IN THE MATTER OF THE ARBITRATION OF THE POLICY GRIEVANCE
DATED MAY 12, 2014, PURSUANT TO
THE COLLECTIVE BARGAINING AGREEMENT

BETWEEN:

THE CITY OF SASKATOON
(the "Employer" or the "City")

AND:

THE AMALGAMATED TRANSIT UNION, LOCAL NO. 615
(the "Union")

BEFORE:	William F.J. Hood, Q.C., Chairperson Carolyn Jones, Union Nominee Pam Haidenger-Bains, Q. C., Employer Nominee
APPEARING FOR THE EMPLOYER:	Christine Bogad and Jon Danyliw
APPEARING FOR THE UNION:	Gary Bainbridge
HEARING DATE:	April 25 and 26, 2016 Saskatoon, Saskatchewan

AWARD

I. INTRODUCTION

1. The substantive issue in this case involves the interpretation of Article A21 in the Collective Agreement between the parties covering the period from January 1, 2010 to December 31, 2012 (the "Collective Agreement"). Article A21 states as follows:

> **ARTICLE A21 SUPERANNUATION**
>
> Superannuation Plan negotiations shall take place from time to time which may be separate from negotiations for the Collective Agreement. The appropriate forum for such negotiations shall be as agreed between the parties and may involve other members of the Pension Administration Board.

2. The City made changes to the Union members' Superannuation Plan (the "Pension Plan" or the "Plan"). The Union claims the Collective Agreement requires the City and the Union to negotiate and reach an agreement on changes to the Pension Plan. The Union did not agree to such changes. The Union claims the City's unilateral changes to the Pension Plan are a violation of the Collective Agreement.

3. The changes increased contribution rates for both the City and the members of the Union, and permitted the City's costs, up to $250,000 annually, associated with the administration of the Pension Plan, be paid from the Pension Plan.

4. The issue in this Grievance is the validity of the change permitting the City to recover its costs from the Pension Plan. The increase in the contribution rates is the subject of another grievance between the parties that is yet to be determined.

5. The members of the Pension Plan are employees in eight unions, one of which is the Union, and two employee associations. Seven unions and the two employee associations agreed to changes to the Pension Plan. The Union did not.

6. The Employer is of the view that it has the right to make the alleged changes to the Pension Plan and enforce the same insofar as the Union is concerned.

7. In addition to this substantive issue, the Employer raises three objections to the arbitrability of this Grievance.

8. First, the Employer argues that the Pension Plan is not incorporated by reference into the Collective Agreement and the dispute is not the proper subject matter to be resolved by arbitration.

9. Second, the Employer submits this Grievance is premature. The Grievance was filed by the Union on May 12, 2014. The City did not approve the changes to the Pension Plan until September 22, 2014, with the enactment by City Council of Bylaw 9224. The City argues that no changes occurred prior to September 22, 2014, and there was no issue to grieve on May 12, 2014. Therefore, the City submits the Grievance is not arbitrable.

10. Third, the City claims the Saskatchewan Labour Board has conclusively determined this issue, reached a final decision, and provided a remedy. Essentially, the City claims the Union has

already been successful and received a remedy for unilateral pension changes and is now trying to re-litigate a matter already determined by the Labour Board. The City claims the Union's Grievance amounts to an abuse of process and should be barred due to issue estoppel and *res judicata*.

II. THE FACTS

11. The Union called one witness, Jim Yakubowski, President of the Union. Mr. Yakubowski is an operator in transit and commenced employment with the City in 2001. For the past four and a half years he has been President of the Union. Prior to this he was Vice-President for three years and the operators' representative for six years.

12. The Employer elected to call no witnesses.

13. For the most part, the facts are not in dispute. What is in dispute is the twist each party gives to the facts and the application of the Collective Agreement to such facts.

14. Mr. Yakubowski testified that until this Grievance, there were no changes to the Pension Plan without the Union's consent.

A. Background

15. The Union found it useful to review the history of the Pension Plan.

16. Mr. Yakubowski had some personal knowledge with respect to this history. For the period of time prior to his involvement with the Union, he relied upon the business records of the Union and the documents contained in such records between the Union and the City.

17. Mr. Yakubowski testified that the Pension Plan was first established in 1964 for all employees of the City, except for those in fire and police.

1. The Early Years

18. The Pension Plan is and has always been a defined benefit plan. The City's practice is to codify the Pension Plan through the enactment of a Bylaw by City Council.

19. The initial Pension Plan is in Bylaw No. 4324, enacted on June 22, 1964. This plan was described as the superannuation plan for the City of Saskatoon employees not covered by the Police and Fire Departments' Superannuation Plans.

20. The Police and Fire Superannuation Plans are trusteed plans. The Pension Plan initially was not a trusteed plan. Rather, the Pension Administration Board oversaw the administration of the Pension Plan.

21. On July 4th, 1983 the Pension Plan referred to in Bylaw No. 4324 was repealed and replaced with the Pension Plan in Bylaw No. 6321. Bylaw No. 6321 consolidated the initial plan with amendments made from time to time and incorporated amendments required to comply with *The Pension Benefits Act* (Saskatchewan).

2. Collective Agreements

22. The collective agreement between the parties covering the period January 1, 1991 to December 31, 1991 referred to the Pension Plan. Article A22 of such collective agreement stated as follows:

> **ARTICLE A22 SUPERANNUATION**
>
> Superannuation Plan negotiations shall take place through the Pension Administration Board. Majority recommendations submitted to City Council by the Pension Administration Board are subject to ratification by City Council.

23. The collective agreement between the parties covering the period April 1, 1995 to December 31, 1997 revised Article A22 to its present language (now Article A21). This is referred to above and repeated here for ease of reference:

> **ARTICLE A21 SUPERANNUATION**
>
> Superannuation Plan negotiations shall take place from time to time which may be separate from negotiations for the Collective Agreement. The appropriate forum for such negotiations shall be as agreed between the parties and may involve other members of the Pension Administration Board.

24. In 1995, although negotiations were ongoing among the parties to convert the Pension Plan to a trusteed plan, the Pension Administration Board was still overseeing the administration of the

Plan. The Pension Administration Board consisted of ten representatives appointed from unions and employee associations, and ten representatives appointed by the City.

3. Trusteed Pension Plan

25. *The Pension Benefits Act, 1992* required that an administrator be responsible to administer a pension plan. The administrator was either the employer or a board of trustees, or similar body constituted in accordance with the terms of the pension plan. The administrator was imposed with statutory obligations, including standing in a fiduciary relationship to members of the plan and the duty to act in good faith and in the best interests of the plan members.

26. In January 1993, the City recommended that the Pension Administration Board appoint a subcommittee of one union and one management representative to work with the Employment Benefits Manager of the City to review and make recommendations on the administration of the Pension Plan and the role of the Pension Administration Board.

27. This subcommittee recommended that the Pension Plan be restructured as a trusteed plan with a Board of Trustees consisting of equal union and City representatives, together with one independent trustee. The Board of Trustees would be named as administrator of the Pension Plan.

28. In its report of September 20, 1993, the subcommittee made several observations regarding the process of changes to the Pension Plan and the requirement of negotiating plan changes with the unions. This report stated in part:

> ...
>
> In addition to the roles outlined under Bylaw 6321, all collective bargaining agreements between the City and its various unions and associations contain language which assigns to the Board the role of negotiating plan changes. Collective agreements contain the following or similar language:
>
> > **"Superannuation negotiations shall take place through the Pension Administration Board. No changes to the Plan will be implemented unilaterally by the City."** [Emphasis in original]
>
> ...
>
> Another major issue which would need to be addressed is the issue of how Plan changes and improvements should be negotiated and implemented under an individual trusteed structure. Since trustees by definition are required to act in a fiduciary relationship to plan members, they

> should not be put in the position of negotiating on behalf of either group. Negotiations would be better served by creating a separate bargaining committee to represent the interests of both the employees and the City. The negotiating committee could be structured so as to include a representative from each civic union and association.
>
> ...
>
> The negotiating of plan changes would occur separate and apart from the functions of the Plan trustees. Civic unions and associations would be expected to form a bargaining committee to negotiate with the City Council's representatives.
>
> ...

29. The subcommittee recommended that the Pension Plan be restructured as a trusteed plan. As it turned out, this recommendation was not implemented at the time. The Pension Administration Board recommended that the City be named as administrator of the Pension Plan. Bylaw No. 6321 was amended on December 20, 1993, in order to comply with *The Pension Benefits Act, 1992*. The City was named administrator of the Pension Plan subject to the proviso that the City requested a further report regarding whether the City should continue to act in such capacity.

30. The Pension Administration Board formed a Working Committee for Governance of the Plan comprising of three employer representatives and three employee representatives, with administrative assistance from the City's Employee Benefits Manager and the City Solicitor to look into the issues of Plan governance and bring forward recommendations to the Pension Administration Board.

31. City Council requested a report from its solicitor on the appropriateness of the City being the administrator of the Pension Plan. Ms. Theresa Dust, the City Solicitor, provided a confidential memo dated June 13, 1995, on this matter to the Committee of the Whole Council. The June 13, 1995 memo from the City Solicitor was part of the agenda for the September 6, 1995 meeting of this Working Committee.

32. The City objected to the admissibility and use of the June 13, 1995 memo from the City Solicitor which was marked "Confidential Solicitor-Client Communication", the September 20, 1993 report from the subcommittee, as well as the other documents that were before the Working Committee. Mr. Yakubowski said he found these documents, together with the other documents

referred to his evidence, in the files and business records in the Union's office. Mr. Len Thiessen was one of the members of the Pension Administration Board and the Working Committee. Mr. Yakubowski explained that Mr. Thiessen was the pension representative for, and held positions with the Union from 1983 until 2009. Mr. Thiessen was President of the Union when he passed away in 2009, and was then replaced by Mr. Yakubowski as President.

33. The City's objection to the admissibility of such documents was overruled. In our view, we are not satisfied that it is the City alone that had privilege to these documents. The report from the City Solicitor is directed to the Committee of the Whole Council which included representatives from the employees and included Mr. Thiessen, an officer in the Union. The Union was ever-much the client. Even if the privilege was specific to the City, such privilege was waived with the voluntary disclosure of these documents to those involved in the process of recommending the administrator of the Pension Plan.

34. The City Solicitor questioned whether the City was fulfilling its fiduciary duty to the members of the Pension Plan as its administrator. The City Solicitor recommended that the City should not continue as administrator of the Pension Plan under the current arrangements. If a new trusteed plan is created, then the Board of Trustees should be the administrator. If a new plan is not created, then the Pension Administration Board should become the administrator.

35. The City Solicitor was of the view that changes to the administration of the Plan required the consent of the unions representing plan members. The report stated in part:

> We had initially intended to report to Council on this matter in the spring of 1994. However, any change in the administration of the Plan will require the agreement of the various unions representing the members. Given the labour relations situation in 1994, we did not consider it an appropriate time to raise the matter.

36. The City Solicitor's report regarding pension negotiations stated, in part, as follows:

> **2. Pension Negotiations**
>
> The Collective Agreements which the City has with its unions all specify that pension negotiations are to take place through the Pension Administration Board. This must be changed. Such a system is contrary to the fiduciary obligations owed by the members of the Pension Administration Board to all members and former members of the Plan. While the last upgrade to Plan benefits was achieved by consensus on the Pension Administration Board,

> there is clearly potential for conflict in this area. In addition, the Superintendent of Pensions has also made it clear that this situation cannot continue.
>
> There are practical reasons for the current provisions in the Collective Agreements. Pension negotiations can be complicated and require a certain expertise on both sides. Issues arise with a frequency which cannot be left to "general" bargaining. Pension negotiations have the potential, as well, of further complicating the collective bargaining situation. Accordingly, the formation of some special body for pension negotiations, separate from the administrator/trustee of the Plan, should be considered.

37. Extensive discussions between the City and the unions continued in the mid-1990s concerning the governance of the Pension Plan. The one thing the parties agreed upon was that changes to the Pension Plan required the consent of both the City and the unions.

38. The Working Committee on Plan Governance provided its report to the Pension Administration Board for consideration in its meeting on November 28, 1995. The report referenced Pension Plan negotiations. Neither the Working Committee nor the Pension Administration Board took issue with the requirement of the negotiations with the unions for Pension Plan changes, but rather the manner in how the negotiations were to take place. The report was accepted in principle by the Pension Administration Board subject to concerns raised by Mr. Thiessen regarding wordsmithing. The minutes of this meeting recorded the statement:

> Mr. L. Thiessen indicated that he has not obtained a motion to approve this proposal from his members (Local 615 Transit) in that they want to see that the process of negotiations will work successfully, as outlined in the proposal.

39. The Working Committee's revised report dated December 13, 1995, referenced the negotiation of pension changes as follows:

> (b) ***Pension Negotiations***
>
> The Committee also considered the manner in which pension negotiations should be undertaken. As the Pension Administration Board is aware, the Superintendent of Pensions has stated on several occasions that conducting pension negotiations in the Pension Administration Board is not in keeping with the PAB members' fiduciary responsibilities to all members of the Plan and that, accordingly, negotiations must be separated from plan administration.
>
> In order to comply with the Superintendent's directive, the Committee recommends that pension negotiations be conducted separate and apart from the administration of the Plan by the trustees. A common Bargaining Committee would be formed by the participating unions and employee associations which would bargain pension improvements with members of the Human Resources Department and other

> members of the civic administration under the direction of City Council. The structure of the Bargaining Committee would be a matter for the unions and associations. It is anticipated that the Bargaining Committee would meet with civic negotiators within sixty days of the receipt of an actuarial report to discuss plan modifications arising out of that report. The Bargaining Committee would also meet with the Administration on a regular basis to discuss other matters as determined by collective bargaining. The role of the trustees would be limited to providing financial and other information requested by the bargainers.
>
> All information provided by the Board shall be forwarded to both employer and employee representatives on the Bargaining Committee.

40. In the March 12, 1996 meeting of the Pension Administration Board, the City Solicitor, J.R. Manning, presented an amending bylaw changing the Pension Plan to a trusteed plan and provided a draft trust agreement between the City and the Trustees. Mr. Graham and Mr. Thiessen, representing the union members on Pension Administration Board, were alive to the issue that the City could not unilaterally change the Pension Plan. The minutes of the meeting reflected this in the following motion:

> Moved by Mr. T. Graham, seconded by Mr. L. Thiessen,
>
> THAT the draft bylaw and Pension Trust Agreement, (as amended this evening), be approved, in principle, subject to the successful completion of negotiated changes to the Collective Agreements with various locals, with respect to the collective bargaining process regarding pensions.
>
> CARRIED.

41. The City acknowledged that the restructuring proposal for the Pension Plan and Plan changes were subject to negotiation with the Union. On May 8, 1996 the City sent a letter to Mr. Dan Bichel, then President of the Union, expressing its wishes to establish a new pension negotiating committee. This became known as the Pension Benefits Committee. The letter stated:

> In accordance with the restructuring proposal which is currently before the Pension Administration Board, the City wishes to create a new Pension Negotiating Committee. This Committee would negotiate all matters related to the design and cost structures of the City of Saskatoon General Superannuation Plan.
>
> The City's representatives on this Committee will be as follows:
>
> Mr. Jim Cowan – Labour Relations Manager
> Mr. Alex Bodnarchuk – Employee Benefits Manager
> Mr. Bernie Veltkamp – City Comptroller

> The City's representatives wish to meet with representatives from all unions and association within the General Superannuation Plan on May 28 from 8:30 a.m. to 10:30 a.m. in Committee Room B. The purpose of this meeting is to establish the parameters for negotiations regarding the Plan.
>
> ...

42. This process led to a recommendation from the Working Committee that an "individually trusteed" plan was the most appropriate method of governance. On May 21, 1996, the report of the Pension Administration Board to City Council, to institute Pension Plan governance by a Board of Trustees, was approved and Bylaw 7556 (amending Bylaw 6321) was enacted. The governance structure of the Pension Plan was transitioned to a trusteed plan where the Board of Trustees, pursuant to a Pension Trust Agreement and the Pension Plan, became the administrator of the Pension Plan in fact and in law.

4. After the Trusteed Plan until Prior to 2013

43. On June 28, 1998, City Council adopted the report of the Board of Trustees and the Terms of Reference for the Pension Benefits Committee. The report stated the Terms of Reference were developed with input from both management and employee group representatives. The report also pointed out that the Pension Administration Board was disbanded and the Board of Trustees was created to administer the Pension Plan.

44. The Terms of Reference provided that the Pension Benefits Committee consist of eight persons appointed by City Council (employer representatives) and one member from each of the eight participating employee organizations at the time. The function of the Pension Benefits Committee is to review benefits under the Pension Plan. Recommendations for improvements not arising out of the Pension Plan surplus are subject to collective bargaining. The Terms of Reference stated, in part, as follows:

> 2.2 Recommendations for benefit improvements arising out of excess surplus shall be made directly to City Council in accordance with the reporting procedure contained in these Terms of Reference. Recommendations on Plan improvements not based upon the available excess surplus, **including recommendations which would involve a change in contribution rates of the City or of Plan members, shall be made to the City and the employee organizations as subjects for collective bargaining.**
>
> [Emphasis added]

45. In 1999, the issue of cost sharing of a deficiency in the Pension Plan surfaced before the Pension Benefits Committee. The minutes of the November 23, 1999 meeting of the Pension Benefits Committee recorded the Union's position that cost sharing of deficiencies cannot be unilaterally changed by the City. The minutes from the November meeting included the following:

> At the August 31, 1999 meeting questions were raised as to whether the Committee has the jurisdiction to make the proposed change for cost sharing of experienced deficiency, in that this would seem to be an issue that requires negotiation between unions and management. A motion that the employer representatives bring forward Plan wording for a 50-50 cost share of experienced deficiency was put and lost, and the matter was deferred to this meeting.
>
> Mr. Len Thiessen indicated that an agreement to share the cost of any future experienced deficiency or unfunded liability would involve a change in contribution rates, and under the Terms of Reference, the contribution rates cannot be changed unilaterally, the proposed changes must be referred back to the respective parties.
>
> ...
>
> RESOLVED: 1) that the employer representatives, on behalf of the taxpayers, bring forward a proposal regarding the cost-sharing of any future experienced deficiency or unfunded liability which is identified by an Actuarial Valuation Report; and
>
> ...

46. It was not until the report of November 27, 2001 that the employer representatives presented such proposal. This resulted in a resolution of the Pension Benefits Committee at its meeting of December 3, 2001, as follows:

> "that the Union/Association representatives present to their membership a recommendation that would result in closing, to future employees of the City, the existing defined benefit plan and the creation of a new defined contribution plan, and report back to the Committee on the outcome."

47. Mr. Yakubowski testified that this recommendation was not accepted by the Union. The Union did not agree to a defined contribution plan or a 50-50 cost share of the deficiencies proposed by the management representatives on the Pension Benefits Committee. No such changes were made to the Plan.

48. There was an attempt by one of the other unions to change the Pension Plan. Tom Graham, President of CUPE Local 859, requested that seasonal employees who were not members of the Pension Plan have the right to purchase past service if and when they become permanent

employees and members of the Pension Plan. This request was considered by the Pension Benefits Committee in the meeting held on February 22, 2005. The minutes from this meeting recorded the Pension Benefits Committee's concern that changes to the Pension Plan need the consent of the Plan members and are the subject of collective bargaining. The minutes stated in part:

> - There was no information before the Committee to indicate that CUPE Local 859's proposal has the support of all employee groups covered by the General Superannuation Plan. It is the Committee's view that Plan improvements should be for the general benefit of all members of the Plan.
>
> ...
>
> - The terms of the General Superannuation Plan have been collectively bargained. It is the Committee's view that fundamental changes to the Plan, such as the right to buy back service presently not included under the existing terms of the Plan should come from the bargaining table.
>
> ...

49. The issue of contribution rates and changes to the Pension Plan was bargained collectively by the parties for the 2007-2009 collective agreement. All of the unions and the one employee association whose members were in the Pension Plan agreed to bargain collectively the issues of compensation, contribution rates, plan benefits and other changes to the Pension Plan. The Memorandum of Agreement between such parties, dated November 15, 2006, stated in part:

> The Parties will open collective bargaining after November 1, 2006, but no later than December 1, 2006. All proposals by the parties will be tabled at the opening of collective bargaining.
>
> The Parties will jointly bargain at a common table the percentage increase to be applied to salaries together with the contribution rates and any other agreed change to the General Superannuation Plan. Each union local shall provide two members to represent their respective union. The Parties agree that any negotiated changes to the General Superannuation Plan will be the same as the changes negotiated with the Exempt Staff Association and CUPE Local 2669.
>
> If the Parties reach agreement on the percentage increase to be applied to salaries together with the contribution rates and any other agreed change to the General Superannuation Plan, then they shall sign off their agreement on that amount on or before December 19, 2006.
>
> ...
>
> After agreement is reached on the percentage increase to be applied to salaries together with the contribution rates and any other agreed change to the General Superannuation Plan, further negotiations may occur on other monetary and non-monetary items. It is understood

between the City and each Union that the percentage increase to be applied to salaries may be reduced by the amount required to cover the costs of agreed monetary items.

All agreed changes shall go through the customary ratification process and, if successful, shall become a new collective agreement between each Local and the City.

...

50. The parties entered into a second Memorandum of Agreement, dated December 19, 2006, that stated in part:

General Superannuation Plan

Unfunded Liability
The City of Saskatoon and General Superannuation Plan members will share the cost of eliminating the current unfunded liability (30.6 million dollars as at December 31, 2005) by each increasing contribution rates by 0.61% on each of April 1, 2007, January 1, 2008, and January 1, 2009. This would be a permanent increase. The contribution rates would not revert back to the current contribution rates after the three year phase in period. The City of Saskatoon and General Superannuation Plan members will commence payment of the increased contribution rates on April 1, 2007.

Plan Improvement
The City of Saskatoon and General Superannuation Plan members will share the cost of extending the 2% benefit formula for five years (2009-2013) by each increasing contribution rates by 0.29% on each of April 1, 2007, January 1, 2008, and January 1, 2009. This would be a permanent increase. The contribution rates would not revert back to the current contribution rates after the three year phase in period. The City of Saskatoon and General Superannuation Plan members will commence payment of the increased contribution rates on April 1, 2007.

51. AON Consulting, as actuary for the Pension Plan, prepared a report, dated August 9, 2010, on the impact of earnings in the definition of "Earnings" on the financial position of the Pension Plan and noted, in part, the following:

- As at December 31, 2009, the Plan has a going-concern unfunded liability of $45,032,000 under the Current Going-Concern Basis (i.e. going-concern assumption basis adopted as at December 31, 2007) and a solvency deficiency of $87,855,000. As well, the current service cost was equal to 17.3% of pensionable earnings for 2010 through to 2013.

- In accordance with the current Plan Bylaw 8226, ***Earnings*** for the purpose of determining a member's pension at retirement and the required employee and City contributions includes **all** remuneration received by a member, including overtime earnings. [Emphasis in original]

...

- Given the salary losses over the past few valuations, the Board of Trustees (Board) has expressed concerns that the inclusion of overtime earnings in the definition of *Earnings*

could potentially be causing these losses to the Plan, depending on the level of overtime earnings received and the period during which the overtime earnings are paid. The purpose of this discussion note is to determine the impact on the Plan, if any, of including overtime earnings in the definition of *Earnings*....

- To get a sense of the historical impact on the Plan of allowing overtime earnings to be included in the definition of *Earnings*, membership information for members who retired during 2006, 2007, 2008 and 2009 was obtained from the City....

- The going-concern liability associated with the overtime earnings shown above is determined by taking the difference between the going-concern liability calculated using the final average earnings with overtime earnings included and the going-concern liability using the final average earnings excluding overtime earnings. In other words, if the definition of Earnings had excluded overtime earnings, it is estimated that the liabilities for these 220 retired members would have been approximately $5,582,000 lower than their actual liability as at December 31, 2009.

  For valuation purposes, the liability associated with overtime earnings of $5,582,000 does not however represent the actual loss the Plan experienced for these members at retirement. A significant portion (estimated at 70% to 80%) of liability associated with overtime earnings may have already been built into the active liabilities for these members prior to them retiring. As outlined above, each time a valuation is prepared, the most recently completed calendar year earnings are used for each active member and includes overtime earnings. Therefore, if an active member received overtime earnings in the year prior to the valuation date, the liability associated with these overtime earnings would already be included in the active liabilities on the going-concern balance sheet and would have been reflected in determining the appropriate funding recommendation for all active members, along with the future contributions at the time the valuation is prepared.

  Having said that, a loss to the Plan would be experienced if a member banked overtime earnings over an extended period, and then decided to "cash-in" these banked overtime earnings in the year of retirement. Under this scenario, the banked overtime earnings would not have been reflected in the active liabilities for this member and a loss would be experienced equal to the increase in liability associated with the overtime earnings less the required member and City contributions made to the Plan in respect to the overtime earnings. Note that the required member and City contributions paid on the overtime earnings in the year of retirement would only partially offset the increase in the liabilities due to the inclusion of overtime earnings as illustrated in the examples below.

  It is estimated that the actual salary losses experienced by the Plan due to the inclusion of overtime earnings would be in the range of $1,000,000 to $1,500,000 for members retiring during the past four years.

...

- To get a sense of the future cost impact of including overtime earnings in the definition of *Earnings*, an analysis of the current active members as at December 31, 2009 was prepared.

...

> ➢ The table above indicates that the estimated net going-concern liabilities under the Current Going-Concern Basis for active members would be $21,002,000 less as at December 31, 2009 if overtime earnings were not included in the definition of *Earnings*. In addition, it was estimated that the solvency liabilities for active members would be approximately $10,000,000 to $15,000,000 less at December 31, 2009 if overtime earnings were not included in the definition of Earnings.

52. On October 1, 2010, the Board of Trustees wrote to the City Manager, Murray Totland, on this issue and stated in part:

> Please find attached a report on the impact of overtime earnings on the General Superannuation Plan financial position. The report was prepared by AON Consulting at the request of the Board of Trustees.
>
> The City Solicitor's Office has advised that the Board has no authority to establish or alter the defining of Earnings within the Plan Bylaw. That authority rests with the Plan Sponsor and the employee groups with which it negotiates.
>
> ...
>
> While the Board has no opinion on whether or not overtime earnings should be included in the definition of Earnings, we wish to inform you about the implications of overtime inclusion, as discussed in detail in the attached report.
>
> ...
>
> Since the Board has no authority or duty to deal with this issue, other than to make the Plan Sponsor aware and to ensure appropriate provision for funding, the Board will not presume to advance possible solutions to address the inequity identified in the AON report.
>
> ...

53. Mr. Yakubowski testified that the definition of Earnings was brought back to the bargaining table, but no changes were made. There was no consensus on this issue. Mr. Yakubowski said changes to the Pension Plan have always been made by consensus.

54. The Letter of Undertaking, dated July 20, 2001, from the Labour Relations Manager for the City to the President of CUPE Local 59 stated:

To: **Ms Lois Lamon**
President
Canadian Union of Public Employees, Local No. 59

Dear Ms. Lamon:

RE: General Superannuation Plan

The Employer undertakes to meet jointly with all unions and associations within the General Superannuation Plan, namely C.U.P.E. Local 59, C.U.P.E. Local 859, C.U.P.E. Local 47, C.U.P.E. Local 2669, I.B.E.W. Local No. 319, A.T.U. Local No. 615 and Exempt Staff Association, at which time the Employer will undertake to establish with the parties the process of negotiating pensions. Future negotiations in this regard will be separate and apart from the Administrative Board of Pension Trustees.

Superannuation plan negotiations shall take place when requested by either the Unions or the City. These negotiations shall commence within sixty (60) days of such request, unless otherwise mutually agreed.

No Changes to the plan will be implemented unilaterally by any of the parties.

55. Mr. Yakubowski was familiar with the Letter of Undertaking.

56. The City objected to this evidence on the basis that the Letter of Undertaking was directed to CUPE Local 59, not the Union. This objection was overruled and the document was entered as evidence. The Letter of Undertaking is part of the Collective Agreement between the City and CUPE Local 59 covering the period from January 1, 2013 to December 31, 2016. There is no issue regarding the document's authenticity and authorship. It is relevant to the matters in issue; namely, can the City unilaterally change the Pension Plan, or are such changes subject to negotiations with the Union?

57. The City pointed out that the collective agreement with CUPE Local 59 has different language regarding the Pension Plan. Article 42.1 of the collective agreement between the City and CUPE Local 59 for the period January 1, 2013 to December 31, 2016 stated:

ARTICLE 42. SUPERANNUATION PLAN AND RETIREMENT

42.1 No changes to the Plan will be implemented unilaterally by the City.

58. The City produced the collective agreement with CUPE Local 59 dating back to 1975. The language in the 1975 collective agreement regarding the Pension Plan stated:

ARTICLE 33. SUPERANNUATION PLAN

The City agrees to continue the practice of negotiating pension provisions with a joint committee of those Unions whose members participate in the City's General Pension Plan, and further agrees that no changes to the Plan will be implemented unilaterally by the City.

59. The City maintains the Union was unsuccessful in its attempts to get similar language to that in the CUPE Local 59 collective agreement in its own Collective Agreement. The City referred to what purports to be the contract proposal made by the Union through its then president, Don Bichel, and finance secretary, Mr. Thiessen, dated November 2, 1990, at collective bargaining for the 1991 collective agreement. The Union's proposal regarding the Pension Plan stated:

ARTICLE A20 OUTSIDE EMPLOYMENT – delete and replace with

new PENSION

a) The City of Saskatoon agrees to support the existing Superannuation Plan and acknowledges the right of Local 615 to bargain collectively with respect to the pension plan and related matters, and that no changes whatsoever with respect to same may be implemented unilaterally by the Board.

b) The City will contribute an amount [to] the Employee's Pension Plan, which when combined with the employee's [current] contribution will provide indexed pensions for all employees, equal to the previous years Cost of Living Increase as reported by Statistics Canada or the equivalent of, as mutually agreed.

c) This adjustment will be made by April 1st of each year retroactive to January 1st of that year.

60. On the same point, the City referred to the Union's Offer For Settlement of December 16, 1991 regarding the wording for the Pension Plan as follows:

ARTICLE A20 SUPERANNUATION

The Unions last position remains as follows:

Wording from the CUPE 59 Agreement #43.1

Superannuation negotiations shall take place through the Pension Administration Board. No changes to the Plan will be implemented unilaterally by the City.

61. There was no evidence of the text in the collective agreements of other unions with reference to the Pension Plan or the positions taken during their collective bargaining.

B. After 2013

62. The most recent Collective Agreement with the Union expired on December 31, 2012. Mr. Yakubowski said that all collective agreements of the City with the unions whose members are in the Pension Plan expire on the same date. Mr. Yakubowski said all nine parties (seven unions and two employee associations whose members are in the Pension Plan) bargained pension issues and general economic increases at a common bargaining table with the City in the fall of 2013.

63. Mr. Yakubowski testified that the actuary said the existing Pension Plan was not salvageable and should be moved to a different structure. The unions and the employee associations proposed to maintain the existing defined benefit plan and look at solutions to the problems.

64. The City reached an agreement at the common bargaining table with five unions (CUPE 59, CUPE 859, CUPE 47, IBEW 319 and IATSE 300) and the two employee associations (Saskatoon Civic Middle Management Association "SCMMA" and Exempt Staff Association "ESA"), but not with the Union.

65. An Agreement in Principle, signed January 15, 2014, was entered into by the City, five unions and two employee associations. Conspicuous by its absence was the Union. The Union was not a party to this Agreement. The Union had not agreed, and does not agree, to the changes to the Pension Plan in this Agreement.

66. The Agreement in Principle dealt with a monetary proposal for wage increases and regarding the changes to the Pension Plan, stated as follows:

> Effective January 1, 2014 or as soon as practicable, the parties agree to implement the following changes to the General Superannuation Plan for City of Saskatoon Employees Not Covered by the Police and Fire Departments' Superannuation Plans (Plan):
>
> 1. Remove commuted value transfer option for members who qualify for a reduced pension but not an unreduced pension. For greater clarity, Members will not have the option of electing to transfer their benefit entitlement out of the Plan once eligible for an immediate pension.
>
> 2. Costs up to $250,000 annually associated with the administration of the Plan shall be borne by the Plan. Costs shall be capped at a maximum of $250,000 per year subject to rate increases equivalent to average GEI. For greater clarity, the administrative costs are those costs that are borne directly by the City in relation to the administration

of the Plan. This is not intended to cover plan related costs that have been authorized by the Board of Trustees.

3. Increase Active Member required contribution rates by 0.30%. The average contribution rate when considering the total contributions above and below the YMPE will be 8.2%.
   - 7.8% of Earnings, other than deemed Earnings, up to the YMPE; and
   - 9.4% of Earnings, other than deemed Earnings, in excess of the YMPE.

Effective January 1, 2015, the parties agree to implement the following changes to the Plan for services accrued on or after January 1, 2015:

1. The normal form of pension will be changed to remove the subsidization for married members. As such, the normal form of pension for a married member will be a 60% survivor benefit with a 5-year guarantee that is actuarially equivalent to the normal form pension of a lifetime benefit with a 10-year guarantee.

2. "Final Earnings" will be calculated as the sum of:

   a) the 60 consecutive months of employment with the City during which the Member's Earnings (excluding overtime earnings) were the highest (i.e. best average 5 years of Earnings); and
   b) the 84 consecutive months of employment with the City on or after January 1, 2015 during which the Member's overtime earnings were the highest (i.e. best average 7 years of overtime earnings commencing January 1, 2015.

   For greater clarity, Final Earnings for service on or after January 1, 2015 can be no greater than Final Earnings for service prior to January 1, 2015.

3. The definition of Earnings for the purposes of calculating a Member's entitlement will no longer be based on all remuneration received by a Member, but rather on base earnings (i.e. excluding overtime).

4. The unreduced retirement age provisions will change to rule of 85, 35 years of service or age 62.

5. Increase Active Member required contribution rates of 0.30%. The average contribution rate when considering the total contributions above and below the YMPE will be 8.5%.
   - 8.1% of Earnings, other than deemed Earnings, up to the YMPE; and
   - 9.7% of Earnings, other than deemed Earnings, in excess of the YMPE.

Effective January 1, 2016, the parties agree to implement the following changes to the Plan:

Increase Active Member required contribution rates by 0.30%. The average contribution rate when considering the total contributions above and below the YMPE will be 8.80%.
- 8.4% of Earnings, other than deemed Earnings, up to the YMPE; and
- 10.0% of Earnings, other than deemed Earnings, in excess of the YMPE.

Future Funding Requirements

In the event the Plan requires additional funding in order to meet the minimum funding requirements for any valuation prepared on or after December 31, 2015 and filed with the regulatory authorities the parties are to:

Increase Active Member required contribution rates by 0.20%. The average contribution rate when considering the total contributions above and below the YMPE will be 9.0%.

- 8.6% of Earnings, other than deemed Earnings, up to the YMPE; and
- 10.2% of Earnings, other than deemed Earnings, in excess of the YMPE.

Thereafter, the Plan will be supported through average fixed rate employee and City contributions of 9.0% of earnings.

...

In the event a valuation, including the December 31, 2015 valuation, is filed within the six year period referenced above that requires additional funding in order to meet the minimum funding requirements in excess of the temporary average contribution rate of 9.5% of earnings the parties will meet as soon as possible and make Plan changes necessary to meet the minimum funding requirements with an average contribution rate of 9.5% of earnings for both employees and the City.

...

Dispute Resolution

In the event the parties are unable to agree on which Plan changes should be implemented in relation to the above circumstances that necessitate changes to plan benefits 90 days prior to the required implementation date of those changes either party may refer the matter to a jointly agreed to or assigned arbitrator, recognized as having expertise in the area of pension design, to determine the reduction in future service benefits that would be required such that the total funding requirements (current service cost and special payments) could be supported by the contribution rates as outlined above. The arbitrator's resolution will be binding with a goal to resolve within 30 days.

This proposal is subject to:

1. the approval of the Financial and Consumer Affairs Authority of Saskatchewan (i.e. Superintendent of Pensions); and
2. the Board of Trustees filing a valuation as at December 31, 2012 with a 5% margin, and
3. requirements as prescribed by the provincial legislation.

This proposal is also deemed to include all consequential amendments to the collective agreement and the City of Saskatoon General Superannuation Plan Bylaw, 2003.

...

The parties agree to ratify this wage and pension package as soon as possible and will continue to bargain in good faith to conclude the remaining issues at each of the individual bargaining tables.

...

67. After January 15, 2014, the City continued to seek the Union's consent to the Agreement in Principle. The Union was of the understanding the Employer would not change the Pension Plan without the Union's consent. Mr. Yakubowski testified that the City did not tell the Union it was proceeding unilaterally to change the Pension Plan.

68. Contrary to this understanding, the Union learned of the May 1, 2014 email from the City to the eight union/employee association signatories to the Agreement in Principle. The City provided notice that it was not only moving forward to make the changes to the Pension Plan, but the contribution increase was to be made retroactive to January 1, 2014. The email stated as follows:

> This is to follow up on our meeting regarding the implementation of the Agreement in Principle. **The Employer is in agreement to proceed with the implementation of the negotiated wage and pension contributions increases based on the Agreement in Principle for all those Unions and Associations that have signed the Agreement in Principle.**
>
> ...
>
> I have been advised that we will be in a position to implement the pension contribution rate increases during the May 1 – 15 pay period. Since the agreement for the contribution rate increase is effective back to January 1, 2014 we will be collecting this retroactive amount over the remaining pay periods in the year to minimize the impact of this retroactivity. As discussed, we will be advising all plan members of the increase in contribution rates.
>
> ...
>
> [Emphasis added]

69. This email was followed by the May 5, 2014 newsletter, "Pension Update", sent to the members of the Pension Plan from the Board of Trustees. The Pension Update stated in part:

> On December 19, 2013 a tentative *Agreement in Principle* (subject to ratification by all of the unions/associations) was reached which resulted in a number of proposed changes to the *City of Saskatoon General Superannuation Plan* (the Plan). One of the proposed changes was to increase the contribution rates by 0.3% on January 1st of 2014, 2015 and 2016 for a total of 0.9% over three years. The increase in the contribution rates could only be implemented once the *Agreement in Principle* had been ratified by the members of each of the respective unions/associations.

Who will be affected by the new contribution rates?

Members of the unions/associations who have ratified the *Agreement in Principle* will be subject to the new rates. This includes members of CUPE 59, 859, 47 and 2669, ESA (including exempt staff of Boards/Commissions), SCMMA, IATSE 300 and IBEW 319. The new contribution rate increase will not apply to members of ATU 615 until the *Agreement in Principle* has been ratified by their members. The exact amount of the increase will be dependent upon the date the agreement is ratified.

...

70. The Union filed the following Grievance on May 12, 2014:

NAME OF THE PERSON(S) AND OR ORGANIZATION THE GRIEVANCE IS AGAINST: The City of Saskatoon and Saskatoon Transit Services.

THE GRIEVANCE IS A VIOLATION OF THE FOLLOWING: A 21 of the Collective Agreement and any other Article or clause of the Collective Agreement, Past Practice, Legislation or policy that may apply.

71. Mr. Yakubowski said the Union filed the Grievance because it felt the City was changing the Pension Plan. Mr. Yakubowski said, by "all appearances", the City was going ahead and making the changes.

72. The City proceeded to implement the changes to the Pension Plan. On September 22, 2014 City Council enacted Bylaw No. 9224 amending the Pension Plan in Bylaw No. 8226 that had been effective from January 1, 2003. The changes to the Pension Plan in Bylaw No. 9224 incorporated the Pension Plan changes in the Agreement in Principle. Bylaw No. 9224 had universal application to all members of the Pension Plan. The changes to the Pension Plan applied to the members of the Union, notwithstanding the Union did not agree to the changes to the Pension Plan.

73. The issue before this Board is the change to the Pension Plan permitting the City to recover its costs for the administration of the Pension Plan. This amendment was as follows:

Subsections 15.02(1) and (2) Repealed and Replaced

13. Subsections 15.02(1) and (2) are repealed and replaced with the following:

"**(1)** Subject to Subsection 15.02(3), annual costs associated with the administration of the Plan shall be borne by the Plan and paid from the Fund up to an annual

> maximum equal to $250,000 per year, subject to rate increases equivalent to the average general economic increase granted to Active Members.
>
> **(2)** The City shall prepare a report and present it to the Board, or a designated committee of the Board, for approval at the Board's final meeting each calendar year which includes an itemized statement of the Plan's administration costs."

74. Not all of the wording changes in prior amendments to the Pension Plan are before us. We are not aware of what subsections 15.02(1) and (2) said before the September 22, 2014 amendment. We take from this that there was a change, otherwise, there would be no reason to address it in the manner that it was in the Agreement in Principle and Bylaw No. 9224.

75. It appears that prior to the changes to the Pension Plan in 2014, the Plan continued to face insolvency due to unfunded liabilities identified in the actuarial report. While we were not made privy to the full extent of the shortfall, evidence was tendered on the extent of the shortfall attributable to the members of the Union. In the press release from the City on September 22, 2014, reference was made to the deficit attributed to the members of the Union as follows:

> ...
>
> Previously, the City and the Transit union had been at an impasse on the union's portion of the City's General Pension Plan which was valued with a $6.7 million deficit.
>
> The issue became an urgent business matter for City Council. The provincial government regulator – The Superintendent of Pensions – last week issued a letter to the City directing the City to pay $90,100 per month starting at January 1, 2014.
>
> ...

C. Labour Relations Board Proceedings

76. The Union filed an unfair labour practice application with the Saskatchewan Labour Relations Board ("SLRB") on May 12, 2014, the same day as the Grievance was filed. The Union alleged the City violated section 6-62(1)(d) of *The Saskatchewan Employment Act,* 2013, c. 15.1.

77. The Affidavit of Mr. Yakubowski, sworn on May 12, 2014, in support of the Union's application to the SLRB, deposed in part:

> 3. The applicant alleges that an unfair labour practice (or a contravention of the Act) has been and/or is being engaged in by the respondent by reason of the following facts:

...

b) The parties have entered into collective agreements from time to time, with the last such agreement having a term of operation of January 1, 2010 to December 31, 2012;

c) Following expiration of the collective agreement, the parties exchanged timely notices to bargain, and collective bargaining commenced in approximately October 2013;

d) In December of 2013, the issue of changes to the pension plan in the workplace (which is enacted as a City bylaw) were brought to the bargaining table, after having previously been negotiated at a separate bargaining table between the respondent employer and numerous other affected unions in this workplace;

e) While all of the other unions were able to reach an agreement on changes to the pension bylaw with the employer, and ratified the same, no such agreement has yet been reached with the applicant union, ATU, Local 615;

f) The respondent employer has repeatedly taken the position at the bargaining table with the Union that money set aside for a general wage increase for members of the Applicant would be used to address the pension shortfall unless the Union also agreed to the changes to the pension bylaw agreed to by the other unions;

g) Notwithstanding that the union's membership recently voted to reject the employer's final offer by a 94% margin, the employer has announced that it will begin to implement these changes (including benefit contribution rates and monies for administrative costs) effective May 1, 2014, despite a lack of agreement on the same, and despite the fact that the parties are still to be bargaining collectively.

78. On May 14, 2014, the City sent the following letter to the Minister of Labour Relations and Workplace Safety providing notice under section 6-33(1) of *The Saskatchewan Employment Act* that an impasse had been reached with the Union:

> Bargaining commenced between the City of Saskatoon and the Amalgamated Transit Union Local No. 615 on October 16, 2013 and the parties have been actively bargaining in good faith in an attempt to achieve a collective agreement. On May 7, 2014, the City of Saskatoon provided the Amalgamated Transit Union Local No. 615 with a final offer which was rejected by the Amalgamated Transit Union Local No. 615 membership. To date, the parties have been unable to conclude a collective agreement.
>
> Please be advised that it is the opinion of the City of Saskatoon that the parties have reached an impasse in the collective bargaining process.
>
> The City of Saskatoon would appreciate your assistance in appointing a labour relations officer or a special mediator, or establish a conciliation board to mediate or conciliate the dispute pursuant to Section 6-33(1) of *The Saskatchewan Employment Act.*

79. The City locked out the Union on September 20, 2014. This is referred to in the City's Brief, and the facts are not contentious:

> 19. As the City and the Union had not yet reached a collective agreement, on September 18, 2014, the City gave the Union written notice that it intended to lockout Union members commencing September 20, 2014. The lockout commenced September 20, 2014, as specified in the notice.
>
> 20. On September 22, 2014, during the lockout, City Council enacted Bylaw No. 9224, *The General Superannuation Plan Amendment Bylaw, 2014* which amended Bylaw No. 8226, *The City of Saskatoon General Superannuation Plan Bylaw, 2003*. Those changes that are the subject of this grievance were included in Bylaw No. 9224.
>
> 21. On September 22, 2014, subsequent to the enactment of Bylaw No. 9224, the Union filed an unfair labour practice application with the SLRB (LRB File No. 210-14) alleging, among other things, that by passing Bylaw No. 9224 the City made unilateral changes to the Pension Plan while an application was pending before the SLRB, contrary to section 6-62(1)(l)(i) of *The Saskatchewan Employment Act*.

80. In *Amalgamated Transit Union, Local 615 v Saskatoon (City)*, 2014 CanLII 63995, the SLRB considered the Union's application that the City committed an unfair labour practice by locking out its members and changing the bylaws governing its members' pensions in contravention of the statutory freeze in section 6-62(1)(l)(i) of *The Saskatchewan Employment Act*, 2013, c.15.1. That section states in part:

> 6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:
>
> ...
>
> l) to declare or cause a lockout or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while:
>
> (i) any application is pending before the board; or
>
> ...

81. The SLRB found that an application by the Union was pending before it from June 3, 2014 until October 3, 2014. There was therefore a statutory freeze during that period pursuant to section 6-62 of *The Saskatchewan Employment Act*. The employer locked out the Union members on September 20, 2014 and enacted the new bylaw on September 22, 2014. The employer violated the statutory freeze and the lockout and pension changes were unlawful. As a remedy for violating the statutory freeze the SLRB ordered the City to cease and desist from its current lockout of members of the Union. The Union sought compensation for the monetary losses suffered by its members resulting from the unlawful conduct of the City. The SLRB ordered the City to pay

compensation for the lockout for the period September 20, 2014 until October 4, 2014 and reserved jurisdiction to determine quantum if the parties could not agree. The SLRB retained jurisdiction regarding the appropriate remedial relief, if any, arising out of enactment of Bylaw No. 9224 and the changes made to the conditions of employment when the application was before the SLRB.

82. The appropriate remedial relief was determined by the SLRB in *Saskatoon (City) and ATU, Local 615, Re* 2015 CarswellSask 115, 256 CLRBR (2d) 37. The Union sought an order from the SLRB directing the City to take such steps as may be necessary to reverse any changes made to the pension plans of the members of the Union by means of Bylaw No. 9224. The SLRB refused to make such order that would strike down or quash a municipal bylaw. The SLRB preferred the more practical, if not the more proportionate remedy, and ordered to read down Bylaw No. 9224 that had no force and effect for the Union members for the period June 3, 2014 until October 3, 2014 (the statutory freeze period.) The Union members were entitled to the benefits and privileges under the previous Bylaw No. 8226 during that period.

D. Chronology of Changes to Pension Plan

83. The following is the chronology of the provisions of the Pension Plan and the substantive amendments relevant to the matters in issue:

1. Bylaw No. 6321 July 4, 1983

84. On June 22, 1964 Bylaw No. 4324 implemented the Pension Plan and thereafter the Plan was amended from time to time. Bylaw No. 4324 was repealed with the Pension Plan in Bylaw No. 6321.

85. Provisions of the Pension Plan in Bylaw No. 6321 relevant to matters in issue are:

SECTION 4
CONTRIBUTIONS

4.1 (a) Each Member except a Lineman, shall contribute monthly to the Fund:

(i) 4.8% of his monthly Earnings up to the MPE, and

(ii) 6.4% of his monthly Earnings in excess of the MPE.

Such contributions shall be deposited monthly in the fund and shall be credited to the Member's "Required Account". Such contributions shall be accumulated with Credited Interest.

(b) Each Member engaged as a Lineman, shall contribute monthly to the Fund:

(i) 5.8% of his monthly Earnings up to the MPE, and

(ii) 7.4% of his monthly Earnings in excess of the MPE.

Such contributions shall be deposited monthly in the Fund and shall be credited to the Member's "Required Account". Such contributions shall be accumulated with Credited Interest.

...

4.5 The City shall contribute to the Fund:

(a) an amount equal to the Employee required contributions under subsection 4.1(a); plus

(b) all other amounts as are determined necessary by the Actuary to maintain the Fund at a level to meet the solvency requirements prescribed by Applicable Legislation.

Such contributions by the City shall be deposited in the Fund at regular intervals as required by Applicable Legislation.

...

SECTION 13
AMENDMENT OR TERMINATION OF THE PLAN

13.1 The City intends that the Plan shall be a permanent plan for the exclusive benefit of its Members and their beneficiaries and contingent annuitants.

13.2 Notwithstanding Section 13.1 hereof, the City retains the right to amend, modify or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) No amendment shall have the effect of reducing any Member's, Spouse's, or beneficiary's then existing entitlements under the plan.

(b) No amendment shall have the effect of diverting any part of the assets of the Fund for any purpose other than for the exclusive benefit of the Members and their Spouses or beneficiaries under the Plan prior to the satisfaction of all liabilities with respect to such person immediately before such amendment.

13.3 If it should become necessary to discontinue the Plan all Members shall immediately become fully vested in all benefits earned to the date of Plan termination and the assets of the Plan shall be used to the extent adequate to provide for such benefits in accordance with the requirements of Applicable Legislation.

The amount and method of providing for payment in accordance with the foregoing shall be as determined by the Pension Administration Board, assisted by the Actuary, subject however, to the amounts and method so determined being acceptable to the Superintendent of Pensions and the Department of National Revenue.

Following termination of the Plan, there shall be no distribution or allocation of assets until the termination amendment and the method of allocating and distributing the assets of the Fund have been approved by the Superintendent of Pensions and the Department of National Revenue.

As and when all liabilities of the Plan have been legally discharged, any balance of the Fund then remaining shall be distributed between the City and the Members in a manner to be determined by the City in consultation with the Pension Administration Board. Notwithstanding the foregoing, any distribution of the Fund to a Member which would result in an annual retirement benefit in excess of that provided in subsection 6.6 shall not be made and such assets must be returned to the City or be distributed to other Members.

...

SECTION 14
PENSION ADMINISTRATION BOARD

14.1 A Pension Administration Board shall be established to oversee the administration of the Plan.

14.2 The Pension Administration Board shall consist of the following:

(a) One representative appointed by each of the following:

(i) Saskatoon Civic Employees Union Local 59 CUPE.

(ii) Saskatoon Civic Employees Union Local 47 CUPE.

(iii) Saskatoon Civic Employees Union Local 859 CUPE.

(iv) International Brotherhood of Electrical Workers Local 319.

(v) Service Employees International Union Local 333.

(vi) Amalgamated Transit Union Local 615.

(vii) Exempt Staff Association of The City of Saskatoon.

(viii) City Hospital Exempt Staff.

(ix) Saskatchewan Union of Nurses (City Hospital) Local 107.

(x) Saskatoon Civic Employees Union Local 2669 CUPE.

(b) Ten representatives appointed by City Council. At least four of the representatives shall be elected Aldermen.

14.3 The members of the Board shall hold office until their successors are appointed.

14.4 The Board shall meet at the call of the Chairman and in any event at least once every three months.

14.5 At its first meeting in each calendar year the Board shall elect a Chairman and Vice-Chairman. The elections shall be made alternately from the employer's representatives and the employees' representatives but the Vice-Chairman shall not be elected from the representatives from which the Chairman is elected.

If both the Chairman and the Vice-Chairman are absent from any meeting of the Board the members present at the meeting may appoint one of the members as Acting Chairman to fulfill the duties of the office during the absence of the Chairman and the Vice-Chairman.

14.6 At its first meeting in each calendar year, the Board shall appoint a Secretary. The Secretary shall receive such remuneration as the Board may determine and such remuneration shall be charged to the Fund.

14.7 Pension computations made by members of the civic administration with respect to employees retiring from the General Superannuation Plan shall be submitted to the Board for examination.

14.8 Enquiries relating to pension matters by the employees may be referred to the Board.

14.9 The Board, assisted as may be necessary by the City Solicitor, shall hear all pension appeals and, where appropriate, shall make its recommendations to City Council. The employee shall make his appeal to the Board within three months after the receipt by the employee of the employee's first pension cheque.

14.10 The Board shall be responsible for the determination of continuing pension questions and the better administration of the Superannuation Plan and shall be advisory to City Council.

14.11 The Board may, from time to time, make such recommendations for changes in the General Superannuation Bylaw to City Council as it deems proper and expedient and such recommendations to City Council are to be accompanied by a report from the City's Actuary.

14.12 A quorum of the Board shall consist of a simple majority of the entire Board.

14.13 Major recommendations shall be made by the Board to City Council only if two-thirds of the members of the Board are present and if three-fourths of the members present agree to the recommendation.

14.14 For other than the triennial actuarial review, the Board is empowered to utilize actuarial services for assistance in the determination of individual pension questions. Charges for such services shall be a charge against the Fund.

14.15 When required, the Board shall render interpretation of the General Superannuation Bylaw, securing assistance from the City Solicitor and such other civic authorities as it may deem necessary.

14.16 The Board is empowered to recommend to City Council expenditures of monies to the extent provided in Applicable Legislation.

SECTION 15
MISCELLANEOUS CONDITIONS

15.1 The City will provide a written explanation to the Member of all terms, conditions and amendments to the Plan applicable to him, together with an explanation of his rights and duties, with reference to the benefits available to him under the Plan. The City shall also provide the Member with statistical and financial information relating to the Fund as prescribed by Applicable Legislation and in all other ways comply with the disclosure requirements of Applicable Legislation.

...

15.4 The Plan is subject to Applicable Legislation.

2. Bylaw No. 7556 Amending Bylaw No. 6321 (May 21, 1996) Codified to Bylaw No. 7610 (February 17, 1997)

Section 1 - Interpretation

(30) Plan Administrator means the Trustees.

...

Section 4 – Contributions

...

4.5 The City shall contribute to the Fund:

(a) an amount equal to the Employee required contributions under subsection 4.1; plus

(b) all other amounts as are determined necessary by the Actuary to maintain the Fund at a level to meet the solvency requirements prescribed by Applicable Legislation.

Such contributions by the City shall be deposited in the Fund at regular intervals as required by Applicable Legislation. The Contributions are subject to the limits prescribed by Subsection 147.2(2) of the *Income Tax Act*, as certified by the Actuary.

...

Section 12 – Superannuation Fund

...

(2) The City shall place the Plan under trusteeship and appoint as Trustee of the Plan either a trust company or three or more individuals, at least three of whom reside in Canada, and in such instance shall enter into a trust agreement with the Trustee(s).

(3) The Trustee(s) appointed pursuant to (2) shall be responsible for the administration of the Plan and the operation of the Pension Fund.

...

Section 14 – Amendment or Termination of the Plan

14 (1) The City intends that the Plan shall be a permanent plan for the exclusive benefit of its Members and their beneficiaries and contingent annuitants.

(2) Notwithstanding Section 14.1 hereof, the City retains the right to amend, modify or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) No amendment shall have the effect of reducing any Member's, Spouse's, or beneficiary's then existing entitlements under the plan.

(b) No amendment shall have the effect of diverting any part of the assets of the Fund for any purpose other than for the exclusive benefit of the Members and their Spouses or beneficiaries under the Plan prior to the satisfaction of all liabilities with respect to such person immediately before such amendment.

(3) Notwithstanding anything else contained herein but subject to Subsection 14(2), the Plan may be amended at any time to reduce benefits to be provided so as to avoid revocation of the Plan's registration.

(4) If it should become necessary to discontinue the Plan all Members shall immediately become fully vested in all benefits earned to the date of Plan termination and the assets of the Plan shall be used to the extent adequate to provide for such benefits in accordance with the requirements of Applicable Legislation.

The amount and method of providing for payment in accordance with the foregoing shall be as determined by the Pension Administration Board, assisted by the Actuary, subject however, to the amounts and method so determined being acceptable to the Superintendent of Pensions and the Department of National Revenue.

Following termination of the Plan, there shall be no distribution or allocation of assets until the termination amendment and the method of allocating and distributing the assets of the Fund have been approved by the Superintendent of Pensions and the Department of National Revenue.

As and when all liabilities of the Plan have been legally discharged, any balance of the Fund then remaining shall be distributed between the City and the Members in a manner to be determined by the City in consultation with the Trustees. Notwithstanding the foregoing, any distribution of the Fund to a Member which would result in an annual retirement benefit in excess of that provided in Subsection 6(6) shall not be made and such assets must be returned to the City or be distributed to other Members.

...

Section 15 – Board of Trustees
(Section 14 – Pension Administration Board in Bylaw No. 6321
is repealed and the following is substituted)

15(1) The City, as part of the Plan, shall enter into a Trust Agreement with the Trustees, attached hereto as Appendix "A" as it may be modified from time to time.

(2) The Trustees shall be comprised of nine persons appointed as follows:

(a) four persons shall be appointed by the City;

(b) four persons shall be appointed by the following employee organizations according to an agreement entered into by those organizations:

(i) Saskatoon Civic Employees' Union Local 59 CUPE;

(ii) Saskatoon Civic Employees' Union Local 47 CUPE;

(iii) Saskatoon Civic Employees' Union Local 859 CUPE;

(iv) International Brotherhood of Electrical Workers Local 319;

(v) Amalgamated Transit Union Local 615;

(vi) Saskatoon Civic Employees' Union Local 2669 CUPE; and

(vii) City of Saskatoon Exempt Staff Association Inc.; and

(c) one person who shall not be an employee of the City, shall be appointed by the City for a three (3) year renewable term upon the recommendation of the Trustees appointed under (a) and (b). There shall be no limit upon the number of terms which may be served by a Trustee appointed under this clause.

(3) The contributions of the Members and of the City to the Plan shall be received, held, invested and administered by the Trustees in accordance with the terms of the Trust Agreement, the Plan and Applicable Legislation. All contributions made by the Members and the City shall be transferred to the Trustees under the terms of the Trust Agreement.

(4) The City and the employee organizations referred to in Subsection (2) may remove their respective Trustees upon reasonable notice, subject to the provisions of the Trust Agreement. The City and the employee organizations shall appoint successor trustees upon the removal or resignation of their respective Trustees.

(5) The Trustees' duties and responsibilities shall include the following:

(a) making application for acceptance by regulatory officials of approved Plan amendments;

(b) ensuring that the Plan is administered in accordance with its terms as registered;

(c) filing annual information returns with the Superintendent of Pensions and the Minister of National Revenue;

(d) preparing information to report pension adjustments (Pas) and past service pension adjustments (PSPAs);

(e) receiving all pension contributions and other trust income, investing such monies, making the required payments and maintaining all records and accounts;

(f) acting as Plan Administrator as defined by Applicable Legislation;

(g) establishing an appropriate investment policy and accompanying guidelines for the Fund;

(h) retaining professional advisors and agents as required to carry out the functions of the Trustees;

(i) monitoring the performance and activities of all parties involved in the administration of the Plan;

(j) implementing plan changes brought about by legislation or through collective bargaining;

(k) acting in the exclusive interest and to the exclusive benefit of Members and beneficiaries;

(l) receiving pension computations made by members of the civic administration with respect to retiring Members;

(m) reviewing and responding to all inquiries made by Members, former Members and other persons entitled to benefits under the Plan;

(n) rendering interpretations of Plan provisions;

(o) preparing an annual report on its activities for Members; and

(p) establishing a process whereby observers may be allowed to attend Trustees' meetings.

(6) The Trustees shall meet at the call of the Chair and in any event at least once every three months.

(7) The Trustees shall elect a Chair and Vice-Chair at the first meeting in each calendar year. The elections shall be made alternatively from the Trustees appointed by the City and the Trustees appointed by the employee organizations but the Vice-Chair shall not be elected from the group of Trustees from which the Chair is elected. Notwithstanding the foregoing, the Trustee appointed under clause 6(1)(c) may be elected as Chair or Vice-Chair upon the unanimous vote of the remaining Trustees. If both the Chair and Vice-Chair are absent from any Trustees' meeting, the Trustees present may elect an Acting Chair.

(8) The Trustees shall appoint a Secretary at the first meeting in each calendar year. The Secretary shall receive such remuneration as the Trustees may determine and such remuneration shall be charged to the Fund.

(9) A quorum for Trustee meetings shall be five Trustees at least two of whom shall be Trustees appointed by the City under Clause 2(a) and two shall be Trustees appointed by the employee organizations under Clause 2(b). The Trustee appointed under Clause 2(c) shall not be counted in determining whether a quorum exists.

(10) The Trustees may act by majority vote except where otherwise specified in the Plan or the Trust Agreement.

(11) The Trustees shall meet with representatives of the employee organizations referred to in Subsection (2) at least once annually.

3. Bylaw No. 8226 (repealing Bylaw No. 6321) (June 23, 2003)

86. We were not presented with the Pension Plan as it existed when Bylaw No. 8226 was enacted on June 23, 2003. Entered as evidence was the certified copy of Bylaw No. 8226 as codified to Bylaw No. 9224 (September 22, 2014). Bylaw No. 8226 replaced and repealed the Pension Plan in Bylaw No. 6321.

87. The certified copy of Bylaw No. 8226 provides a history of the Pension Plan for the period from 2001 to 2008 as follows:

1.04 History of the Plan

(1) In 2001, the following changes were made to the Plan:

(a) Effective January 1, 1992, the contribution rate for Linemen was retroactively reduced from 5.8%/7.4% to 4.8%/6.4%, and the over-contributions refunded;

(b) Effective January 1, 2001:

- The 7.2% indexing provision for active members was extended from pre-1998 service to pre-2001 service;
- Pensioners received an additional 1.35% indexing provision;
- Spouses that are transferring their benefits out of the Plan as a result of marital breakdown can now purchase a pension commencing at the earlier of age 55 or the Early Retirement Date provided for under the Plan (previously limited to age 55); and
- The limitations on exercising buybacks have been relaxed and the deadlines have been removed.

(c) Effective July 6, 2001, the definition of Spouse was amended to include same-sex spouses, in accordance with the Pension Benefits Act.

(2) Effective January 1, 2003, this Plan was re-stated to clarify the benefits of the Plan and to remove obsolete wording with the intention that no Member's rights or benefits under the Plan are changed. In addition, the definition of "RRSP" was amended as per recent Pension Benefits Act changes. This consolidation of the Plan incorporates all prior amendments contained in the previous Bylaw No. 6321, codified to Bylaw No. 7984 (November 6, 2000), as well as the amendments outlined above.

(3) Effective March 17, 2003, the Plan was amended to allow for buy backs of past service by certain members of The Canadian Union of Public Employees, Local 859, to allow for buy backs of service which had not been properly credited to Plan members, and to make various minor corrections as required by the Superintendent of Pensions.

(4) Effective November 1, 2004, the Plan was amended to provide for an additional 15-year guarantee period for retirees choosing survivor pensions, to provide additional options to surviving spouses upon the death of members who qualified for unreduced early retirement, to delete the provision for reciprocal transfer agreements and to provide for certain housekeeping changes.

(5) Effective June 1, 2005, the Plan was amended, as per changes to the *Pension Benefits Act*, to permit a Member's Spouse to waive entitlement to pre-retirement death benefits, to allow a surviving Spouse to receive pre-retirement death benefits in cash, and to revise the small benefit provisions. The Plan was also amended to provide for certain housekeeping changes.

(6) Effective January 1, 2006, the Plan was amended to provide for buy-back of post-1989 service for members re-employed after one year, to recommend rather than require annual meetings with employee organizations, and to clarify the Plan text wording regarding allowable investments to be consistent with wording contained in *The Pension Benefits Act, 1992*.

(7) Effective April 1, 2007, the Plan was amended to increase Active Member required contribution rates by 0.90% on each of April 1, 2007, January 1, 2008 and January 1, 2009. As well, the 2% benefit formula was extended for an additional 5 years to December 31, 2013 from December 31, 2008.

(8) Effective November 17, 2007, as a consequence of the elimination of mandatory retirement in the Province of Saskatchewan, the Plan was amended to permit continued contributions and benefit accruals up to the latest date permitted under the *Income Tax Act*.

(9) Effective August 26, 2008, the Plan was amended to increase the Plan's contribution to the City's cost of administering the Plan to $39.50 for each Active Member and $2.10 for each pension payroll cheque or direct deposit drawn on the Fund.

(10) Effective January 1, 2014, the Plan was amended to:

(a) increase Active Member required contribution rates by 0.30% on each of January 1, 2014, January 1, 2015 and January 1, 2016;

(b) remove the option for Members to transfer out the Commuted Value of their entitlement once eligible for an immediate pension in accordance with the provisions of the Plan;

(c) set the annual maximum reimbursement from the Plan for the City's costs associated with administration of the Plan at $250,000 per year starting in 2014, increased each year thereafter by the general economic increase granted to Active Members in the Plan for the year;

(d) for Contributory Service after 2014:

(i) change the normal form of pension for married Members to be actuarially equivalent to the normal form of pension for single Members;

(ii) change the date at which a Member is eligible for an unreduced pension to the earlier of age 62, 35 years of Contributory Service or the date when a Member's age plus Contributory Service is equal to 85 (ie. rule of 85); and

(iii) change the definition of Final Earnings to be based on the highest average 60 consecutive months of base Earnings, plus the highest average 84 consecutive months of overtime earnings (excluding overtime earnings prior to January 1, 2015).

4. Bylaw No. 9224 Amending Bylaw No. 8226 (September 22, 2014)

SECTION 4
CONTRIBUTIONS

4.01 Employee Required Contributions

(1) Active Employees

(a) For Contributory Service for periods prior to April 1, 2007, each Active Member shall contribute by payroll deduction the sum of:

(i) 4.8% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 6.4% of Earnings, other than deemed Earnings, in excess of the YMPE.

(b) Effective April 1, 2007, each Active Member shall contribute by payroll deduction the sum of:

(i) 5.7% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 7.3% of Earnings, other than deemed Earnings, in excess of the YMPE.

(c) Effective January 1, 2008, each Active Member shall contribute by payroll deduction the sum of:

(i) 6.6% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 8.2% of Earnings, other than deemed Earnings, in excess of the YMPE.

(d) Effective January 1, 2009, each Active Member shall contribute by payroll deduction the sum of:

(i) 7.5% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 9.1% of Earnings, other than deemed Earnings, in excess of the YMPE.

(e) Effective January 1, 2014, each Active Member shall contribute by payroll deduction the sum of:

(i) 7.8% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 9.4% of Earnings, other than deemed earnings, in excess of the YMPE.

(f) Effective January 1, 2015, each Active Member shall contribute by payroll deduction the sum of:

(i) 8.1% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 9.7% of Earnings, other than deemed Earnings, in excess of the YMPE.

(g) Effective January 1, 2016, each Active Member shall contribute by payroll deduction the sum of:

(i) 8.4% of Earnings, other than deemed Earnings, up to the YMPE; and

(ii) 10.0% of Earnings, other than deemed Earnings, in excess of the YMPE.

(2) Disabled Employees

A Disabled Member shall cease making contributions as at the date they are no longer receiving remuneration directly from the City.

(3) Leaves of Absence

A Member on an approved leave of absence without pay shall cease making contributions during the period of leave.

...

4.03 Employer Contributions

(1) The City shall contribute to the Fund:

(a) an amount equal to the Member required contributions under Subsection 4.01(1); plus

(b) all other amounts as are determined necessary by the Actuary to maintain the Fund at a level to meet the minimum funding requirements prescribed by Applicable Legislation.

...

SECTION 12
GOVERNANCE STRUCTURE

12.01 Administrator

(1) The Administrator of the Plan is the Board of Trustees, as established in Section 12.02.

...

SECTION 14
AMENDMENT

14.01 Amendments

(1) Unless otherwise stated, amendments to the Plan become effective according to the effective date of the amending bylaw, and shall apply to any terminations, retirements or deaths occurring on or after the effective date of the amendment.

(2) The City intends that the Plan shall be a permanent Plan for the exclusive benefit of the Members and their beneficiaries and contingent annuitants.

(3) Notwithstanding Subsection 14.01(2) hereof, the City retains the right to amend, modify or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) No amendment shall have the effect of reducing any Member's Spouse's, or beneficiary's then existing entitlements under the Plan; and

(b) No amendment shall have the effect of diverting any part of the assets of the Fund for any purpose other than for the exclusive benefit of the Members and their Spouses or beneficiaries under the Plan prior to the satisfaction of all liabilities with respect to such person immediately before such amendment.

(4) Notwithstanding anything else contained herein but subject to Subsection 14.01(3), the Plan may be amended at any time to reduce benefits so as to avoid revocation of the Plan's registration.

14.02 Termination of the Plan

(1) In the event the Plan is terminated and the assets of the Plan are insufficient to meet the Plan's liabilities, the assets of the Plan shall be allocated and distributed as follows:

(a) assets shall be allocated first to provide benefits equal to the value of the contributions, with interest, made by and transferred from another plan with respect to Members and former Members;

(b) assets not allocated pursuant to Subsection 14.02(1)(a) shall be allocated to provide for accrued benefits with respect to which

(i) no unfunded liability was established; or

(ii) where an unfunded liability was established, the liability has been amortized at the date of the termination of the Plan; and

(c) assets not allocated pursuant to Subsections 14.02(1)(a) and 14.02(1)(b) shall be allocated to provide for accrued benefits with respect to which unfunded liabilities have not been amortized at the date of termination of the Plan;

(d) an unfunded liability that has not been amortized at the date of the termination has the effect of reducing the benefits for employment that led to the establishment of the unfunded liability, proportionate to the extent to which those benefits remain unfunded;

(e) each unfunded liability is to be dealt with separately and applied only to the benefits with respect to which it was established.

(2) Subject to Subsection 14.02(1), if the Plan is terminated, all Members shall immediately become fully Vested in all benefits earned to the date of Plan termination and the assets of the Plan shall be used to the extent adequate to provide for such benefits in accordance with the requirements of Applicable Legislation.

(3) The amount and method of providing for payment in accordance with the foregoing shall be as determined by the Board, assisted by the Actuary, subject however, to the amounts and method so determined being acceptable to the regulatory authorities under Applicable Legislation.

(4) Following termination of the Plan, there shall be no distribution or allocation of assets until the termination amendment and the method of allocating and distributing the assets of the Fund have been approved by the regulatory authorities under Applicable Legislation.

(5) As and when all liabilities of the Plan have been legally discharged, any balance of the Fund then remaining shall be distributed between the City and the Members in a manner to be determined by the City in consultation with the Board. Notwithstanding the foregoing, any distribution of the Fund to a

> Member which would result in an annual retirement benefit in excess of that provided in Section 5.06 shall not be made and such assets must be returned to the City or be distributed to the other Members.

...

SECTION 15
GENERAL PROVISIONS

...

15.02 Cost of Administration

> (1) Subject to Subsection 15.02(3), annual costs associated with the administration of the Plan shall be borne by the Plan and paid from the Fund up to an annual maximum equal to $250,000 per year, subject to rate increases equivalent to the average general economic increase granted to Active Members.
>
> (2) The City shall prepare a report and present it to the Board, or a designated committee of the Board, for approval at the Board's final meeting each calendar year which includes an itemized statement of the Plan's administration costs.
>
> (3) All costs of administering the Plan in excess of the amount referred to in Subsection 15.02(1) shall be borne by the City.

...

88. The issue in this Grievance is the validity of the amendment in subsection 15.02(1) in Bylaw No. 9224 referred to above.

89. We are uncertain of the wording of subsections 15.02 (1) and (2) prior to the September 22, 2014 amendment. Section 1.04(9) in the codified Bylaw No. 8226 regarding the History of the Plan refers to the amendment effective August 26, 2008 increasing the Pension Plan's contribution to the City's cost of administering the Plan. We are proceeding with the understanding that the reason the Union grieved this amendment was because the $250,000 was an increase in costs borne by the Plan. We are comforted in the correctness of this understanding in the statement made by the City in its Brief at paragraph 38 as follows:

> 38. The Union has raised two specific changes to the Pension Plan in this grievance: the **increase** to the administrative costs payable to the City from the Pension Plan and increases to employee contributions for 2014. Both of these changes are included in the amendments

made to *The City of Saskatoon General Superannuation Plan Bylaw, 2003*, through the enactment of Bylaw No. 9224 on September 22, 2014.

[Emphasis added]

E. Collective Agreement

90. Other provisions in the Collective Agreement relevant to this Grievance are:

ARTICLE A2 COVERAGE

a) This Agreement will constitute the wages and working conditions of all employees of the City within the collective bargaining unit represented by the Union.

b) This Agreement will not cover the Transit Manager, Business Manager, Occupational Safety Administrator, Operations Manager, Maintenance Manager, Planning and Access Transit Manager, Planning Supervisor, Body Shop Supervisor, Mechanical Supervisor, Service Supervisor, Secretary to Transit Manager, Accounting Coordinator, Access Transit Supervisor, Customer Service Manager.

...

ARTICLE A18 GRIEVANCE PROCEDURE

a) Settlement Through Discussion

Whenever possible, the Union will discuss complaints with Transit Management prior to filing formal grievances. If a matter cannot be resolved through discussions, then the Grievance Procedure shall be as follows:

Step One: Grievances shall be referred to the Transit Manager, Transit Branch within seven (7) working days of their occurrence in order to be considered as such. They shall be dealt with by the Transit Manager as far as possible within five (5) working days.

Step Two: Grievances unresolved at Step One may be referred to the General Manager, Utility Services, who, as far as possible, will deal with them within seven (7) working days.

Step Three: Grievances unresolved at Step Two may be referred to the City Manager, who, as far as possible, will deal with them within seven (7) working days.

Step Four: Grievances unresolved at Step Three may, within forty-five (45) calendar days of receipt of the City Manager's decision, be referred to arbitration or City Council; otherwise, the grievance shall be considered resolved. Where a grievance is referred to City Council, the Union may, within forty-five (45) calendar days of receipt of City Council's decision, refer the grievance to arbitration; otherwise, the grievance shall be considered resolved.

...

d) An Arbitrator shall not have the power to alter the terms and conditions of this Agreement.

...

h) Time Limits

i) All time limits specified in the Grievance Procedure can be extended by mutual agreement between the parties.

ii) If the Employer fails to answer any of the steps in the Grievance Procedure within the time limits, the Union may move the grievance to the next step in the procedure.

III. THE ISSUES

91. The substantive issue is, can the City unilaterally amend the Pension Plan without the consent of the Union? Put another way, and specific to the issue before the Board, can the City amend the Pension Plan without the consent of the Union to require the Pension Plan to bear the City's costs associated with the administration of the Pension Plan up to $250,000 per year?

92. The City challenges the jurisdiction of the Board to determine the substantive issue. The issues raised in this challenge are:

1) Is the change to the Pension Plan a dispute that falls within the Collective Agreement? The City alleges the Pension Plan has not sufficiently been incorporated into the Collective Agreement and this Board does not have jurisdiction over disputes that are outside the Collective Agreement.

2) Is this Grievance premature?

3) Has the substantive issue in this Grievance already been determined by the SLRB? Do the finality doctrines of *res judicata*, issue estoppel, collateral attack and abuse of process estop this Board from determining the issue?

IV. THE LAW AND ARBITRAL JURISPRUDENCE

A. Arbitrability

93. The City submits that the Pension Plan is not incorporated by reference into the Collective Agreement. The City argues clear language is required to incorporate the Pension Plan in the Collective Agreement, and this clear language is missing.

94. The City refers to Brown and Beatty, *Canadian Labour Arbitration*, looseleaf (Rel 56, March 2017) 4th ed vol 1 (Toronto: Thomson Reuters Canada Limited, 2016) at para 4:1440:

> **4:1440 Incorporation by reference of plan or policy**
>
> In the fourth and final category, the collective agreement by its terms incorporates all or part of a specific plan or policy. Accordingly, the terms of the plan or policy so incorporated actually become part of the collective agreement itself, and any alleged breaches of such plans are arbitrable. In those circumstances, whatever the insurance carrier may determine as to eligibility and coverage is irrelevant, as the employer is the ultimate insurer or provider of benefits pursuant to the terms of the incorporated plan or policy.
>
> However, clear language will be required to effect such an incorporation. For example, where an agreement merely provided that "there will be no reduction in the benefits of the Company Pension or Death Benefit Plans … during the life of the current agreement, it was held to be insufficient to incorporate the insurance policies by reference. Indeed, where the agreement only stated that the application of the plans continued, but provided for grievances over their application, it was held to be insufficient to incorporate the plans themselves into the agreement.

95. The jurisdiction of arbitrators to settle labour disputes finds its underpinnings in the collective agreement. Section 6-45(1) of *The Saskatchewan Employment Act*, *supra,* states in part:

> Arbitration to settle disputes
>
> 6-45(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into respecting its meaning, application or alleged contravention, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.
>
> …

96. The Supreme Court has provided considerable guidance to labour arbitrators when disputes fall to be determined by arbitration. The law was canvassed in *Saskatoon (City) v Amalgamated*

Transit Union, Local No. 615 (Gieni Grievance) (2010), 194 LAC (4th) 28. The *Gieni Grievance* was between the same parties and chaired by the same chair in this arbitration.

97. In the companion decisions of *Weber v Ontario Hydro,* [1995] 2 SCR 929 ("*Weber*") and *New Brunswick v O'Leary,* [1995] 2 SCR 967 ("*O'Leary*") the Supreme Court affirmed the exclusive jurisdiction of arbitrators over courts to settle collective bargaining agreement disputes.

98. Arbitrators have jurisdiction to settle labour disputes viewed in its essential character that arise expressly or inferentially out of the collective agreement. *Gieni Grievance, supra,* stated at paras 28 to 30:

> 28 In both *Weber* and *O'Leary*, the Court held that arbitration had jurisdiction only to settle disputes that expressly or inferentially arose out of the collective agreement and that it was not the legal framework as to how the dispute was presented, but the essential character of the dispute that is looked to, to determine if the dispute arises out of the collective agreement. In *Weber*, McLachlin, J. stated at para. 51:
>
> > On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> and again at para. 54:
>
> > This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: *Elliot v. De Havilland Aircraft Co, of Canada Ltd.* (1989), 32 O.A.C. 250 (Div. Ct), at p. 258, per Osler J.; *Butt v. United Steelworkers of America, supra*; *Bourne v. Otis Elevator Co., supra*, at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in *St. Anne Nackawic, supra.*
>
> 29 McLachlin J., in *Weber* at para. 49, stated "one must look not to the legal characterization of the wrong but to the facts giving rise to the dispute" to determine the essential character of the dispute and the appropriate forum for settlement of the issue:
>
> > While more attractive than the full concurrency model, the overlapping spheres model also presents difficulties. In so far as it is based on characterizing a cause of action which lies outside the arbitrator's power or expertise, it violates the injunction of the Act and *St. Anns Nackawic* that one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute. It would also leave it open to innovative pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action, as remarked by La Forest J.A. in the Court of Appeal decision in *St. Anne Nackawic*, at pp. 694-95. This would undermine the legislative purposes underlying such provisions and the intention of the parties to the agreement. This approach, like the concurrency model, fails to meet the test of the statute, the jurisprudence and policy.

30 In commenting upon the importance of the essential character of the dispute rather than the manner in which the dispute is drafted, McLachlin, J. wrote at paras. 5-6 of *O'Leary*:

> The remaining question is whether the dispute between the parties in this case, viewed in its essential character, arises from the collective agreement. In my view, it does.
>
> The Province's principal argument is that the collective agreement does not expressly deal with employee negligence to employer property and its consequences. However, as noted in *Weber*, a dispute will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially. Here the agreement does not expressly refer to employee negligence in the course of work. However, such negligence impliedly falls under the collective agreement. Again, it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue.

99. The Supreme Court in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324,* [2003] 2 SCR 157 held that the substantive rights and obligations of human rights and other employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. The Court endorsed the jurisdiction of arbitration boards to resolve labour disputes. Iacobucci J. writing on behalf of the majority stated at paras 50-51:

> 50 In respect of policy considerations, I first note that granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes advances the stated purposes of the LRA, which include promoting the expeditious resolution of workplace disputes. As this Court has repeatedly recognized, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole. See, for example, *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768 (S.C.C.), at p. 781; *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 (S.C.C.), at p. 489; and *Toronto (City) Board of Education*, *supra*, at para. 36. It is essential that there exist a means of providing speedy decisions by experts in the field who are sensitive to the workplace environment, and which can be considered by both sides to be final and binding.
>
> 51 The grievance arbitration process is the means by which provincial governments have chosen to achieve this objective. As Professor Paul Weiler puts it, grievance arbitration is both "an antidote to industrial unrest and an instrument of employment justice": *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), at pp. 91-92. The primary advantage of the grievance arbitration process is that it provides for the prompt, informal and inexpensive resolution of workplace disputes by a tribunal that has substantial expertise in the resolution of such disputes. It has the advantage of both accessibility and expertise, each of which increases the likelihood that a just result will be obtained with minimal disruption to the employer-employee relationship. Recognizing the authority of arbitrators to enforce an employee's statutory rights substantially advances the dual objectives of (i) ensuring peace in industrial relations and (ii) protecting employees from the misuse of managerial power.

100. The preference of the arbitration forum over courts to resolve workplace disputes governed by a collective agreement was addressed again by the Supreme Court in 2004 in *Alberta Union of Provincial Employees v Lethbridge Community College*, [2004] 1 SCR 727. Iacobucci J., again writing this time for a unanimous Court stated at paras 40-41:

> 40 This Court's jurisprudence has recognized the broad remedial powers required to give effect to the grievance arbitration process. The need for restraint in the fettering of arbitral remedial authority was initially acknowledged by Dickson J. (as he then was) in *Heustis*, *supra*, at p. 781, wherein the policy rationale for judicial restraint was explained thus:
>
> > The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.
>
> This Court's approach in *Heustis* foreshadowed an expansion of arbitral authority.
>
> 41 For instance, in *St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.), the Court expressly recognized the arbitrator's heightened competence in adjudicating breach of rights under collective agreements. Decisions such as *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.), its companion case *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 (S.C.C.), and *Parry Sound*, *supra*, further explain how the arbitrator's role has grown to fill its mandate. In *Weber*, *supra*, the Court acknowledged that arbitrators have exclusive jurisdiction over disputes arising from the interpretation, application, administration or violation of the collective agreement. *Parry Sound*, *supra*, expanded the scope of the arbitrator's jurisdiction to include human rights and other employment-related legislation. These decisions mark a trend in the jurisprudence toward conferring on arbitrators broad remedial and jurisdictional authority. Moreover, I cannot help but reiterate this Court's oft-repeated recognition of the fundamental importance of arbitral dispute resolution: see *Heustis*, *supra*; see also *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 (S.C.C.), *Toronto (City) Board of Education*, *supra*, and *Parry Sound*, *supra*. Arming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes.

and at para. 34:

> 34 As noted earlier, the purpose of this grievance arbitration scheme, like all others, is to "secure prompt, final and binding settlement of disputes" arising out of the collective agreement: see *Parry Sound*, *supra*, at para. 17. Finality in the resolution of labour disputes is of paramount significance both to the parties and to society as a whole. Grievance arbitration is the means to this end: see Brown and Beatty, *supra*, note, at §2:1401, that "[t]his legislative framework has been recognized and accepted as establishing an arbitral mandate to fashion *effective* remedies, including the power to award damages, so as to provide redress for violations of the collective agreement beyond mere declaratory relief" (emphasis added).

B. Premature

101. The City argues that at the time the Grievance was filed, it did not address an alleged violation of the Collective Agreement.

102. The Pension Plan was not changed until Bylaw No. 9224 was enacted by City Council on September 22, 2014, some four months after the Grievance.

103. The May 1, 2014 email from the City refers to only proceeding with the pension contribution increases for the unions and associations that signed the agreement. The Pension Plan Update dated May 5, 2014 stated the contribution rate increase will not apply to members of the Union until the Union ratifies the Agreement in Principle. No mention was made regarding the change to the subject matter of the Grievance, namely the City paying from the Pension Plan its administrative costs for the Plan up to $250,000 per annum.

104. The City referred to the decision in *Hamilton (City) v O.N.A.*, [2009] OLAA No. 409, 187 LAC (4th) 96. The grievor alleged she was discriminated against when the employer did not accommodate her disability. The grievor suffered a work injury in September 2005, necessitating surgery. Further surgery was required in 2006 resulting from complications in the original surgery. The grievor unsuccessfully attempted to return to work in 2006 and 2007. She had not worked since March 2007. The grievor did not discuss with her employer a possible return to work or any possible accommodation. Medical information was provided by the grievor's doctor in November, 2007 stating that surgery would unlikely fix her problems and there would be significant restrictions if she returned to work immediately. The grievance was filed on December 7, 2007. Management was surprised to receive the grievance. The most recent report from the grievor was that she was not ready to return to work.

105. Arbitrator Bendel dismissed the grievance on the basis that it was premature. The grievor had not informed the employer that she was seeking an accommodation before filing the grievance. Arbitrator Bendel stated at paras 14-15:

> 14 By way of preface, I should state that it is not contested by the union that a grievance must relate to an alleged violation of the collective agreement: it is not sufficient that it relates to a belief or a fear that the agreement might be violated in the future. In *Re Beachvilime*, *supra*,

the grievor alleged that he had been threatened with lay-off, contrary to the collective agreement. At pages 411-412, the arbitrator said the following:

> As regards the "threat" of lay-off out of seniority, at some future time, regardless of its propriety or its accuracy in terms of the interpretation of the current lay-off provision, it did not constitute a violation of the collective agreement. A violation of the lay-off provision can only arise when a lay-off actually occurs and will depend upon the facts as they exist in the face of the language contained in the agreement at that time. At this point in time, the grievor has not been laid off so that nothing has occurred which could constitute a violation of art. 9.2 and the fact of the company simply putting this employee on notice that something might happen at some indeterminate time in the future, which he considers would then be a violation of the collective agreement, does not, in itself, violate any clause of the agreement. The function of an arbitrator is to determine whether there has been a violation of the collective agreement and arbitrators, in fact, have no jurisdiction until a violation has occurred: see Re U.E.W., Loc. 505 and Int'l Silver Co. of Canada Ltd. (1963), 14 L.A.C. 298 (Cross).
>
> . . .
>
> Accordingly, until such time as a lay-off of this grievor does occur, this grievance, simply anticipating that possibility, is premature.

15 (Although this matter was not specifically dealt with in argument, I should add that, unless the alleged violation precedes the filing of the grievance, the arbitrator is without jurisdiction, even where, by the time of the hearing, the facts have changed and the employer has done some act that, arguably, constitutes a violation of the agreement. As a general proposition, of course, evidence of what occurred after the filing of the grievance is not even admissible (except on consent). Where such evidence is admissible, it can only be because it is relevant to events that preceded the grievance: see, *e.g.*, *M.U.A., local 6869 c. Cie minière Québec Cartier*, [1995] 2 S.C.R. 1095 (S.C.C.). Evidence of subsequent events cannot cure a lack of jurisdiction.)

and again, at paras 21-22:

> 21 In the present case, the grievor had failed to tell the employer, before filing the grievance, that she was ready to return to work with some accommodation. But what is perhaps even more striking is that she had told the WSIB, in her Worker's Progress Report of November 26, 2007, just a few days before filing the grievance, that she was not ready to return to work, that her doctor had not approved a return to work, and that her condition was still serious. This amounts to a formal denial by the grievor of her availability for any work at all.
>
> 22 In the face of these statements by the grievor, I do not accept that the employer could be said to have arguably violated its duty to accommodate her as of the date of the grievance. It is inconceivable that, as of that time, with the grievor denying that she was available for any work, the employer could be held to be in breach of its statutory obligation (under the *Human Rights Code*, R.S.O.1990, c. H.19), with the possibility of substantial fines, to accommodate the needs of the grievor arising from her disability, or of its parallel contractual obligation (under the collective agreement).

106. The Union argues the Grievance is not premature. The Union submits that section 6-45(1) of *The Saskatchewan Employment Act* provides that all disputes between the parties, including alleged contraventions of the Collective Agreement, must be settled by the grievance procedure and arbitration. The section is repeated for ease of reference:

> 6-45(1) Subject to subsections (2) and (3), all disputes between the parties to a collective agreement or persons bound by the collective agreement or on whose behalf the collective agreement was entered into **respecting its meaning, application or alleged contravention**, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective agreement.
>
> [Emphasis added]

107. The Union submits this case concerns a violation of Articles A2 and A21 of the Collective Agreement. The Union claims this dispute is arbitrable as of right because the parties disagree on the "meaning" of the Collective Agreement.

108. Furthermore, the Union argues it is not precluded from grieving early. The Union refers to *N.S.U.P.E., Local 2 v Halifax Regional School Board* (2002), 110 LAC (4th) 258 (Christie). The union filed a grievance in response to the employer's interpretation of the collective agreement. The employer argued that since it had not applied the collective agreement despite its interpretation, there was nothing to grieve. Arbitrator Christie held that the grievance was arbitrable because it concerned the interpretation of the collective agreement even though the changes were not yet implemented. Arbitrator Christie stated at paras 22-26:

> 22 I note that at p. 126 of *Steelco Inc. v. U.S.W.A., Local 1005* the learned arbitrator states:
>
> > In *Re ATV New Brunswick and N.A.B.E.T.* decision of arbitrator Bruce Outhouse dated August 23, 1994, [summarized 38 C.L.A.S. 361] the arbitrator stated at p. 30 that, "where an employer informs a bargaining agent that it is intending to embark on a course of action which would violate the existing collective agreement between them, then the right to grieve arises immediately ..."
>
> 23 In my opinion Arbitrator Outhouse is quite correct. The Collective Agreement before me here in Article 20.01 defines a grievance:
>
> > **20.01 GRIEVANCE DEFINED**
> >
> > Where an employee or the Union has a dispute with the Employer regarding the interpretation, application or alleged violation of this Collective agreement, the dispute shall constitute a grievance.

> 24 As counsel for the Union submitted, **if the intention is that the Union cannot file a grievance until the Employer has *applied* its interpretation of the Collective Agreement why does this clause include reference to "*interpretation*, application *or* alleged violation..."? If the Union is expected, as it is, to ensure that its members "work now and grieve later" it must be entitled to test the Employer's asserted interpretations of the Collective Agreement before the members are faced with situations in which they will loose rights now and only be able to grieve after the fact.**
>
> 25 To the extent that Arbitrator Hinnegan in *Beachvilime Ltd. v. E.C.W.U., Local 3264* (1989), 7 L.A.C. (4th) 409 (Ont. Arb.), quoted by Arbitrator Picher in *Steelco Inc. v. U.S.W.A., Local 1005* at p. 124, held to the contrary, i.e. that arbitrators have no jurisdiction until a violation has occurred, I must disagree with him.
>
> 26 I also respectfully suggest that the words of Sopinka J., for the Supreme Court of Canada in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.), at 239, also quoted by Arbitrator Picher at p. 124, may require careful consideration in the context of the application of a collective agreement to the ongoing relationship between a union and an employer. The judicial doctrine of "mootness" as "an aspect of the general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question" and which generally requires "a live controversy", "unless the court exercises its discretion to depart from its policy..." should undoubtedly be considered in this context, but it is not a statement of law that precludes arbitrators from deciding cases where no violation of the collective agreement has occurred.
>
> [Emphasis added]

109. The Union also relies on *C.U.P.E., Local 34 v Saskatoon School Division No. 13* (2003), 120 LAC (4th) 150 (Hood). The journeyman carpenters were given layoff notices in May 2002 to take effect at the end of June 2002. The union grieved the layoff notices and the contracting out of work. Upon receipt of the grievances, the employer recalled the grievors and deferred the permanency of the layoffs. The employer brought a preliminary objection alleging that the grievance was premature because at the time of the grievance the grievors had not yet been laid off. The majority of the arbitration board determined the grievance was not premature:

> 49 In my view, the Grievance is not premature and is arbitral. I conclude this for several reasons:
>
> ...
>
> (b) There is a time limit to bring a grievance. If the Union waited until the recalls ended and the contracting out of the portable work for the season was over, the Union could have been faced with argument they were in breach of Article 16.03, which requires all grievances to be filed within seven days from the date of becoming aware of the grievance but not more than 90 days after the grievance occurred.
>
> (c) Even if I was wrong in my reasons as set forth above, and there was no violation of the Agreement until the layoff occurred, **I am still satisfied that given the proximity of the**

> **notice of the layoff, the contracting out and the layoffs that ensued that the "difference" between the Union and the Employer is neither mute nor a threat.** Rather, the difference is real and requires adjudication. The wording of the dispute resolution provision in Article 16.01 is not limited to violations of the Agreement. **Rather, Article 16.01 encompasses much more. It includes disputes "regarding the interpretation, application or alleged violation of this Agreement or any other dispute relative to working conditions". In my view, there are sufficient facts which exist to support the adjudication of the Grievance based on the wording of Article 16.01.**
>
> [Emphasis added]

C. Finality of SLRB decisions

110. The City claims the Grievance amounts to an abuse of process, or should be barred due to issue estoppel or *res judicata*. The City's argument is that the SLRB has conclusively determined this issue, reached a final decision, and provided a remedy. Essentially, the Union has already succeeded and received a remedy for the unilateral pension changes and is now trying to re-litigate a matter already determined by the SLRB.

111. The City further argues the Union had to bring forward all of its arguments regarding this issue when matters were before the SLRB.

112. The City also argues the Union is asking this Board to make an inconsistent factual finding to that of the SLRB. The City submits the Union is asking this Board to rule that changes to the Pension Plan occurred in May 2014 when the SLRB ruled that changes to the Pension Plan occurred in September 2014 with the passage of Bylaw No. 9224. The City claims the Union is seeking a different finding on a material fact than found before the SLRB so it can obtain relief in this forum without jeopardizing the relief it obtained from the SLRB.

113. Justice Arbour in *Toronto (City) v C.U.P.E., Local 79*, [2003] 3 SCR 77 ("*Toronto*") explained the relationship between issue estoppel and *res judicata* at para 23:

> Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding....
>
> [Emphasis in original]

114. In *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422, ("*Figliola*") the Supreme Court of Canada affirmed the three preconditions of issue estoppel at para 27:

> The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant ... is only entitled to one bite at the cherry.... Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

115. The City maintains that pursuing the Grievance is a collateral attack on the SLRB's decision.

116. Writing on collateral attack, Justice Arbour, in *Toronto, supra*, stated at para 33:

> The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the rule against collateral attack
>
> > has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

117. The City relies on the doctrine of abuse of process. The City claims the Union, by re-litigating the issue, seeks to circumvent the final decision of the SLRB made in another forum.

118. The Supreme Court of Canada in *Figliola* affirmed the reasoning in *Toronto* where it was established that even absent a strict finding of *res judicata*, the potential for inconsistent rulings and unnecessary exhaustion of resources precluded further litigation of an issue and affirmed the doctrine of abuse of process at para 33:

> Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice"

(para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]

119. The Supreme Court continued in *Figliola* with the reasoning for the finality of litigation enunciated in these doctrines at para 34:

> At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process". Their common underlying principles can be summarized as follows:
>
> • It is in the interests of the public and the parties that the finality of a decision can be relied on.
>
> • Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.
>
> • The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature.
>
> • Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.
>
> • Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.
>
> [Citations omitted]

D. Interpretation of Collective Agreement

120. The substantive issue involves the interpretation of the provisions in the Collective Agreement relevant to the Grievance.

121. The objective in the interpretation of provisions in a collective agreement is to ascertain the intentions of the parties at the time the agreement is made.

122. The canons of construction resorted to by a court or administrative body include the principles and maxims referred to by the board I chaired in *RRR SAS Capital Facilities Inc. and SEIU - West* (Kraus), [2015] SLAA No. 11 at paras 40-41:

> **40** The objective in interpreting a collective agreement is to ascertain the intention of the parties at the time the agreement was made. In *Saskatchewan Telecommunications v Communications, Energy and Paperworkers Union of Canada, Locals 1-S and 2-S (Hague Grievance)*, [2009] S.L.A.A. No 4, the principles to be followed were stated at para 36:
>
> > The objective of the interpretation of a collective agreement is to determine the mutual intentions of the parties at the time the agreement is made. There are rules that are followed to determine this intention, such rules are generally consistent with the interpretation of ordinary contracts and include:
> >
> > - The presumption is that the parties' intentions are manifest in the words that are used. Had the parties intended something different, they would have said so.
> > - The words used are to be construed in their ordinary and grammatical sense, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. The words are to be given their plain, literal and ordinary meaning unless the context otherwise requires. If competing interpretations are possible, deference is given to reasonableness; absurdity is to be avoided.
> > - Words and phrases should not be interpreted in isolation, but rather in the context of the agreement in its entirety. The agreement should be read as a whole to reconcile all terms but yet, to the extent possible, provide meaning to all words and without unnecessarily rendering words superfluous.
> > - If the operative part of the agreement is unclear, recitals (unless otherwise stated) may be used to control, cut down or modify the operative part. Headings in the agreement (unless otherwise stated) may be used to explain the meanings of the paragraphs that follow.
>
> See generally Brown and Beatty, *supra* at para. 4:2000 and 4-37 - 4-46; *De Beers Canada Inc. v. Shore Gold Inc.*, 2006 SKQB 154, aff'd, 2006 SKCA 58; and Kim Lewison, Q.C., *The Interpretation of Contracts*, 2d ed. (London: Sweet and Maxwell, 1997).
>
> **41** Arbitrator Elliott, in *Communication, Energy and Paperworkers Union, Local 777 v Imperial Oil Strathcona Refinery (Policy Grievance)*, [2004] AGAA No 44; 130 LAC (4th) 239, at paras 39-47, had this to say about the interpretation of the collective agreements:
>
> > **39.** I use as my approach to the interpretation of collective agreements the same principle that the Supreme Court of Canada has adopted for the interpretation of legislation. I refer to this approach as the modern principle of interpretation. In my view, the modern principle of interpretation is a superior statement, as a guide to interpretation, than the rule stated in Halsbury's Laws of England to which Canadian texts refer, which relies heavily on the "intention of the parties". The modern principle of interpretation is, I believe, particularly apt for interpreting collective agreements which, of course, are based upon legislation.

40. The modern Canadian approach to interpreting agreements (including collective agreements) and legislation, is encompassed by the modern principle of interpretation which, for collective agreements, is:

> In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.

41. Using this principle, interpreters look not only to the intention of the parties, when intention is fathomable, but also to the entire context of the collective agreement. This avoids creating a fictional intention of the parties where none existed, but recognizes their intention if an intention can be shown. The principle also looks into the entire context of the agreement to determine the meaning to be given to words in dispute.

42. Before applying the modern principle of interpretation to this grievance I will identify the components of the modern principle and what they encompass. The modern principle of interpretation is a method of interpretation rather than a rule, but still encompasses the many well-recognized interpretation conventions. The modern principle directs interpreters:

1 to consider the entire context of the collective agreement

2 to read the words of the collective agreement

- in their entire context
- in their grammatical and ordinary meaning

3 to read the words of a collective agreement harmoniously

- with the scheme of the agreement
- with the object of the agreement, and
- with the intention of the parties.

1 What is the "entire context of a collective agreement"

43. The "entire context" includes

- the collective agreement as a whole document. One provision of a collective agreement cannot be understood before the whole document has been read because what is said in one place will often be qualified, modified or excepted in some fashion, directly or indirectly, in another
- reading one provision of the collective agreement keeping in mind what is contained in other provisions. In the first instance it must be assumed negotiators knew not only the provisions specifically bargained but all the others contained in the collective agreement. An example is the use of words that have defined meanings. Those meanings must be applied whenever the defined word is used in the collective agreement

- keeping in mind the legislative framework within which collective agreements exist and keeping that framework in mind as part of the entire context.

2 Reading the words

44. Words in a collective agreement are to be read

(a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,

(b) in their grammatical and ordinary meaning. Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by common usage of the parties or by the context in which the word is used, and

(c) harmoniously with

- the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or a particular part of the agreement)

- its object

- the intention of the parties, assuming an intention can be discerned. The intention is to be found in the words used, but evidence of intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.

3 The meaning of "context"

45 The word "context" itself means

> the circumstances that form the setting...for [a] statement...and in terms of which it can be fully understood Concise Oxford Dictionary (10th) and the Merriam-Webster Dictionary includes in its definition of context:

the weaving together of words; the parts of a discourse that surround a word or passage and can throw light on its meaning; the interrelated conditions in which something exists or occurs.

46 And so, entire context in terms of a collective agreement and the interpretation of the words used in it includes considering

- how the words have been weaved together

- how those words connect with other words

- the discourse (other information) that can throw light on the text to uncover the meaning

- any conditions that exist or may occur that might affect the meaning to be given to the text.

Testing the interpretation

47 Once an interpretation is settled upon, it should be tested by asking these questions:

- is the interpretation plausible -- is it reasonable?
- is the interpretation effective -- does it answer the question within the bounds of the collective agreement?
- is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

E. Positions of the Union and the City on the Substantive Issue

1. The City

123. The City submits that Article A21 does not prohibit changes to the Pension Plan without the agreement of the Union. Article A21 does not preclude the City from unilaterally changing the Pension Plan.

124. Without conceding that the City needs the consent of the Union to change the Pension Plan, the City submits that the evidence establishes the City was negotiating with the Union in May 2014 with the view of obtaining the Union's consent by way of an agreement to change the Pension Plan. The City says it was engaged at the time, in the very conduct that the Union claims is required in Article A21.

125. The City argues that the language in Article A21 is insufficient to require the Union's consent prior to any changes to the Pension Plan. By way of contrast, the City points to the CUPE 59 collective agreement which states:

> 42.1 No changes to the Plan will be implemented unilaterally by the City.

126. The City states that if it was the intention to restrict the right of the City to unilaterally change the Pension Plan, clear and express language such as found in the CUPE 59 collective agreement would have been included and is required to limit the City's ability. The language in Article A21 falls short of limiting the City's ability to change the Pension Plan. The City submits

the language in Article A21 simply reflects the recognition by the parties that negotiations should be permitted at a time other than during collective bargaining.

127. The City further argues that the bargaining history respecting Article A21 confirms this assertion. During collective bargaining in 1991 the Union had sought similar language to the CUPE 59 collective agreement and was unsuccessful. The City says the Union cannot seek to achieve, through arbitration, something it failed to obtain through collective bargaining.

128. To support this position the City refers to *Inco Ltd. (Re)*, [1990] MGAD No. 61 (Atwell). The case involved the interpretation of a provision in the collective agreement. The provision allowed time off to union stewards to assist an employee in connection with grievance and disciplinary matters. The union maintained the intent of this provision was to ensure that an employee involved in discussions with the employer involving disciplinary matters could have a union representative present if requested by the employee. There were provisions in the collective agreement expressly allowing a union representative to be present with the employee in certain circumstances, but the employer argued this was not one of them. The employer pointed out that the union had made proposals in bargaining negotiations to amend the collective agreement to clearly provide the right of the union representative to attend all disciplinary meetings and be present at all discussions between management and an employee, but these proposals were unsuccessful. The provision in dispute was not amended.

129. Arbitrator Atwell, after forming the view that the plain reading of the impugned provision was inconclusive, examined the provision within the context of the agreement as a whole and against the evidence relating to bargaining history and past practice. Arbitrator Atwell dismissed the grievance and found the negotiating history was of no real assistance in the interpretation of the provision stating at paras 56-57:

> **56** It is quite clear from these proposals that the Union was seeking to establish through these negotiations a right for employees to have a Union Steward present at all times when they meet with management if they so desire. It is also clear that the totality of this objective has not been achieved through Clause 19.05 under any reasonable interpretation of that Clause. As late as 1987 negotiations the Union was proposing that "Stewards must be present at all investigations, including medical involving an hourly rated employee". The explanation that at negotiations you sometimes write in and formalize what you already have, while plausible, only tends to compound the difficulty of placing substantial reliance on a contested version of the negotiation proceedings.

> **57** The question then is whether evidence presented regarding discussions during the several negotiations provides any substantive assistance in the interpretations of Clause 19.05. In this regard it must be concluded that the negotiating history surrounding this Agreement, as presented in evidence, provides no substantive assistance in determining the meaning of that Clause.

130. In our view, the decision in *Inco, supra,* does not support the City's argument that because the Union was unsuccessful in getting language similar to the CUPE 59 collective agreement, Article A21 should not be interpreted as proposed by the Union. The position taken by the Union in the 1991 negotiations does not provide any substantive assistance in the interpretation of Article A21. Article A21 is different than Article A22. Article A22 is in the 1991 collective agreement. Article A21 is the result of bargaining for the 1995 to 1997 collective agreement. The Union may have backed off insisting on the CUPE 59 language in 1991 for many reasons and we cannot infer what those reasons may have been without sufficient evidence.

131. The City submits the Pension Plan is not incorporated into and made part of the Collective Agreement. The City maintains that clear language of the intention of the parties to incorporate the Pension Plan into the Collective Agreement is required. The City argues the clear language is missing. This argument calls into question the arbitrability of the Grievance.

132. The City argues that the language in Article A21 does not override the provisions in the Pension Plan that permit the City to unilaterally amend the Pension Plan.

133. In *St. Mary's Cement v United Steelworkers, Local 9235 (Pension Plan Grievance)* (2010), 194 LAC (4^{th}) 72 (Hunter), the issue was, could the employer unilaterally convert the employee pension plan from a defined benefit plan to a defined contribution plan? Article 14.01 of the collective agreement expressly provided that the pension plan formed part of the collective agreement. The pension plan provided in article 15.01: "The Company intends to maintain the Plan indefinitely, but reserves the right to amend the Plan or discontinue the Plan either in whole or in part ..." and in article 15.02, "no amendment shall operate to reduce the pension benefits which have accrued to any Member before the date of the amendment."

134. Arbitrator Hunter did not agree with the union's argument that the incorporation of the plan into the collective agreement gave the union control over any changes to the pension plan.

Arbitrator Hunter noted that a change from a defined benefit plan to a defined contribution would cause financial hardship to the pensioners and the employees. However, she found her duty was to give effect to the collective agreement that incorporated the plan and the plan text. The plan text reserved unto the employer the right to "amend" or "discontinue" the plan "either in whole or in part at any time." To find for the union would have required reading article 15.01 out of the collective agreement. Arbitrator Hunter found that article 6.05 of the collective agreement precluded her from doing this.

135. Article 6.05 in *St. Mary's Cement, supra,* was similar to Article A18 d) in the Collective Agreement and is generally consistent with the rights and restrictions of arbitrators. Article 6.05 provided that the arbitrator was not authorized to make any decision inconsistent with the provisions of the agreement, and not to alter, amend, add or delete any part of the agreement. Arbitrator Hunter, in dismissing the grievance, stated at para 96:

> **96** If the Union is correct, I must read Article 15.01 out of the Collective Agreement. As arbitrator, I do no consider that I have jurisdiction to read Articles out of Collective Agreements; certainly not where the Article in question (a) does not conflict with any other part of the Collective Agreement; and (b) does not result in manifest absurdity; and (c) is part of the bargain negotiated between the parties.

136. In *Royal Ontario Museum v S.E.I.U. Local 2*, [2011] OLAA No. 292 (Raymond), the collective agreement required the employer to consult with the union before changing benefits provided for in the pension plan. If the amendments to benefits were not agreed to, the decision of the employer prevailed. The plan contained an express provision that the plan can be modified or terminated. The employer amended the benefits. Arbitrator Raymond held the employer could unilaterally amend the pension plan because the pension plan allowed for it and stated at para 15:

> **15** There is no violation of any term of this Collective Agreement when the Employer makes a unilateral change to the Pension Plan. There is no provision or promise in the language of the Collective Agreement that the Employer will not change the Pension Plan benefits. In fact, the Collective Agreement contains the opposite - there is a provision that employees are subject to the terms and conditions set out in the plan, including the Pension Plan. As was said in *St. Mary's*, supra, para. 90:
>
> > The Collective Agreement (Article 14.01) incorporates a Pension Plan that gives St. Mary's Cement the unilateral right to change the Plan in whole or in part at any time; indeed, to discontinue the plan. This right is nowhere forbidden, or qualified, by any other provisions of this Collective Agreement.

137. The City also makes the argument that the language in Article A21 does not prohibit the City from making changes to the Pension Plan that only affects the members of the other unions and associations that have agreed to the changes, when such changes do not affect the members of the Union.

2. The Union

138. The Union's position is that the Employer cannot change the Pension Plan without the Union's consent. The Employer's unilateral change of the Pension Plan violates both Articles A21 and A2 of the Collective Agreement.

139. The Union says the use of the word "negotiates" in Article A21 means the parties must reach an agreement regarding changes to the Pension Plan. Article A21 not only contemplates, but requires, "negotiations" between the parties. Article A21, repeated again for ease of reference, states:

> **ARTICLE A21 SUPERANNUATION**
>
> Superannuation Plan **negotiations** shall take place from time to time which may be separate from **negotiations** for the Collective Agreement. The appropriate forum for such **negotiations** shall be as agreed between the parties and may involve other members of the Pension Administration Board.
>
> [Emphasis added]

140. The Union submits that "negotiations" is a process leading to a consensual resolution in the form of an agreement. The final step in the negotiation process is an agreement.

141. The Union refers to *In re Macgowan, Macgowan v Murray,* [1891] 1 Ch 105 at 115 ("*Macgowan*"), where Bowen LJ wrote at p 116:

> Negotiation, I should have thought, in the ordinary meaning of the English language, is that which passes between parties or their agents in the course of or incident to the making of the contract; and if the negotiation is brought to such a close as leaves the principal at liberty to say, "I accept the offer" – then the agent has done all that a negotiating agent can do, and within the meaning of the rule he has arranged the sale, the sale afterwards being effected.

142. In *Macgowan, supra,* the taxing officer had disallowed the solicitor's scale fee in the tariff of £40 for negotiating a sale of the property. The solicitor had done all of the work in obtaining an

offer of £5000 from a bank on property subject to foreclosure proceedings. A formal contract for the sale was prepared and completed in writing, conditional on court approval. The solicitor obtained a report on the value of the property from a firm of valuers and the valuers' fees were included in the bill of costs. The court approved the sale.

143. The taxing officer disallowed the fee under the rules, concluding the solicitor had not done all of the negotiations up to a completed contract. The solicitor conducted the negotiations up to the conditional contract. After the conditional contract the additional expense of the valuer was incurred and court approval was required to finally sanction and compete the agreement.

144. The Court of Appeal disagreed with the taxing officer and the lower court, finding that the valuation and court approval were not part of the negotiation process, but obtained for the purpose of performing the condition.

145. The Union refers to *Commercial Union Life Assurance Company of Canada v John Ingle Insurance Group Inc. et al.* (2002), 61 OR (3d) 296, 217 DLR (4th) 178. The Union points out that Weiler, JA of the Ontario Court of Appeal found that "negotiation" meant "to agree through communication or discussion", and that "negotiation" is separate from the concept of "bargaining":

> [52] Soliciting insurance is not the same thing as selling insurance. A person who solicits seeks to incite or influence someone to do something, in this case, to buy insurance. The trial judge considered the appellant's submission and held that the manner in which the website was structured resulted in direct contact between JIIG and potential customers and, further, that potential customers were not directed to a licensed agent to purchase insurance. Having regard to the deference due to a trial judge's finding, there is no basis to interfere with it. This comment applies equally to the trial judge's finding that JIIG's mode of handling applications and policies brought it within the definition of persons who "transmit, for a person other than itself, application for or policies of insurance to or from an insurer". **I also agree with the trial judge that the word "negotiate" means to agree through communication or discussion.** An element of bargaining or exchange need not be present. The appellant states at para. 92 of its factum:
>
> > The most frequently cited definition of negotiation in the Canadian cases derives from the Oxford English Dictionary, which defines **negotiate as "to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise."** Westward Farms v. Cadieux (1982), 138 D.L.R. (3d) 137 (Man. C.A.); International Corona Resources Limited v. Lac Minerals (1986), 53 O.R. (2d) 737 (H.C.J.).

> [53] Accepting this definition, it is not necessary to import an element of exchange or bargaining into the definition.
>
> [Emphasis added]

146. At the lower court of the same case (*Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group, Inc.* (2000), 22 CCLI (3d) 221 (Ont Sup Ct J) ("*Commercial Union Life Assurance Co. of Canada*"), the Union submits Stinson J similarly found that "negotiation" means "agreement through discussion":

> **268** "Negotiation" can be used in a number of ways. Black's Law Dictionary defines it as follows:
>
> > **Negotiation is process [sic] of submission and consideration of offers until acceptable offer is made and accepted.** The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction.
>
> **269** "Negotiate" is defined in Black's as:
>
> > **To communicate or confer with another so as to arrive at the settlement of some matter.** To meet with another so as to arrive through discussion at some kind of agreement or compromise about something. To discuss or arrange a sale of bargain; to arrange the preliminaries of a business transaction. Also to sell or discount negotiable paper, or assign or transfer it by endorsement and delivery. **To conclude by bargain, treaty, or agreement.**
>
> **270** It is clear from these definitions that while negotiation involves communication, it need not involve bargaining nor, necessarily, the exchange of proposals and counter-proposals. The problematic implications of JIIG's proposed definition of negotiation can be seen through a consideration of section 402(1) of the Insurance Act. As discussed above, the section provides that an agent or broker who "acts in negotiating, renewing or continuing a contract of insurance" is deemed to hold the premiums in trust for the insurer. Typical insurance policies are inflexible, an d do not allow for bargaining and personally designed policies. If I were to adopt the defendants' proposed definition of "negotiation" in interpreting section 402, it would have the effect of excluding a majority of agents from the deemed statutory trust. Agents who simply sign people up for policies would not fall within the statutory definition of "agent". This is both an illogical and an undesirable result.
>
> **271** In my view, **"negotiation" in the definition of "agent" in section 1 of the Insurance Act should be interpreted as meaning "arrangement through communication" or "agreement through discussion".** It need not contain an element of bargaining and its applicability should not in any way depend on the degree of flexibility in the policy.
>
> [Emphasis added]

147. The Union submits that in arbitration case law, consent or agreement is a necessary element in negotiation. In *Re Great Lakes Power Ltd. and C.U.P.E., Local 3033,* [1996] OLAA No. 295 (Marcotte) ("*Great Lakes Power*"), the union alleged the employer changed the pension plan in contravention of the collective agreement. The relevant article in the collective agreement concerning the pension plan was as follows:

> 12.1 The existing pension plan as set out in the Retirement Annuity Plan No. P.3100 with the Canada Life Assurance Company, **revised in accordance with changes negotiated for this agreement, shall continue in effect.** Regular employees hired after January 1, 1991 shall become a member of this Plan after three months of continuous service. Credited service for pension purposes shall commence at that date.
>
> [Emphasis added]

148. The Union says the arbitration board concluded the collective agreement's reference to negotiated changes meant there must be bilateral agreement to the changes, or in other words, the Union's consent to the changes. Arbitrator Marcotte stated:

> **64** The above examination of the Miramichi, DuPont and Misericordia cases reveals that, where a pension plan is incorporated by reference into a collective agreement, as is the circumstance before us, it is necessary to reconcile the provisions that exist within the plan and the collective agreement in order to determine the extent to which the rights of the parties are affected by the provisions of the plan and the collective agreement Re Miramichi supra. In that regard, the Employer's cases, which are distinguishable and which do not deal with the provisions of a collective agreement that incorporate by reference a pension plan, are also not helpful for purposes of this determination.
>
> **65** An analysis of the provisions of art. 15.01 of the pension plan before us and art. 12.1 of the collective agreement reveals that, while the Employer, pursuant to the former, has the right to unilaterally change or discontinue the plan, it agrees, pursuant to art. 12.1 of the collective agreement, that the pension plan "shall continue in effect" for the period of time from January 1, 1991 to December 31, 1993, i.e., the term of the parties' collective agreement. In our view and following on the reasoning in the DuPont case, had the parties simply intended that the pension plan was to continue during the term of the agreement, there would have been no need for them to include the phrase "shall continue in effect." Rather, it is clear, and we so find, that the phrase "shall continue in effect" means that the pension plan, as it existed at the time of the parties' 1970-71 collective agreement, was to continue, not subject to unilateral change by the Employer for the period of that agreement Re Misericordia supra, Re DuPont supra. In our view, in agreeing to the inclusion of the above language of art. 12.1 of the collective agreement, the Employer agreed that its right to unilateral change the provisions of the pension plan were restricted by the provisions of that article. We also find that the parties did turn there minds to the issue of changes to the pension plan, as evidenced by the inclusion, in art. 12.1, of the phrase, "revised in accordance with changes negotiated for this agreement" in describing the "existing pension plan." **That is, we find that the parties agreed that whatever revisions were to be made to the plan, those revisions would be as**

> **"negotiated for this agreement", i.e., changes through bilateral agreement between the Employer and the Union.**
>
> **66** Had the parties intended that revisions other than those negotiated between them in negotiations could properly be made during the term of the collective agreement, the above phrase would be entirely meaningless language. **However, since it must be assumed that all words used in a collective agreement are intended to have some meaning Re Seaview Manor Corp. and C.U.P.E. Loc. 2094 (1986), 27 L.A.C. (3d) 50 (Outhouse). Re Brown and Beatty supra at p.4-26, then it must be found that the parties' intention is that only plan revisions in accordance with changes negotiated between them are proper.** Moreover, had the parties intended that the Company could unilaterally decide upon revisions to the plan, language to that effect could easily have been negotiated by them, given that these are sophisticated parties who have negotiated collective agreements for an extended period of time. Further, that our interpretation is proper or correct is buttressed by the specific identification of negotiated changes as those which are proper. **By specifying revisions by way of changes negotiated by the parties, they have clearly indicated that such revisions are to be made bilaterally by them, as the parties to the collective agreement, and which bilateral agreement cannot reasonably be said to also include unilateral decision-making on the part of either party to the collective agreement.**
>
> **67** In the result, we find that the proper interpretation of the language of art. 12.1 means that the existing pension plan, revised in accordance with changes negotiated for the 1991-93 collective agreement, is to continue in effect for the period of the agreement and that, for the foregoing reasons, **revisions that are not in accordance with negotiated changes are not proper.** In applying the above interpretation to the matter at hand, it is not disputed that the 4 amendments in question were not negotiated by the parties for the 1991-93 collective agreement but were unilaterally determined by the Company. Therefore, we must find, on the clear language of art. 12.1, that the 4 amendments at issue are not proper revisions to the existing pension plan.
>
> [Emphasis added]

149. The Union's position in summary on this point is that the Collective Agreement requires "negotiation" for any amendments to the Pension Plan. A requirement of "negotiation" in the arbitral case law requires bilateral consent. The City implemented changes to the Pension Plan unilaterally, without the Union's consent. The City understands the requirement of consent, as it unsuccessfully sought to obtain it. The City failed to "negotiate", as the term is defined in case law, and breached the Collective Agreement.

150. The Union submits that the City's own past practice and communications confirm that "negotiation", as used in the Collective Agreement, requires nothing less than an "agreement" with the Union before making changes to the Pension Plan.

151. The second point in the Union's argument is that the Pension Plan falls within "wages and conditions" of employment under Article A2 of the Collective Agreement, and since an

employer is not free to make unilateral changes to the collective agreement's provisions, the City could not make such changes to the Pension Plan.

152. Article A2, repeated again for ease of reference, states in part:

> ARTICLE A2 COVERAGE
>
> a) This Agreement will constitute the wages and working conditions of all employees of the City within the collective bargaining unit represented by the Union.

153. The Union submits that after having negotiated a collective agreement the employer is bound by it. It may not unilaterally depart from the collective agreement. The employer's rationale or motivations for making the changes do not matter. What matters is the fact of the change and the non-compliance with the collective agreement: even unilateral wage increases are prohibited once the collective agreement is signed.

154. The Union refers to *Maple Leaf Meats Inc. v U.F.C.W., Locala 175 & 633,* 2001 CarswellOnt 4736 (Johnston). In that case, the union grieved the unilateral implementation of a wage increase for certain members of the bargaining unit and the unilateral implementation of changes to overtime payments to employees. The employer wished to change the wages for a group of employees and attempted to negotiate those changes with the union. Those negotiations failed. The arbitrator found that in making unilateral changes without the agreement of the union the employer breached the collective agreement. The employer's intentions did not matter. Arbitrator Johnson stated at para 28:

> 28 The company argues that it had the best interests of its employees in mind when it instituted the changes to the collective agreement and that the changes benefited all employees. That may be true, but in this case, whether the employer was motivated by business necessity or not is irrelevant. Unless the collective agreement allows for it in some way, an employer cannot make unilateral changes to the wage rates or any other clause in the collective agreement.

155. The Union says that once the parties have negotiated the Collective Agreement the Employer may not renege on its negotiated commitments. It must maintain the status quo. The Union submits this principle is demonstrated in *Kelowna (City) v Kelowna Professional Fire Fighters Assn., IAFF Local 953,* 2003 CarswellBC 4000, 75 CLAS 396 (Glass), where the union grieved the city's unilateral change to the Extended Health Benefits plan as a breach of the

collective agreement. The employer's plan became more expensive to cover the same services so it altered the plan to include fewer services.

156. The employer contended that it had the right to change the plan and had not contravened the collective agreement because it maintained the same payments it was previously making (even though this resulted in fewer benefits for the employees under the plan). Arbitrator Glass disagreed, holding that the employer did not maintain the status quo in the negotiated coverage. The grievance was allowed:

> 64 ... In the present case, the cost of visits to the paramedicals had been previously covered. The fact that it became more expensive to maintain that coverage because of the actions of the MSP, was not a legitimate reason to alter the coverage. The action taken did not maintain the status quo as far as coverage was concerned. The action taken by the City maintained the level of its premiums. It did not maintain the level of the coverage agreed to be provided.
>
> 65 With respect to this argument, I note that the same conclusion was reached by arbitrator Kelleher on facts closely approximating these, on this point. See *City of Richmond and IAFF Local 1286*, (unreported) August 29, 2002, (Kelleher)

157. The Union maintains that if circumstances change enough so the Employer forms the opinion that changes are required, the changes must be achieved through additional bargaining and negotiations with the Union. This general rule applies as equally to rates of pay as it does to other items covered by the Collective Agreement, including a pension scheme.

158. The Union submits that the rule against unilateral change also applies to changes to pension plans. They say a pension plan is a benefit and a right under the Collective Agreement. In *National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 1015 v Scotsburn Dairy Group (Pension Funds Grievance)*, [2008] NSLAA No. 1, 66 CCPB 194 (Christie), the union alleged, *inter alia,* that the employer breached the collective agreement by unilaterally amending the pension plan to authorize returning pension surplus to the employer. Arbitrator Christie agreed that the pension plan fell within the category of "existing customs and practices, rights and privileges, benefits and working conditions" under the collective agreement, and unilateral amendments could not be made and stated at paras 212 and 216-217:

> **212 Breach of Article 18.1.** I find that the Employer breached Article 18.1 of the Collective Agreement when, in 1981, without the Union's agreement, it amended the Pension Plan to provide that upon termination any surplus was to be returned to the Employer. There were a

number of complex arguments on this point. Before dealing with them I should address the fact that, to some extent, the 1981 amendment was made to bring the EDC Pension Plan into compliance with the National Revenue's letter of April 13, 1981 and its Information Circular No. 72-13R6 quoted in that letter. It has been held by the Supreme Court of Canada that such circulars do not have the force of law and, specifically, that they did not justify the amendment of a pension plan otherwise binding in law.

...

216 The Plain Meaning of Article 18.1, as amended in 1978. In the Collective Agreement of 1978 between EDC Ltd. and the RWDSU and every Collective Agreement onward, Article 18.1 has stated:

ARTICLE 18 - MISCELLANEOUS

1. Existing customs and practices, rights and privileges, benefits and working conditions shall be continued unless modified by mutual agreement of the employer and the union.

This was a change from the pre-1978 version of Article 18.1 which provided, simply:

ARTICLE 18 - MISCELLANEOUS

1. All privileges now in effect and not covered by this Agreement shall remain in effect.

217 The Union's position is that in 1981 this included the Pension Plan, so that the amendment of Section 16 Plan required the agreement of the Union because it affected rights, privileges or benefits of the members of the bargaining unit. The Employer's position is that the words "customs and practices, rights and privileges, benefits and working conditions" were not intended to include rights or benefits under the Pension Plan. In my opinion, on the plain meaning of the words, employee rights under a pension plan clearly are "rights" and "benefits". I cannot think of anything commonly referred to as "benefits" under collective agreements more important and more widely understood to be "benefits" than pension benefits, except possibly health benefits. The parties must be taken as having intended to refer to the Pension Plan.

159. The Union argues the negotiated Pension Plan falls within the ambit of "rights" and "benefits" negotiated into the Collective Agreement and falls within "wages and working conditions" of the employees in the bargaining unit. The City and the Union members make contributions to the Pension Plan, and the City makes deductions from the employee's wages into the Pension Plan.

160. The Union maintains the Pension Plan negotiated with the City can be revised, but such revisions require further negotiations and bilateral agreement with the Union. Otherwise, the benefits persist for the duration of the Collective Agreement. The Union again refers to *Great Lakes Power, supra,* where Arbitrator Marcotte stated at paras 57-59:

> **57** We find, therefore, that the proper interpretation of the words "The existing pension plan ... shall continue in effect" means that the provisions of existing pension plan, in this case, "as set out in the Retirement Annuity Plan No. P3100 with the Canada Life Assurance Company", are to continue for the period January 1, 1991 to December 31, 1993 and that it is the provisions of the pension plan that are to be in effect and not any other provisions that are to be in effect. Thus, we find that changes in or to those provisions that were not in effect as of January 1, 1991, are not proper
>
> **58** Also, the language of art. 12.1 contains the phrase "revised in accordance with changes negotiated for this agreement." There is no dispute that the 4 amendments in question were not subject-matter of the parties' negotiations over the 1991-93 collective agreement. Therefore, it cannot be said these amendments are changes or revisions made to the pension plan "in accordance with changes negotiated for this agreement." There is also no dispute between the parties that these same 4 amendments took effect during the term of the 1991-93 collective agreement. Hence, it cannot be said that these 4 amendments are revisions negotiated by the parties and it cannot be said that they were in effect as of January 1, 1991. Thus, it would appear that because the 4 amendments were neither negotiated nor in effect as of January 1, 1991, they are not proper amendments or revisions of the pension plan.
>
> **59** We have now come to the gravamen of the parties' dispute. We have found that the 4 amendments are not proper in light of the proper interpretation of the language of art. 12.1 because they were not in effect as of January 1, 1991 and are not revisions resulting from negotiations between the parties. However, we have also found that the pension plan is incorporated by reference into the collective agreement, and, one provision of that pension plan, art. 15.01 states, in part, as follows: "The Company expects and intends to maintain the Plan in force indefinitely, but necessarily reserves the right to amend or discontinue the Plan." That is, on the one hand, the Company, pursuant to art. 12.1 of the collective agreement, agreed that the pension plan in effect as at January 1, 1991 shall continue until December 31, 1993, and which plan did not include the 4 amendments unilaterally made by the Company and are not a result of or in accord with negotiations, while, on the other hand, the Company, pursuant to art. 15.01 of the plan, has the right to change the provisions of the plan on the basis of unilateral action on its part.

161. The Union submits that *International Assn. of Firefighters, Local 1137 and Township of Etobicoke,* 1966 CarswellOnt 603, 17 LAC 199 (Lane) is a case similar to this one because it also involves a municipal government and unilateral changes to a pension plan. Arbitrator Lane held that the employer could not unilaterally change the pension plan. The union grieved the reduction in contributions to the firefighters' pension plan. The government, in a letter, had directed the township to integrate the pension plan with the *Canada Pension Plan.* Arbitrator Lane found that the township could not unilaterally change or alter the pension plan, despite the government's direction because the parties had a history of negotiating changes to the pension plan. The employer could not now unilaterally alter what had been negotiated. Arbitration Lane stated:

> 12 The issue, then, is: can the Municipality here unilaterally change or alter the terms of the pension plan which had been a matter of agreement between the parties in all of the years since 1956 and up to and including the current year? The first agreement in 1956, being one

> contemplating a pension plan in the future, might not be too effective, but certainly all the agreements which refer to an existing pension plan have incorporated it into and made it a part of the collective agreement by the words of reference contained in those collective agreements, and which I have particularly referred to in this finding.
>
> 13 The issue here has been before a couple of arbitration boards. Lang, J., has dealt with this matter in an unreported industrial arbitration, *Re U.A.W., Local 27, and Tecumseh Products of Canada* [since noted (1966), 17 L.A.C. 144], and has found that, in effect, the company changed their plan which had been agreed upon between the parties when they integrated the plans, in that they reduced that portion of the contributions which would go to the existing plan from 5% to 3.2%, and that they also reduced the benefits to be derived from the agreed plan. In my view, the reasoning of Lang, J., is compelling in this situation, and I am satisfied that this is an alteration of an existing plan which had been agreed upon between the parties. Irrespective of the pressure the Government may place upon it, failing legislation in that behalf it cannot direct the Municipality to change something that has been agreed upon between the Municipality and its employees during the term of a current collective agreement unless the collective agreement has a provision which allows such change to be made.
>
> 14 In my view, this grievance must succeed, because there is no such provision in the collective agreement and the Legislature has not seen fit by legislation to change the respective positions of the parties in this matter.

F. Promissory Estoppel

162. The Union also relies upon the doctrine of promissory estoppel to prevent the City resiling from its stated position that the changes to the Pension Plan were subject to negotiation with the Union.

163. If the City's interpretation of Article A21 prevails, namely that the City does not require the consent of the Union to change the pension plan, the Union submits that the City is estopped from relying on that interpretation during the currency of the Collective Agreement.

164. The doctrine of estoppel serves to restrain a party from relying on its strict legal rights in circumstances where it would be inequitable to do so. Lord Denning defined estoppel in *Combe v Combe,* [1951] 1 All ER 767 (CA) at 770:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

165. Arbitrator Weiler described promissory estoppel as follows in *Re City of Penticton and C.U.P.E., Loc. 608* (1978), 18 LAC (2d) 307 at 317:

> That brings us to the problem of estoppel, another legal concept of the same genre. In its classic form, the application and the attractiveness of the notion of estoppel is quite easy to appreciate. One party enjoys a legal right under a contract. That party says that it is not going to enforce that right on a particular occasion. The other party relies on that representation and acts accordingly. Then the first party changes its mind and decides that it does want to enforce its strict legal rights; but only after its counterpart has irretrievably committed itself. The equitable doctrine of estoppel is designed to prevent such an unfair tactic. In the words of a noted Canadian arbitrator, Dean Arthurs, "to use a common metaphor, you are not allowed to let someone go out on a limb so that you can saw him off": see *Re City of Toronto and Civic Employees Union, Local 43* (1967), 18 L.A.C. 273 at p. 280.

166. The elements of the doctrine of estoppel were set out by Sopinka J. in *Maracle v Travellers Indemnity Co. of Canada,* [1991] 2 SCR 50 at 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, [1] by words or conduct, made a promise or assurance [2] which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, [3] in reliance on the representation, [4] he acted on it or in some way changed his position ...

167. The Saskatchewan Court of Appeal in *Viterra Inc. v Grain Services Union (ILEU-Canada)*, 2013 SKCA 93 ("*Viterra Inc.*") applied the doctrine of estoppel to prevent the employer from resiling from a longstanding past practice of its predecessor of paying vacation pay on overtime at vacation entitlement rates.

168. The doctrine of estoppel was also applied by the Court of Appeal in *Sherwood Co-operative Association Limited v Retail, Wholesale and Department Store Union, Local 539,* 2013 SKCA 119 ("*Sherwood Co-operative*") to prevent the union, midway in the collective agreement, from challenging the correctness of the language that was the subject of a longstanding past practice.

169. The doctrine of estoppel serves to restrain a party from relying on its strict legal rights in circumstances where it would be inequitable to do so. The Court noted the elements of the doctrine of estoppel at para 41 of *Viterra Inc.*:

> The basic features of the doctrine of promissory estoppel are solidly established. In *Maracle v. Travellers Indemnity Co. of Canada,* [1992] 2 S.C.R. 50, the Supreme Court said that the doctrine engages when there is both (a) a representation intended to affect legal rights and be acted upon, and (b) reliance on that representation. Sopinka J. explained the nature of the doctrine as follows at p. 57:
>
> > The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.,* [1968] S.C.R. 607, Ritchie J. stated, at p. 615:
> >
> > > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason,* [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

170. The Supreme Court of Canada in *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals,* 2011 SCC 59 ("*Nor-Man*") held that labour arbitrators not only can make use of the principle of promissory estoppel to resolve workplace disputes, but are not restricted in the use to the same extent as the principle is applied in courts. Arbitrators have greater flexibility in applying the doctrine in the labour law context.

171. Mr. Justice Fish, stated:

> [5] Labour arbitrators are not legally bound to apply equitable and common law principles – including estoppel – in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.
>
> [6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. **They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.**
>
> [44] Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

[45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates – and well equipped by their expertise – to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

...

[48] Collective agreements govern the ongoing relationship between employers and their employees, as represented by their unions. When disputes arise – and they inevitably will – the collective agreement is expected to survive, at least until the next round of negotiations. The peaceful continuity of the relationship depends on a system of grievance arbitration that is sensitive to the immediate and long-term interests of both the employees and the employer.

[49] Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.

[50] These are the governing principles of labour arbitration in Canada. Their purpose and underlying rationale have long been well understood by arbitrators and academics alike. More than 30 years ago, Paul C. Weiler, then Chairman of the British Columbia Labour Relations Board and now Professor Emeritus at Harvard University, underlined their importance in a dispute of particular relevance here. He explained in the following terms why the doctrine of estoppel must be applied differently in a grievance arbitration than in a court of law:

> ... a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [*Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23*, [1978] 2 C.L.R.B.R. 99, at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship – all contrary to the objectives of the Labour Code" ....
>
> (*Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.), at p. 320)

> [51] Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, **and reserve to arbitrators the right to craft labour specific remedial doctrines**. Within this domain, arbitral awards command judicial deference.
>
> [Emphasis added]

172. In *Sherwood Co-operative, supra,* Mr. Justice Cameron, writing for the Court of Appeal, stated:

> [30] [T]he Board reasoned that the grievance amounted to notice to the Co-operative that the Union no longer approved the past method of calculation, and that this notice served to bring an end to the estoppel rooted in this past practice. With respect, the Board did not seem to appreciate the ramifications of this line of reasoning, the effect of which was to bring the estoppel to an end retrospectively, rather than prospectively, in the sense the events giving rise to the grievance pre-dated the grievance and, therefore, the notice. **This line of reasoning, for which the Board cited no authority, runs counter to the basic proposition of fairness and equity formulated years earlier by Paul Weiler in *Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608, supra,* which proposition was cited with approval in *CN/CP Telecommunications* and endorsed by the Supreme Court in *Nor-Man.***
>
> [33] For some reason the Board failed to grasp the point – or let it slip away – that the collective agreement in force at the time the grievance was initiated had been entered into upon a common understanding of the import of Articles 12.2 and 12.4, or at least upon an understanding by the Co-operative of their import based on longstanding practicing in which the Union had acquiesced. **The notion that it was open to the Union in the circumstances of this case to resile from that practice, midway through the term of the agreement, by filing a grievance contesting the correctness of the practice, is not a tenable notion. It is both inherently inequitable and potentially destructive – destructive, that is, of the ongoing relationship of the parties over the term of the agreement.** As noted in *Nor-Man* (citing with approval the observations of Paul Weiler in *Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608*), this amounts to a recipe for eroding the atmosphere of trust and co-operation which is required for good labour-management relations, ultimately breeding industrial unrest in the relationship.
>
> [Emphasis added]

173. Mitchnick and Etherington, in *Leading Cases on Labour Arbitration*, (Toronto: Lancaster House, 2011) online: Lancaster House <www.lancasterhouse.com/etext/show/title/leading_cases_on_labour_arbitration (01 May 2017) stated at para 17.5.2:

> Any remaining uncertainty on this point appears to have been dispelled by the Supreme Court of Canada's judgment in *Nor-Man Regional Health Authority Inc. v. Manitoba Ass'n of Health Care Professionals* (2011), 340 D.L.R. (4th) 1. A unanimous Court held that arbitrators' broad dispute resolution mandate necessarily includes the power to apply equitable and common law principles, including estoppel, and to adapt those principles in a way that is responsive to the

labour relations context. In the case at hand, the Court concluded that an arbitrator had acted reasonably in determining that the union was estopped from enforcing vacation provisions in the collective agreement, based on its longstanding acquiescence in the employer's practice with respect to calculating entitlement.

IV. ANALYSIS

A. Jurisdiction

174. This Board has the jurisdiction to determine the subject matter of the dispute raised by the Grievance, namely, whether the City can change the Pension Plan without the Union's consent.

175. The Pension Plan is incorporated by reference into the Collective Agreement.

176. Article A22 in the Collective Agreement refers to the Pension Plan.

177. The Collective Agreement spells out that "negotiations" relating to the Pension Plan are to be in a forum agreed to by the City and the Union.

178. The "negotiations" may involve members of the PAB as it was referred to in 1995. The "may" does not mean "shall".

179. The "negotiations" regarding the Pension Plan shall take place from time to time and these "negotiations" may be separate from the negotiations for the Collective Agreement. We take this to mean the negotiations for the Collective Agreement may include any changes to the Pension Plan or the negotiations of changes to the Pension Plan would be conducted by the parties separately from the other provisions of the Collective Agreement.

180. The language is clear, without ambiguity, to the reference to Pension Plan in the Collective Agreement and the process for Pension Plan negotiations.

181. In summary, the Pension Plan is intertwined with the Collective Agreement by this language and incorporated by reference into the Collective Agreement.

182. It is useful to look to the conduct of the parties in how they viewed the Pension Plan and the Collective Agreement. At this juncture, this is not about the interpretation of the Collective Agreement but rather about determining if the Pension Plan is a stand-alone agreement or if it has

been sufficiently incorporated by reference into the Collective Agreement. The general rule is that one should not look outside the agreement to past practice to interpret a provision of the Collective Agreement unless there is an ambiguity. However, this rule is not strictly applicable to determine if the parties incorporated the Pension Plan into the Collective Agreement such that disputes relating to the Pension Plan are disputes that fall within the jurisdiction of an arbitrator.

183. In this case, the evidence is sufficient to conclude that for decades the parties were of the mind the Pension Plan was intertwined with the Collective Agreement and the collective bargaining process.

184. The process of how the City brought about the amendment to the Pension Plan from an employer administered plan to a trusteed plan where the Board of Trustees became the administrator, is strong and compelling evidence that the Collective Agreement incorporated Pension Plan negotiations into the same forum as collective bargaining in furtherance of the Collective Agreement.

185. One other way to look at whether the Board has jurisdiction to determine the dispute is: does the essential character of the dispute arise expressly or inferentially out of the Collective Agreement? We are guided by the Supreme Court of Canada in *Weber and O'Leary, supra,* that confirms arbitrators, and not the courts, have the exclusive jurisdiction to determine and settle collective bargaining disputes where the essential character of the dispute arises expressly or inferentially out of the collective agreement.

186. We are of the view the essential character of this dispute arises out of the Collective Agreement and the collective bargaining process.

187. We add to this the endorsement from the same court in *Parry Sound, supra,* that the grievance arbitration process is the preferred forum to resolve workplace disputes. The issue in this grievance is a workplace dispute if there ever was one.

B. Timing of the Grievance

188. The City entered into the Agreement in Principle, dated January 15th, 2014, with the other unions and the employee associations to increase contribution rates regarding the Pension Plan and

provide the City's administrative costs regarding the Pension Plan, up to $250,000 annually, be borne by the Plan.

189. On May 1 2014, the City confirmed it was moving forward to collect the pension contribution increases from the unions and associations that had signed the January 15th, 2014 Agreement in Principle. On May 5, 2014, in the Pension Update, while acknowledging the contribution rates increase would not apply to the members of the Union, said nothing on the Union's share for the responsibility of the increased administrative costs borne by the Pension Plan.

190. The Union was not a party to the Agreement in Principle. The Union did not consent to the changes to Pension Plan agreed to by the City and the other unions and employee associations.

191. The alleged contravention of the Collective Agreement preceded the filing of the Grievance. The genesis of the alleged contravention is the Agreement in Principle.

192. The City entered into an agreement with the other parties to the Pension Plan to change the Pension Plan without the consent of the Union. The Union's position is that there can be no changes to the Pension Plan without the Union's consent.

193. The City could have just as easily argued that the Grievance was outside of the time limit required by the Articles.

194. Article A18 a) sets out the steps for filing grievances and the specific time limits that apply to each step after the grievance is filed. Article A18 h) provides the ability for the Union to move to the next step if the City fails to fulfil the requirements of a step in the procedure.

195. Step One in Article A18 a) requires the grievance be referred to the City within seven working days of the occurrence. If the occurrence is the date of the Agreement in Principle, the Grievance is not premature timewise and could be challenged by the City as out of time. But, if the City took the position the Grievance was out of time, which it does not, this would call into play the statutory ability of this Board to relieve against breach under section 6-49(3)(f) of *The Saskatchewan Employment Act, supra* that provides:

Rules of arbitration

...

(3) An arbitrator or an arbitration board may:

...

(f) relieve, on terms that in the arbitrator's or arbitration board's opinion are just and reasonable, against breaches of time limits set out in the collective agreement with respect to a grievance procedure or an arbitration procedure;

196. Had the City's position been that the Grievance was out of time, we would have granted the required relief.

197. The City's position is that it did not change the Pension Plan benefits of Union members prior to the filing of the Grievance. In this position there are two premises. One, the City and the other unions and employee associations can change the Pension Plan provided the changes do not change the benefits and rights of the Union in the Pension Plan, and two, the alleged contravention is only arbitrable when the changes are made to the Pension Plan.

198. We need not determine if the City is correct in its first premise to determine the arbitrability of the Grievance. It matters not that the City did not initially require the Union members to increase contributions along with the other unions and employee associations who had agreed to do so. A dispute is arbitrable if there is an "alleged contravention" of the Collective Agreement. The alleged contravention, at least in part, is whether the City, without the consent of the Union but with the agreement of the other parties, can change the Pension Plan if there is no change to the benefits and rights of the Union.

199. Regarding the second premise, we do not agree that the Union, in these circumstances, needs to wait to file a grievance until the changes are actually made to the Pension Plan by way of a City Bylaw before there is an alleged contravention of the Collective Agreement. The Agreement by the City with the other unions and employee associations to make the changes to the Pension Plan is ever much a dispute as the finality of the City actually making the changes. One need not wait until one's head is under the blade of the guillotine to place in dispute why one got there.

200. We also make the following stand-alone observation (stand-alone because the observation is unnecessary to support the reasons set forth above). The issue in this Grievance is not increased contribution rates; it is the change permitting the City to recover up to $250,000 of its administrative costs from the Plan. There is no evidence that the City put on hold (as the City said it did for the increased contribution rates in May 2014) the $250,000 administrative costs insofar as the Union members were concerned. Nor is there any evidence as to how the City could have implemented the $250,000 administrative costs without adversely impacting the Union members.

201. Arbitrability is not limited to an alleged contravention of the collective agreement. Workplace disputes determinable by arbitration in section 6-45(1) of *The Saskatchewan Employment Act* include the "meaning" of the collective agreement.

202. We are satisfied there was a genuine dispute on the meaning of Article A21, and this dispute led to the filing of the Grievance. The Union was aware the City was taking steps to implement the Agreement in Principle without the consent of the Union.

203. For the above reasons, we find the Grievance was not premature.

204. If we are wrong in this reasoning, and the Grievance was premature, it is our view the circumstance are such that such technicality does not render this Grievance unarbitrable.

205. There is a live issue here that must be addressed. This is not a moot issue. The Union's grievance is not a hypothetical future violation of the Collective Agreement. Even if the Union grieved early, the grieved changes to the Pension Plan occurred. Aside from a purely technical basis, we see no substantive reason justifying the City's position. There is no evidence the City suffered any prejudice by the grievance being filed early. We also see no reason on the face of Section 6-45 (1) of *The Saskatchewan Employment* why it should necessarily be fatal to grieve early if there was a labour dispute, the essential character of which arises expressly or inferentially out of the Collective Agreement. The filing of the grievance is presumptuous that there is a dispute and, if there is a dispute, how can it be too early?

206. We are also concerned with the consequences of the City's argument. Considering the City made changes to the Pension Plan, if the Union succeeded on all of it arguments except for prematurity, the result would be unreasonable.

207. It is useful to consider and give full recognition to the words of Iacobucci J. in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324, supra* in para 50:

> As this Court has repeatedly recognized, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole.

208. To skirt resolving this real dispute because of the early timing of the Grievance would, in the circumstances, abdicate the Board's mandate.

C. Finality

209. We take no issue with the law the City cites to support the argument on the finality of litigation. We do take issue with the applicability of the finality doctrines to the process before and decisions made by the SLRB.

210. As noted earlier, the City argues the SLRB had conclusively determined the issue in dispute, reached a final decision and provided a remedy. Essentially, the City says the Union has already succeeded and received a remedy for the unilateral pension changes and is now trying to re-litigate a matter already determined by the SLRB.

211. The City further argues the Union was obligated to bring forward all of its arguments regarding this issue when matters were before the SLRB.

212. The City also argues the Union is asking the Board to make an inconsistent factual finding to that of the SLRB. The City's reasoning is that the Union is asking the Board to rule that changes to the Pension Plan occurred in May, 2014 when the SLRB ruled that changes to the Pension Plan occurred in September, 2014 with the passing of Bylaw 9224. The City claims that the Union is now seeking a different finding on a material fact than in the matter before the SLRB so that it can obtain relief in this forum, without jeopardizing the relief it obtained from the SLRB.

213. We disagree with all of the City's assertions on this point.

214. First, the issue before the Board is not the same issue dealt with by the SLRB. The issue before the SLRB was, did the City commit an unfair labour practice by locking out its members

and changing the agreement governing its members' pensions in contravention of the statutory freeze when there was a pending application before the SLRB?

215. The SLRB dealt with relief arising out of the pension changes. The Board ruled that the City Bylaw changing the Pension Plan shall be of no force and effect during the statutory freeze period and the Union members were entitled to the benefits under the previous bylaw during that period.

216. The SLRB was tasked with determining whether the City breached the legislation by committing an unfair labour practice. Once it so determined, it provided a remedy limited to that specific issue. The Collective Agreement was not relevant or considered in its decision. The SLRB only dealt with the question of whether the pension changes could be made during the time period of the statutory freeze without infringing the legislation, and it accordingly limited its remedy to the freeze period. It did not deal with the issue of whether changes to the Pension Plan without the Union's consent breached the Collective Agreement. Whether the City could make the pension changes during the statutory freeze period and whether those changes breached the Collective Agreement are two very different issues requiring very different considerations. The SLRB's ruling did not determine whether the City could make these changes unilaterally under the Collective Agreement. As such, the SLRB's remedy did not provide a remedy to the Grievance. The City's contention that the Union is attempting to re-litigate a matter already determined by the Board is without merit.

217. Second, the City's claim that the Union was obligated to bring forward all of its arguments regarding pension changes ignores the different jurisdiction of the SLRB and the Board. Disputes regarding the "meaning, application or alleged contravention" of a collective agreement are to be settled by arbitration. The issue of whether the City's unilateral changes to the Pension Plan breached the Collective Agreement are the domain of this Board. The Union and the SLRB appropriately did not deal with that issue when matters were before the SLRB, as this is the appropriate forum. At a basic level, the issue before the SLRB involved the statutory freeze. The questions about the "meaning or alleged contravention" of the Collective Agreement are at the heart of this Grievance, and were irrelevant to the issues before the SLRB.

218. Last, the City claims the Union is seeking a different finding on a material fact (when the pension changes occurred) so it can obtain relief in this forum without jeopardizing the relief it obtained from the SLRB. The relief the Union is seeking in this forum is not tied to the relief it obtained from the SLRB, so we do not understand why there may be "jeopardy". Whether the City breached the statutory freeze and whether it breached the Collective Agreement are mutually exclusive issues with separate and distinct remedies. It is not inconsistent to find there was an arbitrable dispute when the Grievance was filed in May and also to find, as the SLRB did, that the City actually changed the Pension Plan in September.

D. Substantive Issue

1. Interpretation of the Collective Agreement

219. "Negotiations", as pointed out by Union counsel, appears three times in Article A21. The Union argues the word "negotiations" should be interpreted to mean the parties are required to reach an agreement regarding changes to the Pension Plan. Without agreement, there are no changes to the Pension Plan. The Union says the City cannot unilaterally change the Pension Plan. Changes require negotiation between the parties and no changes can be made to the Pension Plan unless the Union agrees.

220. The City argues that the language in Article A21 is insufficient to require the Union's consent prior to any changes in the Pension Plan. It points to CUPE 59's collective agreement which specifically states that no changes will be implemented to the pension plan unilaterally by the City. According to the City, such express and clear language is required.

221. The rules of interpretation of collective agreements referred to earlier include:

- Words and phrases should not be interpreted in isolation, but rather in the context of the agreement in its entirety. The agreement should be read as a whole to reconcile all terms but yet, to the extent possible, provide meaning to all words and without unnecessarily rendering words superfluous.

- The presumption is that the parties' intentions are manifest in the words that are used. Had the parties intended something different, they would have said so.

222. One of the difficulties we have with the City's argument is that it reads out of Article A21 the word "negotiations" and renders such word superfluous. The City does not offer any practical

meaning for the word "negotiations"; its position is simply that "negotiations" is insufficient to require the Union's consent to make changes to the Pension Plan.

223. In our view the word "negotiations" is not in Article A21 by happenstance.

224. If "negotiations" does not mean what the Union argues, then what does it mean?

225. Other rules of interpretation include:

> • The words used are to be construed in their ordinary and grammatical sense, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. The words are to be given their plain, literal and ordinary meaning unless the context otherwise requires. If competing interpretations are possible, deference is given to reasonableness; absurdity is to be avoided.

226. Or said another way:

> • In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties.

227. Arbitrator Elliot, in *Communication, Energy and Paperworkers Union, Local 777 v Imperial Oil, supra,* at para 44, provided guidance on what is meant by reading the words in this manner:

> **44.** Words in a collective agreement are to be read
>
> (a) within their entire context in order to figure out the scheme and purpose of the agreement and the words in a particular article must be considered within that framework,
>
> (b) in their grammatical and ordinary meaning. **Typically this involves taking the appropriate dictionary definition of a word and using it, unless the dictionary meaning is modified by a definition, by common usage of the parties or by the context in which the word is used, and**
>
> (c) harmoniously with
>
> - the scheme of the agreement (which could include the arrangement of provisions and the purpose of the agreement or a particular part of the agreement)
>
> - its object
>
> - the intention of the parties, assuming an intention can be discerned. The intention is to be found in the words used, but evidence of

> intention from other sources may be appropriate in order to decide on what the words used by the parties actually mean.
>
> [Emphasis added]

228. The word "negotiations" is used in Article A21 in reference to the Pension Plan.

229. The lower court in *Commercial Union Life Assurance Co. of Canada, supra,* referred to the definitions of "negotiation" and "negotiate" in *Black's Law Dictionary* and on appeal the court agreed with the trial judge that the word "negotiate" meant "to agree through communication and discussion (at para 52)."

230. In *Great Lakes Power, supra,* Arbitrator Marcotte concluded the reference in that collective agreement to negotiated changes to the pension plan are changes through the bilateral agreement between the employer and the union. Repeated again for ease of reference, Arbitrator Marcotte stated at para 66:

> By specifying revisions by way of changes negotiated by the parties, they have clearly indicated that such revisions are to be made bilaterally by them, as the parties to the collective agreement, and which bilateral agreement cannot reasonably be said to also include unilateral decision-making on the part of either party to the collective agreement.

231. "Negotiations" is defined in Oxford Dictionaries, online: https://en.oxforddictionaries.com as:

> **negotiation**
>
> NOUN
>
> *[mass noun]*
>
> **1** (also **negotiations**) Discussion aimed at reaching an agreement.
>
> *'a worldwide ban is currently under negotiation'*
>
> *'negotiations between unions and employers'*

232. "What is negotiations?" is defined in Black's Law Dictionary, online: http://thelawdictionary.org as:

> What is **NEGOTIATIONS?**
>
> the term that is applied to discussions that lead to the conclusion of an agreement or a transaction.
>
> [Emphasis in original]

233. In our view the plain, literal and ordinary meaning of the word "negotiations" used in reference to the Pension Plan requires the City to negotiate changes to the Pension Plan with the Union. Changes cannot be implemented unilaterally by the City without the consent of the Union.

234. Does the context or the factual matrix in which the parties have used "negotiations" otherwise require a different meaning than the "plain, literal and ordinary meaning?"

235. The context in which a contract was made is often described as the "factual matrix". In *Zeubear Investments Ltd. v. Magi Seal Corp.*, 2010 ONCA 825, 103 OR (3d) 578 the Ontario Court of Appeal stated at para 23:

> When interpreting a written contract, a court should focus on the meaning of the words used in the contract. **It should consider the meaning of the words in light of the whole of the contract as well as in the context in which the contract was made, sometimes called the factual matrix.** The purpose of the interpretive exercise is to determine the meaning of the contract in an objective sense, by asking what the parties using the words in the contract against the relevant background would reasonably have been understood to mean.
>
> [Emphasis added]

236. Evidence outside the four corners of the Collective Agreement is admissible to clarify or demonstrate the factual matrix of the context in which the words were used by the parties.

237. The context of the agreement is of paramount importance. In *Reardon Smith Line Ltd. v. Hansen-Tangen,* [1976] 3 All ER 570 (HL), the House of Lords set out at 574:

> No contract is made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

238. During the process leading to the consensual change to a trusteed Pension Plan the parties repeatedly confirmed the collective agreements required that changes to the Plan required negotiations with the unions.

239. We refer to the following by way of example:

.1 The Subcommittee created through the Pension Administration Board in its September 20, 1993 report made several observations regarding the process of changes to the Pension Plan and the language in the collective agreements requiring negotiating plan changes with the unions. The report stated:

> In addition to the roles outlined under Bylaw 6321, all collective bargaining agreements between the City and its various unions and associations contain language which assigns to the Board the role of negotiating plan changes. Collective agreements contain the following or similar language:
>
> **"Superannuation negotiations shall take place through the Pension Administration Board. No changes to the Plan will be implemented unilaterally by the City."** [Emphasis in original]

.2 In the City Solicitor's report to the Working Committee on Plan Governance of June 13, 1995, she noted that changes to the Pension Plan required the consent of the unions. This report stated:

> However, any change in the administration of the Plan will require the agreement of the various unions representing the members.
>
> **2. Pension Negotiations**
>
> The Collective Agreements which the City has with its unions all specify that pension negotiations are to take place through the Pension Administration Board.

.3 The amending bylaw changing the Pension Plan to a trusteed plan presented to the Pension Administration Board in the meeting on March 12, 1996 reflected in the minutes that the bylaw was subject to successful negotiations with the unions:

> THAT the draft bylaw and Pension Trust Agreement, (as amended this evening), be approved, in principle, subject to the successful completion of negotiated changes to the Collective Agreements with various locals, with respect to the collective bargaining process regarding pensions.

.4 The Terms of Reference for the Pension Benefits Committee adopted by the City on June 28, 1998 recognized that Plan improvements are subject to collective bargaining:

> Recommendations for benefit improvements arising out of excess surplus shall be made directly to City Council in accordance with the reporting procedure contained in these Terms of Reference. Recommendations on Plan improvements not based upon the available excess surplus, **including recommendations which would involve a change in contribution rates of the City or of Plan members, shall be made to the City and the employee organizations as subject for collective bargaining.**
>
> [Emphasis added]

.5 On November 27, 2001, CUPE Local 859 requested the Pension Benefits Committee change the Pension Plan to accommodate seasonal employees. The Pension Benefits Committee said that changes to the Pension Plan required the consent of the unions and are the subject of collective bargaining:

> The terms of the General Superannuation Plan have been collectively bargained. It is the Committee's view that fundamental changes to the Plan, such as the right to buy back service presently not included under the existing terms of the Plan should come from the bargaining table.

.6 Contribution rates to the Pension Plan and salaries were bargained collectively between the City and unions for the 2007-2009 collective agreements. The Memorandum of Agreement speaks to "if the Parties reach agreement", "after agreement is reached" and "all agreed changes shall go through the customary ratification process and, if successful, shall become a new collective agreement".

.7 On October 1, 2010, the Board of Trustees wrote to the City Manager regarding overtime earnings and the Pension Plan, affirming the City's position that it had no authority to make unilateral changes to the Pension Plan.

> The City Solicitor's Office has advised that the Board has no authority to establish or alter the defining of Earnings within the Plan Bylaw. That authority rests with the Plan Sponsor and the employee groups with which it negotiates

.8 The May 5, 2014 "Pension Update" newsletter indicated that the consent of the Union was required to change to the Pension Plan insofar as the Union members were concerned.

> The new contribution rate increase will not apply to members of ATU 615 until the *Agreement in Principle* has been ratified by their members.

240. This factual context hardly supports the right of the City to make unilateral changes to the Pension Plan. If the City is correct in that it can make unilateral changes to the Pension Plan without the Union's consent, why did the City, in the last 2 decades of negotiations with the unions and this Union, negotiate with the Union to obtain the consent of all unions before changes were made to the Pension Plan?

241. In our view, the factual context in which the parties have operated prior to this dispute affirms the plain and literal meaning of "negotiations".

242. We find the City cannot make unilateral changes to the Pension Plan without the consent of the Union.

E. Is the $250,000 charge a permitted change to the Pension Plan?

243. The City argues Article A21 does not override Article 14.01 of the Pension Plan which permits the City to amend the Plan.

244. The Pension Plan permits unilateral amendments. Article 14.01(4), formerly 14(3), of the Pension Plan states:

> Notwithstanding anything else contained herein but subject to Subsection 14.01(3), the Plan may be amended at any time to reduce benefits so as to avoid revocation of the Plan's registration.

245. The City's argument is that there is no change to the Pension Plan if the amendment is permitted in the Pension Plan.

246. In our view, the City's argument is not successful.

247. First, the word "negotiates" limits the ability of the Employer to make amendments to the Pension Plan. In the Collective Agreement the parties agreed to restrict the right of the City to make unilateral changes to the Pension Plan.

248. Accordingly, the facts in this case are distinguishable from *St. Mary's Cement, supra.* Unlike *St. Mary's Cement,* the Collective Agreement specifically limits the right of the Employer to make amendments to the Pension Plan. The Employer is required to negotiate changes to the Pension Plan, and if the negotiations are not successful, the Pension Plan does not change.

249. Second, the change is not permitted in Subsection 14.01(3)(b) of the Plan. Subsection 14.01(3) states:

> **(3)** Notwithstanding Subsection **14.01(2)** hereof, the City retains the right to amend, modify or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:
>
> (a) No amendment shall have the effect of reducing any Member's, Spouse's, or beneficiary's then existing entitlements under the plan; and
>
> (b) No amendment shall have the effect of diverting any part of the assets of the Fund for any purpose other than for the exclusive benefit of the Members and their Spouses or beneficiaries under the Plan prior to the satisfaction of all liabilities with respect to such person immediately before such amendment.

250. The amendment to the Pension Plan in the Grievance is the right of the City to recover its administrative expenses from the Plan up to $250,000 annually. This amendment has the effect of diverting from the Fund up to $250,000 annually. This is for the benefit of the City, not for the exclusive benefit of the Plan Members.

F. Estoppel

251. If wrong in our interpretation of Article A21 and the application of this interpretation to the $250,000 change made to the Pension Plan without the consent of the Union, we find the City is estopped from making this change to the Pension Plan.

252. There was a longstanding understanding among the City and the unions that the City would not unilaterally make changes to the Pension Plan without the consent of the unions. The City represented, and made it known, that the collective agreements with the unions whose members were covered by the Pension Plan all contained language that required the City to negotiate changes through collective bargaining.

253. In the Letter of Undertaking, dated July 20, 2001, the Labour Relations Manager for the City wrote to CUPE Local 59 regarding the Pension Plan stating:

- The Employer undertakes to meet jointly with all unions and associations within the Pension Plan to establish with parties the process of negotiating pensions.
- Pension Plan negotiations shall take place within 60 days when requested by the unions or the City.
- No changes to the Pension Plan will be implemented unilaterally.

254. The Union is distinctly identified in the Letter of Undertaking as one of the unions to whom this undertaking is provided. The Undertaking remains part of the collective agreement with CUPE 59 for the January 1, 2013 to December 31, 2016 period.

255. The City's conduct and representations provided an assurance to the Union that changes to the Pension Plan would be negotiated with the Union and not implemented unilaterally. The City intended, and the Union relied on, this undertaking. All was fine until the present dispute. Previously, Pension Plan change was the result of successful negotiations between the City, the Union and the other unions and employee associations.

256. There was no need for the Union to negotiate more than what it had in Article A21. It did not need to amend Article A21 to read the same as the wording in the CUPE Local 59 collective agreement. The City's conduct assured the Union that the language in Article A21 was good enough, the Union had it. Pension Plan changes required negotiation with the Union and no changes could be made without the successful completion of negotiations.

G. Other

257. The Union's other argument is that the Pension Plan falls under "wages and conditions" of employment under Article A2 of the Collective Agreement, and changes to the Collective Agreement cannot be made unilaterally by the City. We are not forced to consider this issue to decide the Grievance in favour of the Union, and make no finding on the validity of this argument.

258. There was a suggestion that the City did not take advantage of and pay itself any additional costs up to $250,000 annually, incurred with the administration of the Pension Plan. In our view,

this is of no consequence to whether the change to the Pension Plan is a violation of the Collective Agreement, but will factor into the damages arising from the breach.

V. CONCLUSION

259. For the foregoing reasons, we find the City violated the Collective Agreement when it changed the Pension Plan in so far as permitting the City to recover from the Pension Plan its costs, up to $250,000 annually, for the administration of the Pension Plan. Any such costs paid by the Pension Plan to the City resulting from this amendment are to be accounted for by the City to the Union and paid by the City to the Pension Plan.

Dated this 8th day of June, 2017.

William F.J. Hood, Q.C., Chair

I concur.

Carolyn Jones, Union Nominee

I dissent.

Pam Haidenger-Bains, Q.C., Employer Nominee