supplement her decision as those would constitute bootstrapping. [*Canada (Attorney General)* v. *Quadrini*, 2010 FCA 246 at para. 16 as cited in *Ontario (Energy Board*) at para. 51].

72. 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, par. 53]

73. 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.

74. 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].

V. CONCLUSION

75. The Superintendent of Pensions cannot present additional evidence at the hearing of the appeal, either by the presentation of documentary evidence or by the testimony of witnesses. She also cannot cross-examine witnesses.

76. The Superintendent of Pensions can present oral and written arguments as set out in paragraph 71 and 72 of these reasons in the form of a written *Statement of Position* and closing arguments at the oral hearing.

DATED this 3rd day of December, 2019.

Judith Keating
Judith Keating, Q.C. Tribunal Chair

Raoul Boudreau
Raoul Boudreau, Vice-Chair of the Tribunal

Mélanie McGrath
Mélanie McGrath, Tribunal Member

APPENDIX "A"

The grounds of appeal raised by the Appellants in the Amended Notices of Appeal are the following:

(a) The Superintendent made incorrect and unreasonable decisions based on the facts and law, with respect to each of the Superintendents decisions, and failed to fulfill her obligations pursuant to the Pension Benefits Act including, without limitation, sections 70,71 and 72.

(b) The Superintendent made an incorrect and unreasonable decision in failing to adequately and properly investigate the complaints and the basis for Mercer's revised valuation reports, as set out in the correspondence from the Police Union and Fire Fighters Association to the Superintendent dated July 31, 2017, and the follow-up correspondence to the Superintendent dated October 26, 2017.

(c) Without limiting the generality of the foregoing, the Superintendent did not adequately investigate the basis for the increased discount rate, or Mercer's unfounded conclusion that the CRA would not have approved the higher level of contributions by members of the Police Union and Fire Fighters Association, levels that had been in place for many years and which are supported by language in the collective agreements between the City and the two unions.

(d) The Superintendent incorrectly and unreasonably failed to ensure that the City engaged an independent actuarial firm to advise the New Plan to ensure that the rights of members of the New Plan were adequately protected. Mercer, the same actuarial firm whose valuations were rejected by the Tribunal in its 2016 decision, was clearly acting only in the interests of the City and were made to justify the City's diversion of pension assets from the New Plan to the Old Plan, without regard to the rights of members of the New Plan.

(e) The Superintendent incorrectly and unreasonably applied the law concerning the fiduciary and statutory duties of the City and its representatives of the Superannuation Board, as set out in the Pension Benefits Act, where such individuals had obligations to the New Plan and/or the Old Plan and/or the City.

(f) The Superintendent incorrectly and unreasonably failed to investigate the alleged complaints of conflict of interest and breach of statutory duties by the City and its members on the Superannuation Board.

(g) The Superintendent incorrectly and unreasonably applied the law pertaining to the City's unilateral decision to abolish the Superannuation Board, which was done to circumvent employee members of the Superannuation Board who were opposed to the City's attempts to unilaterally reduce contributions to the New Plan in order to divert additional funds to the Old Plan. The Superannuation Board's refusal to approve the Mercer valuations were relevant to the Superintendent's determination on August 28, 2017 to prevent the City from taking further action to refund contributions or to decrease employee contributions.

(h) The Superintendent's decision is also in violation of sections 69(6) and 70(5) of the Pension Benefits Act, in that the Superintendent of Pensions failed to refuse to consent to the City of Fredericton1S valuation/ because the 2016 valuation and the retroactively revised valuations for 2013, 2014 and 2015, do not protect the pension benefits of the members and former members who are represented by the Fredericton Fire Fighters Association.