IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Amherst (Town) v. Nova Scotia (Superintendent of Pensions), 2007 NSSC 344

Date: 20071127
Docket: S.H. 267196
Registry: Halifax

In the matter of: An appeal pursuant to Section 89(9) of the *Pension Benefits Act*, R.S.N.S. 1989, c. 340

Between:

The Towns of Amherst, Bridgewater, New Glasgow, Springhill, Stellarton, Trenton, Truro, and Westville, and The Regional Municipality of Cape Breton

Appellants

v.

Nova Scotia (Superintendent of Pensions)

Respondent

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: May 28, 2007, in Halifax, Nova Scotia

Counsel: Ronald A. Pink, Q.C. and Ms. Bettina Quistgaard for the appellants
Peter J. Driscoll, Esq. and Brian P. Casey, Esq. for the Trustees of the PANS Pension Plan
David W. Fisher, Esq. for the Police Association of Nova Scotia
Ms. Agnes E. MacNeil for the respondent Superintendent of Pensions

By the Court:

[1] The Superintendent of Pensions ruled that the appellants were employers under the *Pension Benefits Act* and were therefore liable to make up a deficiency in the Pension Plan for the members of the Police Association of Nova Scotia (PANS). The appellants are towns that negotiated collective agreements with several PANS locals. Although the towns did not formally join the pension plan, the Superintendent determined that they were "employers" for the purposes of the *Pension Benefits Act*. This appeal of the Superintendent's decision is brought under s. 89(9) of the *Act*.

BACKGROUND

[2] In 1981, the Directors of the Police Association of Nova Scotia set up a pension plan, which was filed with the Director of Pensions, pursuant to the *Pension Benefits Act*. The Certificate of Registration stated that the Plan was "organized and administered to provide pension benefits for the employees of Police Association of Nova Scotia or its successors or assigns...."

[3] The Pension Plan, in its original form, was administered by a Pension Plan and Retirement Committee consisting of a Chairman appointed by PANS; the PANS Executive Director, Solicitor and Secretary-Treasurer; one person appointed by the Police Club of Nova Scotia; one person representing non-union personnel belonging to the Plan; and "[o]ne person appointed by each participating local Authority (subject to a maximum of three)..." (s. 12.1). The Chairman had the discretion to permit non-voting observers to attend Committee meetings (s. 12.3). The Committee was required to administer the Pension Plan; to decide "all questions with respect to the interpretation and administration of the Plan"; to make recommendations to PANS with regard to appointment and reappointment of trustees; to establish and guide the investment policy to be followed by the trustees; to receive copies of actuarial reports, financial statements and lists of investments pertaining to the Pension Plan; and to direct the reporting policy to be followed by the Administrator in reporting to the Plan members (s. 12.4). The Administrator was the Executive Director of PANS (s. 1.3). PANS reserved the right to amend or terminate the Pension Plan, after consultation with the Committee (s. 14.1).

[4] By means of a Trust Agreement the Directors of PANS appointed trustees to "hold and administer" and to "invest and re-invest" the pension fund. The Trust Agreement reiterated that PANS had adopted the Pension Plan "for the benefit of certain of its employees and their beneficiaries, executors or

administrators....” Under the Trust Agreement, the trustees were to be “selected from time-to-time by and for such term as may be decided by the Association” (s. 7), and PANS reserved the right “at any time and from time-to-time to amend, in whole or in part, any or all of the provisions of this Agreement by notice thereof in writing delivered to the Trustees....” (s. 12).

[5] Members of PANS – who were employed by various town police forces – joined the plan by way of collective agreements between PANS locals and the towns. Most of the collective agreements required police officers to join the PANS Pension Plan, although membership was optional for officers in Bridgewater and Sydney Mines. Since 2000, officers in Sydney Mines have been limited to the municipal plan.

[6] Under the collective agreements, in most cases, the towns agreed to contribute a percentage of employees’ salaries to the Pension Plan, and to deduct an equal amount from the salaries. Both amounts were remitted to the Administrator of the Pension Plan. The collective agreements did not state that the appellants became members of the Pension Plan, nor did they explicitly require the towns to fund deficiencies that might arise. The union locals are distinct from PANS, and consequently the contracts were between the towns and the locals. Pension contributions and deductions were negotiated between the locals and the towns and set out in the collective agreements. The collective agreements were the only agreements entered into by the towns that related to the Pension Plan.

[7] In the original Pension Plan text, the definition of “employer” was “the Police Association of Nova Scotia or a body so designated by the Association or any local Authority” (s. 1.11). A “Local Authority” was “an employer whose employees or a class of employees are members of the ... Association ... and who has entered into an agreement with the ... Association ... to participate in the pension plan” (s. 1.14). The Pension Plan was a “single-employer” Plan, but it contemplated the possibility of becoming a “multiple-employer” plan in the event that other employers agreed to participate so as to be classed as “local authorities” and therefore “employers.”

[8] The Pension Plan required members to contribute five percent of their earnings (s. 4.1). The Employer was required to contribute an equivalent amount (s. 4.5) and was also required to “contribute an amount as is required to pay the costs of providing benefits as determined on an actuarial basis over and above that amount referred to in Section 4.5" (s. 4.6). According to the appellants, the significance of s. 4.6 is that the Employer “bears the

obligation and risk of ensuring that benefits provided by the Plan are fully funded."

[9] The Pension Plan was amended and restated effective January 1, 1988. In the 1988 restatement, "Employer" was defined as "PANS or any Local Authority", with the note that a reference in the Plan "to any action to be taken, approval or opinion to be given by the Employer shall refer to PANS acting through its Board of Directors or any person designated by the said Board to act..." (s. 2.09). The Chairman's discretion to allow non-voting observers at meetings was deleted (s. 4), although collective agreements allowed certain towns to appoint non-voting observers. The funding provisions were amended (at s. 7.03) to require the Employer to

> contribute each year such amounts as are indicated by the Actuary as necessary to provide for the cost of pension benefits accruing to Members during the current year and to amortize any unfunded liability or solvency deficiency with respect to benefits for service to date, in accordance with the provisions of the *Pension Benefits Act*.... [s. 7.03].

[10] The amendment provision was amended to state that the "Employer" reserved the right to amend or discontinue the Plan (s. 15.01).

[11] The Pension Plan was again amended and restated effective January 1, 1997. This restatement was amended several times. Each Amendment includes, in its preamble, the statement that PANS "maintains a registered pension plan for its employees and for those of its members who are employed by employers who have agreed with the Association to participate in the Plan...".

[12] The towns have not played any role in administering or operating the Pension Plan, and have never had any representatives appointed as trustees, nor have they ever received notice of, or had representatives attend, trustees' meetings. The only exception is that the towns were invited to send representatives to a trustees' meeting on April 20, 2005, which was held to discuss the funding dispute.

[13] The 1997 restatement placed responsibility for "operation, administration and interpretation of the Plan" in the hands of an Administrator, with duties delegated to a Board of Plan Trustees (s. 10). The Board consists of a Chairperson (the Executive Director of the Administrator, or another person appointed by the Administrator); one person appointed by each "Participating Employer", to a maximum of three; and one person "who is independent of the Employer and who is not a significant shareholder, partner, proprietor, director, officer or an employee of the Employer or an

affiliate of the Employer" (s. 10.4). The power to amend the Pension Plan was reserved to the "Administrator" – i.e. PANS, pursuant to s. 1.5 – under s. 13.1.

[14] When the funding dispute arose, PANS took the position that the towns are not "participating employers" and are not entitled to representation under the Pension Plan.

[15] In the 1997 restatement, s. 1.20 defined "employee" as "any person in the full-time or part-time employment of PANS or of a Participating Employer and who is a member of PANS." Section 1.21 defined "employer" as "PANS or any Participating Employer." Neither of these definitions was changed in later amendments, although they were subsequently re-numbered as sections 1.22 and 1.23, respectively (see Amendment No. 4 (Revised), March 2003.)

[16] The 1997 version of the Pension Plan replaced the term "Local Authority" with "Participating Employer", defined as "an employer whose employees (or class of employees) are members of PANS and who has entered into an agreement with PANS to participate in the Plan" (s. 1.32). By way of Amendment No. 4 of May 2002, Amendment No. 4 (Revised) of March 2003, and Amendment No. 6 of March 2003 this definition was amended to "an employer having employees who are members of PANS and who has entered into an agreement with PANS to permit such employees to participate in the Plan." Amendment No. 6 identified the following towns as "participating Employers" as of November 1, 2002: Amherst, Bridgewater, New Glasgow, Springhill, Stellarton, Trenton, Truro and Westville.

[17] In the 1997 restatement the right to amend the Pension Plan was reserved to the "Administrator" – i.e. PANS – pursuant to s. 13.1. The Board of Plan Trustees was required to include one person appointed by each Participating Employer, to a maximum of three (s. 10.4). With respect to contributions, s. 3.4 provides that the employer

> shall contribute monthly such amounts, if any, as the Employer determines at its sole discretion, provided that:
>
> (a) such contributions shall not be less than the amount, if any, indicated by the Actuary as necessary to maintain registration of the Plan under the Act; and
>
> (b) such contributions shall not be more than the amount, if any, indicated by the Actuary as the maximum amount permissible in order to maintain registration of the Plan under the Tax Act;
>
> (c) such contributions shall not be less than those made by the Members; and

(d) such contributions shall be "eligible contributions" in accordance with the Tax Act.

[18] Pursuant to Amendment No. 6, in 2003, s. 3.4(c) was amended by the addition of the words "unless established otherwise through a collective agreement process" immediately before the existing words.

[19] As to unfunded liabilities, s. 3.7 of the 1997 restatement provided

The Employer's contributions in respect of the normal cost of benefits, or in respect of special payments to amortize an unfunded actuarial liability or solvency deficiency, shall be remitted to the Board of Plan Trustees, for deposit to the Pension Fund, within 30 days following the end of the month to which such contributions relate.

[20] Section 62 of the *Pension Benefits Act* provides that a pension plan "is not eligible for registration unless it provides for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan" in accordance with the *Act* and regulations (S. 62(1)). Further, the *Act* states, "[a]n employer required to make contributions under a pension plan, or a person required to make contributions under a pension plan on behalf of an employer, shall make the contributions to ... the pension fund ... in the prescribed manner and in accordance with the prescribed requirements for funding" (s. 62(2)(a)). An employer, "in relation to a pension plan, a member of a pension plan or a former member of a pension plan, means the employer required to make contributions under the pension plan..."(s. 2(p)).

[21] Another statute relevant to this matter is the *Municipal Government Act*, which requires a council to "establish a pension plan to provide pensions for full-time employees in such manner as the council shall, by policy, determine" (s. 45(2)).

THE FUNDING DISPUTE

[22] An actuarial valuation report issued on September 30, 2003 identified unfunded liabilities and solvency deficiencies, for which the towns refused to provide additional funds. The matter came before the Superintendent of Pensions, who proposed an order under s. 87(2)(c) of the *Pension Benefits Act*, requiring the appellant towns to pay the unfunded liabilities. Sections 87 and 89 provide, in part:

87 (1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to Section 89 (reconsideration), by a written order may require an administrator or any person to take or to refrain from taking any action in respect of a pension plan or a pension fund.

(2) The Superintendent may make an order pursuant to this Section if the Superintendent is of the opinion, upon reasonable and probable grounds, that

(a) the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;

(b) the pension plan does not comply with this Act and the regulations; or

(c) the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.

(3) In an order pursuant to this Section, the Superintendent may specify the time when or the period of time within which the person to whom the order is directed shall comply with the order.

(4) An order pursuant to this Section is not effective unless the reasons for the order are set out in the order.

* * *

89 ... (2) Where the Superintendent proposes to make an order pursuant to

* * *

(e) Section 87 (administration of pension plan or contravention of Act or regulation),

the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any person to whom the Superintendent proposes to direct the order.

(6) A notice pursuant to subsection ... (2) ... shall state that the person on whom the notice is served is entitled to a hearing by the Superintendent if the person delivers to the Superintendent, within thirty days after service of the notice pursuant to that subsection, notice in writing requiring a reconsideration, and the person may so require such a reconsideration.

* * *

(8) Where the person requires a reconsideration by the Superintendent in accordance with subsection (6), the Superintendent shall reconsider the proposed action and notify the person of the decision.

[23] In a subsequent reconsideration hearing the Superintendent made certain determinations, which I summarise:

(a) the towns are "employers" pursuant to the *Pension Benefits Act* “because they are employers making contributions to the PANS Plan”, as described in s. 2(p) of the *Act*;

(b) the towns are bound by the requirement to establish employee pension plans pursuant to s. 45 of the *Municipal Government Act*; having excluded police officers (in most cases) from the municipal pension plans, “they can only have satisfied the MGA by providing the PANS Plan for the police officers”;

(c) contrary to the town's position, the collective agreements “are not meant to restrict the Towns' contributions, but rather to establish what percentage of pay the contributions are, if they are to be less then member contributions”; the collective agreements “cannot be used to contract out of the legislated requirements of the *Act* to fund the benefits”;

(d) PANS, which is itself an employer under the Pension Plan, acts as administrator, and delegates certain administrative duties to the Board of Plan Trustees. The fact that the towns chose not to participate in the operation of the Plan, and did not know anything about it, does not change their status as employers;

(e) while the towns stated that they did not agree to participate in the PANS Plan, and were not obligated to have signed participation agreements, the *Act* does not require participation agreements, except in the case of multi-employer agreements, where the duty is upon the employer, not the administrator. The collective agreements – which require participation in the PANS Plan – are evidence that the towns agreed in writing to participate in the PANS Plan. While it would have been prudent for the towns to have written agreements respecting their payments, the *Act* does not require it. Further, the contributions made by the towns are evidence of their agreement to participate;

(f) the towns argued that, not being parties to the Trust Agreement set up for holding the Pension Plan’s assets, they are therefore not employers. The Superintendent concluded that there was a discrepancy between the Trust Agreement and the PANS Pension Plan as to who may appoint trustees; this was an issue to be resolved by the parties;

(g) the PANS Pension Plan does not limit the towns’ contributions to those set out in the collective agreements; rather, s. 3.4 requires them to contribute the amounts necessary to fund the benefits.

[24] The Superintendent did not emphasise the fact that the towns were not parties to the trust agreement of March 1, 2002, which is silent as to the definitions of “employer” and “employee.”

STANDARD OF REVIEW

[25] Pursuant to s. 89(9) of the *Act*, the Appellants have a statutory right of appeal from the decision and reconsideration by the Superintendent. I am nevertheless required to determine whether the standard of review is correctness, reasonableness or patent unreasonableness: *Creager v. Provincial Dental Board (N.S.)* (2005), 230 N.S.R. (2d) 48 (C.A.) at para. 15.

[26] The Appellants argue that correctness is the appropriate standard, while the Trustee and the Superintendent argue for reasonableness. It is necessary to determine the standard of review in accordance with the "pragmatic and functional approach" set out in a line of decisions of the Supreme Court of Canada: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; and *Dr. Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226. The "pragmatic and functional approach" requires consideration of four contextual factors, which were summarized by Fichaud J.A. in *Creager, supra,* at para. 15:

> ... Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal.... The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review.... [Citations omitted.]

[27] The trustees identify several specific decisions made by the Superintendent. These include the following:

> (1) the assumptions contained in the actuarial report are reliable and the methodology is sound;
> (2) there is a deficiency in the plan;
> (3) under the *Act*, for the purposes of remedying a deficiency in the pension plan, the towns are employers or are otherwise subject to remedying the deficiency;
> (4) the towns should be ordered to correct the deficiency rather than having the plan wound up; and
> (5) the particular payments the Superintendent has ordered are a reasonable means of accomplishing this objective.

[28] The trustees note that there may be different standards of review for different decisions.

Privative clause/right of Appeal

[29] The *Pension Benefits Act* permits an appeal. Section 89 states, in part:

> 89 [...] (2) Where the Superintendent proposes to make an order pursuant to
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> * * *
>
> (e) Section 87 (administration of pension plan or contravention of Act or regulation),
>
> the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any person to whom the Superintendent proposes to direct the order.
>
> * * *
>
> (6) A notice pursuant to subsection (1), (2), (3), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Superintendent if the person delivers to the Superintendent, within thirty days after service of the notice pursuant to that subsection, notice in writing requiring a reconsideration, and the person may so require such a reconsideration.
>
> (7) Where the person on whom the notice is served does not require a reconsideration in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.
>
> (8) Where the person requires a reconsideration by the Superintendent in accordance with subsection (6), the Superintendent shall reconsider the proposed action and notify the person of the decision.
>
> (9) Upon receipt by a person of the decision of the Superintendent pursuant to subsection (8), that person may appeal to the Trial Division of the Supreme Court and the Court may confirm the decision or substitute any decision the Superintendent was authorized to make. [Emphasis added.]

[30] In considering the significance of the presence or absence of a privative clause, the Court stated in *Dr. Q.*, *supra*, at para. 27:

> The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review.... A statute may be silent on the question of review; silence is neutral and "does not imply a high standard of scrutiny"..... Finally, a statute may contain

> a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due. [citations omitted.]

[31] The appeal provision states that the Court "may confirm the decision or substitute any decision the Superintendent was authorized to make." The Court of Appeal has held that this subsection allows "the widest scope of appeal": *Spectrum Pension Plan (Administrator) v. Superintendent of Pensions (N.S.) et al.* (1997), 161 N.S.R. (2d) 1 at para. 107. There is no privative clause. A broad right of appeal and the absence of a privative clause tend to support a lower level of deference.

Relative expertise

[32] In *Dr. Q.*, *supra*, the Court said, at paras. 28-29:

> The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise.... Thus, the analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise"....
>
> Relative expertise can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone. The composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might, therefore, be called for under this factor.... For example, a statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development.... Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise.... Simply put, "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act," an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference.... [Citations omitted. Emphasis added.]

[33] In *Hawker Siddeley Canada Inc. v. Superintendent of Pensions (N.S.) et al.* (1994), 129 N.S.R.(2d) 194, at para. 34, Clarke C.J.N.S. recognized that the

Superintendent has expertise in the administration and interpretation of the *Pension Benefits Act*:

> ... The *Act* anticipates the Superintendent is one who is skilled in the administration of legislation which calls for a considerable degree of expertise. The Superintendent is appointed by the Government of Nova Scotia on a full time and continuing basis. The Superintendent is charged with the responsibility of administering legislation which by its nature is one of public policy. The interest of the public, in general, and of participating employees, in particular, in the fair, equitable and consistent administration of pension plans is high. Thus the position of the Superintendent cannot be described as *ad hoc*. It is continuing and on-going....

[34] Expertise was a crucial consideration in *Spectrum Pension Plan*, where the question before the Superintendent was the ownership of a pension plan surplus. The Court of Appeal held that the Superintendent did not have significantly greater expertise in respect of the application of the law of trusts and contract, and the interpretation of documents, than the Court did. Further, the *Act* did not expressly authorize the Superintendent to answer the question. As such, no deference was due.

[35] In *Dustbane Enterprises Ltd. v. Ontario (Superintendent of Financial Services)*, 2001 CarswellOnt 673, Dustbane administered a pension plan for its employees, subsidiaries, affiliates and distributors. The directors pursued a partial wind-up of the pension plan, which would exclude the distributors from the plan. Dustbane sought to apportion a deficit among the distributors, but the Superintendent proposed an order requiring Dustbane to pay the amount due. Dustbane thus sought an order directing the Superintendent to refrain from making or carrying out such an order. The Financial Services Tribunal dismissed the application, holding that the pension plan was not a multi-employer plan within meaning of the Ontario *Pension Benefits Act*. Dustbane, as the employer, was responsible for the deficit. It was irrelevant that the distributors were regarded as employers for other purposes, such as income tax and labour relations. The history of the plan showed that the parties regarded it as a multi-employer plan until the issue of responsibility for deficit arose. The distributors had not received copies of basic plan documents. On appeal, at [2002] O.J. No. 2943 (Ont. S.C.J.), the Court stated, at para. 2, that

> The issue of whether the appellant was an employer was not a "jurisdictional" fact. The real issue before the tribunal was whether the appellant or its distributors should be liable for the deficit. This determination did call on the tribunal to utilize its expertise in the domain of pension administrate. Determining who was an "employer" in this context may raise different issues from any determination of

> who was the employer in the conventional sense. There is no privative clause. The appropriate standard of review with respect to this issue in our view is reasonableness *simpliciter*.

[36] The Court held that the Tribunal's conclusion was reasonable. The Court did not apply the pragmatic and functional analysis in determining the standard of review. The statute provided a right of appeal; however, the *Financial Services Commission of Ontario Act*, which established the Tribunal, included a privative clause for decisions under the *Pension Benefits Act*. As has been noted, no such clause applies to the Superintendent's order.

[37] The tasks assigned to the Superintendent were considered by Chief Justice Clarke in *Hawker Siddeley*, *supra*, at para. 29:

> A review of the legislative scheme of the *Act* persuades me that for the purposes of review, the Superintendent should be equated to a statutory tribunal which is not protected by a privative clause. In addition to the general duties required by s. 10 (above), the legislature imposes a broad range of responsibilities upon the Superintendent, many of which require expertise and decision making. As the respondent points out, the Superintendent determines whether a total or partial wind up of a plan is required (ss. 73-79), whether a pension plan is suitable for registration (ss. 12-24), whether conditions for the transfer of pension plans have been met (s. 50), whether contribution methods and funding levels are sufficient (s. 62), whether surplus pension plan funds may be paid out (ss. 83-84), and, in addition, broad powers to make orders for compliance with the *Act*.

[38] In order to achieve this, it is argued that the Superintendent must be familiar with pension regimes in Nova Scotia as well as other Canadian jurisdictions. She is required to consider pension language, calculations and formulas, as well as relevant provisions of the *Income Tax Act*. She must review pension analyses and interpret the enabling legislation. Pension legislation and pension plans are not straightforward and expertise and experience are required.

[39] The trustees argue that section 87 of the *Act* gives the Superintendent the discretion to decide who should make up a deficiency, which amounts to a legislative determination as to expertise. Section 87 permits the Superintendent – in circumstances where a pension plan or fund is not being administered in accordance with the legislation or with the plan, where the plan does not comply with the legislation, or the administrator is contravening a requirement of the legislation – to "require an administrator or any person to take or to refrain from taking any action in respect of a pension plan or a pension fund." The trustees say the Superintendent's task was to determine whether the towns should be treated as employers under

the *Act*, or otherwise required to fund the deficiency, not whether the towns had agreed to be bound by the funding obligations of Employers under the Pension Plan, as the towns would have it.

[40] Section 87 does not expressly authorize the Superintendent to determine whether a particular employer is contractually bound to a particular pension plan, or is liable to make special payments on account of a pension plan deficit. As the Court of Appeal noted in *Spectrum Pension Plan*, in the context of a discussion of the Superintendent's powers with respect to wind-ups under section 75, the Superintendent "does not have authority to do whatever the Superintendent considers might be in the Members' interests" (para. 203).

[41] On behalf of the Superintendent, it is submitted that her role is "registrar, gatekeeper, enforcer, policy maker and adjudicator, using each of these roles in turn to ensure the framework of pension regulation is implemented and works in Nov Scotia." These duties, it is suggested, require familiarity with pension regimes and legislation, including the interpretation of the enabling legislation "with a view to defining provisions to provide guidance to those in the area, and resolving disputes in a way which furthers the purposes of the *Act*." These are duties that an "ordinary person" could not fulfill. As such, it is submitted, the Superintendent has "considerable expertise in the area of pensions" and her decisions "should be given some deference."

[42] The appellants concede that the Superintendent has expertise in the analysis of pension plans and the application of the *Act*. They submit, however, that the issues in this case do not fall within the scope of the Superintendent's expertise as compared with the Court's expertise. They also suggest that the issue before the Superintendent was one that could have come before the Court at first instance, pursuant to s. 64 of the *Act*, which provides that a pension plan administrator "may commence proceedings in a court of competent jurisdiction to obtain payment of contributions due under the pension plan, this *Act* and the regulations." This would suggest that the issue does not involve subject matter in which the Superintendent's expertise outweighs that of the Court.

[43] I am satisfied that the Superintendent has expertise in the application and administration of the *Pension Benefits Act*, and in the pension regime generally. In keeping with *Spectrum Pension Plan*, *supra*, however, this expertise does not extend to statutory interpretation and general law, where the Court's expertise will be equal or greater.

<u>Purpose of the legislation</u>

[44] In *Dr. Q.*, *supra*, the Court said, at paras 31-32:

> A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court.... In *Mount Sinai*, *supra*, at para. 57, Binnie J. recognized that the express language of a statute may help to identify such a purpose. For example, provisions that require the decision-maker to "have regard to all such circumstances as it considers relevant" or confer a broad discretionary power upon a decision-maker will generally suggest policy-laden purposes and, consequently, a less searching standard of review.... Reviewing courts should also consider the breadth, specialization, and technical or scientific nature of the issues that the legislation asks the administrative tribunal to consider. In this respect, the principles animating the factors of relative expertise and legislative purpose tend to overlap. A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference.
>
> In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference. The more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show. [Some citations omitted.]

[45] A concise statement of the purpose of the *Act*, and of the office of the Superintendent, appears in *Spectrum Pension Plan*, *supra*, where the Court of Appeal stated, at para. 134:

> The *purpose* of the *Pension Benefits Act* is to establish laws regulating pension plans in the Province and to provide for administrative framework in which the Superintendent can see to it that the laws and regulations made under the *Act* are complied with and that administrators in administering such plans act in accordance with the law. For the most part, the Superintendent's duties are administrative but in certain areas including the making of determinations as to whether or not to approve or disapprove of a winding up, the Superintendent performs a quasi judicial function and it is from decisions in this area that a full right of appeal exists to the Supreme Court of Nova Scotia. [Emphasis in original.]

[46] In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, the Court made the following comment, with respect to the Ontario *Pension Benefits Act*, at para. 13:

The purpose of the Act was well stated in *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:

> [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures"...

[47] The trustees maintain that the purpose of the *Act* is to protect the expectations of pensioners. The requirement that deficiencies be funded or the plan wound up fulfills a valid purpose. On behalf of the Superintendent, it is argued that the statute requires the Superintendent "to select from a range of remedial choices or administrative responses", and that the Superintendent is "concerned with the protection of the public" and is required to engage in policy issues or to balance interests or considerations, as discussed in *Dr. Q.*, *supra*. This would militate in favour of deference.

[48] I am satisfied, however, that the purpose is as described by the Court of Appeal in *Spectrum Pension Plan*, *supra*.

<u>The nature of the problem</u>

[49] In *Spectrum Pension Plan*, *supra*, the issue before the Superintendent was the ownership of a pension plan surplus upon a wind-up. The Superintendent concluded that the surplus was impressed with an irrevocable trust in favour of employees and former employees. The Court of Appeal held (at para. 127) that the matter "involved the interpretation of relevant pension plan documents and the application of the law of trusts and the law of contract rather than simply an interpretation of the provisions of the *Pension Benefits Act*." The standard of review was correctness, not reasonableness, as had been applied on the original appeal to the Supreme Court.

[50] In *Schriver v. Securities Act* (2006), 239 N.S.R. (2d) 306, the Court of Appeal considered a question of statutory interpretation by the Securities Commission, dealing with the *Securities Act*. The Court stated that the interpretive issue must be placed in the context of the statute as a whole and of the role of the Commission. The issue was at the centre of the Commission's role in carrying out the purposes of its constituting statute.

[51] The appellants argue that the issue requires the interpretation of pension plan documents and the application of the law of contracts and statutory

interpretation. The liability issue, they say, is a question of law, attracting a lower level of deference.

[52] The Superintendent says the interpretation of the term “employer”, and the determination of who has responsibility to fund an employees’ pension plan, goes to the core of her role in establishing, monitoring and enforcing terms of pension plans and legislation. The question before the Superintendent involved the definition of “employer” in the legislation, as well as a consideration of arrangements between the towns, their employees and PANS with respect to funding the Pension Plan. This involved finding facts on the evidence, as well as interpretation of the *Act* and the Pension Plan. This was a determination of both fact and law. As a result on this final branch of the test, the Superintendent submits that her decision should receive some deference.

[53] The Trustee’s view is that the matter is a mixed question of fact and law. The factual component calls for an assessment of “what the municipalities have done in employing the police officers and paying past pension contributions into the Plan”; the legal component involves a consideration of “what is embraced by the statute and regulations”. A mixed question, it is submitted, requires increased deference. The trustees add that the Superintendent has seen the witnesses, observed their cross-examination, and considered their demeanor in giving evidence, providing a substantial advantage over this court in factual findings: see *Toneguzzo-Norwell v. Burnaby Hospital* [1994] 1 S.C.R. 114. I am not convinced that there were substantial factual disputes in the present proceeding. There is little or no argument as to the course of events. The fundamental dispute is over the legal effect of the parties' conduct.

[54] The issue is whether the appellants are employers for the purposes of the *Pension Benefits Act*. The factors to be considered in determining whether a particular institution is an employer are not set out in the legislation. It is left to the decision-maker to interpret the meaning of “employer”. This is not a question of how policy considerations of the statute are met, nor is it a question of how the Minister should meet the purpose and objectives of the *Act*. I do not believe that a decision as to whether the towns are employers is a policy-driven one. Rather, it is a question of interpretation of the *Pension Benefits Act*, the Pension Plan, the collective agreements and related legislation. It is a question of law, as is the interpretation of the *Municipal Government Act*.

<u>Conclusion on Standard of Review</u>

[55] It is necessary to consider all of the "pragmatic and functional" considerations together in order to determine the proper level of deference. No single factor is determinative, including the determination that a question of law is involved. In this case, as I have discussed above, there is no privative clause, but there is a broad right of appeal; there is a limited expertise, but it does not extend to questions of general law; the statute is intended to regulate pension plans, and the Superintendent's duties are primarily administrative; with some quasi-judicial aspects; and the question before the Superintendent was one of law. I am satisfied that the Superintendent's decision should be reviewed on a correctness standard.

SUBSTANTIVE ISSUES

[56] The towns claim that the Superintendent erred in law in finding that the towns are liable to pay the unfunded liability and solvency deficiency in the Pension Plan, in that they are not participating employers under the Pension Plan and are not bound by the *Pension Benefits Act* or the *Municipal Government Act* to make good the deficiencies. The respondent trustees submit that the Superintendent was correct in finding the towns liable to make up the unfunded liability and solvency deficiency under the Pension Plan.

Obligations under the Pension Plan

[57] The principles of statutory interpretation apply to pension plans: *White v. Halifax (Regional Municipality)*, [2007] N.S.J. No. 61 (C.A.) at paras. 43-44. A contract – such as a pension plan – requires assent. While it is possible for contractual rights or obligations to be imposed by law upon contracting parties, the original contract must have been voluntary: G.H.L. Fridman, *The Law of Contract in Canada*, 5th edn (2006), pp. 5-6.

[58] The appellants argue that the Superintendent erred in finding that the towns were "participating employers." Specifically, the towns submit that the Superintendent erred (a) in concluding that the collective agreements are evidence that the towns agreed in writing to participate in the PANS Pension Plan; (b) in finding that the towns' conduct in making contributions pursuant to the collective agreements is evidence of an agreement to participate in the PANS Pension Plan; and (c) in relying upon the "unilaterally amended" definition of "participating employer" under the Pension Plan to establish the towns' obligation.

[59] The towns take the position that they never agreed to be "participating employers" under the Pension Plan, nor did they agree to be liable for the funding obligations of employers under the Pension Plan. They say their agreed obligation was only to "contribute a fixed percentage rate of each employee's salary or earnings to the Plan and remit this amount to the Administrator on a monthly basis." The towns say they cannot be bound to the Pension Plan by way of the unilateral amendment by PANS of the definition of "participating employer."

[60] The appellant towns also submit that the Superintendent erred in interpreting "employer" in the *Pension Benefits Act* to include them, thereby imposing upon them an obligation to fully fund the benefits under the Plan. The position of the towns is that neither the *Pension Benefits Act* nor the *Municipal Government Act* binds them to the PANS Pension Plan or requires them to fully fund it. They say PANS, having retained all rights of an employer under the Pension Plan, also bears all of the funding obligations.

[61] The *Pension Benefits Act* recognizes single-employer and multi-employer pension plans, imposing different funding requirements on each. Referring to A. Kaplan, *Pension Law*, at pp. 96-97, the towns submit that under a single-employer plan the employer is a guarantor, with the power to amend or to terminate the plan, as well as the obligation to ensure that it is fully-funded. By contrast, under a multi-employer plan, the employer or employers are not required to fully fund the benefits, and there is an arm's-length board of trustees with employee representatives: *Pension Benefits Act*, s. 14(1)(e). Employers' participation in multi-employer plans is voluntary, and is usually set out in a participation agreement.

[62] According to the appellants, a single-employer plan is not transformed into a multi-employer plan simply because other employers contribute. Contributions alone do not constitute an agreement to participate, and the single employer remains liable for any funding obligations under the pension plan or the *Pension Benefits Act*. The appellants refer to *Dustbane*, *supra*, where the Financial Services tribunal concluded that Dustbane's conduct was inconsistent with its claim that the Pension Plan was a multi-employer plan. In view of the manner in which Dustbane had administered and operated the Pension Plan, and the lack of participation agreements, the Tribunal held that Dustbane was the employer and was responsible for the deficit in the pension plan.

[63] The trustees say the Pension Plan is not a multi-employer plan. Commenting on the appellant's submissions respecting single-employer and multi-

employer pension plans, the trustees say that "[a]lthough the definition of multi-employer plan under the *Act* seems to 'fit' the relationship between PANS and the various Towns, the manner in which the benefits are funded, does not." The *Act*, the Trustees say, does not contemplate a relationship like the one described by the towns, whereby PANS is the employer and the towns are only "contributaries" without further responsibility. Rather, they say, the *Pension Benefits Act* does not prevent several employers from participating in a "single-employer" pension plan. The *Act* only requires that each employer provide funding in the manner required for a single-employer plan (i.e. that necessary funding ratios be maintained by the payment of unfunded liabilities and solvency deficiencies).

[64] The trustees also suggest that the Superintendent would not have exercised her discretion under the *Act* "to register the pension plan model submitted by the Appellants where it would be left to an administrative entity such as PANS to be solely responsible for funding accrued member benefits under a pension plan." I decline to speculate about what considerations might have been before the Superintendent when the Pension Plan was registered more than two decades before the current dispute arose. In particular, I have no basis upon which to conclude that the Superintendent would have understood PANS to be a mere administrative entity" that did not intend to be solely liable under the Pension Plan.

[65] According to the appellants, the Superintendent incorrectly interpreted the collective agreements as constituting agreements to participate. The PANS Pension Plan defines "employer" as "PANS or any Participating Employer" (previously "local authority"). Before the 2003 amendment, a "participating employer" (or "local authority") was "an employer whose employees (or class of employees) are members of PANS and who has entered into an agreement with PANS to participate in the Plan." This wording, the towns say, means that before a party can be considered a "participating employer" there must be a participation agreement with PANS. The towns say the collective agreements cannot be construed as agreements to participate in the Pension Plan. The collective agreements expressly state that the towns have agreed to contribute a fixed percentage, to be remitted to PANS, the administrator. The collective agreements do not express any intention that the towns will participate in the Pension Plan as employers, or that they are liable for any payments other than the specified percentage contribution.

[66] Further, say the appellants, some of the collective agreements contain language that is inconsistent with participation in the Pension Plan. For

instance, the Bridgewater collective agreement expressly states that five per cent is the town's entire contribution, and that the town will not be liable for any unfunded liability. The New Glasgow/Westville and Stellarton agreements provide for the town to appoint a non-voting observer to the Pension Plan, which would be unnecessary if the towns were participating employers (because they would be entitled to representation.) In the Springhill agreement the town was required to contribute to the PANS Pension Plan <u>or</u> to an RRSP chosen by the local union. The Truro agreement required an assurance by PANS that "all employees will be well protected." All of these provisions, the appellant towns submit, are inconsistent with the suggestions that they are participating employers under the Pension Plan.

[67] The appellants submit that the Superintendent erred in concluding that the *Pension Benefits Act* does not require a written agreement to participate. They note that s. 66 requires a participating employer to "transmit to the administrator a copy of the agreement that requires the employer to make the contributions or a written statement that sets out the contributions the employer is required to make and any other obligations of the employer under the pension plan." It should be noted that this applies to "[a]n employer who is required to make contributions to a multi-employer pension plan." The appellants also refer to provisions (specifically, ss. 15(2) and 26(2)) requiring the administrator to file certified copies of documents related to the plan and the fund, in order to obtain registration, and to ensure that the plan is administered in accordance with such documents. While these provisions clearly support the requirement for a written agreement in some circumstances, I do not think that, standing alone, they create a condition precedent in every situation.

[68] As to the Superintendent's conclusion that the towns' conduct in contributing to the Pension Plan was evidence of agreement to participate, the appellants say these contributions were merely made in compliance with their contractual obligations under the collective agreements. They argue that, in considering "conduct", the Superintendent considered only the conduct of the towns, ignoring the fact that an "agreement" requires mutual assent. They say PANS's conduct demonstrates that it did not intend the towns to be participating employers. If PANS intended the towns to be participating employers, it was obliged, as administrator of the Pension Plan, to enter into participation agreements with them, which it did not do. PANS would also have been obliged to ensure that the towns were represented on the Committee/Board of Trustees, as was required under the Pension Plan

for each participating employer. None of this was done, nor have the towns ever been consulted on amendments to the Plan, suggesting that PANS did not regard the towns as participating employers.

[69] According to the appellants, the Superintendent erred in relying on the amended definition of "participating employer" that was inserted in the Pension Plan in March 2003. The definition was unilaterally amended by PANS. The original definition was "an employer whose employees are members of PANS and who has entered into an agreement with PANS to participate in the PANS Pension Plan." The amended definition is "an employer having employees who are members of PANS and who has entered into an agreement with PANS to permit such employees to participate in the Plan." The appellants argue that, not having agreed to participate in the Pension Plan, they have likewise not agreed to be bound by PANS's power to amend the Plan unilaterally. PANS cannot amend the Pension Plan to bind the towns, or to create a contract between itself and the towns.

Obligations under the Pension Benefits Act

[70] The appellants say the Superintendent erred in interpreting the *Pension Benefits Act* as imposing an obligation on the towns to fully fund the benefits provided by the Pension Plan. The towns say it is not clear whether the reasoning was that the town's status as "employers" under the *Act* arose from their status as "participating employers" under the Pension Plan, or whether she found that the *Act* imposes liability even in the absence of an agreement. Obviously, the towns' position in the first case would be that, not being "participating employers" under the Pension Plan, they cannot be "employers" under the *Act*. If, however, the Superintendent concluded that liability arose under the *Act*, independently of any contract, the towns' position is that this too is an error, and that the *Act* does not require non-parties to a pension plan to fund the plan.

[71] The section 2 definitions of "employer" and "pension plan" refer to an employer's obligation to make contributions "under" the plan, as do the contribution requirements in s. 62(2), which refers to an "employer required to make contributions under a pension plan, or a person required to make contributions under a pension plan on behalf of an employer...." According to the towns, contributions "under" a pension plan are distinct from contributions "to" a pension plan.

[72] The towns suggest that "under" means "subject or liable to; controlled or bound by...": *Oxford Concise English Dictionary* (1995), p. 1520. As such, they submit, the references in the definitions, and in s. 62(2), refer to "an existing contractual relationship between an employer and a pension plan, whereby the employer is bound by the plan to make contributions to the plan." The use of "under", they say, "signifies that pension plans are voluntary." Obligations under the *Act* only arise when an employer has agreed to be bound by a pension plan. According to the towns, PANS is the only "employer" required to make contributions "under" the Pension Plan. As such, they argue, the towns do not have additional funding obligations imposed by the *Act*.

[73] The respondent trustees argue that the Superintendent correctly applied a "very broad" interpretation to the meaning of "employer" for the purpose of plan funding. It has been said, in respect of the Ontario *Pension Benefits Act* and its regulations, that they require an "employer" to "ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind-up of the plan. This obligation exists quite apart from the particular funding requirements set out in the pension plan itself": *Re St. Mary's Paper Inc.* (1994), 116 D.L.R. (4th) 448 (Ont. C.A.) at 460; appeal dismissed as moot, 131 D.L.R. (4th) 606 (S.C.C.).

[74] In *Re St. Mary's Paper* a trustee in bankruptcy undertook to operate a bankrupt business with a view to selling it as a going concern. The trustee re-engaged the employees, whose employment had been terminated upon bankruptcy, and agreed to continue the union and non-union pension plans, including "current service costs", but excluding "unfunded pension liabilities." The Pension Commission of Ontario appointed an administrator of the pension plans. The administrator took the view that the trustee in bankruptcy was an "employer" under the *Pension Benefits Act*, and was therefore liable for unfunded liabilities. The majority of the Court of Appeal came to the following conclusion, at p. 456:

> As a result of its deal with the workers, the appellant agreed to pay employee pension contributions and current service costs to the pension plans. It honoured those obligations, that is, it deducted employee pension contributions, remitted those contributions to the trustee and paid the required current service costs. In proceeding as it did, the appellant continued the pension plans and in our view adopted them.

[75] The definition of "employer" under s. 1 of the Ontario *Act* was,

> in relation to a member or a former member of a pension plan ... the person or persons from whom or the organization from which the member or former

> member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning....

[76] The appellant relied upon various definitions in the pension plans in order to submit that the wages it paid were not remuneration to which the pension plans were related; the majority rejected this argument, at p. 459:

> In our opinion, this approach is inconsistent with the basic philosophy and purpose of the PBA. It would allow a pension plan's provisions to control status (the "employer" issue). In the result, it would be the definitional elements of the plan, not, as we think was intended, the PBA, which would determine the status of the person from whom the workers received their wages. Consequent upon that determination, the plan would determine whether the payor had the PBA obligations of an "employer".
>
> The interpretation urged upon us by the appellant would seriously erode the protection afforded to members and former members of the pension plans provided by the PBA, which is manifestly intended to impose a degree of control over the terms and operation of pension plans.
>
> ... To look to the plan to determine the status of the person from whom the workers received their wages is inconsistent with the scheme of the Act....

[77] The Court concluded that the trustee in bankruptcy had "essentially wanted to put in place a pension plan which did not conform with the PBA, in that the employer would not be responsible for unfunded pension liabilities" (p. 459). Regardless of its intentions, the trustee in bankruptcy was an employer, and accordingly was liable for special payments in respect of the pension plans.

[78] While *Re St. Mary's Paper* supports the view that the *Act* provides minimum standards for pension plans, I hesitate to conclude that its reasoning applies on the facts in this case. It will be noted that the definition of "employer" that was at issue in that case differs from that in the Nova Scotia legislation, i.e., "in relation to a pension plan, a member of a pension plan or a former member of a pension plan ... the employer required to make contributions under the pension plan..." (s. 2(p)). The Ontario *Pension Benefits Act* referred to "the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related." In addition, the circumstances in *Re St. Mary's Paper*, in which the party claiming not to be obligated to make special payments had stepped into the shoes of a single employer, and assumed direct responsibility for the terms of the relevant pension plans, does not resemble the situation here, where the parties claiming not to be

liable for the unfunded liabilities have not had direct involvement in the design or administration of the Pension Plan.

[79] The trustees say *Dustbane*, which the appellants submit is instructive, should be restricted to its own facts, and point out that the Financial Services Tribunal decision included a dissent. The trustees speculate that the Tribunal decision would still have been upheld as reasonable by the court had the dissenting reasons been accepted by the majority of the Tribunal.

Obligations under the Municipal Government Act

[80] The appellant towns say the Superintendent erred in interpreting the *Municipal Government Act* as binding them to the Pension Plan, as a result of allowing some employees to join the PANS Pension Plan in place of their own municipal plans. According to the towns, they have met their obligations under the *Municipal Government Act* by establishing pension plans for their full-time employees. The *Act*, they say, does not require that all employees be covered by municipal pension plans. It is open to those employees who transferred out of the municipal plans to transfer back in.

THE "WITHOUT PREJUDICE" LETTER

[81] The Superintendent held that a letter from the solicitor for PANS to the town clerk of Stellarton was privileged and inadmissible. The appellants submit that she erred in excluding this letter, which they argue is relevant to the issue of whether the towns are employers under the Pension Plan.

[82] The use of the words "without prejudice" does not automatically create privilege. A "without prejudice" communication will be privileged where (1) a litigious dispute is in existence or in contemplation; (2) the communication is made with the express or implied intention that it would not be disclosed to the court should the negotiations fail; and (3) the purpose of the communication is an attempt to effect a settlement: Sopinka et al., *The Law of Evidence in Canada*, 2d edn. (1999) at pp. 810-813. Communications "without prejudice" permit the parties "to conduct genuine and serious negotiations toward settlement": *Begg v. East Hants (Municipality) and Nova Scotia (Director of Assessment)* (1986), 75 N.S.R. (2d) 431 (S.C.A.D.) at para. 13.

[83] According to the appellants, while the letter at issue contains the words "without prejudice", it does not indicate that a "litigious dispute" is in existence or in contemplation, nor does it suggest that it was written for the purpose of effecting a settlement of such a dispute. There is no reference to

any grievance or arbitration process; in any event, the appellants submit, "since the Towns are not a party to the PANS Pension Plan, and PANS has the exclusive right to interpret the Plan, it is difficult to see how a litigious dispute could exist between PANS and the Town of Stellarton in relation to the interpretation and application of the PANS Pension Plan."

[84] The trustees argue that the Superintendent's decision to exclude the letter did not affect the fairness of the hearing and is therefore not reviewable. They say the reconsideration procedure under section 89 of the *Pension Benefits Act* permits the Superintendent to determine the procedure to be followed and does not require her to consider particular evidence. As such, they claim, the towns are not entitled to appeal evidentiary rulings, the only issue being whether there was a fair hearing. The appellants have not argued that the hearing did not accord with the principles of fairness and natural justice. The inadmissibility of the letter, according to the trustees, did not prevent the towns from making their argument that they were not "employers" under the *Act*.

[85] The trustees cite *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, where the Court held that a grievance arbitrator's rejection of relevant evidence was not automatically a breach of natural justice, and that it is not "desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator."

[86] The trustees also suggest that the Superintendent's decision to exclude the letter was correct, because the opinion expressed in the letter was irrelevant to the determination she was called upon to make. The opinion expressed in the letter, they claim, were made in a different context and is not binding on the Superintendent.

[87] There appears to be little doubt that the letter met the threshold of relevance. As such, the Superintendent ought to have admitted it. Having done so, the assessment of what, if any, weight it should receive was the Superintendent's decision.

CONCLUSION

[88] For the reasons set out above, I am satisfied that the Superintendent erred in concluding that the appellant towns were obligated to make good the unfunded liabilities, either under the PANS Pension Plan or as a result of the operation of the *Pension Benefits Act* or the *Municipal Government Act*. I

am also satisfied that the Superintendent erred in excluding the without prejudice" letter.

[89] If the parties are unable to agree on costs, they may provide submissions in writing within three weeks of the release of this decision.

J.