Citation: *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2020 NBFCST 4

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: 2020-08-27
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:	January 27-30, 2020
WRITTEN REASONS:	August 27, 2020

TABLE OF CONTENTS

I. DECISION………………………………………………………………………………………………….. 3

II. OVERVIEW………………………………………………………………………………………………… 3

III. ISSUES……………………………………………………………………………………………………. 4

IV HISTORICAL CONTEXT………………………………………………………………………………….. 6

V. ANALYSIS…………………………………………………………………………………………………. 10

A. Jurisdiction to Hear the Appeal…………………………………………………………………….. 10

B. Standard of Review………………………………………………………………………………… 12

C. Duties of Administrators, Sponsors and Actuaries……………………………………………… 18

D. Sufficiency of the Superintendent's Investigation………………………………………………. 20

E. Revised 2016 Actuarial Valuation Report and Request for an Independent Actuary…………………………………………………………………………………………… 21

F. Conflict of Interest and Breach of Fiduciary Duties……………………………………………… 34

G. Abolishment of the Superannuation Board……………………………………………………… 45

H. Decrease in Contribution Rates……………………………………………………………………. 50

VI. CONCLUSION AND ORDER…………………………………………………………………………… 61

I. DECISION

1. The July 12, 2018 decision of the Superintendent of Pensions is vacated except for her decision in relation to the abolition of the Superannuation Board, which is affirmed.

II. OVERVIEW

2. This proceeding involves an appeal by the Fredericton Police Association and the Fredericton Fire Fighters Association [collectively "the Unions"] of the Superintendent of Pensions' decision of July 12, 2018. It is part of a long-standing dispute between the Police and Fire Fighters Unions and the City of Fredericton [the City] regarding the pension plan for the Police and Fire Fighters. The Superintendent's decision was in relation to a complaint by the Police and Fire fighters dated July 31, 2017 to which they added further details on October 26, 2017. In her decision, the Superintendent of Pensions dismissed the Unions' complaint and made the following order, which is the subject of this appeal:

   a. pursuant to section 70 of the *Pension Benefits Act*, the transfer of assets between the Superannuation Plan for the Employees of the City of Fredericton to the Superannuation Plan for Certain Employees of the City of Fredericton is approved on the basis of the revised Report on the Actuarial Valuation for Purposes of the Transfer of Assets and Liabilities as at 31 March 2013, filed on 11 July 2017;

   b. the Superannuation Plan for Certain Employees of the City of Fredericton revised Report on the Actuarial Valuation for Funding Purposes as at April 1, 2013, as at April 1, 2014, and as at April 1, 2015, all as filed by Mercer on 11 July 2017, are hereby accepted and may be implemented;

   c. the Superannuation Plan for Certain Employees of the City of Fredericton revised Report on the Actuarial Valuation for Funding Purposes as at April 1, 2016, as well as the Actuarial Valuation for Funding Purposes as at March 31, 2017 as filed by Mercer on 18 December 2017, are hereby accepted and may be implemented;

   d. the acceptance of the reports mentioned in a - c above hereby vacates my 28 August 2017 direction to the City of Fredericton to not take any further actions regarding refunding contributions or decreasing employee contributions until a final determination was made in this matter;

   e. no breach of the conflict of interest rules or of the other statutory obligations outlined in section 17 of the Pension Benefits Act has been committed by the City of Fredericton or their staff, and no further investigation is warranted; and

   f. the plan amendment filed by the City of Fredericton on 15 December 2017 to change the plan administrator from the Superannuation Board to the City of Fredericton, effective 27

November 2017, was a valid amendment and was properly registered on 7 May 2018 by this office.

3. The evidence on this appeal consists of the *Record of the Decision-making Process* prepared by the Superintendent of Pensions as required by rule 5.3 of the Tribunal's *Rules of Procedure,* additional documents submitted by the Unions and the City, and the testimony of the Unions' two witnesses: Blair Sullivan, a fire fighter representative on the former Superannuation Board, and Brendan George, an actuary. Brendan George testified as an expert in actuarial matters. The City did not call any *viva voce* evidence despite providing notice that it intended to call Jane Blakely and David Hughes to testify at the hearing.

III. ISSUES

4. The *Amended Notices of Appeal* filed by the Appellants list eight grounds for this appeal:

> (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 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.

(g) 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 Fredericton's 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.

5. However, in their *Statement of Position*, the Appellants set out the following five grounds for the appeal:

(i) Did the Superintendent of Pensions err when she accepted the discount rate applied in the revised April 1, 2016 actuarial valuation without requiring an independent analysis?

(ii) Did the Superintendent of Pensions err when she failed to investigate and rule on whether the plan administrator ought to have originally applied for an exemption to the 9% contribution limit?

(iii) Did the Superintendent of Pensions err by failing to ensure that the City engaged an independent actuarial firm to advise the New Plan to ensure that the right of members of the New Plan were adequately protected?

(iv) Did the Superintendent of Pensions err by failing to investigate the complaints of conflict of interest and breach of statutory duties, and by dismissing those complaints.

(v) Did the Superintendent of Pensions err by failing to determine that the City had improperly abolished the Superannuation Board?

6. At the hearing, the City raised the differences between the grounds of appeal set out in the *Notices of Appeal* and those set out in the Appellants' *Statement of Position*. The City stated that the grounds of appeal set out in the *Statement of Position* appeared to fall under grounds c), d), e), f) and g) of the *Notices of Appeal,* but not grounds a), b) and g) of the *Notices of Appeal*[1].

[1] Hearing transcript, volume 1, pp. 40-45.

7. In response, the Appellants stated that they were relying only on the grounds of appeal set out in their *Statement of Position*. They also confirmed that if a ground of appeal was not discussed in their *Statement of Position*, then they were not relying on that ground.

8. We find that the five grounds set out in the Appellants' *Statement of Position* are subsumed within the eight grounds of appeal set out in the *Amended Notices of Appeal* as follows:

- Ground (i) of the *Statement of Position* comes within ground b) of the *Amended Notices of Appeal*;
- Ground (ii) of the *Statement of Position* comes within ground c) of the *Amended Notices of Appeal*;
- Ground (iii) of the *Statement of Position* comes within ground d) of the *Amended Notices of Appeal*;
- Ground (iv) of the *Statement of Position* comes within grounds e) and f) of the *Amended Notices of Appeal*; and
- Ground (v) of the *Statement of Position* comes within the first ground g) of the *Amended Notices of Appeal*.

9. The Respondents therefore had notice of these grounds of appeal and have sustained no prejudice.

10. The City also contended that the Appellants attempted to raise a new ground of appeal at the hearing in relation to an alleged conflict of interest and breach of fiduciary duty by Mercer – the actuary for the Police and Fire Plan. According to the City, the *Notices of Appeal* do not contain allegations of conflict of interest or breach of fiduciary duty by Mercer[2].

11. We find no merit to this argument. 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[3].

IV. HISTORICAL CONTEXT

12. Before we begin our analysis of the grounds of appeal, it is useful to set out the history of the dispute between the Unions and the City.

13. Before March 31, 2013, the City maintained a single defined benefit pension plan for its employees, including police and fire fighters, which we will call the Old Plan. The Old Plan had a funding deficit that had to be remedied. The City proposed the conversion of the Old Plan from a defined benefit plan into a shared risk plan. This proposal was rejected by the Police and Fire Unions.

[2] Hearing Transcript, p. 654 and 701.

[3] Record, pp. 545-547 and 805-809; *Amended Notices of Appeal*, fact scenario, para. 9, 10, 13, 14, 16 and 18 and grounds, para. 20b), c), d) and 21b).

14. Despite the refusal of the Police and Fire Unions, City Council approved the conversion of the Old Plan into a shared risk plan. We will call this shared risk plan the City Plan. The Police and Fire Unions filed complaints with the Labour and Employment Board seeking an Order preventing the City from imposing the shared risk plan on them. The Labour and Employment Board ruled in the Unions' favour.

15. This culminated with the creation of a new defined benefit plan for the bargaining police and firefighters, effective March 31, 2013. We will call this the Police and Fire Plan. The pension plan text is the City of Fredericton's Bylaw A-13. As the plan sponsor, the City chose to have the Police and Fire Plan administered by the Superannuation Board made up of representatives of the City (as employer) and police and firefighters (as employees). The pension plan text granted the City, as employer, the authority to appoint the City representatives to the Superannuation Board. The Police and Fire Unions also had the authority to appoint their respective representatives[4].

16. The actuarial firm of Mercer acted as the actuary for the Police and Fire Plan.

17. The City also retained Mercer to prepare a valuation of the assets and liabilities of the Old Plan and to propose a split of these between the City Plan and the Police and Fire Plan. In their report, Mercer performed the valuation using the going concern apportionment method. This resulted in the transfer ratio for the Police and Fire Plan being 47.9% while the transfer ratio for the City Plan was 56.9%. The Police and Fire Unions were concerned that this resulted in an inequitable split of the assets and liabilities. Regardless, the City filed an application with the Superintendent of Pensions seeking her consent to the split of assets and liabilities on the basis of the Mercer report. On November 18, 2014, the Superintendent of Pensions consented to the proposed split of assets and liabilities.

18. On December 8, 2014, the Police and Fire Unions appealed the Superintendent's decision to this Tribunal. In a March 2016 Decision, the Tribunal vacated the Superintendent's decision. The Tribunal found that the Superintendent's consent to the split of assets and liabilities should have been provided based on the solvency apportionment method, the application of which resulted in a transfer ratio of 55.2% for each plan and best protected the interests of the members of both plans.

19. The effect of the Tribunal's March 2016 Decision was to shift approximately $5.5 million in assets from the City Plan to the Police and Fire Plan.

20. No steps were taken to implement the Tribunal's 2016 decision as both the City and The Board of Trustees of the City Plan sought leave to appeal the decision to the Court of Appeal. Leave to appeal was granted. However, in March 2017, the City and Board of Trustees withdrew their appeal.

21. The change in the assets apportioned to the Police and Fire Plan and City Plan due to the implementation of the Tribunal's 2016 decision would change the calculation of the funded status of each plan. Because of the withdrawal of the appeals, the previously submitted actuarial reports for

[4] Exhibit R-2, p. 68, section 10.6.

2013, 2014 and 2015 had to be resubmitted as they had been calculated using the going concern apportionment method rather than the solvency apportionment method.

22. David Hughes, an actuary for Mercer, prepared the revised actuarial valuation reports for 2013, 2014 and 2015 and the initial actuarial valuation report for 2016 for the Police and Fire Plan. He presented these reports to the Superannuation Board at an emergency meeting on March 17, 2017. He indicated that pursuant to the Tribunal's 2016 decision, the split of assets between the City Plan and the Police and Fire Plan had to be done using the solvency apportionment method. Using this method, it appeared that contributions to the Police and Fire Plan since 2013 were higher than they needed to be. Historically, the police and fire fighters' contributions represented approximately 11% of their pensionable earnings. Mr. Hughes recommended that contribution rates be reduced retroactively to March 31, 2013 and that the over-payment in contributions be refunded to Plan members and the City[5]. For the 2016 actuarial valuation report, Mr. Hughes recommended a discount rate of 6.2% with a 0% margin for adverse deviation. The Superannuation Board initially voted in favour of Mr. Hughes' recommendations[6].

23. Following this emergency meeting, the police and firefighter representatives on the Superannuation Board questioned whether the decisions made at the meeting were in the best interests of the Police and Fire Plan members. They had concerns with the appropriateness of reducing the contribution rates when the Police and Fire Plan had a significant solvency deficit.

24. At an April 25, 2017 meeting, the Superannuation Board adopted a motion rescinding the Board's March 17, 2017 decision. This revoked the Board's approval of the actuarial valuation reports prepared by Mercer.

25. Despite this, David Hughes of Mercer filed the revised actuarial reports for 2013, 2014 and 2015 as well as the initial valuation report for 2016 with the Superintendent of Pensions.

26. Shortly after, the City filed an application with the Superintendent to amend the contribution rates for the Police and Fire Plan. The City sought to reduce the contribution rates retroactively to 2013 and to cap the contribution rate at 9% from April 1, 2016 onward. The amendment was approved by the Superintendent retroactively to July 10, 2017.

27. The City proceeded to refund the overpayment in contributions since 2013 to the Police and Fire Plan members and to itself.

28. On July 31, 2017, the Unions sent a complaint letter to the Superintendent alleging that: (1) the actuarial valuation reports prepared by Mercer were done in violation of the *Pension Benefits Act*; (2) the actuarial valuation reports effected changes to their pension plan by reducing the pension contributions for members and the City to 9% of pensionable earnings and by refunding over-

[5] Exhibit R-6, p. 530.
[6] Record, p. 326 and 331.

payments of contributions since 2013 to the members and the City; (3) the City intended to inject its share of the refund of contributions into the shared risk City Plan; (4) the actuarial valuation reports were filed without the approval of the Superannuation Board – the administrator of their pension plan; (5) Mercer was taking direction from the City rather than the Superannuation Board; (6) Tina Tapley and Jane Blakely were in a conflict of interest; and (7) City officials were breaching their fiduciary obligations under the *Pension Benefits Act*. The Unions sought the following intervention from the Superintendent:

> 1. Refuse to accept the DB Plan changes set out in the recently filed valuations for 2013 and 2016, and order the City of Fredericton to continue making contributions to the DB Plan at the same rate that applied prior to the split of assets.
>
> 2. Order the City of Fredericton (a) to not split the assets of the previous all employee Plan until you have dealt with this complaint, (b) to not refund past contributions to the DB Plan members, (c) to not refund the City's past contributions to the City and/or transfer those refunded contributions to the SR Plan, and (d) to continue making deductions from DB 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 DB Plan Superannuation Board, to determine if they breached their statutory obligations under Section 17 of the *Pensions 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 DB Plan Superannuation Board.
>
> 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 Superannuation Board, not to the City of Fredericton[7].

29. After receiving the Unions' complaint, the Superintendent directed the City to cease refunding the overpayment in contributions or decreasing employee contributions until she had made a final determination of the complaint.

30. On August 24, 2017, the Superintendent rejected the actuarial valuation report for 2016 on the basis that the discount rate of 6.2% was too high and out of line with any other 2016 valuation reports she had on file. She also questioned whether the report had been submitted with the Superannuation Board's approval and requested that Mercer provide the minutes of the Superannuation Board meetings.

[7] Record, p. 546-547.

31. As a result, Mercer had to prepare a revised actuarial valuation report for 2016. David Hughes, on behalf of Mercer, presented additional options for the discount rate at an October 13, 2017, meeting of the Superannuation Board. The Board did not choose any of the options. Rather, the police and firefighter appointees on the Board brought a motion to terminate Mercer's actuarial services on the basis that it was not acting in the best interests of the Police and Fire Plan. The motion was adopted, and Mercer's services were immediately terminated.

32. After this meeting, the City took steps to disband the Superannuation Board and to become the plan administrator. On December 15, 2017, the City filed an amendment to the pension plan with the Superintendent, seeking to change the plan administrator to City Council. The amendment was sought retroactive to November 27, 2017. The Superintendent accepted this amendment in her July 12, 2018 decision.

33. In the meantime, the City re-hired David Hughes/Mercer as the actuary for the Police and Fire Plan and approved the revised 2016 actuarial valuation report prepared by Mercer.

34. On October 26, 2017, the Unions added to their complaint and made the following allegations against the City: (1) that the City had embarked on a plan of action that seriously undermined the Superintendent's investigation into the discount rate; (2) that the City had interfered with the statutory obligations of Superannuation Board members and had threatened and intimidated Board members in an attempt to have them disregard their statutory obligations; and (3) that the City had illegally stripped all responsibility from the Superannuation Board because of its refusal to accept the recommendations submitted by Mercer on behalf of the City.

35. On December 18, 2017, Mercer submitted the revised actuarial valuation report for 2016 to the Superintendent. The discount rate employed was 5.95% with a 0.25% margin for adverse deviation. The Superintendent accepted the actuarial valuation for 2016 in her July 12, 2018 decision.

V. ANALYSIS

A. Jurisdiction to Hear Appeal

36. We find the Tribunal has jurisdiction to hear this appeal pursuant to subsection 73(1) of the *Pension Benefits Act.*

37. The City argues that the Superintendent must have made a quasi-judicial order under subsection 72(2) of the *Pension Benefits Act* for the Tribunal to have the jurisdiction to hear this appeal. They rely on the decision of *Imperial Oil Ltd. v Ontario (Superintendent of Financial Services),* 2009 ONFST 26 from the Ontario Financial Services Tribunal. According to the City, the evidence clearly shows - for each of the individual grounds of appeal - that after enquiring into the Unions' complaints, the Superintendent determined there was no evidence the City, its employees or the plan actuary breached the *Pension Benefits Act* or the pension plan, and therefore no further action on her part was justified. The City

contends there is no decision or order within the meaning of subsection 72(2) of the *Pension Benefits Act*. According to the City, in the absence of such an order or decision, the Unions have no right to a hearing under section 73 of the *Act* and the Tribunal has no authority to hear this appeal.

38. Decisions are usually categorized as policy, legislative, administrative or quasi-judicial. Quasi-judicial decisions are decisions made in a court-like manner and usually concern the rights of an individual. To determine whether a decision is quasi-judicial, we must look to the following non-exhaustive list of criteria:

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?[8]

39. In the case of the Superintendent's July 12, 2018 decision, all the above can be answered in the affirmative. In this decision, the Superintendent decided that there was no merit to the Unions' complaint and therefore refused to order the relief sought. The Superintendent's decision was the result of her investigation into the Unions' complaint against the City and David Hughes (Mercer). She gathered evidence from the Unions, from the City and from Mr. Hughes. She then issued a lengthy written decision in which she applied the substantive rules of law to the allegations set out in the complaint. This decision does significantly affect the rights of the members of the Police and Fire Plan. Finally, the process was adversarial in that she obtained information from the Unions and then from the "adversary" – the City. While the Superintendent did not hold an oral hearing, the process she employed can be characterized as a hearing in writing.

40. Second, in *Imperial Oil Ltd. v Ontario (Superintendent of Financial Services),* 2009 ONFST 26, the Financial Services Tribunal recognized that the Superintendent may decide not to act on a matter because, after an investigation, she has exercised her "quasi-judicial" function and (based on facts gathered in her investigation) decided not to act. We find that is precisely what the Superintendent did in her July 12, 2018 decision.

41. In addition, we cannot accept the City's interpretation of subsection 73(1) of the *Pension Benefits Act*. That subsection sets out the following right to appeal an order or decision of the Superintendent to this Tribunal:

[8] *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para. 24.

> **73**(1) If the Superintendent has made an order or decision under this Act or the regulations, the person against whom the order or decision is made or who is affected by the order or decision may appeal the order or decision to the Tribunal within 30 days after the date of the order or decision.

42. Subsection 73(1) creates a very broad right to appeal a decision or order of the Superintendent. It does not require, as a condition precedent to an appeal, that the order or decision of the Superintendent be quasi-judicial in nature. In addition, subsection 73(1) does not restrict a right of appeal to a decision or order of the Superintendent made pursuant to section 72. If that were the intent of the Legislature, this would have been indicated in subsection 73(1). The Superintendent makes decisions under other sections of the *Pension Benefits Act*, which are subject to appeal to this Tribunal[9].

B. Standard of Review

43. For the reasons set out below, we find that the Legislature intended the Tribunal to review the Superintendent's decision for correctness with no deference.

44. The Superintendent of Pensions contends that the Tribunal should grant deference to her decision and apply a standard of reasonableness in reviewing her decision. According to the Superintendent, this standard of review is appropriate as she has greater expertise than the Tribunal in the regulation of the pensions industry.

45. The Appellants submit that this is not a judicial review by a non-specialist court of a decision of a specialist tribunal, but rather an appeal from one specialist decision-maker, the Superintendent, to another specialist decision-maker, the Tribunal. According to the Appellants, deference is therefore not appropriate.

46. The City did not take a position with respect to the standard of review.

47. The issue raised by the Superintendent is what standard of review is to be applied by the Tribunal in hearing an appeal of a decision of the Superintendent of Pensions pursuant to the *Pension Benefits Act*, S.N.B. 1987, c P-5.1 [*Pension Benefits Act*].

48. The Superintendent relies on the Supreme Court of Canada's decision in *McLean v. BC (Securities Commission),* 2013 SCC 67 for the proposition that a reasonableness standard should be applied to an administrative decision-maker's interpretation of its home statute. The Superintendent also relies on the following excerpt of *Administrative Law in Canada*, 5th ed., at p. 173 by Sara Blake:

> *Regardless of how broad the scope of appeal appears to be from the wording of the appeal*

[9] *Fredericton Police Association v. New Brunswick (Superintendent of Pensions)*, 2019 NBFCST 6.

provision, the extent of deference shown by the appellate body to the decision of the lower tribunal may depend on a number of other factors, including the extent to which the issue under appeal is within the special expertise of the lower tribunal. These factors are more fully discussed in chapter 8. In appeals from lower tribunals to appellate tribunals, the greater expertise is often possessed by the lower tribunal because of its practical experience gained in its daily regulation in the field. For that reason, its exercise of discretion should be given deference by the appellate tribunal. ***This approach to determining the standard of review described in chapter 8 may be supplanted by a statutory test that the appeal tribunal must apply.*** [Our emphasis]

49. The Supreme Court of Canada recently clarified the standard of reasonableness in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, where it stated:

> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

50. We agree that the Superintendent of Pensions has a greater expertise than the Tribunal in pensions matters given the Tribunal's multi-disciplinary jurisdiction which encompasses fifteen statutes. We also agree that the Superintendent's role under the *Pension Benefits Act* is an important one. She is tasked with the general supervision of the pensions sector[10]. However, the Superintendent's position that this expertise, on its own, justifies the application of a reasonableness standard of review on an appeal of her decision is not supported by the caselaw.

51. Multiple courts have recognized that the caselaw dealing with the determination of the standard of review in an appeal from a decision of an administrative tribunal to a superior court is not applicable to an appeal from the decision of an administrative decision-maker to an appellate administrative tribunal[11]. In our view, given the above, the *McLean* decision upon which the Superintendent relies is

---

[10] *Pension Law*, Kaplan and Frazer, 2nd edition, at page 130-1.

[11] *Paul v. British Columbia (Forest Appeals Commission*), 2003 SCC 55; *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board),* 2002 BCCA 473; *Djossou v. Canada (Citizenship and Immigration*), 2014 FC 1080;

not applicable to the within matter. *McLean* was an appeal of a decision of a panel of the Ontario Securities Commission to the Ontario Court of Appeal; it was not an appeal from a first instance administrative decision-maker to an appellate administrative decision-maker.

52. Recent decisions have espoused the approach that whether an administrative appellate tribunal should apply a standard of review depends on the applicable legislative scheme. In the recent decision of *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43, Whitmore, J.A., writing for the Saskatchewan Court of Appeal, conducted an exhaustive review of the different approaches in the Canadian caselaw. After this review, Whitmore, J.A. concluded that the determination of the applicable standard of review is a matter of statutory interpretation.

53. It is trite law that in seeking to give effect to the legislator's intent, we must resort to the modern method of interpretation by looking at the broad and specific context, the object of the statute and a consideration of the legislative text in its grammatical and ordinary sense[12]. In the within matter, two statutes are relevant: the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30 and the *Pension Benefits Act.*

54. The *Financial and Consumer Services Commission Act* is the Tribunal's enabling statute. It sets out the Tribunal's powers across "financial and consumer services legislation" as defined in section 1, which includes the *Pension Benefits Act.* In our view, this statute sets out the broader context in which the *Pension Benefits Act* should be interpreted.

55. The *Financial and Consumer Services Commission Act* was enacted in 2013 and served to combine under a single umbrella the regulation of the financial and consumer services in the Province of New Brunswick. To do so, the *Act* created two new entities: the Financial and Consumer Services Commission and the Financial and Consumer Services Tribunal. The Commission, through various regulators, such as the Superintendent of Pensions, provides regulation of the financial and consumer services sectors. The Tribunal provides independent adjudication in these same sectors.

56. The Tribunal has two main functions. It provides independent adjudication by acting as a first instance administrative tribunal when hearing applications, motions, and enforcement proceedings. It also provides independent adjudication and oversight by acting as an appellate administrative tribunal when hearing appeals of regulators' decisions.

57. It is on this contextual background that we examine the purposes of the *Financial and Consumer Services Commission Act*. The purposes are stated in section 2 as follows:

Purposes of the Act

Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93; and *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43.

[12] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21.

2. The purposes of the Act are to

(a) enable the Commission to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors, and

(b) enable the Commission to disseminate knowledge and promote understanding of the regulated sectors and develop and conduct educational programs.

58. A review of the *Financial and Consumer Services Commission Act* reveals that it does not explicitly set out the standard of review applicable to appeals of regulators' decisions before the Tribunal. The only explicit mention of an appeal is found in section 1 of the *Act*, which defines "hearing" as "includes a review or an appeal".

59. Section 38 sets out the Tribunal's powers regarding "hearings" under financial and consumer services legislation, including the *Pension Benefits Act*. Subsection 38(1) states: "With respect to the following matters, when the Tribunal holds a hearing under financial and consumer services legislation, the Tribunal has the same power that the Court of Queen's Bench has for the trial of civil actions…" The powers set out in subsection 38(1) include summoning and enforcing the attendance of witnesses, compelling witnesses to give evidence under oath or in any other manner; and compelling witnesses to produce documents. Subsection 38(5) of the *Financial and Consumer Services Commission Act* stipulates that the Tribunal may "decide all questions of fact or law arising in the course of a hearing". In our view, this means that on an appeal, the Tribunal can re-examine the facts and draw its own factual and legal conclusions.

60. Subsection 38(6) of the *Financial and Consumer Services Commission Act* provides the Tribunal with the authority to receive in evidence "any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it", regardless of whether it is given or produced under oath or would be admissible as evidence in a court of law.

61. Section 38 does not indicate that it is inapplicable to hearings that are appeals. We therefore conclude that the powers in section 38 apply to first instance proceedings as well as appeals. Section 38 grants the Tribunal powers on appeals under financial and consumer services legislation that are typical of first instance proceedings. These hearing powers reveal the Legislature's intent to have appeals under financial and consumer services legislation conducted in a *de novo* manner with no deference to the regulators' decision.

62. It is against this broad contextual backdrop that we turn to our interpretation of the specific context of the *Pension Benefits Act.* The purpose of the *Pension Benefits Act* is not expressly set out in the statute. In *Fredericton Police Association v. Superintendent of Pensions*, 2016 NBFCST 2, this Tribunal 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]

63. Sections 73 to 76 of the *Act* are the specific provisions dealing with an appeal of a Superintendent's decision to the Tribunal:

> **Referral of matters to the Tribunal**
>
> **73**(1) If the Superintendent has made an order or decision under this Act or the regulations, the person against whom the order or decision is made or who is affected by the order or decision may appeal the order or decision to the Tribunal within 30 days after the date of the order or decision.
>
> **73**(2) Repealed: 2013, c.31, s.23 73(2)
>
> **73**(3) The Tribunal may hear a matter appealed to it under this section despite that a time period set out in subsection (1) was not complied with.
>
> **73**(4) If a matter is appealed to the Tribunal, an order of the Superintendent or decision issued by the Superintendent with respect to the matter is stayed pending the disposition of the matter by the Tribunal, unless the Tribunal directs otherwise.
>
> **74** Repealed: 2013, c.31, s.23 1994, c.52, s.4; 2013, c.31, s.23
>
> **Proceedings before the 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(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.

1994, c.52, s.4; 2013, c.31, s.23

Orders and records of the Tribunal

76(1) If a matter has been appealed to the Tribunal under section 73, after hearing and considering the matter the Tribunal may issue an order

(a) affirming the decision or order of the Superintendent,

(b) vacating the decision or order of the Superintendent and substituting the decision or order that, in its opinion, the Superintendent should have made, or

(c) remitting the matter to the Superintendent for further investigation, with such directions as the Tribunal considers appropriate,

and in every case the Tribunal shall in writing so advise all parties to the proceeding of its disposition and the reasons for the disposition.

64. Section 73 confers the right to appeal a decision of the Superintendent to the Tribunal. The words "may appeal" found in subsection 73(1) provide no indication as to the applicable standard of review, if any. The words "may appeal" cannot be read in isolation from the rest of the statutory scheme[13].

65. Section 75 sets out the Superintendent's participatory rights on an appeal of her decision. This section was the subject of a decision of this Tribunal in *Fredericton Police Association v. New Brunswick (Superintendent of Pensions),* 2019 NBFCST 12 and is not helpful in determining the applicable standard of review.

66. Section 76 does provide some indicia. It grants the Tribunal the authority to vacate the Superintendent's decision and substitute the decision or order that, in the Tribunal's opinion, the Superintendent should have made. The ability to substitute its own view and provide the correct decision is not characteristic of a reasonableness standard of review, which requires that the reviewing body exercise "judicial restraint" and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process"[14].

67. In our view, the clear intent of sections 73 to 76 is to provide independent legal oversight of the Superintendent of Pensions' decisions by the Tribunal. The *Pension Benefits Act* does not exclude the

[13] *BC Society for the Prevention of Cruelty to Animals v. British Columbia (Farm Industry Review Board*), 2013 BCSC 2331; *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080.

[14] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 13.

application of section 38 of the *Financial and Consumer Services Commission Act*, which sets out the Tribunal's powers for hearings, which as discussed above includes appeals. These hearing powers are applicable to appeals under the *Pension Benefits Act*. We could find no intent in either the *Financial and Consumer Services Commission Act* nor the *Pension Benefits Act* that the Tribunal is to apply a reasonableness standard of review in an appeal of a Superintendent's decision. We conclude that the intent of the Legislature was to have appeals under the *Pension Benefits Act* conducted in a *de novo* manner with no deference to the regulators' decision.

C. Duties of Administrators, Sponsors and Actuaries

68. It is also helpful before beginning our analysis of the grounds of appeal to lay out the duties of administrators, sponsors and actuaries of a pension plan.

69. The plan sponsor or employer is responsible for creating the pension plan, amending the pension plan text and winding up the pension plan. The plan sponsor must also deduct employee contributions and remit these. Finally, the plan sponsor provides the administrator with any information required by the administrator to comply with the pension plan or pensions legislation[15]. When a plan sponsor occupies only that role, it does not owe fiduciary obligations to plan members[16].

70. The plan administrator is the ultimate authority accountable for the administration and investment of the pension plan and fund. This includes ensuring that the pension plan and pension fund are administered in accordance with the pension plan text, the *Pension Benefits Act* and its regulations[17]. The plan administrator has the following specific duties: applying to register and filing pension plan documentation, enrolling eligible employees in the pension plan, regularly communicating or disclosing prescribed information to employees as prescribed or requested, ensuring employer and employee contributions are made, prudently investing the assets of the fund, paying benefits to employees and beneficiaries within the prescribed time limits, paying benefits to former spouses, and complying with all prescribed time limits for taking action[18]. The plan administrator is also responsible for filing an annual information return and any other additional reports[19]. The plan administrator has the duty to ensure the plan is reviewed by an actuary and an actuarial valuation report prepared by an actuary annually. This includes approving the discount rate and margin for adverse deviation employed in the actuarial valuation report. The plan administrator must then file the report with the Superintendent within nine months of the review date.

71. A plan administrator owes plan members a special duty of care as a fiduciary in connection with its statutory functions[20]. As such, administrators are subject to a duty of loyalty and good faith and must act solely in the best interests of the beneficiaries. The plan administrator has an absolute duty to

---

[15] *Pension Benefits Act*, s. 20, 23 and 49.
[16] Pension *Law* at 327, citing *Imperial Oil Ltd. v Ontario (Superintendent of Pensions)* (1995), 18 CCPB 198.
[17] *Pension Benefits Act,* s. 14.
[18] Ari Kaplan & Mitch Frazer, *Pension Law,* 2nd (Toronto: Irwin Law, 2013) at 316-317.
[19] *Pension Benefits Act*, s. 15.
[20] *Burke v. Hudson's Bay Co.,* 2010 SCC 34; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6.

avoid any conflict of interest, regardless of whether the conflict is actual or perceived[21].

72. In New Brunswick, this high standard of care for plan administrators is set out at section 17 of the *Pension Benefits Act:*

> ***Duty of care, diligence and skill***
> *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(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(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.*

73. Section 18 of the *Pension Benefits Act* sets out the plan administrator's authority to retain agents, such as an actuary, 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(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).*

74. Pursuant to subsection 18(3), an actuary for a pension plan has the same fiduciary obligations to pension plan members as a plan administrator.

75. 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 the plan sponsor. There are

[21] Ari N. Kaplan, *Pension Law*, Irwin Law, Toronto, 2006 at 323 and 336.

multiple instances where the City, in its capacity as plan sponsor, usurped the authority of the Superannuation Board.

D. Sufficiency of the Superintendent's Investigation

76. We find that the Superintendent's investigation into the Unions' complaint lacked thoroughness and that this affected the outcome of the Unions' complaint.

77. The Appellants contend that the Superintendent did not conduct a reasonable investigation and that she abdicated her investigatory powers in relation to certain aspects of the complaint.

78. The City submits that the Superintendent took the Appellants' complaints seriously and investigated the issues in a manner that satisfies her obligations under the *Pension Benefits Act*.

79. The Superintendent submits that she received evidence and submissions from the Unions and the City. She further submits that she was provided significant disclosure addressing the issues raised in the complaint, all of which she reviewed. Finally, she submits that she followed up with City employees and Mercer to clarify or fill in the gaps of her understanding.

80. As part of her mandate to enforce and administer the *Pension Benefits Act*, the Superintendent has a duty to investigate complaints alleging a breach of the *Pension Benefits Act*. When doing so, the Superintendent has the obligation to be responsive to employee concerns. The Superintendent also has a proactive duty to require compliance with the *Pension Benefits Act.* Any non-compliance that comes to the Superintendent's attention triggers an independent obligation to investigate[22].

81. To be adequate, an investigation by an administrative body must satisfy two conditions: neutrality and thoroughness[23]. However, the Superintendent's investigatory powers must be used reasonably; she cannot go on a "free-wheeling fishing expedition"[24]. The Superintendent also has broad powers to compel the production of information, records or documents[25].

82. 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

---

[22] Ari Kaplan & Mitch Frazer, *Pension Law,* 2nd (Toronto: Irwin Law, 2013) at 136.
[23] *Slattery v. Canada (Human Rights Commission),* [1994] 2 F.C. 574 (Fed. T.D.) at para. 50, aff'd (1996), 205 N.R. 383 (Fed. C.A.).
[24] *College of Physicians and Surgeons of Ontario v Sazant,* 2012 ONCA 727 at paras. 154-156.
[25] *Pension Benefits Act*, s. 78.3.

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.

E. Revised 2016 Actuarial Valuation Report and Request for an Independent Actuary

83. We conclude that the Superintendent erred by accepting the discount rate in the revised April 1, 2016 actuarial valuation prepared by Mercer. We further conclude that the Superintendent erred by failing to order that the plan administrator engage an independent actuary.

Authority to Order an Analysis by an Independent Actuary

84. We conclude that the Superintendent, and by extension this Tribunal, has the authority to order a plan administrator to appoint an actuary in accordance with the directions she considers appropriate, including directions surrounding impartiality and independence.

85. The Appellants submit that if there are reasonable and probable grounds to conclude to the existence of one of the circumstances in subsection 72(2) of the *Pension Benefits Act*, then the Superintendent has the authority to order that an actuarial valuation be conducted by an independent actuary pursuant to subsection 72(1) of the *Act*. In their *Notices of Appeal*, the Appellants request that the Tribunal order the City to conduct new valuations for the years 2013 through 2017 with an independent actuarial firm to be selected by members of the New Plan and/or members of the reinstated Superannuation Board.

86. The Superintendent contends that she does not have the jurisdiction to order new valuations by an independent actuary. According to the Superintendent, the definition of "actuary" in *Regulation 91-195* under the *Pension Benefits Act* precludes this. Under the *Pension Benefits Act*, the responsibility for hiring and directing the pension plan actuary with respect to actuarial valuations is a duty which falls to the pension plan administrator. The Superintendent contends that her authority does not extend to ordering that the valuations be completed by an independent actuary, as this would not be an actuary within the meaning of the definition in *Regulation 91-195*.

87. The City submits that nothing in the *Pension Benefits Act* grants the Superintendent and, by extension the Tribunal, the authority to order which actuarial firm the administrator must use or how the administrator must select an actuarial firm. According to the City, subsection 18(2) of the *Pension Benefits Act* is clear that a plan actuary must be personally selected and supervised by the plan administrator. The City contends that the Superintendent is without jurisdiction to interfere in that choice.

88. In our view, the issue is not whether the Superintendent should have selected the actuary *per se*. Rather, it is whether she had the authority to order the plan administrator to appoint an independent actuary to perform services for a pension plan.

89. We find that neither the Superintendent nor the Tribunal have the authority to select an actuarial firm. The term "actuary" is defined in section 2 of Regulation 91-195 under the *Pension Benefits Act*. It is clear from the definition that the actuary must be appointed by the plan administrator:

> *"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".*

90. Section 18 of the *Pension Benefits Act* stipulates that it is the plan administrator's duty to personally select a plan actuary and be satisfied of the actuary's suitability to perform the act for which he or she is employed. In our view, suitability necessarily implies an actuary who can deliver unbiased actuarial services and honoring its fiduciary obligations. That section also imposes the obligation on the plan administrator to supervise the actuary. Clause 10.1.1 of the pension plan text for the Police and Fire Plan also grants the plan administrator the authority to employ an actuary[26].

91. We cannot, however, accept the argument that the Superintendent is without jurisdiction in her review of the choice of the actuary. To accept such an argument would mean that a plan administrator's choice of an actuary is never subject to the regulatory supervision of the Superintendent. Under the *Pension Benefits Act,* the Superintendent has "*wide jurisdiction and broad powers of administration and enforcement over a pension plan's administration, operation, and termination*"[27]. Nothing in the *Pension Benefits Act* nor the definition of an "actuary" in *Regulation 91-195* precludes the Superintendent from exercising a supervisory role with respect to the appointment or comportment of an actuary, where necessary. This argument is incompatible with the purpose of the *Pension Benefits Act*, which 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*"[28].

92. We conclude that the plan administrator's authority to appoint an actuary is not an unfettered right; it is subject to the actuary being able to comply with the fiduciary obligations set out in section 18 of the *Pension Benefits Act.* In our view, where the actuary cannot respect these fiduciary obligations, the actuary should not be appointed as a plan actuary nor be permitted to continue providing services to the pension plan. The Superintendent clearly has the duty to ensure the plan actuary complies with these fiduciary obligations.

[26] Exhibit R-2, p. 67.
[27] Ari Kaplan & Mitch Frazer, *Pension Law,* 2nd (Toronto: Irwin Law, 2013) at 132.
[28] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),* 2004 SCC 54, at para 38.

93. In requesting an order for an analysis by an independent actuary, the Unions were requesting that the Superintendent make a remedial order. Subsection 72(1) of the *Pension Benefits Act* grants the Superintendent the authority to make remedial orders upon "reasonable and probable grounds" of the existence of one of the circumstances set out in subsection 72(2). If so satisfied, the Superintendent has a very broad authority to order an administrator or *"any other person whom the Superintendent considers appropriate in the circumstances"* to "*take or refrain from taking any action in respect of a pension plan*". We reproduce the relevant portions of section 72:

> *72(1) The Superintendent, in the circumstances mentioned in subsection (2), by a written order may require an administrator, or any other person whom the Superintendent considers appropriate in the circumstances, to take or to refrain from taking any action in respect of a pension plan, a pension fund or a retirement savings arrangement prescribed for the purposes of subparagraph 36(1)(a)(ii).*
>
> *72(2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,*
>
> > *(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,*
> >
> > *(b) that the pension plan or prescribed retirement savings arrangement does not comply with this Act and the regulations,*
> >
> > *(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.1) that the administrator of the pension plan, the employer or any other person is violating a provision of the multilateral agreement entered into under section 93.3, in the case of a pension plan that is subject to that agreement,*
> >
> > *(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,*
> >
> > *(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,*
> >
> > *(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,*

(g) that a report or form submitted in respect of a prescribed retirement savings arrangement does not meet the requirements and qualifications of this Act, the regulations or the prescribed retirement savings arrangement, or

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

72(3) In an order under this section, the Superintendent may specify the time or times when or the period or periods of time within which the person to whom the order is directed must comply with the order.

72(4) An order under paragraph (2)(d), (e) or (f) 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 in the preparation of the new report.

94. In our view, the authority to make an order as against "*any other person*" includes an actuary. In addition, the Unions' allegations relating to the conduct of Mercer and David Hughes are allegations that they were violating their fiduciary obligations under section 18 of the *Pension Benefits Act.* These allegations come within "any other person is violating a provision of this Act or the regulations" in paragraph 72(2)c). The Superintendent had the authority under subsection 72(1) to make a remedial order provided there were reasonable and probable grounds to conclude that Mercer or David Hughes were breaching their fiduciary obligations to the Police and Fire Plan members. This was indeed the case as is discussed below.

95. We conclude that the Superintendent's authority to order a plan administrator or any other person "*to take or to refrain from taking any action in respect of a pension plan*" is broad enough to order the plan administrator, be it the Superannuation Board or City Council, to obtain an analysis by an independent actuary of the discount rate applied in the revised April 1, 2016 actuarial valuation report. It is also broad enough to make the following remedial orders:

a) Order an actuary to cease providing actuarial services to a pension plan;
b) Order a plan administrator to terminate the services of its actuary; and
c) Order a plan administrator to appoint another actuary in accordance with the directions she considers appropriate, including directions surrounding impartiality and independence.

96. An actuary appointed by a plan administrator in accordance with directions set out by the Superintendent in a remedial order is an actuary under *Regulation 91-195* and section 18 of the *Pension Benefits Act*. The actuary is appointed by the plan administrator and must be supervised by the plan administrator.

97. The term "reasonable and probable grounds" found in subsection 72(2) of the *Pension Benefits Act* has not been judicially considered. In *R v. Shepherd,* 2009 SCC 35, the Supreme Court of Canada

considered the term “reasonable and probable grounds” in the context of an offence under section 253 of the *Criminal Code.* The Court stated this standard contained both a subjective and an objective component: there must be an honest belief that the suspect committed the offence (subjective element) and there must be reasonable grounds for that belief (objective element). Courts have held that reasonable and probable grounds must:

- be based on:
    - reasonable and specific inferences drawn from the known facts of the situation;
    - a serious possibility based on credible evidence;
    - compelling and credible information; or
    - sufficient credible evidence;
- or be:
    - an objective opinion capable of justification;
    - a belief for which any reasonable person standing in that person’s shoes would believe that there were reasonable and probable grounds; or
    - justifiable from an objective point of view[29].

98. Applied to subsection 72(2) of the *Pension Benefits Act*, this would mean that the Superintendent must have an honest belief of the existence of one of the circumstances in subsection 72(2) and there must be reasonable grounds for that belief.

99. We turn to the Tribunal’s authority to make a remedial order. Section 76 of the *Pension Benefits Act* states that, when hearing an appeal of the Superintendent’s decision, the Tribunal can, amongst other things, vacate the decision and substitute “*the decision or order that, in its opinion, the Superintendent should have made*”. We conclude the Tribunal has the authority to make the orders set out in paragraph 95 above.

100. We turn to our analysis of the discount rate employed in the revised 2016 actuarial valuation report prepared by Mercer.

2016 Actuarial Valuation Report

101. The Superintendent should not have accepted the revised 2016 actuarial valuation report prepared by Mercer as David Hughes was in a conflict of interest and in breach of his fiduciary obligations to the Police and Fire Plan members.

102. The Appellants submit that at the time Mercer submitted the revised 2016 actuarial report, there was

[29] Robert W. MacAulay & James L.H. Sprague, *Hearings Before Administrative Tribunals,* 5th ed (Toronto: Thomson Reuters Canada Limited, 2016) at 5-36 - 5-37.

legitimate cause to be concerned that it recommended a discount rate at the high end of the allowable spectrum to promote the City's interests of injecting additional capital into the City Plan to counter-act the Tribunal's 2016 Decision. In doing so, Mercer preferred the interests of the City over those of the Police and Fire members. The Appellants contend that the Superintendent erred in not requesting that a second actuarial firm be retained to provide an independent opinion on the appropriate discount rate to apply in the 2016 valuation.

103. According to the City, the revised 2016 actuarial valuation report was thoroughly reviewed by the Superintendent's office and found to comply with the *Pension Benefits Act*, using assumptions and discount rates within acceptable ranges for the Police and Fire Plan. The City submits the Appellants have provided no evidence suggesting the revised valuations do not protect the interests of plan members.

104. The Superintendent states that she accepted the discount rate used by Mercer in the revised 2016 valuation report as it was in accordance with generally accepted actuarial principles and appropriate for the Police and Fire Plan. According to the Superintendent, there is no credible evidence supporting the Appellants' position. The Superintendent adds that she could only make an order under subsection 72(1) of the *Pension Benefits Act* upon finding reasonable and probable grounds of the existence of one of the following three circumstances: (1) the assumptions or methods used by the expert are inappropriate for a pension plan (paragraph 72(2)(d)); (2) the assumptions or methods used in the preparation of the report do not accord with generally accepted actuarial principles (72(2)(e)); or (3) there are likely to be insufficient funds to pay the pensions and benefits under the plan (72(2)(h)). According to the Superintendent, none of these circumstances were present.

105. 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[30].

106. Given the importance of the discount rate for the pension fund, the actuary's fiduciary obligations to plan members extends to recommending a discount rate. The actuary must act in the best interests of the plan members when recommending a discount rate.

107. The lack of thoroughness of the Superintendent's investigation is particularly evident in this ground of appeal. The Superintendent did not obtain or consider the following evidence: (1) the relationship and interaction between David Hughes and the City; (2) the evidence of Superannuation Board members; (3) the Minutes of the Superannuation Board meetings; and (4) the correspondence

[30] Hearing transcript, p. 426-427.

between City officials and David Hughes. As discussed below, this evidence was highly relevant to the consideration of the Unions' allegation that Mercer and David Hughes were acting at the direction of the City rather than the Superannuation Board.

108. The actuary must take instruction from the plan administrator and avoid conflicts of interest[31]. Brendan George testified that the plan actuary's client is the plan administrator[32]. 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[33].

109. 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[34].

110. The evidence detailed below exposes that Mr. Hughes was taking instruction from two City employees: Tina Tapley and Jane Blakely. Tina Tapley was the City treasurer and occupied no position with the Superannuation Board. As for Ms. Blakely, she was the Director of Strategic Direction and Consulting for the City, the designated legal counsel for the City on pension matters, and a member of the Superannuation Board. Blair Sullivan testified that the Superannuation Board had not authorized Mercer or David Hughes to deal with Jane Blakely. Mr. Sullivan further testified that the Superannuation Board had not given Ms. Blakely the authority to act on its behalf[35]. This evidence was uncontested. We accordingly find that Mr. Hughes' multiple communications with Ms. Blakely were in her capacity as a City employee as she was never a designate of the Superannuation Board.

111. In March 2017, Mr. Hughes was preparing the draft actuarial valuation report for 2016. He provided his draft presentation to Tina Tapley and Jane Blakely for comments. He also met with Ms. Blakely to review his presentation before it was presented to the Superannuation Board[36]. The City instructed Mr. Hughes that it was capping contribution rates for the Police and Fire Plan at 9% from April 1, 2016 onward[37].

112. The City caused an emergency meeting of the Superannuation Board to be held on March 17, 2017[38]. At that meeting, Mr. Hughes presented the revised actuarial valuation reports for 2013, 2014 and 2015 and the draft actuarial valuation report for 2016. He indicated that pursuant to the Tribunal's 2016 decision, the split of assets between the Police and Fire Plan and the City Plan had to be done

---

[31] *Pension Benefits Act,* s. 18.
[32] Hearing transcript, p. 416.
[33] Hearing Transcript, p. 417.
[34] Hearing transcript, p. 56 and 115.
[35] Hearing transcript, pp. 56 and 115.
[36] Exhibit A-1, p. 7.
[37] Exhibit A-1, p. 7; Record, pp. 647-648.
[38] Record, p. 620.

using the solvency apportionment method. By applying this method, Mr. Hughes concluded that contributions to the Police and Fire Plan were higher than they needed to be for the years 2013 to 2015. He indicated that contributions would be reduced retroactively to 2013 – the date of the split into two plans[39]. He indicated that the over-payment in contributions since 2013 would be refunded to Plan members and the City. Mr. Hughes also recommended a decrease in the contribution rates to 9% each for employees and the City from 2016 onward. For the 2016 valuation, Mr. Hughes recommended a discount rate of 6.2% with a 0% margin for adverse deviation. The Superannuation Board voted in favour of Mr. Hughes' recommendations[40].

113. During this meeting, Blair Sullivan asked what would happen with the City's share of the over-payment in contributions. Mr. Hughes responded that the City's refund of contributions would be injected into the City Plan[41].

114. The following day, Blair Sullivan sent a letter to the Superannuation Board chair setting out concerns with Mr. Hughes' presentation. Mr. Sullivan indicated that the Board was forced into making decisions that were not in the best interest of the Plan and were not provided the proper information or any viable options to best maximize the plan's fiscal needs. He indicated that the proposed changes to the contribution rates would have a negative impact of approximately $700,000 per year, which was significative given that the plan had a solvency deficit of $50 million. Mr. Sullivan also worried that the new funding formula suggested for 2016 could not withstand any market fluctuation and was dependant on a consistent rate of return annually, which was not logical given the poor return on investments in 2015. Mr. Sullivan requested that an emergency meeting of the Superannuation Board be convened to reconsider their March 17, 2017 decisions.

115. Mr. Hughes provided comments on Mr. Sullivan's letter to John McDermid (the Board Chair), Jane Blakely and Tina Tapley[42].

116. At the next meeting of the Superannuation Board on April 25, 2017, the Police and Fire members of the Board expressed their view that the decisions made on March 17, 2017 were detrimental to the best interests of the members of the Police and Fire Plan. They brought a motion to suspend these decisions. 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[43]. 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.

[39] Exhibit R-6, p. 530.
[40] Record, p. 326 and 331.
[41] Exhibit R-6, p. 531.
[42] Exhibit A-1, p. 14.
[43] Exhibit A-7, p. 557-558.

117. On May 8, 2017, David Hughes attended a City Council meeting at which he presented the draft 2016 actuarial valuation report. 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[44].

118. 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[45]. Mr. Hughes' participation in the May 8 meeting clearly depicts that he was taking his instructions from the City rather than the Superannuation Board.

119. 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[46]. 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[47].

120. On July 31, 2017, the Unions sent their complaint letter to the Superintendent alleging that the 2016 actuarial valuation report was fundamentally flawed and violated the *Pension Benefits Act*. They also alleged that the Superannuation Board did not approve the 6.2% discount rate and the 0% margin for adverse deviation in the 2016 actuarial valuation report. In other words, the Unions were alleging that the report was submitted without the Superannuation Board's approval[48].

121. In an August 9, 2017, email to David Hughes, the Superintendent indicated that she had reviewed the 2016 AVR and had some questions and concerns:

> *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*

---

[44] Record, pp. 647-648.
[45] Hearing transcript, p. 636.
[46] Record, p. 647 and 832-833; Exhibit A-1, p. 60 and p. 69; Exhibit A-9, p. 186.
[47] Record, p. 155.
[48] Record, p. 542 and 546.

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.[49]

122. Mr. Hughes responded that the change in the discount rate assumption from 5.3% p.a. in 2015 to 6.2% p.a. in 2016 was due to the reduction in the margin for adverse deviations. He further indicated that: "*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*"[50]

123. On August 24, 2017, the Superintendent rejected the 2016 actuarial valuation report. She indicated that the 6.2% discount rate was "out of line" with any other 2016 valuation reports she had on file and was a full percent higher than what was being assumed by other plans. In her e-mail to Mr. Hughes, the Superintendent also expressed concerns that the report was submitted without the Superannuation Board's approval:

> *I have been advised that the Board does not and did not agree with the change in discount rate and removal of the margin for adverse deviations, and passed a motion rejecting these items. I assume there must be minutes of the Board meetings and would ask to be provided with same given the conflicting information provided to me*[51].

124. There is no evidence confirming that the Superintendent received the minutes of the Superannuation Board meetings. There is also no evidence indicating that the Superintendent requested these minutes directly from the Superannuation Board. In light of the concern expressed, she should have done so.

125. Had the Superintendent conducted a thorough investigation, she would have discovered that Mr. Hughes had been instructed by the City, rather than the Superannuation Board, to use the 6.2% discount rate.

126. 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[52]. We disagree. As is discussed below, by submitting valuations without the Board's approval, Mr. Hughes was in breach of his fiduciary obligations.

---

[49] Record, p. 769-770.
[50] Record, p. 768-769.
[51] Record, p. 786.
[52] Record, p. 676.

127. After the Superintendent rejected the initial 2016 actuarial valuation report on August 24, 2017, Mercer had to recommend a new discount rate to the Superannuation Board. Once again, this was done based upon the City's directions. Tina Tapley asked Mr. Hughes to confirm that he could present the 2016 valuation discount rate options and the preliminary 2017 valuation results at a Superannuation Board meeting on October 13, 2017[53]. In a September 19, 2017 Memo to City Council, Jane Blakely wrote:

> *Issue #2:* *For the 2016 Plan Valuation, the Plan Actuary has indicated that a Discount Rate of 6.0% with a margin for adverse variations of 0.2% is possible without changes to City contributions. There is no guarantee that the Superboard or the Superintendent of Pensions will approve this rate. Council's decision as set out above should be brought to the Board's attention with the advice that any change to the discount rate that would trigger the requirement for increased contributions must instead be offset by benefit changes[54].*

128. 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*"[55]. 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[56].

129. Mr. Hughes presented options for the revised discount rate for the 2016 actuarial valuation report at an October 13, 2017 meeting of the Superannuation Board. He provided the following options:

a) Agree on the original proposal to use a discount rate of 6.2% and a 0% margin for adverse;
b) Use a discount rate of 6.0% with a 0.2% margin for adverse deviation;
c) Use a discount rate of 5.7% with a 0.5% margin for adverse deviation;
d) Use a discount rate of 5.5% with a 0.7% margin for adverse deviation; or
e) Use a discount rate of 5.3% with a 0.9% margin for adverse deviation[57].

130. Given the City's direction that it was capping its contribution rate at 9% (meaning employee contributions were also capped at 9%), the only viable options were the discount rate of 6.2% and 6.0%. The use of the other discount rates would require a decrease in benefits[58].

---

[53] Exhibit A-6, p. 109.
[54] Exhibit A-9, p.186-187.
[55] Exhibit A-10, p. 202-203.
[56] Exhibit A-10, p. 202.
[57] Exhibit R-10, p. 569-576.
[58] Exhibit R-10, p. 573.

131. Blair Sullivan testified at the hearing that this presentation was not done at the Board's request, but rather at the direction of City Council[59]. We accept this evidence as it is supported by the emails described above.

132. After the presentation, the police and firefighter members of the Superannuation Board brought a motion to terminate Mercer's services effective immediately due to bias. The motion was carried[60]. John MacDermid, who was the Chair of the Board and a City Councillor, cautioned that moving forward with the decision to terminate Mercer as the actuary would "put the City in a terrible bind, and that ultimately the decision to terminate would be brought to Council". Mr. MacDermid was incorrect in stating that the decision to terminate Mercer's services was subject to City Council's approval. Pursuant to the *Pension Benefits Act* and the pension plan text, the Superannuation Board as plan administrator had the authority to terminate Mercer's services[61]. This is another example of how the City continued to usurp the Superannuation Board's authority.

133. The City admitted at the hearing that Mercer and David Hughes should not have communicated with the City when the Superannuation Board was the plan administrator without disclosing these communications to the Board[62]. We would go even further. In our view, Mercer and David Hughes should not have communicated with the City without the Board's consent and approval.

134. We find that Mercer and David Hughes were not appointed by the Superannuation Board to act as actuaries for the Police and Fire Plan as required by pensions legislation[63]. Blair Sullivan, who was a member of the Superannuation Board from late 2013 to 2017, testified at the hearing that he had no knowledge of a Board resolution appointing Mercer as the actuarial firm for the Police and Fire Plan[64].

135. The Superintendent asked the City's outside legal counsel to advise when Mercer was appointed as the plan actuary for the Police and Fire Plan[65]. Again, in our view, the Superintendent should have requested that information from the Superannuation Board rather than the City because it was the Board that had the authority to retain the actuary for the Police and Fire Plan. In any event, the City's outside legal counsel responded:

> *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[66].*

---

[59] Hearing transcript, p. 561.
[60] Exhibit R-10, p. 574.
[61] *Pension Benefits Act*, s. 18; *Bylaw A-13*, s. 10.1.1, Exhibit R-2 p. 67.
[62] Hearing transcript, p. 700.
[63] *Pension Benefits Act*, s. 18; *Regulation 91-195* under the *Pension Benefits Act*, s. 2.
[64] Hearing transcript, p. 48 and 65.
[65] Exhibit A-25, p. 610.
[66] Record, p. 782.

136. It is incorrect to state that Mercer became the actuary for the Police and Fire Plan due to a continuation of services from the Old Plan to the Police and Fire Plan. The Old Plan was converted into the City Plan. The Police and Fire Plan was an entirely new pension plan. We find that during the time the Superannuation Board was the plan administrator, Mercer and David Hughes did not come within the definition of "actuary" in section 2 of Regulation 91-195 and section 18 of the *Pension Benefits Act* as they were not appointed by the Superannuation Board.

137. Immediately after the Superannuation Board terminated Mercer's services, the City took steps to disband the Superannuation Board. Mercer assisted the City by providing precedents of other pension plans and eventually even drafted the amendment to change the plan administrator to City Council[67].

138. Despite being dismissed by the Superannuation Board because of bias, Mercer and David Hughes continued to provide actuarial services for the Police and Fire Plan after the change in plan administrator.

139. 0n December 18, 2017, Mercer filed the revised 2016 actuarial valuation report approved by City Council as the new plan administrator. The discount rate employed was 5.95% with a 0.25% margin for adverse deviation[68].

140. 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.

141. 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 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.*

Remedy

142. An actuary that is breaching its fiduciary obligations cannot be permitted to continue providing actuarial services to a pension plan. The Superintendent should not have accepted any actuarial valuation reports prepared by Mercer and David Hughes. Consequently, there is no need to discuss the appropriateness of the discount rate employed in the revised 2016 actuarial valuation report prepared by Mercer.

143. We must take the measures that the Superintendent could have taken to safeguard the pension

[67] Exhibit A-11, pp. 236-281.
[68] Record, pp. 436 and 447-449.

benefits and rights of the members of the Police and Fire Plan. In our view the following remedial action under subsection 72(1) of the *Pension Benefits Act* is warranted:

a) Mercer and David Hughes are removed as the plan actuaries for the Police and Fire Plan;
b) The plan administrator for the Police and Fire Plan must retain another actuary to provide independent and impartial actuarial services for the Police and Fire Plan;
c) The revised 2016 actuarial valuation report is rejected;
d) The actuarial valuation reports for 2013 to present must be resubmitted to the Superintendent of Pensions by the new actuary retained by the plan administrator.

F. Conflict of Interest and Breach of Fiduciary Duties

144. We find that Jane Blakely was in a conflict of interest; she further breached her fiduciary duties to the Police and Fire Plan members. As for Tina Tapley, we find there is no merit to the allegations against her. The City's conduct as plan administrator is more appropriately dealt with under the next ground of appeal dealing with the abolishment of the Superannuation Board.

145. The Appellants contend that Jane Blakely and Tina Tapley were in a conflict of interest and breached their statutory duties. They submit that the Superintendent erred in her interpretation of the two hats doctrine. The Appellants contend that the duties of Jane Blakely and Tina Tapley to the City not only held a substantial risk of materially and adversely affecting their representation of plan beneficiaries, they were aimed at advancing the City's interests in reducing contributions to the Police and Fire Plan. The Appellants further contend that the Superintendent abdicated her investigative powers by failing to conduct an even rudimentary investigation of the allegation of conflict of interest. According to the Appellants, the Superintendent's decision to dismiss the complaints without investigation, was based, at least in part, on her imputation of ulterior motives on the Appellants to the effect that they were attempting to use her office as a weapon in their continued battle with the City.

146. The City contends that the Superintendent did not make a decision or order under section 72 of the *Pension Benefits Act* and therefore the Tribunal does not have the jurisdiction to deal with this ground of appeal. The City further contends that the Superintendent's statement and application of the law respecting fiduciary and statutory duties of the City and its representatives on the Superannuation Board were correct. The City submits that the evidence clearly shows that the Superintendent used her investigative powers reasonably. She determined, after enquiring into the Appellants' complaints and based on the information gathered, that the circumstances did not justify further investigation or action on her part. According to the City, there is no evidence that Jane Blakely was ever in a material conflict of interest in her role as a member of the Superannuation Board. As for Tina Tapley, the City contends that she did not owe a fiduciary duty to the Police and Fire Plan members as she was never a member of the Superannuation Board.

147. The Superintendent states that she dismissed the allegations of conflict of interest and breach of statutory duty as there was no evidence that either Tina Tapley or Jane Blakely were in a conflict of interest. In her *Statement of Position*, she further contends that the evidence submitted to her and

upon which she based her decision suggested instead that the Superannuation Board had been administering the plan contrary to its fiduciary obligations under the *Pension Benefits Act* in failing to file the required actuarial valuation reports.

Superintendent's Arguments

148. We will not deal with the Superintendent's argument that the evidence submitted suggests the Superannuation Board was administering the plan contrary to its fiduciary obligations. It is not relevant to the determination of whether Jane Blakely or Tina Tapley were in a conflict of interest or breached their fiduciary duties. In addition, this argument is not found in the Superintendent's decision and is not presented in response to an argument raised by the Unions or the City. In our view, this argument constitutes impermissible bootstrapping as it is an attempt to vary, qualify or supplement the Superintendent's reasons[69].

Jurisdiction

149. We reject the City's argument on jurisdiction for the reasons set out in Part A of this Decision.

Tina Tapley

150. We find there is no merit to the allegation that Tina Tapley was in a conflict of interest. She was the Director of Finance and Administration and the Treasurer for the City of Fredericton. Ms. Tapley was never a member of the Superannuation Board. Consequently, she was not subject to the fiduciary duties set out in section 17 of the *Pension Benefits Act.*

Jane Blakely

151. We find the Superintendent erred in concluding that Jane Blakely was not in a conflict of interest and did not breach her fiduciary obligations. We further find the Superintendent did not exercise her investigatory powers reasonably in relation to the allegation of conflict of interest and breach of fiduciary obligations by Jane Blakely. The law relating to the Superintendent's investigatory powers and duties is set out in Section E of this Decision.

152. Jane Blakely was a member of the Superannuation Board for the Police and Fire Plan. The exact date Ms. Blakely was appointed by the City to the Superannuation Board is unknown. However, we know that she was a Board member from at least 2015 to the fall of 2017 when the Superannuation Board was disbanded.

153. Ms. Blakely was also an employee of the City of Fredericton; she was the Director of Strategic Direction and Consulting. The Superintendent requested, in the course of her investigation, that the City provide information regarding Jane Blakely's employment. In response, the City provided City Council's April 14, 2014 resolution which revealed that Ms. Blakely had also been appointed as legal counsel for labour, employment and pension matters:

[69] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at par. 50.

<u>DIRECTOR OF STRATEGIC DIRECTION AND CONSULTING TO PROVIDE LEGAL ADVICE ON LABOUR, EMPLOYMENT AND PENSION ISSUES</u>

> ***BE IT RESOLVED THAT*** *the Council of the City of Fredericton hereby provides direction to the Chief Administrative Officer that Jane Blakely, Director of Strategic Direction and Consulting, being a practicing member of the Law Society of New Brunswick, shall provide legal advice and/or opinions to the Municipality and City Council, solely with respect to labour, employment and pension matters, unless a specific direction concerning the matter in question is made to the City Solicitor by the Chief Administrative Officer or by City Council.*
>
> *This direction shall continue until Jane Blakely, Director of Strategic Direction and Consulting ceases to be an employee of the City of Fredericton and/or practicing member of the Law Society of New Brunswick or until this resolution is rescinded by City Council whichever comes first[70].*

154. Paragraph 32 of the Superintendent's Decision sets out the whole of the evidence considered by her regarding the allegation of conflict of interest:

> *[32] […] Jane Blakely is the Director of Strategic Direction and Consulting with the City, and provides legal advice on labour, employment and pension issues to the City in that capacity. She attended Superannuation Board meetings in that capacity and as a City appointee to the Superannuation Board.*

155. The Superintendent concluded, regarding the allegation of conflict of interest:

> *[44] 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.*

156. In our view, Jane Blakely's conduct in being cooperative and not offering any resistance to the Superintendent's requests is not relevant to the determination of whether she was in a conflict of interest.

---

[70] Record, p. 783.

157. The Superintendent applied the two hats doctrine as set out in *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 and concluded that Jane Blakely was not in a conflict of interest. She concluded that Ms. Blakely's participation in Superannuation Board meetings fell squarely within the role an employer plays vis-à-vis a pension plan when it is not the plan administrator.

158. With respect, we find that the Superintendent erred in her interpretation of the law and the facts. *Imperial Oil* stands for the proposition that when an employer acts in the capacity of administrator, it is subject to the fiduciary duties imposed on plan administrators. However, when an employer acts in its capacity as employer, it does not owe plan members a fiduciary duty.

159. In the more recent decision of *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 65-66, the Supreme Court of Canada limits the application of the two hats doctrine. The Supreme Court states that when the employer is the plan administrator, it cannot disregard its fiduciary obligations to plan members and favour the competing interests of the corporation (as employer) on the basis that it is acting in its capacity as employer:

> *[65] […] 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.*
>
> *[66] 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.*

160. Our understanding is that the two hats doctrine applies only when the employer is also the plan administrator. The City of Fredericton was not the plan administrator during the time that Jane Blakely was a Superannuation Board member; it was solely the employer and plan sponsor. Consequently, the two hats doctrine was not applicable.

161. In our view, the Superintendent's conclusion regarding Ms. Blakely's participation in Superannuation Board meetings highlights the deficiencies of her investigation, which consisted solely in ascertaining

Ms. Blakely's position with the City. A reasonably thorough investigation would have uncovered the following: (1) the evidence of other Superannuation Board members in relation to Ms. Blakely's participation on the Superannuation Board; (2) Ms. Blakely's duties as a City employee and legal counsel to the City and how these conflicted with her duties as a Superannuation Board member; and (3) the minutes of Superannuation Board meetings. This evidence provides ample proof that Jane Blakely was in a conflict of interest and breaching her fiduciary obligations to the Police and Fire Plan members. We turn to our analysis of this evidence.

- *Evidence of Other Superannuation Board Members*

162. Blair Sullivan testified that the Superannuation Board had not passed a resolution giving Jane Blakely the authority to act on its behalf[71]. He added that Ms. Blakely also did not have the authority from the Board to communicate with or provide instructions to Mercer or David Hughes. Mr. Sullivan was of the view that Ms. Blakely's communications with Mercer were in her capacity as legal counsel to the City on pension matters. Mr. Sullivan further testified that Ms. Blakely was not appointed as legal counsel to advise the Superannuation Board[72]. We found Mr. Sullivan to be a credible witness and accept his uncontested evidence.

- *Jane Blakely's Duties*

163. We conclude that Ms. Blakely's obligations as the Director of Strategic Direction and Consulting for the City, which included providing legal advice on pension matters, conflicted with her fiduciary obligations as a member of the Superannuation Board. This conclusion is amply supported by the following evidence: (1) Ms. Blakely's role in responding to the Unions' complaints; (2) her interaction with Mercer; and (3) her role in implementing amendments to the Police and Fire Plan that were contrary to the best interests of the Plan members.

164. As legal counsel for the City on pension matters, Ms. Blakely was involved in responding to the Unions' complaints and legal proceedings. She represented the City as a client in the previous proceedings before this Tribunal dealing with the split of assets between the Police and Fire Plan and the City Plan. In those proceedings, the City took the position that the split of assets proposed by Mercer was reasonable. The going concern apportionment method employed in Mercer's report resulted in a transfer ratio of 47.9% for the Police and Fire Plan and 56.9% for the City Plan. The Tribunal found that the split proposed by Mercer was not in the best interests of the Police and Fire Plan members and ordered that the split be done using the solvency apportionment method[73]. We find that given the City's position in these proceedings, Ms. Blakely's representation of the City did not coincide with the best interests of the Police and Fire Plan members.

165. Ms. Blakely also assisted the City in responding to the Unions' July 31 and October 26, 2017 complaints, which culminated in this second appeal to the Tribunal. She prepared a memo to City

[71] Hearing transcript, p. 56.
[72] Hearing transcript, pp. 56 and 114-115.
[73] *Fredericton Police Association v. Superintendent of Pensions*, 2016 NBFCST 2.

Council regarding the Unions' July 31, 2017 letter[74]. In an October 27, 2017 email to Mercer and other City officials, Ms. Blakely wrote regarding the Unions' October 26, 2017 complaint letter: *"We have received the latest salvo from the solicitor for the unions. I spoke with Jennifer Sutherland-Green in the [Superintendent of Pension's] office earlier in the week and told her what had happened to date. They were expecting to hear something from the unions. We should have a chat about this once you've had a chance to read it."*[75]

166. We turn to Ms. Blakely's interaction with Mercer and David Hughes. Ms. Blakely arranged for City Council to have a presentation from Mr. Hughes on the discount rate employed in the initial 2016 actuarial valuation report for the Police and Fire Plan. City Council went on to approve the 6.2% discount rate employed in the 2016 actuarial valuation report at its May 23, 2017 Council Meeting and to direct Mercer to file the report with the Superintendent. As previously discussed, the City did not have the authority to approve the discount rate nor to direct Mercer to file the report as it was not the plan administrator.

167. Ms. Blakely knew or should have known that it was the Superannuation Board's responsibility to approve the discount rate for the 2016 actuarial valuation report. She also knew that the Board had revoked its approval of the 2016 actuarial valuation report by resolution dated April 25, 2017. There is no indication that she advised City Council of this fact. Ms. Blakely knew or should have known that City Council was usurping the Board's authority in approving the 2016 actuarial valuation report[76]. We find that Ms. Blakely facilitated the City's usurpation of the Superannuation Board's authority. This was a clear breach of Ms. Blakely's fiduciary obligations to the Police and Fire Plan.

168. Given her legal background in pension matters, Ms. Blakely knew or should have known that Mercer was obligated to report to and take direction from the Superannuation Board. She also knew that she was not authorized to communicate with or provide directions to Mercer on behalf of the Superannuation Board. The correspondence between Jane Blakely and Mercer reveals that Ms. Blakely instructed Mercer with respect to all aspects of the Police and Fire Plan, including the preparation of actuarial valuation reports, the implementation of a reduction in contributions to the Police and Fire Plan, the preparation of a response to the Unions' concerns and complaints, and the change in the plan administrator from the Board to City Council. We reiterate that Ms. Blakely did not have the authority from the Superannuation Board to communicate with Mercer. These interactions were in her capacity as a City employee. Below are some examples:

- She met with David Hughes to review his draft 2016 actuarial valuation report before it was presented to the Superannuation Board at the March 17, 2017 emergency meeting[77].

[74] Exhibit A-9, p. 18.
[75] Exhibit A-6, p. 144.
[76] Exhibit A-1, p. 60 and p. 69; Exhibit A-9, p. 186.
[77] Exhibit A-1, p. 7.

- Following receipt of Blair Sullivan's March 18, 2017 letter asking that the Board reconvene to reconsider Mercer's March 17, 2017 presentation, she wrote to Mercer to work on a response to Mr. Sullivan's letter[78].

- She discussed the amendments to the pension plan text to implement the reduction in contribution rates[79].

- She asked Mercer to provide an explanation from Canada Revenue Agency regarding the contribution exemption based on the current structure and composition of the plan[80].

- She provided comments on Mercer's draft presentation for the October 13, 2017 Superannuation Board pertaining to the revised 2016 actuarial valuation report[81].

- She provided the Unions' October 26, 2017 complaint letter to Mercer and invited him to discuss the complaint[82].

- On October 31, 2017, Ms. Blakely provided David Hughes with the Minutes of the Superannuation Board's October 13, 2017 meeting. In her email, she wrote: "I sent you some interesting reading on our favorite subject - the DB pension plan. […] David, now you can find out what happened when you left the room"[83]. This was shortly after Mercer's services had been terminated by the Superannuation Board.

- She discussed the amendments required to change the plan administrator from the Superannuation Board to the City and instructed Mercer to draft the amendment[84].

169. Ms. Blakely also assisted the City with the amendments to the Police and Fire Plan to reduce and then cap contribution rates. She communicated with Mercer in furtherance of the City's plan to implement a reduction in contribution rates. In her September 19, 2017 report to City Council, Ms. Blakely provides the following recommendation to City Council:

> ***RECOMMENDATION:***
>
> *It is recommended that staff be directed as follows: That the Superannuation Board be advised that:*
>
> 1. *Council contributions to the Police/Fire DB Pension Plan will not exceed 9% of payroll.*

[78] Exhibit A-1, p. 10 and p. 14.
[79] Exhibit A-2, p. 80.
[80] Exhibit A-3, p. 96.
[81] Exhibit A-10, p. 202.
[82] Exhibit A-6, p. 144.
[83] Exhibit A-6, pp. 122-123.
[84] Exhibit A-11, pp. 264-281.

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 Superboard should reflect 9% contributions by the City*[85] [Our emphasis].

170. This memo clearly illustrates how Ms. Blakely's duties as a City employee were incompatible with her fiduciary obligations to the Police and Fire Plan members. As is discussed later in these reasons, this was not in the best interest of Plan members. Ms. Blakely's recommendation that the Superannuation Board be advised that any change to the discount rate that would trigger the requirement for increased contributions be offset by benefit changes was not in the best interest of the Police and Fire Plan members.

- *Minutes of Superannuation Board Meetings*

171. The Minutes of the Superannuation Board meetings further illustrate the extent to which Ms. Blakely was in a conflict of interest and incapable of honoring her fiduciary obligations to the Police and Fire Plan members.

172. The renewal of Jane Blakely's term as a Board member was discussed at the July 20, 2016 Superannuation Board meeting. Blair Sullivan commented that the consensus from police and firefighter members was that Ms. Blakely should recuse herself from the Board until the appeal before the Court of Appeal (of the Tribunal's 2016 Decision) was concluded as she had represented the City on legal issues pertaining to the Police and Fire Plan. Mr. Sullivan indicated that police and firefighter members did not feel she could be impartial. Ms. Blakely's re-appointment was deferred, and the Board decided to seek a legal opinion as to whether it was in the Board's best interest to re-appoint Jane Blakely[86].

173. The issue of conflict of interest arose again at the October 18, 2016 Superannuation Board meeting. The Minutes captured the discussion as follows:

> *Blair Sullivan recalled that some other members of the Board had agreed with him that Ms. Blakely's membership might pose a conflict of interest. Councillor MacDermid noted that he had acknowledged the concerns expressed, and indicated that the Board was willing to explore whether or not her involvement actually did pose a conflict; hence the request for the City Solicitor to provide a legal opinion as to whether or not Ms. Blakely was in a position of conflict. (Councillor MacDermid advised that he had since been told by the City Solicitor that there is no legal opinion to be given on the matter.)*

[85] Exhibit A-9, pp. 188-189.
[86] Exhibit R-4, p. 522.

As it is possible that a board member could face a conflict of interest at one time or another, it is left to each individual to excuse themselves from those discussions. Councillor MacDermid did not believe that Ms. Blakely's involvement was in conflict, even if she had represented the City on other matters; those matters would have no bearing on the administration of this pension plan, which is what the Board is responsible to do[87].

174. The police and firefighter members of the Board reiterated their concerns regarding Jane Blakely's conflict of interest. Ultimately, the Board passed a resolution recommending that the City re-appoint Jane Blakely to the Board[88]

175. At the April 25, 2017 Superannuation Board Meeting, the issue of conflict of interest arose once again. The police and firefighter members of the Board presented a Notice of Motion seeking to "*exclude Jane Blakely from having any input into or participating in any decision involving the pension plan*." John MacDermid, a City councillor and the Chair of the Board, indicated that the Board was not able to exclude anyone; Board members were appointed by Council and could only be removed by Council. Mr. MacDermid indicated that the Notice of Motion needed to go to City Council. The Notice of Motion was ultimately approved by the Board[89]. There is no evidence before the Tribunal indicating that the issue of removal of Jane Blakely was brought to City Council.

176. The Minutes of the October 13, 2017 Superannuation Board meeting highlight Ms. Blakely's role in representing the City's interests at Board meetings. Following the presentation by Mercer of possible discount rates for the revised 2016 actuarial valuation report, the police and firefighter members brought a motion to terminate Mercer's services due to bias. The Minutes reflect Ms. Blakely's comments on the motion:

Jane Blakely […] cautioned that Council can amend the by-law, as required. There is no requirement under the Act that there be a Board with this constitution, to be the administrator of the Plan.

She went on to say that the Act states that there must be an administrator to file the Plan, and that the actuary reports to the administrator. If the administrator (which is what this Board is) chooses to not have an actuary for a period of time, it means we cannot comply with filing requirements, which means that Council, as the Plan sponsor, may feel the need to establish an administrator who can comply.

[…]

The administrator has responsibilities under the Act, and one of them is to comply with filing deadlines, and there are implications to not complying with the Act. A decision to immediately terminate Mercer in their role as actuary is going to make it impossible

---

[87] Exhibit R-5, p. 525.
[88] Exhibit R-5, pp. 525-528.
[89] Exhibit R-7, pp. 559-560.

for the Board to comply with the Act. The question becomes, what is the peril of not doing so? Changing actuary as of this moment, with no foreseeable replacement, is a very rash and foolhardy decision that will have lots of consequences[90].

177. We agree with Ms. Blakely's comments about an administrator's obligations under the *Pension Benefits Act*. However, the Superannuation Board members had the obligation to ensure that David Hughes was abiding by his fiduciary obligations[91]. That was clearly not the case. The motion to terminate Mercer's services was appropriate and necessary. In our view, it was more important to protect the interests of the Police and Fire Plan members than to abide by a filing deadline. We reiterate that an actuary that is breaching its fiduciary obligations cannot be permitted to continue providing actuarial services to the pension plan. The Board could have explained the reasons for terminating Mercer's services to the Superintendent. Had this been done, the Superintendent would have been justified in granting a further extension of the filing deadlines for the 2016 actuarial valuation report with any directions she deemed appropriate. In taking the above position, Ms. Blakely was preferring the City's interests in reducing contribution rates to the best interests of the Police and Fire Plan members.

178. The evidence strongly establishes that in her capacity as a Superannuation Board member, Ms. Blakely breached her fiduciary obligations to the Police and Fire Plan members under section 17 of the *Pension Benefits Act.*

179. We would add, although not specifically argued by the Unions, that Ms. Blakely's conflict of interest arose directly from the nature of her employment with the City. In our view, given the history of the conflict surrounding the Police and Fire Plan, which is set out in Part IV of these reasons, Ms. Blakely placed herself in an untenable situation by being both legal counsel to the City on pension matters and a Superannuation Board member. A lawyer's relationship with his or her client is fiduciary in nature and includes the duty to avoid conflicts of interest[92].

180. In her Decision, the Superintendent cites her November 10, 2017 letter to the Unions' solicitors where she wrote: "*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*". We fully agree with the Superintendent. However, the evidence clearly demonstrates that Jane Blakely was in a conflict of interest and preferred the City's interests to those of the Police and Fire Plan members.

181. We are cognizant that the City had the authority under the pension plan to appoint City representatives to the Superannuation Board[93]. This was not an unfettered authority. In our view, the

---

[90] Exhibit R-10, p. 575.
[91] *Pension Benefits Act,* s. 18.
[92] *Code of Professional Conduct*, section 3.4.
[93] Exhibit R-2, p. 68, s. 10.6.

City's authority to appoint a representative was conditional on that person being able to meet the fiduciary obligations of plan administrators set out in section 17 of the *Pension Benefits Act.* If the person could not honour these fiduciary obligations, he or she could not be appointed to the Board. We find that in fulfilling her obligations as a lawyer as well as her fiduciary obligations to the City, Ms. Blakely was in a material conflict of interest with respect to the interests of the Police and Fire Plan members. For this reason, she should not have been appointed to the Superannuation Board.

182. If we are wrong in our conclusion and the two hats doctrine is applicable, we are of the view that the result is the same. We cannot accept the Superintendent's conclusion that Jane Blakely's participation in Superannuation Board meetings fell within the role the City played vis-à-vis the Police and Fire Plan as plan sponsor and that, as such, she did not have fiduciary obligations to the Police and Fire Plan members. In our view, this conclusion results from an erroneous application of the two hats doctrine and ignores the crucial fact that Ms. Blakely was a Superannuation Board member. As such, Ms. Blakely was subject to a duty of loyalty and good faith and had the obligation to act solely in the best interests of the Police and Fire Plan members. She had the absolute duty to avoid any conflict of interest, regardless of whether the conflict was actual or perceived[94].

183. 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.

184. As recognized in *Sun Indalex*, as a plan administrator, Ms. Blakely was not permitted to disregard her fiduciary obligations to the Police and Fire Plan members and favour the competing interests of the City as employer on the basis that she was wearing the employer hat. We must look at the consequences of the City's decision, not its nature. The City's decision to reduce contributions clearly conflicted with the interests Ms. Blakely had a duty to preserve as a Superannuation Board member given the Plan's significant solvency deficit. We conclude there was a substantial risk that Ms. Blakely's representation of the Police and Fire Plan members was materially and adversely affected by her duties to the City[95]. Pursuant to *Sun Indalex,* a solution had to be found to ensure the Police and Fire Plan members' interests were taken care of. This was not done. Rather, when a majority of the Superannuation Board members expressed concern with the City's plan and dismissed Mercer due to bias, the City disbanded the Board and made itself the plan administrator.

---

[94] Ari N. Kaplan, *Pension Law*, Irwin Law, Toronto, 2006, at pp. 323 and 336.
[95] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at par. 201.

185. We conclude there were reasonable and probable grounds to conclude that the circumstances in paragraph 72(2)(c) of the *Pension Benefits Act* were met.

Remedy

186. We note that the Unions did not request any specific relief with respect to Jane Blakely.

187. In their Amended *Notices of Appeal*, the Unions request that the Tribunal order a full investigation into the actions of the City, the City managers and the City appointed members of the Superannuation Board to determine if there were violations of the *Pension Benefits Act.* The Unions request that this investigation be "done by an individual or individuals at arm's length from the Superintendent, as the Superintendent has already pre-judged the complaints". In the alternative, and in the event the Tribunal does not have the authority to order such an investigation, the Unions request that the Tribunal order that a full investigation be conducted by the Superintendent's office in accordance with sections 78.3 and 78.31 of the *Pension Benefits Act* and any other specific directions given to the Superintendent by the Tribunal. In our view, this request for relief is moot, given that the Superannuation Board is no longer in existence. We are also of the view that nothing more would be accomplished by ordering a full investigation given the relief ordered in this Decision.

G. Abolishment of the Superannuation Board

188. We find there is no merit to this ground of appeal.

189. The Unions submit that the Superintendent concluded, without investigation, that the City's decision to abolish the Superannuation Board was within its rights as plan sponsor. According to the Unions, the Superintendent did not consider that the City was usurping the Superannuation Board's authority and was the plan administrator in all but name even prior to the elimination of the Superannuation Board. According to the Unions, the Superintendent ignored the clear evidence that the City's decision to abolish the Superannuation Board was retaliation for the Superannuation Board's refusal to rubber stamp the 2016 valuation prepared by Mercer. The Unions contend that when it became the plan administrator, the City ignored the interests of the plan members and imposed the reduction in contributions to their detriment, thus violating its fiduciary obligations under section 17 of the Act.

190. The City contends that the Superintendent's decision was correct. They further argue that neither the Superintendent nor the Tribunal have the authority to prevent a plan amendment, including a change in administrator, if it complies with the terms of the pension plan text and the *Pension Benefits Act.* The City further contends that the Superintendent and Tribunal only have the authority to intervene in the plan sponsor's choice of administrator in the event of a plan wind-up or bankruptcy – neither of which is applicable in the present case. The City submits that the power to remove/replace an administrator is not within the scope of the Superintendent's power under section 72 of the *Pension Benefits Act.* In the alternative, the City submits that if the Superintendent and the Tribunal have the jurisdiction to order that the Superannuation Board be reinstated, such an order is not justified on the facts. Finally, the City submits that when the Superannuation Board terminated

Mercer's services, leaving itself without a plan actuary or a means of filing the actuarial reports required by the *Pension Benefits Act*, it was violating the terms of the plan and the *Act*, including its fiduciary duties to plan members. The City contends that as a result it was justified and necessary, to protect the interests of the Plan members, to remove the Superannuation Board as plan administrator.

191. In her decision, the Superintendent concluded that the plan amendment seeking to change the plan administrator complied with the *Pension Benefits Act.* The Superintendent also concluded that the City, as plan sponsor, was not subject to a fiduciary duty to the Plan members when exercising its power of amendment. The Superintendent contends that given the right hypothetical factual scenario and upon reasonable and probable grounds, such as if an employer had dismissed a Superannuation Board without designating a replacement, she would have the authority to make the order sought by the Appellants under subsection 72(1) further to paragraphs 72(2)(a), (b) or (c) of the *Pension Benefits Act.* The Superintendent contends that absent evidence confirming a breach of the *Pension Benefits Act,* which is the case in the within matter, she has no authority to order the City to re-establish the Superannuation Board.

192. Subsection 9(1) of the *Pension Benefits Act* requires every pension plan to have an administrator. If a plan does not have an administrator, it cannot be registered. Section 9 contemplates several different types of administrators for a pension plan, including a board or an employer.

193. The responsibility for the selection of an administrator is not specifically assigned to any one person or party under the *Pension Benefits Act.* In practice, the selection of the administrator is done by the plan sponsor.

194. Bylaw A-13, the pension plan text, grants the City, as the employer, the right to amend the pension plan as follows:

> *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*[96]*.*

195. The ability of the City to amend the Police and Fire Plan was subject to two limitations. First, it was subject to section 12 of the *Pension Benefits Act* which sets out when an amendment is void:

> ***Effect of certain amendments to pension plan***
>
> *12(1) An amendment to a pension plan is void if the amendment purports to reduce*

[96] Exhibit R-2, p. 496-497, s. 11.1.

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment,

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan, or

(c) the amount or the commuted value of an ancillary benefit that a member or former member is receiving or for which a member has satisfied all eligibility conditions at the effective date of the amendment.

196. The second limitation, which is set out in clause 11.2 of the Police and Fire Plan, essentially replicates section 12 of the *Pension Benefits Act:*

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[97].

197. Section 11 of the *Pension Benefits Act* stipulates that it is the plan administrator that submits an application for an amendment to the Superintendent. An amendment is not effective until an application for the registration of the amendment is made in accordance with the *Act* and its regulations. If the Superintendent accepts the registration of the amendment, she issues a notice to the plan administrator. However, registration of an amendment is not proof that the plan or the amendment complies with the *Act* and the regulations[98].

198. If the Superintendent refuses to register an amendment or revokes the registration of an amendment, the refusal or revocation operates to terminate the amendment as of the date specified by the Superintendent[99].

199. We agree with the Superintendent's conclusion that the City did not have fiduciary obligations when it amended the Plan. An employer that is solely the plan sponsor does not owe a fiduciary duty to plan members when amending the pension plan, nor is it acting as trustee[100]. In addition, the Police and Fire Plan stipulates that the employer is free to prefer its interest to that of any beneficiary. Clause 10.5.1 provides:

---

[97] Exhibit R-2, pp. 496-497.
[98] *Pension Benefits Act,* s. 13(2).
[99] *Pension Benefits Act*, s. 13(4).
[100] *Lloyd v Imperial Oil Limited,* 2008 ABQB 379.

> *10.5.1 […] Where any reference in the Plan is made to any action to be taken, consent, approval or opinion to be given, discretion or decision to be exercised by the Employer, the Employer may prefer its interest to that of any other beneficiary or class of beneficiaries in the Plan*[101]*.*

200. The law is also clear that employees – generally speaking – have no right to participate in the administration of a pension plan, unless that right is set out in the pension plan or a collective bargaining agreement[102]. In the within matter, the Unions do not have any standing or authority in relation to the administration of the Police and Fire Plan.

201. We agree with the Superintendent that there was no evidence that the amendment seeking to change the plan administrator to the City Council was void or that the pension plan with the amendment would cease to comply with the *Pension Benefits Act* and the regulations. The pertinent evidence is as follows.

202. At the October 13, 2017 Superannuation Board meeting, the Police and Fire Plan members of the Board brought a motion to terminate Mercer's services effective immediately as they felt he was biased. Jane Blakely cautioned that the City could amend the pension plan to change the administrator of the Plan. John MacDermid, who was the Chair of the Board and a City Councillor, cautioned that moving forward with the decision to terminate Mercer as the actuary would "*put the City in a terrible bind, and that ultimately the decision to terminate would be brought to Council*"[103]. We note, parenthetically, that the City, as plan sponsor, did not have the authority to terminate the plan actuary's services; that authority belonged to the Superannuation Board as the plan administrator[104].

203. Immediately after the Superannuation Board terminated Mercer's services, the City took steps to disband the Superannuation Board. A couple of hours after the October 13, 2017 meeting, Jane Blakely was in contact with David Hughes to obtain precedents for an employer administrator model[105].

204. On October 16, 2017, the City released a press release indicating that the Superannuation Board had voted to remove its plan actuary, which put the plan at risk of not being able to meet its legislative and regulatory requirements. The press release indicated that City Council would vote on a bylaw amendment at its next regular Council meeting that would change the plan administrator to the City Council[106].

205. On October 23, 2017, City Council adopted a resolution approving the change of the administrator

---

[101] Exhibit R-2, p. 68.
[102] *Buschau v. Rogers Communications Inc.,* 2006 SCC 28.
[103] Exhibit R-10, p. 574.
[104] *Pension Benefits Act*, s. 18; Exhibit R-2, p. 67, s. 10.1.1.
[105] Exhibit A-11, p. 236-281.
[106] Exhibit A-11, p. 231.

model to the employer model[107]. That same day, City Council sent a memo to the Superannuation Board informing it that "*effective immediately, City Council has removed the authority to act as plan administrator of the Plan from the Board. The responsibility for the normal operation of the Plan will be conferred upon City Council*."[108]

206. The Unions contend that the removal of the Superannuation Board was illegal as it was done by resolution of City Council, rather than as a formal amendment pursuant to section 11 of the *Pension Benefits Act.* The Superintendent found that the situation leading to the Appellants' concerns was only temporary and resulted from the time required for the City of Fredericton's process for amendment of the pension plan. Because the pension plan is a City by-law, the City must first amend its own by-law and then file an application to amend the pension plan with the Superintendent. We agree with the Superintendent that the Appellants' concerns were only temporary.

207. On December 15, 2017, the City filed an amendment with the Superintendent seeking to change the administrator to the City Council with an effective date of November 27, 2017. The Superintendent accepted the amendment on May 7, 2018[109].

208. We conclude that none of the circumstances in section 12 of the *Pension Benefits Act* are present. The change in the plan administrator from the Superannuation Board to City Council had no impact on the pension benefits, the commuted value of a pension or a deferred pension accrued under the pension plan or the amount of the commuted value of an ancillary benefit. In addition, there is no evidence that the pension plan with the amendment ceased to comply with the *Pension Benefits Act* and the regulations.

209. That brings us to whether the Superintendent could or should have ordered the reinstatement of the Superannuation Board pursuant to section 72 of the *Pension Benefits Act.* We agree with the Superintendent's contention that given the right hypothetical factual scenario and upon reasonable and probable grounds, she would have the authority to make the order sought by the Appellants under subsection 72(1) further to paragraphs 72(2)(a), (b) or (c) of the *Pension Benefits Act.* Paragraphs 72(2)(a), (b) and (c), stipulate that the Superintendent can make an order in the following circumstances:

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

---

[107] Record, p. 823.
[108] Exhibit A-11, p. 226.
[109] Record, p. 70.

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

210. While we are sympathetic to the Unions' allegation that the change in administrator appears to have been done in retaliation for the Superannuation Board's refusal to approve Mercer's revised 2016 actuarial valuation report and the decrease in contribution rates, the Unions have provided no caselaw indicating that the Superintendent (and this Tribunal) can consider motive in considering an amendment to a pension plan.

211. We conclude that the Unions have not identified a breach of the *Pension Benefits Act* by the City as plan sponsor in relation to the change in the plan administrator. We conclude that the amendment changing the plan administrator to City Council was a valid amendment and was properly registered with the Superintendent.

212. The Unions also allege that after the City became the plan administrator, it breached its fiduciary obligations to the Police and Fire Plan members. According to the Unions, as plan administrator, the City ignored the interests of the plan members and imposed the reduction in contributions to their detriment, which was a violation of the City's fiduciary obligations under section 17 of the *Pension Benefits Act.* We will not deal with this argument. It was not raised as a ground of appeal in the Unions' *Notices of Appeal,* nor the restated grounds of appeal in their *Statement of Position.* Finally, the Unions did not submit any evidence establishing that the City, as plan administrator, was breaching its fiduciary obligations.

H. Decrease in Contribution Rates

213. We find the Superintendent should have refused to register the amendment decreasing the contribution rates for the Police and Fire Plan.

214. The Appellants contend that the Superintendent did not address the contribution exemption issue in her decision, even though it was specifically mentioned in their complaint. The Appellants contend that the intention in creating the Police and Fire Plan was to continue the *status quo* from the Old Plan, which included an exemption from the 9% contribution limit. According to the Appellants, had the Superintendent appropriately considered this issue, she would not have allowed the refund in overpayment of contributions without first requiring the City to apply for the CRA exemption.

215. The City contends that the CRA would not have granted the contribution exemption for contribution rates in the range of 11%. The City states that as the plan administrator it was entitled to rely on the advice of the professionals it engages, including the plan actuary. Mercer had advised that it was unlikely the exemption would be granted. The City also contends that neither the Superintendent nor the Tribunal have the authority under the *Pension Benefits Act* to order an administrator to apply for a CRA exemption. Finally, the City contends that in seeking to impose the old contribution rates, the Appellants are asking to import a defined contribution into their defined benefit plan, which is not permissible at law.

216. In her decision, the Superintendent did not specifically address the issue of the CRA exemption. She found there was "no justifiable reason to withhold approval of the reports" for 2013-2017 as her office found that all utilized assumptions and discount rates were within acceptable ranges for the Plan. She concluded that the reports complied with the *Pension Benefits Act*[110]. The Superintendent contends in her *Statement of Position* that reducing the contribution rate for the pension plan to 9% was a legal requirement given Mercer's analysis that there was no chance the CRA exemption would be granted. The Superintendent states that to apply to the CRA for an exemption to allow higher contribution rates than those generally allowed under the *Income Tax Act* is squarely a plan administrator or plan sponsor activity. There is no statutory requirement for a plan administrator to apply for an exemption from CRA. The Superintendent submits that a decision by the plan administrator not to apply for a CRA exemption cannot be considered a failure to administer the plan according to the legislation or pension plan nor a violation of the *Pension Benefits Act*, and as such she did not have the authority to make a remedial order under section 72 of the *Pension Benefits Act.*

217. This issue is multi-faceted. We will analyze it in three sections: the authority to amend a pension plan, the authority to set contribution rates, and the authority to reject a plan amendment and direct an application for a CRA exemption.

218. As previously discussed, clause 11.1 of the pension plan text grants the City, as the employer, the authority to amend the pension plan. This includes amending the member and employer contribution rates set out in clauses 4.1 and 4.2 respectively of the pension plan text. However, this authority is limited by section 12 of the *Pension Benefits Act* and clause 11.2 of the pension plan text. Those provisions stipulate that an amendment is void if it reduces the amount of benefits the members, former members, retired members, their spouses and their beneficiaries are entitled to under the plan up to the date of the amendment.

219. We turn to the authority to set contribution rates. The *Pension Benefits Act* is silent on who sets the contribution rates for a pension plan. In practice, this is done by the plan sponsor. However, the plan administrator has fiduciary obligations to the plan members and must ensure that the plan is funded in a manner that provides funding sufficient to provide the pension benefits under the pension plan[111]. Clause 10.2.2 of the pension plan text stipulates that the plan administrator assumes the administrative duties for the pension plan, including the determination of acceptable funding levels[112]. In addition, clause 4.2.2 provides the administrator the following authority to increase contributions:

> *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*

[110] Record, p. 147.
[111] *Pension Benefits Act,* s. 49.
[112] Exhibit R-2, p. 67.

> *Administrator may increase the contributions under paragraphs 4.1.1 and 4.2.1 so that contributions are sufficient.*

220. We therefore conclude that the employer's ability to set contribution rates is limited by the administrator's duty to ensure the best interests of plan members.

221. The setting of contribution rates is also subject to subsection 8503 (4) of the *Income Tax Regulations* which limits employee contributions to a maximum of 9% of earnings. Since the City and employee contributions to the Police and Fire Plan are equal, this limits total contributions to the Plan to a maximum of 18% of pensionable earnings.

222. However, subsection 8503 (5) of the *Income Tax Regulations* allows pension plans to seek an exemption from the 9% employee contribution limit. If certain conditions are met, the Minister has the discretion to grant the exemption:

> *8503(5) The Minister may waive the conditions in paragraph (4)(a) where member contributions under a defined benefit provision of a pension plan are determined in a manner acceptable to the Minister and it is reasonable to expect that, on a long-term basis, the aggregate of the regular current service contributions made under the provision by all members will not exceed ½ of the amount that is required to fund the aggregate benefits in respect of which those contributions are made.*

223. In simple terms, the test for obtaining an exemption is that employee contributions cannot, on the long-term basis, exceed 50% of the cost of benefits. The CRA's Actuarial Bulletin No. 3 further clarifies that "*We will grant the exemption if this ratio is below 50%, and the conditions in subsections 8503(5) of the Regulations are met. This approval will be granted for a four-year period after the date of the actuarial valuation report. If the ratio is over 50%, more information and analysis may be needed to make a final determination.*"

224. There is no express statutory requirement in the *Pension Benefits Act* for a plan administrator or plan sponsor to apply for a CRA exemption.

225. We turn now to the evidence. Before the Police and Fire Plan was created, the Old Plan benefited from a CRA exemption allowing contributions for police and firefighters to exceed 9% of their earnings. Prior to the split, the police contributed 9.54% of earnings up to $5,000 and 11.14% of earnings in excess of $5,000. Firefighters contributed 9.59% of earnings up to $5,000 and 11.19% of earnings in excess of $5,000. While the contribution rates were well in excess of the 9% maximum, the Old Plan was able to obtain an exemption because the higher contribution rates for police and fire fighters were offset by lower contribution rates for the remaining City employees ensuring that the contribution levels of the employees of the Old Plan as a whole did not exceed the 50% threshold outlined in the *Income Tax Regulations.*

226. When the Police and Fire Plan was created in 2013, the contribution rates remained at the same levels as before the split[113]. However, a CRA exemption was not obtained at that time. It appears that contributions were simply maintained at the old rate while the previous appeal to this Tribunal and the subsequent appeal to the Court of Appeal were ongoing. Given that a CRA exemption had not been obtained, contributions in excess of 9% were technically not permitted.

227. The Appellants argue that the intention in creating the Police and Fire Plan was to continue the *status quo* from the Old Plan, which included maintaining contribution rates at approximately 11% and obtaining a CRA exemption for contributions in excess of 9%. We could find no concrete evidence of this intention.

228. On December 20, 2016, David Hughes wrote to the Superintendent to advise of Mercer's proposed approach for implementing the Tribunal's 2016 decision. Mr. Hughes indicated that using the solvency valuation method as dictated by the Tribunal would result in the initial funded ratio for the Police and Fire Plan being higher by approximately $5.5 million. As such, all subsequent actuarial valuations would show a higher funded ratio and the minimum employee/employer contributions would be lower as the contribution requirements would be lower. He suggested that the actuarial valuation reports for 2013, 2014 and 2015 be re-filed with lower contribution rates and that contributions paid in excess of the new proposed contribution rates be refunded. He estimated that the contribution rates would be the following: 10.19% of pensionable earnings for the 2013 actuarial valuation report; 9.30% of pensionable earnings for the 2014 actuarial valuation report; and 9.57% of pensionable earnings for the 2015 actuarial valuation report[114]. The Superintendent agreed with the proposed approach[115].

229. At the outset, we question the logic of reducing contribution rates on the basis that the funded ratio increased by $5.5 million. This completely ignores the fact that the Police and Fire Plan had a significant solvency deficit that would require remedying at some point.

230. Mr. Hughes presented his proposal to reduce contribution rates to the Superannuation Board at its March 17, 2017 meeting. Blair Sullivan questioned the logic of refunding the over-payment in contributions. Mr. Hughes responded that the CRA restricts contributions to 9% and the Old Plan was exempt from this rule. He added that the Police and Fire Plan was considered a new plan and did not meet the CRA test[116].

231. At the April 25, 2017 Superannuation Board meeting, the Police and Fire members requested that Mr. Hughes make enquiries of the Superintendent of Pensions and Canada Revenue Agency as to whether an exemption was necessary to continue contributions of approximately 11% and to determine the feasibility of applying for an exemption, if required. The Chair of the Board stated that

[113] Exhibit R-5, p. 527.
[114] Record, pp. 689-690.
[115] Record, p. 693.
[116] Exhibit R-6, pp. 529-530.

the question had been put to Mercer and he responded that it was not possible[117]. The police and firefighter members of the Board were concerned about the decrease in contribution rates and how this would affect the funded status of the Plan.

232. At the request of the City, Mr. Hughes prepared a draft letter dated June 28, 2017, for illustration purposes only, to demonstrate that if contribution rates were maintained at the *status quo*, they would not pass the CRA 50% ratio test. Mercer only made the calculations for 2013. Employing these contribution rates, Mercer arrived at a ratio of 53.7%, which is over the 50% ratio test prescribed by the CRA. This letter was not sent to the CRA; its sole purpose was to demonstrate to the police and firefighter members of the Board that the waiver could not be obtained[118].

233. However, Mercer did not explain that the Minister retained the discretion to grant a waiver pursuant to subsection 8503(5) of the *Income Tax Regulations* if the ratio exceeded 50%. In our view, this again demonstrates that Mr. Hughes was preferring the City's interests to those of the Police and Fire Plan members. We do not accept Mr. Hughes' statement that the CRA would not have granted the waiver.

234. On July 11, 2017, David Hughes filed the revised actuarial valuation reports for 2013, 2014 and 2015 and the actuarial valuation report for 2016 with the Superintendent. The contribution rates were:

For the fire fighters:

- Between April 1, 2013 and March 31, 2014: 8.95% of earnings up to $5,000 and 10.44%
- of earnings in excess of $5,000;
- Between April 1, 2014 and March 31, 2015: 8.26% of earnings up to $5,000 and 9.63%
- of earnings in excess of $5,000;
- Between April 1, 2015 and March 31, 2016: 8.46% of earnings up to $5,000 and 9.87%
- of earnings in excess of $5,000; and
- From April 1, 2016 onwards: 9.00% of earnings.

And for the Police:

- Between April 1, 2013 and March 31, 2014: 8.90% of earnings up to $5,000 and 10.39%
- of earnings in excess of $5,000;
- Between April 1, 2014 and March 31, 2015: 8.21% of earnings up to $5,000 and 9.58%
- of earnings in excess of $5,000;
- Between April 1, 2015 and March 31, 2016: 8.41% of earnings up to $5,000 and 9.82%
- of earnings in excess of $5,000; and
- From April 1, 2016 onwards: 9.00% of earnings.

235. Given that the contribution rates for 2013 to 2015 were over the 9% contribution limit, Mercer submitted an exemption application to the CRA on July 19, 2017. The application showed that on a

[117] Exhibit R-7, p. 554.
[118] Record, pp. 668-670.

long-term basis the ratio of the aggregate of member contributions (for past and future service) to the present value of pension benefits earned by members (for past and future service) was equal to 48.6%, which is below the 50% threshold for automatic CRA approval[119]. The CRA granted the exemption on August 25, 2017, for a four-year period commencing on April 1, 2013[120]. We have no evidence indicating that an exemption has been obtained since April 1, 2017.

236. As we understand this ground of appeal, the Unions argue that the Superintendent should have ordered the plan sponsor or administrator to apply for an exemption with contribution rates as they existed under the Old Plan.

237. Upon review of these actuarial valuation reports, the Superintendent raised concerns in an August 9, 2017 email that an amendment to the pension plan had not been submitted to her office for the decrease in the contribution rates[121].

238. On August 20, 2017, the City submitted an application to amend clause 4.1.1 of the pension plan text dealing with member contributions. The amendment sought to decrease member contribution rates as set out in the actuarial valuation reports prepared by Mercer. The proposed amendment had an effective date of July 10, 2017. The City of Fredericton is indicated as being the administrator of the plan on *Form 2 – Application for Registration of Amendment to Pension Plan*. The form was signed by the Mayor of the City of Fredericton, who was not a member of the Superannuation Board, and the Assistant City Clerk, Melanie McDonald. Ms. McDonald also signed a *Declaration* solemnly declaring that she was authorized to make the application on behalf of the administrator of the plan, which she identified as the Board of Administrators[122].

239. 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.

240. 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

[119] Exhibit R-8, p. 567.
[120] Exhibit R-9, p. 568.
[121] Record, pp. 769-770.
[122] Record, pp. 5-7.

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).

241. A review of the revised actuarial valuation reports for 2013 through 2016 and the actuarial valuation report for 2017 prepared by Mercer reveals that the plan had a significant solvency deficit (wind-up excess shortfall) that increased dramatically from 2014 to 2015:

	2013	2014	2015	2016	2017
Funding Shortfall	$5,783,000	$6,250,000	$6,211,000	$2,557,000	$2,286,000
Wind-up excess shortfall	$35,065,000	$25,814,000	$65,189,000	$58,442,000	$56,442,000
Funded ratio	88.1%	88.4%	91.1%	96.1%	96.9%

242. We are mindful that a deficit position reflects only a snapshot of a fund at a specific point in time. Since a pension plan is usually viewed as an ongoing instrument, time and sound actuarial advice are supposed to allow for secure funding. Although the existence of a deficit is not an anomaly since actuaries cannot perfectly predict the future, in an ideal world, each plan would always be funded to the exact amount required to discharge its obligations[123].

243. 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[124]. 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[125]. 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.

244. 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.

245. We accept that a refund in contributions was permitted by clause 4.3.2 of the pension plan text which provides:

[123] *Buschau v. Rogers Communications Inc.,* 2006 SCC 28 at par. 15.
[124] Record, p. 786.
[125] Record, pp. 769-770.

> *4.3.2 Notwithstanding anything else in this Section, any amount contributed under paragraphs 4.1.1 or 4.2.1 on or after January 01, 1992 may be refunded to the Member, Employer or Participating Employer as applicable, with the approval of the Superintendent of Pensions of New Brunswick, where such action is required to avoid revocation of registration of the Plan under the Income Tax Act.*

246. However, there was no evidence before the Tribunal that the Plan would have been revoked if the refund of contributions was not made.

247. Clearly, higher contribution rates would have decreased the solvency deficit at a faster pace and improved the overall health of the Plan.

248. In an e-mail to the City, David Hughes outlined the risks of reducing contribution rates for the Police and Fire Plan. He stated:

> *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.*
>
> *[...]*
>
> *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 a 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*[126]*.*

249. 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[127]. Mr. George explained that typically in a defined benefit plan, the contribution rate is adjusted to ensure the benefits are

[126] Exhibit A-1, p. 14.
[127] Hearing transcript, p. 462; Exhibit A-24, p. 607.

maintained. Mr. George explained that *"[w]ithout the exemption, the Plan will operate like a shared-risk 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."*[128] 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.

250. 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.

251. 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).

252. 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.

253. We understand that the Unions wanted to maintain the *status quo* from the Old Plan including maintaining the contribution rates. We agree with the City that the Unions are attempting to obtain a guarantee not only to the benefits they will ultimately receive but also a defined level of contributions. As explained in *Baxter v Ontario (Superintendent of Financial Services),* (2004) 192 OAC 293 (Sup. Ct. Jus), this is impermissible. However, we note that by capping contribution rates at 9% since 2016, the City was essentially doing the same thing. We reiterate that in a defined benefit plan, contribution rates are adjusted to ensure the defined benefit.

[128] Exhibit A-24, p. 607.

254. According to the City and the Superintendent, a CRA exemption request based on the contribution rates that existed under the Old Plan had no chance of success. The City and the Superintendent's position is premised on an "expert" report prepared by David Hughes and Doug Brake of Mercer. At the hearing, the City decided not to call Mr. Hughes to testify. As a result, he was not qualified as an expert and the report was not entered into evidence.

255. We have no concrete evidence that the CRA would not have granted the waiver based on the contribution rates that existed under the Old Plan. All we have are the City's and Superintendent's assertions that there was no chance the CRA would have granted the exemption.

256. We again accept the uncontested evidence of Brendan George. He explained that even if the ratio is over 50%, the Minister retains the discretion to grant the exemption. In these circumstances, the Minister may request additional information and analysis. This is consistent with the CRA's Actuarial Bulletin No. 3 that states "*If a ratio is over 50%, more information and analysis may be needed to make a final determination.*"

257. Mr. George also points out that Mercer's conclusion that the exemption would not be granted based on the contribution rates employed in the Old Plan was based solely on an analysis of the contribution rates for 2013. Mercer did not perform an analysis to determine whether the 50% would be exceeded on a long-term basis, which is the test set out in subsection 8503(3) of the *Income Tax Regulations.* Mr. George indicates that Mercer could have submitted the exemption request for contributions in the range of 11% to CRA with more information and analysis to justify the higher ratio. Mr. George admitted that he does not know whether CRA would have granted the exemption. He testified at the hearing that "*there is the opportunity to engage with CRA and convince them that even though the ratio is above 50, they should still provide an exemption based on the 11 percent contribution rates.*"[129]

258. Mr. George explained that the ratio is very sensitive and can easily be adjusted by changing the contribution rate, the discount rate or the margin for adverse deviation. Generally speaking, the higher the contribution rate, the higher the ratio[130]. He added:

> *[…] if you've got to redo a calculation that is very sensitive every four years to the assumptions and what the contributions are at that point, at some points you'll be above 50 and some points you'll be below 50. It is a sensitive calculation. You're not going to always be below 50 percent. And if you're above 50 and you want to get a exemption, my opinion is you need to go to CRA and explain to them that this is a point in time. You're going to make us redo this every four years. At this point we're above 50, if we do it in four years time contributions will be different, we'll be below 50. So, that doesn't guarantee them agreeing but by definition the plan is set out to be 50/50*

[129] Hearing transcript, p. 465.
[130] Hearing transcript, pp. 465-467.

cost sharing which is ... their main concern is that the members don't contribute more than 50 and contribute a very high percentage[131].

259. Mr. George was of the opinion that the CRA exemption could have been obtained, albeit perhaps not with the same levels as under the Old Plan. He stated the following in his expert report:

- Mercer's analysis that an exemption could not be obtained with the contribution levels from the Old Plan, producing a ratio of 53.7%, was based on the 2013 actuarial valuation which used a discount rate of 5.95% and a margin for adverse deviation of 0.4%. Using a lower discount rate would have resulted in the ratio being closer to 50%. Mr. George also indicated that lowering the discount rate would likely not have been sufficient on its own to reduce the ratio below 50%.

- Reducing the contribution rates of 11.19% and 11.14% by approximately 1.4-1.5% would have resulted in a ratio of about 50%. This would have resulted in member contribution rates that were still significantly higher than 9%.

- A combination of a slight increase in the margin for adverse deviation used with the discount rate accompanied by a slight reduction to contribution rates would likely have resulted in a ratio below 50% and the CRA's approval of an exemption to the 9% member contribution limit[132].

260. Mr. George opined that the argument could be made to the CRA that by design the Plan should meet the requirements of the 50% ratio over time because the plan text stipulates that employer contributions are equal to member contributions. Mr. George also indicated that on the Police and Fire Plan's inception date of April 1, 2013, the Plan did not meet the 50% test of subsection 8503(5), since the Plan had a going-concern funding ratio of 88.1% and the members were required to fund 50% of the deficit payments. Over time however, the deficit should be eliminated, allowing for a reduction in member contributions.

261. On cross-examination, Mr. George admitted that he was not aware of CRA granting an exemption where the ratio was 53.7%. He qualified this by saying that the plans he had been involved with had a ratio below 50% and therefore he had never had to provide the extra information and analysis that is required when the ratio is above 50%[133].

262. We accept Mr. George's opinion that a CRA exemption could have been obtained for higher contribution rates than those set out in the revised actuarial valuation reports for 2013 through 2016. We reiterate that according to Mr. George, capping contribution rates at 9% from 2016 onward will result in benefit reductions. We conclude that the Superintendent should have refused the capping of contribution rates at 9% and directed the plan administrator or plan sponsor to apply for a CRA exemption.

---

[131] Hearing transcript, pp. 467-468.
[132] Exhibit A-24, p. 607.
[133] Hearing transcript, pp. 510-511.

263. That being said, we previously concluded that Mercer and David Hughes must be removed as the plan actuaries and that the new plan actuary must resubmit all actuarial valuation reports from 2013 to present. It goes without saying that in doing so, the independent actuary should conduct an analysis to determine the appropriate funding levels for the Police and Fire Plan from its inception in 2013 and determine whether a CRA exemption is required.

VI. CONCLUSION AND ORDER

264. The Superintendent's decision is vacated, except for her decision in relation to the abolition of the Superannuation Board, which is affirmed. We make the following order pursuant to paragraph 76(1)(b) of the *Pension Benefits Act*:

a) Mercer and David Hughes are removed as the plan actuaries for the Police and Fire Plan;

b) The plan administrator for the Police and Fire Plan must retain a new actuary to provide independent and impartial actuarial services for the Police and Fire Plan;

c) The revised 2016 actuarial valuation report is rejected;

d) The new actuary must conduct an analysis to determine the appropriate funding levels for the Police and Fire Plan from its inception in 2013 and determine whether a CRA exemption is required;

e) The actuarial valuation reports for 2013 to present must be redone by the new actuary and submitted to the Superintendent of Pensions.

DATED this 27th day of August 2020.

Judith Keating

Judith Keating, Q.C. Tribunal Chair

Raoul Boudreau

Raoul Boudreau, Vice-Chair of the Tribunal

Mélanie McGrath

Mélanie McGrath, Tribunal Member