2024 SKCA 106 (CanLII)

Court of Appeal for Saskatchewan

Docket: CACV4334

Citation: *3sHealth v Canadian Union of Public Employees*, 2024 SKCA 106

Date: 2024-11-19

Between:

3sHEALTH, SASKATCHEWAN HEALTH-CARE ASSOCIATION (conducting business under the name "SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS") and RICHARD PHILLIPS, LEANNE ASHDOWN, JOHN KNOCH, NADIA MARUSCHAK-CLAY, KELLY MINER, SARA KNOWLES and LYNN SANYA, being members of the EMPLOYER PARTNER COMMITTEE

Appellants
(Applicants)

And

CANADIAN UNION OF PUBLIC EMPLOYEES, HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, SASKATCHEWAN UNION OF NURSES, SERVICE EMPLOYEES' INTERNATIONAL UNION – WEST and JANICE PLATZKE, BASHIR JALLOH, KAREN SCHMID, TANYA SCHMIDT and DONNA TRAINOR, being members of the UNION PARTNER COMMITTEE

Respondents
(Respondents)

Before: Caldwell, Schwann and Bardai JJ.A.

Disposition: Appeal allowed in part

Written reasons by: The Honourable Justice Neal W. Caldwell

In concurrence:	The Honourable Justice Lian M. Schwann The Honourable Justice Naheed Bardai
On appeal from:	2024 SKKB 31, Regina
Appeal heard:	September 16, 2024
Counsel:	Eileen Libby, K.C., and Allison Graham for the Appellants Vlad Calina for the Respondents

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Caldwell J.A.

I. OVERVIEW

[1] The Appellants, 3sHealth, Saskatchewan Health-Care Association, Richard Phillips, Leanne Ashdown, John Knoch, Nadia Maruschak-Clay, Kelly Miner, Sara Knowles and Lynn Sanya, appeal from the judgment in *3sHealth v Canadian Union of Public Employees*, 2024 SKKB 31 [*Decision*]. That judgment concerns the interpretation of an Agreement and Declaration of Trust[1] [Trust Agreement] between 3sHealth and the Respondent unions, Canadian Union of Public Employees [CUPE]; Health Sciences Association of Saskatchewan; Retail, Wholesale and Department Store Union; Saskatchewan Government and General Employees' Union; Saskatchewan Union of Nurses; and Service Employees' International Union – West [Unions]. The issues involve the interpretation of a provision that establishes a mandatory meeting, mediation and arbitration process [Mandatory Process] under the Trust Agreement.

[2] 3sHealth, Saskatchewan Health-Care Association and Saskatchewan Association of Health Organizations are the same organisation, which is now a corporation continued under the name *Health Shared Services Saskatchewan* pursuant to s. 2-1(1) of *The Health Shared Services Saskatchewan (3sHealth) Act*, SS 2022, c 9, and having the statutorily authorised abbreviated name of *3sHealth* (s. 2-1(2)); I refer to that continued corporation as *SAHO* in these reasons. The individuals named as appellants and respondents in the style of cause are members respectively of the employer partner committee [EPC] and union partner committee [UPC] established pursuant to the Trust Agreement [Partners].

[3] The Trust Agreement addresses the operation and administration of The Saskatchewan Healthcare Employees' Pension Plan [SHEPP], which is a registered pension plan under *The Pension Benefits Act, 1992*, SS 1992, c P-6.001. SHEPP was established in 1962 to provide retirement benefits to employees of hospitals and other members of the Saskatchewan Hospital

[1] The original Agreement and Declaration of Trust is dated December 31, 2002. The Appeal Book contains an "Unofficial Consolidation" of the agreement prepared on May 29, 2023, which ostensibly incorporates and consolidates three Amending Agreements, dated November 30, 2018; June 14, 2021; and May 26, 2023. References in this judgment are to the unofficial consolidation.

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Association, a predecessor to SAHO. SHEPP is administered by a board of trustees [Trustees] appointed by SAHO and the Unions. The Trustees are not members of a Partner.

[4] Barring the error shown in the footnote below, SHEPP's origin and the role of the Trust Agreement is explained in the history set forth in SHEPP's registered plan document entitled *The Saskatchewan Healthcare Employees' Pension Plan* (consolidated), dated November 16, 2016[2]:

> (1) The Saskatchewan Healthcare Employees' Pension Plan (SHEPP) was established by the Saskatchewan Hospital Association in 1962 to provide retirement benefits to eligible employees of participating hospitals and other Saskatchewan Hospital Association members. In 1976, the Saskatchewan Hospital Association became the Saskatchewan Health-Care Association, which in 1991 amalgamated with the Saskatchewan Association of Special Care Homes and the Saskatchewan Homecare Association to form the Saskatchewan Association of Health Organizations (SAHO). Effective April 17, 2012, Health Shared Services Saskatchewan (3sHealth) assumed SAHO's rights, duties and responsibilities in respect of SHEPP [*sic* – the Saskatchewan Health Care Association was continued as a corporation under the names *Health Shared Services Saskatchewan* and *3sHealth* on April 1, 2023].
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> (2) In 1998, SAHO and six major healthcare unions signed an agreement in principle to jointly trustee the Plan, which was followed by the signing of the Trust Agreement that caused SHEPP to become jointly trusteed as of December 31, 2002. SHEPP is now governed by a board of trustees made up of an equal number of employer and employee appointees.

[5] In the proceeding below, SAHO applied pursuant to Rules 3-49(1)(a), (d) and (e) of *The King's Bench Rules*, by way of an originating application, seeking the Court's opinion and direction with respect to Partner rights under the Trust Agreement based solely on an interpretation of that agreement in circumstances where it was unlikely that there would be any dispute as to the material facts.

[6] The questions at the root of SAHO's application were (1) whether the UPC was "entitled to provide notice to the EPC pursuant to section 10.05" of the Trust Agreement of its intention to invoke the Mandatory Process and (2) whether the UPC "has provided notice to the [EPC] pursuant to s. 10.05(b) of the Trust Agreement". Section 10.05(a) of the Trust Agreement permits either the

[2] The SHEPP Plan in the Appeal Book is described as being "Restated as of January 1, 2015" and as a "consolidation prepared by Lawson Lundell on November 16, 2016", incorporating an amendment to the Plan dated July 20, 2016. Section 1.1 of the consolidation refers to *3sHealth*, which was created by statute approximately eleven years *after* the date of the consolidation. Nonetheless, as neither party have taken issue with the accuracy of the Plan document in the Appeal Book, I have ignored this discrepancy.

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UPC or the EPC to notify the other that it is initiating the Mandatory Process in the following circumstances:

> 10.05(a) **Partner Meetings — Contributions and Benefits** - In the event that either Partner wishes to increase the rate of Contributions to the Plan, either to bring the contribution rate up to the Plan's current service costs, or to fund a benefit improvement, the Partner shall notify the other Partner of its desire to meet to discuss such changes, and the Partners shall meet and discuss the proposed changes (involving both the Contribution rate and any corresponding benefit improvements) in good faith. Failing agreement within thirty (30) days of the day either Partner notifies the other of a request for a meeting for the purpose of considering such changes, the mandatory mediation and arbitration provisions of this section 10.05 shall apply. Either Partner may notify the other under this section as of January 1, 2004, and on each third anniversary of that date, such that any increases that may be agreed to or ordered by an arbitrator under these provisions may be effective on the dates referred to in (f)(viii). It is acknowledged that amendments to [*The Pension Benefits Act, 1992*] or other applicable legislation that have the effect of requiring the Plan to be amended to improve benefits are not subject to the process set forth in this Section 10.05.

[7] Section 10.05(b) of the Trust Agreement permits either Partner to initiate the mediation step of the Mandatory Process by notice to the other Partner:

> 10.05(b) **Mediation** - In the event that a matter referred to in (a) remains unresolved forty five (45) days after the notice referred to in (a), then either Partner may notify the other Partner of its desire to submit the matter to mediation. In such a case, the Partners shall agree upon a mediator within fourteen (14) days of the notice of mediation, failing which the mediator shall be selected by lot from the following list of persons:
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> [names redacted]

[8] In the *Decision*, the Court of King's Bench Chambers judge identified three issues of contract interpretation arising from SAHO's application, each dealing with the meaning of section 10.05 of the Trust Agreement, and he answered each question in the negative (i.e., No):

(a) Does section 10.05(a) limit service of a meeting notice to the third anniversary of January 1, 2004?

(b) Does section 10.05(a) require the meeting notice propose a contribution rate increase?

(c) Does section 10.05(b) require the mediation notice be given by a member of a Partner Committee?

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[9] Summarising the outcome of his interpretation of section 10.05 in the *Decision*, the judge said that a meeting notice given by the UPC to the EPC on February 13, 2023 [Meeting Notice], and a mediation notice it had given to the EPC on November 17, 2023 [Mediation Notice], "were both effective" (at para 57). He furthermore directed "that the parties proceed to mediation and, failing agreement, to arbitration as provided in [section 10.05] of the Trust Agreement" (at para 57).

[10] In its appeal from the *Decision*, SAHO argues that the judge erred in law or jurisdiction:

(a) when interpreting the Trust Agreement, by:

(i) failing to apply the approach to contract interpretation set forth in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*];

(ii) failing to apply the presumption that the parties to an agreement "have intended what they have written and using practical considerations in disregard of the express language of the Trust Agreement"; and

(iii) reaching an interpretation of the Trust Agreement that "fails to give life to" or renders the language of the Trust Agreement irrelevant or ineffective; and

(b) by misapprehending or ignoring evidence and arguments and by granting relief not sought by either party.

[11] In response to this appeal, the Unions sought to adduce fresh or new evidence pursuant to Rule 59 of *The Court of Appeal Rules*. I would deny that application because the evidence does not satisfy the test for admission under *R v Palmer*, [1980] 1 SCR 759. The application is unusual because the Unions are the respondents in this appeal and seek to have the result of the *Decision* upheld. Further, the proffered information, which is about events that occurred years after the time of contract formation, could have no bearing on the interpretation of the Trust Agreement. I would make no order of costs in that regard.

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[12] Applying the appellate standards of review to the contractual interpretation (see *Sattva* at paras 46–50, and *Housen v Nikolaisen*, 2002 SCC 33 at paras 31–37, [2002] 2 SCR 235), I find that the judge erred in law when he interpreted the Trust Agreement; however, I conclude that the errors did not affect his rejection of SAHO's contention that a Partner may only serve a meeting notice on the first day of every third January after January 1, 2004. While a Partner may deliver a notice under section 10.05(a) at any time, it does not take effect until the next ensuing triennial of January 1, 2004. The judge did not separately interpret section 10.05(b) dealing with mediation notices, but it follows logically that a mediation notice cannot become effective until 45 days after the effective date of the meeting notice containing the proposal to which the mediation will relate.

[13] Although the judge also erroneously interpreted the Trust Agreement as permitting notice to be given where the notifying Partner did not propose an increase in the rate of contributions to SHEPP, the UPC proposal, made under the Meeting Notice, did contemplate a possible increase in that rate. Furthermore, the judge did not err when he concluded that, in the circumstances of this matter, the fact that an individual who was not a member of the UPC had authored and delivered its Mediation Notice, did not affect the validity of that notice. Lastly, I agree that the judge exceeded his jurisdiction by granting relief that the parties had not sought and that was not available under Rule 3-49(1)(a), (d) or (e) of *The King's Bench Rules*.

[14] Accordingly, I would allow the appeal, set aside the *Decision* and the relief granted thereunder, and direct the parties to interpret the Trust Agreement in accordance with the opinion set forth in these reasons.

II. ARTICLE X OF THE TRUST AGREEMENT

[15] I will be quoting parts of Article X of the Trust Agreement throughout these reasons. The full text of that Article is as follows:

> **ARTICLE X — PARTNER COMMITTEES**
>
> 10.01 **Union Partner Committee**
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> (a) Each of the Unions shall appoint one representative to a committee, to be known as the "Union Partner Committee". A Trustee may not be appointed to the Union Partner Committee. A Union may remove and replace their representative at any time, and for any reason.

(b) The Union Partner Committee shall act on the basis of a majority vote. Votes on the Union Partner Committee shall be allocated to union representatives on the basis of the most recent best estimate by the Chief Executive Officer of the number of active Members of the Plan who belong to their Union as at the date preceding the day of the vote, provided that representatives voting in favour of a motion are appointed by Unions that represent at least 50% of the unionized Employees participating in the Plan.

(c) For greater certainty, when Retail, Wholesale and Department Store Union ceases to be a Union effective April 14, 2021, the representative of Retail, Wholesale and Department Store Union shall be removed from the Union Partner Committee, and Retail, Wholesale and Department Store Union shall no longer appoint representatives to the Union Partner Committee.

10.02 **Employer Partner Committee**

(a) The Employer Partner shall appoint representatives to a committee to be known as the "Employer Partner Committee". A Trustee may not be appointed to the Employer Partner Committee. The Employer Partner may remove and replace its representatives at any time, and for any reason.

(b) Decisions of the Employer Partner Committee must be supported by a majority of the Employer Partner representatives.

10.03 **Partners' Meeting with the Trustees** — The Partners shall meet annually with the Trustees, at which time the Trustees shall report to the Partners as to:

(a) the administration of the Plan during the previous year;

(b) the performance of the Plan's investments during the previous year;

(c) the funded status of the Plan; and

(d) any other matters of which either Partner may notify the Trustees at least thirty (30) days in advance of the meeting.

10.04 **Partner Meetings - General** — Either Partner may notify the other of its desire to meet to discuss any matter in relation to the Plan or Fund, and the Partners shall meet to discuss the matter within thirty (30) days of the notice. The Partners shall make their best efforts to resolve the matter in a timely and mutually satisfactory way.

10.05(a) **Partner Meetings — Contributions and Benefits** - In the event that either Partner wishes to increase the rate of Contributions to the Plan, either to bring the contribution rate up to the Plan's current service costs, or to fund a benefit improvement, the Partner shall notify the other Partner of its desire to meet to discuss such changes, and the Partners shall meet and discuss the proposed changes (involving both the Contribution rate and any corresponding benefit improvements) in good faith. Failing agreement within thirty (30) days of the day either Partner notifies the other of a request for a meeting for the purpose of considering such changes, the mandatory mediation and arbitration provisions of this section 10.05 shall apply. Either Partner may notify the other under this section as of January 1, 2004, and on each third anniversary of that date, such that any increases that may be agreed to or ordered by an arbitrator under these provisions may be effective on the dates referred to in (f)(viii). It is acknowledged that amendments to the Act or other applicable legislation that have the effect of requiring the Plan to be amended to improve benefits are not subject to the process set forth in this Section 10.05.

(b) **Mediation -** In the event that a matter referred to in (a) remains unresolved forty-five (45) days after the notice referred to in (a), then either Partner may notify the other

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Partner of its desire to submit the matter to mediation. In such a case, the Partners shall agree upon a mediator within fourteen (14) days of the notice of mediation, failing which the mediator shall be selected by lot from the following list of persons: [names omitted.]

(c) **Mediation Process —** The mediator shall meet with the parties and attempt to resolve the matter in dispute within sixty (60) days of the mediator's appointment. If the matter has not been resolved by that time, then the mediator shall prepare a report, and deliver it to the parties within thirty (30) days, such that the mediation process shall be concluded within ninety (90) days of the appointment of the mediator.

(d) If the Partners do not accept the mediator's report, then it shall be destroyed and not referred to in any arbitration, and within thirty (30) days after the delivery of the report either Partner may notify the other of its desire to proceed to final and binding arbitration. In such a case, the Partners shall select a mutually agreeable arbitrator. Failing agreement within forty-four (44) days of the delivery of the report, the arbitrator shall be chosen by lot from the following list of persons: [names omitted.]

(e) The arbitrator shall make his or her best efforts to hear and determine the dispute within ninety (90) days of a Partner's notification of its desire to engage the arbitration process. It is agreed that the arbitrator shall have full access to the most recent valuation report prepared by the Plan Actuary and any other relevant materials.

(f) **Authority of the Arbitrator** — The authority of the arbitrator constituted pursuant to subclause (d) is subject to the following constraints:

(i) the arbitration award shall be based on the valuation of the Plan and the costing of any proposed changes and benefits as prepared for the Trustees by the Plan's Actuary;

(ii) the arbitration award may not provide for benefit improvements that increase current service costs above the level of Contributions (as adjusted pursuant to (iv)) to the Plan;

(iii) the arbitration award shall not impair the ability of the Board to fulfil its fiduciary responsibilities;

(iv) the arbitration award shall not provide for an increase in the Contribution rate paid by Members greater than .5% of pensionable salary;

(v) the arbitration award shall not provide for a decrease in the contribution rate paid by Members of more than .5% of pensionable salary, provided that under no circumstances shall the Members' contribution rate be less than 4% of pensionable salary up to the Year's Maximum Pensionable Earnings ("YMPE") (for the purposes of the Canada Pension Plan) and 5.5% of pensionable salary over the YMPE;

(vi) the arbitration award shall ensure that the ratio of Contributions payable by Participating Employers to the Contributions payable by Members remains at 1.12 to 1;

(vii) the arbitration award shall ensure that the Required Contributions are not changed from a percentage of Earnings (or different percentages at different levels of Earnings) that are the same for all Members;

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(viii) Contribution rates may not be increased until January 1, 2005, and then not more frequently than every three (3) years thereafter; and

(ix) the arbitration award shall comply with all applicable laws; and

(x) until Contribution rates equal the Plan's current service costs, or 11.2% of pensionable payroll, whichever is less, in arriving at a decision, the arbitrator shall consider, as a priority, the full funding of current service costs by current Contributions, but, after Contributions exceed either of these thresholds, the arbitrator may consider all relevant matters.

10.06 **Effect of Arbitration Award**

(a) The Arbitration award shall fully and finally determine the adjustment, if any, to the contribution rate, and corresponding benefit improvements if any, and shall be binding upon the Partners and the Trustees, and the Trustees are empowered to and shall take all necessary steps to implement the arbitration award.

(b) In the event that implementing the arbitration award would necessarily result in the revocation of the Plan's registration with a regulatory or tax authority or would result in the Plan no longer being in compliance with applicable law, or in the event that the arbitrator's award is not based on the costing referred to in Section 10.05(f)(i), the Trustees may modify the arbitration award to the extent necessary for it to comply with Sections 10.05(f)(i) or to avoid revocation of the Plan's registration with a regulatory or tax authority. The Trustees may seek independent advice in determining the extent to which an award needs to be modified. If, in these circumstances, the Trustees have not agreed to make such modifications to the arbitration award within thirty (30) days of the award, then either Partner may refer the award back to the arbitrator for reconsideration.

(c) For purposes of clarity, no constraint upon the Trustees' power to amend the Plan that may be set out elsewhere in this document or in the Plan itself, shall be operative to restrict the Trustees from fully implementing the arbitration award.

III. ANALYSIS

[16] The specific issues of contract interpretation in this matter all relate to the meaning of section 10.05 of the Trust Agreement. In appellate terms, they may be described as follows:

(a) Did the judge err when he interpreted section 10.05 as permitting a Partner to serve meeting notices other than on the first day of every third January after January 1, 2004?

(b) Did the judge err when he interpreted section 10.05 as permitting a Partner to invoke the Mandatory Process without proposing an increase in the contribution rate?

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(c) Did the judge err when he interpreted section 10.05 as permitting someone other than a member of a Partner to provide notice to the other Partner?

[17] SAHO's appeal also asks (d) whether the judge erred by ordering the parties to "proceed to mediation and, failing agreement, to arbitration", since that relief was not sought by SAHO or the Unions (*Decision* at para 57).

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A. Did the judge err when he interpreted section 10.05 other than as permitting a Partner to serve meeting notices only on the first day of every third January after January 1, 2004?

[18] Although I find that the judge erred in law when he interpreted the Trust Agreement, I conclude that the errors did not affect his determination that section 10.05(a) does not mandate that a Partner give a meeting notice *only* on the first day of every third January after January 1, 2004. For ease of reference, the relevant language of section 10.05(a) is emphasised below:

> 10.05 (a) **Partner Meetings — Contributions and Benefits** - In the event that either Partner wishes to increase the rate of Contributions to the Plan, either to bring the contribution rate up to the Plan's current service costs, or to fund a benefit improvement, the Partner shall notify the other Partner of its desire to meet to discuss such changes, and the Partners shall meet and discuss the proposed changes (involving both the Contribution rate and any corresponding benefit improvements) in good faith. Failing agreement within thirty (30) days of the day either Partner notifies the other of a request for a meeting for the purpose of considering such changes, the mandatory mediation and arbitration provisions of this section 10.05 shall apply. Either Partner may notify the other under this section as of January 1, 2004, and on each third anniversary of that date, such that any increases that may be agreed to or ordered by an arbitrator under these provisions may be effective on the dates referred to in (f)(viii). It is acknowledged that amendments to the Act or other applicable legislation that have the effect of requiring the Plan to be amended to improve benefits are not subject to the process set forth in this Section 10.05.
>
> (Emphasis added)

[19] Under the heading "Does article 10.05(a) limit service of the Meeting Notice to the third anniversary of January 1, 2004?", the judge opened his analysis of the meaning of the highlighted sentence in section 10.05(a) by saying:

> [36] This question focuses on the meaning of the words "as of" in article 10.05(a). Do those words mean that the Meeting Notice must be given on that day only? Or do they mean the date is the deadline for notice? I find that the latter meaning is correct.

[20] SAHO submits that this was the wrong focus for the judge's analysis because the issue before him did not concern the meaning of the phrase "as of January 1, 2004", although it acknowledges that that phrase also has interpretive value. Rather, SAHO says the principal issue was the meaning of the phrase "on each third anniversary of that date", pointing out that that was how it had characterised the issue in the brief of law it had filed.

[21] Respectfully, I agree that the judge's narrow reformulation of the issue appears to have overlooked the interpretive value of the phrase "on each third anniversary of that date". I conclude that, by focusing on the phrase "as of January 1, 2004", the judge further erred in law because he failed to give effect to the plain and ordinary meaning of the words the parties had chosen to use in section 10.05(a). Nonetheless, the judge's assessment of the parties' mutual intention with respect to this aspect of the meeting notice requirements of section 10.05(a) is itself not so easily dismissed as erroneous.

[22] In his analysis, the judge properly recognised that section 10.05(f)(viii), which states that "[c]ontribution rates may not be increased until January 1, 2005, and then not more frequently than every three (3) years thereafter", assists with the determination of the meaning of the meeting notice requirements under section 10.05(a). His complete analysis of the issue was as follows:

> [39] The apparent purpose of this provision [i.e., section 10.05] and others is to allow changes to contribution rates and benefits, but limit the frequency of such changes to every third year. This limitation is no surprise since both employers and employees want certainty and stability of contribution rates.
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> [40] The Employers argued that the words "as of" before "January 1, 2004" meant that a Meeting Notice could only be provided on that single day, recurring every three years thereafter. One must ask what purpose would that serve? January 1 is a statutory holiday, so businesses are closed and many people are away on holidays. Combined with the Employers' assertion that only a member of a Partner Committee could provide notice and then only to a member of the other Partner Committee on that single day, the effect would be to discourage or prevent discussion of changes to the Plan. That the Trust Agreement intended such a result would be surprising and contrary to the general tenor and purpose of the Trust Agreement.
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> [41] The clear intent of the Trust Agreement is to allow and facilitate discussion of such changes by the Partner Committees. The Trust Agreement requires prompt meeting and, if no agreement is forthcoming, provides for speedy dispute resolution by mediation and arbitration.
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> [42] As set out above, articles 10.04 and 10.05 repeatedly require timeliness in meeting to discuss and reach agreement. For example, article 10.04 states "the Partners shall meet to discuss the matter within thirty (30) days of the notice." Article 10.05(a) states "Failing agreement within thirty (30) days of the day either Partner notifies the other of a request

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> for a meeting for the purpose of considering such changes, the mandatory mediation and arbitration provisions of this section 10.05 shall apply." Why the rush if the opportunity for the Partners to meet to discuss proposed changes was as restricted as the Employers argue? That answer is that it is not so restricted.
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> [43] The reasonable interpretation is that article 10.05, read in context of the entire Trust Agreement, allows either Partner Committee to give Meeting Notice anytime. The restriction is that any resulting change cannot take effect unless the Meeting Notice was given at least a full year before the next triennial (once every three years) date for changes to the Plan. Article 10.05(a) sets the first initial notification deadline as January 1, 2004, to allow in article 10.05(f)(viii) for a change in contribution rates on January 1, 2005. These deadlines then repeat every three years, such that the next notice deadline would be January 1, 2025, for change effective on January 1, 2026.
>
> [44] The point is that the Union Partner Committee was entitled to give notice at any time on or before January 1, 2025. In fact, the earlier the better to allow time for discussion between the Partner Committees and, failing agreement, to allow time for the mediation and arbitration process, so that any decision to change rates would both be properly considered and capable of implementation.
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> (Emphasis in original)

[23] I conclude that the judge's interpretation largely accords with the plain and ordinary wording of section 10.05(a), when that wording is read in the full context of that section and of the Trust Agreement as a whole. However, while I agree with the judge that section 10.04 requires timely meetings and discussions, section 10.05, which has a manifestly different function, does not – not until a triennial of January 1, 2004. One critical difference between the two provisions is that there is no obligation on a recipient Partner under section 10.05(a) to meet with the notifying Partner or to otherwise discuss a proposal put forward by the notifying Partner until the next ensuing third anniversary of January 1, 2004. In its most relevant parts, section 10.05 states:

> (a) … Either Partner may notify the other under this section as of January 1, 2004, and on each third anniversary of that date, such that any increases that may be agreed to or ordered by an arbitrator under these provisions may be effective on the dates referred to in (f)(viii).
>
> …
>
> (f)(viii) Contribution rates may not be increased until January 1, 2005, and then not more frequently than every three (3) years and thereafter.

[24] There is no palpable error in the judge's finding that sections 10.05(a) and (f)(viii) mean that changes to the contribution levels proposed by a Partner can only occur at three-year intervals, on a triennial of January 1, 2005. In the full context of section 10.05, the words "as of January 1, 2004, and on each third anniversary of that date" are plainly meant to establish a one-year cycle of meetings, discussion, mediation and arbitration (if necessary), commencing "as of January 1,

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2004," and concluding before January 1, 2005, and, if a Partner serves notice, recommencing "on each third anniversary of that date" and concluding before the next ensuing triennial of January 1, 2005. This interpretation follows from the interplay between sections 10.05(a) to (f) as well as section 10.06. In this regard, section 10.05(f)(viii) clarifies the parties' intention as being that, before each triennial of January 1, 2005, the Partners will have had the opportunity, whether voluntarily or under the Mandatory Process, to reach a binding resolution to any proposal made to increase the rate of contributions. I agree with the judge that the parties may choose to meet and to discuss such a proposal under section 10.04, but they are not mandated to do so under section 10.05 unless and until notice has been given under section 10.05(a) and the next ensuing triennial of January 1, 2004, has occurred.

[25] That said, while the judge understood the interplay between sections 10.05(a) and 10.05(f)(viii), his interpretation is palpably in error in that it otherwise ignores the effect of sections 10.05(b) through (f). In short, by stating that the Partners may give *effective* notice at any time and stating that the Mediation Notice was also "effective", the judge rendered the one-year cycle meaningless. Under his interpretation, any failure by the Partners to agree "within thirty (30) days *of the day either Partner notifies the other* of a request for a meeting for the purpose of considering such changes" means that the mandatory mediation and arbitration provisions could apply well outside the one-year cycle contemplated by the parties (section 10.05(a), emphasis added).

[26] Given its language and that of section 10.04, a meeting notice served under section 10.05, regardless of when it is served on the recipient Partner, can only become effective or binding on the recipient Partner on the next ensuing triennial of January 1, 2004. At that point, the Partners would have 30 days to reach an agreement on the proposal contained in the meeting notice, otherwise the matter would be resolved through the Mandatory Process, assuming notice is given under section 10.05(b).

[27] Although it could not override the language chosen by the parties, I can see no error in the judge's finding that SAHO's proposed interpretation of section 10.05(a) was not commercially reasonable – i.e., that the provision mandated that a notifying Partner effect service *only* on a January 1st. As the judge reasoned, a mandatory January 1st notice date comes with all sorts of

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practical problems, not least of which is, since it is always a statutory holiday, the uncertain availability of a means of effecting service and similar doubts about the availability of a member of the recipient Partner to accept service. It is unreasonable to think that the parties intended the narrow interpretation proposed by SAHO (*Toronto (City) v W.H. Hotel Ltd.*, [1966] SCR 434).

[28] The Unions argued that this Court should sustain the judge's interpretation of section 10.05(a). Nonetheless, they acknowledged in their factum that the Mandatory Process may be invoked on a date other than a triennial of January 1, 2004, "provided that the notice is 'as of' January 1", so that the one-year cycle contemplated by section 10.05 is maintained. I take this to be consistent with the interpretation set out in these reasons.

[29] To summarise, I find no palpable error in the judge's conclusion that a Partner may serve a section 10.05(a) meeting notice on the other Partner at any time. That said, the notice only becomes effective or binding for the purposes of section 10.05 on the next ensuing triennial of January 1, 2004. Commencing on that triennial, the Partners have 30 days to reach an agreement on the proposal contained in the meeting notice, otherwise the Mandatory Process will apply (see section 10.05(a)). This means that a mediation notice could not become an effective or a binding notice until 45 days after the effective date of the meeting notice to which it relates (see section 10.05(b)).

B. Did the judge err when he interpreted section 10.05(a) as permitting a Partner to invoke the Mandatory Process without proposing an increase in the contribution rate?

[30] The judge erroneously interpreted section 10.05(a) of the Trust Agreement as permitting a Partner to give notice without proposing an increase in the rate of contributions; however, I am satisfied that the UPC Meeting Notice proposed an increase in that rate.

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[31] Section 10.05(a) provides as follows in relevant part:

> 10.05 (a) **Partner Meetings — Contributions and Benefits** - In the event that either Partner wishes to increase the rate of Contributions to the Plan, either to bring the contribution rate up to the Plan's current service costs, or to fund a benefit improvement, the Partner shall notify the other Partner of its desire to meet to discuss such changes, and the Partners shall meet and discuss the proposed changes (involving both the Contribution rate and any corresponding benefit improvements) in good faith.…
>
> (Emphasis added)

[32] In addition, there are several definitions in the Trust Agreement that assist with the interpretation of this aspect of section 10.05(a), including:

> 2.07 **"Contributions"** shall mean sums of money paid or payable to the Trust Fund by a Member or Participating Employer in accordance with this Agreement, the Plan or a Participation Agreement.
>
> …
>
> 2.10 **"Employee"** shall mean any person or persons employed by a Participating Employer, and, where applicable, includes a former Employee.
>
> …
>
> 2.17 **"Member"** means a person who is an Employee and who has qualified for membership in the Plan.
>
> 2.18 **"Participating Employer"** shall mean an employer who is a member of SAHO at the date hereof (whether or not such employer remains a member of SAHO), or an employer who, subsequent to the date hereof, becomes a member of SAHO, and is required to make Contributions to the Fund in accordance with the terms of a Participation Agreement or such other written agreement, arrangement or practice as may be acceptable to the Trustees. The Board of Trustees, and any corporation controlled by them, shall also be Participating Employers.
>
> 2.19 **"Participation Agreement"** shall mean an agreement in writing between the Trustees and a Participating Employer, which among other things, binds the Participating Employer to this Agreement and the Plan and which also requires the Participating Employer to make Contributions to the Trust Fund. A Participation Agreement is attached as Schedule "2" to this Agreement.
>
> …
>
> 2.21 **"Plan**" shall mean the Saskatchewan Association of Health Organizations Retirement Plan set forth in Schedule "1" hereto, to be known as the Saskatchewan Healthcare Employees' Pension Plan from and after December 31, 2002 as amended from time to time, which Plan shall be registered and comply with the Act and the *Income Tax Act* (Canada) or successor legislation thereto.
>
> …
>
> 2.24 **"Trust Fund"** or **"Fund"** shall mean all of the assets of the Saskatchewan Association of Health Organizations Retirement Plan Trust Fund consolidated with all funds and assets received from time to time by way of Contributions, together with all increments, earnings and gains accruing from the administration of the said Trust Fund.

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> From and after December 31, 2002 the name of the "Fund" or "Trust Fund" shall be the Saskatchewan Healthcare Employees' Pension Plan Trust Fund.

[33] To summarise the analysis that follows, I am of the view that the judge's interpretation of section 10.05(a), which he principally expressed as a rejection of SAHO's proposition that a meeting notice must contemplate a contribution rate increase, contradicts the plain and unambiguous language of section 10.05(a) as well as the mutual intention of the parties as revealed by that provision when it is read in the context of the Trust Agreement as a whole.

[34] It is important to understand that the Trust Agreement is a contract that SAHO asked the judge to interpret. However, absent from the *Decision* is any reference to *Sattva* or the approach the Supreme Court of Canada has directed judges to employ when interpreting contracts. While that omission is not in and of itself an error, I am unable to read the *Decision* as adhering to or even recognising the dicta of *Sattva*. Here, I speak particularly of the "cardinal presumption" of contractual interpretation, which is that the parties to a contract are presumed to have intended what the text of the contract says (*Eli Lilly & Co. v Novopharm Ltd.*, [1998] 2 SCR 129 at para 56; see: *Sattva* at para 57; see, also: *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36 at para 73, [2021] 9 WWR 1). In *QHR Technologies Inc. v Niebergal*, 2022 SKCA 85, this Court explained:

> [24] Setting the surrounding circumstances to one side for the moment, under *Sattva* a court interpreting a contract must determine the intention of the parties based on the language used in the written document, adhering to the cardinal presumption that the parties have intended what they have written. This requires the interpreting court to read the text of the entire agreement, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms. …

[35] In the instant case, the fact that the words of the parties' agreement were overwhelmed in the judge's interpretation of section 10.05(a) is established by simply reading the introductory language of that section. There, the parties agreed that, if either of the Partners "wishes *to increase* the rate of Contributions to the Plan", it must notify the other Partner of its "desire to meet to discuss *such changes*". Following that, the Partners must "meet and discuss the *proposed changes* (involving both the Contribution rate and *any corresponding benefit improvements*) in good faith" (emphasis added).

[36] The error occurred early in the *Decision*. Before setting out his interpretation of section 10.05(a), the judge broke down section 10.05 into steps and timelines. In doing so, he

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retitled the section, replacing the title chosen by the parties – i.e., "10.05(a) Partner Meetings — Contributions and Benefits" – with his own title, namely, "Article 10.05(a) – meeting of Partner Committees *to discuss changes*" (at para 35, emphasis added). Then, under the steps he identified, the judge described the purpose of section 10.05(a) as allowing either Partner to "initiate discussion of proposed changes" and "to meet and discuss proposal [*sic*] in good faith" (at para 35). The judge continued this thread when he interpreted section 10.05(b) as allowing a Partner "*seeking change*" to initiate mediation and arbitration under the Mandatory Process (at para 35, emphasis added). This theme of good faith cooperation runs throughout the *Decision*, where the judge interpreted the Trust Agreement as evidencing the parties' mutual intention that they ought to be able to meet and discuss in good faith *any proposed changes* to contributions and benefits, whether that entailed an increase or decrease, at any time.

[37] For example, the judge variously described section 10.05 and the Trust Agreement as more broadly affording the Partners the opportunity to "discuss proposals for change to contribution rates and benefits" (at para 8); as containing an "express requirement …that the Partner Committees meet and discuss proposed changes 'in good faith'" (at para 32); as contemplating "steps and timelines for the Partner Committees to discuss proposed changes to contribution rates and benefits and for dispute resolution by mediation and arbitration where the Partner Committees cannot agree" (at para 35); and as providing and allowing for "changes to contribution rates and benefits" (at para 39). Elsewhere, when considering the timing of notices under section 10.05 and referring generally to any changes to the rate of contributions, the judge stated that, "[t]he clear intent of the Trust Agreement is to allow and facilitate discussion of such changes by the Partner Committees" (at para 41). Further, when the judge rejected SAHO's interpretation of section 10.05, he did so in these terms:

> [24] The Unions' position is that the Employers' position takes an unduly restrictive interpretation of the Trust Agreement with respect to the notice requirements for the Partner Committees to meet and to refer a dispute between the Partner Committees to mediation. *The Employers' construction of article 10.05 in this regard is contrary to both the words and purpose of the Trust Agreement to encourage discussion of proposed changes and speedy resolution of disputes by providing a flexible path to mediation and arbitration when the Partner Committees are unable to reach agreement.*
>
> …
>
> [40] The Employers argued that the words "as of" before "January 1, 2004" meant that a Meeting Notice could only be provided on that single day, recurring every three years thereafter. One must ask what purpose would that serve? January 1 is a statutory holiday,

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> so businesses are closed and many people are away on holidays. Combined with the Employers' assertion that only a member of a Partner Committee could provide notice and then only to a member of the other Partner Committee on that single day, *the effect would be to discourage or prevent discussion of changes to the Plan. That the Trust Agreement intended such a result would be surprising and contrary to the general tenor and purpose of the Trust Agreement*.
>
> (Emphasis added)

[38] When it came time to interpret section 10.05(a) itself, the judge did not seek to determine the meaning of the phrase "to increase the rate of Contributions to the Plan"; rather, he incorrectly identified the question of interpretation as focusing on *the proposal* submitted under the UPC's Meeting Notice, when that notice could have had no bearing on what the parties' intended by section 10.05(a) at the time of contract formation (*Thunder Bay (City) v Canadian National Railway Company*, 2018 ONCA 517 at paras 61 and 65, 424 DLR (4th) 588; and *Kilitzoglou v Curé*, 2018 ONCA 891 at paras 57–58, 143 OR (3d) 385; see also *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 4, [2017] 1 SCR 688). The judge then rejected SAHO's proposition that a meeting notice under section 10.05(a) must propose to increase the contribution rates because, in his assessment, that would mean that the parties "intended to discourage proposals from the Partner Committees" in circumstances where, "[a]s discussed above, such intent would be contrary to the general thrust of the agreement" (at para 46).

[39] After referring to the actuarial aspects of the operation of pension plans in general, the judge concluded that the content of the UPC's Meeting Notice was "sufficient and effective" for the purposes of section 10.05(a) (at para 49). The entire analysis in the *Decision* under the heading "Does article 10.05(a) require the Meeting Notice propose a contribution rate increase" was as follows:

> [45] This question focuses on the Union Partner Committee's proposal submitted under cover of the letter of February 13, 2023. That proposal, titled "SHEPP Union Partner Proposal: Security for SHEPP Retirees, Current & Future" proposes benefit improvements (indexing of pensions) funded by surpluses. The letter does address contribution rates, stating "these improvements can be implemented *without increases to employer or member contribution rates*." (Emphasis in original) (Affidavit of Richard Phillips sworn December 5, 2023, Exhibit "I").
>
> [46] The Employers argued that article 10.05(a) limits any proposal to one which will "increase the rate of Contributions to the Plan". If accepted, then again one would conclude that the drafters of the Trust Agreement intended to discourage proposals from the Partner Committees. As discussed above, such intent would be contrary to the general thrust of the agreement.

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> [47] Contribution rates and benefits are inseparable in pensions. Contribution rates must be sufficient to fund future benefits. Put simply, past and present contributions pay for future benefits. To ensure the long-term health of pension plans, there are regular actuarial studies and reports which recommend changes to contribution rates or benefits or both. In this context, the Partner Committees must consider contribution rates when discussing benefit improvements. To do otherwise would be to ignore reality.
>
> [48] The Union Partner Committee's proposal does refer to contribution rates. Whether the funding part of its proposed benefit improvement (from surpluses) was realistic would be a necessary topic for discussion at the meeting of the Partner Committees or, failing agreement, at mediation or arbitration.
>
> [49] I reject the Employers' position that the proposal was deficient. It was sufficient and effective.
>
> (Emphasis in original)

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[40] As is immediately apparent, the judge's reasoning fails to interpret section 10.05(a) at all and, specifically, fails to give any meaning to the opening language of that provision. Respectfully, the judge's implicit conclusion – that a Partner *could* provide a meeting notice under section 10.05(a) *without* expressing a wish "to increase the rate of Contributions to the Plan" also contradicts or ignores how the remainder of section 10.05(a) is worded. It effectively reads the adjective out of the phrase "to meet to discuss *such* changes" and reads the article and adjective out of the phrase "meet and discuss *the proposed* changes". In operative terms, the judge's interpretation neutralised the specific meaning of "to increase the rate of Contributions" and the noun *changes* in section 10.05(a). There is no possible grammatical meaning of section 10.05(a) other than that the Mandatory Process may only be invoked where a Partner "wishes to increase the rate of Contributions to the Plan".

[41] With respect to their overall intention, the parties quite obviously meant for section 10.05 to establish a narrow and restrictive gateway into the Mandatory Process. I surmise that was in part because the changes it contemplates otherwise fall within the Trustees' powers, and the Mandatory Process involves binding mediation and arbitration upon the failure of the Partners to agree on an increase in the rate of contributions.

[42] Respectfully, the judge's understanding that section 10.05 was added to facilitate the Partners' discussion on *any* changes is refuted by the overall tenor and intent of the Trust Agreement. For example, without a narrow gateway, section 10.05 would unnecessarily duplicate sections 4.03 and 10.04 of the Trust Agreement. Those sections respectively permit the Partners to agree in writing to amend the Plan or to meet and discuss *anything*:

> 4.03 The Partners may agree in writing to amend the Plan in any respect. Upon their agreement, they shall provide a written direction to the Trustees to adopt the amendment, and the Trustees shall adopt and file the amendment with all appropriate regulatory and tax authorities provided that the Trustees shall not be required to approve and implement a Plan amendment if it would necessarily result in the revocation of the Plan's registration with a regulatory or tax authority or would result in the Plan not remaining in compliance with applicable law.
>
> …
>
> 10.04 **Partner Meetings - General** — Either Partner may notify the other of its desire to meet to discuss any matter in relation to the Plan or Fund, and the Partners shall meet to discuss the matter within thirty (30) days of the notice. The Partners shall make their best efforts to resolve the matter in a timely and mutually satisfactory way.
>
> (Emphasis added)

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[43] Moreover, the judge's interpretation overlooks the fact that the very concerns about the general or actuarial operation of pension plans that the judge referenced at paragraph 47 of his reasons (when validating his interpretation of section 10.05) are expressly addressed elsewhere in the Trust Agreement in terms that explicitly or implicitly preclude resolution under section 10.05. For example, under the heading "Article XII – Funding", section 12.01 addresses actuarial valuations and the establishment and elimination of actuarial contingency reserves that "shall be irrelevant to and have no bearing upon any arbitration under Section 10.05".

[44] In addition, section 12.02, entitled "Unfunded Liability or Solvency Deficiency", states that, if an actuarial valuation "discloses an unfunded liability or solvency deficiency, the Actuary shall advise the Trustees as to the adjustments to the Contributions of Members and Participating Employers that are necessary to fund any such unfunded liabilities or solvency deficiency". Section 12.02 goes on to describe how unfunded liabilities or solvency deficiencies are to be addressed by stating that the *Trustees* must "require the Participating Employers and the Members to make the additional payments required by this section, and shall adjust their Contribution rates (by Plan amendment or otherwise) accordingly". Section 12.03, which deals with circumstances where an actuarial valuation discloses that the combined contributions of employers and employees "is less than the current service cost and there is insufficient surplus to cover the shortfall for the subsequent three years", similarly states that the *Trustees* shall "require the Participating Employers and the Members to make the additional payments required by this section, and shall adjust their Contribution rates (by Plan amendment or otherwise) accordingly". The terms of sections 12.02 and 12.03 do not contemplate or allow for discussion between the

Partners on such changes to contribution rates. Only Partner-proposed changes that increase the contribution rate "to bring the contribution rate up to the Plan's current service costs, or to fund a benefit improvement" are left to the Partners under section 10.05.

[45] Furthermore, while section 4.02 of the Trust Agreement states that any fundamental change to SHEPP requires "the agreement of the Partners in writing", the definition of *Fundamental Change* does not include "changes in the level of Contributions required pursuant to sections 12.02 and 12.03" (section 2.14). Section 4.02, when read together with the definition of *Fundamental Change* in section 2.14(b), states that changes to "the level of Contributions by Participating Employers and Members" may be made pursuant to the dispute resolution mechanism set out in Article VII. Notably, the dispute resolution mechanism under Article VII addresses deadlocks at the Trustee decision-making level. There is, again, no mention of the Mandatory Process made available to Partners under section 10.05 of the Trust Agreement.

[46] Unfortunately, the judge seems to have painted out large tracts of the Trust Agreement with the broad brush of a misunderstanding as to its overall intent because his interpretation overlooks sections 2.17, 4.02, and 10.04, the express gateway language in section 10.05, as well as the whole of Articles VII and XII.

[47] In summary, I respectfully conclude the judge's interpretation of section 10.05 is not grounded in the plain language of the parties' agreement. Section 10.05(a) unambiguously states that "[i]n the event that either Partner wishes *to increase* the rate of Contributions to the Plan" (emphasis added), it may give notice to the other Partner invoking the Mandatory Process. The whole of the parties' agreement consistently supports an interpretation of section 10.05 whereby a notifying partner must propose an increase in the rate of contributions to validly invoke the Mandatory Process described under that section.

[48] All of that being said, I also conclude that the judge erred in his interpretation of the UPC's Meeting Notice. As I understand his reasons, the judge found that the Meeting Notice did not propose an increase in the rate of contributions. On the evidence however, I find that the UPC's Meeting Notice proposed changes to benefits that required the Partners to contemplate increasing the rate of contributions.

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[49] Although the judge noted that the UPC's Meeting Notice proposed "benefit improvements (indexing of pensions) funded by surpluses" and addressed "contribution rates", he unfortunately truncated his reference to that notice, by only stating that it said that "these improvements can be implemented *without increases to employer or member contribution rates*" (emphasis in the Meeting Notice). Whereas the Meeting Notice stated in full as follows:

> The funding health of SHEPP has been improving significantly in recent years. The SHEPP Board of Trustees have succeeded in addressing the plan's longstanding deficit in a manner that now presents plan members and stakeholders with the prospect of finally achieving a surplus position within the next few years.
>
> One of the consequences of so many years without any surpluses to allocate has been a long period of nearly 20 years with no pension benefit increases at all for retirees. The practice of providing roughly 75% of the rate of inflation (CPI) as an annual increase for SHEPP retirees was discontinued after 2003. Moreover, the plan has never provided any guarantee of indexation nor specified funding for this important security. In the context of recent increases in the rate of inflation, this gap in SHEPP plan design has become an urgent concern for the plan's Union Partners.
>
> In this light, the Union Partner Committee proposes the following two amendments to the SHEPP Plan Text for consideration by the Employer Partner Committee (as provided for under Section 10.05(a) of the SHEPP Trust Agreement and Section 4.03 of the SHEPP Plan Text):
>
> > 1. **Greater security for current retirees** - Section 7 of the SHEPP Plan Text will be amended to provide a new section that adds a conditional indexation mechanism that automatically allocates going concern plan surplus to the provision of annual increases to the pension benefits of SHEPP retirees at a level of 75% of the rate of inflation (as measured under the Consumer Price Index), or such smaller level as can be afforded from "available surplus". Available surplus will be defined as any going concern surplus reported by the plan actuary above a going concern funded ratio of 105%, inclusive of all margins for conservatism established by the Board of Trustees.
> >
> > 2. **An indexation guarantee for current active members** - Section 7 of the SHEPP Plan Text will be amended to provide a new section that adds a fully funded guarantee of indexation to be provided in respect of future pensionable service earned at a rate of 75% of the rate of inflation (as measured under the Consumer Price Index).
>
> The Union Partners Committee proposes that these amendments be scheduled for implementation on the date that coincides with that date on which an actuarial valuation report that is to be filed with plan regulators shows that the plan has achieved a funding level at which all special payments can be discontinued. Based on actuarial cost estimates provided by the SHEPP administration, we can project that with such timing these improvements can be implemented *without increases to employer or member contribution rates*.
>
> In accordance with Section 10.05 (a) of the SHEPP Trust Agreement, the Union Partner Committee hereby submits this proposal to the Employer Partner Committee and proposes

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> that a meeting of the Union and Employer Partner Committees be convened as soon as practicable to discuss and, we hope, reach agreement on it.
>
> (Italic emphasis in original; underlining emphasis added)

[50] It is clear from the foregoing that the UPC proposal sought two changes to SHEPP, respectively benefiting retirees and active members, to address inflation by adding indexation for each group tied to the Consumer Price Index. While the UPC's proposal is described as involving the allocation of "going concern plan surplus[es]" to the conditional provision of annual increases to retiree pension benefits, its proposal for "a fully funded guarantee of indexation" for current active members is silent on how that benefit improvement would be funded. Nonetheless, the UPC projected that, if the two proposed changes were made coincident with an actuarial valuation report showing that SHEPP had addressed an existing funding deficiency, then the contribution rate reduction consequent to that event could offset the contribution rate increase necessitated by the proposed benefit improvements. More importantly, the UPC proposal began by recognising that there is only a "prospect of finally achieving a surplus position within the next few years".

[51] It is also important to understand that, without the Partners' agreement to use a surplus in the way the UPC proposed, the use to which a going-concern surplus may be put is expressly left to the Trustees discretion under the Trust Agreement. Section 12.05 states that the Trustees may use such surpluses for "any of the following purposes":

> (a) to improve Benefits under the Plan in accordance with Section 8.06(a);
>
> (b) to establish a contingency reserve; and
>
> (c) to reduce the level of required Contributions to the Plan (provided always that the ratio of Employer and Member Contributions remains at 1.12 to 1), …

[52] As I read it, the principal thrust or objective of the UPC Meeting Notice was to raise the issue of inflation and commence discussions to obtain the EPC's agreement as to how to address a longstanding "gap in SHEPP plan design" that had "become an urgent concern for the plan's Union Partners". In that regard, the UPC's proposal cannot be read as being contingent upon the benefit improvements being implemented *without* increasing the rate of contributions. When properly understood, the UPC's Meeting Notice establishes that the proposed benefit improvements were important enough to the Unions for them to invoke the Mandatory Process without knowing whether there would be a going-concern surplus. In the absence of agreement, that process compelled the Partners to arbitrate to a final decision about benefits indexation that

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would be binding on the Partners and the Trustees (see section 10.06 above). One way or another, indexation would be considered, although the UPC recognised that, if it were agreed upon, then there *might* be a way for the Partners to avoid a resultant increase in the rate of contributions.

[53] Put another way, the UPC initiated a process under which pension benefits indexation had to be considered and resolved but where the issue of offsetting any resultant increases in the rate of contributions against a prospective going-concern surplus was itself up in the air, left to be determined by agreement, mediation or arbitration, or by an exercise of the Trustees' discretion under section 12.05. The corollary being that, absent a going-concern surplus or absent implementation of the UPC's proposal being conditional upon such a surplus, the benefit improvements, if agreed upon, would have to be funded some other way, presumably by an increase in the rate of contributions. In my view, the judge erred by conflating the UPC's proposal that the Partners consider indexation – which is a proposal for an increase in benefits – with the UPC's proposal for how that increase might be funded.

[54] In short, I interpret the UPC Meeting Notice as setting forth a proposal for benefit improvements that raised the possibility of increases to the rate of contributions, thereby satisfying the particular precondition under section 10.05(a) that a notifying Partner "wishes to increase the rate of Contributions to the Plan … to fund a benefit improvement".

C. Did the judge err when he interpreted section 10.05 as permitting someone other than a member of a Partner to provide notice to the other Partner?

[55] I find no error in the judge's opinion that, in the circumstances of this matter, the validity of the Mediation Notice was not affected by the fact that Mark Janson, the individual who authored the Mediation Notice on behalf of the UPC, was not a member of that Partner committee. While this issue required the judge to interpret section 10.05, his opinion relied most heavily on the facts of this matter rather than the result of his interpretation of the Trust Agreement.

[56] To start, I must identify Mr. Janson's role. He is a senior pensions officer employed by CUPE; he is not, however, CUPE's designate on the UPC or otherwise a member of that Partner. It is not disputed that the UPC's Mediation Notice was delivered via an email dated November 17,

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2023, sent from Mr. Janson's email account to that of Mr. Phillips, chair of the EPC and a respondent in this appeal.

[57] With that understood, I would remind that the issue upon which SAHO sought the Court's opinion, which it set out twice in its originating notice, was whether the UPC:

(a) "has provided notice to the [EPC] pursuant to s. 10.05(b) of the Trust Agreement"; and

(b) "gave notice to the [EPC] under s. 10.05(b) through the email of Mr. Janson".

[58] To better define the issue in this aspect of its appeal, SAHO does not dispute that Partners may engage an agent to provide a mediation notice pursuant to section 10.05(b) of the Trust Agreement. It submits, however, that Mr. Janson's authority to act on behalf of the UPC had not been communicated to the EPC. It argues that, because the EPC was unaware that Mr. Janson was authorised by the UPC to serve it with a mediation notice, the Mediation Notice was invalid or ineffective.

[59] Specifically, SAHO submits that the Unions did not adduce any evidence before the judge to the effect that the UPC had communicated the fact that it had delegated its authority to deliver a mediation notice pursuant to section 10.05(b) to Mr. Janson. Which is, as I understand it, a submission that the judge either erred in law, by making a finding of fact for which there was no supporting evidence, or palpably erred when he inferred that "the written notice seeking mediation would have come as no surprise to the [EPC]", that "No one was misled", and that "There was no misunderstanding" (at para 54).

[60] Starting with the Trust Agreement, the provisions that the judge understood as applying to mediation meeting notices do not detail any specific requirements about who may or may not author or serve a notice on behalf of a Partner. Aside from satisfaction of the preconditions in sections 10.05(a) and (b), the latter section simply states that "either Partner may notify the other Partner of its desire to submit the matter to mediation". Though not disputed in this appeal, I confirm that the judge correctly held that there is nothing in the Trust Agreement that "prevents an agent or employee from authoring or sending notice on behalf of a Partner Committee"

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(at para 51). Although the judge answered a different question than that posed by SAHO, there is no error in the following statement of his opinion:

> 3. Does article 10.05(b) require the Mediation Notice be given by a member of a Partner Committee? – No

[61] Lastly, any question in this appeal as to whether there was evidence supporting the judge's finding that the UPC had communicated to the EPC the fact it had delegated its authority is, in my respectful view, dispelled by the judge's reasons in the paragraphs immediately preceding his finding in that regard:

> [52] From the materials filed, the Union Partner Committee told the Employer Partner Committee that it intended to invoke the dispute resolution mechanism in article 10.05 if no agreement was reached by November 17, 2023. This was stated both in writing, in the letter of September 15, 2023, from Karen Wasylenko, then Chair of the Union Partner Committee to Richard Phillips, Chair of the Employer Partner Committee, and verbally, at the meeting of November 15, 2023.
>
> [53] The Employers do not dispute that Mark Janson was acting on behalf of the Union Partner Committee when he provided written notice in his email of November 17, 2023. Mr. Janson attended the September 14, 2023, meeting between the Partner Committees (Affidavit of Taylor Bodnarchuk, para. 3 and Exhibit "A" minutes) and was copied on the Wasylenko letter of September 15, 2023. Nor is it disputed that the email notice was received by Richard Phillips in his capacity as Chair of the Employer Partner Committee.

[62] Accordingly, I am of the view that the judge did not err in law or fact when answering the second iteration of the question SAHO had put to the Court – i.e., that "the [UPC] gave notice to the [EPC] under s. 10.05(b) through the email of Mr. Janson". This conclusion is qualified by the interpretation of section 10.05 at paragraph 27 of these reasons.

D. Did the judge err by ordering the parties into mediation and arbitration?

[63] I conclude that the judge exceeded his jurisdiction by granting relief *suo moto* and without regard for Rule 1-4(2) of *The King's Bench Rules* when he ordered the following remedy:

> **OPINION AND DIRECTION**
>
> [57] For the reasons stated above, I find that the Meeting Notice given on February 13, 2023 and the Mediation Notice given on November 17, 2023 by the Union Partner Committee to the Employer Partner Committee were both effective. I therefore direct that the parties proceed to mediation and, failing agreement, to arbitration as provided in article 10.05 of the Trust Agreement.
>
> [58] I will remain seized for the purposes of providing any further direction.

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[64] I start by acknowledging that judges of the Court of King's Bench have the jurisdiction "to hear and determine any action or matter in the court" (*The King's Bench Act*, SS 2023, c 28, s 3-1(4)). However, the authority of judges of the Court of King's Bench is not without its limitations. Indeed, one limitation that applies in the circumstances of this matter is directly addressed in *The King's Bench Rules*:

> **General authority of the Court to provide remedies**
>
> 1-4(1) The Court may do either or both of the following:
>
> (a) give any relief or remedy described or referred to in *The King's Bench Act*;
>
> (b) give any relief or remedy described or referred to in or under these rules or any enactment.
>
> (2) The Court may grant a remedy whether or not it is claimed or sought in an action on providing the parties with:
>
> (a) a notice of its intention to grant a remedy; and
>
> (b) an opportunity to respond.
>
> (3) Nothing in these rules prevents or is to be interpreted as preventing the Court, as a superior court, from exercising its inherent jurisdiction.
>
> (Emphasis added)

[65] In *Onion Lake Cree Nation v Stick*, 2020 SKCA 101, [2021] 2 WWR 614, Leurer J.A. (as he then was) wrote that "[i]t is inherent in [Rule 1-4(2)] that a party must be given notice and an opportunity to respond, before a Court grants relief that goes beyond that which has been requested by the moving party" (at para 75).

[66] As noted, the matter before the judge was commenced under an originating application filed pursuant to Rule 3-49 of *The King's Bench Rules*. In relevant part, Rule 3-49 provides as follows:

> **Actions started by originating application**
>
> **3-49**(1) An action may be started by originating application if the remedy claimed is:
>
> (a) the opinion or direction of the Court on a question affecting the rights of a person with respect to the administration of the estate of a deceased person or the execution of a trust;
>
> …
>
> (d) the determination of rights that depend solely on the interpretation of:
>
> (i) a deed, will, contract or other instrument; or
>
> (ii) an enactment, order in council or municipal bylaw or resolution;

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> …
>
> (i) with respect to any matter where it is unlikely that there will be any material facts in dispute.
>
> …
>
> (4) An originating application must:
>
> …
>
> (c) state the remedy sought; …

[67] In this case, in compliance with Rule 3-49(4)(c), SAHO stated that it had brought the Rule 3-49 application seeking the opinion and direction of the Court only with respect to the validity of the Meeting Notice and the Mediation Notice pursuant to the Trust Agreement. SAHO specifically identified the remedy it sought from the Court in these terms:

> **The applicants seek the following remedy or order:**
>
> 1. The Applicants, 3sHealth, Saskatchewan Health-Care Association (conducting business under the name of "Saskatchewan Association of Health Organizations") ("SAHO"), and Richard Phillips, Leanne Ashdown, John Knoch, Nadia Maruschak-Clay, Kelly Miner, Sara Knowles, and Lynn Sanya (collectively, the "Employer Partner Committee") seek the opinion and/or direction of the Court with respect to whether:
>
> (a) Janice Platzke, Bashir Jalloh, Karen Schmid, Tanya Schmidt and Donna Trainor, being members of the Union Partner Committee (collectively, the "Union Partner Committee") were entitled to provide notice to the Employer Partner Committee pursuant to Section 10.05 of the Agreement and Declaration of Trust made between SAHO and Canadian Union of Public Employees, Health Sciences Association of Saskatchewan, Retail, Wholesale and Department Store Union, Saskatchewan Government and General Employees' Union, Saskatchewan Union of Nurses and Service Employees' International Union (collectively, the "Unions") as of December 31, 2002, as amended (the "Trust Agreement"); and
>
> (b) the Union Partner Committee has provided notice to the Employer Partner Committee pursuant to s. 10.05(b) of the Trust Agreement.
>
> …
>
> 19. The Applicants seek the opinion and/or the direction of the Court respecting whether:
>
> (a) the Union Partner Committee was entitled to give notification of the Proposal to the Employer Partner Committee pursuant to s. 10.05 and on a date other than the "third anniversary" of January 1, 2004; and
>
> (b) the Union Partner Committee gave notice to the Employer Partner Committee under s. 10.05(b) through the email of Mr. Janson.

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[68] To be clear about this, neither SAHO nor the Unions asked the Court for injunctive relief or to otherwise take steps to ensure that the parties *carried out* their contractual obligations under the Trust Agreement, and neither side asked the judge to convert their contractual commitments into court-ordered obligations.

[69] As has been addressed above, the judge provided his opinion on the two questions upon which SAHO sought the Court's advice (as well as answering other questions), thereby advising the parties when and how the Mandatory Process could be triggered. He plainly exceeded his jurisdiction, however, when he directed them to proceed to mediation and to arbitration pursuant to the Mandatory Process and by seizing himself of the matter "for the purposes of providing any further direction" (at para 58).

[70] The conclusion that the judge exceeded his jurisdiction is readily drawn from the face of SAHO's originating application because, once the judge had provided the opinions requested, there was nothing left to be determined or directed thereunder. It is not disputed that the injunctive relief of ordering the parties into mediation and arbitration was unsolicited, granted without notice to the parties, and imposed without the opportunity for them to respond to it or to otherwise address it. Although the parties had intended that this matter be concluded by the Court providing an advisory opinion about the meaning of a single provision of a trust agreement, the relief the judge granted effectively perpetuated their dispute by imposing an extracontractual mechanism under which they could seek further assistance from the judge to enforce performance under the Trust Agreement. In that regard, I observe that s. 6-4(1) of *The King's Bench Act* states as follows:

> **Multiplicity of proceedings avoided**
>
> **6-4**(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:
>
> (a) all issues in controversy between the parties are determined as completely and finally as possible; and
>
> (b) a multiplicity of legal proceedings concerning the issues is avoided.
>
> (2) Relief pursuant to subsection (1) may be granted either absolutely or on any terms and conditions that a judge considers appropriate.
>
> (Emphasis added)

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[71] Lastly, the relief granted injects the Court into contractually defined mediation and arbitration proceedings where the Court's involvement was not contemplated. In argument in this appeal, SAHO went so far as to suggest that, if either Partner decided not to engage in mediation or arbitration proceedings, they could be held in contempt of court due to the *Decision*. While that may be a bit of hyperbole, it serves to underline the error.

[72] In my assessment, this matter is similar to the circumstances addressed in *Kirk v Kirk*, 2017 SKCA 97, [2018] 1 WWR 123, where, when interpreting Rule 1-4 of *The Queen's Bench Rules*, Richards C.J.S. wrote:

> [27] The reality, however, is that the Chambers judge went too far in his effort to help bring the matters before him to a resolution. Rule 1-4 does indeed indicate that a judge may grant a remedy whether or not it is claimed or sought in the proceedings. This, clearly, reflects the view that judges have a responsibility to ensure that a multiplicity of proceedings is avoided if possible and that controversies are resolved as fully, finally and fairly as circumstances allow.
>
> [28] Nonetheless, and at the same time, Rule 1-4 also expressly preserves and acknowledges the rights of parties to be heard. …Rule 1-4 empowers a judge to grant a remedy that has not been claimed or sought but *only* if (a) notice of his or her intention in this regard has been given to the parties, and (b) the parties had been afforded an opportunity to respond.
>
> [29] This important qualifier on a judge's right to grant unsolicited remedies reflects the principle that a fair hearing is one where the parties know the case they have to meet and have an opportunity to present evidence and make submissions in relation to it. This is a fundamental concept, and it cannot be sacrificed in the quest for efficiency or the speedy resolution of disputes. …

[73] Accordingly, I conclude that it was an error of law and of jurisdiction for the judge to have granted relief beyond what the parties had requested without notifying them of his intention to do so and without giving them the opportunity to respond (*Scott v Vanston*, 2016 SKCA 75 at para 70, [2016] 9 WWR 256).

IV. CONCLUSION

[74] I would allow the appeal, lift the stay of execution imposed in this matter, set aside the *Decision* and the relief granted thereunder, and direct that the Trust Agreement be interpreted in accordance with these reasons.

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[75] Given that the parties have met with mixed success in this Court and because judicial interpretation of the Trust Agreement benefits them both, I would order that they bear their own costs in the Court of King's Bench and in this Court, except that SAHO shall have the costs of its application to impose a stay of execution, which I would fix at $1,000.

"Caldwell J.A."

Caldwell J.A.

I concur. "Schwann J.A."

Schwann J.A.

I concur. "Bardai J.A."

Bardai J.A.

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