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 AND

THE AMALGAMATED TRANSIT UNION, LOCAL NO. 615

DECISION OF PAMELA HAIDENGER-BAINS, Q.C. (IN DISSENT)

## I. PRELIMINARY COMMENTARY

1. I agree with the statement of facts as set out in the decision of the majority above, with the addition of certain facts as set out below. I have also used defined terms from the decision of the majority, except where indicated.

2. The statement of facts in the decision of the majority is extensive and detailed. It is important to step back and consider the larger picture, as otherwise it is too easy to become lost in such details. Facts without context lose critical meaning.

3. The matter before this Board of Arbitration appears to be small. The original Grievance was broad in scope; it was then limited by the Union at the hearing to the changes set out in section 15.02 of the Pension Plan, which modified the amount that the City could charge for administration fees. The most important finding of the decision made by the majority above, is that all changes to the Pension Plan, no matter how large or how small, require the consent of the Union. The Union has filed a further grievance on the other changes made to the Pension Plan, this award will have a substantial impact on such grievance and on future decisions concerning the Pension Plan.

4. It is also important to appreciate that Union members covered by the Collective Agreement and those members receiving benefits under the Pension Plan are not the same group of people. To the contrary, members of eight other employee organizations receive benefits under the Pension Plan, and have a stake in the matter at hand.

## II. ANALYSIS

### *A. Aribitrability*

5. The first question is whether this Board of Arbitration has the jurisdiction to hear the dispute and to grant the remedies requested. Under section 6-45(1) of *The Saskatchewan Employment Act,* our authority is limited to hearing disputes between parties of a collective agreement as to the meaning, application, or alleged contravention of the collective agreement. This grievance relates to changes made to the Pension Plan, a document which stands outside of the Collective Agreement.

6. First, what is the nature of the Pension Plan itself? I concur with the decision of the majority that the Pension Plan is a fully formed pension trust. This means that it is subject to trust law and pension legislation, and not contract law. (See, for example, the Supreme Court of Canada decision, *Schmidt v. Air Products Canada Ltd.*, [1994] 2 SCR 611, 1994 CanLII 104 (SCC), 1994 Can LII 104).

7. The trust is embodied by two documents; the Pension Trust Agreement dated October 1, 1996 (the "Trust Agreement"), and the City bylaws setting out the details of the General Superannuation Plan for the City of Saskatoon Employees not covered by the Police and Fire Departments Superannuation Plans (the "Superannuation Plan Bylaws"). Section 2 of the Trust Agreement provides that the Trust Agreement is made part of the Plan. The two documents are married together through their own incorporation by reference (and are collectively referred to herein as the "Pension Plan".)

8. The Union seeks an order declaring that the changes made to the Pension Plan be set aside, and requiring that the employer account for and reimburse the Pension Plan for any expenses for which it has been reimbursed as a result of the changed plan, to the extent those reimbursements were greater than the employer's previous reimbursement entitlement. The decision of the majority, above, limits the award to an order of reimbursement to be made to the Pension Plan. Given that the Board of Trustees administers the Pension Plan and would be the true recipient of the funds, this amounts to an order that reimbursement be made to a third party. Both the remedies sought and the remedy granted affect the Pension Plan. I am of the opinion that to grant any such order, we must first be able to find that the Pension Plan has been incorporated by reference into

the Collective Agreement, as otherwise we will not have the authority to grant the orders sought nor the order given.

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

> 4:1440 Incorporation by reference of plan or policy
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> 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.

10. This excerpt emphasizes that clear language is required for an incorporation by reference. In my opinion, such clear language does not exist in this Collective Agreement. The decision of the majority believes that the language of Article A21 is sufficient for incorporation by reference; I disagree. The whole of Article A21 states as follows:

> **ARTICLE A21 SUPERANNUATION**
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> 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. (bolding added)**

11. It would not be necessary to state that Pension Plan negotiations could take place separate from the negotiations of the collective agreement, and may involve representatives from other employee organizations, if the Pension Plan formed part of the Collective Agreement. In fact, in order for separate negotiations to take place that involve other employee organizations, the Pension Plan must be regarded as being separate from the Collective Agreement. As a result, I am of the opinion that the Pension Plan stands on its own and cannot be incorporated by reference.

12. The decision of the majority also include discussion regarding the ability of an arbitrator to look at the essential character of a dispute in determining forum. For example, the following passages from *Saskatoon (City) v Amalgamated Transit Union, Local No. 615,* (2010), 194 LAC (4th) 28, at paras 28 to 30, are cited:

> 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. (bolding added)**
>
> 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.
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> 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:
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> 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 cmeet 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.
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> 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.

13. This excerpt sets out two critical elements for the consideration of the judge or arbitrator when determining the appropriate forum: (1) the dispute and (2) the ambit of the collective agreement.

14. This dispute does not just involve the City and the Union; it involves eight other employee organizations that benefit from the Pension Plan, and the Board of Trustees whose job it is to administer the Pension Plan. The Collective Agreement, on the other hand, pertains only to the Union and the City, and only these two parties were represented at the hearing. The Collective Agreement should not have so broad a scope as to override or amend the provisions found in a Pension Plan that applies to other employee organizations that have agreed to its terms.

15. Furthermore, the Collective Agreement is a contract, while the Pension Plan is a trust; it is difficult to conceive as to how the ambit of a contract can be extended to include the terms of a trust. The pension trust is also entrenched within a city bylaw, which is a form of legislation. Questions also arise as to whether it is appropriate that the Collective Agreement assume authority over a City bylaw.

16. It is also important to recognize that the Pension Plan has its own provisions for amendment, which are found at Section 14 of the Superannuation Plan Bylaws and that provide in part as follows:

> 14.01 Amendments
>
> (1) Unless otherwise stated, amendments to the Plan become effective according 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 section 14.01(3), the Plan may be amended at any time to reduce benefits so as to avoid revocation of the Plan's registration.

17. If the Union must consent to all amendments to the Pension Plan, it amounts to a finding that the rights of amendment set out in section 14.01 of the Pension Plan are restricted by a provision found in a separate contract. Not only might this be a problem under trust law; it is also prohibited by section 21 of the Trust Agreement, which states:

> 21. This Agreement shall constitute the entire written agreement between the parties and there are not other written or verbal agreements or representations.

18. Accordingly, I am of the opinion that this Board does not, and should not have the jurisdiction to hear this matter with respect to the orders which have been requested and the order that has been granted, as it exceeds the authority given to us by section 6-45(1) of *The Saskatchewan Employment Act*

*B. Prematurity*

19. The next question to be considered is whether the Grievance was filed prematurely, before any alleged violation had taken place. It is based upon the principle discussed in the the decision in *Hamilton (City) v O.N.A.*, [2009] OLAA No. 409, 187 LAC (4th) 96, that unless the alleged violation precedes the filing of the grievance, there is no jurisdiction.

20. The Union cites the case of *C.U.P.E., Local 34 v Saskatoon School Division No. 13* (2003), 120 LAC (4th) 150, in which Mr. Chairman Hood hold that jurisdiction can be found where there is sufficient proximity between the alleged violation and the filing of the grievance such that the "difference" between the Union and the employer is neither moot nor a threat. Further, the Union is of the view that a dispute as to the interpretation of the collective agreement can be heard at any time.

21. Determining whether or not a premature filing had occurred is very fact-specific. As a result, I believe it useful to review the facts as known to us, as set out in the documents referred to in the decision of the majority as well as through the testimony of Mr. Yakubowski:

- The other eight employee organizations affected by changes to the Pension Plan signed an Agreement in Principle on January 15, 2014.
- The City and the Union met at least 14 times between October of 2013 and May of 2014 to discuss, among other things, proposed changes to the Pension Plan.
- In addition, the City and the Union exchanged at least five proposals from the City and two counter-proposals from the Union.
- The Board of Trustees for the Pension Plan (not the City of Saskatoon), in its Pension Update of May 5, 2014, reviewed the status of the new contribution rates. The Board of Trustees represented in such Pension Update that the new contribution rate increase would not apply to members of the Union until they ratified the Agreement in Principle signed by the other eight employee organizations in January of 2014. No mention was made of the changes to the administration fee.
- The City made a further Offer of Settlement to the Union on May 7, 2014. This Offer of Settlement was rejected by the Union membership on May 9, 2014.
- **The Union filed the Grievance in question on May 12, 2014.** The Grievance is stated as being that "[t]he Employer reduced benefits by imposing changes to ATU 615 members pension plan (Superannuation Plan) during the collective bargaining process without consent." It is not limited to the cap on administration fees.
- The Union filed an Unfair Labour Practice Application dated May 12, 2014 regarding changes to the Pension Plan.
- The City wrote to the Minister of Labour Relations and Workplace Safety on May 14, 2014 stating that there was an impasse in negotiations and asking that the dispute be mediated or subject to the process of conciliation. The letter is shown as having been copied to Mr. Yakubowski, President of ATU Local No. 615.
- The City and the Union met on June 25, 2014 and June 26, 2014 for the conciliation process, after which the City presented an enhanced offer. This offer was rejected by the Union membership.

- The City then made application to the Labour Relations Board for a supervised vote. The vote took place on August 15, 2014, and was rejected by the Union membership.
- The Union filed a further Unfair Labour Practice Application on September 22, 2014 regarding the changes to the pension plan.
- The City passed Bylaw 9224 on September 22, 2014. Bylaw 9224 contains the grieved amendment(s) to the Pension Plan.
- A hearing was held before the Saskatchewan Labour Relations Board on October 14, 2014. The Labour Relations Board rendered two decisions; one on October 21, 2014 and one on March 13, 2015. The decision of October 21, 2014 (*Amalgamated Transit Union 615 v. City of Saskatoon*, 2014 CarswellSask 658) states at paragraph 29 the Union's position that the City had made changes to the pensions of members of the Union on September 22, 2014 through the enactment of Bylaw 9224.
- The City started taking from Union members increased pension deductions as provided for in Bylaw 9224 in July of 2015.
- The Union filed a further Grievance on July 20, 2015, that the employer made unlawful pension deductions from ATU 615 members without authorization on the July 15, 2014 pay cheque.

22. Mr. Yakubowski further testified that he had heard in 2014 that the Board of Trustees had some questions as to the meaning of the bylaw changes to section 15.02, and accordingly the City had received nothing at all for administration costs in 2014. It is not known when the City began to receive payment for the administration costs; presumably it would have begun in 2015 at the earliest.

23. What we can see from this history of events was that at the time this Grievance was filed, there had been no violation as alleged in the Grievance that "[t]he Employer reduced benefits by imposing changes to ATU 615 members pension plan (Superannuation Plan) during the collective bargain process without consent." Nor can it even be said that the Union had a reasonable apprehension that it was under any immediate threat of any reduction in benefits. It was, in fact, moving towards a process of conciliation with the City.

24. As far as the City was concerned, it was still in the process of trying to reach an agreement with the Union; it was still negotiating as required by the terms of Article A21. The Board of Trustees had indicated in its Pension Update for that month its belief that the Union was unaffected by the Agreement in Principle signed by the other eight organizations. The Union had every indication that the City would continue to negotiate with it until all avenues were exhausted. According to Mr. Yakubowski in his testimony, the Grievance was filed on the basis that the other employee organizations were in the process of making arrangements to implement the changes to be made to the Pension Plan.

25. Grievances should not be filed on the basis of rumor and innuendo relating to other employee organizations; some real and calculable harm should either have been suffered or be immediately imminent to the Union members themselves. This does not appear to be the case.

26. The Union has failed to prove that any reduction of benefits has occurred. The Union disputes the validity of the change to the amount payable to City for administration fees. We have no evidence before us that this is a change to a "benefit" of the Union members. Section 6 of the Pension Plan sets out retirement benefits; section 7 sets out death benefits, and section 8 sets out termination benefits. Section 15.02, the costs of administration discusses the maximum amount that the City may charge for administration fees; it is not a "benefit" in the same sense as contemplated by the other sections. It is the reimbursement of costs incurred by the City on behalf of the Board of Trustees, in administration of the pension trust. It is a discretionary amount subject to the review of the Board of Trustees. We have scant evidence as to when the City began receiving payment under the revised section 15.02; it appears that the City may even have received nothing at all in 2014 as a result of the exercise of this discretion by the Board of Trustees. No other evidence was adduced to demonstrate any reduction of benefits has occurred, let alone a reduction that had occurred or was imminent as of the date of filing of the Grievance.

27. It is argued that all the Union must prove is that the terms of Article A21 had been breached as of the date of filing in order for it to have standing to ask for an interpretation; even should this be the case, I am of the opinion (as discussed later in this opinion), that no breach had occurred and the City had met the obligations of Article A21.

28. Finally, it would appear from the history between these two parties that the Union itself was uncertain as to the validity of its grievance of May 12, 2014, as it filed on July 20, 2015 a

further grievance which covers the most important part of the subject matter – changes to pension deductions. The grievance of July 20, 2015 states as follows:

> THE GRIEVANCE IS A VIOLATION OF THE FOLLOWING: Article A2, A21 of the Collective Agreement and any other Article or Clause of the Collective Agreement, Past Practice, Legislation or Policy that may apply. Section 2-36 of the Saskatchewan Employment Act.
>
> GRIEVANCE: The employer made unlawful pension deductions from ATU 615 members without authorization on the July 15, 2015 pay cheque.

29. As with this Grievance, the grievance of July 20, 2015 also pertains to changes made to the Pension Plan in Bylaw 9224, and relies upon the same Article A21. This second grievance, unlike the one of May, 2014, properly waits until such time as a detriment has actually been suffered by members of the Union. It was filed more than one year after the original Grievance.

*C. Multiplicity of Actions*

30. The City has argued res judicata/issue estoppel, collateral attack, and abuse of process, relying upon the March 3, 2015 decision of *Amalgamated Transit Union, Local 615 v. City of Saskatoon*, [2015] S.L.R.B.D. No. 7, 256 C.L.R.B.R. (2nd) 37, [2015] CLLC para 220-006, LRB File No. 210-14, as having settled the issues as between the parties.

31. The March 3, 2015 decision of the Saskatchewan Labour Relations Board first sets out the arguments of the Union, as follows:

> 9. In argument, the Transit Union took the position that, in light of the Board's finding that Bylaw No. 9224 was enacted by City Council during the period of the statutory freeze, the Board's remedial relief must put its members in the position they would have enjoyed had the violation not occurred. To which end, the Transit Union sought an Order that the City of Saskatoon be directed by this Board to take such steps as may be necessary to reverse any changes that were made to the pension plans of members of the Transit Union by means of Bylaw No. 9224. The Transit Union argued that this Board need only direct the outcome it desired and then leave it up to the City of Saskatoon to choose the means by which the outcome would be achieved, much as the Board does when directing the reinstatement of an employee found to have been unlawfully terminated in contravention of The Saskatchewan Employment Act.
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> 10. Simply put, the Transit Union argued that, in light of the legislative prohibition against making changes to the conditions of employment, benefits and privileges during the period of a statutory freeze, and in light of the Board's finding that the City violated that prohibition in enacting Bylaw 9224, the presumed remedy logically must be to direct the City to reverse those

> changes. In this regard, the Transit Union noted that the City's elected representatives clearly have the authority to amend or rescind Bylaw No. 9224 and to enact a new Bylaw. The Transit Union disagreed that damages would have been an appropriate remedy because, in the Union's view, the more appropriate remedy would have been to simply direct that the offending actions are reversed. The Transit Union took the position that doing so would most accurately place its members in the position they would have enjoyed had the City not violated the '*application pending*' statutory freeze.

32. The decision then provides, in part, the following analysis:

> 18. First, Bylaw No. 9224 was enacted by elected officials acting in furtherance of authority delegated to them pursuant to The Cities Act, S.S. 2002, c. C-11.1. As such, it was a legislative action by duly elected officials and may not be struck down or quashed by this Board. In our opinion, striking down or quashing a municipal bylaw would require clear and express authority; authority not found in s. 6-103 or 6-104 of The Saskatchewan Employment Act. While the Transit Union's desired remedy is not expressed in terms of striking down or quashing Bylaw No. 9224, the substantive effect of the remedy it seeks on behalf of its members is intended to achieve the same result. In this regard, we are loath to purport to do something indirectly (i.e.: by directing the City's elected officials to reverse its decision to enact Bylaw No. 9224) that we cannot do directly (namely, to strike down or quash the Bylaw.)

33. In the arbitration before us, the Union came seeking an order declaring that the changes made to the pension plan respecting cost reimbursement be set aside. It is in essence seeking the same order as asked for from the Saskatchewan Labour Relations Board, thus giving rise to the City's argument of res judicata and issue estoppel. It has already been decided by the Saskatchewan Labour Relations Board that the indirect effect of such an order is to quash Bylaw No. 9224, which is beyond the authority of the Board. Just as such order is beyond the authority of the Board, it is similarly beyond the authority of an arbitrator.

34. The decision of the majority, however, does not grant an order making changes to the Pension Plan. All that it orders is that the City reimburse the Pension Plan for any costs paid by the Pension Plan to the City resulting from the amendment relating to the administration of the Pension Plan. It is framed as an order for damages, albeit such damages are to be payable to the Board of Trustees for the Pension Plan, rather than the Union itself.

35. Regardless of how the order is framed, it is still subject to the application of the doctrine of abuse of process.

36. The Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422, states the following at paragraphs 33:

> 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 of 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 justice process, thereby diminishing its authority, its credibility and its aim of finality.

37. The Union asked this arbitration board for essentially the same order it had sought from the Saskatchewan Labour Relations Board. It will undoubtedly ask the arbitration board for the July 20, 2015 grievance for the same order as well. To reach a different conclusion as that which was reached by the Saskatchewan Labour Relations Board is to undermine the credibility of the process and the aim of finality.

38. Extensive time, effort, and resources have been expended in reaching this point. The City and the other eight employee organizations have moved forward in reliance upon changes made to the Pension Plan and approved by the Superintendent of Pensions for the Financial and Consumer Affairs Authority of the Province of Saskatchewan. To continue to press forward on this matter and to risk the resulting labour relations difficulties that may ensue, puts at risk all the work done by others to salvage the Pension Plan, and is an abuse of process. It is time for the Union and the City to move forward in re-establishing a more productive relationship.

### *D. Interpretation of Collective Agreement*

39. The final issue is that of the interpretation of Article A21 of the Collective Agreement. It is argued that Article A21 requires that the Union and the City must reach an agreement on changes to the Pension Plan before any such changes can be made; this finding is the foundation for the award. The effect of this conclusion is that the Union is given an absolute right of veto to all changes made to the Pension Plan.

40. I disagree with this conclusion.

41. It was first argued that the plain and clear meaning of the term "negotiation" requires that an agreement be reached. The decision of the majority cites as an example the definition from "Negotiations" found 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'*

42. This definition doesn't state that an agreement will be reached; it merely provides context that negotiation is a process aimed at reaching an agreement (as opposed to some other objective). We all understand that negotiation is a process, a means to an end. We also understand that negotiations are as likely to end in a failure to reach an agreement as they are to reach an agreement. We hope to reach an agreement; we don't count on reaching an agreement. This is demonstrated time after time at the bargaining table.

43. There are many available definitions for "negotiations". The definition set out in the online version of the Merriam-Webster https://www.merriam-webster.com/ is as follows:

> **Definition of negotiation**
>
> : the action or process of negotiating or being negotiated —often used in plural -- *Negotiations between the two governments have failed to produce an agreement.*

44. The Merriam-Webster definition shows the use of the term "negotiations" to include a failure to produce an agreement.

45. Accordingly, I am of the view that the term "negotiations" as used in Article A21 is more commonly understood to refer to a process of negotiating, and not the end product of an agreement. Using the "plain, literal and ordinary meaning" of the word, the City meant to give the Union a right to participate in the process of negotiation, but did not intend to give it a veto right that would override the rights the City and that may potentially cause harm to the members of eight other employee organizations.

46. This definition is consistent with factual context, as discussed in the decision of the majority. The Pension Plan became a pension trust on October 1, 1996, upon signature of the Trust Agreement. Prior to that date, changes to the Pension Plan had taken place through the Pension Administration Board. In the period between 1993 and 1996, the City and the Pension Administration Board discussed how the Pension Plan would be restructured. The City was of the view that the administration of the Pension Plan could not be restructured without the consent of all the employee unions; it did not take the position that going forward, changes to the benefits and other terms of the Pension Plan required consent of all the employee organizations In June of 1995, the City Solicitor presented a confidential report in which she discussed the issue of negotiation of pension benefits. She stated:

> 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.

47. The Working Committee on Plan Governance, a joint committee established for the purpose of recommending changes to the structure of the Plan and which included union representation, stated a similar viewpoint in its report of December 13, 1995:

> 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.

48. The language of Article A21 was changed in the 1995 – 1997 collective agreement with the Union to reflect that negotiations for changes to the Pension Plan no longer needed to take place through the Pension Administration Board; instead it would be a forum as agreed to between

the parties and may involve other members of the Pension Administration Board (i.e., other employee organizations).

49. The parties were contemplating that negotiations would take place through a common bargaining committee, having expertise in pension matters. The purpose of Article A21, accordingly, is to give the Union the chance to participate in what would most likely be collective negotiations, and not to give it an absolute right of veto.

50. The bargaining history between the parties supports this interpretation. During the collective bargaining of the 1991 collective agreement with the Union, the Union sought the following language in replacement of the then existing language:

> 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 the same may be implemented unilaterally by the Board.

51. The City would not agree to this proposed change. The only change that has been agreed to is that as shown in the current Article A21, which change was agreed to in 1995. It follows that the language as currently set out in section A21 was not intended to give the Union an absolute veto on all changes to the Pension Plan.

52. The Union cannot seek to achieve through arbitration something they could not achieve through collective bargaining (see, for example, *In the Matter of an Arbitration between the City of Hamilton, Employer and Ontario Nurses Association, Union*, 2009 CarswellOnt 8670, [2009] O.L.A.A. No. 409, 187 L.A.C. (4th) 96, 99 C.L.A.S. 32).

53. This interpretation is further borne out by the structure in place for approving benefit improvements to the Pension Plan. Following the disbandment of the Pension Administration Board and its replacement by the Board of Trustees, the Pension Benefits Committee was put in place. We have its Terms of Reference as approved in April of 1998. Each of the employee organizations, including the Union, is given a representative on the Committee. Section 2.1 of the Terms of Reference provides as follows:

> 2.1 The function of the Committee is to review benefits available under the Plan and to recommend benefit improvements. This includes, but is not limited to, benefit improvements based on the available excess surplus as determined in the annual Actuarial Valuation Report prepared by the Plan Actuary in accordance with the provisions of the Plan.

54. Section 5.5 of the Terms of Reference provides as follows:

> 5.5. The Committee will act by a vote of 2/3rds of the members present.

55. The Pension Benefits Committee gives to the Union the opportunity to participate in a collaborative process to amend pension benefits, which process is outside the bargaining process for the Collective Agreement, is not binding on the City, and does not even require unanimity. It flies in the face of common sense to argue that section A21 has an expanded meaning that the Union consent to all changes to the Pension Plan, giving it a greater right than that which it has as a part of the Pension Benefits Committee.

56. Nor is the City estopped from denying the broader interpretation argued by the Union. First, the Pension Plan became a trust on October 1, 1996. It has not been argued by the Union that it did not agree to the creation of the pension trust; to the contrary, the Union points out the representation of the City Solicitor that changes would not be made to the administration of the Pension Plan (that is, the structure) without the consent of all the employee organizations. The Pension Trust Agreement is incorporated into and forms part of the Pension Bylaw, which has its own rules for amendment. Section 21 of the Pension Trust Agreement specifically excludes all other verbal or written representations, which representations form the foundation for the doctrine of promissory estoppel.

57. Furthermore, the representations relied upon were those made by various committees and subcommittees and by the Board of Trustees for the Pension Plan. These are all third party organizations with Union representation that are making some form of representation; the City cannot be bound by a representation made by someone else. It is also consistent from the operation of the Pension Benefits Committee that the Union did not regard itself as having the absolute right to consent to any and all changes to the Pension Plan.

58. So did the Union have a place at the common bargaining table, such that it could participate in the negotiations? Mr. Yakubowski testified that in 2012, the collective agreements for the various employee organizations had all expired. The City expressed its concern regarding the long term sustainability of the Pension Plan as it then existed, and asked for an extension on the time for negotiations so that it could obtain a valuation. The employee organizations agreed to a common bargain table for, among other things, changes to the Pension Plan. Common table

bargaining began in the fall of 2013; the Union was at the table. Discussions began with a presentation from Mercer stating that the plan was not salvageable and needed to move to a different structure. Discussions evolved over time to ways to keep a defined benefits plan, which included commuted value options, changing the age from 80 to 85, requiring four years of service, and providing for a $250,000 cap on reimbursement to the City. In December of 2015, the City reached an agreement with eight of the nine employee organizations. The Union was the only one in disagreement. An Agreement in Principle was signed with the eight other organizations, and discussions changed to a separate table for the Union where negotiations continued until a complete impasse was reached.

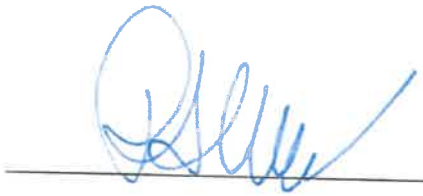
59. Furthermore, even without the collective negotiation process, the Union participated in negotiations held directly between the City and the Union, a forum which is also contemplated by the Article A21.

60. There were extensive negotiations between the City and the Union, more than is even reasonably necessary. Accordingly, I am of the opinion that the City more than met its obligations to the Union under Article A21.

## III. DECISION (IN DISSENT)

61. Based upon the foregoing analysis, it is my opinion that the Grievance of the Union should be dismissed.

Dated this 8th day of June, 2017.



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