

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

(Plaintiffs) Respondents,

- and -

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

(Defendants) Appellants

RESPONDING FACTUM OF THE (PLAINTIFFS) RESPONDENTS EXCLUDING CEP

INDEX

	<u>Page</u>
I - INTRODUCTION.....	1
II - SUMMARY OF MATERIAL FACTS.....	5
III - LIST OF ISSUES	72
IV - ARGUMENT	74
V - LIST OF CASES	154

I - INTRODUCTION

1. MTS compares this litigation to the Lewis Carroll fantasy novel Alice in Wonderland, with the trial judge lurching about making “Mad Hatter” findings.
2. Lamentably, MTS laces its argument with such attacks on the trial judge’s findings as:

“The trial judge’s decision has been described by one commentator as ‘Alice in Pension Land’.” (p. 10, par. 5);

“The trial judge’s decision reflects a misunderstanding of even the most rudimentary concepts of pension law.” (p. 11, par. 7);

“The opacity and in some cases the incoherence, of the Reasons come perilously close to frustrating this right.” (p. 16, par. 18); and

“The Reasons . . . lack coherent reasoning.” (p. 17, par. 20).

2. Such an inappropriate analogy makes a mockery of a court case which involved serious pension issues effecting more than 7000 employees/pensioners, many of whom attended each day of the trial.
3. Hearken back some 14 years to a time when employees and retirees of MTS were comfortable in a pension plan where they were respected, not disregarded; soothed by the knowledge that they had real input into their financial future by virtue of their meaningful participation in their pension plan.
4. The Old Plan belonged to the employees/retirees because the plan was funded solely with employee money. Over time, employees had built a formidable

“nest egg” in the form of surplus. The existence of a tangible surplus at the time of privatization was a finding in this case the trial judge said had been established beyond all doubt.

5. Now imagine these content people suddenly confronted with a stark announcement that their security and their “nest egg” would be transported unilaterally, without consultation, to a new entity governed by different rules, in a different environment, with profits as its overriding mantra. The Kafkaesque atmosphere understandably created angst and paranoia.

6. From the moment of the Government’s announcement of privatization, their world changed for the worse. Now, rather than being treated as a partner whose contribution was valued, the employees / retirees were treated with disdain; as an irritant; and, with a “father knows best attitude”. Their source of information from MTS was based on propaganda; information on a need to know basis; by a calculated program of non-disclosure and misinformation; and, a pocerante attitude towards the very people who had the most vested interest in their pension plan.

7. Based on assurances that MTS would not use their money and promises of enhanced benefits, employees reluctantly handed over to MTS for safekeeping

their \$49 M. “nest egg”. It was their life savings to be used only to provide them with some financial security in the uncertain latter years of retirement.

8. Then their worst fears came to fruition. That money disappeared. Where did it go? It took years of searching, seemingly endless detective work and an enormous strain of resources to solve the mystery. The denouement occurred many years later when MTS admitted directly, and through its actuaries, that the money disappeared into the black hole of a jerry-rigged COLA account, never to fulfill what turned out to be an empty promise.

9. Along the way, the employees / retirees have been met with a minefield of obstacles, endured several motions, a summary judgment application and appeal, and a 13 week trial. Finally, they were vindicated in a detailed, thorough and logically organized decision of the trial judge righting the injustice. His mantra was “where there is a wrong, there is a remedy”.

10. Unfortunately, after 14 years, a final resolution has not yet been achieved. Many of the employees / retirees have passed away unable to enjoy the benefits to which they are rightfully entitled. With each passing day without closure, more employees / retirees will pass away without vindication.

11. Sadly, the employees / retirees are now met with a lassitude of technical arguments including:

- (a) The “square peg” of pension law relating to ongoing plans should be hammered into the “round hole” of the facts of this case involving the commencement of a brand new pension plan.
- (b) The assertion that the initial surplus is not really money at all, but merely a “circumstance”;
- (c) facts and intentions do not mean anything; technical narrow meanings rule the day;
- (d) A solemn undertaking does not mean what it plainly says;
- (e) notwithstanding the admitted heinous interference in the independent actuary functions by the Provincial Auditor and by MTS, Fox’s conclusion should prevail;
- (f) if it does not prevail, justice should be further delayed and the matter resubmitted to a stranger, unknowledgeable of and not privy to the labyrinth of documentation, issues and trial evidence already gathered, assessed, reassessed and synthesized;
- (g) the shocking allegation that 11 years of pre-trial litigation, 13 weeks of trial, despite MTS’ willing participation, were never warranted; it could have been neatly tied up in a simple judicial review application.

12. Mercifully, the riposte of the employees / retirees is contained in an argument which reveals the true course of events. It is a story about facts, not technicalities or artificial constraints. The most important findings of fact from the lengthy trial below follow.