
IN THE COURT OF APPEAL

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,**

Respondents (Plaintiffs),

- and -

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

Appellants (Defendants).

NOTICE OF APPEAL

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**FILED
COURT OF APPEAL
APR 08 2010
LAW COURTS
WINNIPEG**

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BETWEEN:

TELECOMMUNICATION EMPLOYEES ASSOCIATION OF
MANITOBA INC. – INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 161,
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF
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ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON
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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
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GROUP CO. PURSUANT TO A SALE ON OCTOBER 2, 2006,

Respondents (Plaintiffs),

- and -

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

Appellants (Defendants).

NOTICE OF APPEAL

TAKE NOTICE that a Motion will be made on behalf of the Appellants before the Court of Appeal, as soon as the Motion can be heard, by way of Appeal from the Judgment of the Honourable Mr. Justice Bryk of the Court of Queen's Bench, Winnipeg Centre, pronounced on the 19th day of January, 2010, and filed on the 10th day of March, 2010, whereby the Learned Trial Judge did order:

1. Clifford Fox's March 5, 1997 opinion on equivalency rendered pursuant to section 15(3) of *The Manitoba Telephone System Reorganization and Consequential Amendments Act*, S.M. 1996, c.79 (the "*Reorg Act*") is invalid and of no force and effect;
2. The Plaintiffs will receive payment from the Defendants, Manitoba Telecom Services Inc., and MTS Allstream Inc. (as successor to MTS Communications Inc., MTS Mobility Inc., and MTS Advanced Inc., collectively "MTS"), in the amount of \$43,343,000.00 plus interest at the rate of return of the pension plan established pursuant to section 15(2) of the *Reorg Act* (the "New Plan") since January 1, 1997, to date of payment (the "Funds"), which is to be used to enhance pension benefits on the understanding that the enhanced pension benefits will not result in an increase of the costs of MTS;
3. The Plaintiffs and MTS are to negotiate the manner of utilization of the Funds and arrive at a mutually agreeable implementation process. If the Plaintiffs and MTS are unable to agree, they are to submit further evidence and/or submissions to the Court for determination of the manner of utilization of the Funds and the implementation process;
4. In all other respects, the Plaintiffs' claim is dismissed; and
5. The issue of costs is to be deferred until matters relating to quantification and the manner of utilization of the Funds has been addressed and resolved.

On the Appeal, this Court will be asked to set aside the said Judgment and order that the Plaintiffs' action be dismissed, or alternatively, order the Provincial Auditor to appoint a new independent actuary to review the New Plan with appropriate directions from this Honourable Court, to determine whether the New Plan provides for pension benefits which, on the implementation date, were equivalent in value to the pension benefits to which employees (or other persons by virtue of the death of an employee) were or may have become entitled under the *Civil Service Superannuation Act* (Manitoba) (the "CSSA"), with costs, on the following grounds:

1. Generally:
 - a) The Judgment is contrary to the law, the evidence and the weight of the evidence;
2. As regards the *Reorg Act*, the Learned Trial Judge erred in law:
 - a) In his consideration of the *Reorg Act*:
 - i) in failing to have regard to the text of section 15(2) in construing its legal effect;
 - ii) in accepting and relying upon the testimony of witnesses as to the meaning of section 15(2);
 - iii) by holding that the clear and unambiguous wording of section 15(2) should be disregarded in favour of an interpretation that

gives effect to agreements and undertakings extraneous to the
Reorg Act;

- b) By failing to make any finding as to the meaning of the phrase "equivalent in value" under section 15(2) of the *Reorg Act*;
- c) By failing to comply with section 15(3) of the *Reorg Act*, by not directing the Provincial Auditor to appoint a new independent actuary to review the New Plan to determine whether the pension benefits thereunder were equivalent in value, on the implementation date, to the pension benefits under the *CSSA*;
- d) By substituting his opinion for that of the independent actuary, and thus, negating MTS' rights, under section 15(4) of the *Reorg Act*;
- e) By failing to adequately consider the definition of "pension benefits" under the *CSSA*, the *Pension Benefits Act (Manitoba)*, and the *Pension Benefits Standards Act, 1985 (Canada)* (the "PBSA"), which are all statutes *in pari materia* to the *Reorg Act*, and therefore relevant to the interpretation of the word "benefits" under section 15(2) of the *Reorg Act*;
- f) By finding that the word "benefits", as that word is used in section 15(2) of the *Reorg Act*, included anything other than formula benefits;
- g) By interpreting the word "benefits" as including "issues of surplus", notwithstanding that MTS employees had no right to and no entitlement to

any benefit increases funded with surplus, and notwithstanding binding jurisprudence that the right to surplus is not a "benefit";

- h) By holding that the word "benefits" under the *Reorg Act*, which term was in the draft legislation as it existed on November 7, 1996, acquired a new and extraordinary meaning because of a meeting on November 7, 1996 even though the text of section 15(2) did not change as a result of the meeting, and no undertaking was made by any government representative to define "benefit" in a manner consistent with the meaning ascribed to that word by the Learned Trial Judge;
3. As regards the Memorandum of Agreement executed on November 7, 1996, by representatives of MTS, the Government of Manitoba, and employees on the subject of pension issues (the "MOA"), the Learned Trial Judge erred:
- a) By relying, contrary to binding case law, on the testimony of witnesses as to their interpretation of the MOA concerning the legal meaning of the document;
 - b) In the alternative, and even if the Learned Trial Judge was correct in finding such testimony to be relevant, he erred:
 - i) by relying only on the testimony of employee representatives as to their understanding of the MOA and not giving equal weight to the testimony of representatives of MTS;

- ii) by concluding, notwithstanding the conflict in the evidence (between MTS and employee representatives), that there existed a *consensus ad idem* as to the meaning of the MOA
 - c) By adopting an interpretation of the MOA that its terms will not reasonably bear, and therefore failing to conclude that MTS complied with its obligation under the MOA;
 - d) By finding that, as of the implementation date of the New Plan, there was an "identifiable and calculable employee surplus";
 - e) By failing to require that any disagreement with respect to the allocation of the "initial surplus" (transferred from the Civil Service Superannuation Fund) be resolved by the independent actuary appointed by the Provincial Auditor, under section 15 of the *Reorg Act*;
4. As regards the New Plan, the Learned Trial Judge erred:
- a) In concluding that the pension benefits under the New Plan, on the implementation date, were not equivalent in value to the pension benefits under the *CSSA*;
 - b) By concluding that there was an obligation to match or prefund the New Plan when no such obligation existed at law;
 - c) By concluding that the plaintiffs had an "entitlement to the utilization" of any surplus in the New Plan;

- d) By concluding that the "initial surplus" was intended to be solely for the purpose of enhancing pension benefits;
- e) By finding that the "initial surplus" in the New Plan was to be used solely to improve pension benefits, on the understanding that any such improvement did not increase the liability of MTS;
- f) By concluding that the "initial surplus" in the New Plan was used to take contribution holidays;
- g) By concluding that the "initial surplus" imposed a restriction on MTS to refrain from reducing its costs of or share of contributions to the New Plan, either at the time of transfer or in the future;
- h) By concluding that MTS was not entitled to fund the New Plan as required pursuant to the PBSA;
- i) By considering only one aspect of the post-1997 activity in the New Plan, namely, contribution holidays, and failing to consider other post-1997 consequences such as (i) actual plan performance, (ii) the obligation to fund deficits on a go-forward basis, (iii) the increasing costs of benefits over time and (iv) the substantial asymmetry in actual future funding which greatly exceeded the value of any "initial surplus";
- j) By failing to consider the fact that the New Plan was in a deficit position at the implementation date;

5. As regards the report of Clifford Fox ("Fox"), the independent actuary appointed under the *Reorg Act*, the Learned Trial Judge erred:
- a) In holding that the opinion of Fox is invalid and of no force and effect;
 - b) In holding that Fox was neither independent nor fair, in the circumstances of the case;
 - c) In holding that Fox was under a duty to act in accordance with administrative law rules of procedural fairness in the exercise of his responsibilities under the *Reorg Act* and that such a duty was breached in the circumstances of the case;
 - d) In failing to hold that any duty of fairness owed by Fox was a matter of valuation dependent upon his professional judgment;
 - e) In failing to hold that any duty of fairness owed by the independent actuary was discharged, and his *audi alteram partem* obligations satisfied, by hearing the points of view of all affected parties;
6. As regards the remedies granted by the Learned Trial Judge, the Learned Trial Judge erred:
- a) In substituting his opinion on the equivalency in value of benefits for that of the independent actuary when he had no jurisdiction to do so, and when it was contrary to law;

- b) In substituting his opinion on the equivalency in value of benefits for that of the independent actuary in view of the requirements of section 15(3) of the *Reorg Act*;
 - c) In concluding that it was in the interests of MTS that he substitute his opinion for that of the independent actuary, rather than order that a new independent actuary be appointed;
 - d) In the alternative, even if the Learned Trial Judge was entitled to substitute his opinion for that of the independent actuary he erred by applying the wrong test to resolve the issue of equivalency of benefits (i.e. by considering issues of surplus as opposed to evaluating formula benefits);
 - e) In concluding that MTS had an obligation to pay \$43.343 million dollars into the New Plan before it was entitled to take contribution holidays;
 - f) In delivering a Judgment that is administratively incapable of fulfillment at law;
7. Such further and other grounds as counsel may advise and this Honourable Court may allow.

Has a transcript of the evidence with respect to the judgment appealed from been ordered from transcription services? Yes No Not Required

DATED this 9th day of April, 2010.

TAYLOR McCAFFREY LLP

Per: 

KEVIN T. WILLIAMS

TO: Registrar of the Court of Appeal

AND TO: Deeley Fabbri Sellen Law
Barristers and Solicitors
903 – 386 Broadway Avenue
Winnipeg, Manitoba R3C 3R6
Attention: Robert I. Zaparniuk,
counsel for the Respondent
(plaintiff), Communications,
Energy and Paperworkers Union
of Canada, Local 5 and Local 7.

AND TO: D'Arcy & Deacon LLP
Barristers and Solicitors
1200 – 330 St. Mary Avenue
Winnipeg, Manitoba R3C 4E1
Attention: Brian J. Meronek, Q.C.
and Kris M. Saxberg, counsel for the
remaining Respondents (plaintiffs)

IN THE COURT OF APPEAL

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**Registrar,
Manitoba Court of Appeal,
Room 205 Law Courts Building
408 York Avenue,
Winnipeg, Manitoba.
R3C 0P9**

COUR D'APPEL

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**Registraire,
Cour d'appel du Manitoba,
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408, avenue York, pièce 205,
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R3C 0P9**