Citation : *Fredericton Police Association v. Superintendent of Pensions*, 2016 NBFCST 2

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *PENSION BENEFITS ACT*, S.N.B. 1987, c P-5.1.

Date: 2016-03-09
Docket: PE-002-2014

BETWEEN:

Fredericton Police Association, Local 911 United Brotherhood of Carpenters and Joiners of America and Applicant 2, Fredericton Fire Fighters Association, International Association of Fire Fighters, Local 1053 and Applicant 4,

Applicants,

-and-

Superintendent of Pensions and The City of Fredericton,

Respondents.

DECISION AND ORDER

Restriction on publication: This Decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c R-10.6.

PANEL: John M. Hanson, Q.C., Panel Chair
Jean LeBlanc, Panel Member
Gerry Legere, Panel Member

DATE OF HEARING: October 21, 2015

WRITTEN REASONS: March 9, 2016

APPEARANCES: Sean McManus for Fredericton Fire Fighters Association and Applicant 4
David Mombourquette for Fredericton Police Association and Applicant 2
Jane Blakely for the City of Fredericton
Brian Maude for the Superintendent of Pensions

TABLE OF CONTENTS

I. OVERVIEW

[1] This matter is a chapter in the ongoing dispute between the Fredericton Police Association [Police] and the Fredericton Fire Fighters Association [Fire Fighters] and the City of Fredericton regarding the City's attempts to remedy the growing deficit of its pension plan while maintaining an affordable, secure and sustainable pension plan for its employees, pensioners and taxpayers.

[2] The Police and Fire Fighters did not agree with the City's proposals to remedy the growing deficit and this led to a multiplicity of proceedings before the Labour and Employment Board. These proceedings culminated in the splitting of the City's pension plan into two plans: a new defined benefit plan for Police and Fire Fighters [Police and Fire Plan] and the conversion of the existing plan into a shared-risk plan for the remainder of City employees [City Plan].

[3] In order to accomplish the split of assets between the City Plan and the Police and Fire Plan, the City obtained an actuarial report from Mercer valuing the assets and liabilities of the original plan and proposing a split of assets and liabilities between the City Plan and the Police and Fire Plan. The split was calculated on the basis of the going concern apportionment method which will be discussed in greater detail below.

[4] As required by the *Pension Benefits Act*, S.N.B. 1987, c P-5.1 [*Pension Benefits Act*], the City filed an application with the Superintendent of Pensions seeking her consent to the split of assets and liabilities between the Police and Fire Plan and the City Plan on the basis of the Mercer report.

[5] On November 18, 2014, the Superintendent of Pensions consented to the split of assets and liabilities between the plans as set out in the Mercer report.

[6] On December 8, 2014, the Fire Fighters and Police filed appeals to this Tribunal of the Superintendent's decision. Their appeals were consolidated by Order of the Tribunal on January 30, 2015.

[7] These appeals were brought pursuant to subsection 73(1) of the *Pension Benefits Act* and proceeded by way of a hearing *de novo*. As such, there is no appellate burden, nor is there any judicial review involved.

[8] The evidence consists of the Record of the decision-making process of the Superintendent of Pensions as required by subsection 11(4) of the Tribunal's procedural rules, Local Rule 15-501: *Proceedings before the Tribunal*, [Tribunal's procedural rules], the Agreed Statement of Facts, the Report of Brendan George dated September 4, 2015, and the testimony of Brendan George.

[9] Pursuant to subsection 76(1)(b) of the *Pension Benefits Act* and for the reasons that follow, we vacate the decision of the Superintendent and conclude that the Superintendent of Pensions' consent to the split of assets and liabilities between the two plans should be provided on the basis of the solvency apportionment method as this best protects the pension benefits of the members of both plans.

II. ISSUE

[10] The issue on this appeal is determining which valuation method should be applied for the split of assets and liabilities between the Police and Fire Plan and the City Plan.

III. POSITIONS OF THE PARTIES

[11] The Police and Fire Fighters contend that the Superintendent's consent to the transfer of assets and liabilities on the basis of the Mercer report results in an inequitable split of assets which is detrimental to the Police and Fire Plan members such that the interests of the City Plan members supersede their interests. The Police and Fire Fighters state that the Superintendent should have refused consent to the transfer of assets and liabilities on the basis of the going concern apportionment method set out in the Mercer report and directed that the transfer be done on the basis of the solvency apportionment method.

[12] On the other hand, the City maintains that the going concern apportionment method set out in the Mercer report is correct as the Old Plan and the new City Plan benefit from a solvency exemption such that they are funded solely on a going concern basis.

[13] The Superintendent of Pensions, who is a party to this appeal pursuant to subsection 75(1) of the *Pension Benefits Act*, takes no position regarding the merits of this appeal other than to provide an explanation of the context in which the decision was made and drawing the attention of the Tribunal to those considerations rooted in the Superintendent of Pensions' specialized jurisdiction and expertise in pensions law.

IV. FACTS

[14] The facts are agreed to between the parties. They filed an Agreed Statement of Facts and the essential facts are as set out below.

[15] Before March 31, 2013, the City maintained a single defined benefit pension plan for its employees, including police and fire fighters, entitled "Superannuation Plan for Employees of the City of Fredericton" [the Old Plan], which was established pursuant to City By-law A-5. This was a defined benefit plan, meaning that upon eligible retirement, the retiree received a specified monthly pension benefit that was predetermined by a formula based on the employee's salary, tenure and age.

[16] We also point out, as it will become important later in our analysis that the Old Plan benefited from a solvency exemption, meaning that it was exempt from the requirement to make contributions to the plan in respect of a solvency deficiency. In other words, the Old Plan was funded on a going concern basis.

[17] At some point, it became apparent that the Old Plan had a funding deficit and that the City would have to take measures to correct this deficit.

[18] In an effort to address this deficit, the City passed an amendment to City By-law A-5 on May 9, 2011 (By-law A-5.8). Among the changes were an increase in pension contributions, a reduction of indexing and a change to the definition of "pensionable earnings". These changes heavily impacted the Police and Fire Fighters.

[19] On June 6, 2011 the Police filed a complaint with the Labour and Employment Board [LEB] alleging unfair practices by the City under the *Industrial Relations Act*. The Fire Fighters filed a similar complaint and those complaints were consolidated.

[20] The LEB issued a Preliminary Order and Reasons for Decision on September 23, 2011 finding that the City's unilateral change to the "pensionable earnings" definition under By-law A-5 interferes with the representation of employees and triggers a violation of subsection 3(1) of the *Industrial Relations Act.* The LEB ordered the City to cease violating subsection 3(1) and directed the City to meet with the Police to discuss the change in the definition of "pensionable earnings" and in the absence of a resolve reached between the parties, the LEB would issue a final direction for remedy following a hearing.

[21] The parties not having reached a resolve, the LEB issued a Final Order on January 18, 2012 with Reasons for Decision dated February 1, 2012 in essence confirming its preliminary order of September 23, 2011.

[22] In the fall of 2012, the City advised its employees, including the police and firefighters, that there had been a further increase in the funding deficit of the Old Plan. Multi-party discussions were held between the City and the unions representing City employees with respect to options for dealing with the deficit.

[23] In January 2013, the City presented a draft Memorandum of Understanding to the CUPE Locals, the Fire Fighters and the Police which proposed the conversion of the defined benefit plan into a shared-risk pension plan. The Memorandum was accepted by the CUPE Locals, but rejected by the Fire Fighters and Police.

[24] On March 18, 2013, the City, in accordance with the Memorandum of Understanding, approved the conversion of the Superannuation Plan into a shared-risk pension plan.

[25] Faced with City Council's March 18, 2013 decision, the Fire Fighters and Police filed new complaints with the LEB seeking, by way of interim relief, an Order to prevent the City from imposing the shared-risk plan on them.

[26] On March 25, 2013, the LEB granted the Police and Fire Fighter's request for interim relief and issued an Interim Order dated March 26, 2013 with reasons for decision dated April 11, 2013. The Order essentially prohibited the City from transferring the Police and Fire Fighters into the shared-risk pension plan.

[27] On March 25, 2013, in response to the LEB's oral ruling, the City passed a resolution directing that the police and firefighters would not be transferred to the shared-risk plan and setting out the process for moving the remainder of the City employees into a shared-risk plan.

[28] On March 28, 2013, the City and the CUPE Unions signed a Memorandum of Agreement agreeing to establish a new Bargaining Police and Fire defined benefit plan effective March 31, 2013 [the Police and Fire Plan]. This Memorandum of Agreement also stated that the Police and Fire Fighters would cease participation in the Old Plan, which was to be converted into a shared-risk plan (the City Plan) effective March 31, 2013. It was also agreed that an appropriate share of assets and liabilities of the Old Plan relating to the Police and Fire Fighters would be transferred from the City Plan to the Police and Fire Plan effective March 31, 2013.

[29] On May 27, 2013, the City passed By-law A-13 to create the Police and Fire Plan and amended By-law A-5 to convert the Old Plan into the new shared-risk City Plan for all other City employees.

[30] At the outset, the whole of the assets of the Old Plan remained in the City Plan.

[31] The City retained Mercer to prepare an actuarial valuation of the assets of the Old Plan as at March 31, 2013 and to calculate the split of assets between the City Plan and the Police and Fire Plan. The Mercer report is dated November 2013. The Mercer report calculated a division of the $202,526,842 in assets from the Old Plan with $37,449,600 going to the Police and Fire Plan and $164,576,300 remaining in the City Plan. The valuation and proposed split of assets was done with the going concern valuation.

[32] On December 5, 2013, the Fire Fighters and Police were invited to a power point presentation by the City which summarized the findings of the Mercer report.

[33] On December 10, 2013, the Fire Fighters and Police wrote to the City and raised concerns about the split of assets and liabilities proposed in the Mercer report.

[34] Despite the Fire Fighters and Police's concerns, the City filed an application with the Superintendent of Pensions on February 26, 2014, seeking her consent to the transfer of assets and liabilities from the City Plan to the Police and Fire Plan. The application specified that the transfer was sought on the basis of the going concern valuation as set out in the Mercer report.

[35] On November 18, 2014, the Superintendent of Pensions issued a decision consenting to the City's proposed split of assets between the two pension plans.

[36] While the transfer of assets was approved by the Superintendent of Pensions, the actual transfer of assets from the City Plan into the Police and Fire Plan has not yet been completed due to these proceedings.

[37] Finally, the parties agreed that Brendan George could be qualified as an expert on actuarial matters. Mr. George has 20 years' experience as a pension consultant and is a partner with the actuarial firm of George & Bell Consulting, which does pension and benefits consulting. His September 4, 2015 report was entered into evidence by consent of the parties.

V. ANALYSIS

[38] Before turning to our analysis, we must mention at the outset that we are concerned with the lack of reasons for the Superintendent of Pensions' decision. A decision such as this one has serious consequences for plan members and we are of the view that procedural fairness required the Superintendent of Pensions to issue reasons for her decision.

[39] We are also of the view that it was inappropriate for the November 18, 2014 decision to be signed by Lynne Martin, a compliance officer, rather than the Superintendent of Pensions. There was no evidence of a written delegation of authority pursuant to subsection 91(3) of the *Pension Benefits Act* from the Superintendent of Pensions to Lynne Martin.

A. Do Section 70 of the *Pension Benefits Act* and Section 54 of the *General Regulation* Apply to the Transfer of Assets?

[40] The *Pension Benefits Act* and the *General Regulation* do not expressly contemplate a transfer of assets from a defined benefit plan to another defined benefit plan with the same employer as will occur by the transfer of assets from the Old Plan to the Police and Fire Plan. Despite this, as

explained below, we find that this transfer of assets and liabilities is governed by section 70 of the *Pension Benefits Act* and section 54 of the *General Regulation*.

[41] Section 70 of the *Pension Benefits Act* and section 54 of the *General Regulation* contemplate the transfer of assets from one plan to another by the same employer.

[42] Section 70 of the *Pension Benefits Act* appears to apply to the transfer in this matter and states:

NEW PLANS

> **70**(1)A pension plan shall not be wound up for the reason only that a new pension plan is established and the employer has ceased to make contributions to the original pension plan.
>
> **70**(2)The benefits under the original pension plan in respect of employment before the establishment of the new pension plan shall be deemed to be benefits under the new pension plan.
>
> **70**(3)Subsection (2) applies whether or not the assets and liabilities of the original pension plan are consolidated with those of the new pension plan.
>
> **70**(4)No transfer of assets shall be made from the pension fund of the original pension plan to the pension fund of the new pension plan without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.
>
> **70**(5)The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan and of any other person entitled to benefits or payments under the plan or that does not meet the prescribed requirements and qualifications.

[43] Sections 53 and subsection 54(1) of the *General Regulation* which apply to transfers under section 70 of the *Pension Benefits Act* mention that the transfer is from a defined benefit to a defined contribution plan. Those sections state:

NEW PLANS

> 53 An administrator seeking consent of the Superintendent to a transfer of assets under section 70 of the Act shall submit to the Superintendent a written request for consent, accompanied by the prescribed fee.
>
> 54(1) The Superintendent shall refuse to consent to a transfer of assets under section 70 of the Act from an original pension plan that is a defined benefit plan to a new pension plan that is a defined contribution plan if the assets to be transferred in relation to the members of the original plan would be less than the total amount of all amounts transferable under subsection (2).

[44] Thus, the confusion as to whether section 70 applies derives from subsection 54(1) of the *General Regulation* which appears to limit the application of section 70 to transfers of assets from a defined benefit plan into a defined contribution plan, which is not the case in this matter.

[45] This confusion is evident in the documents forming part of the Record. In an October 3, 2013 e-mail, Doug Brake at Mercer writes to the Superintendent of Pensions and enquires which statutory provision applies to the apportionment and transfer of assets given that the situation is not directly addressed in the *Pension Benefits Act* or *General Regulation*.

[46] The Superintendent of Pensions responded by return e-mail on October 17, 2013 that "[s]ince the employer is the same, I see this transfer more as a New Plan transfer under s. 70 of the Act (s. 53 & 54 of the Regs) rather than a Sale and Transfer under s. 69."

[47] It would appear that when section 54 was drafted, the unique situation that has occurred in this matter was not contemplated, namely the transfer of a portion of assets from a defined benefit plan to another defined benefit plan by the same employer.

[48] No other provision of the *General Regulation* contemplates the transfer from a defined benefit plan to a defined benefit plan by the same employer. There is in essence, a hole or gap in the pension benefits legislative scheme.

[49] Statutory interpretation principles can assist us in filling this gap.

[50] It is a well-recognized statutory interpretation principle that in the event of a conflict between an Act and a Regulation, the Act trumps the Regulation. In other words, the conflicting provision of the Regulation is deemed not to apply.

[51] Section 70 of the *Pension Benefits Act* does not specify that the transfer of assets must occur from a defined benefit plan into a defined contribution plan. It simply refers to "the original pension plan" and "the new pension plan".

[52] It is subsection 54(1) of the *General Regulation* that adds the specification that the transfer is from a defined benefit plan into a defined contribution plan.

[53] Thus, subsection 54(1) of the *General Regulation* conflicts with section 70 of the *Pension Benefits Act*.

[54] Applying the statutory interpretation principle we have set out above, we find that insofar as subsection 54(1) of the *General Regulation* conflicts with section 70 of the *Pension Benefits Act*, the conflicting provisions of subsection 54(1) become inapplicable. In other words, the requirement in subsection 54(1) that a transfer be from a defined benefit plan to a defined contribution plan does not apply and the more general terms of section 70 of the *Pension Benefits Act* apply.

[55] Thus, subsection 54(1) should be read as applying to all transfers of assets by the same employer from one plan to another, regardless of the type of plan. We agree with Mr. George's rationale in his September 4, 2015 report that "there is no obvious policy rationale that would justify a different valuation for a defined benefit to defined benefit asset transfer compared to a defined benefit to defined contribution asset transfer. The policy goal underlying the legislation and supporting regulations should be to ensure that plan members under a defined benefit plan have equal protection irrespective of whether the successor plan is a defined contribution or a defined benefit."

B. Which Valuation Method Should be Applied for the Split of Assets Between the Two Plans?

[56] Having found that section 70 of the *Pension Benefits Act* and subsection 54(1) of the *General Regulation* apply to this transfer, we must now determine which apportionment method should be applied to the split of assets and liabilities between the Police and Fire Plan and the City Plan. We find that the solvency apportionment method best protects the benefits of the members of both plans.

(i) Legislative Scheme

[57] Subsections 70(4) and 70(5) of the *Pension Benefits Act* require that any transfer of assets from one pension plan to another must be approved by the Superintendent, who can only consent to the transfer if doing so protects the benefits of the members of the plan.

[58] In this unique case, the members of the original plan are now members in two plans. Despite this, the Superintendent of Pensions nonetheless has the obligation under subsection 70(5) to protect the interests of all members of the original plan, which includes the members of the new Police and Fire Plan as well as the members of the City Plan. We repeat subsection 70(5) which reads:

> **70**(5)The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan and of any other person entitled to benefits or payments under the plan or that does not meet the prescribed requirements and qualifications.

[59] We have already found that section 54 of the *General Regulation* applies to this transfer of assets as the portion of subsection 54(1) stipulating that the transfer of assets be from a defined benefit plan to a defined contribution plan is inapplicable. Subsection 54(2) of the *General Regulation* stipulates that the Superintendent of Pensions can only provide her consent by setting the transfer ratio at the higher of the solvency or going concern valuation. Those subsections read:

> 54(2) The amounts transferrable in relation to a member of an original pension plan that are deemed to be contributions made by or on behalf of the member under a new pension plan under section 70 of the Act, with interest, shall not be less than the greatest of
>
> (a) the commuted value of the pension benefit determined in accordance with subsection 19(4),
>
> (b) the going concern liabilities of the accrued pension benefit, and
>
> (c) the accrued solvency liabilities of the accrued pension benefit to and including the date of the windup of the original pension plan.

[60] Subsection 54(1) of the *General Regulation* adds that the Superintendent shall refuse to consent to a transfer of assets if the assets to be transferred in relation to the members of the original plan would be less than the total amount of all amounts transferable under subsection 54(2).

[61] In considering this legislative scheme, we are also mindful of statutory interpretation principles.

[62] The Supreme Court of Canada has stated that all legislation must be interpreted according to the modern method of interpretation. According to the modern method of interpretation, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". [*Alberta Union of Provincial Employees v. Board of Governors of Lethbridge Community College*, 2004 SCC 28 at par. 25. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27]

[63] Contrary to other legislation, the *Pension Benefits Act* does not contain an "objects" or "purpose" provision which would aid in its interpretation.

[64] The New Brunswick *Interpretation Act,* R.S.N.B. 1973, c. I-13 is of assistance however and section 17 states:

> 17 Every Act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision.

[65] In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services*), 2004 SCC 54, the Supreme Court of Canada was called upon to interpret the Ontario *Pension Benefits Act.* It stated the following regarding the purpose of the Ontario *Pension Benefits Act:*

> 38 The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see *GenCorp*, *supra*; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1990 CanLII 6833 (ON CA), 1 O.R. (3d) 122 (C.A.), at p. 127). […]

[66] We also glean insight from *Villani v. Canada (Attorney General)*, 2001 FCA 248 at par. 27, where the Federal Court of Appeal stated that benefits-conferring legislation "ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant."

[67] We are of the view that the Supreme Court and the Federal Court of Appeal's comments are equally applicable to New Brunswick's *Pension Benefits Act.*

[68] We also set out relevant terminology necessary to these reasons.

Asset transfer ratio

[69] The asset transfer ratio is the ratio of assets divided by liabilities. The *General Regulation* defines "asset transfer ratio" at subsection 51(1) as

> "asset transfer ratio" means the quotient obtained by dividing the total of the market value of investments held by an employer's pension plan, any cash balances and any accrued and receivable income items by the sum of the residual liabilities and the transfer liabilities;

Valuation

[70] A valuation provides a snapshot of a pension plan's financial condition on a given date.

[71] The *General Regulation* mandates that an actuary who prepares an actuarial valuation report of a pension plan must perform two types of valuations:

- Subsection 9(4) of the *General Regulation* requires that the actuary prepare a going concern valuation of the pension plan and dictates what information must be included in the valuation, and

- Subsection 10(1) of the *General Regulation* requires that the actuary prepare a solvency valuation of the pension plan.

[72] Section 1 of the *General Regulation* under the *Pension Benefits Act* defines "going concern valuation" as follows:

> "going concern valuation" means a valuation, prepared by an actuary on the basis of actuarial assumptions and methods that are considered by the actuary to be adequate and appropriate and that are in accordance with generally accepted actuarial principles, of the assets and liabilities of a pension plan that is not expected to be wound up in whole.

[73] Mr. George explained that a going concern valuation is generally used as the method to determine the contributions that should be going into a pension plan to fund the benefits. When employing this method, the actuary makes certain assumptions and then makes a recommendation to the plan sponsor on what is an appropriate contribution that should be going into the plan to fund the benefits over a long period of time. As part of the going concern valuation, the actuary also determines the current assets held in the plan, the current liabilities, and the ratio of assets to liabilities (how the assets and liabilities compare to each other).

[74] The *General Regulation* also defines the term "solvency ratio" as :

> "solvency ratio" means the quotient obtained by dividing the solvency assets of a pension plan by the solvency liabilities of the plan, both determined as of the review date of the most recently filed actuarial valuation report.

[75] Mr. George testified that the solvency valuation calculates the assets and liabilities of the pension plan if it were wound up on the date of the report. According to Mr. George, you determine the liabilities by determining the payout to pension plan members on that given day. Active members would receive a lump sum transfer value (the calculation of which is defined) and retirees would generally have an annuity purchased for them. Mr. George explained that when you divide the assets by the wind-up liability, you obtain the transfer ratio.

[76] Mr. George also indicated that a solvency valuation can give you two results: (1) either there is no solvency deficiency because the assets of the plan are sufficient to provide for the payments of all benefits accrued under the plan; or (2) there is a solvency deficiency because of an excess of solvency liabilities over solvency assets.

Apportionment

[77] An apportionment is a method employed to calculate a split of assets between two plans.

[78] There are two apportionment methods that can be applied to apportion assets and liabilities between two plans: the going concern apportionment method and the solvency apportionment method.

[79] In the going concern apportionment method, the actuary determines the funded ratio of the plans and from this number flows the calculation of the assets and liabilities.

[80] In the solvency apportionment method, the actuary starts with the transfer ratio and from this number flows the calculation of assets and liabilities between the two plans.

[81] In each of these apportionment methods, the actuary carries out a going concern valuation and a solvency valuation.

Solvency Exemption v. Solvency Valuation

[82] There also appeared to be some confusion at the hearing surrounding the terms "solvency exemption" and "solvency valuation".

[83] We note at the outset that the term "solvency valuation" is used independently of the term "solvency deficiency" throughout the *General Regulation.*

[84] Mr. George explained that the solvency exemption is not the same thing as a solvency valuation; these terms are not interchangeable.

[85] The solvency valuation is one of two statutorily prescribed models of actuarially determining the value of a pension plan, which we discussed above.

[86] The solvency exemption is a contribution exemption set out in section 42.1 of the *General Regulation.* This exemption means that a pension plan can be funded on the basis of the going concern valuation to determine how much money, or contributions, should go into the plan. With a solvency exemption, the plan sponsor is exempt from making contributions in respect of a solvency deficiency (the excess of the liabilities over the assets in a solvency valuation).

[87] Mr. George testified that in recent years, pension legislation across the country, including New Brunswick, allows certain types of plans to be exempt from funding on the solvency basis. He stated that solvency exemptions are fairly common in the public sector or municipal sectors where the plan sponsor is felt to be in a more stable position.

[88] Mr. George further explained that even when a plan sponsor benefits from a solvency exemption, it is still obligated to perform a solvency valuation and a going concern valuation on a triennial basis pursuant to subsections 9(4) and 10(1) of the *General Regulation*. In other words, the solvency exemption contained at section 42.1 of the *General Regulation* does not exempt pension plans from being subject to solvency valuations.

(ii) Findings

[89] The Mercer report concludes that the amount of assets to be transferred into the Police and Fire Plan as at March 31, 2013 is $37,449,600, while the amount to remain in the City Plan is $164,576,300. These figures are based on a funded ratio of 76.80% for both plans and result in 47.9% of the assets going to the Police and Fire Plan and 56.9% going to the City Plan.

[90] The figures in the Mercer report were obtained by employing the going concern apportionment method. We note that the authors of the Mercer report did not carry out the solvency apportionment method in their report. Mr. George confirmed this at the hearing.

[91] According to the authors of the Mercer report, the Superintendent of Pensions confirmed that the division of assets between the two plans should be performed on the basis of the going concern liabilities because the City Plan benefits from a solvency exemption and is funded only on a going concern basis.

[92] We agree with Mr. George that the fact that the Old Plan benefited from a solvency exemption and that the City Plan also obtained a solvency exemption has no bearing on what apportionment method should have been employed in splitting the assets between the two plans.

[93] Mr. George testified that his most important critique of the going concern apportionment method employed in the Mercer report is that it relies on assumptions which are at the discretion of the actuary and as such it is quite subjective.

[94] Mr. George explained that with the solvency apportionment method, there is really no subjectivity and discretion because the assumptions are mandated by legislation and actuarial standards set by the Canadian Institute of Actuaries.

[95] Mr. George testified that he has two main concerns with the going concern apportionment method employed in the Mercer report:

- He disagrees with the retirement age assumption chosen by the authors. The assumption employed in the Mercer report is that 60% of firefighters and police will retire at their earliest unreduced retirement age (or in 1 year if later) and the remaining 40% will retire at age 65. In Mr. George's experience, very few police and firefighters retire as late as age 65. In fact, based on the data found in the Mercer report, only 2% of active police and firefighter members were over age 60 and only 7% were over age 55. According to Mr. George, these figures clearly illustrate that the assumption that 40% of plan members would retire at age 65 is invalid.

- The calculation of the transfer of assets was conducted by a single actuarial firm at the direction of the City and there was no actuarial firm representing the interests of the Police and Fire Plan. According to Mr. George, in every transfer in which he has been involved based on the going concern apportionment method, there were two actuaries, one for each plan, thus ensuring a negotiation process to ensure the interests of the members of both plans were represented.

[96] There was some suggestion at the hearing that the Police and Fire Fighters could have retained their own actuary to represent their interests. We are satisfied with the Police and Firefighter's explanation that this was not possible as they do not have standing with respect to the provisions of the pension plan – it is the individual plan members who have standing.

[97] Mr. George is of the opinion that the going concern apportionment method negatively impacts the benefit security of the Police and Fire Plan as it results in an inequitable division of assets.

[98] Mr. George states that the solvency apportionment method is the fairest method to divide assets in a situation such as this for three reasons:

a) The solvency method would better protect members' benefits in the event of future wind-up of the Police and Fire Plan.

b) The going concern method is subjective and depends on the assumptions used by the actuary.

c) The going concern method would not benefit the security of members in the Police and Fire Plan, as illustrated by the reduction of the transfer ratio of that Plan from 55.2% to 48.1%.

[99] Mr. George provided the calculations for both apportionment methods in his September 4, 2015 report. The following chart from Mr. George's report clearly reflects how the use of the two different apportionment methods affects the allocation of assets:

Going Concern Apportionment Method

	Going Concern Funded Ratio	Transfer Ratio	Allocation of Assets
Police and Fire	76.8%	47.9%	$37,449,600
CoF	76.8%	56.9%	$164,576,300
Total	76.8%	55.2%	$202,025,900

Solvency Apportionment Method

	Going Concern Funded Ratio	Transfer Ratio	Allocation of Assets
Police and Fire	88.1%	55.2%	$42,976,700
CoF	74.2%	55.2%	$159,049,200
Total	76.8%	55.2%	$202,025,900

[100] Mr. George testified that if the police and firefighters had stayed in the Old Plan, the transfer ratio (assets divided by liabilities) was 55.2%. By using the going concern apportionment method in the Mercer report, the transfer ratio of the Police and Fire Plan is reduced to 48 percent while the transfer ratio of the City Plan is increased from 55.2 % to 57.1%.

[101] In short, when the transfer ratio is kept the same for both plans, this results in an additional $5,527,100 in assets for the Police and Fire Plan (a change of 14.8% in the asset value). Of course, this also results in a loss of $5,527,100 for the City Plan (a change of -3.4% in the asset value).

[102] Mr. George testified that the changes in the transfer ratio from the Old Plan to the Police and Fire Plan is a direct indication that the benefit security of the Police and Fire Plan is weakened when employing the going concern apportionment method.

[103] Mr. George testified that using the solvency apportionment method would best protect the benefits of members of both plans as it would keep the transfer ratio for both plans at 55.2% after the transfer, thus ensuring that each plan has the same ratio of assets to liabilities.

[104] We agree with Mr. George's opinion that the solvency apportionment method should be employed in the calculation of the transfer of assets. Using the transfer ratios in the going concern valuation is not fair to the members of the Police and Fire Plan as this results in an inequitable allocation of assets between the Police and Fire Plan and the City Plan.

[105] In accordance with section 54 of the *General Regulation*, the Superintendent of Pensions can only consent to a transfer of assets if the asset transfer value uses the greater of the going concern and solvency liabilities. In this case, the correct apportionment method would be the solvency apportionment method.

[106] Subsection 54(1) of the *General Regulation* adds that the Superintendent shall refuse to consent to a transfer of assets if the assets to be transferred in relation to the members of the original plan would be less than the total amount of all amounts transferable under subsection 54(2).

[107] Given the lack of reasons for the Superintendent's decision, we are left with the conclusion that there does not appear to have been an analysis under subsection 54 of the *General Regulation* regarding this transfer.

[108] Regardless, nowhere in the *Pension Benefits Act* or *General Regulation* is the Superintendent of Pensions permitted to consent to a transfer of assets that would provide less to pension plan members. Rather, she has the statutory duty, clearly spelled out in the *Act,* to protect all plan members regardless of the type of transfer.

[109] Even if section 70 of the *Pension Benefits Act* and section 54 of the *General Regulation* is found not to apply to this transfer, we are of the view that the Superintendent of Pensions must protect the interests of all members of the Old Plan, which, at a minimum, means retaining the apportionment method which best protects the interests of all members. This would be in keeping with the broader purpose of the *Pension Benefits Act* and other pension legislation in Canada, which is to benefit, protect and expand the interests of employees.

[110] In our view, faced with an application for a transfer of assets, the Superintendent of Pensions cannot discharge her duty under the *Pension Benefits Act* without having both the going concern apportionment and the solvency apportionment results. Without these results, the Superintendent of Pensions cannot determine what best protects the benefits of the plan members.

[111] In our view, the discrepancy of 9% in the asset transfer ratio between the Police and Fire Plan and the City Plan should have prompted the Superintendent of Pensions to further investigate the application.

[112] There was some suggestion at the hearing that all the Superintendent can do faced with an application for consent to a transfer of assets is to either consent or refuse consent.

[113] In our view, this position is too simplistic. In light of the 9% discrepancy in the asset transfer ratio set out in the solvency valuation of the Mercer report, the Superintendent could have done the following, which are all accessory to her authority to provide or refuse consent:

- suggested that a second actuarial firm be retained as is normally done when the going concern apportionment is employed to ensure checks and balances between the two plans. This would have ensured the interests of the police and firefighters were represented. Again, we see this as accessory to her authority to provide or refuse consent,

- requested further information, and

- suggested that the solvency apportionment method be calculated to allow her to compare those figures with the going concern apportionment figures provided in the Mercer report.

[114] In our view, the solvency apportionment method clearly protects the interests of members of both plans as they maintain the same asset transfer ratio from the Old plan into their new plans. An equal transfer ratio, in our view, fairly ensures the protection of benefits of members of the two plans.

VI. DECISION AND ORDER

[115] Pursuant to paragraph 76(1)(b) of the *Pension Benefits Act,* the Tribunal vacates the decision of the Superintendent of Pensions and states that consent to the transfer should be granted on the basis of the solvency apportionment method.

DATED at Saint John, New Brunswick, this 9th day of March, 2016.

“original signed by”
Christine M. Bernard
Registrar
Signed for panel members John M. Hanson, Q.C., Jean LeBlanc, and Gerry Legere
pursuant to subsection 40(3) of the *Financial and Consumer Services Commission Act*