File No. 2010-PBA-001

FINANCIAL SERVICES TRIBUNAL

In the Matter of the *Pension Benefits Standards Act*

Appeal Pursuant to Section 21 of the
Pension Benefits Standards Act

Between:

Brewers' Distributor Ltd.

Appellant

And:

Brewery, Winery and Distillery Workers, Local 300 and
Superintendent of Pensions

Respondents

APPEAL DECISION

Before: Patrick F. Lewis, Member, Financial Services Tribunal

Keith J. Murray Harris & Company LLP	Counsel for the Appellant
Anthony Glavin Fiorillo Glavin Gordon	Counsel for the Respondent, Brewery, Winery and Distillery Workers, Local 300
Sandra A. Wilkinson Ministry of Attorney General Legal Services Branch	Counsel for the Respondent, Superintendent of Pensions

Date of Decision: December 10, 2010

A. Introduction

1. This is an appeal by Brewers' Distributor Ltd. ("BDL" or "the Appellant") from a decision ("Decision") of the Superintendent of Pensions ("the Superintendent") dated April 27,

2010, which confirmed a prior direction ("Direction") of the Superintendent dated December 11, 2009. By the Decision, BDL was to offer membership in its Pension Plan for Hourly Employees in British Columbia ("the Plan") to certain "casual" employees, by May 14, 2010.

2. The Decision was made pursuant to section 20(4) of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 ("PBSA"). As administrator of the Plan BDL had the right under section 21(1) of the PBSA to appeal the Decision to the Financial Services Tribunal ("FST" or "this tribunal"), which by this proceeding it has done. Pursuant to section 21(1.1) of the PBSA this appeal operates as a stay of the Decision (unless otherwise ordered, which has not occurred), such that the casual employees affected need not be offered membership in the Plan pending the outcome of the appeal.

3. The Appellant seeks an Order setting aside and quashing the Decision. Its position is opposed by each of the Respondents, Brewery, Winery and Distillery Workers, Local 300 ("the Union") and the Superintendent of Pensions. The Superintendent of Pensions is a party to the appeal by virtue of section 242.2 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 ("FIA"), which has application to appeals of this kind pursuant to section 21(1) of the PBSA (when I refer below to the Superintendent of Pensions in its capacity as a party to this appeal I will do so by using the term "Staff", as did the parties in their submissions, in distinction to the term "Superintendent" which refers to the Superintendent of Pensions in its capacity as a decision-maker below).

4. While there is no provision that a party in the Union's position here is to be a party in the appeal proceeding, the Appellant named the Union as a Respondent in the Notice of Appeal and none of the Appellant, the Union or Staff objected to the Union having that status when earlier invited by this tribunal to make a submission on the point. I note that it would have been open to this tribunal to permit the Union to make submissions on the appeal even if it were not a party to it, pursuant to section 242.2(10)(c) of the FIA.

5. The proceeding before the Superintendent commenced with an April 23, 2009 letter from the Union, seeking a determination under section 25 of the PBSA and section 23 of the *Pension Benefits Standards Regulation* ("the PBSA Regulation") that certain casual employees,

quantified only as "more than 20", who had been denied enrollment in the Plan had in fact qualified for eligibility and must be offered membership in the Plan. BDL responded with a written submission of August 21, 2009, accompanied by a series of documents, to which the Union replied by letter of September 11, 2009. The Direction, as stated, was provided by the Superintendent on December 11, 2009, under section 71 of the PBSA. Within sixty days thereafter, BDL availed itself of its right under section 20(3) of the PBSA to serve on the Superintendent a notice of objection to the Direction. Following the receipt of submissions from BDL and the Union, the Superintendent issued his Decision on April 27, 2010, which confirmed the Direction.

6. At no point was any oral presentation made before the Superintendent, and the Record on this appeal ("the Record") comprises all of the information placed before the Superintendent dating from the original Union submission of April 23, 2009, together with the Direction and the Decision.

7. The Record reveals the following background facts.

8. BDL warehouses and distributes beer in and outside of British Columbia. Its employees and those of predecessor companies have long been represented for collective bargaining purposes by the Union. BDL has several locations within British Columbia and is party to several different collective agreements. That said, the majority of its British Columbia employees are covered by a collective agreement negotiated in 1997 and known as the "Full Goods" Collective Agreement ("the Collective Agreement").

9. It was a term of the Collective Agreement that a new (as at 1997) pension plan be provided for employees. The Plan was the result, and contains terms as to eligibility for entry. Briefly stated, the Union's position giving rise to its original complaint was that, while the Plan expresses two sets of criteria for eligibility, one seemingly more demanding than the other, the casual employees were entitled to the benefit of either set of criteria, whichever was first satisfied; accordingly, in the case of those casual workers not yet admitted but who had earlier satisfied the more relaxed of the eligibility tests, they must be admitted, and in the case of those who had entered the Plan but would have done so earlier had the more relaxed test been applied

to them, they must receive the benefit of the earlier entry. The Superintendent ultimately shared the Union's view of the matter. The Appellant denies that the more relaxed of the eligibility tests is applicable to the affected casual workers and, among other things, argues that as a practical matter the regular employees have never enjoyed any advantage represented by that test, in any event. The Appellant urges that a proper interpretation of the Plan terms requires an understanding of the historical background of both the Plan and the Collective Agreement.

10. The Plan includes the following terms:

> "2.23 **"Employee"** means a Union employee paid on a hourly basis and is employed on a regular full-time or part-time basis by the Company and who is covered, or deemed by the Company to be covered, by a collective agreement, and shall exclude (i) any individual employed for casual, season or temporary work, and (ii) any bottle sortation employee covered by a collective agreement with the Union.
>
> ...
>
> 2.31 **"Member"** means and includes (i) an eligible Employee who has enrolled for participation in this Plan in accordance with Article 3 hereof, and (ii) any former Employee who remains entitled to receive benefits under this Plan or the Prior Plan.
>
> ...
>
> 2.41 **"Year's Maximum Pensionable Earnings (YMPE)"** shall mean the maximum pensionable earnings for that year as defined in the Canada Pension Plan.
>
> ...
>
> 3.02 (a) On and after the Effective Date, any Employee who does not work on a permanent full-time basis shall become a Member on the first day of the month next following one hundred and thirty-two (132) days of work on a full-time basis in a twelve (12) month period.
>
> (b) On and after January 1, 1997, any Employee shall become a Member on the first day of the month next following one hundred and thirty-two (132) days of work on a full-time basis in a twelve (12) month period.
>
> (c) On and after January 1, 1993, any other Employee shall become a Member on the first day of the month next following completion of two (2) consecutive

calendar years of employment during which such Member earned at least thirty-five percent (35%) of the YMPE in each such year."

11. As can be seen, Article 2.23 of the Plan purports to exclude "casual" workers from the definition of "employee". Article 3.02(a) and (b) set out criteria for entry into the Plan based on the employee's having worked 132 days on a full-time basis in a twelve month period ("132/12"). In contrast, Article 3.02(c) provides that "any other Employee" shall become a member of the Plan after having completed two consecutive calendar years of employment during which he or she earned at least thirty-five percent of the Year's Maximum Pensionable Earnings ("YMPE"), a term defined in the Canada Pension Plan.

12. The particular complaint by the Union in this case was that only the YMPE standard set out in Article 3.02(c) was being applied to the casual employees affected whereas, it was submitted, those employees had met the 132/12 test at an earlier time and should have been admitted to the Plan on that basis.

13. It is apparent that these provisions in the Plan are not neatly drawn, their meaning obvious. As one example, the distinction between "any Employee" and "any other Employee" in Article 3.02(b) and (c) is not self-evident. A reasonable construction of the language, so far as it goes, would seem to be that "any other Employee" is probably a reference to the workers excluded by Article 2.23 from the definition of Employee, even though the term "any other worker" would have been more clear. In any case, what is apparent is that Article 3.02 has indeed set out separate criteria for entry into the Plan.

14. In contrast to Article 2.23 of the Plan, which refers to all of "regular full-time", "part-time", "casual", "seasonal" and "temporary" workers, Article 9.28 of the Collective Agreement states simply that there will be two groups of employees, regular and casual. Article 9.28(g) of the Collective Agreement provides that casual workers "will be entitled to regular benefit status, if they move to regular status in seniority order as part of maintaining the minimum number of core employees". The term "regular benefit status" is not defined and its connection, if any, with the right to membership in the Plan is not discussed in the Collective Agreement. The reference to "minimum number of core employees" in Article 9.28(g) is to an arrangement inaugurated in

the Collective Agreement whereby each branch of operation is accorded a minimum number of "core regular benefit status employees". When the number of such employees in a particular branch drops below that minimum level through attrition, the most senior casual employee (and who had achieved a certain level of hours) is to take up the vacancy, thereby becoming a regular employee and entitled to regular benefit status.

15. With respect to admission into the Plan, and notwithstanding how one might interpret the terms of the Plan reproduced above, it is common ground that casual workers have been enrolled only on satisfaction of the YMPE test. A key submission by the Appellant is that no lower threshold has been applied to regular employees: they have not been admitted into the Plan on the strength of the 132/12 test, either, but rather became members of the Plan immediately on its inception by virtue of their membership in a predecessor plan. Since then, the Appellant argues, or at least insofar as the available records indicate, only casual employees have entered the Plan and, again, only on reaching the YMPE standard. Accordingly, the Appellant submits that neither regular nor casual employees have enjoyed the benefit of the 132/12 standard which, in practice, has therefore been meaningless from the time the Plan was established.

16. The Union's essential contention, in contrast, is that on a proper interpretation of the relevant legislation casual employees must be entitled to enrollment in the Plan based on the 132/12 criterion given its inclusion in the Plan terms, regardless of practice.

17. The Plan was closed to new members effective April 21, 2007. BDL established a different plan (being a group RRSP plan) for those eligible after that date. Accordingly, the scope of the dispute is limited to those who were arguably entitled to enrollment in the Plan by April 21, 2007.

18. In upholding the Union's complaint, the Superintendent reasoned as follows:

> "29. As set out in section 25 of the Act and section 23 of the Regulation, pension plans for only certain classes of employees, including hourly and unionized employees, are permitted. All of the employees in question are hourly and belong to the Union; therefore, under the Act the "seasonal", "casual" or "temporary" employees are indistinguishable from "regular" employees. This means that, for

the purposes of the Act, there is no basis for not applying the 132/12 criteria to "casual", "seasonal" or "temporary" employees, as is done for regular employees.

30. The way BDL administered the Plan provisions had the effect of excluding a certain sub-group within a class of employees ("season/casual/temporary"). The "fix" to this has been not to entirely exclude them, but to allow them to join the plan under the Minimum Eligibility Test only.

31. The Plan had also been administering different eligibility provision for the sub-group of regular "part time" employees by only applying the minimum statutory provision of Minimum Eligibility Test. Now all "regular" employees (full time and part time) qualify only under the less onerous 132/12 criteria.

32. Subsections 25(4) and (5) of the Act contemplate that an employer may provide a separate pension plan for employees of a covered class who are employed on less than full time basis. If the employer established a separate plan for those employees, that plan must have similar benefit or contribution provisions as the plan for full time employees taking into account the hours worked in the relevant period of employment.

33. As described above, within the Plan there have been and continues (sic) to be different eligibility requirements. An employee may join the Plan upon satisfying either the more generous 132/12 criteria or the Minimum Eligibility Test established under the Act. If BDL had set up separate plans for its part-time or casual employees, as is permitted under section 25(4) of the Act, it would have had to do so with similar eligibility provisions; that is, part-time or casual employees would be eligible to join upon satisfaction of either the 132/12 criteria or the Minimum Eligibility Test.

34. The legislation does not contemplate permitting BDL to do something in the single Plan what it cannot do in a separate plan. I therefore find that this means that all employees must have similar eligibility provisions in the Plan. Therefore, all employees should have been eligible under both tests: the 132/12 criteria and the Minimum Eligibility Test, whichever comes first."

(Direction, paras. 29-34)

19. The Appellant challenges the Superintendent's conclusions on a number of grounds, including that he erred in his determination of the substance of the dispute as reflected in the above passage from his Direction.

20. Before the underlying merits of the appeal may be considered, there are several preliminary submissions of the Appellant that must be resolved:

(a) the reasons expressed by the Superintendent are so deficient that the Decision should be quashed;

(b) the Superintendent lacked jurisdiction to decide the matter;

(c) alternatively, if the Superintendent had jurisdiction, it was concurrent with, and should have been deferred to the jurisdiction of a labour arbitrator;

(d) the Superintendent erred in failing to consider whether the Union's complaint was time-barred; and

(e) alternatively, the Superintendent erred in concluding that the doctrine of *laches* did not apply and that the complaint was not barred by delay.

21. In turn, before those preliminary positions can be considered the standard (or standards) of review to be applied on this appeal must be determined.

B. Standard of Review

22. The Appellant did not discuss the question of standard of review in its main submission on appeal, though in reply does make a submission in answer to Staff's position on standard of review as detailed in its written argument. The Union adopted Staff's submission in this regard.

23. Relying on *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, Staff submits that the standard of review should be reasonableness for all questions of fact, law and mixed law and fact, and correctness on the issue of jurisdiction.

24. *Dunsmuir* involved judicial review of the decision of an administrative tribunal, specifically of an adjudicator appointed pursuant to the *Public Service Labour Relations Act* of New Brunswick, following the dismissal from employment of a government worker. When ultimately hearing the matter the Supreme Court of Canada took the opportunity to reconsider the different standards of judicial review, which to that point had been patent unreasonableness, at the most deferential, correctness at the least deferential and reasonableness *simpliciter* apparently somewhere in between. The majority of the Court held, however, that the distinction between patent unreasonableness and reasonableness *simpliciter* was illusory in practice and determined that it was unnecessary to retain the patent unreasonableness standard, which the

Court then collapsed into a single reasonableness standard. The result is that the alternative standards of judicial review have become, simply, reasonableness and correctness. As to which of these applies in a particular context, it is useful on this appeal to consider the decision in *Dunsmuir* at some length:

> 52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.
>
> 53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined and cannot be readily separated.
>
> 54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision [page 224] maker will always risk having its interpretation of an external statute set aside upon judicial review.
>
> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard *(Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness [page 225] standard (*Cartaway Resources Corp. (Re)*, [2004] 12 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act*, 1867: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determination of true questions of jurisdiction or *vires*. We mention true questions or *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D.J.M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi*

Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, per Bastarache J.). That case involved the decision-making powers of a municipality [page 226] and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" *(Toronto (City) v. C.U.P.E.*, at para. 62, per LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, per Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to

> consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific cause.
>
> *Dunsmuir, supra*, paras. 52-64

25. The present proceeding of course is not a judicial review *per se* but rather an appeal to a separate administrative tribunal. The Appellant has not objected to Staff's attempt to apply the reasoning in *Dunsmuir*, on that basis or otherwise and, in any event, I would see no reason to conclude other than that the judgment in *Dunsmuir* is instructive in a matter such as this. The FST is a body entirely independent of the Superintendent of Pensions and there is no reason in principle why the general considerations set out in *Dunsmuir* should not be applicable here.

26. The Appellant in reply expresses its agreement, as might be expected, with Staff's position that the standard of review in the matter of jurisdiction is correctness. It implicitly argues that correctness is also the standard applicable to the balance of the issues on appeal, saying that "little or no deference" should be paid the Superintendent in respect of those issues. The Appellant argues in part that the Superintendent has no particular expertise regarding questions of general law such as, on this appeal, the adequacy of his reasons, application of the *Limitation Act*, application of the doctrine of laches and the use of extrinsic evidence (the latter relating to the Appellant's contention that the history of the Plan and the Collective Agreement must be considered and inform their correct interpretation). Even in respect of the Superintendent's decision that the Plan was unlawful as featuring different entry criteria within the same class, the Appellant submits that little or no deference should be paid, as the appeal does not involve the Superintendent's interpretation of the PBSA: the Appellant says in its reply submission on appeal that it "... has not challenged the Superintendent's conclusion that the PBSA prevents a Plan from having different entrance criteria for different types of employees within the same class". The Appellant goes on to say that its position, rather, is that there were not different entry criteria for regular and casual employees, either in theory or in practice, and the Superintendent incorrectly and unreasonably found otherwise.

27. In effect, without saying so expressly, the Appellant appears to submit that the correctness standard applies to all grounds of appeal advanced.

28. Staff and the Union submit that correctness applies only to the matter of the Superintendent's jurisdiction, while the reasonableness standard, representing a measure of deference to the Superintendent, governs the remaining issues. Bearing in mind the direction in *Dunsmuir* to first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded in a particular circumstance, Staff argues that this tribunal has previously determined that the reasonableness standard is to be applied to issues of fact, law and mixed law and fact.

29. In *Grimm's Fine Foods Ltd. v. Superintendent of Pensions*, January 22, 2007, this tribunal was called upon to adjudicate an appeal from a decision of the Superintendent of Pensions centred on whether the definition of "spouse" in the subject retirement plan satisfied the requirements of the definition of that term in the PBSA. The decision noted that this tribunal "will show considerable deference to the decision of the regulatory body especially in those cases where unique, special or exceptional expertise is required on the part of the regulator in administering the legislation in question or where discretion is provided to the regulator by the legislation in question" (at page 7). The member of this tribunal also observed, however, that in light of the statutory review powers afforded the FST it was not appropriate to shy away from the exercise of those powers merely in deference to the statutory decision-maker. Balancing these considerations it was ultimately reasoned as follows:

> "... it is my view that the standard of review set out in the earlier decisions of the FST as noted above requires a pragmatic and functional approach based upon consideration of the reasonableness of the decision in question and the application of considerable deference given, in this case, to the unique and special expertise required of the regulator in the administration of the pension plan scheme set out in the PBSA and the protection of the public interest in the application of the principles set out in that *Act*" (at page 8).

30. In other words, with deference to the Superintendent of Pensions in mind, a standard of reasonableness (though not, even at that pre-*Dunsmuir* stage, patent unreasonableness) was applied.

31. In *The Board of Trustees of the Interior Lumbermen's Pension Plan v. The Superintendent of Pensions*, June 23, 2008, the FST again considered the standard to be applied to a review of a decision of the Superintendent of Pensions, involving in part an interpretation of

a certain pension plan. While there was no discussion on the point, in dealing firstly with certain issues of law, being whether the Superintendent had breached the rules of natural justice by denying one of the parties an opportunity to respond to a submission, and whether the Superintendent had erred in failing to apply common law principles in reaching his decision, it would appear a correctness standard was applied. That said, it is possible that the member of this tribunal considered the point unimportant as the Appellant's position on those two questions was rejected on the merits, in any case. The appropriate standard of review was considered in the context of the next ground of appeal advanced, which was that the Superintendent had erred by misinterpreting the provisions of the governing trust agreement that gave the trustees full authority to interpret and administer the pension plan. It was noted that the FST had ruled in prior decisions that the standard of review to be applied will vary depending on the nature of the appeal, so that where the appeal is based on consideration of facts, a great deal of deference will be accorded to the original tribunal, but where it involves questions of law, less deference may be paid. On referring to prior pension decisions, including *Grimm's Fine Foods Ltd., supra,* it was stated that the FST had determined that a standard of reasonableness will apply to reviews of decisions of the Superintendent of Pensions. The following was also stated:

> "With respect to the standard of reasonableness, the Superintendent is in a position of greater expertise than the reviewing tribunal with respect to the interpretation of the PBSA and its application to pension plans presented to the Superintendent for review. The Superintendent is a creation of statute and his office serves the function of specialized review in this relatively complex administrative area. In this appeal, findings of fact are minimal. Rather, the Decision is largely an interpretation of the definition of "compensation" in the Plan and the application of the PBSA to the manner in which the Trustees were administering the Plan. The determination of the Superintendent and the direction provided to the Trustee is reasonable in this analysis.
>
> Further, the PBSA gives administrative and enforcement jurisdiction over pension plans to the Superintendent. The Superintendent has access to court ordered enforcement and parties affected by the Superintendent's decision are afforded an objection and reconsideration process. This is all in line with legislation which is by its nature public policy and designed to ensure that contractual schemes such as pension plans are administered in accordance with the statutory requirements in effect in the Province. A greater degree of deference must be afforded to decisions of specialized statutory bodies such as the Superintendent and to that extent, I believe the decision in *Grimm's* to apply the reasonableness test is correct. Given the nature of the legislative scheme in effect and exercise of the

> responsibility expected of the Superintendent by virtue of the PBSA, the interpretation of the definition of "compensation" and the administration of the Plan by the Trustee in relation to the calculation of member benefits based on that interpretation are matters that fit within the statutory expertise and authority of the Superintendent" (at pp. 7-8).

32. That reasoning is entirely consistent with the earlier judgment of the Ontario Court of Appeal in *Gencorp Canada Inc. v. Superintendent of Pensions for Ontario*, [1998] 39 O.R. (3rd) 38. The case was an appeal from a decision of the Divisional Court, dismissing an appeal from a decision of the Pension Commission of Ontario which had upheld an Order of the Superintendent of Pensions directing a partial wind-up of the Appellant's pension plan under a provision of the *Pension Benefits Act* of Ontario. The key issue on appeal was the governing standard of review and the Court of Appeal held that the Divisional Court had correctly applied the test of reasonableness on the footing that considerable deference should be paid to decisions of the Pension Commission, being a body with specialized knowledge and expertise mandated to carry out a supervisory authority in relation to public policy legislation which sets out minimum standards for pension plans in the Province.

33. Though in *dicta,* the Court of Appeal of this Province expressed a similar (if not entirely definitive) view in *Butler Brothers Supplies Ltd. v. British Columbia Superintendent of Pensions,* [2005] 255 D.L.R. (4th) 70. The judicial review proceeding concerned a determination by the Superintendent of Pensions that a proposed letter of credit was not "an asset" of a particular pension plan for the purposes of the PBSA. While the British Columbia Supreme Court had applied a standard of correctness to the review Petition before it, and the Court of Appeal would have dismissed the Petition even on that standard, it observed that there were "... elements of discretion and judgment based on the special expertise of the Superintendent which suggests a level of deference at the reasonableness *simpliciter* standard ..." (at para 3).

34. I conclude that the Superintendent of Pensions is an authority with particular expertise in applying the PBSA and the PBSA Regulation, being public policy laws concerned with the rights of pension plan members, to the matters that come before that office. As such, considerable deference in the form of the reasonableness standard will generally be afforded to decisions

which the Superintendent has made. That this should be so is reinforced by the existence of a privative clause in the form of section 242.3(2) of the FIA, which provides:

> "Judicial Review
>
> 242.3 (1) In respect of this Act or any other Act that confers jurisdiction on the tribunal, the tribunal has exclusive jurisdiction to
>
> (a) inquire into, hear and determine all those matters and questions of fact and law arising or requiring determination; and
>
> (b) make any order permitted to be made.
>
> (2) A decision of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court."

35. Section 242.3 of the FIA applies to this appeal by virtue of section 21(1) of the PBSA.

36. I will now turn to the standard of review to be applied to the issues raised on the appeal. For convenience I reproduce the numbered grounds of appeal set forth in the Notice of Appeal:

> "The grounds for the appeal are:
>
> 1. The Superintendent erred in assuming jurisdiction over the matter, where jurisdiction over the issue of eligibility for entrance into the Plan is squarely within the jurisdiction of a labour arbitrator acting under the Collective Agreement;
>
> 2. In the alternative, the Superintendent erred in not deferring jurisdiction over the matter to a labour arbitrator;
>
> 3. The Superintendent erred in failing to consider BDL's argument that the Union's complaint regarding the Plan was statute-barred pursuant to the *Limitation Act*;
>
> 4. In the alternative, the Superintendent erred in concluding that the doctrine of laches did not apply and that the matter was not barred as a result of delay;
>
> 5. The Superintendent made significant factual errors in the Decision, undermining the basis for the Decision. Those errors include the following:
>
> a. Concluding that "casual" employee was not defined under the collective agreement between BDL and the Brewery, Winery and Distillery Workers, Local 300 (the "Union") (the "Collective Agreement");

b. Re-phrasing the entry criteria into the Plan;

c. Failing to understand and/or articulate the transition from "casual" to "regular" employment status under the Collective Agreement;

d. Failing to understand the distinction between "casual" and "regular" employment status under the Collective Agreement; and

e. Erroneously describing the manner in which employees have historically been enrolled into the Plan; and

6. The Superintendent erred in failing to consider and accept BDL's argument that there were not different criteria for entry into the Plan being applied to a single class, and that the Plan has been administered in accordance with the *Pensions Benefits Standards Act*."

37. In addition to those grounds, the Appellant subsequently submitted that the reasons of the Superintendent were so inadequate on their face that the decision should be quashed.

38. I conclude that the standard of correctness applies to the first two grounds in the Notice of Appeal, which relate to jurisdiction, particularly in light of the reasoning in paragraphs 59 and 61 of *Dunsmuir* set out above. While the Appellant's second ground urging that the Superintendent erred in not deferring jurisdiction to a labour arbitrator has the sound of involving a discretion, in light of the observation in *Dunsmuir* that correctness applies in the context of two competing jurisdictions, I am satisfied that it so applies here.

39. I would also apply a standard of correctness to the additional issue raised by the Appellant regarding the adequacy of the Superintendent's reasons. That is a pure issue of general law on a threshold question, and one on which it would be illogical and paradoxical to pay deference to the reasoning employed by the Superintendent, where it is a void of such reasoning that is being asserted.

40. The allegations contained in paragraph 5 of the Notice of Appeal, regarding alleged factual errors, clearly give rise to the reasonableness standard. So too, in my view, does the final ground of appeal in paragraph 6, alleging that the Superintendent erred in failing to consider the argument that there were not different criteria for entry into the Plan being applied to a single class, and that the Plan has been administered in accordance with the PBSA. That ground of

appeal strikes at the very heart of the Decision and the Superintendent's reasoning, which I consider to have turned on his view as to what was permissible under the PBSA and the PBSA Regulation. While the Appellant in reply says that it is not challenging on this appeal the Superintendent's holding that the PBSA does not allow for different eligibility criteria within the same class, the Superintendent's opinion in this regard was central to the Decision, and was arrived at after BDL had made detailed submissions to him that such separate criteria were *not* unlawful. The Appellant's submission on the point in reply is a marked departure from its earlier position, including in its main appeal submission where at paragraph 146 it stated that "... it is not unlawful under the Act to have different eligibility criteria within a class ...". It can also be seen from the language of paragraph 6 in the Notice of Appeal that the Appellant is challenging the Superintendent's finding that the Plan had not been administered in accordance with the PBSA, being a matter clearly falling within his expertise.

41. The third and fourth grounds of appeal, concerning the *Limitation Act* and the doctrine of *laches*, are somewhat harder to classify, as they concern general law outside of the expertise of the statutory decision-maker, though in both cases, as is apparent from BDL's appeal submissions, they involve issues of fact and allegations that certain facts were misapprehended or ignored by the Superintendent. On balance, I consider that a standard of correctness should be applied in these instances, despite the factual involvement. First, these submissions are grounded in the very sort of legal issues into which appellate bodies will venture and which, again, fall outside the expertise of the originating tribunal. Second, while there is a factual component to these questions, *Dunsmuir* tells us that it is not all tribunal decisions on matters of mixed law and fact that are entitled to deference, but rather only those where "... the legal and factual issues are intertwined and cannot be readily separated" (*Dunsmuir, supra*, at para. 53). In this case, I do think it feasible to tease out the legal principle and fairly consider whether it was properly applied to the facts, which facts were not adduced *viva voce* but rather are contained in the same Record on appeal as was available to the Superintendent. Third, while the privative clause here needs to be kept in mind, just as a Court would consider based on *Dunsmuir* (particularly para. 52) that such a clause cannot oust its constitutional power to review decisions of administrative bodies, I note that a right of appeal to the FST is conferred by section 21(1) of the PBSA, notwithstanding that privative clause.

42. In summary, the standard of correctness will be applied to the issues of jurisdiction, the basic adequacy of the Superintendent's reasons, and the submissions concerning the *Limitation Act* and the doctrine of *laches,* while the standard of reasonableness will be applied to the alleged factual errors and the determination that different criteria for entry into the Plan were being applied contrary to the PBSA.

43. I will now consider the various preliminary issues raised by the Appellant.

C. Adequacy of the Reasons

44. As stated, while the Appellant did not raise the issue in its Notice of Appeal, in its submission on appeal it makes the threshold argument that the Superintendent's reasons are so deficient that the Decision should be quashed on that basis, relying on *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FSC 158, a judgment of the Federal Court of Appeal.

45. Staff submits that the point should not be considered as it was not included in the Notice of Appeal. Both Staff, in the alternative, and the Union submit substantively that the Superintendent's reasons were sufficient.

46. I am prepared to consider this ground, though not within the Notice of Appeal, as it was raised in the initial appeal submission rather than late in the process and the Respondents were thereby able to make full submissions on the point as they saw fit.

47. That said, I reject the Appellant's submission, for the following reasons.

48. The Federal Court of Appeal observed as follows in *Vancouver International Airport Authority*:

> "**20** In 13 of the 23 positions found to be in the bargaining unit, the Board simply wrote that "there is no basis to exclude given the job duties," "there is no basis in the information supplied to exclude the position from the unit", or "job duties do not require exclusion". Did the Board apply any principles in these rulings? If so, what are the principles? It is a mystery. The applicants have no idea why they lost, they cannot meaningfully assess whether a judicial review was warranted or formulate any grounds

> for it in the case of these 13 positions, this Court is unable to conclude any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out above. All we have are conclusions, laudably definitive, but frustratingly opaque.
>
> **21** In effect, for these 13 positions, the Board is telling the parties, this Court, and all others, "Trust us, we got it right ...".

49. Elsewhere in the decision, the Court reviewed applicable principles as to what is required in the reasons of an administrative decision-maker. The Appellant here does not provide any analysis of those principles, but rather in its brief submission on the point simply refers to the basic outcome of *Vancouver International Airport Authority* and maintains that the Superintendent's reasons were inadequate.

50. I do not find that the Superintendent's reasons were inadequate, or so inadequate as to justify quashing the decision on that basis. The reasoning of the Superintendent is more terse than it might have been on certain issues, particularly pertaining to the *Limitation Act*, but generally and certainly in relation to the essential point of the Appellant on the merits, both the conclusion and the basis for it are sufficiently clear.

51. Further, in contrast to the circumstances of *Vancouver International Airport Authority*, in the present case the Appellant has not only been able to ascertain the Decision made and formulate appeal arguments, it has proceeded to do precisely that.

52. Applying the correctness standard I reject the argument as I perceive no merit in it.

D. Existence of the Superintendent's Jurisdiction

53. The Appellant submits that the Superintendent lacked jurisdiction to adjudicate this matter as jurisdiction rested exclusively with a labour arbitrator. The Appellant relies in this regard on section 89(g) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244, and a number of decisions, including *Bisaillon v. Concordia University*, [2006] 1 .SCR 666, *Vancouver (City) v. Canadian Union of Public Employees, Local 15*, [2006] B.C.C.A.A.A No. 128 (Munroe), *Telecommunications Workers Union v. Telus Communications Inc.*, [2010] BCJ No. 999 (BCSC) and *Weber v. Ontario Hydro*, [1995] 2 SCR 929.

54. Both Respondents support the jurisdiction of the Superintendent, relying on certain provisions of the PBSA and the PBSA Regulation and, in the case of Staff, certain case authorities including *Health Labour Relations Assn. of British Columbia v. Prins*, [1983] BCJ No. 13 (BCCA).

55. The Superintendent accepted jurisdiction, despite the Appellant's position on the matter, based on what he perceived as his statutory mandate to determine this type of dispute, referring specifically to sections 2 and 71(2) of the PBSA and section 23(2) of the PBSA Regulation (which I will come to shortly). The Superintendent's particular view of the matter is supported by the Respondents on this appeal.

56. Distilled to its rudiments, the Appellant's submission is that the essential character of this dispute is ingrained in the Collective Agreement, thereby conferring exclusion jurisdiction over it upon a labour arbitrator. It points out, uncontroversially, that the Plan was created pursuant to the requirement for a pension plan set out in Article 9.25 of the Collective Agreement, which is therefore the Plan's origin. That Article commences with the language, "The Company agrees to continue the pension plan as follows" and proceeds to set out its basic elements. In that sense, it can be fairly concluded that the Collective Agreement binds the parties to an agreement for provision of certain pension benefits. The Appellant also relies on this appeal, as it did before the Superintendent, on the history of the collective bargaining between these parties, which it says sheds light on the true meaning of the eligibility provisions in the Plan, in contrast to what one would take from a literal interpretation of those provisions.

57. In essence the Appellant submits that the Collective Agreement lies at the core of this dispute and that the Superintendent's authority and expertise do not extend that far.

58. Section 89(g) of the *Labour Relations Code* provides:

> "**89** For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
>
> ...

(g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict the terms of the collective agreement."

59. Section 82 of the *Labour Relations Code* describes "the purposes" in this way:

"Purpose of Part

82 (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.

(2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute."

60. The Appellant does not submit, at least not expressly, that subsection 89(g) itself confers exclusive jurisdiction on an arbitration board over matters falling within it.

61. Tracking the language in subsection 89(g), the Appellant makes a brief submission that the PBSA is an "Act intended to regulate the employment relationship of the persons bound by a collective agreement", on the basis that pension matters are clearly a significant part of the employment relationship for employees working under a collective agreement. In that regard the Appellant relies on the decision in *Vancouver (City), supra.* The Respondents do not comment on this point in their submissions.

62. As to the asserted exclusivity of a labour arbitrator, the Appellant primarily relies on the Supreme Court of Canada's decision in *Bisaillon, supra.* By a 4 to 3 majority, that Court restored a decision of the Quebec Superior Court holding that, as the Quebec *Labour Code* gives an arbitrator exclusive jurisdiction over "any disagreement respecting the interpretation or application of a collective agreement", and as a union has a monopoly on representation of its members' interests under a collective agreement, there was no jurisdiction in the Court to entertain a desired class action against the employer university by an individual union member alleging that pension fund monies had been misapplied. Writing for the majority, Lebel J.

observed that the Supreme Court of Canada had "clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement" (at para. 33). Such a connection was found to be present in that case. Notably, Lebel J. went on to consider whether the relevant pension legislation in Quebec contained any provision conferring jurisdiction on the matter in question upon a decision-maker appointed under that legislation. It was held that the Quebec *Supplemental Pension Plans Act* did not establish an administrative tribunal with the power to resolve disagreements over the interpretation of pension plans and that, while there were certain discrete types of dispute for which that statute sets out an arbitration procedure, as it happened the case before the court did not correspond to any of those specified situations (at paras. 43 and 44). Accordingly, there was no question of a statutory clash of jurisdiction, as only the *Labour Code* was applicable. Rather, the case was a contest between the jurisdiction of an arbitrator and that of a Court over a class action which, the majority concluded, amounts to a procedural vehicle that does not change the rules of "subject-matter jurisdiction" (at paras. 15 to 19).

63. The majority decision in *Bisaillon* applied the earlier judgment of the Supreme Court of Canada in *Weber v. Ontario Hydro*, *supra,* and in particular the premise that whether an exclusive jurisdiction clause in labour legislation is engaged hinges on whether the dispute in its essential character arises from the interpretation, application, administration or violation of the collective agreement (at para. 30). Such an exclusive jurisdiction clause clearly existed in both *Weber* and *Bisaillon.*

64. In the recent decision in *Telecommunications Workers Union v. Telus, supra,* the British Columbia Supreme Court concluded that the key fact underlying the decision in *Bisaillon* was that the parties had incorporated the conditions applying to the pension plan into the collective agreement (at para. 50). In that case, the Court upheld a declination of jurisdiction by an arbitrator over what was concluded to really be a dispute between a union member and a disability insurer over the provision of benefits, rather than one arising from the collective agreement.

65. In *Vancouver (City)*, *supra,* being a collective agreement arbitration award, the arbitrator referred to the Supreme Court of Canada's statement in *Bisaillon* that it has adopted a liberal position toward the exclusive jurisdiction of arbitrators in disputes connected to a collective agreement, and held that the *Public Sector Pension Plans Act* under consideration there is a statute within the meaning of section 89(g) of the *Labour Relations Code*; that is, it is a statute regulating the employment relationship of persons bound by a collective agreement (at para. 60). Still, the arbitrator went on to consider the true essence of the dispute before him, which arose from an apparently inadvertent failure of the employer to enroll in its pension plan certain persons entitled to enrollment. The basic thrust of the dispute was found to be the union's request for remedies set out in the collective agreement terms, and accordingly it was held that there was arbitral jurisdiction to hear the union's grievance. It was not stated that this jurisdiction was exclusive, and indeed it was observed in the course of the reasons that a finding of arbitral jurisdiction does not necessarily imply exclusivity. Accordingly, while the arbitrator noted that a board was established to hear pension disputes under an agreement between the parties ancillary to the *Public Sector Pension Plans Act*, he did not suggest that the Board would have lacked jurisdiction if the parties or one of them had first petitioned that body.

66. I will now set out a portion of the legislative framework that might be seen as conferring jurisdiction in this case on the Superintendent. The particularly relevant provisions are as follows:

From the PBSA

"Designation and duties of Superintendent of Pensions

2 (1) The minister must designate as Superintendent of Pensions a person appointed under the *Public Services Act.*

(2) The superintendent is the chief administrative officer charged with the administration and enforcement of the Act.

(3) The superintendent may designate a person who, in the absence of the superintendent, exercises the powers and performs the duties of the superintendent.

...

General requirements of pension plans

24 (1) Subject to this Part, a pension plan must provide for the following:

(a) the administration and maintenance of the plan;

(b) the means of paying the administration expenses;

(c) the conditions for membership in the plan;

(d) benefits and entitlements on

(i) the termination of membership,

(ii) the death of a member or former member,

(iii) pension commencement, and

(iv) the termination of the plan;

(e) the deadline for choosing any option and the consequences of not meeting the deadline;

(f) the matters prescribed under section 31 (4) with respect to interest;

(g) the treatment of surplus assets during the continuation of the plan;

(h) the determination of benefits, member and employer contributions and the allocation of contributions using formulas that comply with the prescribed criteria;

(i) the method for conversion of optional ancillary contributions to optional ancillary benefits upon retirement, termination of membership, pension commencement, pre-retirement death and winding up of the plan.

...

Entitlement of employees to join plan

25 (1) Subject to subsection (3), every employee in a prescribed class of employees for whom a pension plan is maintained is, on application, eligible to become a member of the pension plan after completing 2 years of continuous employment with the employer, which period may begin before January 1, 1993, with earnings of not less than 35% of the Year's Maximum Pensionable Earnings in each of 2 consecutive calendar years.

(2) For the purposes of subsection (1), the prescribed class of employees may consist of employees within that class who are employed at a particular establishment of the employer.

(3) For the purposes of subsection (1), a multi-employer plan may require not more than 2 years of continuous employment, which period may begin before January 1, 1993, in which the employee completes at least 350

hours of employment with one or more of the participating employers with earnings of not less than 35% of the Year's Maximum Pensionable Earnings in each of 2 consecutive fiscal years.

(4) If a group of employees in a prescribed class of employees are covered by the plan but the employees in that group are employed other than on a basis that the employer considers to be full time, the employer may establish a separate plan for that group.

(5) The separate plan under subsection (4) must be comparable to the plan covering employees in the prescribed class who are considered to be employed on a full time basis,

(a) in the case of a defined benefit plan, in terms of the value of the benefits provided, or

(b) in the case of a defined contribution plan, in terms of the rates or amounts of contributions,

taking into account the differences in the number of hours worked in the relevant period of employment.

...

Civil enforcement

71 ...

(2) If, in the opinion of the superintendent, a pension plan does not comply with this Act or the regulations or is not being administered in accordance with this Act, the regulations or the plan, the superintendent may

(a) direct the administrator, the employer or any person to

(i) cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance, and

(ii) perform such acts as in the opinion of the superintendent are necessary to remedy the situation, or

(b) institute any action that could be initiated by a member or any other person entitled to a benefit under the plan.

(3) If the superintendent considers that a person has failed to comply with a direction made under this section, the superintendent may apply to the Supreme Court for either or both of the following:

(a) an order directing the person to comply with the direction or restraining the person from violating the direction;

(b) an order directing the directors and officers of the person to cause the person to comply with or to cease violating the direction,

and the Supreme Court may make any order it considers appropriate."

From the Pension Benefits Standards Act Regulation

"Entitlement of employees to join plan

23 (1) For the purposes of section 25 (1) of the Act, the classes of employees entitled, on application, to become members of a pension plan are any one or more of the following:

(a) employees who are paid a salary;

(b) employees who are paid on an hourly basis;

(c) employees who are members of a trade union;

(d) employees who are not members of a trade union;

(e) supervisory employees;

(f) management employees;

(g) executive employees;

(h) employees who are officers of the employer;

(i) employees who are connected with the employer for the purposes of section 8500 (3) of the regulations under the *Income Tax Act* (Canada);

(j) employees belonging to some other identifiable group of employees acceptable to the superintendent.

(2) If there is a dispute as to whether or not an employee is a member of a class of employees for whom a pension plan is established or maintained and the superintendent is of the opinion that, on the basis of the nature of the employment or of the terms of employment of the employee, the employee is a member of that class, the superintendent may require the administrator to accept the employee as a member."

67. It is clear from the above provisions that the Superintendent is statutorily mandated to administer this pension legislation and enforce non-compliance of pension plans with the PBSA or the PBSA Regulation. The powers of the Superintendent in that regard are broad. All of the foregoing is apparent from sections 2(2) and 71(2) and (3) of the PBSA. Within those broad powers, the Superintendent has the right and indeed the obligation to enforce compliance with the various provisions regarding entitlement to join a pension plan and to the benefits thereof. This is evident from sections 24 and 25 of the PBSA and section 23 of the PBSA Regulation, the latter being concerned with the entitlement to membership in a pension plan of various types of employee classes. Subsection 23(2) of the PBSA Regulation expressly states that the

Superintendent may require an administrator to accept an employee as a member of the plan - which is precisely what he did in this case in respect of a number of employees.

68. In its original letter of complaint of April 23, 2009, the Union asked the Superintendent to determine the criteria by which certain employees became members of the Plan and relied upon section 25 of the PBSA and section 23 of the PBSA Regulation, arguing based on those provisions that casual employees who satisfied either set of eligibility criteria in the Plan were entitled to entry. The Appellant's position before the Superintendent was, as indicated earlier, more broadly based, and referred to the history of the Plan and the Collective Agreement. In ultimately upholding the Union's complaint, the Superintendent grounded his decision in section 25 of the PBSA and section 23 of the PBSA Regulation. In particular, his interpretation of those provisions led to the conclusion that different classes of the affected employees could not be subjected to different rules for entry into the Plan. Whether that was a reasonable conclusion is a question on this appeal, but clearly that was the Superintendent's application of the legislation.

69. It is very difficult to conclude in the face of the different provisions of the statute and regulations outlined above that the Superintendent had no jurisdiction to adjudicate a matter of this kind. To the contrary, those provisions, together with the nature of this dispute, which is entirely concerned with pension plan eligibility and at least partially concerned with application of the PBSA and PBSA Regulation, compel a conclusion that the Superintendent did possess jurisdiction – unless, that is, it could be demonstrated that it had elsewhere been stripped away. If that were to occur, presumably the logical place for it would be in the *Labour Relations Code* and it would take the form of provisions plain enough to establish exclusive jurisdiction of an arbitration board that would clearly override the language of the PBSA and PBSA Regulation establishing the Superintendent's powers and mandate in such a case as this. But subsection 89(g) of the *Labour Relations Code*, relied on by the Appellant, does not contain such plain and clear language. It may also be borne in mind that, in *Bisaillon*, a leading decision and that primarily relied upon by the Appellant, the relevant labour legislation clearly conferred an exclusive jurisdiction and the pension legislation in issue by its own terms had no application to the dispute, contrasting starkly with the situation in this case.

70. In *Prins, supra,* the British Columbia Court of Appeal upheld the decision of the trial court that the Director of Employment Standards by virtue of the provisions of the *Employment Standards Act* had jurisdiction to hear a dispute over alleged non-payment by a hospital employer, though the obligation in issue arose under a collective agreement and despite the dictate of the then *Labour Code* that a collective agreement contain terms to resolve disputes between persons bound by it. The Court of Appeal held that the Director's jurisdiction had not been ousted by the collective agreement or the legislation. The Court agreed expressly with the decision below of Chief Justice McEachern, then of the Supreme Court of British Columbia, who stated:

> "It would be salutary, in my judgment, if all disputes of any kind between parties bound by a collective agreement could be resolved in a domestic forum. But many of our working citizens are not parties to a collective agreement, and the Legislature has furnished a procedure for the direct and expeditious settlement of these kinds of problems. It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this legislation" (at page 13).

71. With respect, that is the view I take here. It is not merely a question of whether, as in *Bisaillon* in different circumstances, the essential character of the dispute is rooted in the Collective Agreement. Given that the Plan is incorporated in the Collective Agreement, one could regard the key issue in dispute here to revolve around either the Plan or the Collective agreement, with equal fairness. In the case of either characterization, unquestionably, the dispute directly concerns pension rights and application of the PBSA and the PBSA Regulation is a key part of the necessary adjudication. I do not regard *Bisaillon* or the other authorities relied on by the Appellant as supporting an exclusive jurisdiction of an arbitration board against the clear statutory mandate here to the Superintendent to determine a matter of this kind, and without any suggestion in other legislation that this clear jurisdiction has been ousted. It would have been a simple matter for the legislature to restrict the Superintendent's authority to pension disputes unconnected to a collective agreement, if that had been intended.

72. Before concluding this discussion I will note the Appellant's reliance on the Union's having lodged a grievance in relation to this same subject matter before making its initial complaint to the Superintendent. The Appellant does not go so far as to argue that the Union

thereby elected between two distinct courses of action, with the result that the second course was no longer available, and does not review the equitable doctrine of election. Rather, the Appellant appears to submit that the filing of the grievance supports a conclusion that the matter falls within the jurisdiction of an arbitrator. For its part, the Union says in essence that it took this action to protect its members' rights. No copy of the grievance is in the Record and it is not clear precisely when it was filed, whether the process went any farther or what, if any, further steps may yet be taken.

73. The existence of the Superintendent's jurisdiction, being the context within which the Appellant makes this point, cannot logically be affected by whether a grievance was first filed in apparent pursuit of a labour arbitration. The question of the Superintendent's jurisdiction is to be determined on the basis of the nature of the dispute and the legislation and applicable case authorities. Depending on one's point of view, whether jurisdiction exists is to be decided either by the Superintendent, or by an arbitration board, or ultimately by this tribunal or a Court, but not by the parties themselves based either on their stated position or their conduct. I do not see, then, that the basic jurisdiction question can be touched by the earlier grievance. One could imagine, possibly, on consideration of relevant authority, not that jurisdiction could be removed but that a party such as the Union might be considered estopped from following one course of action if an inconsistent course had already been taken, though, again, that is not the argument which has been made. If it were made, one of the questions to consider would likely be whether these really were inconsistent actions to take; it might be the case that the Union was entitled, so to speak, to ride both horses. Perhaps the two processes provide for somewhat different remedies. The details of this are not explored in the Record. Another consideration in that event would be whether, even if the Union were estopped from pursuing a complaint, such estoppel would prevent the Superintendent from carrying out his statutory powers.

74. In at least one decision, being that of the *Yukon Territory Supreme Court in Benner v. Yukon*, [1994] Y.J. No. 172, it was held that the lodging of a grievance by a union did not preclude its later taking up the same matter with the Yukon Employment Standards Board (at para. 24).

75. I conclude that the Superintendent was correct in deciding that he had jurisdiction over this dispute. In reaching this conclusion I am not unmindful of the Supreme Court of Canada's expressed liberal approach to findings of exclusivity of labour arbitrators in disputes pertaining to collective agreements, but no authority has been referred to me suggesting that this practice should extend to the present circumstances which I have summarized, and particularly to the legislative framework of this case.

E. Whether Jurisdiction Should Have Been Declined

76. The Appellant argues alternatively that the Superintendent and an arbitration board under the *Labour Relations Act* have concurrent jurisdiction here, and that the former should have deferred to the latter.

77. The Appellant submits that the Superintendent determined that the Plan was incorporated in the Collective Agreement by considering the history of the Collective Agreement and interpreting its current terms. From this, the Appellant argues that interpretation of the Collective Agreement was fundamental to the outcome, but that almost all of the Superintendent's conclusions about its terms were incorrect.

78. The Appellant submits that labour arbitrators are experts in the interpretation of collective agreements, including those that incorporate pension plans, and that the *viva voce* evidentiary process of a labour arbitration would allow a full exploration here of the bargaining history, the intentions of the parties and facts bearing on application of the *Limitation Act*. In contrast, it asserts that the process of written submissions before the Superintendent was ill-suited to the complex issues to be resolved.

79. The Appellant does not refer to any case authority offering guidance as to when, in matters of shared jurisdiction, one decision-maker should defer jurisdiction to another.

80. In reply, the Union submits that the Legislature determined the Superintendent to be the proper person to administer the complex pension legislation, and that he properly did so in this case in view of that legislation and his expertise in such matters. It argues that the very question in this case of whether there are two eligibility tests for employees and, if so, whether this is

permissible under the PBSA, falls within the Superintendent's jurisdiction and is not unique to collective agreement language. That said, the Superintendent is able to apply all of the Plan, the Collective Agreement and the legislation, as required.

81. Staff submits that in substance this is a matter of applying pension legislation to the terms of the Plan and that the Superintendent found the history of the collective bargaining agreement to be irrelevant. Staff argues that the Superintendent properly identified a legislative intent that he as chief administrator of the PBSA enforce that legislation, and that the Superintendent correctly held that he did not have authority to cede jurisdiction to another body, in light of his legislative mandate.

82. While the argument presented around section 89(g) of the *Labour Relations Act* was slender, I will assume (without definitively deciding) that the PBSA does fall within its language, and accordingly that an arbitration board would have jurisdiction to interpret and apply its provisions in a dispute arising under a collective agreement (and I note that sub-sections (a) through (g) of section 89 are only examples of the arbitration board's authority to settle a dispute arising under a collective agreement, "without limitation"). I will also provisionally accept the premise (without having to definitively decide the point) that this matter can be characterized as "a dispute arising under a collective agreement", as that language appears in section 89. Even applying those propositions, however, I cannot accept that the Superintendent was required here to defer jurisdiction to an arbitration board. I arrive at that view primarily because, as I consider it, the central issue to be decided is and has been whether the terms of the Plan and how they were implemented can bear the scrutiny of the pension legislation, which is a matter falling squarely within the Superintendent's expertise and is therefore uniquely suited to the PBSA adjudicative process. I appreciate the wider compass urged by the Appellant, and recognize the right in the Appellant to attempt to adduce the various historical agreements and plans, but all of that is in aid of an urged interpretation of the relevant terms in the Plan and does not alter the basic nature of the inquiry. If it is decided, as the Superintendent appears to have done, that the historical analysis is irrelevant, does the mere fact of the Appellant's submission in that regard recast the nature of the dispute and the identity of the appropriate decision-making body? That would assume the substantive submission is well-founded and smacks of a bootstrap argument. In any case, even with the collective bargaining history in the frame, the heart of the dispute

remains compliance of the Plan and its administration with the pension legislation. I do not say that a labour arbitrator could not deal with that issue when arising in the context of a collective agreement, but I cannot agree that a labour arbitrator was better-suited to the matter than the Superintendent.

83. As Staff points out, the Superintendent held that as chief administrative officer charged with the administration and enforcement of the PBSA, under section 2 thereof, he lacked authority to cede jurisdiction to another party. The Appellant has not referred to any authority casting doubt on that proposition. While I need not conclude that this submission is necessarily correct - it is sufficient, in my view, to observe that the Superintendent was correct, as I believe he was, in declining the invitation to defer jurisdiction, even if it could be said that he had the right to do so – I do note that it seems well-taken and represents a further obstacle the Appellant has not overcome.

84. While, again, I recognize the right in the Appellant to attempt to prove what it regards as the factual matrix of the Plan provisions requiring interpretation, I do not see that this necessitates a full hearing with *viva voce* evidence. Nor do I think that ascertaining the parties' intentions necessarily suggests such a hearing should have been preferred; there is a clear limit to how far the law will go, if at all, beyond the instrument itself to make such a determination, and *viva voce* evidence often will not come into it. In this case, there are no examples offered by the Appellant of *specific relevant points* that could usefully and uniquely have been developed by *viva voce* evidence, thereby suggesting that the otherwise-mandated Superintendent should decline jurisdiction in favour of a labour arbitration.

85. Finally, if the Legislature had wished pension-related disputes to be subject to a full-scale hearing, it could easily have so provided. Presumably it did not do so because it preferred a more summary and expeditious process. The absence in the legislation of provisions for a full-scale hearing is not a reason for the Superintendent to relinquish jurisdiction over a matter falling within his purview and expertise, which I consider this to be.

86. For the foregoing reasons, I conclude that the Superintendent correctly refused to cede jurisdiction to a labour arbitrator.

F. *Limitation Act*

87. The Appellant next submits that the complaint in this matter was barred by the *Limitation Act*, R.S.B.C. 1996, c. 266, and particularly section 3(5) thereof, which provides:

> "(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose".

88. The Union's original complaint to the Superintendent occurred on April 23, 2009. The Appellant submits that the *Limitation Act* applies to a matter of this kind and, while not spelled out in these terms, must be arguing that the right to make this complaint under the PBSA arose prior to April 23, 2003.

89. The Appellant's particular submission on appeal is that the Superintendent erred in failing to consider whether the complaint was time-barred. The Appellant had argued before the Superintendent that the complaint was brought out of time, relying as it does on appeal on the decision in *Buschau v. Rogers Cable Systems Inc.*, [2001] 83 B.C.L.R. (3d) 261 (BCCA). The case involved an allegation of mismanagement of a pension plan and the issue before the Court of Appeal, insofar as the *Limitation Act* is concerned, was whether the applicable limitation period was six years or ten years which, to state the point simply, depended on whether the mismanagement amounted to a breach of trust. The Court held that a six year limitation period applied with the result that a portion of the claims had been brought too late.

90. The Appellant goes on to submit that as a quasi-judicial adjudicator, the Superintendent is bound to apply legislation and the common law relating to procedural fairness.

91. In respect of the Union's submission expressed earlier to the Superintendent that it was not aware of the facts giving rise to the claim until late in the day, the Appellant states that the eligibility language in the Plan has not changed since the Plan came into effect in 1997 and that the Union's point underscores the need for an oral hearing before an arbitrator.

92. The Respondents oppose the Appellant's position on a number of bases but primarily asserting that the *Limitation Act* has no application here. In part that is said to be because the Superintendent as regulator must be able to inquire into possible non-compliance with the PBSA, being public policy legislation, and cannot lose jurisdiction because of a party's lateness in bringing the matter forward, and in part on consideration of certain case authorities said to suggest that this type of matter is not governed by the *Limitation Act*. The Union also argues (as anticipated by the Appellant) that it was not aware of "the violation until recently", implicitly urging that the running of time was postponed even if a limitation period were found to apply. Both Respondents seek to distinguish *Buschau* as being a court action and, says Staff, one in which damages were sought, being relief that could not be pursued before the Superintendent.

93. The answer provided by the Superintendent to the limitation argument in this case was pithy. While referring to an authority on the question of whether a *laches* defence applied in a situation such as this, as concerns the *Limitation Act* the Superintendent really said only that the Appellant had failed to adduce any authority showing that complaints to the Superintendent were subject to the *Limitation Act*. In effect, the Superintendent merely concluded that, in the absence of such authority, the *Limitation Act* could not be seen as having any application.

94. The question arising is whether the Superintendent was correct in rejecting the limitation defence. I believe that he was, but for reasons that go beyond his brief dismissal of the point.

95. It is important to first consider the factual underpinning of the limitation argument. The Union stated in its April 23, 2009 letter of complaint that "more than 20 'casual' employees" had, in effect, wrongfully been denied admission into the Plan. The submission was that those persons had attained the right of entry on satisfying the 132/12 test but had been wrongfully denied entry by BDL because they had not yet met the YMPE criterion. The Union did not provide the names or the precise number of the affected employees and did not, either in that original complaint or subsequently, set out any facts to indicate when each of these persons had met the more relaxed criterion – that is, when they had worked 132 full days in a 12 month period.

96. The Appellant in its submissions to the Superintendent did not provide any of that information, either.

97. There is in the Record a January 21, 2009 letter from the Union to the Appellant (between counsel) asking for a breakdown of employees entered into what is called the Defined Benefit Plan and the Defined Contribution Plan, the dates on which that occurred and the criteria applied for admission. On March 23, 2009 the Appellant responded by providing a list with names of roughly 100 members and dates of entry into these plans ranging from 1997 to 2008. The list does not reveal, however, when the persons on whose behalf the Union's complaint was made first met the 132/12 test.

98. The latter information is particularly important in the present context because the right to take any action on behalf of the affected persons would not have arisen until, according to the Union's view, BDL had wrongfully failed to admit them into the Plan. That could only have occurred following their satisfaction of the 132/12 test. Perhaps in the case of all of the affected employees such satisfaction did not occur until after April 23, 2003, in which case the right to complain would have arisen within six years of the start of this legal process. Perhaps all of these employees met the 132/12 criterion before April 23, 2003. Some may have met it before that date and some after. Without evidence it is all guesswork.

99. In its submission on appeal, the Appellant states:

> "108. The Union was aware of the circumstances under which it could bring a claim pursuant to the *Pension Benefits Standards Act* in 1997, or earlier. The eligibility language in the Plan that is at issue has not changed since the Plan came into effect in 1997. While the Union disputes its awareness of the circumstances giving rise to the Complaint, that dispute again underscores the need for an oral evidentiary hearing before a labour arbitrator".

100. It is not, however, the establishment of the eligibility language that could give rise to a claim. Rather, it is the action of one of the parties to the Plan inconsistent with that language that could do so. In this context, that means the failure of BDL to admit an employee into the Plan after either set of entry criteria had been attained. No evidence has been referred to showing when such allegedly wrongful failure(s) took place.

101. In many cases, the date of the underlying event giving rise to a right to bring action is plain and obvious to all concerned. The simplest example may be a motor vehicle accident causing injury. But in this case the date of the alleged breach of duty is not at all clear. I am referring not to the separate issue of whether the running of time is postponed on the discoverability principle, but rather to the issue lying at the very threshold, being when the underlying wrong is said to have occurred. Without that basic level of evidence, the limitation issue cannot even be framed.

102. I recognize that this was not an issue raised by any of the parties, and I have determined to dismiss the *Limitation Act* submission on another basis. Were that not the case, however, I would not have considered allowing the appeal on the limitation ground without first inviting further submissions from the parties on:

(a) whether there is any evidence showing when the right to bring action arose and, if so, the applicable date or dates; and

(b) whether, BDL having raised the limitation defence, it had the burden of proving that the Union's complaint was brought out of time or the Union had the burden of proving that it was within time (I note that the *Limitation Act* refers to burden of proof only in relation to a possible postponement of the running of time, being a separate issue). In other words, if indeed the factual underpinning of the issue was missing, the question arising would be which party suffers the effect of that.

103. I will now consider the other points that do arise in the parties' submissions regarding the *Limitation Act*.

104. Staying for the moment with the factual aspect, as indicated the Union maintains that, even if the *Limitation Act* were applicable, it did not possess the facts needed to be aware of the right to complain until an advanced date, well within the six years preceding April 23, 2009. The Union submits that, "... even if a limitation period could be implied, the Union is not time-barred from filing this application because it was not even aware of the violation until recently ...". It

goes on to assert that it first became aware of the Appellant's practice of enrolling casual employees solely under the YMPE test in January, 2009. In its September 11, 2009 submission to the Superintendent, incorporated by reference in its appeal submission, it asserts a number of facts and refers to certain correspondence to support that contention. It states that around that time it was attempting to ensure that all members entitled to enrollment in the Plan had in fact been enrolled by the date of the Plan's expiry, being April 21, 2007. It says that until that time there was no reason for it to believe there were issues of concern with administration of the Plan, in which it had not been involved since prior to 1997. At a meeting of October 31, 2008 the Union asked the Appellant for clarification regarding several members who had evidently qualified for enrollment but not yet been enrolled, and a number of letters were exchanged thereafter. The Union says that it was only during a conference call between the parties on January 19, 2009 that the Appellant first outlined its position that casual employees could be enrolled only on the strength of the YMPE test.

105. Following that Union submission to the Superintendent on September 11, 2009, BDL did not challenge the facts I have just summarized in any of its letter of February 15, 2010 to the Appellant, its main submission on this appeal or its reply submission on this appeal. Rather, BDL simply asserts that the Union was aware of the terms of the Plan in 1997 and that its position on these facts underscores the need for an oral evidentiary hearing. As these facts were not contested, I am able to accept and do accept that the Union was not aware until January, 2009 that the 132/12 criterion had not been applied to casual employees and that it had no reason to be aware of this earlier.

106. That, however, is not the end of the analysis of the postponement issue. Beyond the factual submission the Union has made it is necessary to show that the facts fall within one of the postponement provisions in the *Limitation Act*, which read as follows:

> **"Running of time postponed**
>
> 6 (1) The running of time with respect to the limitation period set by this Act for an action
>
> (a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or

(b) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use,

is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

(2) For the purposes of subsection (1), the burden of proving that time has begun to run so as to bar an action rests on the trustee.

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

(a) for personal injury;

(b) for damage to property;

(c) for professional negligence;

(d) based on fraud or deceit;

(e) in which material facts relating to the cause of action have been wilfully concealed;

(f) for relief from the consequences of a mistake;

(g) brought under the *Family Compensation Act*;

(h) for breach of trust not within subsection (1).

...

(6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement."

107. No party has made a submission on these provisions or on the potential question whether, if these facts do not fall within section 6 of the *Limitation Act*, there is any room within the discoverability principle at common law to effect a postponement of the running of time in circumstances such as these.

108. It is not obvious that this case does fall within one of the categories described in section 6. In the absence of any submissions on that critical issue, I decline to give effect to the Union's postponement argument.

109. The remaining issue arising from the submissions is whether the *Limitation Act* applies to this kind of process. The reasoning in *Buschau*, in my view, is not sufficient to show that it does as that case concerned an action in Court where, as might be expected, there was no argument apparently made that the *Limitation Act* did not apply. The real question for the Court, as I have stated, was whether the relevant limitation period was six years or ten years. On the facts of the case the general applicability of the statute was neither tested nor discussed.

110. The potential legal questions here include whether the making of the complaint to the Superintendent constituted the bringing of an "action" as that word is used in section 3(5) of the *Limitation Act* and, if so, whether there is any basis outside of that statute for concluding that it nonetheless has no application to a complaint under the PBSA (I say "potential" legal questions, as I consider there to be another way to resolve the point, as will be apparent shortly).

111. The word "action" is defined in section 1 of the *Limitation Act* as including "any proceeding in a court and any exercise of a selfhelp remedy". No submission has been made as to the significance of that definition in the present context or whether it leaves room for application of the *Limitation Act* to legal proceedings commenced outside of the court system.

112. As to the case authorities that have been cited to me, and just as I do not consider *Buschau* of assistance on whether the *Limitation Act* applies in this matter, I do not regard the decisions relied on by the Respondents as determining the issue, or at least not clearly. There is modest support for the position that the *Limitation Act* does not apply to a statutory power to regulate a matter of public policy in *British Columbia (Commissioner of Municipal Superannuation) v. Prince George* (1986), 4 B.C.L.R. (2d) 178 (BCCA). There, a stated case was brought questioning in part whether the *Limitation Act* applied to the right of the Commissioner of Municipal Superannuation to claim 20 years arrears of pension contributions from the City employer under the provisions of the *Pension (Municipal) Act*. The Supreme Court of British Columbia had decided that the *Limitation Act* did apply but this was overturned

on appeal, the Court of Appeal simply stating that "The *Limitation Act* does not apply to this action ..." (at para. 6). With respect, however, there was no elaboration on the reasons for that conclusion, and there were other grounds on which the Court of Appeal held that the claim was not barred including in relation to when the cause of action truly arose.

113. While the authorities cited are not clearly instructive on whether the *Limitation Act* applies to the Union's complaint in this case, I prefer in any event to regard the matter in the following way.

114. Subsection 71(2) of the PBSA, once again, provides:

> **Civil enforcement**
>
> "71 ...
>
> (2) If, in the opinion of the superintendent, a pension plan does not comply with this Act or the regulations or is not being administered in accordance with this Act, the regulations or the plan, the superintendent may
>
> (a) direct the administrator, the employer or any person to
>
> (i) cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance, and
>
> (ii) perform such acts as in the opinion of the superintendent are necessary to remedy the situation, or
>
> (b) institute any action that could be initiated by a member or any other person entitled to a benefit under the plan."

115. In this case, the Superintendent has made a direction to the Appellant under section 71(2). Following receipt of a notice of objection from the Appellant under section 20(3), the Superintendent then reconsidered the Direction and rendered a Decision under section 20(4) of the PBSA.

116. It is useful to contrast the language in those provisions with that in section 3(5) of the *Limitation Act*, which is concerned with the right to bring action. It is apparent from that provision, and from other sections of the *Limitation Act* referring to the right of "a person" to

bring action, that the *Limitation Act* is concerned with the time within which a party feeling aggrieved may proceed with a claim.

117. The Superintendent is not, however, a party empowered under the PBSA to bring a claim for the purpose of his private interests. Rather, the Superintendent is a regulator charged with responsibility for enforcing important public policy legislation. I am therefore of the view that the right of the Superintendent to take enforcement action under the PBSA is not governed by the provisions of the *Limitation Act*, but rather flows simply from the rules laid down in the PBSA itself. As Staff points out, section 73 of the PBSA sets a time limit of two years for prosecution under the *Act*, but there is no such temporal restriction stated to apply to the right to make directions and decisions under sections 71 and 20.

118. The key question is not, therefore, when the aggrieved party (the Union) had the right to bring action or in fact brought it. In my view the date on which a party advances a complaint cannot deprive the Superintendent of *his statutory ability* to act. As Staff submits, whether the timing of the complaint is such that the matter should or should not be inquired into is an issue for the Superintendent to decide.

119. I am accordingly of the view that the Superintendent was correct in his decision that the *Limitation Act* does not apply in this matter. If I had not reached that conclusion I would, as indicated above, have invited submissions from the parties on the factual question of when the right to bring action arose and where the onus of proof rests once a limitation defence has been advanced.

G. *Laches* and Delay

120. The next string in the Appellant's bow is that the Superintendent erred in concluding that the doctrine of *laches* had no application and that the complaint was not barred by the Union's delay. The Appellant submits that the Union delayed 12 years in bringing the complaint, from 1997 to 2009, and alleges a number of ways in which the Appellant has been prejudiced by that delay. The Appellant relies on the British Columbia Supreme Court decision in *Sneddon v. British Columbia (Hydro and Power Authority)* (2003), 16 B.C.L.R. (4th) 254, in which one of

the bases for the Court's dismissal of an action to recover pension contributions was *laches*, where over 20 years had elapsed between the alleged breach of trust and the bringing of the action. The Court found that the delay had been unreasonable and that to grant the Plaintiffs relief would be unreasonable or unjust, applying *Ahone v. Holloway* (1988), 30 B.C.L.R. (2d) 368 (BCCA). An appeal by the Plaintiffs in *Sneddon* was dismissed (*Sneddon v. British Columbia* (2004) 85 B.C.L.R. (4th) 212 (BCCA)), without discussion of the *laches* point.

121. The Superintendent dealt with this issue by holding that the doctrine of *laches* or *estoppel* does not apply to a regulator carrying out his duties and powers, citing *The Board of Trustees of the Interior Lumbermen's Pension Plan* (Superintendent of Pensions, June 13, 2007, upheld by FST June 23, 2008), in which it was stated:

> "The Superintendent's duties and powers to carry out the provisions of the legislation are, like those of municipalities, '... of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel'",

in reference to the decision in *Langley (Township) v. Wood* (1999), 173 D.L.R. (4th) 695 (BCSC).

122. In my opinion, the Superintendent was correct in holding that the doctrines of *laches* and delay do not apply to the ability of the Superintendent to take action under sections 71 and 20 of the PBSA. The reasons I expressed above in the context of the *Limitation Act* apply equally here.

123. Even if I were of a different view, I would go on to dismiss the *laches* and delay submission as lacking the necessary factual foundation. By this I mean, again, that there is no evidence to show when the right to bring a complaint actually arose and, secondly, that the evidence demonstrates the Union was not aware BDL was admitting casual employees into the Plan only on the strength of the YMPE criterion until early 2009, its lack of earlier knowledge of the practice having been reasonably explained. In light of all of that, the necessary constituent of a *laches* defence that the delay has been "unreasonable" is entirely missing. I believe the Superintendent's decision to dismiss that defence was correct.

H. Alleged Factual Errors

124. We thus arrive at the underlying merits of the appeal, as to which the Appellant makes two broad submissions:

(a) the Superintendent made a number of significant factual errors which undermine his Decision; and

(b) the Superintendent erred in failing to consider that there are not different criteria for entry into the Plan and that the Plan is being administered in accordance with the PBSA.

125. I will commence by considering the alleged factual errors, of which there are five.

126. Firstly, the Appellant says the Superintendent was wrong in concluding that the term "casual employee" is not defined in the Collective Agreement. In dealing with that suggestion in his Decision, the Superintendent stated that while the Collective Agreement describes the entitlements of a casual employee, it does not define what a casual employee is. I consider that to be a reasonable view of Article 9.28 of the Collective Agreement. That Article sets out eight areas of entitlement or lack of entitlement to benefits of one kind or another for casual employees, but does not actually define the term; nor does any other provision of the Collective Agreement do so. The Superintendent demonstrated in his response to this point in the Decision that he was mindful of the language within Article 9.28.

127. In any event, this point appears more semantical than substantive.

128. Secondly, the Appellant points out that in reproducing Article 3.02(c) of the Plan in his Direction, the Superintendent omitted the word "other" which modifies the word "Employee". After this was raised by BDL in its notice of objection, the Superintendent expressed disagreement with the submission that this was a significant error, stating that the inclusion or exclusion of the word had no bearing on the statutory interpretation. It does appear that the issue did not touch the Superintendent's analysis; there is no indication, for example, that the

Superintendent initially interpreted Article 3.02(c) wrongly as a result of the omitted word. The Appellant's having brought the omission to the Superintendent's attention prior to the Decision, it was effectively cured and the real question is whether the analysis ultimately employed by the Superintendent is attackable on appeal. I therefore see no substance in this submission.

129. Thirdly, the Appellant submits the Superintendent erred in the Direction in stating that casual employees transition to regular status based on length of service and that he then minimized the error in the Decision as being irrelevant. The Appellant's point is that under the Collective Agreement a casual employee can only become a regular employee when a vacancy opens, which was not mentioned by the Superintendent.

130. I do not see any substance to this complaint. Largely, the Superintendent was correct, given that as a practical matter attainment of regular status does indeed depend on seniority, even if it also requires a vacancy to open. The Superintendent did not say that length of service automatically or on its own confers a right in a casual employee to take on regular status. In any event, even if that had been his view, which is not clear, I do not regard the point as impacting on his analysis or indeed on the substance of the matter in any significant respect.

131. Fourthly, and similarly to the last point, the Appellant submits that the Superintendent erred in stating in the Direction that the only difference between regular employees and casual, seasonal or temporary employees is their length of service. The Appellant points out that there are numerous distinctions between regular and casual employees set out in Article 9.28 of the Collective Agreement, none of which revolves around length of service. As stated above, the Superintendent in his Decision clearly referred to the "entitlements" of casual employees, which are set out in Article 9.28, so was aware of that Article. I do not see that, in saying that the only difference between regular and casual employees is length of service, he was confused into thinking that their benefit entitlement was precisely the same. Rather, he seemed to be merely restating that a casual employee can become a regular employee through length of service. He did not mention that a vacancy in the regular ranks had to also open up for the casual employee to advance, but I do not therefore conclude he was unaware of this and in any event do not see the precise mechanics by which a casual employee becomes entitled to regular benefits as being important in the ultimate analysis.

132. For clarity, in the case of the above allegations of factual error I consider that the Superintendent's ultimate determinations were reasonable, as that term is explained in *Dunsmuir*, or as I have indicated were not points of substance that could advance this appeal.

133. There is greater merit, in my view, in the Appellant's fifth and final allegation of factual error on the part of the Superintendent, which relates to the way in which employees have historically been enrolled into the Plan.

134. The matter of substance here is that in his Direction the Superintendent stated as follows:

(a) the employer had enrolled "regular 'full-time' employees" based on the 132/12 criterion (Direction, para. 10);

(b) the Plan had been administered with different eligibility provisions, being the minimum statutory standard for "regular 'part-time' employees" and the 132/12 criterion for 'regular' employees (full-time and part-time) (Direction, para. 31); and

(c) within the Plan there have been and continue to be different eligibility requirements, such that an employee may join it upon satisfying either the more generous 132/12 criterion or the statutory minimum standard (Direction, para. 33).

135. The Appellant's complaint to the Superintendent following the Direction and its submission on this appeal is that such statements ignore that no regular employee has been admitted into the Plan since it was incepted (so far as available records indicate). Another way of expressing the point, as the Appellant does, is that all casual employees admitted into the Plan since 1997 were qualified on the YMPE standard, and not by virtue of attaining regular benefit status under the Collective Agreement; as a result, all new entrants into the Plan came directly from the ranks of casual employees. Since no regular employees have been enrolled in the Plan from its commencement, and given that no employee was subsequently admitted on the strength

of the 132/12 standard, the Appellant submits that the complaint of differential treatment between regular and casual employees is groundless.[1]

136. In dealing with this complaint in the Decision, the Superintendent said the following:

> "7. BDL contends that I erred in failing to consider the argument that all members gained entry into the Plan on the same criteria. BDL then argues, at length, that the minimum criteria set out in section 25 of the Act was (sic) used as the sole means of determining eligibility for membership in the Plan, notwithstanding the provisions of section 3.02(a) and (b) of the Plan. This concerns me, as it appears from this argument that BDL, in its role as administrator of the Plan, is admitting that it (BDL) has not been administering the Plan in accordance with the Plan's own terms, as required by section 8(2) of the Act. It further appears to me that BDL is admitting to a violation of the Act and the Plan terms, but seeking to excuse this violation by claiming "historical leftover" (Decision, para. 7).

137. More generally, in the Decision the Superintendent stated that:

> "After reviewing the materials submitted by both BDL and the Union with respect to this reconsideration, for the purposes of section 20(4) of the Act, I hereby confirm the Direction of December 9 (sic), 2009 (copy attached). My reasons are set out below ..." (at p. 3).

138. It is not entirely clear whether the Superintendent was indicating there that he affirms the entire reasoning set out in the Direction or simply that he confirms his disposition of the matter. As he does not state in the Decision that he adopts all of the reasoning within the Direction, and proceeded to set out seven paragraphs of reasons in the Decision, the better view is that he was confirming the result reflected in the Direction rather than repeating by reference all of the findings therein.

139. The Superintendent did not in his Decision answer the substantive argument of the Appellant that different eligibility criteria had not been used as between regular and casual

---

[1] In its February 15, 2010 request for a reconsideration of the Direction, the Appellant acknowledged in a footnote that it did not have records for the period of April 21, 1997 to January 31, 2001 on the point, but stated that it "believes" that all employees within that period who entered the Plan did so as casual employees, based on having met the YMPE standard. The source of that belief is not set out, and the Union did not accept it, arguing in its March 5, 2010 reply that there was no evidence on the point.

employees. In my view, the Superintendent should have dealt with the substance of the point, which formed an important part of BDL's submission.

140. I find that the Superintendent clearly erred in stating in his Direction that the Plan had been administered using different eligibility provisions for different sub-groups (leaving aside how he described those sub-groups), one criterion being the minimum statutory eligibility (YMPE) and the other the 132/12 test. He plainly stated that regular employees were qualifying for entry on the latter basis, which was contrary to the evidence.

141. Before proceeding to consider that key issue, I will express my views on two somewhat related allegations by the Appellant of factual error.

142. Regarding enrollment of employees into the Plan, the Appellant says the Superintendent erred in referring in paragraph 9 of the Direction to the Appellant's "administrative practice" to enroll casual and regular part-time employees into the Plan when they qualify under section 3.02(c). The complaint is that it is not a matter of administrative practice to do so but rather an application of the Plan and the Collective Agreement. In my view, this statement by the Superintendent was innocuous and nothing arises from it.

143. The Appellant also asserts there to be no such thing as "regular full-time" or "regular part-time" employees, being terms used by the Superintendent, but rather that by the terms of the Collective Agreement only regular and casual employees exist. While that is true of the Collective Agreement, however, it is also the case that Article 2.23 of the Plan refers to persons "employed on a regular full-time or part-time basis", and I infer that the Superintendent reflected his view of that language in using the terms "regular part-time" and "regular full-time". In any event, I see no significance in the point on this appeal.

144. The Superintendent's conclusion of uneven treatment of employee groups is, however, a significant issue. The manner in which the Superintendent dealt with this in his Decision is curious. In the notice of objection to the Direction, BDL plainly asserted that the Superintendent had erred in concluding that administration of the Plan involved using different entry criteria. As is apparent from paragraph 7 of the Decision (set out in paragraph 135 above), the Superintendent understood the point, as he must surely have done: "BDL contends that I erred in

failing to consider the argument that all members gained entry into the Plan on the same criteria. BDL then argues, at length, that the minimum criteria set out in section 25 of the Act was (sic) used as the sole means of determining eligibility for membership in the Plan, notwithstanding the provisions of section 3.02(a) and (b) of the Plan. This concerns me ...". He did not, however, go on to expressly correct his contrary conclusion in the Direction, nor did he indicate that, notwithstanding that only one entry test was used in practice, his reasoning and ultimate disposition as set out in the Direction must stand. On the other hand, though not stated, it seems a safe inference from the language I have just excerpted that this was his viewpoint. He did seem to accept, for example, the factual assertion by BDL that only one entry criterion had been used, saying in paragraph 7 of the Decision that, "This concerns me ..." (and going on to discuss a violation of the PBSA). I have already said that the Superintendent should have answered BDL's point substantively. He should indeed have expressed clear reasons as to whether or why the result should be affirmed, in light of that point. Nonetheless, it is apparent enough that he was aware of it.

145. Accordingly, assessing what occurred as best I can, I regard the Direction to express a clear error of fact on a material issue though I do not regard the Decision, from which this appeal is taken, to have perpetuated that error. This does not mean, however, that the Decision is unattackable. There remains the key question of its reasonableness given the lack of evidence of uneven treatment of employee groups. That, to my mind, is the crux of the appeal.

146. The central issue of the reasonableness of the Decision given that differential entry criteria were not applied in practice is the subject of the Appellant's final ground of appeal, which I shall now consider.

I. Whether Plan Administered in Accordance with the Act

147. The Appellant has made an extensive submission, as it did to the Superintendent, that the provisions of the Plan and Collective Agreement under consideration must be construed in light of their history in prior agreements. I have carefully considered that submission and, as requested by the Appellant, its earlier submissions on this topic before the Superintendent. I

understand the Appellant's argument to be that on consideration of that history it is clear that Articles 3.02(a) and (b) of the Plan have no meaning or application. The Appellant argues that Article 3.02 was "cut and pasted" from prior plan instruments, which explains some of its inartful construction. Cobbling together the Appellant's extensive submissions on this subject, I extract the following position:

(a) all employees with regular status when the Plan was established enjoyed immediate membership that had been transferred from earlier plans;

(b) under the Collective Agreement entry into the Plan is earned immediately upon attainment of regular employee status, and this trumps any more onerous eligibility requirements set out in the Plan;

(c) Articles 3.02(a) and(b) of the Plan, which set out the 132/12 test, expressly relate only to regular employees; and

(d) therefore, as all regular employees at inception of the Plan became members automatically, and any other worker subsequently becoming a regular employee would by the terms of the Collective Agreement immediately be entitled to enrollment (if, theoretically, he had not already been enrolled on the YMPE test), no regular employee ever would need to meet the 132/12 test in order to gain entry, thereby rendering Articles 3.02(a) and (b) moot (or, as the Appellant calls it, "an historical leftover").

148. On the state of the evidence I accept the element in the foregoing paragraph (a), but I have difficulty accepting that in paragraph (b). In its submission before the Superintendent and on this appeal, the Union took the position that benefit status under the Collective Agreement was not the same as entitlement to enroll in the Plan, and that BDL had conflated these concepts. The Collective Agreement does not, in fact, provide that regular employees are entitled to admission into the Plan. It does not actually even state that regular employees are entitled to "full benefits" or anything on those lines. It does provide in Article 9.28(g), as indicated earlier, that casual employees will be entitled to "regular benefit status" once advancing to the core,

which clearly implies (and which seems axiomatic) that regular employees are entitled to regular benefit status. Exactly what regular benefit status entails, however, and its relation to the Plan, if any, is not discussed at all in the Collective Agreement.

149. Article 3.02 of the Plan clearly sets out separate and distinct entry criteria for different groups. The Appellant wishes to effectively negate that clearly stated language by referring to an asserted dominant but unstated rule in the Collective Agreement. It would be highly unusual, to say the least, to construe documents in that fashion. Nor can the Appellant say that the documents should be interpreted that way because the parties had subsequently acquiesced in regular employees being admitted to the Plan immediately on attaining that regular status, as that situation apparently did not ever arise: the Appellant stresses that no regular employee has ever entered the Plan. I have considered all of the other extrinsic evidence relied on by the Appellant in support of this submission but, given the clear reference in Article 3.02 to the 132/12 test and the lack of clarity over (or even reference to) admission into the Plan in the Collective Agreement, I am unable to accept this submission. Indeed, on the language of the documents, I am more inclined to the Union's position that the argument conflates regular benefit status under the Collective Agreement and entitlement to membership in the Plan.

150. As I have indicated earlier in these reasons, it is apparent that there has been a certain evolution of BDL's position through these legal proceedings. In its original submission to the Superintendent BDL argued at some length that the different eligibility criteria in Article 3.02 of the Plan did not offend the PBSA. In its main submission on this appeal it stated as follows:

> "146. Although *we submit it is not unlawful under the Act to have different eligibility criteria within a class*, in practice, all new members have entered the Plan on the same criteria, since the Plan was established in 1997. That criteria is (sic) the minimum statutory criteria, reflected in Article 3.02(c) of the Plan (emphasis added)."

151. In its reply submission on the appeal, however, the Appellant said this:

> "16. This Appeal does not involve the Superintendent's interpretation of the PBSA. *BDL has not challenged the Superintendent's conclusion that the PBSA prevents a Plan from having different entrance criteria for different types of employees within the same class. That issues (sic) is not in dispute before the*

> *Tribunal.* BDL's position is that it did not have different entry criteria for regular employees v. casual employees, either in theory or in practice. The Superintendent, incorrectly and unreasonably we say, found otherwise". (emphasis added)

152. Accordingly, the Appellant no longer takes the position that different entry criteria for regular and casual employees is permissible, but rather relies simply on its submission that no such different criteria existed in this case.

153. Because the Appellant no longer submits that the PBSA can permit a pension plan to have different entrance criteria from employees in the same class, the scope of this appeal is narrowed. A number of considerations are obviated, including:

(a) if the Plan properly construed does feature different entrance criteria for employees in the same class, whether this offends the legislation and in particular the language of subsections 25(4) and (5) of the PBSA; and

(b) whether the Superintendent's analogy between the facts of this case and the creation of separate plans under subsection 25(5) was well-founded.

154. In making that observation I am not suggesting that there necessarily is merit in those positions, but rather am explaining why I do not see it necessary to consider those issues.

155. As I take the view that Article 3.02 of the Plan, properly interpreted, does indeed set out separate entry criteria for employee groups in the same class, which distinction is not negated on reference to the extrinsic evidence referred to by the Appellant, and as the Appellant does not challenge the Superintendent's conclusion that having different entry criteria within the same class is contrary to the legislation, I conclude that the Plan is non-compliant with the PBSA.

156. At the same time, I accept the Appellant's factual contention, ultimately uncontroversial, that despite its language the Plan has not been administered differently toward different groups. Relative at least to the period of February 1, 2001 onward, the Appellant has shown that no regular employee has entered the Plan at all, since (a) all regular employees from predecessor

plans immediately became entitled to membership in the Plan when established at April 21, 1997 and (b) no casual employee has become a regular employee since that time, so it has not been possible for a new regular employee to become enrolled in the Plan. The Appellant explains the latter fact by saying that under the Collective Agreement, and in contrast to earlier practice, it would take years for a casual employee to advance into the core group of regular employees and that by the time that occurs the casual employee has inevitably reached the YMPE standard, therefore gaining admission into the Plan.

157. As the relevant records are not available for the period of April 21, 1997 to January 31, 2001, it is not actually known whether all employees who joined the Plan did so solely on the YMPE criterion. While the Union does not accept the Appellant's stated belief that this was the situation during that period, it has not advanced any facts to show that uneven treatment of the different groups occurred then or indeed at any time. The Union does not seem to dispute the Appellant's positive assertion that this has not occurred since at least February 1, 2002. While no party has addressed the point, presumably as the original complainant the Union bore the onus of making out its case. The question arising is whether it was essential to the Union's case to show that, in practice, different pension eligibility criteria had actually been applied to regular and casual employees.

158. It is emphatically the Union's position on this appeal, and indeed that of Staff, that it need not demonstrate such a practice. It argues it is irrelevant if all employees were in fact enrolled under the statutory test, and further as follows:

> "102. The Employer continues to assert that the Union is arguing that "regular" employees have been receiving "preferential treatment" (paragraph 148 of its submissions). However, the Union is not alleging that "regular" status employees are *actually* being treated better or differently, but rather that there are two tests outlined in the Plan and they should apply equally whether the member is a "casual" or "regular" employee. The fact that the 132/12 test cannot, practically speaking, apply to a "regular" employee does not mean that it should not apply to a "casual" employee".

159. The situation is a highly unusual one. The Union has not demonstrated any actual differential treatment of regular and casual employees. It seeks to rely for the benefit of casual

employees upon Article 3.02(b) of the Plan. It cannot say that any regular employee has ever enjoyed the benefit of that provision. By virtue of Article 2.23, the provision on its face is inapplicable to casual employees. Nonetheless, because it is there, on the books, so to speak, theoretically available to regular employees, the Union says the legislation requires that Article 3.02(b) also apply to casual employees.

160. It is useful in this context to once again consider subsection 71(2) of the PBSA. With certain portions emphasized, it reads:

> **"Civil enforcement**
>
> **"71** ...
>
> (2) If, in the opinion of the superintendent, a pension plan does not comply with this Act or the regulations ***or*** is not being administered in accordance with this Act, the regulations or the plan, the superintendent ***may***
>
> (a) direct the administrator, the employer or any person to
>
> (i) ***cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance***, and
>
> (ii) ***perform such acts as in the opinion of the superintendent are necessary to remedy the situation, or***
>
> (b) institute any action that could be initiated by a member or any other person entitled to a benefit under the plan."

161. There are two aspects to subsection 71(2). The first is a consideration of whether a pension plan *or* the way it is being administered fails to comply with the Act or regulations. The second, which comes into play where there is such a lack of compliance, amounts to a discretion in the Superintendent as to whether to direct a remedy and, if so, what particular remedy within the language of the section to direct (I do not construe the section to require a remedy, the only issue being which one – I give the permissive word "may" a broader and, I believe, more natural construction).

162. In this case, the Superintendent concluded that there was non-compliance and decided pursuant to subsection 71(2) that BDL must offer all affected employees membership in the Plan.

While he did not specifically address the opening language of subsection 71(2) which distinguishes between the Plan and its administration, it would appear at least at the Direction stage that he was of the view that both the terms of the Plan (Direction, para. 33) and the way in which it was administered (Direction, paras. 30 and 31) ran afoul of the PBSA. As I have described, in the Decision he seemed to acknowledge that in practice only one entry criterion was used though this did not alter his general view of the matter.

163. Because the reference to a pension plan and the way it is administered in the opening language of subsection 71(2) is disjunctive, non-compliance in either of those respects will give rise to the Superintendent's discretion to direct a remedy under subsection 71(2)(a) or initiate an action under subsection 71(2)(b). Accordingly, because of the non-compliance of the Plan terms, I conclude that such a discretion existed in this case.

164. The task for this tribunal is to determine whether the Superintendent's finding of non-compliance of the Plan and fixing of the particular remedy were within the bounds of reasonableness. In other words, applying an appropriate measure of deference to the Superintendent, the question is whether his decision on those substantive issues should be upheld. *Dunsmuir, supra*, describes the concepts of reasonableness and deference in this way:

> "47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page 221] justification, transparency and intelligibility with the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ...
>
> 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many

> instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree [page 222] of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p.93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system."

165. Guided accordingly, I take particularly the following factors into account:

(a) subsection 25(4) of the PBSA requires any separate pension plans within a prescribed class to be comparable to each other in certain respects, taking into account differences in hours worked;

(b) the Superintendent was of the view by analogy that a single pension plan must comparably treat groups within a prescribed class, and cannot stipulate different eligibility criteria for them;

(c) the Appellant does not challenge the propositions in (a) and (b), which in any event seem reasonable;

(d) the Superintendent concluded that the Plan was contrary to the PBSA and the PBSA Regulation, by reason of specifying different entry criteria for different employee groups;

(e) while the Appellant has challenged that conclusion, arguing that even "in theory" there were no different eligibility criteria because the 132/12 test had no application, for reasons I have given I cannot accept that submission;

(f) additionally, while it appears no regular employee ever enjoyed the benefit under the Plan of the 132/12 criterion, the evidence is not sufficient to allow me to conclude that it was impossible that this could ever occur. Rather, as it happened and given presumably the pace of attrition within the regular employee group, it

did not occur because casual employees always reached the YMPE standard, opening the door to the Plan, before becoming regular employees. I cannot conclude that it could not have occurred the other way, at least in one or a small number of cases, and I cannot conclude on the evidence whether, if that had occurred, a new regular employee would have automatically been admitted to the Plan or would have been admitted later, perhaps only on achieving the 132/12 standard;

(g) accordingly, I do not agree with the Appellant's submission that even "in theory" the Plan does not feature separate admission criteria. I prefer the view that the existence of the clearly separate entry criteria in Article 3.02 of the Plan must be recognized and given effect;

(h) the Union's position, in any case, is that the mere presence of the 132/12 test in Article 3.02 of the Plan means it must be extended where applicable to casual employees;

(i) the Superintendent initially determined that the administration of the Plan was also out of compliance, as regular employees were being admitted to the Plan on the 132/12 test, but appeared to ultimately recognize that this was not so. In any case, I find that it was not so (at least, so far as the evidence indicates);

(j) accordingly, the only contravention here was by the expression of the Plan terms themselves, and not by their application;

(k) while he did not expressly analyze the remedial language in subsection 71(2) of the PBSA, the remedy chosen by the Superintendent was to direct that all affected causal employees be offered admission into the Plan. Though he could have decided that nothing need be done in the circumstances, this was peculiarly a matter for the Superintendent's discretion and it was not illogical to apply the 132/12 standard to casual employees given that it was one of two separate

eligibility tests plainly expressed in the Plan and the legislation does not (as the Superintendent found) permit such to exist within the same prescribed class;

(l) while the Superintendent did not specifically address the point, and nor has it been the subject of any submission, I consider that a direction to BDL to offer the affected employees admission into the Plan, against its refusal prior thereto to do so, can be seen as a form of direction to the administrator to "cease or refrain from committing the act of pursuing the course of conduct that constitutes the non-compliance", as that language appears in subsection 71(2)(a)(i). In other words, BDL's refusal to apply Article 3.02(b) to the subject casual employees can be seen as an extension of the non-compliance of Article 3.02. Accordingly, in my view the particular remedy directed fell within the Superintendent's statutory discretion;

(m) the PBSA is important public policy legislation; and

(n) the Superintendent is the regulator charged with responsibility to administer and enforce the PBSA.

166. With those considerations in mind I find that I cannot accede to the Appellant's submission. While I believe reasonable persons could differ over whether these unique circumstances called for a remedy of extending the 132/12 measure to the affected casual employees, even in light of the non-compliance of the Plan, that is not sufficient for the appeal to succeed. Given the standard of review I have found to apply, it is not a question either of whether I would have determined the matter in the same way as the Superintendent. I dismiss the final ground of appeal, rather, because with particularly the above factors in mind I do not regard the Superintendent's decision on the issue as being beyond the spectrum of what is reasonable.

J. Disposition

167. I accordingly dismiss the appeal.

168. In the December 11, 2009 Direction, the Superintendent directed that the affected employees be offered membership in the Plan by January 15, 2010, slightly more than one month on. In the April 27, 2010 Decision, he required that BDL offer all affected employees membership in the Plan by May 14, 2010, being a somewhat shorter period. I will direct that membership in the Plan be offered to all affected employees by no later than January 21, 2011.

169. Both the Union and Staff in their written submissions have sought costs of this appeal (Staff saying if this tribunal "is so inclined"). Pursuant to section 47(1)(a) of the *Administrative Tribunals Act*, RSBC 1996, c. 45, made applicable to the FST by section 242.1(7) of the FIA, a tribunal does have authority to require "a party to pay part of the costs of another party" in connection with an application, which by definition includes an appeal.

170. The parties may make a written submission on costs, including as to entitlement, quantum and the basis thereof, as follows:

(a) for each or either of the Respondents, by January 10, 2011;

(b) for the Appellant, by January 24, 2011; and

(c) for each or either of the Respondents in replying to the Appellant's submission, by January 31, 2011.

Patrick F. Lewis,
Member, Financial Services Tribunal