Financial Services Tribunal

Citation: *Board of Trustees of the IWA – Forest Industry Pension Plan v. Superintendent of Pensions*, 2023 BCFST 3

Decision No.: FST-PBA-22-A001(a)

Decision Date: 2023-05-26

Method of Hearing: Conducted by way of written submissions concluding on June 24, 2022

Decision Type: Final Decision

Panel: Stacy Robertson, Chair

Appealed Under: Section 127 of the *Pension Benefits Standards Act*, SBC 2012 c. 30

Between:

Board of Trustees of the IWA – Forest Industry Pension Plan

Appellant

And:

Superintendent of Pensions

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Marko Vesely, Counsel
Murray T.A. Campbell, Counsel

For the Respondent: Adam Ngan, Counsel
Danny Urquhart, Counsel

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THE APPEAL

[1] The Board of Trustees of the IWA – Forest Industry Pension Plan (the "Trustees" or the "Appellant" and the "Plan") seeks an amendment to its Plan to deal with the consequences of the funding of benefits if a participating employer departs the Plan (the "Amendment"). The Trustees passed Amendment 10 and filed it with the Superintendent of Pensions (the "Superintendent" or the "Respondent") seeking acceptance of the Amendment.

[2] Section 18 of the *Pensions Benefits Standards Act*, SBC 2012 c. 30 (the "PBSA") requires any amendments to the plan text document of a pension plan to be filed with the Superintendent. Pursuant to section 22 of the PBSA, the Superintendent, upon receipt of amendments under section 18, must either accept or reject the amendments. The Superintendent can reject an amendment if it does not comply with the PBSA or the regulations thereunder.

[3] On March 31, 2021, the Superintendent received an application pursuant to section 18 of the PBSA to register the Amendment to the Plan.

[4] On November 2, 2021, the Superintendent, pursuant to section 22(2)(a) of the PBSA, refused to register the Amendment to the Plan and, pursuant to section 113(1) of the PBSA, directed the Trustees of the Plan to bring the existing Article 23 of the Plan into compliance with the PBSA and the Pension Benefits Standards Regulation (the "PBSR") by January 31, 2022 (the "Initial Decision").

[5] On November 30, 2021, pursuant to section 126(1) of the PBSA, the Trustees filed a notice of objection of the Superintendent's Initial Decision.

[6] On February 22, 2022, the Superintendent provided a Notice of Reconsideration of its Initial Decision pursuant to section 126(2) of the PBSA confirming the Initial Decision and giving the Trustees until April 22, 2022 to amend Article 23 (the "Decision").

[7] On March 23, 2022, the Trustees appealed the Decision of the Superintendent pursuant to section 127 of the PBSA to the Financial Services Tribunal (the "FST" or the "Tribunal") appealing both the rejection of the Amendment and the direction to bring Article 23 of the Plan into compliance with the PBSA and PBSR.

[8] On April 25, 2022, the Decision was stayed by this Tribunal pending final resolution of the appeal, based on the agreement of the parties, on the conditions that that Appellant not administer contested portions of the Plan in the event of a potential employer withdrawal and notify the Respondent in the event of a potential employer withdrawal.

BACKGROUND

The Plan and the Amendment

[9] The Plan is between the United Steelworkers Wood Council Locals (the "Union"), a successor to the International Woodworkers of America, and employers in the forest industry in respect of their employees for whom the Union is the bargaining agent.

[10] The Plan is a collectively bargained multi-employer pension plan ("CBMEP") as defined in section 1 of the PBSA. The Plan is also a target benefit plan as defined in section 1 of the PBSA. Members of a target benefit plan, unlike members of a defined benefit plan, are not guaranteed a certain benefit amount upon termination of membership. Instead, a benefit amount is targeted as an amount that is intended to be payable which may be reduced under section 20(2) of the PBSA below the target or intended benefit if the level of funding cannot support the target benefit.

[11] The Plan is administered by a board of trustees with an equal number representing the Plan members and the Plan's participating employers (previously defined as the "Trustees"). The Trustees passed the Amendment which is the subject matter of this appeal.

[12] The Amendment provides for a reduction of 25% of the accrued pension of an employee of an employer who withdraws from the Plan through decertification, or where the Union is no longer the bargaining agent for the employees, or the Union and the employer agree to terminate the employer's participation in the Plan (herein referred to as a "withdrawing employer" or "withdrawing employee").

The Superintendent's Decision

[13] The Superintendent found that the Amendment did not comply with sections 20 and 32 of the PBSA or section 20 of the PBSR. The PBSA and PBSR prescribe and limit the circumstances in which accrued benefits may be reduced and the Superintendent did not find that the Amendment applied to any of those circumstances. The Superintendent found that if the Amendment was applied and a member of a withdrawing employer's pension entitlement was reduced by 25% then the Plan would not be compliant with the PBSA and PBSR, particularly section 32(1) of the PBSA which requires unreduced pensions at termination of plan membership.

[14] The Superintendent states that this finding is not in conflict with section 93 of the PBSA, which speaks to "the consequences to the funding of benefits" whereas section 32 speaks to the benefits that are payable. The Superintendent says that when a participating employer withdraws then the Plan has the option to allow the members of a withdrawing employer to remain in the Plan with benefits determined at the date of withdrawal or to force the members out. If a decision is made to force the withdrawing members out of the

plan, then the provisions of the PBSA and PBSR apply to the amounts that the withdrawing members are entitled to upon withdrawal. The proposed Amendment seeks to alter that statutory entitlement and the Superintendent found that it was therefore not compliant and rejected it. The Superintendent found that section 93 simply provides the mechanism which requires the Trustees to communicate their decision to the withdrawing members whether they are allowed to stay in the Plan or are forced out of the Plan.

[15] If the Trustees force the members of a withdrawing employer out of the Plan, then the Superintendent says that section 135(12) of the PBSR prescribes a pro rata allocation based on the target benefit funded ratio as set out in the termination report for the withdrawing employer. If the Plan's assets are not sufficient to pay all the benefits, section 135(12) of the PBSR prescribes the method of allocation of assets of the Plan.

[16] Regarding the direction to bring the existing Article 23 of the Plan into compliance with the PBSA, the Decision states that:

> [s]ection 23.08 of Article 23 provides for a reduction to accrued benefits that is not permitted under the PBSA. It effectively establishes a priority allocation method. The PBSA does not permit a priority allocation method.

[17] The Superintendent found that Article 23 as it existed prior to the Amendment was not in compliance with the PBSA and PBSR and directed the Trustees to file another amendment to bring it into compliance.

PRELIMINARY ISSUES

Appellant's Application for Oral Submissions

[18] As a preliminary matter the Appellant applies pursuant to s. 242.2(8)(a) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 (the "FIA") to the Tribunal for leave to make oral submissions on this appeal. The Superintendent opposes the Appellant's application for oral submissions.

[19] Section 242.2(5) of the FIA provides that appeals are to proceed as appeals on the record and must be based on written submissions. However, the member hearing the appeal has the discretion to permit oral submissions pursuant to s. 242.2(8)(a) of the FIA. The FIA does not provide any guidance on how the member should exercise their discretion in considering whether to grant oral submissions.

[20] The FIA states a preference for appeals on the record based on written submissions. To overcome that preference, the Appellant has the burden of establishing that oral submissions should be ordered.

[21] The Appellant submits that this appeal is important and complex and therefore oral submissions should be ordered. The Appellant makes no further submissions on this point and cites no case authority to support its position.

[22] The Respondent submits that oral submissions are not necessary to resolve this appeal. The Respondent makes no further submissions and relies on *Brewers' Distributor Ltd. (Re)*, 2020 BCFST 1 (2010-PBA-001) ("*Re: Brewers*"), an interim decision of this Tribunal dated September 30, 2010.

[23] The Appellant did not make any reply submissions to the Respondent's submissions on this point.

[24] As will be discussed below, the main issue in this appeal is the interpretation and application of section 93 of the PBSA. Both parties agree that the standard of review for issues of statutory interpretation is correctness.

[25] Both parties have submitted detailed and lengthy written submissions and several binders of applicable authorities in this appeal.

[26] The Appellant submits that the appeal is important to it and is complex. If a party pursues an appeal of any decision, it is axiomatic that it considers the issue to be important. As far as complexity, many matters are complex and without something more this submission in not particularly persuasive.

[27] The FST acknowledged in *Re: Brewers* that oral submissions would always be helpful to some extent and I agree with that statement. However, given the statutory preference for an appeal on the record based on written submissions, I find there must be something more than simply being helpful in order to exercise my discretion to order oral submissions.

[28] I agree with the following statements in *Re: Brewers* (at page 4) regarding the exercise of discretion:

> The basic proposition that can be distilled from these cases is that oral submissions are not to be permitted unless regarded as necessary to a fair hearing of the appeal, being precisely the point on which the parties here are divided. I would venture to say that in the vast majority of cases this test will not be met and the written material will be considered sufficient for a fair adjudication of the appeal. It surely cannot be enough to invoke the exception to demonstrate that oral submissions may be of some assistance to the tribunal; in virtually every case it can be said that oral submissions, particularly when delivered by experienced counsel, would assist to some degree. Clearly the applicant must demonstrate something more.

[29] It can be said that every appeal is important to the parties and complex to some degree. This submission alone would rarely satisfy the test for an oral hearing. The parties in this matter are in agreement that the appeal involves an issue of statutory interpretation involving a provision of the PBSA which is subject to a correctness standard of review. This is something that the FST is equipped to do based on the detailed written submissions from the parties and the supporting authorities. I do not find any

circumstance of this appeal which would take it outside of the stated statutory preference for a written hearing or that would make proceeding with a written hearing unfair.

[30] In the circumstances of this appeal, the Appellant's application for oral submissions is denied.

Addition to Record and Confidentiality of Plan Text

[31] On May 10, 2022, in a letter enclosing the Appellant's written submissions, counsel for the Appellant requested that the Superintendent supplement the appeal record by providing a copy of the text of the entire Plan. In a letter response, on May 31, 2022, counsel for the Superintendent stated that Superintendent does not object to the request to provide a copy of the Plan text but noted that some or all of the Plan text is confidential.

[32] At the close of submissions in this appeal, the FST asked the parties to provide a copy of the Plan text, and this was done on June 24, 2022. The parties are in agreement that the Plan text reflects the private and confidential bargain between the parties and there is some commercial sensitivity to the disclosure of the Plan text. In addition, the parties note that there is personal and confidential information of members of the Plan in the text which should be protected from disclosure. The parties note that the Plan text is not otherwise available to the public through the Superintendent or the provisions of the PBSA and are concerned that disclosure may occur through the public nature of this hearing if the full Plan text is made part of the record.

[33] After a review of the parties' submissions on this appeal, neither party made any reference to the Plan text. Therefore, I order that the Plan text does not form part of the record on this appeal with one exception. I was unable to find the existing Article 23 which the Amendment sought to change in the record as filed. This existing version of Article 23 is relevant as the Superintendent made a direction that it be brought into compliance with the PBSA and the Appellant has appealed that direction to the FST.

[34] I order that the existing Article 23 – as contained in the Consolidated Plan Text - form part of the record on this appeal. I will note that neither party made any significant submissions on the existing Article 23, how it was, or was not, compliant with the PBSA and PBSR. This issue is subject to further comment later in these reasons but for the purposes of this appeal I find it is appropriate that it be part of the record.

[35] In the absence of submissions from the parties regarding the confidentiality of this particular portion of the Plan text, I am not prepared to make an order that the existing Article 23 should be received to the exclusion of the public under section 41(2) of the *Administrative Tribunals Act*. However, the parties retain the right to make submissions on this point and will be invited to do so in the event that the Tribunal receives a request for this portion of the record to be provided to any non-parties.

ISSUES ON APPEAL

[36] There are two issues in this appeal.

[37] The first issue is whether the Superintendent breached the rules of procedural fairness and natural justice by considering the withdrawal provisions of other CBMEPs in arriving at the Decision, which were not disclosed to the Appellant.

[38] The second and more fundamental issue in this appeal involves the interpretation of section 93 of the PBSA and whether it permits a reduction in benefits to members of a withdrawing employer.

DISCUSSION AND ANALYSIS

The Standard of Review

[39] The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, at paragraphs 25 and 36-47, established that where a legislative appeal mechanism is provided, the standard of review should be applied in accordance with the standard of review on appeal of a lower court's decision pursuant to *Housen v. Nikolaisen* 2002 SCC 33. A correctness standard applies to issues of law, a reasonableness standard applies to issues of fact or mixed fact and law, and a fairness standard applies to issues of procedural fairness.

[40] Section 127 of the PBSA provides a right of appeal to a person on whom a notice of reconsideration is served, such as the Appellant in this case.

[41] Both parties are in agreement that the standard of review on the first issue involving issues of procedural fairness is whether the decision maker acted fairly in all the circumstances (see *Inglis v. Real Estate Council of BC and the Superintendent of Real Estate* 2019-RSA-001(a)). That is the standard of review that I will apply to the first issue.

[42] Both parties agree that the more fundamental issue in this appeal is the statutory interpretation of the PBSA and the PBSR, and that the standard of review for issues of statutory interpretation is correctness.

[43] The FST has applied *Vavilov* to the standard of review for appeals before it in *TruNorth Warranty Plans of North America, LLC v. Superintendent of Financial Institutions*, 2020 BCFST 2 (2019-FIA-003(a)) at paragraphs 69-70. The Tribunal explained the rationale for the correctness standard of review for questions of law as follows:

> The FST's jurisprudence is consistent insofar as appeals from questions of law are concerned in applying correctness as the standard of review. I find that this approach is reinforced by *Vavilov* insofar as it holds [at para. 37] that judicial statutory appeals from administrative decisions will review for correctness on questions of law.

> Accordingly, and further given my findings as to the presumed expertise and statutory mandate of the FST, I find that deference is not owed by the FST on this appeal to the Superintendent's interpretation of the *IA*, the *FIA* or the regulations under the *FIA* or on questions of law generally. As pointed out in *Hensel*, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the FST is also entitled to proceed on the premise that the legislature intended that it would correct legal errors made by the first instance regulator. I will apply correctness as the standard of review on this issue.

[44] I agree that the standard of review of the second issue involving the statutory interpretation of the PBSA and PBSR is correctness and will apply such standard.

Issue 1 - The Superintendent's consideration of the provisions of other CBMEPs

[45] At page 2 and 3 of the Superintendent's Decision, it notes:

> A review of the employer withdrawal provisions for BC's CBMEPs confirms that the general approach to section 93 is either to require a termination of the part of the plan made up of the withdrawing employer's members or to specify that the withdrawal has no impact on the affected members other than triggering termination of membership in the normal course…
>
> No other CBMEPs withdrawal provisions impose arbitrary reduction in benefits. Where a reduction is applied, it is tied to the plan's actual funded position…
>
> Section 93 allows CBMEP trustees to decide if the ongoing funding obligations for the members employed or formerly employed by the departing employer will fall to the remaining plan contributors. This interpretation is consistent with its application by TBPs currently registered in BC.

The Appellant's Position

[46] The Appellant did not get any notice that the Superintendent was going to consider the section 93 provisions of other CBMEPs and did not get a chance to review those provisions and make any submissions in that regard. The Appellant submits that the failure to provide adequate notice and disclosure of those other section 93 provisions of CBMEPs amounted to a breach of procedural fairness and natural justice.

[47] The Appellant submits that notice is a fundamental component of the administrative process. It is necessary to enable the party who would be directly affected by an adverse decision to possess sufficient information on the matter to be in a position to make representations on their own behalf, effectively prepare their own case, and answer the case to be met.

The Superintendent's Position

[48] The Superintendent submits that the review of other CBMEPs' section 93 provisions did not have a material effect on the Decision and the comments were made to provide some comfort to the Appellant that they were not being treated harshly or differently than others by the Decision.

[49] The Superintendent submits that the level of procedural fairness owed in the Decision is low as the Decision is not at the judicial end of the spectrum of the exercise of statutory decision making. The Superintendent notes that there is a statutory appeal from the Decision and the Decision is not disciplinary in nature or a decision that greatly affects an individual's life or livelihood. In addition, the Superintendent submits that there are specific disclosure obligations in sections 125 and 126 of the PBSA which were followed in this matter and the Appellant does not have a reasonable expectation that it be provided with all of the Superintendent's personal and institutional knowledge. Finally, the Superintendent submits that its statutory processes, which were followed in this matter, are entitled to deference and the Appellant is not entitled to all of the evidence relied on to reach the Decision.

[50] The Superintendent says the Appellant's own submissions argue that how others have conducted themselves is wholly irrelevant and cannot inform the statutory interpretation exercise.

[51] The Superintendent says I should follow the decision in *The Board of Trustees of the Interior Lumbermen's Pension Plan and the Superintendent of Pensions*, 2008 BCFST 3 (FST-07-37) ("*Re: Lumbermen's PP*"), where the Tribunal found that there was no breach of procedural fairness despite the fact that the appellant in that case did not have an opportunity to respond to certain evidence because it was clear that the issue was the interpretation of certain plan provisions of which the appellant had adequate notice.

[52] The Superintendent submits that if a decision maker considered facts which were not material to their decision, it is not a breach of procedural fairness where the affected individual had an opportunity to address the material issues that were before the decision maker.

Analysis – Issue 1

[53] I agree with the Appellant's submissions that notice is a key component of procedural fairness in the administrative hearing process. I also agree with the comments in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R.817 that procedural fairness is not absolute and depends on the circumstances of each case. *Baker* sets out a non-exhaustive list of factors to determine the level of procedural fairness required for a particular administrative action.

[54] The Appellant has relied on two cases to support its submission that there was a breach of procedural fairness and natural justice. The first case is a criminal case, *R. v.*

Bornyk, 2015 B.C.C.A. 28, where the judge conducted his own research after the conclusion of trial on a material issue. A criminal matter where a person's liberty is at stake is at the highest end of the judicial process spectrum. Strict adherence to the full set of procedural protections that are available in criminal matters is not applicable to the administrative process followed by the Superintendent pursuant to the PBSA and therefore criminal cases do not provide any particular assistance in this case.

[55] The Appellant also relied on an administrative case of *Schwab v. Alberta (Director of SafeRoads)*, 2022 ABQB 244, where the adjudicator used Google maps to obtain driving time estimates and relied on this information in making his decision. This case, while not a criminal case, involves a provincial regulatory driving offence and is near the judicial end of the procedural fairness spectrum. There is a direct appeal to a court and the adjudicator must make findings of fact and operates in an alternative process to criminal proceedings regarding driving while intoxicated. The adjudicator used outside information essentially to test the driver's credibility which led to the adjudicator disbelieving the driver's statements about how much alcohol was consumed. The outside investigation directly affected the outcome of this quasi-criminal matter and the court on appeal found it was impermissible and sent the matter back for a re-hearing. The Superintendent in this matter is not making findings of fact and the parties are in agreement that this appeal involves statutory interpretation issues. The *Schwab* case is inapplicable to the present matter.

[56] The case of *Lumbermen's PP* found that "the administrative process set out in the PBSA does not approach that of a judicial process, the nature of the statutory scheme is one of interpretation and direction, and the legitimate expectations of persons challenging the decision would be met through the procedures afforded by the Superintendent in this case." I agree with those statements.

[57] The role of the Superintendent in this matter is simply to receive proposed amendments and issue approvals or rejections and any applicable directions. This administrative process is not at the judicial end of the procedural fairness spectrum where full procedural protections would be required. The PBSA sets out the process and the Appellant has not submitted that the Superintendent has not followed any of the statutory processes set out in the PBSA regarding disclosure obligations or any other process in this matter.

[58] I find that there was no breach of procedural fairness or natural justice in this matter.

[59] While not necessary to decide this matter, I note that the Appellant calls into question the relevancy of the Superintendent's review of other section 93 provisions in CBMEPs. While I find that the Superintendent did not breach procedural fairness by not disclosing that review to the Appellant, I also do not believe that the review is relevant to the statutory interpretation exercise in this matter. In addition, as the Appellant has a right of statutory appeal on a standard of correctness, the issue of the correct

interpretation can be done by this Tribunal without reliance on the review of other section 93 provisions in CBMEPs. It should be noted that the Superintendent has not provided any evidence of any other section 93 provision in other CBMEPs in this appeal and therefore I cannot and will not consider them in determining this matter.

[60] I find it is a reasonable assumption that the Superintendent provided the information about other CBMEPs in its Decision to provide some assurance that the Appellant was not being treated differently than other CBMEPs and that the review referenced by the Superintendent was not material or relevant to the substance of the Decision.

Issue 2 - The Interpretation of Section 93 of the PBSA

[61] Section 93 of the PBSA states:

> The plan text document of a collectively bargained multi-employer plan must specify what the consequences to the funding of benefits are if a participating employer withdraws from the plan.

[62] Section 93 is specific to collectively bargained multi-employer plans but it applies to all three types of CBMEPs including a defined benefit plan, a defined contribution plan and a target benefit plan.

The Appellant's Position

[63] The Appellant submits that section 93 of the PBSA gives the Trustees the discretion to determine what the consequences will be to members of a participating employer who withdraws from the Plan. The Appellant exercised this discretion to amend the Plan to reduce the target benefit of the members of a withdrawing employer by 25% as a consequence of the withdrawal.

[64] The Appellant says that they have complied with their fiduciary obligations as trustees at common law and pursuant to section 35 of the PBSA in dealing equitably with both the withdrawing and remaining members of the Plan. The Appellant says that one important factor they considered in passing the Amendment is the fact that only 20% of the 70,000 plan members are actively making contributions to the Plan. The Trustees say that they have a limited ability to respond to future adverse actuarial experience such as interest rate decreases or unexpected investment losses. For those reasons the Trustees say they must place greater reliance on the existing fund.

[65] The Appellant says because of the maturity of the Plan, there is a real risk that future adverse actuarial experience could lead to benefit cuts or an increase in contribution rates from members and employers. The Appellant says that a withdrawal scenario impacts the Plan in two ways; first, there would be fewer contributing members;

and second, the Trustees must allocate a portion of the fund to pay for the pension liabilities of the withdrawing group.

[66] To balance the interests of both the withdrawing and remaining members the Trustees decided to reduce the benefits that would otherwise be payable under the PBSA by 25% to essentially provide some protection or buffer against future adverse actuarial experiences that might affect the remaining members. The Trustees refer to this as a "real risk" but do not provide any actual evidence that the Plan is currently in a deficit position or will have a future funding deficit. The Trustees say that the long term viability of the Plan cannot be determined by a point in time assessment and given the impact of the withdrawing members and the real risk of future adverse actuarial experiences, the 25% is fair and equitable to both the withdrawing members and the remaining members.

[67] The Appellant notes that they cannot prefer the interest of one group of beneficiaries at the expense of another. I agree with that principle. The Appellant then implies that you can treat different groups of beneficiaries differently as long as there is a principled rationale for the different treatment. I find that there must be more than simply a principled rationale. If there is different treatment of groups then that must be in accordance with the statutory scheme of the PBSA and regulations.

[68] The Appellant says that there is no requirement in the PBSA that assets must be allocated pro rata when an employer withdraws from a CBMEP. However, apart from the Appellant's submission on the interpretation of section 93 of the PBSA, there are no other provisions mentioned which allow a non pro rata or unequal determination of the assets and benefits between withdrawing and remaining members as the Appellant has proposed in the Amendment.

[69] The Appellant candidly admits that the 25% reduction of benefits upon withdrawal from the Plan provides an incentive for employers and employees to remain in the Plan. The Appellant says that this is not meant as an incentive against decertifying the Union as the bargaining agent but it is meant to maintain the viability of the Plan and not for any ulterior labour organization purpose. It should be noted that the Trustees are comprised of an equal number of management and Union members, presumably to counter any labour/management influences from interfering with the fiduciary duties imposed on the Trustees.

[70] The Appellant says that the Superintendent's interpretation of section 93, which only permits the Trustees to decide if it would allow the withdrawing members to remain in the Plan or be forced out, would compel the Trustees to put the interests of the withdrawing members ahead of the remaining members. However, the Appellant does not clearly state how or why a pro rata division of assets would be preferring the withdrawing members over the remaining members other than an inference that there is a real risk of future adverse event with less active members to share that risk. The Appellant's concern is really about the consequences of having a future risk spread over fewer members.

[71] The Appellant says that the Superintendent's reliance on sections 20 and 32 of the PBSA and section 20 of the PBSR is myopic and that they do not prohibit any consequence to the funding of benefits for withdrawing members. However, the Trustees do not say on what basis those provisions do not apply to the reduction of benefits in the Amendment or how section 93, even on their interpretation, overrides the operation of those provisions. They appear to argue that those sections are irrelevant to the discretion they assert section 93 provides them and section 93, by itself, addresses the issue of the consequences of withdrawing employers more directly and specifically. However, if this were the intention of section 93, one would expect the provision to provide "despite section 20 …" to identify that section 20 did not apply to consequences identified in section 93. There is no such language in section 93 of the PBSA.

[72] The Appellant says that CBMEPs are unique because they are collectively bargained and have equal union and employer representation as trustees. However, that does not derogate from the statutory obligations of the Superintendent to ensure that any amendments are compliant with the PBSA and PBSR. The scheme of the PBSA protects people who may not be in the majority position and ensures that they are dealt with fairly and in accordance with the PBSA. It is very likely that a member of a withdrawing employer would not be in a majority position and is someone who would need the protection of the provisions of the PBSA and PBSR.

[73] The Appellant says that the Superintendent's interpretation of section 93 makes it largely superfluous and if it simply provides notice to members then that obligation is provided elsewhere in the statutory scheme.

[74] The Appellant says that the target benefit funded ratio which is set out in the Amendment can simply be inserted into the calculation of the transfer amount pursuant to section 86(b)(ii) of the PBSA but the Appellant has ignored the remainder of that provision which provides: "the target benefit funded ratio, as calculated in accordance with the regulations, that is set out in the actuarial valuation report that has most recently been filed in relation to the plan." The section does not refer to the target benefit funded ratio as specified in section 93. The calculation is required in accordance with the regulations and is related to the most recent valuation report filed in relation to the plan.

The Superintendent's Position

[75] The Superintendent submits that section 93 of the PBSA does not give the Trustees the discretion to lower the benefit accrued to members of a withdrawing employer. They submit that section 93 simply provides a duty to disclose the consequences to the funding of benefits if an employer withdraws from the Plan. The Superintendent submits that the PBSA and the PBSR provide for specific, explicit and clear mechanisms through which amendments may be made to allow for benefit reductions to members. The Superintendent says that these mechanisms typically require a proven funding deficit. Neither party has presented any other prescribed circumstances in the PBSA or PBSR,

other than a funding deficit, that would allow for benefit reductions pursuant to section 20 of the PBSA. The Superintendent says that section 20 of the PBSR sets out the prescribed circumstances referenced in section 20(b) of the PBSA. Section 20 of the PBSR requires that the expected contributions be insufficient to fund the payments and if this situation exists, the plan must be amended to either reduce the target benefit or increase contributions. There are no other prescribed circumstances provided by either party that would permit a benefit reduction.

[76] The Superintendent says that the Appellant has described the process it considered that led to the Amendment but notes that there was no evidence of that process as part of the evidentiary record. This is not a case where the issue is whether the Trustees acted with impartiality; the issue is whether the Amendment is compliant with the PBSA and PBSR and therefore I do not find the process of deliberations relevant to the determination of the issues in this appeal.

[77] The Superintendent says that the 25% reduction in benefits to withdrawing members is effectively a wealth transfer to the remaining members by either increasing the proportional benefits available or reducing the contributions of the remaining members for the same target benefit. The Superintendent says that the Trustees justify the transfer of benefits to the remaining members from the withdrawing members to shield the remaining members from possible future adverse events. The Superintendent points out that there is no evidence before this Tribunal of any current adverse actuarial event or any current insolvency of the Plan and the risk referred to by the Trustees is hypothetical. Further, there is no evidence submitted by the Trustees regarding how the 25% figure was determined other than it was the judgement of the Trustees. Further, the Trustees say that the fact of the withdrawal of members puts the solvency of the Plan at risk but if that were the case, then actuarial evidence should exist to establish the fact of a future funding deficit and no such evidence was presented to the Superintendent or in this appeal.

[78] The Superintendent says that the immediate vesting found in section 32 of the PBSA reflects an overall intention in the PBSA to ensure that pension members are not vulnerable to discretionary interference with their benefits and to prevent any reduction in earned benefits. The Superintendent says this reflects the modern view that members are entitled to their pensions without reduction except in accordance with the PBSA and PBSR.

[79] The Superintendent says that sections 58 and 135 of the PBSR provide specific methods to determine the amount of any reduction in a member's benefit in a target benefit plan and they provide for a pro rata reduction in relation to any deficiency in funding the target benefit.

[80] The Superintendent says that the Appellant is seeking an arbitrary and penal reduction in benefits without any relation to the actual funding level of the Plan and that is not consistent with the meaning, scheme or purpose of the PBSA.

[81] The Superintendent says that section 93 simply imposes a disclosure obligation on the Trustees to disclose any consequences that are otherwise permitted or required by the PBSA as a result of the withdrawal of an employer from the Plan. The Superintendent says that section 93 only mentions the funding of benefits and therefore is limited to that subject and any interpretation that includes a reduction in the level, entitlement to or the pay-out of benefits is specifically not dealt with in section 93 and therefore not permitted by that section.

[82] The Superintendent notes that section 93 is not limited to target benefit plans but also applies to defined benefit and defined contribution plans and therefore section 93 is not superfluous even if it has limited applicability to target benefit plans. The Superintendent notes that section 93 could require the disclosure of a number of consequences about benefit funding such as:

a. The funding requirements of employers or employees in respect of withdrawing members are frozen as of the date of withdrawal;
b. A withdrawing employer must fully fund any pension amounts in respect of withdrawing members as of the date of withdrawal;
c. For a defined benefit plan, set out that any deficit would need to be funded as of the date of withdrawal;
d. For a defined contribution plan, set out that contributions are due up to the date of the withdrawal;
e. For a target benefit plan, that the withdrawing employers are required to fund up to the target benefit set as of the date of the withdrawal; or
f. The members of a withdrawing employer may continue to remain in the plan and the remaining employers continue to have specified obligations to make contributions as set out in the plan text document and legislation, of which obligations must relate to members of the withdrawing employers who remain and continue to have entitlements under the plan.

[83] The Superintendent says that all these consequences are otherwise permitted or allowed by the PBSA and section 93 simply requires that the Plan text specify the consequences so it is clear to all plan members. The Superintendent has not pointed out any other provisions of the PBSA or PBSR which deal with the permissible consequences to the members of a withdrawing employer in a target benefit plan.

[84] The Superintendent submits that the PBSA does not permit an administrator to prospectively reduce benefits short of actual evidence of a funding shortfall for a very good reason. Pension benefits are supposed to provide security and predictability and the reduction of benefits should only occur as a last resort to deal with a proven and existing funding shortfall which is why the PBSA requires actuarial reports showing the funding shortfall to support any reduction in benefits.

[85] The Superintendent submits that if the legislature intended to set out specific ways in which benefits in target benefit plans could be reduced, without reference to the level

of funding, one would expect that a specific provision would have been set out in the legislation. The Superintendent submits that the principles and purposes behind the statutory scheme of the PBSA do not favour an arbitrary and discretionary approach to benefit reductions not tied to funding shortfalls. The Superintendent relies on Ari Kaplan's treatise, *Pension Law* (3rd ed.) (Toronto: Irwin Law, 2021), at pages 9-10 and 209-214, where he states that: "[g]enerally, the legislation is designed to accomplish two objectives; secure employee pensions from discretionary revocation and preserve the financial integrity of earned pension entitlements." The passage referred to by the Superintendent continues: "It does so by guaranteeing minimum vesting rights for employees with relatively short service in the plan, permitting the portability of pensions on termination of employment, and requiring the locking-in of benefits to preclude access to the funds prior to retirement age." The Kaplan text further states, in relation to the Ontario pension legislation: "The *PBA* has consistently been identified by the courts as public policy legislation designed to "benefit," "protect," and "expand" the interests of employees .... The focus has invariably been on preserving employee rights."

Analysis - Issue 2

[86] The parties are in general agreement on the applicable principles of statutory interpretation but differ on their application to the present case.

[87] In *Vavilov*, the Supreme Court of Canada articulated the principles for statutory interpretation for administrative decision makers. When a decision maker interprets a statutory provision, that interpretation must be consistent with the text, context and purpose of the provision, applying its particular insight into the statutory scheme at issue. Further, such interpretation must consider the provision in its entire context, and in its grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute and the intention of the legislature (see *Vavilov* paras. 117-118 and *Rizzo & Rizzo Shoes Ltd. (Re:)* [1998] 1 S.C.R. 27 at para. 21).

[88] In *Monsanto v. Superintendent of Financial Services*, 2004 SCC 54, at paragraph 13, the Supreme Court of Canada held that pension legislation is public policy legislation that establishes minimum standards and regulatory supervision in order to protect and safeguard the pension benefits of those entitled to them. The Court also found that the PBSA is designed to protect the interests of British Columbia pension plan members by setting minimum standards for British Columbia pension plans in the areas of eligibility, vesting, portability, survivor benefits, employer contributions, disclosure to members, among other things.

[89] Neither party has submitted any case authority dealing with the interpretation of section 93 of the PBSA or any analogous cases from other jurisdictions on the treatment of members of a withdrawing employer in similar circumstances to the present case.

[90] The Appellant relies on *Neville v. Wynne et al.*, 2005 BCSC 483 for the principle that to meet the trustees duty of impartiality towards members in different categories, they

must give equal consideration and not necessarily equal treatment to each category of members and give a reasonable and principled rationale for their decision. In *Neville*, the trustees were faced with a solvency issue and they chose to reduce benefits of retired and non-retired members although they allocated more of a reduction to the non-retired members including Neville.

[91] The *Neville* case involved an action against the trustees of the plan and not the superintendent under the PBSA and the case does not address the role of the superintendent in accepting amendments to plans pursuant the PBSA and PBSR. The court found that the trustees complied with their duties when they reduced benefits to deal with the solvency issue. This case did not involve any withdrawing members and involved a difference in benefit reduction between current and retired members caused by a deficit funding of the plan. These facts are inapplicable to the present case which involves circumstances unique from the facts in *Neville*.

[92] The court in *Neville* noted that the PBSA prohibits a reduction in benefits and provides a permitted exception where the circumstances require a reduction in benefits. The circumstance in *Neville* was the insolvency of the plan which permitted a reduction in benefits. The court noted that the provisions of the PBSA override the provisions of a plan that are in conflict with the PBSA. The court also noted that any discretionary power to reduce benefits must be with the written consent of the superintendent who must ensure compliance with the PBSA and PBSR.

[93] The Appellant submits that the impact of partial or full withdrawals by participating employers and the long term viability of a plan are proper considerations of trustees of a plan and relies on *Larkin v. Johnson*, 2022 BCSC 603 at paras. 136-137. The case of *Larkin* involves a challenge by the members against the trustees of an employer sponsored defined benefit plan. This case is distinguishable to the present case as the change to the plan text in *Larkin* was accepted by the superintendent pursuant to the PBSA; the plan was employer sponsored and not a collectively bargained plan; and the plan was a defined benefit and not a target benefit plan. The *Larkin* case involved a review of the trustees' powers pursuant to the trust and not the interpretation of provisions of the PBSA and PBSR which are in issue in this case.

[94] The cases submitted dealing with a reduction in benefits to members all dealt with solvency issues and the difficult decisions that trustees must make to deal with solvency issues. None of the cases presented dealt with the Appellant's submission that they can consider a real risk of future insolvency in making decisions to reduce benefits to any member who withdraws from a plan.

[95] Section 20 of the PBSA provides:

> 20(1)(a) An amendment to the plan text document of a pension plan must not reduce a person's benefit relating to employment …
>
> …

> 20(2)(b) Despite subsection (1), the administrator of a pension plan, if the plan text document of the plan contains a target benefit provision, must, in the prescribed circumstances and within the prescribed period, amend the plan text document to do one or more of the following:
>
> (i) Reduce or eliminate the ancillary benefits under the plan in accordance with section 82(3);
>
> (ii) Reduce the benefit that, under the target benefit provision, was intended to be paid, which reduction may but need not apply to accrued benefits;
>
> (iii) Increase the amount of the contributions payable under the plan…

[96] Section 20(1) of the PBSA provides a general prohibition on any reduction of a person’s benefits. Subsection 20(2)(b) provides the exceptions to the general prohibition for target benefit plans. It provides that the Plan must do one of three options if the prescribed circumstances apply: one, reduce or eliminate ancillary benefits; two, reduce the target benefit which may but need not apply to accrued benefits; and three, increase contributions to the plan.

[97] Section 20 of the PBSR provides the prescribed circumstances when a target benefit plan must be amended to reduce benefits and/or increase contributions. Section 20 provides that if an actuarial valuation report is filed for a target benefit plan which demonstrates that the expected contributions will be insufficient to fund the benefits, then an amendment must be filed which either reduces the target benefit or increases the contribution to the plan to meet the funding obligations under section 58(2) or (4).

[98] Section 58 of the PBSR deals with the funding requirements applicable to target benefit provisions including the payment of any unfunded liability of the plan.

[99] Section 135(12) of the PBSR provides for the allocation and distribution of assets of a target benefit plan if the assets are insufficient:

> 135(12) Assets of the target benefit component must be allocated to each person who is entitled to receive benefits out of the target benefit component in accordance with the following: … (b) after an allocation under paragraph (a), the balance of the assets in the target benefit component must be allocated so that each person entitled to a benefit other than a benefit under paragraph (a) from that target benefit component is allocated the product of (i) the commuted value of that benefit, and (ii) the target benefit funded ratio, as set out in the termination report.”

[100] Section 135 of the PBSR provides for the allocation of assets in the event of a winding up of a plan. The provisions generally apply a pro rata sharing of any deficiency. There are no specific provisions in the PBSA or PBSR dealing with a withdrawing employer but it can be analogous to a partial winding up of the plan which pursuant to the *Monsanto* decision would follow the same rules and procedures as a full winding up.

[101] The Trustees rely on the *Monsanto* case to assist in interpreting pension legislation in particular. However, the findings in the *Monsanto* case are analogous to the situation in the present case dealing with a potential partial windup due to the departure of members of a withdrawing employer. The Supreme Court of Canada found that the statutory scheme of Ontario's pension legislation was to treat partial and full windups equally. In the circumstances of this case, the withdrawing members can be viewed as a partial wind up of the Plan and therefore should be entitled to be treated equally with the remaining employees. This pro rata division is what section 135 of the PBSR provides and what the Superintendent relies upon.

[102] The Appellant has pointed out that there are no provisions in the PBSA or PBSR that prescribe the consequences of a withdrawal of a participating employer in a target benefit plan. The Superintendent has pointed to provisions dealing with reductions in benefits generally, but that provision does not refer to members of a withdrawing employer specifically. The Appellant is correct that section 93 is mandatory. However, the Superintendent says that the mandatory component of section 93 is simply that the consequences must be specified which it suggests makes section 93 simply a notification provision.

[103] The goal in statutory interpretation is not to parse out words individually or to narrowly follow grammatical rules without considering the entire legislative scheme and purpose. Both interpretation guidelines must be considered together, harmoniously, and there must be an ultimate interpretation of section 93 which furthers the object and scheme of the PBSA.

[104] I agree with the Superintendent that the object and purpose of the PBSA and PBSR is the protection of pension benefits from any discretionary actions, and specifically any reduction in benefits that is not in accordance with the statutory scheme and the goal of providing stability, security, predictability and portability of pension benefits to members who are entitled to those benefits. The immediate vesting provisions of section 32 of the PBSA supports the above purpose and objects of the legislative scheme regarding pensions in British Columbia.

[105] The statutory scheme is silent on what the consequences should be for members of a withdrawing employer. However, it is obvious that there has to be some consequences as the status quo cannot continue. The members of a withdrawing employer are no longer active contributing members, so their membership status has to change. Section 93 refers to the funding of benefits of members of a withdrawing employer which recognizes that neither those members nor the withdrawing employer will continue to fund the benefits under the Plan if they are no longer active members or a participating employer. Section 93 simply says that the decision on how to treat withdrawing members must be specified in the Plan text. This provides some predictability which is one of the aims of the statutory scheme.

[106] Although the Superintendent argues that section 93 is just a notification provision, the Decision itself suggests that section 93 must be more than that. In the Decision, the Superintendent says that "[s]ection 93 gives the Trustees the authority to decide whether to allow the members of a withdrawing employer to remain in the plan or to force them out of the plan." The Superintendent does not go into detail regarding how those two options would operate but presumably that discretion is left to the Trustees to exercise. The Superintendent does not provide any other specific provision of the PBSA or PBSR which provides for the authority for the two options it notes in its Decision.

[107] Without any specific authority anywhere in the PBSA and PBSR on what the consequences are for members of a withdrawing employer, the Trustees are left to determine those consequences pursuant to their authority provided in the Plan text and are circumscribed by the fiduciary duty and any other specific limitations in the PBSA and PBSR. It is not critical to determine whether the authority to make a decision on the treatment of the funding of pensions of withdrawing members comes from section 93 itself or from the general authority the Trustees have regarding the Plan. The Trustees do have a decision to make regarding the treatment of members of a withdrawing employer and that decision must be specified in the Plan text. Section 93 requires both: that a decision be made, and that the decision be specified in the Plan text.

[108] The Trustees argue that the authority granted by section 93 to make a decision regarding the consequences gives it the discretion to make a decision which is only limited by their fiduciary duties at common law and section 35 of the PBSA. Section 93, however, does not operate in a vacuum; it operates within the statutory scheme of the PBSA and PBSR and any interpretation of the authority granted to the Trustees to make a decision in relation to section 93 must also be compliant with the statutory scheme.

[109] Any decision made by the Trustees pursuant to section 93 must not offend any other provision of the PBSA and it must also be in compliance with their fiduciary duties in section 35 of the PBSA and at common law generally.

[110] Section 20(1) of the PBSA prohibits any reduction in a person's benefits. This is a provision of general application to all types of pension plans governed by the PBSA. It is notable that section 20 refers to a person and not a member. Member is a defined term in the PBSA which includes an active member, a deferred member and a retired member. The use of a "person" instead of a "member" in section 20 makes section 20 applicable to a broader scope than simply members. Whatever the status of a person, if they are entitled to benefits, section 20 provides the broadest possible protection from reduction in benefits which would include the members of a withdrawing employer.

[111] I find that the specific provision in section 20(1) prohibiting the reduction in benefits limits any general authority in section 93, or pursuant to the Trustees' authority derived from the Plan itself, to reduce benefits as one of the consequences for members of a withdrawing employer. This interpretation accords with the general purpose of the statutory scheme for pensions in the PBSA and PBSR which is the security and

predictability of pensions and to provide limits on discretionary actions which may reduce pension benefits.

[112] Section 20(2)(b) of the PBSA provides the prescribed circumstance that permits the reduction of benefits of a target benefit plan. For the prescribed circumstance to be met, there must be an actuarial report filed showing that the expected contributions will be insufficient to fund the target benefit payments. This essentially identifies a solvency issue with the plan. In that prescribed circumstance, the benefits must be reduced, or contributions increased to remove the solvency issue. This section provides the only prescribed circumstance that would permit the reduction in benefits for a target benefit plan.

[113] The Appellant has not relied on any actuarial report to reduce the benefits of the members of a withdrawing employer, which is required pursuant to section 20 of the PBSA and the prescribed circumstance in section 20 of the PBSR. The Appellant acknowledges that as part of their extensive review of Article 23 of the Plan, they reviewed reports from their actuaries and other professional advisors. The Appellant repeatedly refers to the "real risk" of a future adverse actuarial experience that could lead to an insufficiency of funding issue which justifies a reduction in the target benefit made pursuant to section 93 of the PBSA. The Appellant essentially argues it is not fair to exclude the members of a withdrawing employer from the real risk of those future events. The Appellant is clearly relying on a speculative future risk as justification for reducing the benefits of members of a withdrawing employer.

[114] There is no actuarial evidence before me, nor was there any such evidence before the Superintendent when he made the Decision. If the removal of a significant portion of active contributing members from the Plan puts the Plan's solvency in jeopardy, then that is something an actuary could identify and provide some evidence on in a report. Actuaries, as I understand their role, provide reasonable predictions of future events and take those into account in the calculation of the sufficiency of funding for a pension plan. Without any actual actuarial evidence about the extent and nature of a real risk of a future adverse actuarial event, then the only basis for any reduction in benefits is the unsubstantiated discretion of the Trustees. While I do not find that the Trustees have acted unfaithfully in passing the Amendment, they have essentially said - trust us we are doing what we think is fair and in accordance with our fiduciary duties. That is simply not enough within the statutory scheme of the PBSA and the PBSR. This is why the statutory scheme requires actuarial evidence to justify any benefit reductions. Whether or not an actuary can take into account the future adverse actuarial events that the Trustees contemplate is not before me and I cannot make any finding in that regard.

[115] In any event, even if an actuarial report could identify an adverse future actuarial event caused by the withdrawal of members which would affect the funding of benefits, it seems to me that that burden must be borne by all members of the Plan. The withdrawing members should not get greater benefits because of the withdrawal but they should also not get less simply by virtue of their withdrawal as the Amendment provides. Withdrawing

members would still be subject to any of the same future adverse actuarial events as the remaining members either by continuing to be part of the Plan as a deferred member or as is otherwise permitted or in a private retirement funding situation or other pension plan they participate in subsequent to their withdrawal from the Plan.

[116] The Appellant says that the Superintendent's Decision would compel the Trustees to put the interests of the withdrawing members ahead of the remaining members. I fail to see how that statement is accurate and I reject that argument. I note that the definition of benefit in section 1 of the PBSA specifically excludes a refund or actuarial excess or surplus. This definition clearly benefits the remaining members over any withdrawing members and is justified by the specific provisions in the statutory scheme of the PBSA.

[117] Not only is the reduction of benefits provided for in the Amendment not in accordance with section 20 of the PBSA and section 20 of the PBSR, it is also contrary to the fiduciary and other statutory duties in section 35 of the PBSA which apply equally to both members and others entitled to benefits which would include any members of a withdrawing employer. As noted earlier, "members" is a defined term in section 1 of the PBSA but "others entitled to benefits" is not a defined term. The use of this description gives a wide scope of people to whom the Trustees owe specific duties to under section 35 in addition to the actual members of the Plan. Section 35 also requires that the Trustees ensure that the plan and the fund are administered in accordance with the PBSA and PBSR and the plan documents.

[118] Providing a different allocation of benefits to a withdrawing member where there is no actual evidence of a funding deficiency would not be acting in accordance with section 35 and the fiduciary duties at common law. Applying an arbitrary reduction solely due to the fact of withdrawal from the Plan is not acting in the best interests of the withdrawing members. If there is no funding deficiency in the Plan, then treating the remaining and withdrawing members equally is also not acting against the best interests of the remaining members as the Appellant asserts.

[119] The Superintendent asserts that, on the Trustees interpretation of section 93, the Trustees could exercise their discretion to reduce the benefits of withdrawing members by 100%. The Trustees say this assertion is absurd as they have a fiduciary duty both at common law and in section 35 of the PBSA which would prevent that. While I agree that the Superintendent's assertion that the Trustees (on their interpretation of section 93 of the PBSA) could deprive withdrawing members of 100% of their benefits is absurd, it is also problematic for the Trustees to rely on a 25% reduction with no evidence to support that exercise of discretion. There is no evidence or discussion of why 10%, 35% or 50% was not chosen. The only justification for the 25% reduction in benefits to withdrawing members provided by the Trustees is the reference to a real risk of a future adverse actuarial consequences and the Trustees assertion that they have acted in accordance with their fiduciary duties under common law and pursuant to section 35 of the PBSA. That is not enough. More is required to justify a reduction both at common law and in accordance with the provisions of the PBSA, including section 35. Allowing the Trustees to

use their discretion to pick any fixed percentage reduction without any actuarial evidence would in my view be equally absurd and is the type of exercise of discretion that the statutory scheme is designed to prevent. There simply is no actuarial evidence to support any reduction in benefits to members of a withdrawing employer.

[120] There may be some merit to the Trustees argument that if there is a significant withdrawal of members it may jeopardize the viability of the Plan, but reductions cannot be done on speculation and must be done based on actual evidence from an actuarial report detailing any deficiencies which flow from a significant departure of members. The pre-determined reduction regardless of the financial position of the Plan is not justified by the provisions of the PBSA or the fiduciary duties of the Trustees.

[121] The Appellant argues that if the withdrawing members leave the Plan, then the future funding obligations or benefit cuts will fall to the remaining members and their employers. The Appellant notes that the withdrawal itself may have contributed to the insufficiency of the fund and, as a consequence of their withdrawal, the withdrawing members would not have to bear the consequences of any insufficiency. This argument is problematic for several reasons. First, it fails to take into account that the withdrawing members' benefits are also frozen to the extent that they are no longer adding pensionable service/time to add to their benefits, so the funding of their benefits is only to the level they were entitled to in the Plan prior to their withdrawal. The remaining members do not have any ongoing funding obligations for the pension benefits of the withdrawing members after the date of withdrawal. The Superintendent has referenced the pro rata division of assets under section 135 of the PBSR as a framework for how the Plan can deal with the Plan assets attributable to the withdrawing members if they leave the Plan. I fail to see how this puts any additional or unjustified funding burden on the remaining members. Second, if the withdrawal itself causes a solvency issue, then there should be actuarial evidence to support that solvency issue and the Trustees did not provide any such evidence even though they acknowledged seeking the input of actuaries in the process of approving the Amendment. The Trustees use of the term "may have contributed to the insufficiency" acknowledges the speculative nature of this argument. Third, the future adverse actuarial events noted such as interest rate decreases or market downturn would also affect the withdrawing members as their pensions would be either locked-in or transferred to another plan and would be subject to the same adverse actuarial events as the remaining members.

[122] The Appellant has not addressed the consequences to the Plan if the withdrawing members are kept in the Plan as essentially deferred members or as otherwise permitted in the PBSA. The Decision notes this as a possibility but neither party provided any submissions on this possibility. I make no findings on whether the statutory scheme allows for it or how it would work. I do note that section 20(2)(b)(ii) of the PBSA, which deals with permissible benefit reductions, specifically notes that benefit reductions may apply to accrued benefits. It is unclear whether this would apply to withdrawing members if they were kept in the Plan, essentially as deferred members. This provision appears to

deal with the situation of a future adverse actuarial event materializing and resulting in a reduction of benefits to all categories of members. Again, this issue was not fully argued but it appears that the legislative framework has contemplated the consequences of an insufficiency of funding of a plan and how that affects different categories of members including some who may not be actively contributing at the time and where their entitlement to benefits has accrued.

[123] I find that the Amendment is not compliant with the PBSA and PBSR. Section 93 does not give the Trustees the discretionary authority to reduce pension benefits simply by virtue of the member being an employee of a withdrawing employer without any actuarial evidence of a solvency issue.

[124] I make no findings regarding what may be permissible consequences to the funding of the benefits of withdrawing members. I have noted elements of the statutory scheme that may be applicable to withdrawing members that may address the concerns of the Appellant regarding future adverse actuarial consequences. However, these issues were simply not argued in this appeal and this appeal deals with the narrow issue of whether there can be a fixed reduction in benefits of a withdrawing member when there is no demonstrated solvency issue. The Tribunal's role is not to write the withdrawal provisions but simply to determine if the withdrawal provisions submitted for acceptance to the Superintendent are in compliance with the PBSA and PBSR.

[125] The Superintendent says that it is not controversial that the existing Article 23 could lower the benefit entitlements of departing members. Based on the reasoning in this decision, the existing Article 23 is not compliant with the PBSA and PBSR for the same reasons as the Amendment and must be amended to bring it into compliance with the PBSA and PBSR. I note that neither party made detailed submissions on the existing Article 23 and therefore it is difficult to deal with it specifically. However, as guidance for the Trustees, section 93 does not provide the authority to reduce the benefits of members of a withdrawing employer, absent a solvency issue or other permitted or justifiable circumstance in the PBSA and PBSR.

COSTS

[126] The Superintendent at the end of its submissions seeks an order granting costs to the Respondent. The Respondent makes no substantive submissions and does not refer to any authorities to support its position for an order granting costs.

[127] The power to award costs comes from section 47 of the *Administrative Tribunals Act*, and section 242.1(7)(g) of the FIA. These sections authorize the FST to require a party to pay all or part of the costs of another party and, in specific situations, to pay all or part of the actual costs and expenses of the FST.

[128] The FST created its own Practice Directives and Guidelines (the "Guidelines") to aid in the just and timely resolution of appeals and the issue of costs which may arise from

them. Section 3.24 of the Guidelines provides that the FST may consider the following in determining whether a participant is liable to pay costs:

a. whether there was conduct that was improper, vexatious, frivolous or abusive;
b. whether the participant submitted a position that was manifestly unfounded;
c. whether the participant unreasonably delayed or prolonged the proceeding, including any failure to comply with an FST undertaking or order;
d. whether the participant assisted the tribunal in understanding the issues;
e. whether the participant unreasonably failed to cooperate with other parties during the appeal;
f. whether the participant failed to attend a hearing or other proceeding, or to send a representative, despite receiving notice;
g. the degree of success in the proceeding; and
h. any other matter the tribunal considers relevant.

[129] Success in the proceeding is only one of many considerations and may not be the determining factor by itself.

[130] Panel Chair Purdie recently summarized the effect of the Guidelines in relation to the discretion of the FST to award costs, at paragraphs 6-7 of *Laity v. Superintendent of Real Estate*, 2022 BCFST 3 (FST-RSA-21-A002(b)):

> While the FST has the power to award costs and there are criteria set out in the Guidelines to assist it in doing so, the FST concluded in *Brewers' Distributor Ltd. v Superintendent of Pensions*, Decision No. 2010-PBA-001(c) ("*Brewers*") that (at para 13):
>
> > While one would normally expect the Guidelines to be applied where applicable, despite their non-binding status, it can equally be said that the assessment of costs, including as to quantum, is traditionally very much a matter for the decision-maker's discretion, and not one to be rigidly carried out.
>
> Several subsequent decisions of the FST, including *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*, 2015-RSA003(c)(*Kadioglu*), have referenced *Brewers* in relation to the assessment of costs. *Kadioglu* concluded that ultimately it is in the decision-maker's discretion as to what, if any, costs should be awarded, and that costs are not routinely awarded to the successful party.

[131] In this matter given that the issue was one of statutory interpretation on a somewhat novel issue, I order that each party bear their own costs.

ORDER

[132] The Trustees' appeal is dismissed and the decision of the Superintendent not to register the Amendment is upheld. Further the direction of the Superintendent, issued under section 113(1) of the PBSA, to amend Article 23 to bring it into compliance is also upheld.

[133] Neither party addressed the time necessary to bring Article 23 into compliance. The Decision roughly allowed for 60 days, and I order that the Trustees have 60 days from the date of the receipt of this decision to submit an amendment to Article 23 of the Plan to the Superintendent to bring it into compliance, subject to any extension of time for this that is agreed upon by the parties.

"Stacy Robertson"

Stacy Robertson, Chair
Financial Services Tribunal