CORRECTED DECISION: The text of the original decision has been corrected with text of the corrigendum (released March 24, 2022) appended.

IN THE MATTER OF
***THE PENSION BENEFITS ACT, 1992*, S.S. 1992, C. P-6.001, AS AMENDED**

AND

A DECISION OF THE SUPERINTENDENT OF PENSIONS PURSUANT TO SUBSECTION 22(4) OF *THE PENSION BENEFITS ACT, 1992* (THE "*PBA*") RECONSIDERING THE SUPERINTENDENT'S DECISION DATED FEBRUARY 24, 2021, RELATING TO THE REGISTRATION OF AMENDMENT P-23 TO THE CCRL PETROLEUM EMPLOYEES' PENSION PLAN (THE "PLAN"), PLAN REGISTRATION NUMBER 0358986

Superintendent of Pensions: **Roger Sobotkiewicz**

Date of decision: **March 11, 2022**

Reasons and Decision of the Superintendent:

1. On October 19, 2020, Consumers' Co-operative Refineries Limited ("CCRL") filed an amendment which CCRL labeled No. P-23 ("Amendment P-23") to the Plan in accordance with section 17(1) of the *PBA*.

2. On December 30, 2020, a staff member in the FCAA's Pensions Division sent emails to CCRL and the stakeholders who provided submissions to me regarding the registration of Amendment P-23 (the "Submission Providers") enclosing a letter from me. In that letter dated December 30, 2020, I notified CCRL and the stakeholders that I had decided to register Amendment P-23 (the "Notice of Decision"). I also stated in the Notice of Decision that written reasons for my decision would follow 'shortly'.

3. On February 24, 2021, I issued the written reasons for my decision (the "Written Reasons") and delivered them to CCRL representatives and the Submission Providers. In the Written Reasons I reiterated that I had registered Amendment P-23 as indicated in the Notice of Decision. I then went on to add that one aspect of Amendment P-23, the lowering of the indexation cap from 5% to 2% for service prior to 2021 as set out in clause 3(h), could not be registered as I was not satisfied it complied with the *PBA* and that aspect had been severed from Amendment P-23 as registered.

4. On April 16, 2021, legal counsel for CCRL delivered to my office a notice of objection ("Notice of Objection") pursuant to subsection 22(3) of the *PBA* in respect of my refusal to register clause 3(h) of Amendment P-23 in the form submitted.

5. I have reconsidered my refusal to register clause 3(h) of Amendment P-23 in the form submitted by CCRL as required by subsection 22(4) of the *PBA*. For the reasons that follow, I have decided to confirm my decision to refuse to register the aspect of clause 3(h) of Amendment P-23 that provides for the lowering of the indexation cap with respect to past service of Opt-In Members, as that group is defined in Amendment P-23.

Background:

6. Much of the factual matrix relevant to this reconsideration decision, including the details of Amendment P-23 and the process followed in arriving at my decision in respect of the registration of Amendment P-23, is set out in great detail in the Written Reasons and I will not repeat it all here. However, there are certain salient points that warrant highlighting here due to their particular relevance to the issues in play for this reconsideration decision.

7. Amendment P-23 was intended, among other things, to put into effect the collective agreement made June 22, 2020, between CCRL and Unifor Local 594 (the "Union") which appears to be principally aimed at reducing the cost of the Plan to CCRL. Amendment P-23 also puts into effect an agreement between CCRL and the Union to resolve a grievance made by the Union regarding the administration of a provision of the Plan. The amendments that comprised Amendment P-23 can be summarized at a very high level as:

    I. To resolve the Union grievance, effective January 1, 2017, the option to elect to receive an annuity in lieu of the retirement benefit provided under the Plan was removed, and members who commenced the payment of a retirement benefit under the Plan between February 1, 2007, and December 31, 2016, inclusive, were provided the right to a one-time option to elect to receive in lieu of the remainder of that retirement benefit a life annuity from an insurance company;
    II. Going forward from the date of the collective agreement members would be required to make contributions towards the funding of the Plan;
    III. Active members in the Plan as of December 31, 2020, would be provided the choice to opt-out of the Plan effective December 31, 2020 ("Opt-Out Members") or to remain in the Plan ("Opt-In Members"). After December 31, 2020, the Plan would be partially terminated in respect of the Opt-Out Members;

IV. The indexation benefits are changed both for past and future service, including complete elimination of indexation for service of Opt-In Members after December 31, 2020.

8. It is this last amendment that changed the indexation benefit for past service of Opt-In Members, and my decision that I was not satisfied it complied with subsection 19(3) of the *PBA*, that is the catalyst for CCRL's reconsideration request. Specifically, the offending portion of clause 3(h) of Amendment P-23 provided that the indexation cap in respect of service of Opt-In Members prior to 2021 was lowered from 5% to 2%.

9. On December 30, 2020, I caused to be issued to CCRL and the Submission Providers the Notice of Decision. The email sent by FCAA Pensions Division staff to CCRL and the Submission Providers to which the Notice of Decision was attached contained the following message and no other wording:

> Please see the attached decision of the Superintendent of Pensions.

10. The attachment to the email that was the Notice of Decision displayed the file name "CCRL Amendment P-23 – Superintendent's Decision December 30 2020.pdf". The Notice of Decision was signed by me. As the precise wording of the Notice of Decision is relevant, I will set out the main body of the correspondence, verbatim, below:

> **Re: CCRL Petroleum Employees' Pension Plan (the Plan); Registration No. 0358986 Amendment No. P23 (the Amendment)**
>
> This letter is to advise you that I have decided to register the Amendment to the Plan that was filed for registration under The Pension Benefits Act, 1992 on October 19, 2020. The written reasons for my decision will follow shortly.

11. On February 24, 2021, eight weeks to the day following the issuance of the Notice of Decision, I issued and delivered to CCRL and the Submission Providers the Written Reasons. In the Written Reasons I reiterated that I had decided to register Amendment P-23. However, beginning at paragraph 3, I went on to state:

> 3. …… After reviewing the PBA and the Plan, and considering the submissions of the stakeholders concerning the registration of Amendment P-23, I notified CCRL and other stakeholders on December 30, 2020 that I had decided to register Amendment P-23. I indicated that written reasons for my decision would follow.
>
> 4. As indicated in the notice on December 30, 2020 regarding my registration decision, I have registered Amendment P-23. However, one aspect of the amendments, the lowering of the indexation cap from 5% to 2% for service prior to 2021 provided for in clause 3(h), cannot be registered as I am not satisfied it is in compliance with the PBA. Accordingly, that aspect has

been severed from Amendment P-23 as registered. These are the reasons for my December 30, 2020 decision.

12. Later, beginning at paragraph 123 of the Written Reasons, I conclude my reasons for finding that I could not register clause 3(h) of Amendment P-23 as submitted:

> 123. After considering all of the evidence provided, including the actuarial evidence, and the submissions received, I am inclined to view the reduction in the indexation cap with respect to past service to be a reduction in the accrued indexation benefit and a contravention of subsection 19(3) of the PBA.
>
> 124. Subsection 17(3) of the PBA provides that I may issue to an administrator a notice of registration with respect to an amendment <u>where I am satisfied that the amendment complies with the PBA</u>. It follows that I am unable to register an amendment if I am not satisfied the amendment complies with the PBA. Accordingly, pursuant to subsection 17(3) of the PBA, I am unable to register clause 3(h) of Amendment P-23 to the extent that it purports to reduce the indexation cap from 5% to 2% with respect to service prior to the effective date of the amendment.
>
> […]
>
> 130. Based on the finding above, I also conclude that clause 3(h) of Amendment P-23 has the effect of reducing a then existing entitlement in contravention of subsection 14.02(1) of the Plan. A failure by the administrator to administer the Plan in accordance with its terms is a contravention of subsection 11(1) of the PBA, and accordingly, this is an additional ground upon which I am not able to issue a notice of registration with respect to this aspect of clause 3(h).
>
> [underline in original]

13. I concluded the Written Reasons with the following:

> 149. Subsection 17(3) of the PBA authorizes me to issue a notice of registration with respect to amendments that I am satisfied comply with the PBA. As I indicated above when discussing clause 3(h) of Amendment P-23, I am not satisfied that the reduction of the indexation cap with respect to past service is in compliance with subsection 19(3) of the PBA. As a result, I have no authority to register that aspect of clause 3(h). The prohibition in subsection 19(3) of the PBA is an absolute prohibition binding plan administrators directly, it is not a discretion provided to me in making a registration decision. I have no ability to cure a failure to comply with subsection 19(3) by registering an amendment that contravenes it.

150. On December 30, 2020, I informed CCRL and all submission providers that I had decided to register Amendment P-23. I have so registered the amendments that comprise Amendment P-23, including clause 3(h), provided however, that the aspect of that clause relating to past service is severed from the clause as I am without authority to register it. Accordingly, CCRL must amend the wording of clause 6.06(2), as amended by clause 3(h) of Amendment P-23, to ensure the reduction of the indexation cap does not apply to past service of the members to which that subsection 6.06(2) applies.

14. On April 16, 2021, legal counsel for CCRL delivered to my office the Notice of Objection. Beginning in paragraph 7 of the Notice of Objection, CCRL describes the steps it took in reliance on the wording of the Notice of Decision that led CCRL to believe Amendment P-23 was registered in its entirety. These steps included notifying the insurer of CCRL's intention to exercise the right to convert an existing buy-in annuity contract to a buy-out annuity contract in respect of retirees who elected to receive a buy-out annuity; sending letters and election forms to retirees entitled to elect the annuity option; holding an online question and answer session for those retirees; formally approving and signing the written notice of partial conversion; commissioning its actuary to complete the partial termination report; preparing individualized member option packages; and initiating changes to the asset mix of the plan fund in order to make the commuted value payments and annuity purchases associated with the partial termination.

15. CCRL objects to my decision to sever a portion of clause 3(h) from Amendment P-23 instead of registering Amendment P-23 in its entirety. The ground for CCRL's objection is described in the Notice of Objection as:

> *Grounds for objection*
>
> 12. The Superintendent was *functus officio* after delivering his Decision. There is no legislative authority for the Superintendent to reconsider a decision to register a plan amendment. The Superintendent did not have the authority to alter his Decision under the guise of issuing reasons for his Decision. The Superintendent's Decision to register Amendment P-23 was final and effective as of the date it was issued. The severance of a portion of clause 3(h) from Amendment P-23 is inconsistent with the Superintendent's Decision. As such, the severance is void and of no force or effect.

16. As I understand it, CCRL objects only to the portion of the Written Reasons wherein I refuse to register the aspect of clause 3(h) of Amendment P-23. I also understand that CCRL objects solely on the premise that I was *functus officio* when I issued the Written Reasons and had no authority to vary from my decision as stated in the Notice of Decision that, in CCRL's view, granted an absolute and unconditional registration of Amendment P-23.

17. On May 25, 2021, my office asked CCRL if it wished to make oral representations in respect of its Notice of Objection. Pursuant to subsection 22(4) of the *PBA*, the Plan administrator (in this case CCRL) had the right to an opportunity to make representations in addition to the written submissions in the Notice of Objection. By letter dated May 27, 2021, CCRL declined the opportunity to provide any further representations.

18. On June 4th, 2021, my office shared the Notice of Objection with the Submission Providers and offered them the opportunity to provide written representations to me regarding the Notice of Objection and the reconsideration of my registration decision in respect of Amendment P-23. I received a submission on July 7, 2021, from one of the Submission Providers, LH. CCRL was copied on that submission of LH ("the LH Submission") and provided a reply to me on July 29, 2021 (the "CCRL Reply"). Prior to receiving the CCRL Reply, at the request of CCRL representatives, my office shared the LH Submission with the Union and offered the Union an opportunity to respond to the LH Submission. The Union provided a response on August 4, 2021.

The Submissions:

Notice of Objection

19. In the Notice of Objection, CCRL cites the Supreme Court of Canada decision in *Chandler v. Alberta Assn. of Architects,* [1989] 2 S.C.R. 848 ("*Chandler*") for the authority that the doctrine of *functus officio* applies to final decisions of statutory decision-makers. CCRL points to the Notice of Decision and subsection 17(3) of the *PBA* as evidence that a final registration decision had been made by me on December 30, 2020. CCRL notes that a final decision is a prerequisite for *functus officio* to be engaged and suggests that the Notice of Decision was in fact the notice of registration contemplated in subsection 17(3). According to CCRL, based on a plain reading of the wording of that subsection, it must be interpreted to provide that the notice of registration by the Superintendent is a final and binding decision of the Superintendent.

20. CCRL refers to the purpose of the *functus officio* doctrine being to "*provide finality and certainty to the parties. A definitive and final decision not only serves a crucial pragmatic function for the parties, it also preserves the integrity of the justice system."* CCRL points to practical considerations in the pension plan administration context that, in its view, dovetail closely with the rationale behind *functus officio*:

> 18. The finality of s. 17(3) ensures certainty and clarity for administrators and members of pension plans. Section 18(2)(a) provides that, once the administrator of a pension plan receives a notice of registration under s. 17(3), the administrator is entitled to rely upon it and to administer the plan accordingly. In the present instance, CCRL has expended considerable time and resources in regards to the buy-out annuity policy conversion,

which formed part of Amendment P-23.

19. Administrators could not effectively administer pension plans if they were uncertain whether the Superintendent might change his mind regarding a decision that he had made to register an amendment. Through the combined effect of s. 17(3), s. 18(2)(a), and the definition of "registration" in the PBA, the legislature indicated its intention to provide for a clear and ascertainable point at which a plan amendment is registered.

21. CCRL also points to past practice of the Superintendent as evidencing that the written reasons accompanying the decision to register a plan amendment are to support a decision and not alter it. Specific reference in this regard is made to my registration decision in respect of an earlier 2019 amendment CCRL labeled as P-22 ("Amendment P-22").

22. CCRL cites *Jacobs Catalytic Ltd. v. I.B.E.W., Local 353,* 2009 ONCA 749 ("*Jacobs*") and *Dumbrava v. Canada (Minister of Citizenship & Immigration)*, 1995 CarswellNat 1229 (*"Dumbrava*"), cases that considered the application of *functus officio* to administrative decision-makers post *Chandler*. CCRL argues those cases stand for the proposition that, aside from the narrow exception to the *functus officio* doctrine set out in *Chandler*, there is no authority for an administrative decision-maker to revisit or reconsider a decision absent legislative authority. Speaking specifically to the *PBA*, CCRL argues that there is no legislative authority for the Superintendent to change his decision or render a new decision through the issuance of reasons. CCRL also points to the importance of regulatory consistency in the pension context and cites the Alberta Court of Queen's Bench decision in *Amoco Canada Petroleum Co. v. Alberta*, [1992] A.W.L.D. 567 ("*Amoco*").

23. CCRL concludes its representations in the Notice of Objection stating that to allow the Superintendent to resile from the decision reflected in the Notice of Decision creates uncertainty, results in procedural unfairness to CCRL and ultimately prejudices the interests of the Plan members.

24. It is important to note that while CCRL referred to procedural unfairness in paragraph 32 of the Notice of Objection, it is in regard to and based upon the same facts that ground CCRL's *functus officio* argument and does not refer to any other aspect of the procedure followed in making my registration decision with respect to Amendment P-23. In other words, the procedural unfairness alleged by CCRL is a by-product of my refusing to register the aspect of clause 3(h) of Amendment P-23 when I was, in CCRL's view, without authority to do so and after CCRL had relied on what it believed to be my final decision to register Amendment P-23 in its entirety.

<u>LH Submission</u>

25. On July 7, 2021, I received the LH Submission from legal counsel on behalf of the Plan member, LH. LH had provided multiple submissions in December of 2020 opposing the registration of Amendment P-23. LH's position in response to CCRL's Notice of Objection is that the Superintendent was without authority to register the reduction in the indexation cap for past service provided for in clause 3(h) and the doctrine of *functus officio* does not apply where an administrative decision-maker makes a decision that it is not authorized to make under its enabling statute. LH cites *Chandler* and *Atchison v. Workers' Compensation Board*, 2001 BCSC 1661, as authorities that *functus officio* does not operate to prevent a decision-maker from revisiting a decision that was made outside of jurisdiction or otherwise a nullity. LH suggests that I did not change my mind nor make an error within jurisdiction, nor was there a change of circumstances, but rather I realized I made a decision that contravened the *PBA* and that was outside my authority to make. LH notes, as a further aggravating factor in this regard, that the aspect of the Notice of Decision that exceeded my authority was a failure to enforce a core minimum standard provided by the *PBA* that is of central importance to modern pension regulation.

26. LH further states that there is no prejudice to CCRL, as the index cap reduction would not take practical effect until 2022. LH notes that if the Notice of Decision had been the Superintendent's final decision, aggrieved parties such as LH could have sought judicial review of the decision and it may have been overturned. LH concludes on this aspect by stating that CCRL's arguments about prejudice caused from a lack of finality have little relevance in a situation like this where the updated decision was released within a short period of time.

27. LH advances an alternative argument that, as the Superintendent is an administrative actor with a right of reconsideration under the *PBA*, *functus officio* should be flexibly applied. He cites *Chandler* as authority. LH notes that CCRL relies on *Dumbrava* in the Notice of Objection and argues that *Dumbrava* is distinguishable from the present case due to the fact that, in *Dumbrava*, there was no right of reconsideration in the enabling statute and the *PBA* includes a right to reconsideration in section 22. LH posits that section 22 of the *PBA* indicates that decisions of the Superintendent are not intended to be final in all circumstances and the *functus officio* doctrine should be applied flexibly. In further support of this argument, LH points to the fact that when the Superintendent determines whether a plan amendment complies with the *PBA*, the Superintendent is enforcing a minimum standard established by the *PBA* and it is not a discretionary decision. LH again raises the fact that there was no prejudice to CCRL as a result of the Superintendent reconsidering the Notice of Decision. LH suggests all of this leads to the conclusion that the balance of interests favours a flexible application of *functus officio* in these circumstances, as the consistent enforcement of *PBA* minimum standards outweighs the finality concerns behind the doctrine of *functus officio*.

CCRL Reply

28. My office wrote to CCRL and its counsel noting that they were copied on the LH Submission and offered them the opportunity to respond to it. Counsel for CCRL provided the CCRL Reply to my office on July 29, 2021.

29. Regarding LH's argument that *functus officio* did not apply to the Notice of Decision because the decision to register Amendment P-23 in its entirety was outside the Superintendent's jurisdiction to make and was a nullity, CCRL responded that if the Superintendent is not restricted from reopening decisions whenever he decides he was not substantively correct, then it would give rise to the untenable situation where there is no certainty or finality to registration decisions under the *PBA*. CCRL says it is precisely this type of uncertainty and arbitrariness that the doctrine of *functus officio* was developed to prevent.

30. CCRL also takes issue with LH's labelling of the error I made in the Notice of Decision with respect to clause 3(h) of Amendment P-23 as a jurisdictional error. In this regard, CCRL says that it would have been reasonable for the Superintendent to accept the actuarial evidence submitted by CCRL's actuaries and conclude that clause 3(h) did not result in a reduction of accrued benefits. This, CCRL suggests, shows that any error I made was at most an error within jurisdiction and would not have rendered the Notice of Decision a nullity. CCRL also points to the right of reconsideration in section 22 as proof that it was contemplated the Superintendent is capable of making mistakes within his jurisdiction, otherwise there would be no need for that section.

31. CCRL disputes LH's position that if *functus officio* does apply to the Superintendent, it must be applied flexibly in light of the fact the Superintendent is given the authority in section 22 of the *PBA* to reconsider decisions. CCRL states that the reconsideration power in section 22 cannot be exercised unilaterally by the Superintendent, it can only be exercised if the plan administrator filing the amendment requests the Superintendent do so, and only if the Superintendent has refused to register the amendment. CCRL argues that as the Notice of Decision did not refuse to register Amendment P-23, CCRL did not ask the Superintendent to reconsider the decision, and section 22 did not become operable.

32. The last substantive point raised in the CCRL Reply is that demonstrating prejudice is not a required criteria before *functus officio* applies to a decision. CCRL explains that it relied on the Notice of Decision and took several irrevocable and costly steps in reliance on Amendment P-23 being registered in its entirety, and it is simply fortuitous that it had not yet acted upon the portion of Amendment P-23 that I decided could not be registered. CCRL concludes on this aspect by noting that none of this prevents the doctrine of *functus*

officio from applying where the constituent elements have been met, as they have in our present situation in CCRL's view.

Union Response

33. The only other submission received that related to this reconsideration decision was from the Union. After our office notified CCRL that it could provide a reply to the LH Submission, a CCRL representative wrote to my office and requested that my office contact the Union to ask if they wished to make a submission in response to the LH Submission. The CCRL representative noted that as Amendment P-23 was collectively bargained, was signed by the Union and that LH is a Union member, the CCRL Labour Relations Department was of the view that it was important the Superintendent hear from the Union in regard to the LH Submission.

34. By email dated July 15, 2021, my office wrote to the Union, provided them with a copy of the LH Submission and informed them the Union was being provided the opportunity to provide a response to the LH Submission. The Union provided a letter in response dated August 4, 2021, in which the Union stated:

> Thank you for providing Unifor 594 with the opportunity to respond to the submission put forward by Koskie Minsky LLP on behalf of [LH].
>
> While we don't have any input specifically in response to the submission, the Union can ensure that the changes outlined in Amendment P-23 were bargained in good faith. Albeit, if some of the proposed amendments cannot be implemented because they would be in contravention of The Acts and Regulations as previously accrued benefits, we will trust the process and leave it to the Superintendent to deliver a ruling.

The Pension Benefits Act, 1992:

35. This reconsideration decision is made pursuant to section 22 of the *PBA* which provides:

> **Objection to certain actions of superintendent**
> **22**(1) If the superintendent refuses to register a plan or a plan amendment, cancels a registration pursuant to subsection 21(1) or directs an administrator to amend an actuarial valuation report or cost certificate pursuant to subsection 11(5), the superintendent shall give the administrator notice in writing of that fact and set out the reasons for the decision in the notice.
>
> (2) In the case of a cancellation of registration, the superintendent shall specify the effective date of cancellation in the notice.

(3) Within 60 days after receiving a notice pursuant to subsection (1), the administrator may deliver to the superintendent a notice of objection setting out the reasons for the objection and all relevant facts.

(4) On receipt of a notice of objection, the superintendent shall:
(a) reconsider the refusal, cancellation or direction to amend;
(b) provide the administrator with an opportunity to make representations, if the administrator has requested the opportunity to do so;
(c) rescind, vary or confirm the previous decision; and
(d) give a notice in writing to the administrator that states the decision and the reasons for the decision.

(5) Where an administrator delivers a notice of objection pursuant to subsection (3), the administrator may, notwithstanding the decision of the superintendent mentioned in subsection (1), administer the plan in a manner that reflects the amendment or report or cost certificate until the matter is dealt with pursuant to subsection (4).

36. The decision which I have been asked by CCRL to reconsider is my decision reflected in the Written Reasons regarding the registration of Amendment P-23. Registration decisions with respect to plan amendments are made pursuant to section 17 of the *PBA*, which provides:

Amendments

17(1) Where an amendment is made to a plan that is registered or with respect to which an application for registration is pending or to any document mentioned in subclauses 16(1)(a)(ii) to (v), the administrator shall file a certified copy of the amendment with the superintendent within 60 days after the amendment is made.

(2) Where a new document mentioned in subclauses 16(1)(a)(ii) to (v) is executed, the document is deemed to be an amendment to the plan for the purposes of this Act.

(3) Where the superintendent is satisfied that the amendment complies with this Act, the superintendent may issue to the administrator a notice of registration with respect to the amendment.

***The Doctrine of Functus Officio*:**

37. As was noted in the Notice of Objection and the LH Submission, it is well settled by the decision of the Supreme Court of Canada in *Chandler* that the doctrine of *functus officio* generally applies to administrative decision-makers. That case involved practice review proceedings in respect of an architectural firm by the Alberta Association of Architects. The facts in that case are readily distinguishable from those before me, however, the Court addressed the application of the doctrine of *functus officio* to administrative

tribunals generally. Justice Sopinka, speaking for the majority of the Court, stated on this aspect:

> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
>
> I. where there had been a slip in drawing it up, and,
>
> II. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, 1934 CanLII 1 (SCC), [1934] S.C.R. 186.

In *Grillas v. Minister of Manpower and Immigration*, 1971 CanLII 3 (SCC), [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At p. 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd*., the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*., *supra*.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.

[emphasis added]

38. Later in his decision, Justice Sopinka stated the following regarding the application of *functus officio* to tribunal decisions that are nullities:

…**Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision.** In *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 1983 CanLII 411 (BC SC), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 1978 CanLII 343 (BC SC), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 1968 CanLII 6 (SCC), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 1978 CanLII 343 (BC SC), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, 1968 CanLII 6 (SCC), [1968]

> **S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect**.
>
> [emphasis added]

39. There is no doubt that *Chandler* is the preeminent authority on the issue and it establishes that the doctrine applies to final decisions made by administrative decision-makers, subject to a number of exceptions. All decisions post-*Chandler* have followed it closely on the issue of the application of *functus officio* to decisions of administrative decision-makers. While the courts in those subsequent decisions have not always been consistent in determining when to apply some of the exceptions set out by Justice Sopinka, the broad principles established by the majority in *Chandler* remain generally unscathed.

40. Pursuant to clause 22(4)(c) of the *PBA*, I am limited on this reconsideration to reaching one of three possible results. I can rescind, vary or confirm my decision. Reading paragraphs 12, 25 and 33 of CCRL's Notice of Objection together, I understand that CCRL is not suggesting that my Written Reasons be rescinded in their entirety, but they should in effect be varied by finding that the portions of the Written Reasons that speak to my refusal to register the portion of clause 3(h) should be found to be void and of no effect.

41. In order to give effect to CCRL's objection and vary my decision based on the application of the doctrine of *functus officio*, I must find that the Notice of Decision was a final and perfected decision. *Functus officio* can only apply once an administrative decision-maker's authority is exhausted by rendering a final, perfected decision. This is the first issue that needs to be addressed in this reconsideration decision, because if the Notice of Decision was not a final, perfected decision, then *functus officio* is not engaged and we need go no further on this reconsideration. If I find the Notice of Decision was a final, perfected decision, then I would need to consider the exceptions to *functus officio* set out in *Chandler* and other cases and find that no exceptions apply. Some of the exceptions clearly do not apply to our facts and do not need to be addressed in this reconsideration decision. The apparent variation in registration result between the Notice of Decision and the Written Reasons was not a clerical error or 'slip' in drawing it up. It also cannot be said that it was due to a failure to express in the Notice of Decision my manifest intention regarding the registration of Amendment P-23. That leaves the remaining exceptions set out in *Chandler* and cases following *Chandler* in which the application of *functus officio* to administrative decision-makers was considered.

42. Before I turn to examine each of the issues engaged in this reconsideration decision, I need to address a couple preliminary matters. The first is that in reconsidering my decision with respect to the registration of Amendment P-23, and specifically whether *functus*

officio applies to the Notice of Decision, I find myself in an awkward situation. As will become clear later in this decision, some of the issues that must be considered are best answered if my subjective mindset when I issued the Notice of Decision are known. One example is the nature of the error I committed in the Notice of Decision, if it was a final decision, by stating that I had decided to register Amendment P-23 in its entirety, including the reduction in indexation for past service in clause 3(h). The nature of the error made would depend on what aspect I changed my view on in the Written Reasons. Was it the scope of my jurisdiction in subsection 17(3) of the PBA, a question of law such as the proper interpretation of subsection 19(3) of the PBA, or a purely factual matter such as the actuarial evidence provided to me? While I am obviously in the best position of anyone to determine what my line of thinking was when I issued the Notice of Decision and the Written Reasons, due to the principle of deliberative secrecy and my concern that any statements I make about my subjective mindset may appear to the parties to be self-serving, I am of the view it would not be appropriate for me to speak about what I was thinking during the relevant period. I will instead proceed only on the basis of the objective facts surrounding the issuance of the Notice of Decision and the Written Reasons that were observed or observable by the parties.

43. As to the second preliminary matter, I note that the regulatory framework set out in the *PBA* will play a central role in determining the issues raised in this reconsideration. As will the application of the common law duty of procedural fairness to registration decisions pursuant to the *PBA*. An in-depth review of the regulatory framework and how the duty of procedural fairness applies, and the ramifications of not complying with that duty, is warranted.

44. In paragraphs 30 through 37 of the Written Reasons, I set out in considerable detail how the regulatory framework established in the *PBA* protects pension plan members and former members. I also note how the *PBA* is silent on members' and former members' right to participate in registration decisions made pursuant to the *PBA*. I won't repeat those paragraphs here for the sake of brevity. However, my conclusion on members' and former members' participatory rights should be reiterated here as it plays a crucial role in my decision on this reconsideration.

45. Beginning in paragraph 34 of the Written Reasons, I said:

> 34. While the registration framework in the *PBA* does not contemplate direct member or former member involvement in the registration process or hearings arising out of that process, it does contain mechanisms to ensure member and former member rights and interests are protected. The sections listed in the paragraph above are prime examples. Much of the onus of protecting the rights and interests of members and former members rests with the Superintendent, to be exercised through the Superintendent's

discretionary decision–making responsibilities under the *PBA*. Indeed, this solemn responsibility has been recognized in court decisions such as *Huus v. Ontario (Superintendent of Pensions)*, [2002] 58 O.R. (3d) 380 (Ontario Court of Appeal) ("*Huus*") and *Hawker Siddeley Canada Inc. v Nova Scotia (Superintendent of Pensions)*, [1993] NSJ No 407 (Nova Scotia Supreme Court) affirmed by the Nova Scotia Court of Appeal in [1994] NSJ No 102 ("*Hawker*")

[…]

36. This unique framework in the *PBA* is a product of the nature of pension plans and the objectives behind the *PBA*. Pension plans are more than just complex contracts that have very serious ramifications for the parties to those contracts, they are the backbone of the Canadian retirement income system. While there are alternative retirement savings vehicles to pension plans, pension plans remain a core part of the broader system. This recognition that pension plans serve an important social good is infused throughout the *PBA* and is the reason the *PBA* is structured the way it is. As I noted in paragraph 148 of the 2019 Decision, embedded in the *PBA* is a delicate balance best described by the Supreme Court of Canada in *Monsanto Canada v Ontario (Superintendent of Financial Services)*, 2004 SCC 54, where the Court said the following about the objectives of the pension benefits legislation of Ontario:

> 14 On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind-up and full wind-up. **On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system…**

[Emphasis added]

37. This registration decision is one of the key mechanisms through which this delicate balance is maintained and the Superintendent is the point person the *PBA* charges with the responsibility of ensuring this balance is adhered to. At the end of the day, the framework in the *PBA* demands that the Superintendent make the 'right' decision that strikes this balance as guided by the specific provisions of the *PBA* registration framework, including subsection 19(3). The nature of this decision is very different than a decision in which the decision-maker is charged with settling a dispute between two opposing parties or the sanctioning or punishment of an individual or individuals. For one, the decision-maker in those other types of decisions is typically expected to be a stranger to the parties, without any substantive knowledge of the facts of the issue in question, in order to ensure not only impartiality of the decision-maker, but the

perception of impartiality by the parties and the public. In registration decisions under the *PBA*, the Superintendent is not going to be a stranger to the parties, nor to the substantive factual framework against which the decision must be made. The registration framework established in the *PBA* expects the exact opposite: a decision-maker who is not a stranger to the parties and who has a diligent understanding of the plan in question and the respective interests of the parties affected by the decision. How else is the Superintendent to effectively protect the interests of members and former members as dictated by sections 9(1)(a)(ii) and 19(3) of the *PBA* and noted in court decisions such as *Huus* and *Hawker*.

[…]

38. Another reason why the regulatory framework of the *PBA* contemplates a different decision-making process than is typically used by the courts and other decision-making bodies is the large number of parties and potential conflicting interests that may be involved in a registration decision. Pension plans can be very large, often having hundreds or thousands of members and former members. It is not uncommon for active members and retirees to have conflicting positions with regard to the registration of an amendment, as the nature of their interests and concerns are different. It is also not unheard of for different cohorts within those two groups to have conflicting perspectives as well. Following a process where the only communication of evidence and submissions to the decision-maker occurs within an open forum in which all interested persons are present and have the opportunity to respond to all other submissions would be extremely cumbersome and impractical in the *PBA* registration context.

39. It is for these reasons that the *PBA* does not envision or contemplate that the Superintendent, in making a registration decision such as this one, is limited to deciding based only upon the submissions of interested or affected parties. The *PBA* contemplates the very opposite, that the Superintendent make a registration decision without any submissions.

40. However, while the *PBA* does not contemplate the involvement of members or former members in the plan amendment registration process or any hearings arising out of the process, it is my view that in many circumstances providing the opportunity for members and former members to make submissions regarding an amendment prior to its registration is not only appropriate, but better ensures that their interests are understood and that the 'right' decision is made by the Superintendent. I am also aware of court decisions in other provinces determining that the pension regulator in those jurisdictions is required by the common law duty of fairness to provide members or former members in certain circumstances with an opportunity to be heard.

46. In the Written Reasons I stopped short of considering whether the common law duty of procedural fairness required that members and former members had a right to be

provided with an opportunity to be heard with respect to my decision to register Amendment P-23. I was not required to decide that matter as part of my decision as I had already provided Plan members and former members with an opportunity to be heard. However, I am of the view that the application of the common law duty of procedural fairness to plan amendment registration decisions pursuant to the *PBA* plays a decisive role in this reconsideration decision.

47. It has been settled law in Canada for decades now that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which affects the rights, privileges or interests of an individual: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. Also see *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (*"Knight"*) and *Baker v. Canada (Minister of Citizenship andImmigration)* [1999] 2 S.C.R. 817 ("*Baker*"). We also know from these cases that the scope and content of the duty of procedural fairness to be applied in respect of a particular decision depends on the specific context of the decision.

48. Several Canadian courts have considered the application of the common law duty of procedural fairness to decisions of pension regulators when making regulatory decisions that impact pension plan members and former members. Some of these decisions were made at a time when the duty of procedural fairness was in its early stages of development and still being shaped by the courts. Others were more recent. The general perspective of the courts' in these decisions has remained relatively constant even as the concept of procedural fairness in the larger context has matured.

49. In *Re Collins and Pension Commission of Ontario*, 1986 CanLII 3913, ("*Collins*") a unanimous decision of the Ontario High Court of Justice, Divisional Court, the Court dealt with a judicial review application in respect of a decision of the Pension Commission of Ontario in which it consented to the removal by Dominion Stores Limited ("Dominion") of a significant sum from the funds of the pension plan maintained by Dominion for its employees. The union and its members applied to the Court for an order quashing the consent and directing the return of the funds on a number of grounds. It is noteworthy that, as described in paragraph 33 of the Court's decision, neither the *Pension Benefits Act* (Ontario) or the regulation made under it included a requirement that notice be given to anyone of the application for consent. After noting this, the Court stated beginning at paragraph 35:

> [35] Is requirement of notice imposed by common law? Does the doctrine of fairness require it? Those questions require consideration of the nature of the commission's mandate, and the nature of the interest that members of the plan, or their agent, the union, had in the subject-matter of the commission's deliberations.

[36] First, it appears that the commission was established to ensure that certain interests were protected. While there is no doubt that those interests included the employer's, there appears to be equally no doubt that the commission was established to safeguard the plan members' interests as well. The commission, in effect, acknowledges that in its guidelines which stress its concern to prevent the removal of so much of the surplus funds from a plan that would endanger the plan's solvency. **While the commission may not, strictly speaking, be a trustee for the members, for it holds no money belonging to the plan, it would be artificial to conclude that the commission's obligation to members is lower than the high standard of fiduciary obligation imposed on trustees.**

[…]

[40] **My conclusion is that the duty owed by the commission, to both plan employees and Dominion as beneficiaries of the trust, was equivalent to that of a trustee. I have no hesitation in calling it a fiduciary duty; the law knows none higher**.

[41] **It is difficult to imagine why the commission was established without accepting that its principal function was to protect the interests of plan members**. Who is more interested in the solvency of a pension plan than its members, who are either depending upon it as a source of income in their retirement years, or looking forward to the day when they will, or must? The commission stresses its concern for solvency in its guidelines. Since solvency can be of greater interest to none than plan members, the commission appears to be well aware of its duty to those members.

[42] While an attempt was made before us to depreciate the commission's role as watchdog over the interests of plan members, to the extent of a suggestion that its consent really was of no effect at all, it can hardly be suggested that plan members had no interest at all in the decisions of the commission. The commission itself, in its guidelines, acknowledged that there might be circumstances in which the members' interests might require them to be notified of an application to remove funds…

[…]

[44] While it is not necessary on this aspect of the matter to consider whether plan members had a right to the surplus funds, any more than on the face of things Dominion had no right, it seems obvious that they had a vital interest in them, in particular, whether they remained in the plan in order to fund its present and future obligations, or were withdrawn from it. **It is difficult to see how the interest of the plan members was of any lesser quality or degree than Dominion's**.

[…]

[50] **The result must be, in my opinion, that the commission owes a duty of fairness to those whose interests may, or will, be affected by its decision.** What that duty requires, in procedural terms, will depend on the circumstances, as Dickson J. points out. The appropriate procedure in any given case might run from a full and formal hearing, at one end of the spectrum, down to simple, even informal notice, and an opportunity to respond, as in

Nicholson, supra. In my opinion, at the very least, the commission should have required Dominion to give notice of its application to the members of the plan or their union. It would have been simpler to notify the union, but we were told by counsel that Dominion kept a mailing list of plan members, and there would thus have been no great difficulty in notifying them individually.

[51] The object of requiring notice would be, of course, to give the union or plan members an opportunity to defend their interest. They could not do this without knowing what the application was based on, so they would have to be furnished with the documents supporting the application. One critical document is the "actuarial report and cost certificate prepared as of a current date showing the funded status of the plan" required under the commission's guidelines. That report contains, of course, an expression of opinion. The opinions of experts are known to vary; one opinion should not be treated as determinative. Surely the members or their union should have been made aware of the basis on which the opinion rested so that they could place it before an expert, or experts, of their choosing. It may be that all the experts would agree on the amount that could have been removed from surplus, assuming any could legally be removed, but that eventuality cannot be assumed. Indeed, I think it unlikely. Some idea of how widely opinions might vary is afforded by the fact that Mr. Black believed that $60 to $75 million could be "recovered", as he put it, whereas consent was given for the withdrawal of only $37,951,000. The commission has not revealed how it came to settle on that figure; it may be that it adopted an opinion of its own.

[52] Further, plan members or the union should have been given an opportunity to put their point that Dominion had no right, on the plan documents as they stood at the time, to remove any of the assests [sic].

[53] While s. 37 of the Act excludes the operation of the *Statutory Powers Procedure Act* from the "determinations of the Commission" it cannot exclude the operation of the common law, and the duty of fairness it imposes. That is well-established: see *Re Downing and Graydon et al.* (1978), 21 O.R. (2d) 292, 92 D.L.R. (3d) 355 (Ont. C.A.).

[54] In my opinion, the commission failed in its duty of fairness and its decision should not be allowed to stand.

[emphasis added]

50. In addressing Dominion's position that, notwithstanding the Pension Commission may have contravened the duty of fairness owed to the union and its members, the Court can only quash the decision and has no authority to order the funds removed be returned to the pension plan fund, the Court stated at paragraph 79:

[79] At the same time, the commission was determining a valuable right of plan members. That was to have the commission ensure that the removal of funds would not imperil the solvency of the plan. No one could have a greater interest in the continued solvency of the plan than the plan members. **The commission had a clear duty to protect their interests and the members had an equivalent right to have them protected. We asked respondent's**

> **counsel: "Whose interests was the Commission established to protect?" The answer could only be: the members of the plan.** In my respectful opinion, to accept, as respondents apparently do, that the members had a vital interest in the continued solvency of the plan, but not a right to it, is a sophistry intended to distract this Court from its essential function, which is to ensure, to the best of its ability, that justice prevails.
>
> [emphasis added]

51. This finding in *Collins* that the administrative decision-maker under the pension benefits legislation of Ontario owed a duty of fairness to plan members of a level of significance approaching that of a fiduciary obligation could be viewed narrowly and restricted to the facts of that particular case. There, the pension funds were held in trust and the consent of the Pension Commission of Ontario allowed some of those trust funds to be withdrawn from the trust. However, in *Hinds v. Ontario (Superintendent of Pensions)*, [2002] O.J. No 525 ("*Hinds*"), a decision of the Ontario Court of Appeal in which neither trust funds nor the law of trusts was involved, the unanimous Court expressly adopts that passage from Collins.

52. *Hinds* involved the sale of a business and subsequent application to the Superintendent of Pensions for Ontario for approval to transfer the vendor company's pension plan to the purchaser company. The *Pension Benefits Act* (Ontario) contemplated that the plan members of the plan being transferred were entitled to be heard on the application. The Act did not contemplate that the members of the purchaser company's plan be entitled to be heard on the application. The Superintendent approved the transfer without giving the members of the purchaser company's plan an opportunity to be heard. Those members applied for judicial review to have the Superintendent's decision quashed. The applicant plan members cited *Collins* as authority that the Superintendent was required to take their interests into account in making the transfer decision. In response, Justice MacPherson, speaking for the Court, said at paragraph 42 of the decision:

> [42] **I agree with the appellants that the Superintendent owes a high duty to employees with Ontario pension plans. Indeed, on that issue I would adopt the particularly eloquent language used by Reid J. in Collins**, at p. 285 O.R.:
>
> > [I]t appears that the commission was established to ensure that certain interests were protected. While there is no doubt that those interests included the employer's, there appears to be equally no doubt that the commission was established to safeguard the plan members' interests as well . . . While the commission may not, strictly speaking, be a trustee for the members, for it holds no money belonging to the plan, it would be artificial to conclude that the commission's obligation to members is lower than the high standard of fiduciary obligation imposed on trustees.
>
> [emphasis added]

53. The Court in *Hinds* ultimately rejects the applicant plan members' argument on the basis that the applicant plan members would have an opportunity to be heard when the purchaser company applied to amend its plan to include the pension fund and employees of the vendor company. The applicants' suggestion that they could be irrevocably adversely affected by the pension plan transfer in a way that could not be remedied when the Superintendent heard them with respect to the amendment of the purchaser company's plan was "nothing more than speculation." The Court states in this regard at paragraph 48:

> [48] The appellants say that this might be too late because if the Superintendent approves a transfer with insufficient funds, the insolvency of the merged plan may be irreparable. This strikes me as nothing more than speculation. **In the context of an amendment application, the Superintendent will have the same high duty to protect the interests of the Colgate employees -- all of them -- that the Superintendent had when the interests of only the Bristol-Myers employees were before him on the transfer application.** Pursuant to s. 26(1) of the *PBA*, the appellants will receive notice of the proposed amendment and they will be able to make submissions concerning it. If the Superintendent accepts those submissions, he has broad authority under s. 18 of the *PBA* to make an appropriate order.
>
> [emphasis added]

54. The Ontario Court of Appeal decision in *Huus v. Ontario (Superintendent of Pensions)*, [2002] O.J. No. 524 ("*Huus*"), a companion decision to *Hinds*, was, like *Collins*, a case in which the pension plan included trust provisions. Justice MacPherson, again speaking for the Court, said beginning at paragraph 25 of the decision:

> [25] **I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension.** As explained by Cory J. in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611 at p. 646, 115 D.L.R. (4th) 631:
>
> > In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.
>
> [26] Similar statements have been expressed by this court in several cases. In Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, 158 D.L.R. (4th) 497 (C.A.), at p. 43 O.R., Robins J.A. said:
>
> > **[T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all**

> **pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans**. . . .
>
> [...]
>
> [28] **The implication of these authorities is that the Superintendent owes a high duty to employees with Ontario pension plans. As for the nature and consequences of this duty, I would adopt, as I did in Hinds, the eloquent language used by Reid J. in Re Collins and Pension Commission of Ontario** (1986), 56 O.R. (2d) 274, 31 D.L.R. (4th) 86 (Div. Ct.) ("Collins"), at p. 285 O.R.:
>
> > [I]t appears that the commission was established to ensure that certain interests were protected. While there is no doubt that those interests included the employer's, there appears to be equally no doubt that the commission was established to safeguard the plan members' interests as well While the commission may not, strictly speaking, be a trustee for the members, for it holds no money belonging to the plan, it would be artificial to conclude that the commission's obligation to members is lower than the high standard of fiduciary obligation imposed on trustees.
>
> [emphasis added]

55. While Justice MacPherson does mention the trust provisions in the pension plan in *Huus*, he does so only to emphasize that the lower court's decision in that case was based solely on the procedural issues and that no decision was made with respect to the substantive pension law issues, including the trust aspect. Justice MacPherson's decision also appears on its face to focus solely on the procedural issues. While it could be argued the fact that trust provisions were involved impacted Justice MacPherson's ruling on the procedural issues and his conclusion regarding the duty of fairness owed by the Superintendent, that is never discussed or mentioned by Justice MacPherson in the decision. Indeed, his perspective on the application of the common law duty of procedural fairness to decisions of the Superintendent of Pensions in *Huus* is very similar to that he expressed in *Hinds*. He expressly adopted in both decisions the same passage from *Collins* that speaks to the high duty owed by the Superintendent to employees with Ontario pension plans. I take from these decisions that in Ontario, the Superintendent owes a high duty of fairness to plan members regardless of whether a trust is involved.

56. In *Hawker Siddeley Canada Inc. v. Nova Scotia (Attorney General)*, 1991 CanLII 4325 ("*Hawker*"), Justice Nathanson of the Nova Scotia Supreme Court, Trial Division, heard an application by an employer and pension plan administrator for declarations regarding a decision by the Nova Scotia Superintendent of Pensions in respect of a pension plan wind-up report.

57. In determining the scope of the Superintendent of Pensions' authority to approve plan wind-up reports, Justice Nathanson considered the purposes of the Nova Scotia pension benefits legislation and the duties owed by the Superintendent of Pensions to members of pension plans. He made the following comments in this regard:

Issue 1(a): Purposes of the Act

The provisions of the Pension Benefits Act, R.S.N.S. 1989, Ch.340, when read together and as a whole, indicate that the general purpose of the Act is to regulate and supervise the administration of every pension plan that is provided for persons employed in the province. The Act attempts to ensure that pension plans are administered completely and in good faith according to a fixed statutory scheme.

Subject to that general purpose, the Act is directed at the protection of the rights and interests of employees who are members of pension plans. In reference to the comparable statute in force in Ontario, the Pension Benefits Act, S.O. 1987, Ch.35, which is very similar to the Nova Scotia statute, Mr. Justice Blair stated in Firestone Canada Inc. v. Pension Commission of Ontario et al. (unreported, Ont. C.A. No. 568/90):

> "... The Act is clearly intended to benefit employees. It prescribes minimum standards for all pension plans in the province of Ontario. Section 20(1) and (2) makes it applicable to all pension plans whether or not they have been amended to comply with it.
>
> In particular, the Act evinces a special solicitude for employees affected by plant closures. Before a pension plan can be wound up, the Pension Commission of Ontario must be satisfied that it is actuarially sound and capable of meeting its obligations to pensioners ..." (emphasis added)

See also Collins, and Batchelor et al. v. Pension Commission (Ont.) et al. (1986), 16 O.A.C. 24 (Div. Ct.) at pp.34 and 41.

[…]

Issue 1(c): Powers and Duties of the Superintendent

The foregoing review of the scheme of the Act points up the many powers of the Superintendent in regard to winding up pension plans. The Superintendent has the power to change the effective date of a wind-up which was initiated by the plan administrator, to order on his or her own initiative a wind up a pension plan in whole or in part, and to refuse to approve a wind-up report and thereby prevent payments out of the pension fund or the wind up of the pension plan. In addition, s.89(4) appears to vest in the Superintendent the power to attach terms and conditions to an approval or consent pursuant to the Act or regulations. The Superintendent also has the power to appoint an administrator to wind up a pension fund.

In exercising those powers, the Superintendent is subject to what may be termed general duties and specific duties.

As to the general duties of the Superintendent, which are set out in s.8(2) and s.10(c), there is no evidence in this case as to any directions having been given by the Minister nor of any assignments having been made by the Governor in Council or the Minister.

Some specific duties are set out in ss.89 and 90. The former provision includes the duty to re-consider and hold a hearing for re-consideration. The latter section requires the Superintendent to serve notice of a proposed order and transmit a copy of the resulting order and reasons. The evidence is not clear whether formal re-consideration was ever requested or required in the present case.

In addition, the Superintendent is also subject to duties which are non-statutory in nature. The Ontario Pension Commission owes a fiduciary duty and a duty of fairness to pension plan members in matters surrounding the question of whether it ought to consent to the withdrawal of funds from a pension plan: see Collins, and Batchelor et al. v. Pension Commission (Ont.) et al., (supra), at pp.34 and 41. Since the Nova Scotia statute attributes to the Superintendent of Pensions similar powers and duties to those attributed by the Ontario statute to the Pension Commission, no doubt the Superintendent of Pensions owes similar duties to members of pension plans in this province.

[emphasis added]

58. At the end of the decision, Justice Nathanson added a brief postscript addressing what he viewed to be troubling conduct of the plan administrator in the matter. Justice Nathanson commenced the postscript with the following:

POSTSCRIPT

As indicated previously in this decision, the Superintendent owes a fiduciary duty and a duty of fairness in regard to the funds held in a pension plan. The Act points this out to some extent in s.75(5) which gives the Superintendent the statutory authority to protect the interests of members and former members.

[emphasis added]

59. Justice Nathanson's decision was affirmed by the Nova Scotia Court of Appeal: 1994 NSCA 91 (CanLII). The Court of Appeal did not comment specifically on the passages of Justice Nathanson's judgment cited above.

60. The last pension decision I will note here is that of the Ontario Superior Court of Justice, Divisional Court, in *Baxter v. Ontario (Superintendent of Financial Services)*, 2004 CanLII 45494 ("*Baxter*"). In that case, the employer company maintained two separate pension plans, one for hourly-paid employees (the "hourly plan") and the other for salaried hourly-paid employees (the "salaried plan"). The employer applied to the Superintendent of

Financial Services (formerly the Superintendent of Pensions) to approve the transfer of the assets of the salaried plan into the hourly plan to merge the plans. Certain members and former members of the salaried plan objected to the transfer on the basis that the significant excess assets in the salaried plan would be used to fund the entire merged plan. The Superintendent consented to the transfer. The objecting members and former members requested a hearing by the Financial Services Tribunal (the successor organization to the Pension Commission) with respect to the Superintendent's decision. The majority of the Tribunal held that it did not have jurisdiction to conduct the requested hearing. The Tribunal then went on the decide the merits of the challenge in case it was wrong on the jurisdiction question and ultimately concluded the transfer complied with the requirements of the legislation.

61. The unanimous Court ultimately dismissed the appeal from the Tribunal's decision. However, on the issue of jurisdiction, the Court agreed with the minority decision of the Tribunal and found the Tribunal had jurisdiction to hear the challenge of the Superintendent's consent to the transfer. The crux of the jurisdiction issue was the interpretation of section 89 of the *Pension Benefits Act* (Ontario). Subsections (1) to (7) of that provision provided:

> 89.(1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.
>
> (2) Where the Superintendent proposes to make or to refuse to make an order in relation to,
>
> subsection 42(9) (repayment of money transferred out of a pension fund);
>
> subsection 43(5) (repayment of money paid to purchase pension, deferred pension or ancillary benefit);
>
> subsection 80(6) (return of assets transferred to new pension fund);
>
> (d) subsection 81(6) (return of assets transferred to new pension fund);
>
> (d.1) section 83 (the Guarantee Fund applies to a pension plan);
>
> section 87 (administration of pension plan in contravention of Act or regulations); or
>
> (f) section 88 (preparation of report),
>
> the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and any other person to whom the Superintendent proposes to direct the order.
>
> (3) Where the Superintendent proposes to make or to refuse to make an order requiring an administrator to accept an employee as a member of a class of employees for whom a pension plan is established or maintained, the Superintendent shall serve notice of the

proposal, together with written reasons therefor, on the administrator, and the Superintendent shall serve or require the administrator to serve a copy of the notice and the written reasons on the employee.

(3.1) Where an application is filed in accordance with subsection 78(2) for the payment of surplus to the employer and the Superintendent proposes to consent or refuse to consent under subsection 78(1), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and on any person who made written representations to the Superintendent in accordance with subsection 78(3).

(3.2) Where an application is filed in accordance with subsection 78(4) and the Superintendent proposes to consent or refuse to consent under subsection 78(4), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and the Superintendent may require the applicant to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the applicant.

(4) **When the Superintendent proposes to refuse to give an approval or consent** or proposes to attach terms and conditions to an approval or consent under this Act or the regulations, other than a consent referred to in subsection (3.1) or (3.2), **the Superintendent shall serve notice of the proposal**, together with written reasons therefor, **on the applicant for the approval or consent.**

(5) Where the Superintendent proposes to make an order requiring the wind up of a pension plan or declaring a pension plan wound up, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and the employer, and the Superintendent may require the administrator to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the administrator.

(6) A notice under subsection (1), (2), (3), (3.1), (3.2), **(4)** or (5) **shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal** if the person delivers to the Tribunal within thirty days after the notice under that subsection, notice in writing requiring a hearing, **and the person may so require such a hearing**

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.

[underline and emphasis added]

62. The Tribunal majority considered the provisions noted above and held that subsections 89(4), (6) and (7) were unambiguous in providing that only the person who applied for the Superintendent's consent or approval to a transfer of assets was entitled to receive the notice of refusal from the Superintendent and only that person in those circumstances could ask the Tribunal for a hearing. The Tribunal majority concluded that it was bound to

follow the unambiguous wording chosen by the Legislature, even if it resulted in asymmetrical, one-sided procedural rights. The Tribunal majority also noted that recent amendments to section 89 expanded subsections 89(3.1) and (3.2) to expressly contemplate notice and a right to a hearing where the Superintendent either consents or refuses to consent in the specified instances to which those subsections applied. No such amendment was made to subsection 89(4), and it remained on its face one-directional, in that notice and a right to a hearing by the Tribunal was only provided where the Superintendent refused to consent (or provided conditional consent) and only to the party who applied for consent. Although not specifically expressed by the Tribunal majority, I would also note that in the case of subsection 89(3.1), regardless of which way the Superintendent decided, under the amended provision the aggrieved party was entitled to a hearing by the Tribunal.

63. On appeal, the Court held that the "applicant" referred to in subsection 89(4) could be read to include the pension plan members opposed to the asset transfer who "make application" or "counter-application" to the Superintendent seeking a rejection of the company's request for approval. In arriving at this interpretation, the Court notes at paragraph 19 of the decision that the Superintendent had in fact provided to the employees notice of his proposed consent to the transfer and advised them of their right to be heard by the Tribunal:

> [19] The Superintendent served the employees with the notice of the proposed consent, and advised them of their right to a Tribunal Hearing. **While the giving of such advice cannot be seen as establishing jurisdiction, it is indicative of the broad consensus in administrative, legal and judicial circles, of the requirement for procedural fairness on such a fundamental issue**.

64. The Court, beginning in paragraph 20 of the decision, then addressed the Tribunal majority's approach to interpreting subsection 89(4) as follows:

> [20] Before dealing with some of the legal precedents that offer some guidance, it is instructive to examine the rather narrow basis for the Tribunal's finding and the Company's submission that the Tribunal lacks jurisdiction. **They parsed the language of s. 89 (4) to find that rights of review exist only where the decision goes against the applicant; and used the maxim *unius est exclusio alterius* as the basis for an argument that the legislature made a policy choice to expand the right to a Tribunal Hearing in some circumstances and not in others as illustrated by ss. 89(3.1) and 89 (3.2)**.
>
> [21] **With respect, the denial of a right of one party to be heard, while protecting the right of the other party, when both parties have substantial interests at stake, would require considerably clearer and less ambiguous legislative language**. As shown earlier, who the applicant is can often be determined on the basis of the priority in time of the request or indeed whether the "respondent" files something in the nature of a counter-application.

65. In paragraph 25 of the decision, the Court reviews and applies the factors set out by the Supreme Court of Canada in *Monsanto Canada v Ontario (Superintendent of Financial Services)*, 2004 SCC 54 (*Monsanto*) regarding the proper approach to interpreting the Ontario *Pension Benefits Act*. The Court notes that one factor to be considered is the object of the Act, and in this regard, the Court says:

> D. *Object of the Act*
>
> In *Monsanto*, *supra*, the court said the following with regard to the object of the Act at para. 38:
>
> > **The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans** (see *GenCorp, supra* [*GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.)]*; Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 646, it is recommended that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. ***The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards*.** [Our emphasis.]
>
> We see no need to say any more on this factor.
>
> [emphasis added]

66. Beginning at paragraph 26 of the decision, the Court goes on to review the evolution of the jurisprudence in Ontario on the pension regulator's duty owed to employees with Ontario pension plans and the appropriate balance between employee and employer interests to be reflected in the regulator's decision-making process:

> **<u>The Jurisprudence</u>**
>
> [26] Finally, the case law, to the extent that it has canvassed the issue, supports the position of the Superintendent, the minority, the appellants, and the union.
>
> [27] **We agree with paragraph 39 of the appellant's factum on jurisdiction where they argue:**

> The Ontario Court of Appeal has determined "the Superintendent owes a **high duty** to employees with Ontario pension plans" in matters of process when considering merger applications under Section 81. This duty is not lower "than the high standard of fiduciary obligation imposed on trustees." *Hinds v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 367 (Ont. C.A.) at 375, 378; *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (Ont. C.A.) at 387 and *Monsanto Canada Inc.*, *supra*, at 409-410.

[28] The language of the Pension Commission in *Hospitals of Ontario Pension Plan, C-001500,* November 22, 1990, PCO, XDEC-05, PCO Bulletin 1/4 (December 1990), affirmed in *Re Canadian Union of Public Employees et al. and Ontario Hospital Association; Superintendent of Pensions, Intervenant* (1992), 91 D.L.R. (4th) 436 (Div. Ct.) ("*HOOPP*") is instructive, even though the section involved was a different one, s. 89 (2). The Pension Commission said as follows:

> a.) **the legislature must have intended fair play for both sides in a pension dispute, and it would be inequitable for one side to have a full right to a hearing by the pension tribunal when the other side, having received the opposite proposal or order from the Superintendent, could only apply for judicial review**;

In affirming the decision, the Divisional Court said, inter alia:

> **It is not reasonable, in our opinion, to think that a decision to refuse to issue an order requested** under s. 88 [now s. 87] **should be treated any differently,** for the purposes of s. 90(6) (now s. 89(6)], **than one to make such an order. *In the first case, those interested and in disagreement with the decision would have to live with it, while in the second, they would have access to the Commission by way of an appeal and the power it possesses*** under s. 90(9) [now s. 89(9)]. See HOOPP (Div. Ct.) at p. 441. [Our emphasis.]

[…]

[30] In *Pension Plan for Salaried Employees of McDonnell Douglas Canada Ltd.*, No. 520593, May 25, 1998, PCO, XDEC-38, affirmed in *Maynard v. Ontario (Superintendent of Pensions)* (2002), 23 C.C.P.B. 145 (Div. Ct.), at p. 146 – 147. the Divisional Court said:

> In our view, **it would be contrary to the purpose of the legislation to say that where the superintendent proposes to make an order under 89(5)** requiring, for example, the wind up of a pension plan, and in which circumstances, the statute specifically states notices to be served on the administrator of the plan and the employer, who are then entitled to a hearing, **that there is no corresponding right to a group of employees who have asked that such an order be made and the superintendent refuses to make such an order. In our view, the reasoning in [*HOOPP*] is apposite to the case at bar.** [Emphasis added.]

> [31] **Notably, at that time, notwithstanding amendments, s. 89(5) expressly provided a hearing only where the Superintendent had proposed to order a wind up or a partial wind up.**
>
> [32] In *Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada* (PN 302851) May 28, 1998, XDEC-39, a case dealing with mergers, the Pension Commission held that there was an implied right to a hearing for employees. The Commission relied heavily on *HOOPP*. It accepted the reasoning in *HOOPP* that the phrase "proposes to make an order" includes a proposal to refuse to make an order.
>
> [33] The company, understandably, has not been able to find any support for its position in the case law dealing with s. 89. **Although the cases cited by the appellants are not on all fours with the case at bar, the sentiments expressed by the Tribunals and the courts on the need for a fair process, that is, a right of review for both parties, run through all of the cases.**

67. These cases readily establish that I owed a high duty of fairness to the Plan members and former members when making my registration decision regarding Amendment P-23. Similar to what the Nova Scotia Superior Court found regarding the Nova Scotia pension legislation in *Hawker*, the regulatory frameworks and objectives encompassed within the *Pension Benefits Act* of Ontario and the *PBA* are highly aligned. As I mentioned in paragraphs 33 and 34 of the Written Reasons, the *PBA* contains numerous provisions aimed at protecting plan members and former members, with the Superintendent being assigned primary responsibility for ensuring those protections are realized. The potential harm to the rights and interests of plan members and former members if a plan amendment does not comply with the *PBA*, for instance where it results in a reduction in accrued benefits, is significant.

68. These cases also establish that the common law duty of procedural fairness owed by the pension regulator is layered overtop any general and specific duties found in the pension benefits legislation, and will supplement the procedural requirements beyond what is set out in the legislation. In addition, based on the decision in *Baxter*, there is a presumption that the procedural rights owed to employers and to plan members and former members under the *PBA* are intended to be symmetrical and balanced where both have vested interests in the regulatory decision. Further, in order to displace that presumption, clear and unambiguous language to that effect in the *PBA* is required. On this last point, reference must be made to the decisions of the Supreme Court of Canada in *Knight* and *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001], 2 SCR 781 ("*Ocean Port*"), as well as to the decision of the Saskatchewan Court of Appeal in *South East Cornerstone School Division No. 209 v. Oberg*, 2021 SKCA 28 ("*Oberg*"). Those decisions all emphasize that where legislation is silent with respect to the procedure to befollowed by administrative decision-makers, there is a presumption

that the legislature intended for the duty of procedural fairness to apply and clear language to the contrary or necessary implication is required in order to rebut that presumption.

69. It is against this backdrop that I now turn to the issues raised in this reconsideration decision.

Issues:

a. Was the Notice of Decision a final, perfected decision sufficient to engage the doctrine of *functus officio*?
b. Was the Notice of Decision a nullity due to a jurisdictional error or a failure to comply with the duty of procedural fairness, rendering it an exception to the doctrine of *functus officio*?
c. Are there indications in the *PBA* that a plan amendment registration decision can be reopened in order to enable the Superintendent to discharge the function committed to the Superintendent by the *PBA*?

I. Was the Notice of Decision a final, perfected decision sufficient to engage the doctrine of *functus officio*?

70. As CCRL notes in the Notice of Objection, in order to attract the doctrine of *functus officio*, a decision must be a final decision. In paragraphs 20 and 21 of the Notice of Objection, CCRL posits:

> *20. A decision is final when the adjudicator has done everything necessary to perfect the decision….*
>
> *21. The PBA does not stipulate any additional or further steps needed for the Superintendent to register an amendment. Thus, the notice of registration issued pursuant to s. 17(3) signals a final and definitive decision by the Superintendent to register the amendment.*

71. The LH Submission did not speak expressly to this point.

72. On first blush, CCRL's argument is compelling. The Notice of Decision stated that I had "decided to register" Amendment P-23. Later that same day, staff in my office in fact caused Amendment P-23 to be noted as registered in the digital licensing and registration system utilized by our office to record registrations. The registration system is not designed to allow my office to unilaterally sever a portion of an amendment for registration purposes. In these types of situations, in order to ensure our registration in the system reflects the true scope of the amendment that is registered, my office would normally inform the administrator who filed the amendment that part of the amendment cannot be registered and ask the administrator to submit a revised amendment for

registration. Typically, this communication with the administrator would be informal, occur outside of the system and before the amendment is registered, in order to avoid the complexities associated with routing everything through the system. In this case, I ultimately did indicate in the conclusion of the Written Reasons that CCRL would need to revise Amendment P-23 in accordance with my decision in the Written Reasons.

73. All of the case authorities provided by CCRL and LH on the application of *functus officio* to administrative decision-makers involved very different facts from those before me on this reconsideration decision. In our situation, the Notice of Decision consisted of only a bare statement that I had decided to register Amendment P-23 with no reasons to support that decision or any elaboration whatsoever. It also included an express statement that written reasons for my decision would follow shortly. With one exception, all of the cases I have reviewed involved a first decision with some reasons to explain the decision and the issuance by the decision-maker of a subsequent decision, or subsequent reasons, that expanded upon or varied the original decision or original reasons.

74. The one exception is *Fédération canadienne de l'entreprise indépendante (section Québec) c. Régie de l'énergie*, 2010 QCCS 6658 (CanLII) ("*CFIB*"), a decision of the Superior Court of Québec. In that case, Hydro-Quebec applied to the Regie de l'energie ("*Regie*"), a multifunctional regulatory body, for approval of supply agreements Hydro-Quebec intended to enter into. The statute providing for oversight of Hydro-Quebec by the *Regie* expressly required the *Regie* to provide reasons for its decision. The *Regie* ultimately made a decision on May 26, 2008, approving the agreements. In the decision, the *Regie* did not provide reasons. The *Regie* indicated that it was communicating its decision in order for the parties to the agreements to rely on them for June 1, 2008, and it would set out its reasons subsequently. The *Regie* issued a second decision on June 5, 2008, apparently in response to complaints by the Quebec chapter of the Canadian Federation of Independent Business ("QCFIB") about the failure to provide reasons accompanying the May 26th decision. The *Regie* held in that decision that it was appropriate to issue a decision with reasons to follow. On June 12, 2008, the QCFIB applied for judicial review of the Regie's May 26th and June 5th decisions. On June 25, 2008, the *Regie* gave detailed reasons for its May 26th decision.

75. On the judicial review application, the Court reviewed the case law on the issue of the appropriateness of issuing a decision with reasons to follow and concluded that there is nothing wrong in principle with the practice. The exception would be where the circumstances would lead a reasonable person to view the subsequent reasons as a *posteriori justification* rather than a statement of the reasoning that led to the decision. The Court concluded the exception did not apply in the case before it and the fact that the *Regie* issued its decision with reasons to follow did not result in non-compliance with the Act provision requiring the *Regie* to give reasons for its decision. The Court then dealt with another argument advanced by the QCFIB, namely that the Regie could not issue the June 25th reasons as it was *functus officio* after making its May 26th "reasons to follow" decision. In support of this argument, the QCFIB cited the *Jacobs* decision of the Ontario

Court of Appeal. The Court reviewed *Jacobs* and concluded that it was distinguishable from the case before it. The Court ultimately holds on this point that the doctrine of *functus officio* applies only after the "reasons to follow" have been provided.

76. The decision in *CFIB* is the closest on point to our fact situation. Although the Court in *CFIB* distinguished *Jacobs*, it appears that the commentary in *Jacobs* influenced the Court's decision on the application of *functus officio*. It is important to examine the decision in *Jacobs* for this reason. I would also note that in the Notice of Objection, CCRL refers to *Jacobs* for authority that in order for statutory decision-makers to have the ability to reconsider their own decisions, the governing statute needs to make that clear. While *Jacobs* does indeed include a statement to that effect, the more important aspect of the decision for our purposes here is the aspect focusing on when an administrative decision is to be considered final such that the doctrine of *functus officio* is engaged.

77. In *Jacobs*, the issue before the Ontario Court of Appeal was whether the Ontario Labour Relations Board ("OLRB") was without jurisdiction when it purported to issue supplementary reasons to an earlier decision in which brief reasons were provided. The OLRB issued the supplementary reasons at the request of the successful party. There was a clear suggestion in the decision of the Court of Appeal that the successful party made the request to the OLRB for additional reasons because the original reasons provided would, if challenged by the unsuccessful party, likely be found to be insufficient and result in the OLRB decision being overturned. It's clear from these facts that, like the Court held in *CFIB*, *Jacobs* is readily distinguishable from our present situation. However, while it was not the case before her, Justice Epstein, speaking for the majority in *Jacobs*, turns her mind to the situation where a decision-maker mentions in the initial decision that further reasons would be provided.

78. In addressing why she disagreed with the Divisional Court's support for the OLRB's issuing supplementary reasons on the premise that it is more time and cost effective to allow a tribunal to correct its own error rather than wait for a court to correct it on judicial review, Justice Epstein states at paragraph 49 of the decision:

> [49] This argument is convincing insofar as it provides normative support for a tribunal's reconsideration power. However, I am not persuaded by this rationale in the circumstances here, where the Board **has issued reasons that are prima facie final** and the successful party has requested that the Board augment those reasons. Allowing the Board to provide "fuller" reasons does not promote efficiency and timeliness; rather, it does the opposite. **When a tribunal does not announce that further reasons are to come, it is fair for the parties to assume that the reasons issued are final and to arrange their affairs accordingly, including deciding whether and on what grounds to seek judicial review.** Leaving a decision open to supplementary reasons invites the unnecessary consumption of resources and avoids finality -- consequences that are hardly consistent with the objective of the expeditious resolution of workplace disputes.

[emphasis added]

79. Justice Epstein also explains why she disagreed with the Divisional Court where it found that based on earlier Divisional Court decisions, including in *I.B.E.W. Local 1739 v. I.B.E.W.* (2007), 86 O.R. (3d) 508 (*"IBEW 1739*"), the OLRB had the authority to provide supplementary, clarifying reasons despite the doctrine of *functus officio*. She says, beginning at paragraph 59 of the decision:

> [59] In IBEW 1739, the Divisional Court was critical of an applicant in a judicial review application who attacked the adequacy of the Board's reasons without first asking the Board for further reasons or asking for a reconsideration pursuant to s. 114(1). **In that case, the Board had issued brief written reasons and stated that further reasons might follow.** The vice chair also noted that he "remained seized to deal with any difficulties in implementing this award": para. 33. The union then sought judicial review on the basis of, among other things, insufficiency of reasons. The Divisional Court noted that in the interests of achieving its labour relations objectives, the Board is often required to give "bottom line" decisions and to release reasons quickly after expedited proceedings. The court also noted [at para. 83] that "where one of the parties is unsatisfied with either the result or the reasoning, it has a legislated right to ask for reconsideration as expressly contemplated in s. 114(1) of the Act".
>
> [60] **The decision in IBEW 1739 is of no assistance for the simple reason that in the instant case the Board did not remain seized to give further reasons. When an arbitrator or tribunal remains seized of an issue, the doctrine of *functus officio*, by definition, does not apply. Black's Law Dictionary, 7th ed., defines "*functus officio*" as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished". Retaining jurisdiction over an aspect of a case is generally acceptable only where that aspect has not been fully addressed; a tribunal cannot arbitrarily reserve for itself extended jurisdiction over a completed aspect of a case. It is important to note that the inquiry as to when a tribunal has completed its commission must be contextual: "[t]he nature of the mandate of an agency is important in determining whether an agency has the authority to reserve jurisdiction on a matter in issuing a decision":** Macaulay and Sprague, at p. 27A-36.
>
> [61] In IBEW 1739, the immediate need for a resolution necessitated an expedited procedure **and prompted the vice chair to reserve jurisdiction to provide fuller reasons in the future**. **In this case, jurisdiction to revisit the reasons was neither reserved nor warranted**.
>
> [emphasis added]

80. I understand Justice Epstein to be saying in these paragraphs that where a decision-maker announces its decision and states that reasons, or further reasons, will follow such that the parties would not expect that they have received the final reasons for the decision, *functus officio* does not yet apply. The rationale for this principle being that the decision-maker has reserved or remains seized of jurisdiction in the matter to issue the reasons. In

other words, the matter was not fully completed. I think this must generally be the case, as it is a common practice of some courts and other decision-makers to issue decisions and indicate that reasons will follow. This was noted by the Court in *CFIB*. If the issuing of a bare decision without accompanying reasons were to, without exception, fully exhaust the decision-maker's jurisdiction notwithstanding it promised at the time the decision was issued that reasons would follow, all of these decision-makers would be *functus* and without jurisdiction to provide the promised reasons.

81. Based on the decision in *CFIB* and Justice Epstein's comments on this point in *Jacobs*, in our case the Notice of Decision was not a final decision sufficient to attract the application of *functus officio*, for I stated unequivocally that written reasons for my decision would follow. Neither CCRL, LH or any other stakeholder of the Plan would reasonably have expected that I had completed my final step in the proceedings by issuing the Notice of Decision.

82. I will pause here to note that, unlike in *Jacobs*, the Divisional Court in *IBEW 1739* makes it clear at paragraph 78 of the decision that the Act governing the OLRB, as it existed then, did not require the OLRB to provide reasons for its decisions. The Divisional Court did find, however, that the OLRB was required to provide reasons as a result of the common law duty of procedural fairness.

83. It is true that in *Chandler* and in decisions following it reference is made to the principle that decision-makers cannot defeat *functus officio* by purporting to reserve jurisdiction to revisit their decision. Clearly, that makes perfect sense to avoid the mischief that would arise if tribunals could so easily defeat the doctrine and its valid objectives merely by adding a reservation of jurisdiction at the end of every decision. But in those cases where this principle is raised, unlike our situation here and that in *CFIB*, the decision-maker had purported to issue final reasons or otherwise completed its final step in the matter. There was no jurisdiction left to reserve.

84. Before leaving *Jacobs*, there is a related principle identified in that decision that I find highly persuasive and applicable to this case. The *ratio decedendi* of Justice Epstein's decision in *Jacobs* is that, based on the very specific wording in the legislation governing the OLRB, the OLRB had wide authority to reconsider a decision, but did not have authority to revisit and supplement the reasons separate and apart from reconsidering the decision. As Justice Epstein's decision on this aspect turned on the specific wording of the legislation before the Court in that case and, because in our situation the issue is not one of supplementary reasons, *Jacobs* is again readily distinguishable from the situation before us. However, Justice Epstein says beginning at paragraph 28 of the decision:

> [28] As a preliminary matter, I start with the Board's duty to provide reasons.

> [29] In Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, the Supreme Court established that in certain circumstances the duty of procedural fairness will include a requirement that an administrative tribunal provide reasons for its decision.
>
> […]
>
> [31] In this case, the decision determined significant rights of the parties and there is a right to have the decision reviewed. Furthermore, the process used was very much like a court process. The Board, like the courts, has a body of jurisprudence, regularly refers back to its own decisions and has its own official reporter series. **In my view, it is therefore within the parties' reasonable expectations that they will receive reasons. These observations support the conclusion that the Board is obliged to provide reasons**.
>
> […]
>
> [38] **As previously indicated, the Baker analysis leads me to conclude that reasons must accompany every Board decision. In other words, the Board's decisions must be reasoned decisions**.
>
> [emphasis added]

85. I understand the point being made by Justice Epstein in the above paragraphs to be that where the legislation granted to the OLRB broad authority to reconsider a 'decision', the word 'decision' was not intended to mean either a decision or the reasons for the decision separate and distinct from the other, for the decision and the reasons were inextricably tied. This conclusion was based on Justice Epstein's finding that as a result of the common law duty of procedural fairness, as well as on a proper interpretation of the entire Act in question, the OLRB was not authorized to issue a decision without reasons.

86. It appears that CCRL turned its mind to this nuanced point in the Notice of Objection where it refers to the wording of subsection 17(3) of the *PBA* and notes that it does not stipulate any further or additional steps needed for the Superintendent to register an amendment. CCRL also notes in the Notice of Objection that the *PBA* does not expressly require the Superintendent to provide reasons when making a registration decision regarding a plan amendment, other than as set out in subsection 22(1) of the *PBA* where the Superintendent is required to provide written reasons to the administrator where the Superintendent decides to refuse to register the amendment. These points are accurate and I understand CCRL's position to be that, because the *PBA* expressly contemplates written reasons are required to be provided for a registration decision in certain circumstances, the maxim *expressio unius est exclusio alterius* dictates that written reasons are not required to be provided by the Superintendent in respect of a plan amendment registration decision in any other circumstances. Following through on this

line of reasoning, as the Notice of Decision was, in CCRL's view, my final and perfected decision in this matter, I was not required to provide reasons as I indicated that I had decided to register Amendment P-23 in its entirety.

87. From a strict statutory interpretation perspective, I view this to be correct to the extent that it stands for the proposition that I would not have been required by the *PBA* to provide reasons for my decision if I had decided to register the entirety of Amendment P-23. However, I do not believe it goes further than that to dictate that I cannot choose to provide reasons where I believe it would be beneficial to the parties or otherwise in the public interest. I also do not view CCRL's reasoning to be sufficient to displace any common law duty I might have been under to provide reasons. As noted earlier in this decision, the Supreme Court of Canada in *Ocean Port* and *Knight* and the Saskatchewan Court of Appeal in *Oberg* emphasize there is a strong presumption that legislators intended that statutory decision-makers comply with the duty of procedural fairness and express wording or necessary implication is required to rebut that presumption. Regard should also be had to the decision of the Saskatchewan Court of Appeal in *Euston Capital Corp. v. Saskatchewan Financial Services Commission*, 2008 SKCA 22, at paragraph 45. In *Hawker* and *Baxter*, this principle was given effect when it was found that the common law duty of procedural fairness owed by the pension regulator to plan members in those cases was layered overtop duties set out in the pension benefits legislation.

88. That leaves the only question remaining on this issue, namely whether the common law duty of procedural fairness I owed to the Plan members and former members in making my registration decision included a duty to give reasons for my decision. I think it did.

89. In *Baker*, the Supreme Court of Canada made it clear that the scope or content of the duty of procedural fairness owed in respect of a particular decision is to be determined based on the specific facts of the decision being made. As set out in *Baker*, the criteria that should be considered to determine the scope of the duty of procedural fairness owed by a statutory decision-maker includes the nature of the decision being made and the process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the importance of the decision to the individuals it affects; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the agency itself. As is made clear in *Baker*, these criteria are not intended to be an exhaustive list and the single overarching requirement is fairness.

90. Applying the *Baker* analysis to the specific facts of my registration decision in respect of Amendment P-23, I find that the duty of procedural fairness I owed to the Plan members and former members included the requirement that I provide reasons for my decision. This is based on:

a. Aside from the reconsideration process set out in section 22 of the *PBA*, the *PBA* is silent on the process for administrators, plan members and former members to be heard in respect of plan amendment registration decisions pursuant to the *PBA*. In the Written Reasons I described how there are few express procedural protections for plan members and former members in the *PBA* and how the Superintendent is charged with ensuring members' and former members' rights are protected through the Superintendent's discretionary decision-making role. I also explained why a formal hearing process like that of the courts could be cumbersome and problematic in the context of some *PBA* decisions. However, the amendment registration process under section 17 of the *PBA* can in practice resemble more formal court proceedings in some respects. While registration applications can sometimes be unopposed and widely recognized to be in the best interests of all affected parties, that is not always the case. As in our current scenario, sometimes members and former members oppose the amendment, and sometimes in different respects and on different grounds from one another. Also, as in the present case, opposing groups may retain professional advisers to assist them to have their perspective prevail, including legal counsel to advocate on their behalf and actuaries to provide actuarial evidence. The nature of the decision can be simple and straightforward in some situations, and in others, such as the present case involving the reduction of an indexation cap for past service, it can be very complex. Pension plans and pension plan regulation can be difficult subject matter for people who are not involved in the industry to learn and understand. The lawyers who practice in this area tend to be specialized and actuarial science is a very complex science for laypersons to grasp.

b. The administrator has a right to require the Superintendent reconsider a negative registration decision (s.22), and then a further broad right to appeal to the court (s.23). Members and former members, however, have no express right to require the Superintendent reconsider a registration decision they are opposed to, and have no right of appeal whatsoever in respect of registration decisions. Their only potential recourse would be through a judicial review application.

c. Plan amendment registration decisions can be of relatively minor impact to the administrator, members and former members, or incredibly significant to all of those parties. In the present case, Amendment P-23 made a number of amendments aimed at reducing the expense of the Plan to CCRL. As a result of Amendment P-23, the remaining members are required to begin contributing a percentage of their salary towards the funding of the plan. The amendment included in Amendment P-23 that I found contravened the prohibition on

reducing accrued benefits was a reduction in the indexation cap for past service of active members. That lowering of the indexation cap would have had the effect of retroactively altering the annual indexation formula from 75% of the Consumer Price Index (CPI) up to a maximum of 5%, to 75% of CPI up to a maximum of 2%. As I found in the Written Reasons, while the lowering of the cap may not have had an impact in some years, and maybe not even in most years, looking at past historical CPI data it was likely to result in lower indexing in some years, and the cumulative spread between the two formulas would increase the longer the former member lived. Indexing is very important to retirees receiving a defined benefit pension as it prevents the retirees' purchasing power or real income from declining as inflation drives prices higher over time. I also view the fact that one member opposed to Amendment P-23 retained his own lawyer and an actuary to provide evidence demonstrates the importance of the registration decision to some members.

d. The legitimate expectations of the person challenging the decision is another factor. While CCRL is challenging my decision as reflected in the Written Reasons, what we are considering for our purposes here is what the content of the duty of procedural fairness should have been in respect of the Notice of Decision. The Notice of Decision was not and would not have been challenged by CCRL, as it reflected exactly what CCRL had asked for. It would have been the members and former members who opposed Amendment P-23, or portions of it, that would have challenged the Notice of Decision. The members and former members who opposed registration of Amendment P-23 would have legitimately expected that I would provide reasons for the Notice of Decision, because I expressly and unequivocally stated in the Notice of Decision that I would do so. Further, with respect to my 2019 decision to approve Amendment P-22 to the Plan, I issued a notice of decision and indicated in that notice that written reasons for my decision would follow. I then provided written reasons several weeks after issuing the notice of decision. The members and former members, having just gone through the registration process for Amendment P-22, would have legitimately expected that I would also provide reasons in respect of the Notice of Decision pertaining to Amendment P-23.

e. The last criteria set out in *Baker* is the choice of procedure made by the decision-maker. I made the choice to announce in the Notice of Decision that written reasons would follow. I made the same decision in respect of my 2019 Decision regarding the registration of Amendment P-22 to the Plan. As I indicated earlier, I do not view it to be appropriate for me to speak to my subjective state of mind when I issued the Notice of Decision except as is apparent on the face of the record. While I believe there are facts on the face of the record that would be

relevant for a decision-maker in my position to take into account in deciding whether to give reasons for my registration decision in these circumstances, as it is not apparent on the record that I acted on any of these facts, I will not recite them here.

91. As I was under a duty to provide reasons for my registration decision in respect of Amendment P-23, in the words of Justice Epstein in *Jacobs*, my decision had to be a 'reasoned decision'. As the Notice of Decision was not a 'reasoned decision', I had not fully accomplished the 'duties and functions of my original commission' by issuing the Notice of Decision. As the Notice of Decision was a not a final, perfected decision, *functus officio* did not apply and I had authority to issue the Written Reasons that varied the Notice of Decision.

92. Before leaving this issue, I should comment on CCRL's position in paragraph 25 of the Notice of Objection regarding the impact on the Written Reasons if I was found to be *functus officio* upon issuing the Notice of Decision. CCRL takes the position that, as they are of the view I was *functus officio* and the Written Reasons were an attempt to render a new decision, "any portion of" the Written Reasons that is inconsistent with the Notice of Decision is void and of no effect. As I understand the doctrine of *functus officio*, once a decision-maker is *functus*, they have no authority to do anything further in respect of the matter. In that case, the entire Written Reasons would be void and of no effect, not just portions of the Written Reasons. I have not come across a case on *functus officio* where only portions of the subsequent decision or reasons were found invalid and the remaining portions valid. It was logical for CCRL to take the position that only portions of the Written Reasons were invalid, because if the entirety of the Written Reasons were found to be void and of no effect, the Notice of Decision would, based on my finding here, be subject to successful challenge by the members and former members opposed to Amendment P-23 for a failure to provide reasons.

93. As I have found that the Notice of Decision was not a final, perfected decision capable of attracting the doctrine of *functus officio*, I need go no further to consider the exceptions to the doctrine identified in *Chandler*. However, in case I am wrong in my conclusion that the Notice of Decision was not a final decision, I will proceed to consider the *Chandler* exceptions.

II. Was the Notice of Decision a nullity due to a jurisdictional error, rendering it an exception to the doctrine of *functus officio*?

94. Where a decision-maker makes a final decision that is rendered a nullity due to jurisdictional error, the doctrine of *functus officio* does not apply to prevent the decision-

maker from correcting the error and deciding the matter again. This much is clear from *Chandler* and the cases that have followed *Chandler*. One such case, *Powell Estate v. British Columbia (Workers Compensation Board)* 2001 BCSC 1661, affirmed at 2003 BCCA 470 ("*Powell Estate*"), was cited in the LH Submission. The ambiguity that has arisen in the court decisions considering this issue following *Chandler* has to do with the type of error that constitutes a jurisdictional error for the purposes of applying this exception to the *functus officio* doctrine.

95. The point of debate stems in large part from the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick* 2008 SCC 9 ("*Dunsmuir*"), the landmark decision resetting the approach to determine the standard of review to be applied by a court in reviewing decisions of statutory decision-makers. In *Dunsmuir*, the Court decided that for the purposes of determining the applicable standard of review with respect to questions of jurisdiction, a distinction had to be made between situations where the error alleged relates to a lack of jurisdiction, or "true errors of jurisdiction", and excess or loss of jurisdiction.

96. Before Dunsmuir, the courts, when considering the effect of privative clauses and the ability of the legislatures to shield statutory decision-makers from review by the courts, concluded that the legislatures did not have the authority to shield their statutory decision-makers from the courts' supervisory role aimed at ensuring the Constitution is adhered to. Errors that resulted in a statutory decision-maker's decision being beyond its jurisdiction were always reviewable by the courts. As the common law developed in this area, the concept of jurisdictional error was shaped to include not just errors involving a lack of jurisdiction from the outset (true jurisdictional errors), but also errors of a different nature that resulted in the statutory decision-maker losing jurisdiction. An example of this latter category of errors that commonly arose was patently unreasonable decisions. A good summary of this development in the law is provided in Justice Newbury's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 ("*Fraser*"), at paragraph 25 of the decision.

97. In *Fraser*, the British Columbia Court of Appeal tackled head on the issue of the scope of jurisdictional errors that give rise to the exception to *functus officio* described in *Chandler*. In a 3-2 split on this point, the majority found the common law authority to reconsider decisions that are a nullity due to jurisdictional error should be limited to situations where there has been a true error of jurisdiction. The dissent concluded the concept of true errors of jurisdiction discussed in *Dunsmuir* should be restricted to standard of review issues and should not be applied to delineate the scope of the jurisdictional error exception to *functus officio* for statutory decision-makers.

98. The British Columbia Court of Appeal decision in *Fraser* was appealed to the Supreme Court of Canada: see 2016 SCC 25. In a 6-1 split, the majority of that Court overturned the decision of the Court of Appeal, but not on the issue of the scope of the common law right

to reconsider decisions as a result of jurisdictional error. The majority noted that the parties now agreed with the majority decision of the Court of Appeal on the scope of jurisdictional error needed at common law to allow reconsideration and on that basis decided not to interfere with the Court of Appeal decision on this aspect. The lone dissenting Justice agreed with the majority that the Court of Appeal decision on this point should be allowed to stand, however, no explanation was provided for the basis of that conclusion. As a result, there is nothing to indicate that the decision of the majority of the Court of Appeal in *Fraser* is not correct on this issue.

99. In the LH Submission, in relying on the *Chandler* exception to *functus officio* where a jurisdictional error is made, LH argues that the Notice of Decision included a jurisdictional error that authorized me to reconsider it. *Fraser* was not referred to in the LH Submission and LH does not distinguish between true errors of jurisdiction and jurisdictional errors resulting from a loss of jurisdiction. I would also note that the facts involved in the *Powell Estate* decision cited in the LH Submission indicate the tribunal made a true error of jurisdiction, and as such, it is consistent with the later decision in *Fraser*.

100. In the CCRL Reply, CCRL responds by taking the position that any error I may have made in the Notice of Decision was a substantive error made within jurisdiction, which would not render the Notice of Decision a nullity. CCRL goes on to the argue that it would have been reasonable for me to conclude, based on the actuarial evidence submitted by CCRL for the purposes of my registration decision, that the lowering of the indexation cap in respect of past service was not a reduction of accrued benefits. No reference is made in the CCRL Reply to *Fraser* and no attempt is made to distinguish between 'true errors of jurisdiction' and errors that result in a loss of jurisdiction. However, I glean from the CCRL Reply that its position is that any error I may have made in the Notice of Decision was not a true error of jurisdiction and was not an unreasonable error in any event. The end result based on this reasoning is that the purported decision in the Notice of Decision was within my "true jurisdiction" to make and nothing in that decision would have resulted in me losing jurisdiction.

101. Based on *Fraser*, in order for me to have made a jurisdictional error that authorized me to re-decide the registration decision, the Notice of Decision would have to include a true error of jurisdiction. The potential error referred to by both LH and CCRL is that the Notice of Decision is inferred to include a decision to register the aspect of Amendment P-23 that lowers the indexation cap in respect of past service. In order for this to have been a true error of jurisdiction, or one in which I lacked the authority to make at the outset, it would have to be concluded that I made that decision under the belief that I had authority to register an amendment even if I was of the view it reduced accrued benefits. On the other hand, if I was aware that I could not register an amendment that I believed reduced accrued benefits, but erred in my initial conclusion whether the amendment reduced accrued benefits, then that would not be a true error of jurisdiction. Perhaps it would be an error that would result in a loss of jurisdiction, but this would not, in light of *Fraser*, be

sufficient to allow me to unshackle myself from the restraints of *functus officio* and re-decide the matter.

102. CCRL and LH are free to infer why I issued the Notice of Decision and reached the conclusion stated in it. As I indicated earlier in this decision, I do not view it to be appropriate for me to speak to my subjective state of mind when I issued the Notice of Decision that is not otherwise apparent on the face of the record. I do refer to my not having jurisdiction to register that aspect of Amendment P-23 in the Written Reasons, however, I did not touch expressly on whether a jurisdictional error was made in the Notice of Decision nor the scope of any such jurisdictional error. With that said, on the face of the record including my decision reflected in the Written Reasons, I am of the view that a reasonable person would infer that the error I made in the Notice of Decision was not an error of true jurisdiction.

103. To add to the complexity on this point, there is another aspect of our situation that is relevant when considering this issue. In *Fraser*, Justice Chiasson, speaking for the majority on this point, said at paragraph 160 of the decision:

> [160] Historically, as expressed in *Chandler* and in s. 253.1, subject to a power to correct non-substantive mistakes, once an administrative tribunal has done what it was mandated to do, its jurisdiction is spent; it is *functus officio*. *Chandler* determined that this concept should be eased to allow a tribunal to reopen its proceeding in order to complete the task it was assigned. **It also stands for the proposition that this includes the failure to provide procedural fairness because that results essentially in the tribunal not fulfilling its role.** There is no suggestion that this limited ability to revisit the proceeding permits the tribunal essentially to retry the case before it in order to decide whether its decision was unreasonable.
>
> [emphasis added]

104. I have already found I owed to the Plan members and former members, as part of the common law duty of procedural fairness, a duty to provide reasons for the Notice of Decision. If that Notice of Decision was a final, perfected decision, I breached that duty of fairness owed to Plan members and former members by not providing reasons for the decision reflected in the Notice of Decision. Based on the statement of Justice Chiasson in *Fraser* quoted above, my failure to provide procedural fairness would bring the Notice of Decision within the common law exception to the *functus officio* doctrine.

105. If the issue was that straightforward, then that would be the end of the matter. However, this statement by Justice Chiasson was *obiter*, as the facts in the case before him did not involve a breach of procedural fairness. In *Chandler*, Justice Sopinka's reference to breaches of natural justice as an exception to the application of *functus officio* was more nuanced. At paragraph 81, he said:

> If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. **Cases such as *Ridge v. Baldwin,* [1964] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange,* [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.**
>
> [emphasis added]

106. If my Notice of Decision was reviewed by a court and I was found to have breached the duty of procedural fairness by failing to provide reasons, I am not convinced the Notice of Decision would be rendered a nullity on that basis alone. One remedy where a statutory decision-maker has failed to give reasons for their decision is for the court to direct the statutory decision-maker to provide reasons. It is certainly plausible that a court would have viewed that to be the most appropriate remedy in our situation, particularly in light of the fact that no reasons whatsoever were given in the Notice of Decision and there are no obvious indications of an error on the face of the Notice of Decision alone.

107. Having considered *Chandler* and *Fraser*, I am inclined to find that any error I made in the Notice of Decision was not an error of true jurisdiction and my failure to provide reasons accompanying the Notice of Decision was not a breach of procedural fairness of a nature that it would have vitiated the whole proceeding and bound me to start afresh in order to cure the defect.

108. I am aware that *Dunsmuir* and the concept of jurisdictional error has been revisited recently by the Supreme Court of Canada, resulting in a continued evolution of this area of the law (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] SCJ No 65). Neither CCRL or LH spoke to these developments and there is nothing before me to suggest that *Fraser*, or *Chandler* for that matter, are no longer leading authorities on the specific issue of the scope of jurisdictional error required to engage the common law exception to *functus officio*. Accordingly, I am left to apply *Chandler*, as elaborated on in *Fraser*, and reach the conclusion that I was not authorized to re-open the Notice of Decision and issue the Written Reasons on the ground that an error I made in the Notice of Decision was a jurisdictional error or due to the breach of the duty I owed to provide reasons for the Notice of Decision.

III. Are there indications in the *PBA* that a plan amendment registration decision can be reopened in order to enable the Superintendent to discharge the function committed to the Superintendent by the *PBA*?

109. As with the *functus officio* exception for jurisdictional error, the jurisprudence on this other *functus officio* exception set out in *Chandler* demonstrates the courts have found it somewhat challenging to land on a common approach to its application. In the article entitled "Doctrine of *Functus Officio*: the Changing Face of Finality's Old Guard", by Anna SP Wong, Canadian Bar Review [Vol.98 2020, page 543], Ms. Wong describes the post-*Chandler* jurisprudence in this area as follows beginning at page 562:

> *Chandler* left a positive legacy, but an ill-defined future for the application of *functus officio* in the administrative arena. In the aftermath of *Chandler,* lower courts struggled to grapple with how to apply the functus doctrine to administrative decision-makers under *Chandler*'s general counsel. Flexible application of a doctrine fixated on finality is not an intuitive exercise. Without clear parameters set for its exercise, much would be left to the presiding decision-maker's discretion. It would be all too easy for different decision-makers to reach different conclusions as to when flexibility ought to be exercised to provide relief from the preclusion rule. The lack of clear direction is an open invitation for differences of opinion.
>
> As anticipated, there has been no consensus. A survey of post- *Chandler* judicial opinions reveals three distinct streams of jurisprudence. Each spells a different fate for the application of *functus officio*; all have their own complications.

110. Ms. Wong then goes on to describe the three judicial approaches as: (i) cases where the court takes a narrow view of the flexibility described in *Chandler* and only applies the exception where the enabling statute provides express authority to reconsider; (ii) cases where the court views there to be a wide latitude to not apply *functus officio*, limited only by express statutory language prohibiting reconsideration; and (iii) cases where the degree of flexibility afforded is tied to the nature of the decision, with less flexibility to reconsider afforded where the decision is more on the adjudicative end of the spectrum and more flexibility afforded if the decision is more administrative in nature. Ms. Wong concludes her article with a plea for the courts to consider adoption of a flexible and pragmatic test for applying *functus officio* to administrative decisions similar to the test for its doctrinal cousin, issue estoppel.

111. While these divergent approaches referred to by Ms. Wong are borne out to a degree in the cases cited to me by CCRL and LH, I do not view it appropriate for me to break from the courts and establish an entirely new test for the application of *functus officio* to statutory decision-makers. Fortunately, I see the beginnings of a jurisprudential path through the confusion taking hold.

112. The line of cases that tend to be cited as standing for the proposition that the *Chandler* flexibility is to be applied narrowly, and only where there is express authority in the enabling statute, predominantly come from citizenship and immigration decisions out of the federal courts and a couple decisions out of the Ontario Court of Appeal. CCRL cited in the Notice of Objection the decision of the Federal Court in *Dumbrava*. In that decision, the Court does indeed conclude that as the decision-maker received its authority from statute, that any power to reconsider had to be found there as well. In the decision of the

Ontario Court of Appeal in *Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252 ("*Stanley*"), the Court expressly rejects the principle that more flexibility to reconsider decisions should be afforded to non-adjudicative decision makers due to the nature of the decision-making process. In reviewing the enabling statute to determine if the decision-maker had the authority to reconsider their decision, the Court in *Stanley* appears to focus on express authority.

113. I question whether *Stanley* should be understood to be making an unequivocal statement that the authority to reconsider must be through an express grant of power. An absolute statement to that effect seems inconsistent with *Chandler* to me. If only an express statutory grant of authority to reconsider will suffice, it seems to me that there is no difference in the application of *functus officio* between courts and administrative-decision-makers. If that is the case, it is hard to give Justice Sopinka's decision in *Chandler* any meaning. It would also run contrary to the Supreme Court of Canada's decision in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577 ("*Grillas*"), which appears to have been one of the primary influences behind Justice Sopinka's decision in *Chandler*. In *Grillas*, the statutory decision-maker had a broad statutory authority to reconsider a deportation decision on what the majority decision on this point describes as "equitable" grounds. Pursuant to the enabling statute, this "equitable" jurisdiction to reconsider became operative after the decision-maker dismissed an appeal from the deportation order. On the facts before the Court, the decision-maker reconsidered the deportation order pursuant to this "equitable" jurisdiction and refused to interfere with the order. Subsequently, the decision-maker was presented with new evidence and asked, and did, reconsider the deportation order again on these same "equitable" grounds. The majority concluded it was appropriate for the decision-maker to do so. This was the case even though the express statutory grant of power to reconsider on these "equitable" grounds did not speak to such reconsideration authority being exercised more than once. With that said, precisely what *Stanley* stands for on this issue is not something I need to ascertain at this time for the reasons I will describe below.

114. The federal citizenship and immigration decisions are also where some of the cases standing for the other two approaches identified by Ms. Wong originate. One example is *Chan v. Canada (Minister of Citizenship & Immigration)*, 136 DLR (4th) 433 ("*Chan*"), which was cited by Ms. Wong. Another such case cited by Ms. Wong was *Kurukkal v. Canada (Minister of Citizenship & Immigration)*, 2010 FCA 230 ("*Kurukkal*"). *Kurukkal* was also cited to me by LH in the LH Submission. It is my view the *Kurukkal* decision of the Federal Court of Appeal overtakes *Dumbrava* and clarifies the approach in the federal courts on this issue. I reach this conclusion due to the fact the Court in the trial decision of *Kurukkal* (2009 FC 695) reviewed the conflicting cases that preceded it on this issue, including *Dumbrava*, and expressly adopted a functional and pragmatic test to determine whether an administrative decision-maker has the authority to reconsider a decision. On appeal, the unanimous Court of Appeal stated beginning in paragraph 3 of the decision:

> [3] **We agree with the judge that the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision**. The Minister and the Intervener agreed in this regard on this appeal (Minister's memorandum of fact and law at paragraphs 1, 24-26; Intervener's memorandum of fact and law at paragraphs 24, 25, 33, 36, 47). **However, in our view, a definitive list of the specific circumstances in which a decision-maker has such discretion to reconsider is neither necessary nor advisable**.
>
> [4] In this case, the decision-maker failed to recognize the existence of any discretion. Therein lay the error. The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.
>
> [emphasis added]

115. While the Federal Court of Appeal in *Kurukkal* declined to adopt the trial judge's proposed functional and pragmatic test for determining whether administrative decision-makers have authority to reconsider their decisions, its ultimate conclusion is not reconcilable with the holding in *Dumbrava* that an express grant of power is required. This is clearly the case as there was no express grant of authority to reconsider the decision in the facts before the Court in *Kurukkal*.

116. In *Stanley*, the Ontario Court of Appeal refers to aspects of Justice Epstein's decision in *Jacobs* to buttress its rationale. *Jacobs* was an appeal from a labour relations board decision, which falls fairly far on the adjudicative end of the spectrum. In *Stanley*, the decision in issue was an investigation conclusion reached by the Office of the Independent Police Review Director ("OIPRD") pursuant to the *Police Services Act* (Ontario). The investigation decision of the OIPRD was not a final decision in the public complaints process in respect of the police, it was an intermediate screening decision that determined whether the complaint was prima facie substantiated and, if so, the manner in which the complaint would proceed to be resolved. Nonetheless, the decision had the potential to result in very serious personal consequences to the police officer(s) being investigated. The complainants were members of the public who alleged mistreatment by the police officer(s) that were the subject of the investigation. The investigation was formal and serious. It resulted in a 118-page report containing a thorough review of the evidence of the complainants, civilian witnesses and 19 police officers. While the nature of the statutory decision involved in *Stanley* had been described in earlier Ontario cases as investigative as opposed to adjudicative, at the very least it did not resemble the plan amendment registration decision I was tasked with making pursuant to section 17 of the *PBA*. The decisions in *Jacobs* and *Stanley* are distinguishable from our present situation.

117. In any event, I am a statutory decision-maker in respect of an Act enacted by the Legislature of Saskatchewan, and as such, I must ascertain what the law is in Saskatchewan in this regard. While CCRL and LH did not refer any Saskatchewan cases to

me, I did come across a recent Saskatchewan decision that provides some degree of clarity on the position of the Saskatchewan Courts on this issue.

118. The Saskatchewan Court of Queen's Bench decision in *Jordan v. Sears*, 2021 SKQB 6 ("*Jordan*"), involved an appeal to the Court by tenants from a decision of the Office of Residential Tenancies ("ORT"). At the centre of the case was a dispute between the tenants and their landlord regarding damages to the rental unit and the release of the tenants' security deposit. After a hearing of the matter, a hearing officer of the ORT issued a decision on December 31, 2019, awarding damages to the landlord and ordering the release of the security deposit to the tenants (the "2019 ORT Decision"). The aspect regarding the release of the security deposit turned on a provision of the governing Act which required the landlord to provide notice to the tenant of the landlord's intention to retain some or all of the security deposit within seven business days of the landlord becoming aware the tenant vacated the premises. As was subsequently admitted by the ORT, this aspect of the 2019 ORT Decision contained an error in its conclusion that the required notice was not provided by the landlord due to a failure by the hearing officer to correctly count the number of business days of notice provided. The landlord requested that the hearing be reopened. On January 21, 2020, the Director of the ORT wrote to the parties advising that "the hearing will be re-opened for the purpose of determining whether the previous decision is possibly in contravention of the Act or its regulations." The second hearing, before a new hearing officer, proceeded on February 10, 2020. Contrary to the Director's January 21st letter, the second hearing officer did not focus on whether the first decision was wrong or in contravention of the Act or its regulations. The second hearing officer treated the second hearing as essentially a fresh hearing. The second hearing officer rendered a decision on March 31, 2020, in which different credibility findings were made from those in the December 31st decision and an award of much larger damages was made in favour of the landlord (the "2020 ORT Decision").

119. Justice Elson identified the true issue before him to be whether the ORT was *functus officio* by the 2019 ORT Decision. Justice Elson reviews *Chandler* and states beginning at paragraph 29 of his decision:

> [29] Based on the authority in *Chandler*, it seems to me that the principle of *functus officio* cannot be summarily dismissed for decisions of statutory entities, such as the ORT. The principle applies but it does so in a more flexible and less formalistic way than would be the case for judgments and orders of a court. The measure of flexibility allowed is informed by the entity's enabling statute. **In short, the lesson from *Chandler* is that one must: (1) assess the scope of any permitted appeal from the decision; and (2) review the enabling statute for indications that a decision can be reopened to permit the entity to complete its statutory responsibilities.**
>
> [30] In the present case, I have already noted that the *RTA* provides for a limited appeal to this court from an ORT decision. More specifically, it is limited under s. 72 to questions of law or of jurisdiction. Findings of fact, such as may be reflected in credibility assessments by a

hearing officer, are not reviewable on appeal. See *Reich v Lohse* (1994), 117 DLR (4th) 1 (Sask CA), and *Lansdowne Equity Ventures Ltd. v Cove Communities Inc.*, 2020 SKQB 113.

[31] **Based on the reasoning in *Chandler*, this limited right of appeal, standing alone, would suggest that the principle of *functus officio* should not be strictly applied in cases where an ORT hearing officer has erred on a finding of fact, from which no appeal is available. Accordingly, where the ORT discovers such an error after the decision is issued, it can be addressed.** As I will discuss later in this judgment, whether the matter can be reheard is an entirely different question.

[emphasis added]

120. Justice Elson then goes on to consider whether there are any other indications in the enabling Act that a decision can be reopened to permit the ORT to complete its statutory responsibilities and concludes as follows beginning at paragraph 32 of his decision:

[32] **Aside from the limited right of appeal, the *RTA* contains at least one other obvious indication of flexibility in the application of *functus officio*. This is found in the remedial authority under s. 76 of the *RTA*.** This remedial provision provides jurisdiction for "a hearing officer" (emphasis added) to "correct", "clarify" and "deal with" matters that may require further consideration and possible corrective action. A hearing officer may exercise this jurisdiction on her/his own initiative or at the request of a party. It is notable, although perhaps not in this case, that the matters on which this remedial jurisdiction can be exercised are broad. They are not confined to questions of law or jurisdiction. It follows that a hearing officer has the authority, under s. 76, to revisit findings of fact and, where justified, clarify or even correct a finding.

[33] **I am also persuaded that the flexibility discussed in *Chandler* has a place in the application of s. 76.** Giving the provision a purposive construction (as per *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at para 21), the Legislature must be taken to have intended s. 76 to have meaning and that it should not be easily defeated. **For example, it should not be defeated by the unavailability, for whatever reason, of the hearing officer who authored an ORT decision that may be open to a s. 76 review. Where that occurs, the flexibility discussed in *Chandler* calls for the Director or another hearing officer to be assigned for the review**.

[emphasis added]

121. Justice Elson ultimately concludes that, while the ORT could have reopened the 2019 ORT Decision to correct the error based on *Chandler* and the grounds referred to above, the ORT was indeed *functus officio* by the 2019 ORT Decision to the extent that it had no authority to rehear the matter afresh.

122. Based on the Saskatchewan approach as set out in *Jordan*, in order to determine if *functus officio* prevented me from correcting the error in the Notice of Decision, I need to first turn my mind to whether there is a full right of appeal from the Notice of Decision, if it had

been my final decision in this matter. I would then need to turn my mind to whether there are any other indications in the *PBA* of flexibility in the application of *functus officio* to my decision.

123. There is a full right of appeal from a plan amendment registration decision set out in section 23 of the *PBA*, however, it only applies where the registration was refused and only the plan administrator is given the right to appeal. Plan members and former members have no right whatsoever to appeal a plan amendment registration decision. Regardless whether the alleged error in a plan amendment registration was an error of fact, law or jurisdiction, Plan members and former members aggrieved by the decision would only have judicial review as a potential recourse. This would have been the case with the Notice of Decision. On this ground alone, *Jordan* stands for the principle that, on the law as set out in *Chandler*, I was authorized to correct the error in the Notice of Decision.

124. The next step described in *Jordan* is to consider whether there are any other indications in the *PBA* that a plan amendment registration decision pursuant to section 17 can be reopened to permit the Superintendent to fulfil the Superintendent's statutory responsibilities. Clearly an express grant of power to reopen or reconsider decisions would suffice, but as I have already found based on the decisions in *Kurukkal* and *Jordan*, an express grant of authority is not required. No case authority establishing a complete and comprehensive list of criteria has come to my attention. In *Kurukkal*, the Federal Court of Appeal expressly concluded that it would not be advisable to establish such a list. Based on this, I am of the view I should be guided by prior court decisions that have identified criteria that was found to have constituted an indication that a decision could be reopened, as well as by the principles and objectives described in Justice Sopinka's decision in *Chandler* animating this exception.

125. The most obvious indication of flexibility in the *PBA* is the reconsideration provision in section 22 pursuant to which I am making this decision. The power to reconsider in that provision is very broad, however, it is a one-way street. As CCRL argues in the CCRL Reply, the section 22 right to reconsideration only becomes operative in respect of a plan amendment registration decision where the Superintendent refuses to register the amendment, and only upon the request of the plan administrator. CCRL takes the position that there is no statutory authority for the Superintendent to reconsider an amendment registration decision in any other circumstance. In terms of an express grant of authority, that much is clear on the face of the *PBA*. However, the issue under this *Chandler* exception to *functus officio* is whether there is an <u>indication</u> in the enabling statute that flexibility should prevail over finality with respect to the decision in question. Clearly section 22 is an express statement by the Legislature that flexibility is to prevail over finality where an amendment registration is refused. The Legislature wanted the Superintendent to have flexibility to best ensure the Superintendent gets the decision right. The plan administrator is given a broad right of appeal to the courts, so the right to

require the Superintendent to reconsider the decision presumably is to ensure any errors subsequently identified could be addressed by the Superintendent in a more expeditious and less costly way. Should we interpret from this that the Legislature intended no flexibility is to be afforded where the Superintendent makes an error, no matter how obvious or harmful to plan members or former members, in deciding to register an amendment? That is not my view.

126. There is another interpretation of section 22 that I find more compelling. In my view, section 22 should be viewed not as a grant to the Superintendent of the power to reconsider the registration decision, but rather as the grant of a right to the plan administrator to require that the Superintendent reconsider the registration decision. In other words, the aim of section 22 is to remove the Superintendent's discretion to refuse to reconsider a decision in which the Superintendent rejects registration of a plan amendment. I arrive at this interpretation for a couple reasons. One is that it is the only interpretation that does not do violence to the principles of presumptive fairness applicable to our situation described earlier in this decision. As set out in *Knight*, *Ocean Port* and *Oberg*, it should be presumed that legislatures intended their statutory decision-makers to follow fair procedures when making decisions that affect the rights of individuals. The other fairness presumption comes from *Baxter* and other Ontario cases that, specifically in the pension benefits legislation context, establish that it should be presumed the procedural rights of the employers and the plan members and former members are intended to be symmetrical and balanced. The courts have been clear that, in respect of both presumptions, clear and unambiguous language or necessary implication are required to displace these presumptions.

127. The second reason is that there is very sound rationale why the Legislature would not have intended for individual plan members and former members to have a right to require the Superintendent to reconsider a decision to register a plan amendment. As I indicated in the Written Reasons and earlier in this decision, there can be hundreds or even thousands of members and former members in a single plan. As the situations and perspectives of individual plan members can vary widely depending on the nature of a plan amendment, it is possible not only for there to be differing and even opposing views amongst cohorts of members and former members in respect of an amendment, but also for there to be differing and opposing views in respect of different aspects of an amendment. In our case here, there were members who supported registration of Amendment P-23, members and former members such as LH and others who opposed registration of the aspect of Amendment P-23 relating to the reduction in the indexation cap with respect to past service, and a different former member opposed to registration of the aspect in clause 1 of Amendment P-23 pertaining to the retroactive elimination of the member right to receive an annuity in lieu of a retirement benefit. If every member and former member had an individual right to require the Superintendent to reconsider a decision to register an amendment on the grounds of their choosing, it could potentially lead to significant unnecessary resource usage for both administrators and the Superintendent and severely curtail the expediency and efficiency of the amendment

registration process. None of this is inconsistent, however, with the Superintendent having a discretion to reconsider a decision to register a plan amendment where the Superintendent is of the view it is appropriate to address a potential injustice. Particularly where members and former members do not have a right of appeal to the courts. This rationale is further supported in my view by the fact that the subject matter can be very complex and require special expertise to understand. There is a distinctly unlevel playing field between many plan administrators who have access to resources and expertise and most plan members and former members who do not. The Superintendent is best positioned to assess whether plan member and former member concerns relate to legitimate issues. This is why the *PBA* contains very few express participation rights for members and former members and instead relies on a number of provisions aimed at protecting members and former members that the Superintendent is assigned responsibility to enforce. Based on my interpretation of section 22, I am of the view it provides an indication that it was intended that the Superintendent could reopen an amendment registration decision in these circumstances.

128. Subsection 17(1), clause 18(2)(b) and subsections 22(5) and 23(3) of the *PBA* are further indications of the intention that flexibility is to prevail over finality in plan amendment registration decisions. Those provisions provide:

> **Amendments**
> **17**(1) Where an amendment is made to a plan that is registered or with respect to which an application for registration is pending or to any document mentioned in subclauses 16(1)(a)(ii) to (v), the administrator shall file a certified copy of the amendment with the superintendent within 60 days after the amendment is made.
>
> **Administration pending registration or amendment**
> **18**(1) …
> (2) An administrator shall not administer a plan in a manner that reflects an amendment to it unless:
> (a) the amendment is registered; or
> (b) subject to subsections 22(5) and 23(3), the amendment has been duly filed for registration and the superintendent has not notified the administrator in writing that the superintendent refuses to register the amendment.
>
> **Objection to certain actions of superintendent**
> **22**(1) …
> (5) Where an administrator delivers a notice of objection pursuant to subsection (3), the administrator may, notwithstanding the decision of the superintendent mentioned in subsection (1), administer the plan in a manner that reflects the amendment or report or cost certificate until the matter is dealt with pursuant to subsection (4).
>
> **Appeal to court**
> **23**(1) …

(3) Where an administrator serves a notice of motion pursuant to subsection (2), the administrator may, notwithstanding the superintendent's decision, administer the plan in a manner that reflects the amendment, actuarial valuation report or cost certificate until the court disposes of the matter.

129. Subsection 17(1) allows an administrator to file an amendment for registration as much as 60 days after the amendment has been made to the plan. The other provisions cited expressly authorize the plan administrator to administer the plan in a manner that reflects the amendment even where the amendment has not yet been determined to be in compliance with the *PBA*; or after the Superintendent has determined the amendment is not in compliance with the *PBA*, but has not yet reconsidered that decision; or even after the Superintendent has both determined the amendment is not in compliance with the *PBA* and reaffirmed that decision on reconsideration, but the Court has not disposed of the appeal of that decision. In any of those scenarios, if the final answer by the Superintendent or the Court, as the case may be, is that the amendment should not be registered, the administrator will have to unwind any effects or outcomes due to the amendment that occurred during the period when the plan was being administered as if the amendment was registered. It is important to note that the *PBA* provides no timelines within which the Superintendent is required to issue a registration decision or reconsideration decision, nor are there timelines imposed for the Court to make its decision on an appeal. Several months could pass in the intervening period. Clearly then, the Legislature was not of the view that absolute finality was imperative. If the Legislature believed that irreparable harm would befall an administrator if it had to unwind an amendment registration decision, it would not have included those provisions in the *PBA*. These provisions are a clear statement of legislative intention that plan amendment registration decisions are capable of being unwound and should be if they are ultimately found to be not in compliance with the *PBA*.

130. Another indication in the *PBA* that *functus officio* should not strictly apply to plan amendment registration decisions is the fact that the decision-making process set out in section 17 is administrative in nature and not a formal adjudicative proceeding. As noted by Ms. Wong in her article, there is a line of cases that suggest that *functus officio* does not apply to non-adjudicative decisions solely based on that fact alone. In addition to the *Chan* case cited by Ms. Wong, the decision in *Saskatchewan Wheat Pool v. Canadian Grain Commission*, 2004 FC 1307 (CanLII) is another example of this position. On the other hand, as mentioned above, the Ontario Court of Appeal expressly rejects this position in *Stanley*. While it is far from clear, the weight of authorities leads me to the view that the informal administrative nature of a decision is a criterion to be considered, but not determinative on its own. This appears to be the position of the Federal Court of Appeal in *Kurukkal*. I should also note that *Jordan* is unhelpful here as it was silent on this point. Perhaps that was because the type of statutory decision involved in that case was on the formal adjudication side of the spectrum, involving a tripartite, adversarial hearing in which credibility findings can play a significant role. It seems to me there is compelling logic that justifies treating administrative decisions differently than formal adjudicative decisions for

the purposes of the application of *functus officio*. As Justice Sopinka noted in *Chandler*, the main rationale behind *functus officio* applying to the decisions of statutory decision-makers is the benefit of finality of proceedings. A key aspect of this is that if a final decision can be readily reopened, the persons affected by the decision and the broader public may view the decision-making process as arbitrary and unfair, and could lead to a loss of confidence in the decisions and the institutions making those decisions. The fact that the statutory decision that was reopened was the result of a formal adjudicative process following procedures akin to those of the courts would most likely exacerbate those views and the loss of confidence.

131. Section 17 doesn't even contemplate a hearing before the initial registration decision is made. Section 22 does build in some formal process after the decision is made as a check on the decision, but only in limited circumstances. This informal approach makes sense from the standpoint that in some cases, a plan amendment could be clearly beneficial to, and supported by, all stakeholders of the plan. If that is the case, then any formal adjudication procedures would be unnecessary and inefficient. It is true that, like in our situation here, plan amendment registration decisions can be contested depending on the nature and circumstances of the amendment. In those cases, as I have already found earlier in this decision, the common law duty of procedural fairness kicks in to ensure a process is followed that is fair to all. However, those 'fair procedures' do not have to match the level of rigour and formality that is employed by the courts. In our case here, Plan members and former members were provided notice that the amendment was filed for registration and the opportunity to send me written submissions expressing their view. It is my view that the fact that the amendment registration process set out in the *PBA* is much closer to the informal administrative decision end of the spectrum and does not establish a formal adjudicative process is an indication that, in respect of these decisions, flexibility is to prevail over finality.

132. Another indication in the *PBA* that flexibility prevails over finality with respect to registration decisions is found in subsections 21(1) and (2). Those subsections provide:

> **Cancellation of registration**
> **21**(1) The superintendent may cancel the registration of a plan:
> (a) that does not comply with this Act; or
> (b) with respect to which the administrator has not complied with this Act or the plan.
>
> (2) The cancellation of registration of a plan pursuant to subsection (1) takes effect from the day, not earlier than the day on which that non-compliance occurred or commenced, specified by the superintendent…

133. When reading this provision it is important to keep in mind that, subject to the limited time allowances described above in paragraphs 128 and 129, the PBA contemplates that every plan and every plan amendment must be registered by the Superintendent (sections 16 and 17). Not only that, pursuant to these provisions the Superintendent can only

register a plan or plan amendment if the Superintendent is satisfied the plan or amendment, as the case may be, complies with the *PBA*. If there is no aspect of a plan to which section 21 applies that the Superintendent has not previously vetted to be in compliance with the *PBA* , then I do not see how section 21 can be reconciled with the notion that registration decisions under either section 16 or 17 are to be viewed to be inviolable and the Superintendent has no ability to revisit those decisions.

134. There are two other potential scenarios that can be imagined for the purposes of clause 21(1)(a) in which some aspect of a "plan" that has been previously vetted by the Superintendent pursuant to the registration provisions could be later found to be in non-compliance with the *PBA*, and where the Superintendent has not changed his mind about that aspect's compliance with the PBA. One is where the plan or plan amendment has been vetted to be compliant and registered, and the *PBA* is subsequently amended in a fashion that results in the aspect of the plan no longer being compliant with the *PBA*. The other is if the reference in 21(1)(a) to "plan" is referring not to a written contract or other document, but to the pension fund in respect of a plan as that concept is encompassed in the definition of "plan" in subclause 2(1)(y)(ii) of the *PBA*. Should the word "plan" in 21(1)(a) be read restrictively such that it only refers to one or both of these two narrow scenarios and not the first scenario? I think clearer statutory language would be required to limit the scope of clause 21(1)(a) in this fashion. To do interpretive gymnastics to read the intent of clause 21(1)(a) down such that the most plain and obvious application of the provision would be excluded would only be justified if the straightforward interpretation of clause 21(1)(a) would result in an absurdity that the Legislature could not have intended. Considering the position of CCRL as set out in the Notice of Objection and CCRL Reply, I understand CCRL would suggest that it would result in an absurdity and point to *Amoco*. Notwithstanding CCRL's arguments on this point, I don't see how it could be viewed to give rise to an absurdity. The pension benefits statutes in several other provinces have been amended to expressly contemplate the Superintendent or another pension regulator has the authority to revoke the registration of an amendment where the Superintendent or other regulator, as the case may be, subsequently determines the amendment does not comply with the statute. For example, see clause 18(1)(e) in the *Pension Benefits Act* (Ontario). Similar provisions can be found in the statutes in British Columbia, Alberta and Quebec.

135. The last indication in the *PBA* that flexibility is to prevail over finality is the overall nature of the role of the Superintendent. When the *PBA* as a whole is examined, what becomes clear is the role of the Superintendent is one of ongoing and continuous supervision over registered plans with very broad discretion to ensure the overall objectives of the *PBA* are achieved. One key objective is ensuring the interests of plan members are not put in jeopardy. For example, section 9 of the *PBA* provides:

> **Superintendent may appoint trustee**
> **9**(1) The superintendent may place a plan under trusteeship and appoint one or more persons to act as trustee of the plan where:

(a) **in the opinion of the superintendent**:
(i) the plan is not being administered in accordance with this Act, the regulations or a decision of the superintendent; **or**
(ii) **the interests of plan members are in jeopardy**; and
(b) the superintendent has given notice to the administrator of the superintendent's intention to do so.

(2) A trustee appointed pursuant to subsection (1) may exercise all of the powers of the administrator of the plan.

(3) The superintendent shall, by order, terminate the trusteeship of a plan authorized pursuant to this section when, **in the superintendent's opinion, termination is advisable and in the interests of the plan members**.

(4) The cost of administering a plan by a trustee is to be paid:
(a) by the employer; or
(b) by the plan fund where, in the opinion of the superintendent, special circumstances exist.

[emphasis added]

136. Section 9 and the other *PBA* provisions referred to above in respect of this issue are key examples, but there are many more such provisions. Numerous sections provide the Superintendent with broad discretionary authority to add to or modify express requirements in the *PBA* in order to ensure the objects of the Act are met as the circumstances of the case require (see: s.2(1)(e)(C); s.2(1)(ee); s.4; 11(4)(b); s.13(3); s.19(4); s.24(2); s.25(2); s.40(3); s.40(6); s.51(4)(c); and s.51(6)(b)). In addition to sections 9 and 21, there are other provisions that provide the Superintendent with a broad discretion to take drastic steps to ensure the interests of plan members and former members are protected (see: s.51(2) and (3); s.52(1); and s.58(1) and (2)). Another good example is found in the *PBA* registration provisions themselves. Subsection 17(3) provides that where the Superintendent is satisfied an amendment complies with the *PBA*, the Superintendent **may** register the amendment. This can be contrasted with the wording in subsection 16(3) concerning plan registrations, where it provides the Superintendent **shall** register a plan if the Superintendent is of the opinion the plan meets the requirements of the *PBA*. The discretion provided to the Superintendent in subsection 17(3) to not register an amendment even if the Superintendent is satisfied it complies with the *PBA* is intended as a safety valve to allow the Superintendent to refuse to register an amendment that would put the interests of plan members and former members in jeopardy. An example might be where the amendment itself does not contravene the *PBA*, but the amendment would result in a dramatic decline in the solvency ratio of the plan that endangers the benefit security of the plan to a degree that the Superintendent views the interests of plan members to be in jeopardy. It would be absurd to require the Superintendent to register the amendment in that scenario and then expect the Superintendent to immediately place the plan under trusteeship pursuant to subclause 9(1)(a)(ii).

137. These provisions are illustrative that the Legislature intended the Superintendent to have a broad discretion to supervise and make decisions in respect of each plan taking into account its unique circumstances with the overriding goal to ensure the interests of the plan's members and former members were best protected as contemplated by the *PBA*. Section 19 of the *PBA* expressly contemplates members should be protected from having their accrued benefits reduced by a plan amendment.

138. The uniqueness and importance of the role of the Superintendent in pension benefits legislation was recognized by the Supreme Court of Canada in *Buschau v Rogers Communications Inc.*, [2006] 1 S.C.R. 973. In that case, the Court considered whether the common law rule in *Saunders v. Vautier* applied to pension plan trusts. In concluding that it did not, Justice Deschamps, speaking for the majority, said beginning in paragraph 19 of the decision:

> **The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked.** Recognizing the economic and social importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them. The first federal pension benefits standards legislation came into force on March 23, 1967 (S.C. 1966-67, c. 92). The current statute, the *PBSA*, was initially enacted in 1986 (S.C. 1986, c. 40). **Under it, an important role of control and supervision is assigned to the Superintendent** (see A. N. Kaplan, *Pension Law* (2006), for analysis on the analogous role of the Superintendent under the Ontario legislation).
>
> […]
>
> **In essence, the Superintendent plays a crucial role in the protection of beneficiaries.** Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. **The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.**
>
> [emphasis added]

139. Based on the above, I am of the view that if the Notice of Decision was a final, perfected decision capable of attracting the application of the doctrine of *functus officio*, then there are sufficient indications in the *PBA* that the Notice of Decision could be reopened to permit me to fulfill my responsibilities under the *PBA*.

140. Before I leave this issue, I should comment on the case of *Amoco Canada Petroleum Co. v. Alberta (Superintendent of Pensions)*, 1992 CarswellAlta 640 ("*Amoco*") cited to me by CCRL. Related to this is CCRL's argument in the CCRL Reply that if the Superintendent had a unilateral declaration of nullity power, the Superintendent would be able at any time to reopen and rescind any registration decision he or his predecessors have ever made,

which would be antithetical to the principles of finality and certainty which underlie the registration regime created under the *PBA*. As set out above, I am of the view that the *PBA* does clearly evince an intention that the Superintendent is not precluded from reopening a plan amendment registration decision in appropriate circumstances. However, I would also note the facts in *Amoco* were very different from our situation. In that case, as I understand it, the initial plan registration decision preceded the subsequent Superintendent decision the Court took issue with by more than ten years. It is also worth noting that *Amoco* was not a *functus officio* case, as the Court never referred to *functus officio* anywhere in its decision. On these grounds alone, it is distinguishable from our situation. However, I would go further and note that my decision that *functus officio* does not apply strictly to plan amendment registration decisions does not necessarily foreclose plan administrators from having a remedy in appropriate circumstances. For instance, as noted by Ms. Wong in her article, issue estoppel is a doctrinal cousin to *functus officio* that also operates to promote finality of decisions. Issue estoppel is aimed at preventing injustice and applies in a more fact-specific, principled way than *functus officio*. Without deciding whether issue estoppel applies to amendment registration decisions pursuant to the *PBA*, taking into consideration the objectives of the *PBA* and the balance it tries to achieve, it is my view that issue estoppel would be a more appropriate tool to ensure justice is done than a binary application of *functus officio*.

Other Points Raised in the Submissions:

141. I think it is important that I touch on the argument advanced by CCRL that it had a legitimate expectation the Written Reasons would not alter the conclusion set out in the Notice of Decision. In the Notice of Objection, CCRL points to the fact that in my 2019 Decision regarding the registration of Amendment P-22 to the Plan, my subsequent written reasons did not alter my initial decision. CCRL claims this gives rise to a legitimate expectation that my written reasons issued following my decisions will not alter the decisions. I believe CCRL is mixing concepts here. The concept of legitimate expectations as discussed in *Baker* is applicable only to procedural aspects of decision-making processes. My decision as reflected in the Written Reasons to refuse to register a portion of Amendment P-23 was not a decision in regard to the procedure to be followed for the registration decision, it was a substantive decision going to whether a reduction in accrued benefits would occur. The most that can be said is my making that substantive decision had an indirect, ancillary impact from a procedural standpoint. That doesn't change the fact that the crux of that decision was a determination that the aspect of Amendment P-23 that reduced the indexation cap in respect of past service did not comply with the *PBA* and could not be registered. That was the very substantive decision that I was charged with making. Nothing in *Baker* or the cases that followed it on the issue of legitimate expectations suggests that a party's expectations can dictate the substantive decision that is to be made. At the end of the day, as I noted earlier, CCRL and the Plan members and

former members did have a legitimate expectation with respect to the procedure to be followed. I told them in the Notice of Decision that my reasons would follow, and this imposed a duty on me to provide those reasons, which I did.

142. All of that said, that does not mean that a party's legitimate expectations regarding a substantive result can never be relevant. As the Supreme Court of Canada said in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36 ("*Agraira*"), legitimate expectations of the parties can play a role when a decision-maker gives an indication of what the substantive decision will be and then subsequently changes that substantive decision. In those circumstances, there is a higher onus on the decision-maker in terms of fair procedures to follow before arriving at the contrary result. I read the statement by the Supreme Court in *Agraira* to mean the obligation on the decision-maker in that case is to provide the aggrieved party with an opportunity to be heard and a fair process to challenge the change in substantive conclusion. My decision to refuse to register the portion of Amendment P-23 was not due to new evidence, grounds or argument that arose after I issued the Notice of Decision. It's clear from the Written Reasons that the basis for my concluding that I could not register the portion of Amendment P-23 dealing with the reduction in the indexation cap with respect to past service was the evidence, grounds and argument already in my possession prior to my issuing the Notice of Decision. If I had been provided with new evidence, grounds or argument after the Notice of Decision was issued, I would have provided CCRL and the other submission providers with an opportunity to be heard in respect of the new evidence, grounds or argument before issuing the Written Reasons. CCRL and the other stakeholders already had all of the evidence, grounds and argument available to them when they made their submissions prior to my issuing the Notice of Decision, there was nothing further to be raised by them if I had provided further opportunity to be heard after issuing the Notice of Decision and prior to my issuing the Written Reasons. All that would have occurred would have been a rehashing of the same argument. I would also note here that a fair process exists in the *PBA* for these circumstances in which a change of substantive conclusion occurred without intervening new evidence, grounds or argument. CCRL had the right to a reconsideration pursuant to section 22 of the *PBA*, which it has in fact chosen to exercise. Further, pursuant to subsection 22(5) of the *PBA*, the administrator can continue to administer the plan in a manner that reflects the amendment until the reconsideration is concluded. If the reconsideration result is unfavourable to the administrator, the administrator can appeal the reconsideration decision to the Court and, pursuant to subsection 23(3) of the *PBA*, the administrator can continue to administer the plan in a manner that reflects the amendment until the Court disposes of the matter.

Conclusion

143. The Notice of Decision was not a final, perfected decision capable of attracting the application of *functus officio*. For this reason alone, I conclude that I was authorized to issue the Written Reasons and hereby confirm my decision as reflected in the Written Reasons.

144. I have also found that if the Notice of Decision was a final decision capable of attracting the application of *functus officio*, then pursuant to the decision of the Supreme Court of Canada in *Chandler*, *functus officio* does not apply strictly to the decision reflected in the Notice of Decision because there are strong indications in the *PBA* that I was authorized to reopen and reconsider the decision to correct the error contained within it.

145. As I have confirmed my decision reflected in the Written Reasons, section 23 of the *PBA* provides CCRL with a right to appeal this reconsideration decision to the Court of Queen's Bench. That section states as follows:

> **Appeal to court**
> **23**(1) Where the superintendent has confirmed a decision pursuant to subsection 22(4), the administrator may appeal to the court by notice of motion for an order requiring the superintendent to register the plan or amendment, reinstate the registration or rescind the direction to amend, as the case may require.
>
> (2) A copy of the notice of motion must be filed with a local registrar of the court and served on the superintendent within 30 days after delivery of the notice pursuant to subsection 22(4) or any longer period that the court allows.
>
> (3) Where an administrator serves a notice of motion pursuant to subsection (2), the administrator may, notwithstanding the superintendent's decision, administer the plan in a manner that reflects the amendment, actuarial valuation report or cost certificate until the court disposes of the matter.

Dated at Regina, Saskatchewan, this 11th day of March, 2022.

"ROGER SOBOTKIEWICZ"
Roger Sobotkiewicz
Superintendent of Pensions
Financial and Consumer Affairs Authority
of Saskatchewan

IN THE MATTER OF
***THE PENSION BENEFITS ACT, 1992*, S.S. 1992, C. P-6.001, AS AMENDED**

AND

A DECISION OF THE SUPERINTENDENT OF PENSIONS PURSUANT TO SUBSECTION 22(4) OF *THE PENSION BENEFITS ACT, 1992* (THE "*PBA*") RECONSIDERING THE SUPERINTENDENT'S DECISION DATED FEBRUARY 24, 2021, RELATING TO THE REGISTRATION OF AMENDMENT P-23 TO THE CCRL PETROLEUM EMPLOYEES' PENSION PLAN (THE "PLAN"), PLAN REGISTRATION NUMBER 0358986

MARCH 24, 2022
CORRIGENDUM TO DECISION DATED MARCH 11, 2022

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1. This is a corrigendum to my decision dated March 11, 2022.

2 In the style of cause on the first page of the decision, the second line has been corrected to remove the reference to "SECTION 1992" and replace it with "S.S. 1992".

3. In paragraph 17, the second sentence has been corrected to remove the comma after "(in this case CCRL)" and to read as follows:

> Pursuant to subsection 22(4) of the *PBA*, the Plan administrator (in this case CCRL) had the right to an opportunity to make representations in addition to the written submissions in the Notice of Objection.

4. In paragraph 47, the second sentence has been corrected to include a shorthand reference for the *Knight* decision and to read as follows:

> Also see *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (*"Knight"*) and *Baker v. Canada (Minister of Citizenship andImmigration)* [1999] 2 S.C.R. 817 ("*Baker*").

5. In paragraph 68, the second last sentence has been corrected to remove the case citation for the *Knight* decision and to read as follows:

> On this last point, reference must be made to the decisions of the Supreme Court of Canada in *Knight* and *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001], 2 SCR 781 ("*Ocean Port*"), as well as to the decision of the Saskatchewan Court of Appeal in *South East Cornerstone School Division No. 209 v. Oberg*, 2021 SKCA 28 ("*Oberg*").

6. In paragraph 90(d), line 12 has been corrected to replace "Approve" with "approve".

7. In paragraph 96, the last sentence has been corrected to include the case citation for the *Fraser* decision and to read as follows:

> A good summary of this development in the law is provided in Justice Newbury's decision in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 ("*Fraser*"), at paragraph 25 of the decision.

8. In paragraph 97, the first sentence has been corrected to remove the case citation for the *Fraser* decision and to read as follows:

> In *Fraser*, the British Columbia Court of Appeal tackled head on the issue of the scope of jurisdictional errors that give rise to the exception to *functus officio* described in *Chandler*.

9. In paragraph 133, the first sentence has been corrected to change the references from "paragraphs 133 and 134" to "paragraphs 128 and 129" and to read as follows:

> When reading this provision it is important to keep in mind that, subject to the limited time allowances described above in paragraphs 128 and 129, the PBA contemplates that every plan and every plan amendment must be registered by the Superintendent (sections16 and 17).

10. In paragraph 134, line 15 has been corrected to replace the word "it" with "if".

11. In paragraph 140, the last sentence has been corrected to remove the word "in" before "my view" and to read as follows:

> Without deciding whether issue estoppel applies to amendment registration decisions pursuant to the *PBA*, taking into consideration the objectives of the *PBA* and the balance it tries to achieve, it is my view that issue estoppel would be a more appropriate tool to ensure justice is done than a binary application of *functus officio*.

Dated at Regina, Saskatchewan, this 24th day of March, 2022.

"ROGER SOBOTKIEWICZ"
Roger Sobotkiewicz
Superintendent of Pensions
Financial and Consumer Affairs Authority
of Saskatchewan