IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC. - INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 161, COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., and LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC., MTS ADVANCED INC. and ALL UNIONIZED EMPLOYEES OF MTS MEDIA INC. WHO WERE TRANSFERRED TO YELLOW PAGES GROUP CO. PURSUANT TO A SALE ON OCTOBER 2, 2006,

Applicants
(Respondents)

- and -

MANITOBA TELECOM SERVICES INC., and MTS ALLSTREAM INC.
(as successor to MTS COMMUNICATIONS INC., MTS MOBILITY INC., And MTS ADVANCED INC.)

Respondents
(Appellants)

MEMORANDUM OF ARGUMENT ON BEHALF OF THE APPLICANTS
(Filed Pursuant to Section 40 and Paragraph 58(1)(a) of the Supreme Court Act and Rule 25 of the Rules of the Supreme Court of Canada)

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PART I – STATEMENT OF FACTS

A. Overview

1. This case involves a dispute between MTS and its 7000 employees[1] over the misappropriation by MTS of $43 million (approximately $101 million with interest) in surplus contributions belonging to the employees ("initial surplus" or "employee surplus"), transferred out of their trust fund into the MTS trust fund.

2. After a 13 week trial, involving numerous witnesses (including six actuaries), 1,400 exhibits and approximately 800 pages of written argument, the trial judge found that the initial surplus belonged to the employees and that MTS and the Manitoba Government ("the Government") had solemnly undertaken not to use this surplus to reduce MTS's pension costs in the New Plan it was required to establish by the privatization *Act*. **[Tab 7 - *The Manitoba Telephone System Reorganization and Consequential Amendments Act*, S.M. 1996, c. 79 (the "*Reorg Act*")]**

3. The trial judge found that MTS had breached the undertaking and violated the *Reorg Act*.

4. The Court of Appeal disregarded or otherwise did not apply the facts and overturned the trial judge's decision, the net result of which is that these employees have lost significant pension benefits.

5. The proposed appeal raises a number of issues of national and public importance. This case represents one of the largest and most significant cases in recent Manitoba history. In an earlier pre-trial application brought by MTS, Chief Justice Scott of the Manitoba Court of Appeal stated:

> As can plainly be seen, the facts of this appeal are unique. It is not every day that a very large provincial Crown corporation, which enjoyed at one time virtual monopoly powers over telephone and telecommunications in Manitoba, is turned into a publicly traded corporation. A large sum of money is at stake. The allegations made are serious, touching as they do on the retirement income of thousands of past and present employees, and the professional reputations of some of the key players involved in the decisions that

[1] For ease of reference, the word "employees" is used herein to refer to employees, retirees and plan members collectively.

> are under scrutiny [...]. ***Telecommunication Employees Association of Manitoba Inc. et al v. Manitoba Telecom Services Inc. et al*** 2007 MBCA 85, [2007] 10 W.W.R. 385 at para. 16.

6. The proposed appeal also raises important questions regarding the extent to which this Court's prior pension jurisprudence establishes a default pension law regime that applies to all pension situations, regardless of the funding mechanism governing the plan in question. The proposed appeal differs significantly from this Court's previous pension cases as it involves the transition from a public to a private plan and the transition from a plan funded on a fixed 50/50 shared-funding model to one in which the employer's contributions are based on actuarial assessments (i.e. where the funding risk has changed).

7. There are several public pension plan schemes in Manitoba and Quebec, which have similar funding mechanisms. In addition, there are several public pension plans across the country, which have transitioned from public plans to private plans, with the likelihood that there will be more public plans transitioning in whole, or in part, from Crown plans to private plans or from Crown plans to Crown Agency plans. Any time there is such a transition from a fixed or equal contribution plan to a plan funded differently, i.e. to a plan where the risk changes such as in a traditional defined benefit pension plan, the issues extant in this case will arise. In these circumstances, the Court of Appeal's one-size-fits-all approach improperly closes the door on further developments in this important area of law.

8. The proposed appeal also raises serious questions regarding the importance of interpreting agreements and statutes in light of their broader context. The Court of Appeal ignored the unequivocal undertakings made by MTS and the Government, which the trial judge found essential in interpreting the Memorandum of Agreement ("MOA") between the parties. Likewise, the Court of Appeal ignored the legislative history and the purpose of the MOA in interpreting the legislative guarantee of benefits "equivalent in value", despite the fact that the MOA had been integrated into the *Reorg Act*.

9. This approach casts aside employees' equitable rights, the presumption against expropriation, and the deferential approach to findings of fact that appellate courts are called upon to employ.

10. Lastly, the issue of apprehension of bias arises because a recently retired Judge of the Manitoba Court of Appeal (Charles Huband) was co-counsel to MTS and argued the case before a panel of the same Court which included a former colleague. This issue has implications for every appellate court in Canada.

B. Factual Background

The Structure of the Prior Plan

11. The *Civil Service Superannuation Act* ("*CSSA*") establishes the pension plan for Manitoba Government employees. Prior to the privatization of MTS, some 7,000 MTS employees belonged to this plan (the "Prior Plan").

12. Under the Prior Plan, the cost of pension benefits was shared 50/50 between the Government and employees. Employees pre-funded their share of the contributions to a trust fund under the *CSSA* (the Government did not contribute to the fund). The Government matched all payments that came out of the fund when benefits came due. This "pay-as-you-go" system ensured that the cost of benefits was split exactly 50/50.

13. Since all the assets in the trust fund were attributable to employee contributions and employees were responsible for any unfunded liabilities in the trust fund, surplus funds were used exclusively to improve pension benefits and never to defray employer costs. **[Tab 4 par. 314]** This use of surplus was never debated despite the fact that the *CSSA* was silent with respect to use of the surplus. The Prior Plan also provided for cost of living adjustments ("COLA") that were funded from a separate account. Awards averaged 73% of inflation in the 20 years before privatization.

14. The evidence at trial established that the surplus in the Prior Plan had been used to improve pension benefits on nine occasions between 1970 and 2000. **[Tabs 16, 17 and 18]** When the Government was not prepared to pay for its 50% share of an improvement, employees sometimes agreed to pay some or all of the costs from their surplus. **[Tabs 11 and 17]** In 2000, after privatization, surplus in the Prior Plan was used to increase benefits by between 6-14%. **[Tab 18]** Had MTS employees remained in the Prior Plan, they would have received this benefit

increase. MTS's actions after privatization prevented employees from receiving similar benefits.

15. As of December 31, 1996, the day before the privatization of MTS, the Prior Plan had an employee surplus of $179 million. **[Tab 26]** The parties agreed that MTS employees' share was exactly $43.364 million. The trial judge found that one fact was established beyond all doubt: that on privatization, there was an identifiable and calculable employee surplus in contributions. **[Tab 4 par. 313]**

The Privatization of MTS

16. In early 1996, the Government announced that MTS would be privatized effective January 1, 1997. The Government and MTS decided that the pension assets and liabilities of both active and retired employees would be transferred to MTS, rather than keeping them in the Prior Plan. Doing so created a massive benefit for MTS. It enabled MTS to achieve a tax-free status (in the amount of $383 million) for the first several years of its existence as a private, publically traded company. **[Tab 19]**

17. From the time employees learned of the Government's plan to privatize MTS, they were acutely alive to the fact that their surplus under the Prior Plan would be transferred to the New Plan. Employees lobbied to ensure that their surplus was protected and used in the same manner as all previous surpluses in the Prior Plan had been used. **[Tab 4 paras. 55 & 59]**

18. In a series of meetings with cabinet ministers and government representatives, employees were given clear assurances by both MTS and the Government that the initial surplus from the Prior Plan was employee owned surplus, that it would be protected and reserved for benefit improvements, and that it would not be used to reduce MTS's cost or share of future contributions. **[Tab 4 paras. 79, 93, 94 & 99]**

19. The Government's stated intention was to not take anything away from employees when it privatized MTS. Section 15(2) of the *Reorg Act* requires that the New Plan "shall provide for benefits which on the implementation date are equivalent in value to [the Prior Plan]...". **[Tab 7]** However, employees were concerned that there were no details regarding this guarantee of "benefits... equivalent in value". Employees were also concerned that the *Reorg Act* 'deemed'

them to 'consent' to the expropriation of their pension assets into the New Plan.

20. On October 31, 2006, counsel for the employees made a presentation to the Standing Committee reviewing the privatization of MTS and set out their concerns with respect to their ownership and any use of the employee surplus as well as maintenance of equal governance of the New Plan. Darren Praznik, the Deputy House Leader, acknowledged the legitimacy of these concerns and outlined the Government's intention to address them. **[Tab 13 p. 159]**

21. On November 6, 1996, MTS provided a briefing note to Glen Findlay, the Minister responsible for MTS, regarding the employees' concerns and MTS's response. **[Tab 20]** The November 6th Memo reiterated a commitment MTS had repeatedly made to employees that the initial surplus would not be used by MTS to reduce its costs. On November 7, 1996, during the public review of the draft legislation, Minister Findlay repeated this solemn undertaking: **[Tab 14 p. 162]**

> MTS has undertaken that any surplus in employee contributions to the [Prior Plan] will not, and I stress not, be used to reduce MTS's costs or share of contributions to the New Pension Plan. [emphasis added]

22. The Government did not want pensions to be an issue holding up the passage of the *Reorg Act,* given the controversy the privatization of MTS had unleashed and the need to follow the timelines set out in the corporate prospectus already issued for MTS. Thus, the Government brokered a meeting between MTS and employee representatives to reach agreement on the protection of the initial surplus and the other matters of concern. Minister Praznik was tasked with working with employees and MTS to resolve these issues.**[Tab 4 par. 131]**

23. On the evening of November 7, 1996, representatives of employees, the Government and MTS met to find a resolution to the employees' outstanding concerns. Employees proposed placing their surplus into a separate account so it could be protected. However, employees were told that a separate account was not possible. **[Tab 4 par. 156]** The parties ultimately agreed that the surplus would be placed in the COLA account. This agreement was set out in an MOA signed that night by the parties. **[Tab 21]**

24. The *Reorg Act* was amended the next day in light of the MOA. Subsection 15(3) was

introduced to provide for an "independent actuary" to ensure that the equivalence sought by plan members was, in fact, achieved. **[Tab 14 p. 163]** Subsection 15(11) was also added so that *"if there is any disagreement or a misunderstanding between the intent of the sections in the bill and the MOA, that the MOA would take precedence."* **[Tab 15 p. 171]** In introducing the amendments Minister Findlay said:

> *There had been a lot of discussion around what that means, what equivalency means...*
>
> *Yesterday, we had major, major meetings... We all wanted something that was signed that represented the idea of equivalency, that gave comfort to all, that as we passed these sections, exactly what everybody wanted was really going to happen.* **[Tab 15 p. 171]**

25. The above comments make it clear that the MOA must be taken into account when determining if the benefits are indeed equivalent in value on implementation.

26. The independent actuary (Fox) was duly appointed by the Provincial Auditor pursuant to s. 15(3) of the *Reorg Act*. Fox concluded that the benefits were not equivalent in value because the employees had contributed more than 50% of the funding on the implementation date and the surplus in the Prior Plan "belonged to the employees." **[Tab 22]**

27. Unfortunately, based on significant interference in his decision making by the Provincial Auditor and MTS, Fox was coerced into changing his opinion to state that the benefits in the two Plans were equivalent in value. The trial judge found this interference to be improper and determined that Fox's final opinion could not stand. **[Tab 4 par. 454]** MTS did not appeal this finding.

The Employees Discover the Flaws in the New Plan COLA Account

28. The MOA permitted employees to review a draft of the plan text, which included provisions relating to the initial surplus being placed in the COLA account. The employees' actuary raised serious concerns about the COLA account. Notwithstanding these concerns, MTS's actuary chose to not disclose key negative aspects of how the account would operate. **[Tab 4 paras. 321-323]**

29. Years passed before the employees had the information necessary to appreciate that the

design of the COLA account precluded the initial surplus from being used to increase their benefits. It was ultimately determined that this outcome was the result of a number of factors: the 20 year pre-funding restriction, the low interest rate MTS used for the COLA account (instead of the actual plan rate of return) and the fact that the COLA guarantee liabilities were applied against the account but the COLA guarantee assets were not. None of these issues were raised at the time of the MOA. The last two items were not referenced in the plan text. **[Tab 4 paras. 320-324]**

30. Moreover, because MTS did not record a liability in association with the initial surplus, which actuarial evidence at trial indicated should have been done, MTS was able to reduce its costs and take five years of contribution holidays. **[Tab 4 paras. 296(e) & 503]** In 2007, MTS's own actuaries acknowledged that the design of the COLA account was so flawed that it could never have produced additional benefits for employees. **[Tab 24]** The expert evidence at trial was that, because the COLA account could not produce additional benefits as intended, MTS's pension costs were reduced by the amount of the initial surplus. **[Tab 31, Evidence of Tom Levy]** As of the date of trial, the COLA account had a deficit of $17 million and counting. **[Tab 25]**

The Trial Judge's decision

31. The trial judge concluded that MTS had breached its undertaking and the MOA, and, as a result, the benefits of the two plans on the implementation date were not equivalent in value, as required by the *Reorg Act*. This conclusion stemmed from a number of pivotal findings of fact. In particular, he found that "...the basic premise was the protection of the initial surplus so that it was available exclusively for funding of improved pension benefits including COLA increases above [the Guarantee]." **[Tab 4 par. 165]** Importantly, Minister Praznik, the only Government representative to testify, supported the employees' key factual assertions at trial. **[Tab 4 par. 160]**

32. The trial judge found that the surplus under the Prior Plan "belonged to employees" as it represented the amount above 50% of the contributions they were required to contribute. He asked rhetorically: why should employees pay more than 50% of the costs on implementation

date for benefits which only cost them 50% in the Prior Plan? **[Tab 4 par. 341]**

33. The trial judge found that MTS and the Government had undertaken that the New Plan, to the extent possible, would "mirror" the Prior Plan, and that the employee surplus would be used for the benefit of employees, not to reduce MTS contributions. **[Tab 4 paras. 136 & 137]** The trial judge ruled that the employees, who wanted absolute security that their surplus would not be used to reduce MTS's contributions, obviously relied on these undertakings, which served as the foundation for the negotiations towards the MOA.

34. The trial judge further concluded that, while the MOA was not clearly worded, it was because employees had not been given reasonable notice of these negotiations. **[Tab 4 par. 511]** They were kept "in the dark" with respect to the privatization process, and were not given relevant information regarding the proposed COLA account. **[Tab 4 paras. 203 & 475]** Nevertheless, the trial judge found the object of the November 7th meeting and resulting MOA was to reach an agreement so that employees would be satisfied that the benefits were "equivalent in value" and that the initial surplus was protected to be used for their exclusive benefit. **[Tab 4 par. 220]** Indeed, MTS's evidence of the objective intent of the MOA confirmed that the goal was to "use up" the initial surplus to provide a benefit to employees. **[Tab 27, Testimony of MTS's president Bill Fraser; Tab 28, MTS briefing note]**

35. The trial judge concluded that one could not determine whether the benefits were equivalent in value on the implementation date of the New Plan, as required by the *Reorg Act*, without considering the use and application of the initial employee surplus, as well as issues of governance. This position corresponded with the conclusion of the independent actuary who assessed this issue, prior to the improper interference that nullified his decision. **[Tab 4 paras. 249-252]**

36. Moreover, the trial judge ruled that the incorporation of the MOA into the *Reorg Act* was to ensure that the guarantees in the MOA received legislative protection. Likewise, the provision for an independent actuary in subsection 15(3) was to persuade employees that their interests in the surplus would be protected. **[Tab 4 par. 462]** These provisions were added because of the issues raised by employees relating to the initial surplus, ongoing surplus and governance. There

was no issue concerning the level of benefits. The issue at the time (and now) was the cost or value of the benefits (i.e. who was paying what share on implementation) and control over their surplus (i.e. governance). **[Tab 4 par. 510]**

37. The trial judge concluded that MTS's actions in structuring the COLA account led to a breach of the MOA and the *Reorg Act*. **[Tab 4 paras. 503 & 518]** Moreover, the trial judge found that the COLA account, because of its design, was incapable of using the surplus to benefit employees. **[Tab 4 paras. 286, 320 & 373]** Employees could not have anticipated this design defect given that they were not informed about the way the account would operate; **[Tab 4 paras 203 & 322]** information they needed prior to signing the MOA. **[Tab 4 paras. 184-185]**

38. Accordingly, the trial judge found that the employees would not have agreed to the MOA had they known that the structure of the COLA account would deprive them of their surplus. **[Tab 4 paras. 324, 502, 517]** The result of this deprivation is that the benefits of the two Plans were not equivalent in value. **[Tab 4 par. 373]** Put another way, the benefits did not have equivalent value in the New Plan because employees paid more than 50% for them on implementation. Those same benefits only cost 50% in the Prior Plan.

39. The guaranteed COLA in the New Plan was not an offset for the employees paying more, since the Prior Plan provided better COLA **[Tab 4 par. 373; Tab 23]** and the guarantee was fully pre-funded by employees without using their surplus. Having so concluded, the trial judge ordered that the initial surplus be paid back to the employees in the form of enhanced pension benefits, as originally intended, with interest. **[Tab 4 par. 518]**

The Court of Appeal's decision

40. The Court of Appeal allowed MTS's appeal with respect to the initial surplus, concluding that the definition of "benefits [...] equivalent in value" did not require consideration of the funding of the benefits or the treatment of the initial surplus. Instead, the Court relied on the use of the term "benefits" in general pension legislation, limiting the definition to include only whether a pensioner's monthly pension payments were reduced by privatization. **[Tab 5 par. 93]**

41. Similarly, the Court of Appeal concluded that the undertakings made by the Government

and MTS were unenforceable, as they were not contracts, and there was no indication that they were relied on by the employees. **[Tab 5 paras. 160-164]** The Court proceeded to interpret the MOA in isolation from these undertakings, and concluded that MTS had not breached the strict terms of the MOA, notwithstanding the fact that the initial surplus did not produce a scintilla of additional benefits, and notwithstanding that MTS's pension costs were thereby reduced by the amount of the initial surplus.

42. Lastly, the Court of Appeal concluded that the common law principles of pension law established by this Court applied to the case notwithstanding the 50/50 funding arrangement, the undertaking and the use of employee surplus in the Prior Plan. **[Tab 5 par. 155]**

PART II – QUESTIONS IN ISSUE

43. The proposed appeal raises the following specific issues of national and public importance:

a. Can an Appellate Court ignore the Trial Judge's findings regarding extrinsic evidence in interpreting a statutory provision that incorporates an agreement, the subject matter of which is inextricably linked to the statutory provision?

b. Does this Court's pension jurisprudence establish a default pension law regime that applies regardless of the funding mechanism that governs in a particular case?

c. Does an apprehension of bias exist where a recently retired Manitoba Court of Appeal judge argued the case on behalf of MTS before the Court of Appeal?

PART III - STATEMENT OF ARGUMENT

A. Can an Appellate Court ignore the Trial Judge's findings regarding extrinsic evidence in interpreting a statutory provision that incorporates an agreement, the subject matter of which is inextricably linked to the statutory provision?

The Court of Appeal failed to interpret the Reorg Act in light of its legislative history and the circumstances surrounding its enactment

44. The Court of Appeal ignored the employees' ownership of surplus when it failed to interpret the legislative guarantee in subsection 15(2) – that benefits under the New Plan would be "equivalent in value" to benefits in the Prior Plan – in light of the unique circumstances

surrounding the enactment of the *Reorg Act*. Instead, the Court of Appeal based its analysis on the use of the term "benefits" in general pension legislation, stripping the protections provided in the *Reorg Act* of their underlying purpose. In doing so, the appellate Court erred by blithely relying upon the definition of "benefits" in other *Acts* having different purposes than the *Reorg Act*. This Court in ***Miln-Bingham Printing Co. v. The King***, [1930] S.C.R. 282 at par. 2 cautioned against this approach:

> No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be *in pari materia*, but it is all together a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be boldly transferred to the other.

45. The trial judge based his interpretation of the *Reorg Act* on a careful examination of its full context. For instance, the trial judge found that the legislative process in the days immediately preceding the passage of the *Reorg Act* focused on the need to address employee concerns that they could lose the benefit of surplus contributions made to the Prior Plan. These concerns were clearly set out in the presentation by employees' counsel to the Standing Committee on October 31, 1996. **[Tab 13; Tab 4 paras. 101-108]**

46. The statements by Government Ministers following this presentation recognized the legitimacy of these concerns and outlined the Government's intention to address them. Minister Praznik stated:

> This is an excellent presentation that Mr. Meronek has made. These are issues that have been flagged with us, and it is not our intention in doing this that we in any way take away from the pension of the employees. If there is some uncertainty here that has to be dealt with, as there may appear to be, we have to address that and that work is currently underway in the discussions Mr. Meronek has outlined and internally to see how best we can accommodate some of these particular concerns. So I wanted to be on the record that we are very much aware of them and the Minister is aware of them and we are trying to find out how we are going to be able to resolve them if we can. **[Tab 13 p. 159]**

47. Similarly, in introducing amendments to the *Reorg Act*, Minister Findlay emphasized the broad scope intended to be given to the protections in the *Act*:

> If the Member looks to the legislation, we get up on to 15(2), we talk about equivalent, equivalent in the broadest sense. I think the problem probably comes in as to how you

> determine that equivalent really happens, and so we have had discussions around an amendment that would give everybody some comfort [...].*(emphasis added)*
>
> I do not think we are on any different page here. We want to be sure we have equivalency, pure and simple, that is determined by an independent analysis process. That is what we want to move as amendments [...] I think, down within the legislation, we see whether there would be concern that, how do you really determine, and in the fairest possible way, what equivalency is? If it is not equivalent, what do you do to bump it up? **[Tab 14 p. 163]**

48. Clearly, the legislature deliberately declined unilaterally to define "benefits ... equivalent in value", because it wanted the question of equivalence to be determined through a fair and independent analysis. The legislature envisioned that equivalence required fact finding by an independent actuary. The trial judge also concluded that the legislative amendments allowing for the provision for an independent actuary and the integration of the MOA into section 15 evidenced the legislature's intent to give this provision a broad meaning that addressed employee concerns regarding the initial surplus. Importantly, the trial judge found that there was no debate with respect to the level of basic benefits provided by the New Plan, as the legislature had already secured employees' rights in that regard. **[Tab 4 par. 393]**

49. The Court of Appeal erred in basing its interpretation of this provision on unrelated pension legislation, instead of the trial judge's factual findings and the relevant legislative history. The *Reorg Act* was a *sui generis* statute, created for the sole purpose of bringing the privatization of MTS into effect. Its unique purpose and structure made comparisons with other pension legislation improper. ***Township of Goulbourn v. Regional Municipality of Ottawa Carleton***, [1980] 1 S.C.R. 496; ***Janzen v. Platy Enterprises Ltd.***, [1989] 1 S.C.R. 1252.

50. This Court has repeatedly emphasized the importance of interpreting legislation in light of its full context, ruling that reliance on legislative history is appropriate where it is of an institutional quality and provides insight into the intent of the legislature. The legislative history in the present case clearly meets these criteria. Indeed, s.15 of the *Reorg Act* cannot be properly understood without taking into account the statements made by Ministers Praznik and Findlay, particularly given the evidence at trial that "equivalent in value" was not a normal actuarial term and its meaning was far from clear. **[Tab 4 par. 249]**

51. Moreover, determining whether language is clear requires consideration of the statute's

purpose. (See: ***Celgene Corp. v. Canada (Attorney General)*** 2011 SCC 1, [2011] 1 S.C.R. 3 at paras. 21, 24-30, where this Court relied on the consumer protection object of the *Act* and related legislative history to depart from the commercial law definition of the term 'sold').

52. The Court of Appeal's approach raises broad concerns by repudiating the rich, contextual analysis this Court has repeatedly required.

The Court of Appeal failed to interpret the MOA in light of important extrinsic evidence and the legislature's intent to give it the full force of law

53. The Court of Appeal committed a similar error in its interpretation of the MOA. The trial judge found on the evidence that the purpose of the MOA was to put aside and protect the surplus for future use by employees. The Court of Appeal, however, ruled that this evidence violated the parol evidence rule and represented an attempt by employees to transform their expectations into binding obligations on the employer. The Court of Appeal justified its strict interpretation approach by stating that it is only the final document which records the intention of the parties. **[Tab 5 paras. 172 & 208]**

54. The Court of Appeal's conclusion misinterprets the rule against parol evidence, which only applies where the parties intend the written document to provide the exclusive record of their agreement. Professor Waddams explains:

> A further important point is that the rule does not apply unless the contract has been "reduced to writing", or "integrated". Another way of putting it is that the rule is that where the parties intend (on an objective test) that the writing shall be the exclusive record of their agreement, their intention will prevail. [...] the parol evidence rule, so formulated, is by no means equivalent to a rule that signed documents are binding: **S.M. Waddams, *The Law of Contracts*, 6th ed.** (Toronto: Canada Law Book, 2010) at s. 321 [emphasis added]; see also ***King v. Operating Engineers Training Institute of Manitoba Inc.***, 2011 MBCA 80, [2012] 3 W.W.R. 269 at paras. 38-40 *et seq.* for a summary of recent cases (*"King"*).

55. The evidence in the present case confirms the Applicants' position that the parties did not intend for the MOA to serve as the exclusive record of their agreement. The MOA was negotiated in furtherance of the employer's previous written and verbal assurances that MTS would not use the employees' surplus to reduce its pension costs and that it would be preserved for employees' benefit. As the trial judge found, those undertakings provide the shared

understanding on which the MOA was negotiated, a point confirmed by the fact that MTS never sought to resile from those commitments.

56. Moreover, the MOA was the outcome of a single night of negotiation that sought to satisfy employees that the employer would take real steps to satisfy its previous commitments regarding the initial surplus. These 11th hour negotiations, which took place in haste during the rush to pass the *Reorg Act,* are a marked departure from the process imagined by the Court of Appeal. Given the ambiguity in the MOA, it had to be interpreted to further the parties' intent: ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, 2010 SCC 33, [2010] 2 S.C.R. 245 at para. 23.

57. The evidence accepted by the trial judge left no doubt that the parties had agreed to protect the initial surplus for employee use, as under the Prior Plan. The Court of Appeal itself accepted that it was the "the hope and expectation" of both parties that placing the surplus in the COLA account would accomplish this aim. **[Tab 5 par. 208]**

58. The expert evidence at trial, however, established that MTS's design of the COLA account made this intention impossible, denying employees the benefit of their surplus, which increased the funded position of the plan, thus reducing MTS's overall pension costs and triggering contribution holidays. **[Tab 4 par. 286]** The Court of Appeal's approach ignored the unequivocal commitments made by the Government and MTS and the unassailable evidence as to the parties' common intentions.

59. The Court of Appeal also cast aside the legislative history underlining the purpose of incorporating the MOA into the *Reorg Act*. Minister Findlay assured the legislature that "*any surplus in employee contributions to the [Prior Plan] will not, and I stress not, be used to reduce MTS's costs*". **[Tab 14 p. 162]**

60. Minister Praznik testified at trial that the Government "wanted to ensure that the [MOA] gave the pensioners the guarantees that we intended it to" by giving it "the force of law", leaving no doubt as to the legislature's intent on this matter. **[Tab 29 p. 11]**

61. The Court of Appeal's narrow approach to contract interpretation leads to an unjust result

that contradicts the parties' intent on this matter. This issue requires guidance and clarification from this Court. In its recent review of cases on this issue in *King*, the Manitoba Court of Appeal noted the confusion in this area of law:

> What constitutes the "factual matrix" or what is also sometimes referred to as the "surrounding circumstances" or "contextual evidence" or "background facts," and whether it may be relied on when interpreting a contract, has been another source of significant confusion in an already confusing area: ***King, supra,*** at para. 59, see also paras. 60-73

The Court of Appeal's approach undermines the special protection provided to equitable and property rights, and the deferential approach to appellate review

62. The Court of Appeal's narrow interpretative approach undermines a number of broader legal principles. The dispute in the present case involves surplus pension contributions that are the subject of a trust. It defies basic trust principles to allow the employer to benefit from a perceived vagueness in the relevant statutory and contractual instruments where it, itself, had clearly undertaken to preserve these funds and put them aside to provide further benefits to employees, in line with past practice. Where a clear undertaking is given with respect to trust property, any resulting contracts must be interpreted broadly to ensure a fair and equitable result. Indeed, where "common law and equity conflict, equity is to prevail". The present result also flies in the face of the employer's fiduciary obligations to act in the employees' best interests and results in the employer being unjustly enriched at the expense of its employees. ***Schmidt v. Air Products of Canada Ltd.***, [1994] 2 S.C.R. 611 at paras. 51, 66, 92 (***"Schmidt"***); ***Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)***, [2009] 2 S.C.R. 678 at paras. 186-194.

63. Further, this approach undermines the presumption that the legislature does not intend to expropriate the rights of its citizens unless it uses clear and unmistakable language in doing so. In the present case, where the legislative history leaves no doubt as to the intent to protect the employees' rights to use the initial surplus for their benefit, the Court of Appeal erred in giving the *Reorg Act* an interpretation that allowed MTS to extinguish the employees' interest as beneficiaries of the surplus funds and permit MTS to take the benefit of the surplus for itself. ***British Columbia v. Tener***, [1985] 1 S.C.R. 533 at para. 52; ***Manitoba Fisheries Ltd. v. Canada*** [1978] 6 W.W.R. 496, [1979] 1 S.C.R. 101.

64. Moreover, despite the Court of Appeal's claims that it had extricated a pure question of

law on which to base its review, the Court of Appeal effectively disregards and overturns numerous findings of fact made by the trial judge.

65. Most important among these transgressions are the Court of Appeal's findings that "the Initial Surplus was simply part of a larger actuarial surplus in the New Plan" **[Tab 5 par. 155]** and "there is no doubt that under the Prior Plan, the Employees had no right to surplus, let alone actuarial surplus." **[Tab 5 par. 206]** These findings directly interfere with the trial judge's following findings, which confirmed that the initial surplus was an "actual surplus in contributions" and not an actuarial surplus:

- Since the surplus in the Prior Plan was entirely attributable to employee contributions, there was never any question about their entitlement to it; **[Tab 4 par. 46]**;
- Surplus in the Prior Plan belonged to employees **[Tab 4 par. 46]**;
- Surplus was always used to improve benefits **[Tab 4 par. 47]**;
- The government never used or attempted to use surplus to defray its existing costs; **[Tab 4 par. 47]**
- MTS undertook not to use the initial surplus to reduce its costs.**[Tab 4 paras. 479-483]**;
- At privatization there was an identifiable and calculable employee surplus in contributions on implementation **[Tab 4 paras. 135 and 313].**

66. Other examples of findings overturned by the Court of Appeal include the assertion that there was no objective meeting of the minds between the parties, only the employees' subjective expectations, and that employees did not rely on the undertakings made by Government and the employer. **[Tab 5 par. 162]**

67. The Court of Appeal's complete disregard of the trial judge's factual findings used to interpret the MOA runs counter to the deferential approach this Court called for in *Housen v. Nikolaisen* and is an example of the conflicting jurisprudence of appellate courts across the country with respect to appellate review of contractual provisions. ***Bell Canada v. The Plan Group***, 2009 ONCA 548, 96 O.R. (3d) 81; ***King***, *supra,* at paras. 21-28; ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235.

B. Does this Court's pension jurisprudence establish a default pension law regime that applies regardless of the funding mechanism that governs in a particular case?

68. The Court of Appeal also sought to overturn the trial judge's conclusion on the basis of this Court's previous decisions in pension cases. The Applicants maintain that this jurisprudence is distinguishable from the case at hand and that it does not establish a default pension law regime that applies regardless of the funding mechanism in each particular case.

69. The Court of Appeal stated what it claims are the common law principles that govern defined benefit pension plans. These include: that employer contributions to a defined benefit plan are made annually on the basis of an actuarial estimate of the amount needed; that neither party has a right to surplus while the plan is in operation, as it only exists on paper; and that the employer can use actuarial surplus to take a contribution holiday, provided the plan wording or legislation does not prohibit it. **[Tab 5 paras. 146-148]**

70. The circumstances of the present case set it distinctly apart from this Court's previous pension jurisprudence. First, although the employer's contributions under the New Plan are based on actuarial valuation, the initial surplus in this case is the product of the employees' contributions under the Prior Plan, which split costs 50/50. Given that the surplus represents the amount by which employee contributions exceeded 50% of the liabilities, it represents the *actual* (as opposed to actuarial) surplus of employee contributions: an over-contribution as of the implementation date of the New Plan.

71. The Court of Appeal's finding that the "Initial Surplus was simply part of a larger actuarial surplus in the New Plan" is plainly wrong. **[Tab 5 par. 155]** There was no actuarial surplus in the New Plan on the implementation date. The first Actuarial report revealed a $7 million unfunded liability. **[Tab 30]** What the trial judge found was that there was an actual and calculable (the parties agreed to the exact number of $43.364 million) initial surplus of employee contributions above 50% of the liabilities of the New Plan on the implementation date. **[Tab 4 paras. 135 & 313]** This initial surplus was real money that was physically transferred out of the *CSSA* trust fund (i.e. investments were unwound and liquidated) and into the New Plan trust. Whether the Prior Plan was formally wound up to crystallize the surplus is thus irrelevant in this

case.

72. The trial judge put it this way:

> [341] In this scenario, the employees were transferring from an existing plan into a new one. In that process, they transferred assets created by their contributions. It was a transfer they were required to make due to the privatization of MTS. They did not benefit from the financial advantages which accrued to both the Government and to MTS as a result of the privatization. Why, then, would they be expected to contribute a greater amount at the outset into a New Plan in whose creation they had no opportunity to participate and in which they had no interest in belonging? Their deemed consent was imposed by legislation. **[Tab 4 par. 341]**

73. The Independent Actuary made the same observation in the report he rendered before he was interfered with:

> (i) The actual level of funding of the pension benefits accrued to December 31, 1996 is very important. Under the CSSA the funding arrangement was one that attempted to provide benefits that were 50% funded by the employer and 50% funded by the employee[...]
>
> (iii) Surplus ownership has not been a concern in the past because the surplus in the CSSA belonged to the employees. **[Tab 22 p.198]**

74. The employees' actuarial expert, Tom Levy ("Levy") stated:

> 36. ... the entire employee surplus was expropriated by MTS... By definition, that money has been used to reduce the MTS cost for the post-privatization Plan. If the transfer from CSSA had been exactly half of the new plan's actuarial liability (i.e., if there were no employee surplus), the new plan's assets would have been lower[...] ...MTS would be required to make larger contributions than it did[...] [If the...] employee surplus was not used for the employees in the past and has no way to be used by them in the future (which is clearly the case), it must have benefited MTS. **[Tab 31]**

75. Clearly, the benefits cannot be equivalent in value if the same benefits cost $43 million more under the New Plan, a point confirmed by the fact that government employees who remained in the Prior Plan after privatization saw their surplus used to provide increases of 6-14% in 2000. Conversely, MTS employees have seen no increase in benefits as a result of MTS's expropriation of their money.

76. To the extent that the Court of Appeal in the present case relied on the Ontario Court of Appeal's decision in *Burke et al. v. Hudson's Bay Co. et al*, it failed to interpret properly the

dicta from that decision. Although Justice Gillese confirms that past history cannot trump the governing legal documents, she maintains that the rights and obligations flow from the plan documentation in each case. Indeed, this Court in *Burke* emphasized that its decision depended on the "text and context" of the Plan before the Court, noting that "[e]ach situation must be evaluated on a case-by-case basis". The Court of Appeal's broad-brush approach to the present case fails to satisfy this requirement, which is particularly evident given that it was the intent of the parties that the surplus not be used in the manner that it was. ***Burke v. Hudson's Bay Co.***, 2008 ONCA 394 at para. 37; 2010 SCC 34, [2010] 2 S.C.R. 273 at para. 96 [emphasis added]; ***Schmidt, supra,*** at paras. 39, 95.

77. Accordingly, the Court of Appeal erred in concluding that all pension cases are to be governed in the same manner, regardless of important differences in their funding structures and regardless of the fact that unequivocal undertakings had been given with respect to the use of the initial surplus. By closing the book on further developments in this jurisprudence, the Court of Appeal's decision prevents future decisions from being decided in the manner that reflects the text and context of each case.

The Issues Raised in the Proposed Appeal Are Expected to Recur

78. The determination of the pension law issues in the present case will govern similar issues that are expected to arise in other jurisdictions. For instance, of particular relevance are plans with a surplus which transition from one funding model to another.

79. The facts set out in the Affidavit of John M. Christie provide compelling evidence that the potential for future spinoffs from the public sector to the private sector, or even from Crown to Crown Agents, is real and the potential for recurring issues as faced in this case is likely. **[Tab 8 - Affidavit of John M. Christie]**

80. Thus, while the proposed appeal will undoubtedly have a significant and direct financial impact on the over 7000 employees who saw $43 million (currently approximately $101 million) of their pension contributions misappropriated by MTS, its also stands to provide important guidance in a broader range of future pension cases. Approximately 49,000 public employees in Manitoba continue to participate in the Prior Plan. **[Tab 8 – Affidavit of John M. Christie]**

Privatization of any other government entities, or their establishment as crown agencies, would require employees to negotiate to protect any potential surplus employee contributions applied to a new plan.

C. Does an apprehension of bias exist where a recently retired Manitoba Court of Appeal judge argued the case on behalf of MTS before the Court of Appeal?

81. After the trial judge's decision, MTS engaged new counsel, including Charles Huband as co-counsel, to argue the Appeal before the Court of Appeal. Huband, a long standing member of the Manitoba Court of Appeal, had retired from the bench approximately three years prior to being engaged by MTS in this case.

82. The Applicants are concerned that the administration of justice is compromised in the eyes of the reasonable ordinary person when an appellate judge argues a case in the same court in which he sat. The concern is of greater moment when one member of the panel is a former colleague. This Court is being asked to give guidance on this serious matter, impacting as it does potentially on every appellate court in Canada.

PART IV - SUBMISSIONS ON COSTS

83. Given that the proposed appeal raises issues of national or public importance, the Applicants request that, if leave is granted, costs be awarded to the Applicants.

PART V – ORDER REQUESTED

84. The Applicants request that leave to appeal be granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, this 10th day of April, 2012.

Brian J. Meronek Q.C./Kris M. Saxberg/ D. Tomas Massi	James Cameron/Andrew Astritis
Counsel for the Applicants	Agents for the Applicants

PART VI – LIST OF AUTHORITIES

Cases ..... **Paras. Cited at**

Academic Text

120 A

PART VII –STATUTES

Statutes ..... **Paras. Cited at**

The Manitoba Telephone System Reorganization and Consequential Amendments Act, S.M. 1996, c. 79 ..... 2, 19, 24, 26, 36, 44, 48, 49, 50, 59,

File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC. - INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 161, COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., and LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC., MTS ADVANCED INC. and ALL UNIONIZED EMPLOYEES OF MTS MEDIA INC. WHO WERE TRANSFERRED TO YELLOW PAGES GROUP CO. PURSUANT TO A SALE ON OCTOBER 2, 2006,

Applicants
(Respondents)

- and -

MANITOBA TELECOM SERVICES INC., and MTS ALLSTREAM INC.
(as successor to MTS COMMUNICATIONS INC., MTS MOBILITY INC., And MTS ADVANCED INC.)

Respondents
(Appellants)

AFFIDAVIT OF JOHN M. CHRISTIE
(Filed Pursuant to Section 40 and Paragraph 58(1)(a) of the Supreme Court Act and Rule 25 of the Rules of the Supreme Court of Canada)

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Barristers and Solicitors
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Ottawa Agents for the Respondents

File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC. - INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 161, COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., and LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC., MTS ADVANCED INC. and ALL UNIONIZED EMPLOYEES OF MTS MEDIA INC. WHO WERE TRANSFERRED TO YELLOW PAGES GROUP CO. PURSUANT TO A SALE ON OCTOBER 2, 2006,

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- and -

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Respondents
(Appellants)

AFFIDAVIT OF JOHN M. CHRISTIE

I, John M. Christie, of the City of Vancouver, in the Province of British Columbia, Consulting Actuary,

MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of Christie Consulting Inc., an actuarial consulting firm located in Vancouver, British Columbia and, as such, have knowledge of the facts to which I herein after depose.

2. I have been a professional actuary for 43 years and have worked throughout for major actuarial firms until establishing my own firm in 1998.

3. I have specialized in pension plans, including public sector pension plans. I have been extensively involved in various committees of the Canadian Institute of Actuaries (the national governing body for actuaries), including as a Committee Member for liaison with government authorities on pension matters (1980-83); as a Member of the Executive Committee, Vice President, responsible for pension committees (1988-90); as Chair of the Task Force on Pension Plan Surplus (1990-91) and, as Chair on Emerging Issues Committee (1991-94).

4. Attached as **Exhibit "A"** to my Affidavit is a copy of my Curriculum Vitae.

5. I have read the Manitoba Court of Queen's Bench decision in TEAM et al v. MTS et al, Queen's Bench File No. CI 99-01-14589 dated January 19, 2010; as well as the Manitoba Court of Appeal decision in MTS et al v. TEAM et al, Court of Appeal File No. AI 10-30-07355 dated February 10, 2012 ("MTS case") and I am familiar with the issues in those decisions.

6. In my opinion the issues in dispute in the MTS case raise significant matters of interest and concern in the realm of pension plans; particularly as they relate to the transition of public sector pension plans or portions thereof, to private sector pension plans. Similar issues will arise in the future and will be of concern to actuaries and other professionals involved in the business of pension plans on a wide scale.

7. I have examined the public sector pension plans in eight jurisdictions in Canada, involving approximately 3,413,000 members and approximately $363 billion in assets.

8. While no doubt the majority of public sector plans will remain, I am of the opinion that there will be future public sector pension plan spinoffs across Canada involving a wide range of occupations and jurisdictions; particularly, given the current economic state of most, if not all, jurisdictions in Canada.

9. Attached as **Exhibit "B"** to my Affidavit is my report which sets out my review of the public sector plans; the potential future spinoffs of public sector plans; and the issues which may surface, including how changes in risk bearing responsibility should be reflected in any new plan spinoff from existing public sector plans.

10. I make this Affidavit *bona fide* and in support of the Leave Application brought on behalf of the Applicants.

SWORN/AFFIRMED before me in the City of Vancouver, in the Province of British Columbia, on the 4th day of April, 2012

John M. Christie

A Notary Public in and for the Province of British Columbia

QUENTIN J. ADRIAN
Barrister & Solicitor
5660 Yew Street
Vancouver, B.C. V6M 3Y3
Ph: 266-7811

John M. Christie

Curriculum Vitae

University Education	1962-66	Glasgow University, Scotland M.A. with First Class Honours in Political Economy and Statistics
Professional Qualifications	1969	Fellow, Faculty of Actuaries in Scotland
	1969	Fellow, Canadian Institute of Actuaries
	1969	Associate, Society of Actuaries
Employment	1966-69	Scottish Amicable Life Assurance Society (Glasgow) Actuarial Student
	1969-74	B.J. Vincent Company Limited (Toronto) Vice President and Actuary
	1974-76	Charles A. Kench and Associates Limited (Toronto) Consultant
	1976-81	William M. Mercer Limited (Toronto) Consultant, Associate (1978), Principal (1980)
	1981-89	William M. Mercer Limited (Vancouver) Principal, Director (1987) Responsible for all training activities in Canada (1987-89)
	1990-97	Alexander Consulting Group Limited (Vancouver) Principal Chair, Professional Standards Committee (1990-94)
	1997-1998	Aon Consulting Inc. (Aon acquired Alexander) Senior Vice President
	1998 -	Christie Consulting Inc. President
Other Offices	Canadian Institute of Actuaries	
	1979-85	Member, Pension Standards Committee (now called Committee on Pension Plan Financial Reporting), Chair (1983-85)
	1980-83	Member, Committee for liaison with government authorities on pension matters
	1983-87	Member, Public Relations Committee, Chair (1985-87)

This is Exhibit "A" referred to in the affidavit of JOHN M. CHRISTIE sworn before me at VANCOUVER in the Province of British Columbia this 9th day of APRIL 2012

A Commissioner for taking Affidavits for British Columbia

QUENTIN J. ADRIAN
Barrister & Solicitor
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1985-88	Member of Council (Board)
1988-90	Member of Executive Committee Vice President, responsible for pension committees
1990-91	Chair, Task Force on Pension Plan Surplus
1990-97	Member, Committee on Discipline Vice Chairperson and Secretary (1992-1997)
1991-94	Chair, Emerging Issues Committee
1997-2003	Facilitator, Fellowship Admissions Course
1999-2000	Member, Task Force on Volunteer Management
2000-02	Member, Committee on Volunteer Initiatives
2004-10	Member, Committee on Rules of Professional Conduct
2007-11	Member, Investigation Team Panel

Other Memberships

International Actuarial Association
International Association of Consulting Actuaries
Canadian Pension and Benefits Institute

Publications

Development and Monitoring of Professional Standards in Canada.
Paper presented to International Association of Consulting Actuaries, 12th Conference, Auckland, New Zealand, 1990.

Expert Witness

Provided expert reports and testimony in

British Columbia Supreme Court
Saskatchewan Court of Queen's Bench
Ontario Superior Court
Nova Scotia Supreme Court

Federal Court of Canada

CHRISTIE
CONSULTING INC.

This is Exhibit " B " referred to in the affidavit of JOHN M. CHRISTIE sworn before me at VANCOUVER in the Province of British Columbia this 4TH day of APRIL 2012

A Commissioner for taking Affidavits for British Columbia

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April 4, 2012

Brian J. Meronek, Q.C.
D'Arcy & Deacon LLP
2200 - One Lombard Place
Winnipeg, Manitoba
R3B 0X7

Dear Mr. Meronek,

TEAM et al. v. MTS et al.

As requested, I am pleased to provide my opinion on the major public sector defined benefit plans across Canada that may be affected by issues similar to those being disputed in the above action.

I have read the Trial and Appeal Court decisions in the above matter. I am familiar with many existing public sector pension plans across Canada and have researched the major public sector plans with which I was not familiar.

In my opinion, the issues being disputed in the above captioned action are significant in the sense that they may well arise in many other spinoffs from existing public sector plans. These spinoffs may be from one public sector plan to another, from a public sector plan to a Crown corporation plan or from a public sector plan to a private organization. The issues are the same in each case.

The table on the following page summarizes the number of members and assets in the major public sector pension plans in Canada that may have future spinoffs. 3.4 million members are covered by these plans. They contain $ 363 billion in total assets[1]. These members and assets form a significant part of all employment related plans in Canada.

[1] This table is illustrative of the size of public sector pension plans in the public sector in Canada. It is not intended to suggest the magnitude of members or assets which may be susceptible to a spinoff from the current status.

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	Jurisdiction	Members	Assets ($millions)
1	Federal	550,000	$ 135,000
2	British Columbia	398,000	$ 49,000
3	Alberta	302,000	$ 29,000
4	Saskatchewan	49,000	$ 4,000
5	Manitoba	130,000	$ 12,000
6	Ontario	600,000	$ 97,000
7	Quebec	1,353,000	$ 33,000
8	Nova Scotia	31,000	$ 4,000
Total		**3,413,000**	**$ 363,000**

Governance

In past spinoffs to other public sector plans or to Crown corporations, the exporting plan has usually been careful to maintain any existing member entitlements in plan governance, whether these existed in the written plan documents or as a result of past practices followed by the parties. In many cases, for example in the Federal jurisdiction for the spinoffs to Canada Post and the Local Airport Authorities, the member entitlements in governance were enhanced as a result of the spinoffs. In some past spinoffs, particularly to private sector organizations, the member entitlements in governance were reduced in exchange for the new employer assuming a greater share of the risk.

Funding

Several Crown Corporations in Manitoba participate in the Manitoba civil service plan and, if any of these Crown Corporations are spunoff, they will experience the same issues. In addition, some other public sector plans provide for the same funding mechanism as the Manitoba civil service plan.

Many of the Quebec public sector plans provide a similar funding mechanism as the Manitoba civil service plan . For example, the two main Quebec public sector pension plans are the Government and Public Employees Retirement Plan (RREGOP) for unionized employees and the Pension Plan of Management Personnel (PMPP) for non unionized employees. In both of these plans, costs are shared equally between members and the employer. The member contributions are deposited in a real fund invested in marketable securities while the employer share is paid on a pay as you go basis in a similar way to the Manitoba civil

service pension plan. In the booklet for the PMPP, the fund of invested assets is referred to as the "Members' Fund". If any parts of these plans are spunoff, they will experience the same issues.

Most other public sector plans are now funded by accumulating real assets from employer and employee contributions in a separate pension fund.

Most public sector plans and plans spunoff from them provide for some sharing of the cost of the plans between the employer and the employees. This cost sharing typically includes both the current service cost and any actuarial surplus or actuarial deficit. Often the costs are shared on a 50/50 basis between the employer and the plan members. Sometimes a fixed ratio of employer to member cost sharing has been established with the employer bearing more than 50% of the cost.

Where the spinoff has been to a completely private sector employer, as with MTS, it is more common for the employer to assume the responsibility for future actuarial surplus and actuarial deficits in exchange for some other concession to employees.

However, regardless of the precise method of funding - fixed employee contributions or employee contributions changing with actuarial valuation results - the same issues arise.

Future spinoffs

Future spinoffs from the public sector plans are highly likely and will be determined by the various governments in power from time to time in different jurisdictions. Current economic pressures are influencing governments towards downsizing the public sector. Much of this downsizing could occur through spinoffs from the existing public sector plans.

My review of public sector plans across Canada indicated no uniform pattern.

For example, in the power industry, BC Hydro had its own plan, was split in two by the creation of BC Transmission Corporation and is now being put back into a single plan. Ontario Hydro was split into Ontario Power Generation (OPG) and Hydro One with the intention of fully privatizing each of them. Neither has been fully privatized. OPG sold Bruce Power to a completely private organization. The Ontario Hydro pension plan was split to follow these reorganizations.

Manitoba Hydro employees are still included in the Manitoba civil service pension plan and form about 25% of the members of that plan. During the

last year, there was considerable political debate about the possibility of privatizing Manitoba Hydro.

In reviewing the economic functions performed by the public sector, no uniform pattern is obvious. For example, some police and firefighter groups are included in the BC Municipal Plan and in the Ontario Municipal Employees Retirement System (OMERS) while others, such as the police departments in Regina, Winnipeg, Toronto and Montreal, have their own separate pension plans. Health care, public auto insurance, workers compensation, public transit, universities and colleges and gaming are other sectors that are contained in the main public service pension plan in some jurisdictions, but are in separate pension plans in other jurisdictions. Where one jurisdiction includes a certain group of employees in the main public service pension plan and another jurisdiction provides a separate pension plan for the same group of employees, a future spinoff in the first jurisdiction is quite possible.

Conclusion

In my opinion, the issues in dispute in this action are likely to have an important influence in future public sector pension plan reorganizations.

Existing public sector pension plans across Canada cover a very large number of plan members and hold large amounts of assets. These plans cover members in a wide range of occupations. In some jurisdictions, an occupation is covered in the main public sector plan, in other jurisdictions the same occupation is in a separate plan. The potential for a future spinoff of that occupation from the main public sector plan is high.

Many issues will arise in future spinoffs that are similar to the issues in this dispute, beyond the simple maintaining of levels of pension benefits. Parties will be confronted with issues relating to the proper application of changing cost sharing structures and risk bearing responsibilities, which beg such questions as:

(a) How should existing cost sharing structures and practices be reflected in the new plan?

(b) How should any changes in the risk bearing responsibilities in the new plan be reflected in the terms of the new plan?

In my opinion, guidance from the Supreme Court of Canada in this action will be of critical value to the many parties who will be involved in future similar spinoffs.

I confirm that I am the person fully responsible for the contents of this report.

Yours truly,

John M. Christie, F.C.I.A.