TEAM ET AL. v. MTS ET AL.
File No. CI 99-01-14589

INDEX

Date: 20100119
Docket: CI 99-01-14589
(Winnipeg Centre)
Indexed as: Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.
Cited as: 2010 MBQB 11

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC., COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 5 AND 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. and MTS ADVANCED INC.,	B. Meronek, Q.C. and K. Saxberg for the Plaintiffs Telecommunication Employees Association of Manitoba Inc., 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. and MTS Advanced Inc.
Plaintiffs,	
- and -	R. Zaparniuk for the Plaintiff Communications, Energy and Paperworkers Union of Canada, Local 5 and Local 7

	)	
MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.,	)	E.W. Olson, Q.C., S. Perlmutter and L. Troup for the Defendants
	)	
Defendants.	)	Judgment delivered: January 19, 2010

BRYK, J.

A. INTRODUCTION

[1] Throughout this judgment, "MTS" will be used to refer to both the former Manitoba Telephone System and its successor Manitoba Telecom Services Inc. The context in which it is used will identify whether reference is being made to the former or the current entity.

[2] As a result of the privatization of Manitoba Telephone System (MTS) and its subsidiaries, their employees/retirees were forced to change pension plans. They were assured by the Government of the Province of Manitoba (Government) and by MTS that the new pension plan (New Plan) would have benefits which were at least equivalent in value to those enjoyed under the old pension plan (Old Plan) - that the New Plan would "mirror" the Old Plan. Moreover, as the employees/retirees were transferring more assets into the New Plan than was MTS, they were promised that "initial surplus" would be used for their benefit and would not be used by MTS to reduce its cost or share of contributions to the New Plan.

[3] Plaintiffs claim that neither of those assurances or promises were met and they bring this action seeking redress.

[4] Earlier in these proceedings, the defendants, which at that time included Jon Singleton (Singleton), the then Provincial Auditor, and Clifford Fox (Fox), an actuary retained by the Provincial Auditor, moved for summary judgment dismissing the action. In ***Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.***, 2007 MBCA 85, 214 Man.R. (2d) 284, the Manitoba Court of Appeal dismissed the action against Singleton and Fox. The court dismissed the motion of the remaining defendants, ruling the matter should proceed to trial as against them.

B. BACKGROUND

[5] On January 1, 1997, MTS was privatized and from that day has continued as Manitoba Telecom Services Inc., MTS Communications Inc., MTS Mobility Inc., and MTS Advanced Inc. (MTS). Prior to privatization, MTS was a provincially-owned Crown corporation and its employees/retirees were members of the Old Plan established under ***The Civil Service Superannuation Act***, R.S.M. 1988, c. C120, and amendments thereto (***CSSA***). The privatization of MTS resulted in its employees/retirees, approximately 7,000 in number, becoming members of the New Plan created by MTS. Their assets and pension rights were transferred from the Old Plan to the New Plan.

[6] As soon as word of privatization became public in 1996, the past and present employees of former MTS as represented by the plaintiffs were

understandably concerned about whether the benefits enjoyed under the Old Plan would be carried over into the New Plan. An Employee/Retiree Pension Committee (ERPC) was formed to pursue these concerns. The Communications, Energy and Paperworkers Union of Canada, Local 5 and Local 7 (CEP) pursued the same concerns. Each group hired its own actuary for assistance and advice. Lengthy and complicated discussions ensued and proposals about surplus funding and governance issues were made. The Government which implemented privatization under ***The Manitoba Telephone System Reorganization and Consequential Amendments Act***, S.M. 1996, c. 79 (the ***Reorg Act***), gave assurances the New Plan, to the extent possible, would "mirror" the Old Plan and the benefits under the New Plan would be "equivalent in value".

[7] On November 7, 1996, a Memorandum of Agreement (M0A) (Agreed Document 440) was negotiated and entered into by MTS, the Government, and representatives of the employees/retirees confirming, among other things, that:

> 2. Four actuaries, who will represent (i) MTS, (ii) IBEW, TEAM and the retirees, (iii) CEP, and (iv) the Civil Service Superannuation Board, will review the process for the transfer of assets from the Civil Service Superannuation Fund (CSSF) and the assumptions relating to the transfer of assets. The initial actuarial valuation of the new MTS Pension Plan, as prepared by Buck Consultants Ltd., will be reviewed by the pension committee and if not agreed to will be referred to the actuary appointed by the Provincial Auditor.
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> 3. ... Any initial surplus from the CSSF would be allocated to the new pension plan trust fund to fund future cost of living adjustments. In subsequent years the financial position of the COLA Account will be reviewed by the plan's actuary, if sufficient additional assets exist in the account beyond those required for the stated COLA increase for a particular year then pension benefits may be increased provided that the

> liability for the pension plan in total does not increase due to the change in benefits.

[8] The MOA stipulated that any disagreements relating to any of the matters described in paragraphs 2 and 3 would be resolved by the independent actuary appointed by the Provincial Auditor as provided for in the ***Reorg Act***.

[9] The completion of privatization by the end of 1996 was a matter of priority and urgency to the Government. The MOA as well as certain provisions in s. 15 of the ***Reorg Act*** (some of which were added as a result of the MOA) were intended to assuage the concerns of the employees/retirees. The following provisions in s. 15 are particularly relevant:

> **New plans established**
> **15(2)** On or prior to the implementation date, the corporation shall establish
>
> (a) the new plan which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may have become entitled under *The Civil Service Superannuation Act* or to which any other person has or would have become entitled under *The Civil Service Superannuation Act* by virtue of the death of an employee; and
>
> ...
>
> **Independent actuary to review plan**
> **15(3)** As soon as possible after this Act receives royal assent, the Provincial Auditor shall appoint an independent actuary to review the plan proposed by the corporation for the purposes of clause (2)(a) to determine whether the benefits under the proposed plan are equivalent in value as required by that clause.
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> ...
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> **Deemed consent**
> **15(10)** The persons described in subsection (2) are deemed to consent
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> (a) to termination of their participation in the fund;
> (b) to the assignment and transfer of assets, liabilities and agreements from the fund to the new plan;

(c) to the determination of all rights under the new plan without reference to *The Civil Service Superannuation Act*, the fund, or any trust or trust agreement relating to them; and

...

Effect of agreement
15(11) Nothing in this section is to be interpreted as nullifying the effect of an agreement executed on November 7, 1996 by representatives of the Manitoba Telephone System, the Government of Manitoba and employees on the subject of pension issues.

[10] Fox was the independent actuary appointed by the Provincial Auditor pursuant to s. 15(3) of the ***Reorg Act***. His March 5, 1997 report concluded the benefits provided under the New Plan were at least equivalent in value to the benefits provided under the Old Plan. The employees/retirees disagreed with that conclusion and ultimately commenced these legal proceedings.

C. RELIEF SOUGHT

[11] Plaintiffs seek the following relief:

(a) payment of $43.343M plus interest at the New Plan rate of return since January 1, 1997 to be used to enhance pension benefits on the understanding that the enhanced benefits will not result in an increase of MTS's costs;

(b) maintain a separate accounting for the COLA account so that surpluses resulting from employee contributions from time to time are available to enhance pension benefits on the understanding that those enhancements do not increase MTS's costs;

(c) a declaration that Fox's March 5, 1997 opinion on equivalency is invalid and of no force and effect;

(d) a declaration that the New Plan is to be governed on the basis of consensus through the operation of a two-thirds vote of the Pension Committee with respect to all changes to the plan that would impact on benefits.

D. HISTORY OF THE CIVIL SERVICE SUPERANNUATION FUND

[12] In order to properly understand the concerns raised by the plaintiffs and the defences advanced by the defendants, it is helpful to have an understanding of the Old Plan and the way it operated.

[13] The Old Plan is a statutory plan enacted by the Legislature of the Province of Manitoba in 1939. It was created to provide superannuation or pension benefits for employees of the Government and Crown agencies.

[14] Initially, it was funded by employees contributing between 4.5% and 7% of pensionable earnings. Contributions were matched by the Government dollar for dollar and benefits were paid out of The Consolidated Revenue Fund. Between 1939 and 1961, various benefit improvements were made to the Old Plan.

[15] In 1961, an agreement was reached between the Government and the then Manitoba Government Employees Association (MGEA) whereby, in exchange for improved benefits, the Government would discontinue matching funding and would use the resulting accumulated revenue for other Government purposes. From that point forward, the Government and Crown agencies were responsible

for payment of 50% of any benefits paid to retirees (although there were instances where either the entire share or a portion thereof of the Government or Crown agency contributions were paid for by the employees). In practical terms, 100% of the benefits are paid by the Civil Service Superannuation Fund (Fund) and the Government and Crown agencies are then billed on a monthly basis for their 50% share.

[16] The Old Plan was established as a defined benefit plan in which contributions are fixed and benefits known. It is administered by the Civil Service Superannuation Fund Board (the CSSF Board). The Fund operates either on a surplus or deficit basis, depending on the amount of employee contributions in the Fund from year to year and the investment income earned on that capital.

[17] The Old Plan is deemed a hybrid because of the unique manner in which the Government and Crown agencies pay their share of benefits. The nature of its management and governance adds to its uniqueness.

[18] Then, as now, the CSSF Board consisted of nine members, four of whom were representatives of employees/retirees and four of whom were representatives of the Crown agencies. The Lieutenant-Governor-in-Council appoints the Chairperson. The CSSF Board appoints a plan actuary who is responsible for making such reports and valuations as are required.

[19] Members of the Old Plan included MGEA (now Manitoba Government Employees Union - MGEU) and employees of unions who are bargaining agents

for civil servants or Crown agencies including the plaintiffs Telecommunication Employees Association of Manitoba Inc. (TEAM), International Brotherhood of Electric Workers, Local 435 (IBEW), and CEP.

[20] The CSSF Board is the trustee of the Fund and is responsible for investment of the Fund's assets. Fund investments are made through the CSSF Board Investment Committee which includes employee representation.

[21] The Government is statutorily obligated to guarantee any payments required to be made by a Crown agency which ceases to exist.

[22] The Old Plan does not have a separate "plan text" or "governance plan". Rather, it is regulated by the provisions of the ***CSSA***.

[23] The Fund is governed by the provisions of ***The Pension Benefits Act***, R.S.M. 1987, c. P32 (the "***PBA***").

[24] Throughout these proceedings, the word "funding" has been given a variety of meanings. For the sake of consistency, I have adopted the following definitions provided by the defendants:

(a) Funding of Existing and Accrued Benefit Entitlements

This is a normal usage of the term and has associated with it the concepts of "fully funded", "underfunded" and "contribution holidays". It is also sometimes referred to as "pre-funding" because it refers to the payment into the pension plan of monies in advance of when they are required to be paid out. A fully-funded plan is one which has sufficient assets to pay now the present value of all accrued pension benefits to date for existing employees/retirees.

(b) Funding of Benefit Improvements Contemplated

This relates to how any improvements will be paid for and by whom. Normally, when a defined benefit pension plan is in an actuarial surplus position (i.e. it has more assets than what is required to pay now the present value of all accrued pension benefits to date for existing employees/retirees), consideration may be given to whether some portion of that surplus should be used for increasing benefits, i.e. improving existing benefits or adding new benefits. In those situations, actuaries are asked to project the total cost of any such improvements to assist in determining the affordability of such improved or new benefits and the appropriateness of making such changes to a pension plan.

(c) Funding of Pension Benefit Payments When Due

Here funding is used in the sense of making the pension benefit payments when they fall due. It refers to the time of actual payment of benefits to a member and is sometimes called "pay-as-you-go" funding.

[25] The Fund operates under the third category of "pay-as-you-go" funding.

[26] Apart from the exempting of Government and Crown agencies from funding existing and accrued benefit entitlements, the ***PBA*** applies in other respects. Examples are:

i) an employer is prohibited from withdrawing funds, including surplus, unless the Pension Commission believes it equitable to do so and consents in writing;

ii) no amendments to the pension plan are permitted which adversely affect the pension benefit credits of any member; or

iii) any amount received by an employer from an employee as a contribution into the pension plan is held in trust by the employer and cannot be appropriated or converted by the employer to its own use or any other unauthorized use by the trust.

[27] The ***PBA*** also includes the following definitions:

> "defined benefit pension plan" means a pension plan under which the pension to which a member is entitled upon retirement in accordance with the pension plan is prescribed by the terms of the pension plan on the basis of a period of service under the pension plan or income earned while a member of the pension plan or during a prescribed period of membership in the pension plan or on the basis of both such as a period of service and such income earned
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> "pension benefit" means the aggregate annual, monthly or other periodic amounts to which an employee is or will become entitled upon retirement or to which any other person is entitled under a pension plan by virtue of the death of the employee after his retirement;
>
> "surplus" when applied to a pension plan means the excess, determined at the time of a review, of the value of the assets of the plan, excluding the present value of outstanding special payments, over the value of the liabilities of the plan in respect of service rendered by employees and former employees prior to that time;

[28] At issue in these proceedings is whether the above definition of pension benefits was intended to be utilized in the determination of the issue of equivalency.

[29] On January 1, 1970, a cost of living adjustment (COLA) was introduced to the Fund to offset the effects of inflation on pensions. It was deemed necessary to update pension benefits by a consumer price index (CPI) adjustment. The Old Plan provided for COLA adjustments so long as there were sufficient funds available. That was determined on an *ad hoc* basis from year to year until July 1, 1977 when the COLA adjustment became a fixed benefit.

[30] As of July 1, 1977, a separate account which became known as the Superannuation Adjustment Account (Adjustment Account) was established to finance the COLA provisions for all recipients of pensions. The COLA adjustment was to be paid on July 1st of every year on a permanent annual basis. The account was to be funded by allocating 10.2% of all employee contributions to the Adjustment Account. Annual COLA payments were to be matched by the Government and Crown agencies.

[31] The ***CSSA*** permitted the CSSF Board to allocate all or any portion of the surplus in the Adjustment Account to other purposes of the Fund including providing new or enhanced existing pension benefits to members.

[32] COLA adjustments were payable provided there was no unfunded liability in the Adjustment Account. That determination was made by the plan actuary.

[33] Assets in the Adjustment Account were kept separate from the main Fund and each was tracked, accounted for and reported separately.

[34] One of the functions of the CSSF Board was to determine the rate of interest to be applied annually to the Adjustment Account. Historically, the rate of interest was based on a formula which met or exceeded the plan rate of interest.

[35] In 1988, the CSSF Board instituted an objective that retirees receive a COLA adjustment annually in the amount of two-thirds of that year's CPI. In earlier years, greater than two-thirds of CPI was frequently granted but as the rate of inflation increased, the level of COLA adjustments was reduced to ensure the Adjustment Account could continue to meet its objective of COLA adjustments of two-thirds of CPI.

[36] In furtherance of that goal, the plan actuary concluded that as a result of high inflation rates and the increase in the number of retirees, the Adjustment Account would be in jeopardy if it continued to pay out greater than two-thirds of CPI. Accordingly, a protection was built in so that no more than two-thirds of CPI could be paid out of the Adjustment Account in any given year unless and until the account could meet the test of having enough assets to cover 20 years of liabilities for 100% of CPI ("the 20 year pre-funding test").

[37] From July 1, 1977 to July 1, 1998, COLA adjustment were paid from the Adjustment Account as follows (Agreed Document 1001, page 2):

Effective Date	Average COLA Paid	C.P.I. Prior Calendar Years	% Paid
July 1, 1977	5.8%	5.8%	100.0%
July 1, 1978	7.0%	9.5%	73.7%
July 1, 1979	6.2%	8.4%	73.8%
July 1, 1980	5.5%	9.8%	56.1%
July 1, 1981	5.8%	11.2%	51.8%
July 1, 1982	7.8%	12.1%	64.5%
July 1, 1983	7.76%	9.3%	83.4%
July 1, 1984	4.5%	4.5%	100.0%
July 1, 1985	3.78%	3.78%	100.0%
July 1, 1986	4.35%	4.35%	100.0%
July 1, 1987	4.17%	4.17%	100.0%
July 1, 1988	2.78%	4.15%	67.0%
July 1, 1989	2.48%	4.00%	62.0%
July 1, 1990	3.42%	5.13%	66.7%
July 1, 1991	3.33%	5.00%	66.7%
July 1, 1992	2.52%	3.78%	66.7%
July 1, 1993	1.43%	2.14%	66.7%
July 1, 1994	1.13%	1.70%	66.7%
July 1, 1995	.15%	.23%	66.7%
July 1, 1996	1.17%	1.75%	66.7%
July 1, 1997	1.45%	2.17%	66.7%
July 1, 1998	.49%	.73%	66.7%

[38] In addition to the CSSF Board, whose function has already been described, there were two committees operating within the Old Plan. While they were referred to by a variety of names, they were commonly known as the Liaison Committee and the Advisory Committee. Their codification by formal enactment under the ***CSSA*** on March 15, 1990 did not change their makeup or function.

[39] The Liaison Committee was made up of approximately 40 members representing approximately 40,000 employee members of the Old Plan. The

Advisory Committee was made up of representatives of the Government and Crown agencies.

[40] The purpose of these committees was to conduct negotiations to effect changes to the ***CSSA*** by agreement. The Liaison Committee's specific function was to propose and then negotiate benefit improvements for the plan members.

[41] The usual process was that whenever there was a surplus in the Fund or Adjustment Account as determined by the plan actuary, the Liaison Committee would initiate a list of improvements the members wanted. The cost of those improvements would then be determined by the plan's actuary and to the extent they were affordable, the Liaison Committee would begin to negotiate their implementation with the Advisory Committee.

[42] It frequently took a long time to reach agreement, but ultimately agreement was reached with respect to the use of surplus.

[43] All agreements which were recommended to the Minister had to go through the process of legislative enactment as the ***CSSA*** had to be amended to accommodate those changes. However, there was never an instance where an agreement reached by the Liaison and Advisory Committees as to the use of surplus was rejected by the Government and there was never an instance where such an agreement, after having been approved by the Government, was not passed by the Legislature.

[44] With respect to the use of surplus, proposals were always at the initiative of the Liaison Committee as it was understood that the surplus represented the

excess of employee contributions over employee's share of liabilities. Understandably, proposals were never advanced by the Advisory Committee.

1. <u>Surplus</u>

[45] Membership in the Old Plan consisted of various Government and Crown agencies including MTS. When MTS privatized on January 1, 1997 and its portion of the assets was transferred into the New Plan, the Old Plan continued with its remaining members. Any references to the Old Plan and its performance, for purposes of this judgment, will relate to the time frame from the date of its inception to December 31, 2006. The performance of the Old Plan beyond that date has limited application to this proceeding.

[46] From time to time, actuarial valuation disclosed a surplus in the Fund. Often, it was a significant amount. Since it was only employee members who contributed to the Fund, there was never any question about their entitlement to the surplus. Plaintiffs have used the word "ownership" in describing the employees/retirees' entitlement to surplus. In my view, ownership denotes characteristics of unilateral or independent use which was not available to the employees/retirees. Nonetheless, throughout this proceeding, all parties have acknowledged that surpluses were created solely by virtue of employee contributions and their growth by investment. It was clear to all that the surplus belonged to the employees/retirees and that is why only the Liaison Committee initiated negotiations regarding its use.

[47] There were instances when the Government was not prepared to share the cost of a benefit improvement equally or at all. As a consequence, in order to implement improvements, the Liaison Committee occasionally would agree to fund the Government's portion either partially or in its entirety. On those occasions where the Liaison Committee agreed to use a part of the surplus to defray Government costs, it was always with the concurrence of the employees through their representatives on the Liaison Committee. Apart from those occasions, the Government never used or even attempted to use the surplus to defray or reduce its existing cost obligation for benefits already accrued.

[48] There was never an occasion where Government refused to allow the surplus to be utilized to pay a portion or all of its share of proposed benefit improvements.

[49] Between 1972 and 1996, benefit improvements under the Old Plan were paid for by 50/50 sharing of cost between the employees and the Government, or by 100% payment of the cost by the employees, or by partial payment of the Government's share of the cost of benefits, or by payment of the entire cost of benefits for a specified period of time after which the Government assumed responsibility for paying its 50% share of the costs.

[50] From time to time, surplus was also used to pay for COLA adjustments above two-thirds of CPI.

2. Pension Reserve

[51] Although not required to do so, as a result of concerns of its ever-increased unfunded liability, MTS established a Pension Reserve in 1987 in relation to its pension liability.

[52] Although the investments in the Pension Reserve were intended to offset future obligations of MTS, the Pension Reserve was not an actual trust fund. Although the investments were always available to MTS for other purposes, they were never used.

[53] As of December 31, 2006, the value of the Pension Reserve was $383M. It was transferred into the New Plan in its entirety.

E. THE ROAD TO PRIVATIZATION

[54] The process of privatization of MTS began early in 1996 shrouded in secrecy. It included the development of the New Plan. While there may have been legitimate reasons for withholding information from the public at large, it is difficult to conceive why the largest stakeholder in the Old Plan would not have been privy to the process. However, as will be discussed, the employees/retirees were essentially kept "out of the loop". The employees/retirees' assets in the Old Plan amounted to more than $400M, considerably more than was in the Pension Reserve. The Government itself had no money invested and with privatization, was about to rid itself of a significant unfunded liability.

[55] Word of the possibility of the privatization of MTS reached the public domain in early 1996. With that, plan members understandably began to raise

concerns about the security of their pensions. In early 1996, members of the Liaison Committee met with The Honourable Vic Toews (Toews), the Minister responsible for the CSSF, to express their concerns. By way of assurance, Toews referred them to s. 22 of the ***CSSA*** which provided for Government intervention where a Crown agency defaults on its pension plan obligations. Toews provided no further information about privatization but observed that in previous situations, changes in ownership structure had no impact on pensions.

[56] Early in 1996, the Toronto-based actuarial accounting firm of Towers Perrin prepared a report for MTS entitled *"Withdrawal from CSSA - Report on Transitional Issues and Strategies"*. It was not shared with the Liaison Committee.

[57] In early May 1996, the first draft of the ***Reorg Act*** was completed. It contained a deemed consent provision in which plan members were deemed to consent to the termination of their participation in the Old Plan, to assign assets, liabilities and agreements from the Old Plan to the New Plan and to have all rights determined under the New Plan without reference to the Old Plan. It was not shared with the Liaison Committee.

[58] In early July 1996, MTS prepared the first formal draft of the plan text. The Liaison Committee was not invited to assist or even make recommendations and did not receive a copy.

[59] The plan members were understandably concerned about the potential utilization by MTS of the actuarial surplus which historically had been used exclusively for the improvement of pension benefits or to fund COLA increases.

[60] Section 16.02 of the draft plan contained a provision which imparted to the employer exclusive rights relating to the use of surplus:

> 16.02 Actuarial Surplus
>
> Subject to the provisions of the Applicable Pension Laws, any actuarial surplus determined by actuarial valuation, or a portion thereof, may be used to reduce the contributions of Participating Employers otherwise required under the Plan or may, to the extent allowed and subject to any conditions or approval procedures under the Applicable Pension Laws and Revenue Rules be returned to the participating employers. The allocation of the surplus among the Participating Employers shall be determined by the Company on the advice of the actuary.

[61] Not having received a copy of the draft plan, the employees/retirees were unaware of this provision.

[62] In early July 1996, certain MTS employees/retirees who were members of the Old Plan convened a meeting to discuss the impact of the ***Reorg Act*** on their pensions. They decided to arrange a meeting with a representative of MTS so as to ascertain the proposed provisions of the New Plan and how it might impact on their benefits. Matters which were of concern at the time were administration of the New Plan, whether MTS's 50% share of liabilities would be fully funded, whether there would be a Board of Directors similar to the old CSSF Board and whether indexing would continue.

[63] This group of interested MTS employees/retirees which became known as ERPC (Employee Retiree Pension Committee) designated Harry Restall (Restall) as its Chairperson.

[64] By this time, ERPC had acquired knowledge of the proposed provisions of the ***Reorg Act*** and specifically of s. 15(2) which provided:

> ... the new plan which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may have become entitled under *The Civil Service Superannuation Act* ...

[65] Arrangements were made to meet with William Chisholm Fraser (Fraser), the then President and Chief Executive Officer of MTS, on July 16, 1996. In order to forewarn Fraser of the concerns which ERPC intended to raise at that meeting, a letter dated July 12, 1996, with enclosures, (Agreed Documents 283 and 284) was sent to him by Kenneth Beatty (Beatty), an ERPC member and retired lawyer from the MTS Legal Department. The letter raised numerous concerns including the following:

(a) governance under the New Plan and whether plan members would be able to exercise the same influence under it as they did under the Old Plan;

(b) whether the financial position of the New Plan would be the same as the Old Plan in that there was an anticipated employee surplus coming over from the Fund;

(c) whether MTS was going to match the employee surplus so that as of the implementation date the employee and employer contributions would be equal;

(d) whether MTS was going to transfer its Pension Reserve to the New Plan; and

(e) the manner in which the assets being transferred from the Old Plan were to be valued including the surplus.

[66] At the July 16, 1996 meeting with Fraser, ERPC asked for a copy of the plan text but were refused. They expressed concern over issues of governance, funding and surplus but received no assurances relative to those concerns.

[67] On July 24, 1996, Beatty prepared another letter for Fraser purporting to summarize the information provided by MTS at the July 16, 1996 meeting (Agreed Document 292). Some of the more salient pieces of information which MTS had provided were the following:

(a) MTS intended to administer the New Plan;

(b) MTS had not yet calculated its cost to fully fund its one-half share of the New Plan; and

(c) MTS had neither calculated nor estimated the amount being transferred from the Fund or, for that matter, the surplus portion of that transfer amount.

[68] The letter also set out what it referred to as "employees' principles":

1. The "transfer amount" estimated between 350 Million Dollars to 400 Million Dollars is the employees' money, having arisen out of

the employees' contribution to the Civil Service Superannuation Fund or out of their share of the surplus in the said Fund.

2. Neither the Province of Manitoba nor MTS has any right to the "transfer amount".

3. Despite Section 15(8) of Bill 67, the employees described in Section 15(2) of Bill 67 DO NOT consent to termination of their participation in the Civil Service Superannuation Fund or to the assignment and transfer of the assets to the new plan which MTS intends to establish and control.

4. The said employees believe that MTS and said employees are contributing equally to the proposed new plan and should have an equal say in how the new plan is administered.

5. The said employees believe that any new plan should be administered by an independent body.

[69] The employees' concerns were expressed as follows:

> At our meeting you suggested that, if MTS administers the plan, the staff of MTS who will be administering the plan are also participants in the plan and will have the "employees' " interest in mind. However, there is no question that the interest of MTS in the plan will differ in many areas from the interests of the employees described in Section 15(1) of Bill 67. Understandably MTS staff administering the plan will have to follow the priorities of MTS.
>
> Obviously the employees have great concern in the treatment of the new plan since it is their money funding ½ of the plan. The actions of MTS and the Province of Manitoba in planning for this legislation without any consultation with the employees as defined in Bill 67, the public announcements by both MTS and the Province of Manitoba on Bill 67 made no mention of Section 15 of Bill 67 and its ramifications, the suggestion that unavailable regulations by MTS and the Province of Manitoba will determine how the new plan will operate and the lack of information from MTS staff during our discussions lead us to believe that it is absolutely necessary for the new plan to be administered by an independent body, not MTS.
>
> The employees have special concerns about Section 15(8) which seems to divest employees of their rights. We reiterate that the transfer funds belong to the employees and Bill 67 is an expropriation of these funds.

[70] Copies of the aforementioned letter were sent to Premier Gary Filmon (the Premier), The Honourable Glen Findlay (Findlay), Minister responsible for MTS,

Toews, Minister responsible for the ***CSSA***, and Tom Stefanson (T. Stefanson), Chairman of MTS Board of Directors.

[71] Fraser issued a general information letter dated July 31, 1996 to the plan members and retirees at large (Agreed Document 294). It provided general information but did not specifically or even generally attempt to address the concerns raised by ERPC at the July 16, 1996 meeting.

[72] Also on July 31, 1996, Fraser replied to Beatty's July 22, 1996 correspondence (Agreed Document 295). Fraser copied the same Government officials as did Beatty with his July 22, 1996 correspondence but also included a copy to Jules Benson (Benson), Secretary to the Treasury Board. Fraser responded to all four of Beatty's questions (Beatty submitted a fourth question in writing following the July 16, 1996 meeting). In response to the concerns about administration, Fraser pointed out that s. 7 of the ***Pension Benefits Standards Act, 1985***, R.S. 1985, c. 32 (2nd) Supp. (the ***PBSA***), provided that the employer would be the administrator of the New Plan. Fraser pointed out that the ***PBSA*** also provided for the establishment of a Pension Committee and outlined its duties.

[73] Regarding the Pension Reserve, Fraser advised that MTS intended to transfer it into the New Plan in its entirety at which point it would become a trust and unavailable to MTS for other than pension matters. Fraser also mentioned it was MTS's intention to transfer sufficient assets to the trust fund immediately

upon the creation of the New Plan so as to fund the employer's portion of the liability.

[74] Understandably, MTS was not in a position to provide all of the information requested by Beatty as some of it simply was not available. However, Fraser's letter did address some of the specific concerns raised.

[75] Of paramount concern to ERPC was the employee surplus portion of the transfer amount. They were seeking assurance that it would only be used as it had in the past, that is, to fund pension improvements and to enhance COLA benefits. These concerns were specifically set out in a July 6, 1996 letter from Beatty to Fraser as follows (Agreed Document 299):

> Included in the transfer amount defined in Section 15(1) of Bill 67 is a potential employees "surplus portion" of the Civil Service Superannuation Fund (C.S.S.F.). Although the final amount of the said employees "surplus portion" has not yet been determined by Turnbull & Turnbull, Actuary for C.S.S.F., please provide answers to the following:
>
> a) Will the employees['] "surplus portion" of the transfer amount become part of the new plan?
>
> b) Will the employees['] "surplus portion" of the transfer amount be used to enhance the employees share of the benefit improvements?
>
> c) Will the employees['] "surplus portion" of the transfer amount be used to reduce the employer's cost to the plan?
>
> d) Please outline how these employees['] "surplus portion" will be invested in a separate trust account on behalf of the employees.
>
> e) Will MTS match the contribution of the employees['] "surplus portion" of the transfer amount by contributing an identical amount to the new plan?
>
> f) Presently C.S.S.F. maintains an Indexing Fund in which 10% of the MTS employees' contributions are placed. This Indexing Fund is used by C.S.S.F. to pay for 50% of the COLA adjustments for

pensioners. At present MTS is required to pay the other 50% of the indexing adjustment to C.S.S.F. for any COLA.

In the new pension plan, will MTS create an identical Indexing Fund with 10% of both employer and employee contributions to be placed in this Fund?

g) Will MTS retirees be guaranteed to receive the same level of indexing to the Canadian Consumer Price Index in future years as they would have if they had remained in C.S.S.F.?

...

[76] On August 12, 1996, ERPC met with Bill Shelest (Shelest), an MTS employee in their Human Resources Department, and were denied a copy of the further draft of the pension plan that had been prepared.

[77] On August 17, 1996, Fraser responded to Beatty's August 6, 1996 correspondence as follows (Agreed Document 313):

(a) In accordance with the definition of "transfer amount" in subsection 15(1) of Bill 67, any surplus will form part of the transfer amount that will be transferred from the Civil Service Superannuation Fund (CSSF) to the trust fund that will be created in connection with the new pension plan to be registered under the PBSA and the *Income Tax Act*.

(b) & (c) Once the amount of the surplus is determined and transferred to the trust fund, an analysis will be undertaken to determine the most appropriate use of the surplus in connection with the pension plan. However, this surplus will not be used to reduce the employer's cost of, and share of contributions to, the new pension plan.

(d) Please refer to paragraphs (a) and (b) above.

(e) MTS will transfer to the pension plan trust fund the assets and investments currently held for pension obligations in its fund known as the "Pension Reserve". If any unfunded liability exists after the transfer of these investments and the transfer amount from the CSSF to the new pension plan trust fund, the PBSA requires that MTS, as the employer, must make additional contributions to the pension plan in accordance with the provisions of the PBSA in order to fully fund the pension plan.

...

[78] Fraser went on to say the New Plan would have an indexing account that would be administered in the same manner as the Adjustment Account and that retirees would continue to receive the same level of indexing to the CPI in future years in keeping with the "equivalent in value" provisions of s. 15 of the ***Reorg Act***.

[79] According to Restall, Fraser's response relating to use of the surplus was taken as a guarantee that the surplus would only be used as it had in the past. ERPC also believed the New Plan would be more than fully funded if MTS transferred into the Fund an amount equal to its 50% share of liabilities. If that was the case, the employees' surplus would result in the New Plan starting in an overall surplus position.

[80] ERPC's understanding about the New Plan being fully funded was based on the assumption that MTS would immediately transfer into it sufficient funds to cover 50% of its share of liabilities. However, what Fraser actually said was that if any unfunded liability existed after the transfer of the Pension Reserve, MTS would be required to make additional contributions to the pension plan in accordance with the provisions of the ***PBSA*** in order to fully fund the pension plan. In fact, ***PBSA*** affords an employer an extended period of time (in this case 15 years) to achieve full funding.

[81] On September 4, 1996, Irene Groot-Koerkamp (Groot-Koerkamp), Senior Associate Counsel with MTS, sent a letter to Richard Yaffe (Yaffe), counsel for

the Government, with documentation relating to certain regulations which the Government was in the process of compiling. Draft number 3 of the pension plan text dated September 3, 1996 was also provided with an admonition to maintain it in strictest confidence and not to disseminate it to any third party without the prior approval of MTS. Groot-Koerkamp pointed out the pension plan text was in draft form only and would be subject to further amendments and revisions, some of which might be fairly extensive.

[82] MTS had been mandated by the Government to develop a new pension plan and to assemble a group of MTS personnel for that purpose. From their perspective, they did not want outside interference for a number of reasons, including the time constraints under which they were operating. The Government was seeking to have the ***Reorg Act*** passed at the fall 1996 sitting of the Legislature. Nevertheless, the employees/retirees had a huge stake in the New Plan, much more so than did the Government. To them, the New Plan represented their financial security for the future. It is understandable that they would want to participate in the process with the opportunity to review the draft plan text and draft ***Reorg Act*** and to offer comments or suggestions.

[83] Through September and October and the first week in November 1996, ERPC repeated its request for a copy of the plan text on numerous occasions but were always refused.

[84] In addition to concerns about issues of governance and exclusive use of their portion of the employees/retirees' portion of existing surplus, ERPC

expressed a desire that emerging surpluses on a go-forward basis be used in the same fashion as they had in the past. In order to protect both the initial and ongoing surpluses from use by MTS to fund its share of the cost of the benefits, ERPC suggested keeping the surplus in a separate account for benefit improvements or putting it into a COLA account to be used for improved COLA benefits. At this point in time, ERPC was relatively "in the dark" insofar as how the New Plan was to be structured and administered. Without that knowledge, they were limited as to the suggestions they were able to advance regarding those issues.

[85] On September 30, a further draft plan text was prepared by MTS which, for the first time, incorporated the minimum guarantee provision of two-thirds of CPI to a maximum CPI of 4% for COLA adjustments. A draft copy of the plan text was forwarded to Benson with the explanation that all changes except for the COLA provision were required in order to comply with the ***PBSA*** and the ***Income Tax Act***, [1985, c. 1 (5^{th} Supp.)] (the ***ITA***). ERPC was neither advised of nor provided with a copy of this latest draft of the plan text.

[86] ERPC hired Louis Ellement (Ellement), an actuary who had worked with the Old Plan, to assist them with their concerns relating to the New Plan. CEP hired John Corp (Corp), an actuary with similar experience to assist them. Although CEP proceeded independently at the time, it operated on a parallel course with ERPC.

[87] MTS issued bulletins to their employees/retirees informing them of the New Plan and of the progress being achieved in the privatization process. The information provided in those bulletins was general in nature and did not address the specific concerns being raised by ERPC and CEP.

[88] In addition to the information bulletins, MTS arranged a series of "information sessions" for plan members in September and October 1996. At meetings held in Winnipeg on October 2 and 3, Tony Williams (Williams), an actuary retained by MTS to assist with the privatization process, was in attendance to provide general information comparing the Old Plan with the New Plan and to answer questions. The information provided included reference to the existence of a 20 year pre-funding requirement in the New Plan similar to that in the Old Plan. Williams also mentioned the New Plan was expected to be fully funded. Surprisingly, there was no reference to the minimum COLA guarantee which had been incorporated into the latest plan draft completed several days earlier. Williams had been instructed by MTS not to divulge that information.

[89] As well, for the first time, the concept of contribution holidays was discussed and attendees were advised that the ***PBSA*** permitted an employer to take contribution holidays if a surplus existed. The specifics of the draft plan text relating to MTS's ability to use the actuarial surplus on an ongoing basis at its sole discretion was neither distributed nor discussed.

[90] On October 11, 1996, Fraser wrote to Brian Meronek, Q.C. (Meronek), counsel for ERPC (Agreed Document 376). The letter was in response to Meronek's September 24, 1996 correspondence where he raised a number of issues. One of them was a suggested amendment to clause 15(2)(a) of the ***Reorg Act*** to read, *"benefits which are equal to or greater than those benefits currently provided under The Civil Service Superannuation Act".* Fraser replied that the existing wording providing for *"benefits which on the implementation date are equivalent in value to the pension benefits"* was utilized to ensure that the New Plan could be registered under the ***PBSA*** and ***ITA***. Since the New Plan was to be governed by the ***PBSA*** and ***ITA*** and not the ***PBA***, its provisions could not be identical to those in the Old Plan.

[91] Fraser went on to advise that a Pension Committee would be established in accordance with the provisions of ***PBSA*** with representation by current employees/retirees. He also reiterated that MTS was considering appointing the CSSF Board to perform administrative duties in respect of the New Plan. Finally, Fraser advised that neither the plan text nor the plan regulations would be available to the ERPC until MTS was satisfied they were registerable under the ***PBSA*** and the ***ITA*** and that they were not yet at that stage.

[92] As the days passed and ERPC still had not received a copy of the plan text, they arranged a meeting with Toews and Findlay. One of the matters discussed was ERPC's concern with the initial surplus, how it was going to be handled in the New Plan and whether there was some mechanism to protect

what ERPC described as employee-owned. Neither Findlay nor Toews contradicted that position. ERPC took away from that meeting an understanding that the initial surplus would be reserved for benefit improvements in the New Plan.

[93] In a letter dated October 24, 1996 from Restall to Findlay (Agreed Document 386), Restall reiterated the understanding with respect to use of initial surplus exclusively for the benefit of employees/retirees. Restall also made reference to governance and ERPC's request that employees/retirees have 50% representation on the "controlling body" as was the case with the Liaison Committee and the CSSF Board. In concluding, Restall invited Findlay to respond if his letter did not accurately summarize the discussions of October 22, 1996. Findlay did not respond.

[94] In an October 23, 1996 letter to Meronek (Agreed Document 383), Fraser responded to a concern raised by Meronek earlier concerning the use of "any surplus accumulated as a result of employees' contributions to the CSSF", not being used to *"finance MTS' 50% share of the benefits already accrued."* Fraser replied that the surplus:

> ... will not be used to reduce MTS's cost of, and share of contributions to, the new pension plan. Moreover, you should note that section 21 of the PBSA provides that for contributions made after December 31, 1986, the employer must pay at least 50% of the pension benefit. *The Civil Service Superannuation Act* has a similar requirement which was adopted for contributions made after December 31, 1984.

[95] Fraser went on to say the amount of surplus would be determined by actuarial valuation. In response to Meronek's suggestion that the surplus be

applied to the Adjustment Account in the New Plan, Fraser stated MTS was evaluating that alternative along with others "that will benefit members of the pension plan." He concluded that a decision regarding the treatment of any surplus funds would not be made until the actual surplus amount was determined and verified.

[96] On October 25, 1996, Williams provided MTS with his draft opinion on equivalency in which he only compared specific formulaic benefits as between the draft plan text and the Old Plan. The only specific improvements in benefits in the New Plan he could point to were in relation to the pre-1984 interest rate on employee contributions, the ability to retire at age 55 after two years of service, and the possibility of a COLA guarantee. ERPC understood those improvements to be technical in nature and of little if any financial significance. Williams finalized his opinion of equivalency a few days later and it remained the same.

[97] On October 30, 1996, Towers Perrin provided MTS with an Estimated Pension Benefit Obligations and Asset Analysis as at September 30, 1996 (Agreed Document 407) to establish the financial position of the New Plan on both a going concern and a solvency basis. The information was intended for insertion in the MTS Prospectus relating to the contemplated public offering of MTS shares. Using a market value of the New Plan's assets, Towers Perrin opined that as of September 30, 1996, the New Plan would be fully funded with a surplus. The report also estimated that as at September 30, 1996, the Old

Plan would have contributed approximately $32M more in assets than the Pension Reserve ($396.6M to $364.8M). While the valuation was dated September 30, 1996, it was a good indicator that the New Plan would be in a surplus position as of January 1, 1997 on the basis of the assets having been valued using market valuation.

[98] By letter dated October 29, 2006, under the signatures of Cheryl Dolores Barker (Barker), Vice-President, Finance and C.F.O., and Patricia Ann Solman (Solman), Treasurer of MTS (both of whom were substantially involved in the development of the New Plan), MTS forwarded the draft pension plan document to the Management Committee and Board of Commissioners for approval. It was explained that every effort was made to mirror the benefits provided by the Old Plan but due to requirements of the ***ITA*** and ***PBSA***, some changes to benefits were required. The letter stated those changes would increase the level of benefit previously provided by the Old Plan based on an opinion received from Williams. It was explained the draft plan text was currently being reviewed by the Government and their legal counsel. It also advised that Revenue Canada had agreed to review the plan text in draft form for preliminary approval. It concluded by advising that the final draft was expected to be available for approval by the Board of Commissioners at their November 22, 1996 meeting.

[99] Fraser invited Restall to attend a meeting in his office on October 30, 1996. Also in attendance was Heather Nault (Nault), a Manager with MTS. The purpose of the meeting was to discuss issues which had been raised by ERPC.

According to Restall, Fraser did not voice any disagreement with ERPC's position concerning the initial and ongoing surplus. Fraser reiterated the fact that MTS would be required to fund any unfunded liability after assets had been transferred into the New Plan. Fraser also advised (for the first time) of the proposed COLA guarantee. There was no mention of a 20 year pre-funding requirement, of the November 7 proposed deadline for passage of the ***Reorg Act***, of the opinion rendered by Williams on the issue of equivalency, of the furnishing to the Board of Commissioners of the draft plan text, of any tax benefits to be derived by MTS or of the Towers Perrin report indicating the New Plan was projected to be fully funded. Restall's request for a copy of the plan text was denied.

[100] At that time, The Honourable Darren Praznik (Praznik) was the Deputy Government House Leader responsible for moving bills through the Legislature. He was aware the employees/retirees had not yet received a copy of the draft plan text. The Government was concerned about any delays in the passage of the ***Reorg Act*** which might be caused by the Opposition as a result of the concerns and complaints being voiced by the employees/retirees.

[101] To ensure its concerns were voiced to members of the Legislature, on October 31, 1996, ERPC, through its legal counsel Meronek, made a presentation before the Standing Committee on Public Utilities and Natural Resources (Agreed Document 409). The presentation focused on the areas of governance, surplus and funding.

[102] Regarding surplus, Meronek made the following points at pp. 3 - 6:

> ... The MTS employees/retirees['] portion of that surplus would represent approximately $17.3 million. *[The surplus was ultimately determined to be approximately $43M.]* There has been no clear indication from MTS that this identified $17.3 million surplus, which clearly belongs to MTS employees/retirees:
> (a) will not disappear by virtue of MTS' own actuarial calculations as to employer liability; or,
> (b) that surplus will be matched by MTS upon transfer to the new trust fund.
>
> As it presently stands, the entire transfer amount represents approximately $378 million. Having arisen out of the employees/retirees' contributions to the Fund, neither the Province nor MTS has any right to the transfer amount. That is a given, but what is equally obvious is this surplus has historically been utilized for purposes of enhancing benefits.
>
> ...
>
> ... There needs to be an amendment to establish that the surplus remains sacrosanct, and any surplus identified presently in the Fund shall require MTS to make a corresponding contribution; so that by some actuarial manipulation, the surplus is not dissipated or otherwise rendered marginal when the employer's liability is determined through subsequent actuarial calculations.

[103] Meronek made reference to Fraser's August 27, 1996 correspondence when he observed at p. 7 that:

> ... it is not up to MTS to determine the best use of the money of the employees/retirees. It is up to the employees/retirees to make that determination. At least MTS must receive their approbation.

[104] On the issue of governance, Meronek pointed out that s. 3 of the ***PBSA*** provides the minimum requirement for employee/retiree representation on the Pension Committee, that being one representative for each. He complained neither Government nor MTS was willing to endorse equal representation on the Pension Committee "in terms of even limited administration and governance which the employees/retirees presently enjoy."

[105] Meronek acknowledged that the ***PBSA*** designates the employer as the administrator of the pension plan and argued that it was incongruous that while only contributing 50% of the cost of pension benefits, the employer would have an overwhelming say in how the plan was to be administered. The CSSF Board had equal representation between employers and employees except for the Chairperson. Given the fact that employees/retirees contributed 50% of the total cost of benefits payable under the New Plan, Meronek argued they should have equal representation on the administrative body. In summation, he cautioned that denying equal representation or, at the very least, representation consistent with that which the employees/retirees enjoyed under the Old Plan was inconsistent with the articulated philosophy of "mirror image" between the Old Plan and the New Plan.

[106] Regarding plan text, Meronek complained about the exclusion of the employees/retirees from having any input in or access to it. He asked for both consultation and concurrence before the plan was presented for registration.

[107] Meronek's concluding remarks at p. 12 were as follows:

> For this transition to a new Plan to proceed without full employee/retiree involvement is incomprehensible and entirely unacceptable. The transfer of approximately $378 million of employee contributions to a Plan without any consultation of the owners of this money cannot be countenanced.

[108] At the conclusion of Meronek's address, The Honourable Albert Driedger (Driedger), Acting Minister responsible for the administration of The Manitoba Telephone Act, stated he would be sure that the presentation would be "properly circulated and dealt with".

[109] On November 1, 1996, a petition with approximately 1,525 signatures from Old Plan members was presented to the Legislature. The petition stated neither the Province of Manitoba nor MTS had any ownership in or claim to the "transfer amount", that it must be used exclusively to provide benefits under the New Plan, that it represents at least one-half of the funding for accrued liabilities in respect of past and present employees of MTS under the New Plan, that the New Plan would be a mirror or look-alike plan to the Old Plan to the extent possible, and that the MTS employees/retirees were entitled to an equal say in preparing a mutually acceptable New Plan, in the manner in which the funds are invested, and by whom the New Plan was to be administered. Those signators concluded by stating if the aforementioned provisions were not accepted by MTS or enacted by legislation, the deemed consent referred to in s. 15 was being withheld.

[110] After having been informed by Fraser of the COLA guarantee which was to be incorporated into the New Plan, Restall reviewed the information with Ellement. Restall then wrote to Fraser on November 4, 1996 confirming their October 30, 1996 meeting and their discussion on the following issues:

(a) Fraser indicated he was prepared to make a recommendation that the Pension Committee be made up of four employees/retirees and four MTS representatives. Restall suggested the Chairperson of the Committee not be a Board of Commissioners member or employee but someone neutral, a highly qualified person with broad experience in investments and pension management. He went on to say:

> "... This would establish a balanced employer/employee committee and would virtually duplicate the existing CSS Board which would be in keeping with the stated objective in Bill 67 of maintaining the present employee benefits. ..."

(b) Restall commented that the COLA guarantee would provide a level of security not found in the Old Plan. He went on to make suggestions that the CPI ceiling, rather than being fixed at 4%, be dependent on the amount of funds available in the indexing fund when the New Plan is established. Based on information received from Ellement, Restall suggested that the combination of the surplus, the amount in the existing indexing account, the cash flow from the 10.2% of employer and employee contributions and accrued interest would probably be sufficient to meet more than the 2.67% maximum adjustments for as many as 20 years. Restall suggested ERPC and MTS actuaries work together to revise the proposal.

(c) Restall again asked for a copy of the plan text before it was sent for certification; and

(d) Restall recommended that Ellement and John Turnbull (Turnbull), an actuary under the Old Plan, work together with Williams on the evaluation of the transfer amount from the Old Plan to the New Plan (Agreed Document 427).

[111] Restall received no written response from MTS to his November 4, 1996 correspondence.

[112] On November 4, 1996, Fraser wrote to Corp (Agreed Document 430) advising the pension plan document would be submitted to the Board of Commissioners on November 22, 1996 and once approved, it would be made available to all interested parties.

[113] On November 5, 1996, the plan text was approved by the Board of Commissioners, which included Fraser, Barker and Groot-Koerkamp. Neither ERPC nor CEP was aware of that having occurred, particularly since Fraser had advised Corp the day before that the document would not be submitted to the Board of Commissioners for approval until November 22, 1996.

[114] On November 7, 1996, MTS sent a draft copy of the pension plan document to Revenue Canada under signature of Brenda Marie McInnes (McInnes), Manager, Corporate Investments (Agreed Document 447). McInnes advised Revenue Canada the ***Reorg Act*** was expected to be passed by the Manitoba Legislature on November 8, 1996 and that an executed copy of the plan document and corresponding Board of Commissioners Resolutions were expected to be available November 25. McInnes added:

> ... It is anticipated that there will be very few changes from the draft copy to the executed copy of the pension document.

[115] None of the above information was shared with ERPC or CEP. The position of MTS was it was given the mandate to create a new pension plan and that mandate did not require consultation or negotiation with the

employee/retiree groups. MTS also pointed to the time constraints under which it was working to create the New Plan and stated there was simply no time for any consultative process. On the other hand, the employees/retirees were co-funding the New Plan and had good reason to be concerned about ensuring they would not be losing any benefits by the move.

[116] There were other factors which influenced the speed with which the privatization process was being carried out. The Government was anxious to rid itself of a significant liability and MTS saw an opportunity to achieve a significant (in excess of $300M) tax advantage by having the New Plan in operation by January 1, 1997.

[117] Finally, the philosophical/political divergence between the Government and the unions representing the employees/retirees resulted in less of an atmosphere of cooperation and mutual respect than might otherwise have been the case.

1. <u>November 6, 1996 Memorandum</u>

[118] Findlay was the Minister responsible for MTS. In response to his request for an update on the privatization process and the concerns which had been raised by ERPC, Findlay received a memorandum dated November 6, 1996 from Fraser (Agreed Document 434).

[119] While the memo is typed on MTS Executive Office stationery, neither Fraser nor any MTS employee closely associated with the preparation of the New Plan could recall who drafted it. Nonetheless, the memo speaks for itself.

[120] The memo states it is in response to Findlay's request for an update on various aspects of the MTS plans regarding implementation of the New Plan. It also makes reference to Fraser's October 30th meeting with Restall at which time various issues were discussed.

[121] The memorandum includes the following representations:

> ...
>
> **Potential Surplus of Contributions to the Civil Service Superannuation Fund**
>
> Pensioners have expressed concerns that the anticipated surplus in employee contributions to the Civil Service Superannuation Fund (CSSF) may be used to finance MTS' share of funding obligations.
>
> MTS has undertaken that any such surplus will not be used to reduce MTS's cost or share of contributions to the new pension plan. This information was communicated by letter to Mr. Brian Meronek on October 23, 1996.
>
> **Governance of the New Pension Plan**
>
> Pensioners and union representatives have put forward concerns that they will not have adequate representation on the body governing the new pension plan.
>
> MTS is proposing that the composition of the governing body emulate the composition of the present Civil Service Superannuation Board. That is, the governing body will be composed of a designated number of employee/pensioner representatives, and an equal number of employer representatives. In addition, the chairman of the governing body will be appointed by management. MTS is currently anticipating that there will be five employee/pensioner representatives, five management representatives, and a chairman designated by management.
>
> **Actuarial Studies**
>
> Actuarial studies will form the basis on which the entitlement of MTS to funds from the CSSF will be determined. These studies will also form the basis on which the assets currently held by the CSSF will be divided between MTS and the CSSF.

The various concerned parties have retained their own actuarial advisors. MTS will be reviewing the study processes with the actuaries representing pensioners and employee groups.

Cost of Living Adjustment (COLA)

The current CSSF operations provide for the creation of a special fund designated to finance pension adjustments related to changes in the cost of living. The dedicated fund is **not** designed to cover 100% of changes in the cost of living, and if available funds are deficient, it may not be possible to grant cost of living increases. It is anticipated that deficiencies will be found in this dedicated fund during the process of the actuarial evaluations.

MTS is proposing that the new pension plan will contain provisions for cost of living adjustments which will be guaranteed by MTS within a specific range. That is, MTS is proposing to guarantee cost of living adjustments of 2/3 of CPI, to a maximum of a 4$ increase in CPI.

Pension Plan Document

Pensioners and employees have requested a copy of the draft pension plan document. As the pension plan is currently being developed, it cannot be provided until MTS is fully satisfied that this plan meets all of the requirements of subsection 15(2) of Bill 67 and that it is registrable under *The Pension Benefits Standards Act, 1985* and *The Income Tax Act*. In order to ensure that MTS will be in full compliance with this critical statutory obligation, a comprehensive and detailed pension plan is being developed by the corporation with the involvement of accounting, legal, benefits and actuarial resources.

MTS has undertaken to provide a copy of this document to the concerned parties at the same time as it is filed with the federal government for registration.

Pension Administration

Pensioners have expressed concerns on the possibility of having the new pension plan administered by a body unfamiliar with the current plan.

MTS has determined that the Civil Service Superannuation Board will be the administrator of the new MTS plan.

...

[122] At trial, Fraser was cross-examined on the meaning of the contents of the memo. Although he insisted he did not write it and couldn't identify who did, he was quite prepared to testify as to its meaning.

[123] On the provision about surplus, Fraser explained the second paragraph to mean MTS would transfer the entire Pension Reserve into the New Plan rather than withholding part and utilizing the employee surplus to make up the difference.

[124] By way of example, he stated if the Pension Reserve was valued at $383M and the employee assets including surplus were valued at $430M and total funding of $800M was required, MTS would not hold back part of the Pension Reserve and utilize the employee surplus to make up the $800M. It would transfer the entire Pension Reserve of $383M even if that meant there would be a surplus in the New Plan.

[125] Curiously, the same meaning of that provision was offered by every MTS employee who testified at the trial. I found it to be little more than an attempt by MTS to remove itself from the undertaking made to the employees/retirees not to utilize any portion of the initial surplus to reduce its funding obligations.

[126] The fact is, by November 6, 1996, Fraser had already committed the transfer of the entire Pension Reserve into the New Plan. It would have been simpler to merely re-state that undertaking if that was what was intended. Moreover, if Fraser's explanation was plausible, it would refer only to the initial surplus not being used to reduce MTS's initial contribution to the New Plan.

However, the paragraph says more - it says not only would the initial surplus not be used to reduce MTS's cost but it also would not be used to reduce MTS's share of contributions to the New Plan. That reference is more applicable to any contributions to future costs which MTS would be required to make on a go-forward basis.

[127] The following exchange between Fraser and the court underlines the frailty of Fraser's evidence on that point:

> A Yes. I mean, Harry's concern was that if there was a surplus in the employee side of the fund, that it not be reduced to -- not be used to reduce MTS's transferring of all of their funds into it. So in other words, we talked earlier that the figure of 383 million dollars I think was the amount transferred; Harry's concern was that we wouldn't reduce that amount by any surplus in the employee side. In other words, if there was 43 million surplus there, we wouldn't take it off the three eighty-three and just put three forty in, and I gave him that assurance that we had no intention of doing that and would not do that.
>
> ...
>
> THE COURT: I don't -- you're saying if there was a surplus of 43 million dollars on the employee side and, and the pension reserve fund had a, was valued at 383 million, your assurance was that you wouldn't take money, you wouldn't reduce the amount of the pension fund being transferred?
>
> WITNESS: Yes.
>
> THE COURT: I don't understand why you would need that assurance. You're transferring less than they are, in any event; why would they need an assurance that -- I'm not sure I'm understanding your answer and so I ...
>
> ...
>
> A Well, to be honest, I mean, I always thought that Harry was, well, in my mind -- not, certainly not trying to put words in, in Harry's mind, but when I listen to him, I mean what I took away was some sort of hybrid that it was a combination of a defined contribution plan and a defined benefits plan, so that when the employees had a surplus in theirs, that they would use that or potentially have the mechanism to use that to enhance benefits and that those benefits would then create higher obligations, higher funding needs, higher potential

> deficits that were a hundred percent belonging to the employer. And that just never made any sense to me.

[128] That explanation makes no sense as the employees/retirees never had the right to unilaterally impose financial obligations on the Government or Crown agencies. Fraser was aware that prohibition existed under the New Plan as well.

[129] On the issue of governance, Fraser testified that use of the words "governing body" in reference to the makeup of the Pension Committee was an error and that at his October 30th meeting with Restall, he was discussing the makeup of the Pension Committee and not the makeup of a "governing body". He referred to his notes in support of that recollection. It is true that when Restall wrote to Fraser on November 4, 1996 confirming the October 30, 1996 discussions, he referred to the Pension Committee and it having equal representation. However, Restall went on to explain his understanding that a balanced employer/employee committee would virtually duplicate the CSSF Board which was the governing body under the Old Plan. There is no question but that ERPC had been advocating a governance model which would have enabled them to have participated in discussions and decisions relating to the administration of the New Plan.

[130] It is clear the ***PBSA*** required the employer to be the administrator of the plan and the ultimate decision-making authority and the employees/retirees were aware of that. Under the Old Plan, they had equal representation on the CSSF Board. As well, they had the opportunity to negotiate proposals concerning the use of surplus through the Liaison Committee. Obviously, the

employees/retirees were looking to have governance under the New Plan which mirrored what they enjoyed under the Old Plan even if the ***PBSA*** precluded the systems from being identical.

2. November 7, 1996 MOA

[131] The Government was concerned that the issues which had been raised by ERPC were not being addressed by MTS and that the ***Reorg Act*** might have difficulty passing through the Legislature as a result. Praznik, who was called as a witness by the plaintiffs, was the only member of that Government who testified at the trial. He recalled being asked by the Premier to play a role in his capacity as Deputy House Leader:

> ... to try to broker-negotiate-facilitate an agreement with the pension unions and pensioners that would satisfy their concerns, resulting in necessary amendments to satisfy their concerns that would have -- allow the bill then to proceed without these being issues attached to the bill.

[132] On November 7, 1996, while Restall was at the Legislature listening to presentations to the committee reviewing the ***Reorg Act***, he was approached by Benson who showed him Fraser's November 6th memorandum to Findlay. Benson asked Restall if that memo resolved ERPC's concerns. After looking at it, Restall replied it did not. Restall asked Benson if he had seen a copy of his November 4th letter to Fraser and when Benson stated he had not, Restall obtained a copy and put it on Benson's desk. He had no further discussions with Benson that day. Restall then discussed the November 6th memorandum with other ERPC members who were at the Legislature.

[133] Shortly thereafter, Benson summoned Fraser to a noon meeting at the Legislature. Also in attendance were Solman, Praznik, The Honourable Eric Stefanson (E. Stefanson), Minister of Finance, Findlay, Benson and Yaffe. According to Praznik, Fraser's November 6th memo to Findlay was the basis for the discussion at that meeting.

[134] Praznik understood initial surplus to be one of ERPC's key concerns:

> ... because the nature of the civil service fund was all of the money in that fund had been contributed by the pension contributors. It was viewed as their money, and my understanding and appreciation of the issue is they wanted absolute security it would not be used by the new MTS to fund any of its obligations or for their purposes, it was their money, and that the protection of that money was a fairly key issue.

[135] At this juncture, "initial surplus" meant the difference between the amount being transferred into the New Plan by the employees and 50% of the liabilities. Later, that term was redefined to mean the difference between the amounts transferred into the New Plan by the employees and employer which was determined to be $43.343M.

[136] Praznik understood the second paragraph of the November 6th memo under the heading "Surplus" to mean that MTS:

> "... would in no way use those dollars that were the surplus coming over from civil service Fund in any way to their benefit".

[137] It was Praznik's recollection everyone in attendance at the meeting agreed with that interpretation and not the one subsequently advanced at trial by Fraser and other MTS employees.

[138] Fraser's recollection of the purpose of the meeting was essentially the same as Praznik's. Fraser jotted some notes of the meeting. The only reference to surplus was that it would go into the COLA account. There is no reference in Fraser's notes to an undertaking to transfer the entire Pension Reserve into the New Plan.

[139] Under the heading of "Governance" in the November 6th memo, Praznik understood "body governing" to mean whatever body under the New Plan, whether it was the Pension Committee or some other, that:

> ... would be responsible for governing-managing the pension fund, setting policy, etcetera, would be one in which there would be shared representation. And it was my understanding that the new plan was to emulate the actual operational structure as close as possible of the civil service plan -- in other words, both having a role, employees -- employer-employees having a role in the governance of that, of, of that fund -- and that there were (inaudible) outstanding issues as to representation, but the fundamental piece was the plan was to be governed jointly with a similar structure to the civil service plan.

[140] Praznik recalled there was no discussion of any other individual or group administering the New Plan and the only issue was the composition of the governing body and the manner in which the Chairperson was to be chosen.

[141] The evidence overall points to confusion on the issue of governance. The ***PBSA*** clearly required MTS to be the administrator of the plan. The focus of dialogue between the employees/retirees and MTS seemed to be on the makeup of the Pension Committee as it appeared there was some expectation it would serve the same function as the combined Liaison and Advisory Committees under the Old Plan. However, even as far back as Meronek's October 31st presentation to the Standing Committee on Public Utilities and Natural Resources, he

recognized s. 3 of the ***PBSA*** provided a minimum requirement for employee/retiree representation on the Pension Committee while he argued for equal representation. At that same time, he acknowledged the ***PBSA*** designates the employer as the administrator of the pension plan and argued that was unfair because the employees/retirees had enjoyed equal representation on the CSSF Board. The point is, much of the confusion relating to governance seems to have arisen well after the New Plan was implemented and in operation. The manner in which the employee/retiree representatives on the Pension Committee were treated, that is, ignored for the most part, likely re-ignited this issue once litigation was commenced.

[142] That afternoon, T. Stefanson and Praznik told Restall they were aware there was no agreement on the issues set out in the November 6th memo. They expressed a desire to create a document that would address those issues. Restall explained ERPC's concerns and it was agreed that a meeting would be scheduled for later that afternoon.

[143] Shortly after 5:00 p.m., in the office of Binx Remnant (Remnant), the Clerk of the Legislature, a meeting was convened which included T. Stefanson, Praznik, Restall, Maggi Hadfield (Hadfield), representative of CEP, Bill Hales (Hales), representative of TEAM, David Nyhof (Nyhof), representative of IBEW, and others.

[144] It was Restall's impression that Praznik and T. Stefanson were prepared to attempt to broker an agreement between MTS and the employees/retirees on

the outstanding issues. Fraser was not physically present at the meeting but was in telephone communication from his office. Only Restall and Praznik spoke on the telephone with Fraser.

[145] The initial concern raised by ERPC was the unavailability of the draft plan text. Restall made it clear there would be no agreement without ERPC having access to a copy of the plan text. Despite Fraser's initial reluctance, it was ultimately agreed the plan text would be made available to ERPC on November 11, 1996.

[146] After a series of phone calls between Restall and Fraser, a first draft of a memorandum was prepared in Fraser's office by Solman (Exhibit 30) and it was delivered to the meeting at the Legislature.

[147] As ERPC had not seen the pension plan text or the governance document, they were unaware of the governance structure being proposed and were also unaware of the provisions which gave MTS full control over future surplus in the New Plan. However, ERPC had previously been made aware that MTS would be the plan administrator pursuant to ss. 7.(7) of the ***PBSA*** and that it also provided for a Pension Committee with the following duties:

> 7.(7) A pension Committee established pursuant to subsection (3) has the following duties, namely,
>
> (*a*) to promote awareness and understanding of the pension plan among members and potential members,
>
> (*b*) to review, at least once every year, the financial, actuarial and administrative aspects of the plan,
>
> (*c*) such other administrative duties as are prescribed, and
>
> (*d*) such other duties as are specified by the pension plan or the employer,
>
> and the employer shall provide the pension committee with such information as is necessary to enable it to perform those duties.

[148] Bearing in mind that the CSSF Board was composed of equal representation between employer and employees/retirees and that in addition, there was a Liaison Committee whose role was to negotiate use of surplus with the Advisory Committee with recommendations that were ultimately always accepted by the Government, and also being mindful of MTS's undertaking that the new governance provisions would "mirror" those under the Old Plan, it is easy to understand why ERPC expected the Pension Committee to have some involvement in administrative decisions, particularly regarding the use of employee surplus. Having that understanding, ERPC was focused on ensuring representation for each of IBEW, CEP, TEAM as well as one retiree representative. ERPC was prepared to let MTS appoint the Chairperson on condition he/she was an independent third party highly qualified and with broad experience in investment and pension management.

[149] Evidence of ERPC's impression that the Pension Committee would have some decision-making responsibility is found in their recommendation to amend the third paragraph of the draft MOA to have the last sentence provide that any initial surplus from the Fund could be allocated to the new pension plan trust fund to fund future cost of living adjustments or allocated to any other use as deemed appropriate by the employee and retiree representatives.

[150] I am satisfied ERPC contemplated the Pension Committee having the same ability to determine the use of surplus as did the Liaison and Advisory Committees. Although paragraph 3 of the final draft of the MOA did not

incorporate the aforementioned wording, the concept of having the initial surplus used exclusively to fund future COLA and/or pension benefits was included in the final draft. That expected mandate is also reflected in the provision that where, on an ongoing basis, if the COLA account had a surplus beyond that required for the guaranteed COLA increase in any particular year, it could be used to increase pension benefits so long as MTS's liability for the pension plan in total did not increase as a result of the increased benefits.

[151] Further evidence of the authority which the employees/retirees expected the Pension Committee to have is found in paragraph 2 which gave the Pension Committee the opportunity to review the initial actuarial valuation of the New Plan. It also provided that if the Pension Committee did not agree with that valuation, the matter would be referred for determination to an actuary appointed by the Provincial Auditor.

[152] As the MOA will be discussed in some detail, it may be beneficial to reproduce it in its entirety:

> ...
>
> 1. The Pension Committee will be comprised of eight representatives plus a [chairperson] as follows:
>
> - one representative from each of IBEW, CEP and TEAM, which representatives must be active employees of MTS or its subsidiaries
> - one retiree representative
> - four employer representatives
>
> The Chairperson of the Pension Committee will be an independent third party who is highly qualified, with broad experience in investment and pension management to be appointed by MTS.

2. Four actuaries, who will represent (i) MTS, (ii) IBEW, TEAM and the retirees, (iii) CEP, and (iv) the Civil Service Superannuation Board, will review the process for the transfer of assets from the Civil Service Superannuation Fund (CSSF) and the assumptions relating to the transfer of assets. The initial actuarial valuation of the new MTS Pension Plan, as prepared by Buck Consultants Ltd., will be reviewed by the pension committee and if not agreed to will be referred to the actuary appointed by the Provincial Auditor.

3. MTS will provide a minimum cost of living adjustment of 2/3 of CPI with a maximum CPI of 4%. However, if the cost of living adjustment account in any particular year is able to fund a higher increase, then a higher increase would be given for that year. Any initial surplus from the CSSF would be allocated to the new pension plan trust fund to fund future cost of living adjustments. In subsequent years the financial position of the COLA Account will be reviewed by the plan['s] actuary, if sufficient additional assets exist in the account beyond those required for the stated COLA increase for a particular year then pension benefits may be increased provided that the liability for the pension plan in total does not increase due to the change in benefits.

4. The draft pension plan text will be available Nov. 11, 1996, and employee/retiree representatives will have until 5:00 p.m. Nov. 25, 1996 to submit any requests for amendments before the plan is submitted for registration.

5. In the event of any dispute in relation to the matters described in paragraphs two and three above an actuary appointed by the Provincial Auditor as proposed by the Act (Bill 67) will resolve any dispute.

...

[153] Paragraph 3 is the most controversial and contested provision. Scrutiny on a paragraph-by-paragraph basis is therefore warranted.

[154] The first sentence is straightforward and uncontroversial.

[155] The second sentence *("However, if the cost of living adjustment account in any particular year is able to fund a higher increase, then a higher increase would be given for that year.")*, makes no reference to a 20 year pre-funding requirement as had been implemented in the Old Plan in 1988. When Fraser

first informed Restall of the proposed COLA guarantee, he made no reference to a 20 year pre-funding requirement nor was any mention made of it up to and including November 7th. Defendants argued since the New Plan was to mirror the Old Plan, it was logical to assume the 20 year pre-funding requirement would also be incorporated. That being the intention of MTS, a specific reference to the inclusion of the 20 year pre-funding requirement might have eliminated the confusion which followed. From ERPC's point of view, it would have been equally logical to assume the 20 year pre-funding requirement would not be incorporated in the New Plan. The guarantee by MTS was to provide a minimum cost of living increase of two-thirds of CPI to a maximum of 4%. That maximum did not exist in the Old Plan where COLA benefits of two-thirds of CPI without any maximum was the goal so long as the Fund could afford it. It was only where a COLA benefit in excess of two-thirds of CPI was being considered that the 20 year pre-funding provision came into play.

[156] The third sentence *("Any initial surplus from the CSSF would be allocated to the new pension plan trust fund to fund future cost of living adjustments.")*, provided the initial surplus from the Old Plan would be allocated to the New Plan trust fund to fund future cost of living adjustments. That was at the suggestion of ERPC for the following reasons as explained by Restall:

> There was certainly a discussion about the, about the surplus and what was going to happen to it. We, we originally -- this is our, our committee, the employee/retiree committee originally suggested that the, the surplus be placed in a separate account. We were still trying to make sure that it was, it was safe and protected, so we felt that if it was placed in a separate account where it could be monitored and it could be, could be tracked, could invested, we felt that that was a, a reasonable request.

> We were advised and I'm, I'm not sure by who, whether it was Mr. Fraser or, or Mr. Stefanson and Mr. Praznik, somebody said, No, you can't have, you can't have it in a separate account. Whether that was -- they got that impression because of a regulation or, or where, they said, no, no separate account, so the discussion was to put it in the indexing account.
>
> ...
>
> The indexing account was -- once again, I kept referring to this. The only information we had on, on, on, on much of the plan was scanty at, at best, so we were looking -- we had been told by Bill 67 the plans were going to be equal, so in looking at these issues we would look at what was happening in the civil service plan and assume or expected that it would carry on into the new plan. If the equivalency was achieved then, then that's what would happen.
>
> So, in the old -- in the civil service plan, there had been, on more than one occasion, the placement or surplus, plan surplus into the indexing account. This was always, always used for indexing, so it was never used for anything other than, than for plan members. So our thinking at that time was to -- if we can't have it in a separate account, then we'll put it in the indexing account.

[157] That evidence clearly reflects the expectation of ERPC that the initial surplus was to be used solely for the purpose of funding future cost of living adjustments just as it had under the Old Plan. This third sentence speaks only of "initial surplus" and not of any future surpluses.

[158] The next sentence *("In subsequent years the financial position of the COLA Account will be reviewed by the plan['s] actuary, if sufficient additional assets exist in the account beyond those required for the stated COLA increase for a particular year then pension benefits may be increased provided that the liability for the pension plan in total does not increase due to the change in benefits.")*, obviously refers to future years. It says in future or subsequent years, the financial position of the COLA account is to be reviewed by the plan's actuary and where sufficient additional assets exist beyond those required for the

normal COLA increase for a particular year, pension benefits may be increased so long as it did not result in an increase in MTS's liability for the pension plan in total. It also refers to increasing "pension benefits" rather than just the COLA adjustment for that year. Under the Old Plan, surplus was used to enhance plan benefits as well as to increase annual COLA adjustments. That appears to be what was contemplated by ERPC for the New Plan as well, i.e. that any surplus attributable to employee contributions could and should be utilized in that fashion and for that purpose only.

[159] According to Fraser, reference to the 20 year pre-funding requirement was discussed at the noon meeting on November 7, 1996 although there is nothing in his notes to support that recollection. He also alluded to the fact that with MTS having total responsibility for unfunded liabilities under the New Plan, it needed to maintain authority over the use of surpluses and plan benefits. However, the last sentence in paragraph 3 of the MOA precludes benefits being increased which could result in an increase of MTS's liability without the consent of MTS. With that ultimate authority, there would be no need for the aforementioned restriction. Because of that, I find Fraser's interpretation of the last part of paragraph 3 of the MOA to be illogical and unsupportable.

[160] Although Praznik was called as a witness by the plaintiffs, I consider him to be an independent witness in that he had no stake in the outcome of the proceedings. He is also the only person other than Restall to have

teleconferenced with Fraser during the negotiations which resulted in the MOA, making his evidence on these matters all the more compelling.

[161] According to Praznik, Fraser's November 6th memo to Findlay was the foundation for the discussions the next day. It was his view that all of the issues set out in that memo were resolved to the satisfaction of all concerned as reflected in the MOA.

[162] It was Praznik's understanding the Pension Committee would have governance responsibilities, a concept with which he said MTS, ERPC, and the Government appeared comfortable. Only the numbers for each representative group were discussed and as well, the qualifications for the Chairperson. Praznik recalled someone suggesting the Chairperson be independent and highly qualified due to the fact the Pension Committee would be responsible for administration of the plan. If, as suggested by Fraser and others, the role of the Pension Committee was to be limited to "promote awareness and understanding of the pension plan among members and potential members and to review, at least once every year, the financial, actuarial and administrative aspects of the plan" (***PBSA***, s. 7.(7)(a) and (b)), it would be less important that the Chairperson of the Pension Committee have those qualifications.

[163] On the issue of actuarial valuation, the terms agreed to as set out in the MOA were substantially different than those spelled out in the November 6th memorandum. The MOA recited that the Pension Committee would review the initial actuarial valuation which was to be completed by Buck Consultants Ltd.,

the actuaries retained by MTS. If the Pension Committee did not agree with that actuarial valuation, the matter would be referred for determination to an independent actuary. That process gave the employees/retirees some degree of control over the transfer of assets and their valuation.

[164] Praznik's recollection and understanding of the third paragraph of the MOA relating to the COLA guarantee was that the funds in the separate COLA account would pay for the annual COLA adjustments as stipulated. However, if the account did not have sufficient assets to pay for the COLA adjustments equivalent to two-thirds of CPI up to a maximum of 4%, MTS would be required to contribute whatever additional amounts needed to cover that cost.

[165] The next sentence relating to the initial surplus being allocated to the new pension plan trust fund was based on the fundamental principle that the initial surplus could not be used to the benefit of MTS. It was there for the benefit of only those who had contributed, i.e. the employees. Admittedly, Praznik's understanding of the operation of the COLA fund was somewhat lacking. However, 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 two-thirds of CPI.

[166] Praznik admitted to limited knowledge of the 20 year pre-funding requirement under the Old Plan but testified it was not part of any discussion whereby it would bind or restrict the use of the initial surplus that was coming over.

[167] Praznik's understanding of the last sentence was that if an actuary determined there to be a surplus in the COLA account, it could be used to finance pension benefits so long as they did not increase the liability to MTS. Again, while his explanation was somewhat convoluted, he concluded by comparing it to use of surplus under the Old Plan where the Government would not agree to benefit enhancement if it would result in a financial obligation to the Government.

[168] Finally, Praznik testified the agreements recited in the MOA had to be reflected in the plan text which the employees/retirees were to be given a reasonable opportunity to review.

[169] The MOA was signed by Fraser on behalf of MTS, by T. Stefanson and Praznik on behalf of the Government, by Hadfield, Hales and Nyhof on behalf of their respective unions, and by Restall on behalf of the retirees. As of that date, none of the employee/retiree representatives had seen the draft plan text or governance summary

F. PLAN TEXT AND GOVERNANCE SUMMARY - NOVEMBER 8, 1996 DRAFT

1. Governance Summary

[170] According to Restall, had he been aware of the provisions in the governance summary relating to the authority of the Board of Commissioners, the administrator and the Pension Committee, he would not have signed the MOA since they did not reflect what had been discussed on November 7th.

[171] Specifically, the governance summary purported to give the Board of Commissioners ultimate responsibility for the plan with certain specific duties and responsibilities including approving amendments to the plan document and having a final say with respect to the utilization of employee surplus.

[172] The responsibilities and duties of the plan administrator, which were not recited in the MOA, were as follows:

(a) evaluating and recommending pension benefit changes as required;

(b) reviewing recommendation for changes as required;

(c) evaluating and recommending pension administration changes;

(d) establishing funding policy; and

(e) establishing economic assumptions, including salary increases and interest discount rates as required for actuarial valuations of the plan, based upon the recommendation of the actuary.

[173] The duties and responsibilities of the Pension Committee were as set out in paragraph 7.(7) of the ***PBSA***.

[174] The purpose of the Pension Committee was described as monitoring the operation of the plan and acting as an Advisory Committee in accordance with the provisions of the ***PBSA***. The Pension Committee was mandated to meet at least once each calendar quarter to perform the aforementioned duties.

[175] Both Restall and John Larry Trach (Trach), one of the plaintiffs and a former alternate on the Liaison Committee, expected the employee/retiree representatives on the Pension Committee referred to in the MOA to play the

same role as did the Liaison Committee in the Old Plan. Fraser's November 6th memo described the Pension Committee as being the "governing body". To Restall, that meant:

> ... some level of authority, some level of control. Some level of, of control in the -- in making changes or other -- anything else that, that, that has a, a major effect on the, on the operation of the plan such as utilization of surplus, change in benefits. Actually, a mirror image of, of what was in the liaison committee and how it operated with the civil service plan.

[176] At the November 7th meeting, Fraser chose not to share with the others what he already knew would be the duties and responsibilities of the Board of Commissioners, the administrator, and the Pension Committee as he had already seen and reviewed a copy of the draft plan text and draft governance summary. For that matter, copies had also been provided to Benson who apparently chose not to share that information with Praznik.

[177] The extent of E. Stefanson's knowledge of the draft plan text and draft governance summary is unknown as he did not testify at the trial.

[178] Praznik's understanding was that governance was to be by consensus as in the Old Plan. As to MTS's concern that it required ultimate authority, Praznik observed that as the Pension Committee was to be constituted by equal representations from both sides, the employees/retirees could not have imposed a decision on MTS which would have resulted in an increase in MTS's overall cost. Ostensibly, the Chairperson of the Pension Committee could cast the deciding vote and on that basis, it would have been possible for the Pension

Committee to expose MTS to increased costs. However, the last sentence in paragraph 3 of the MOA precluded that from happening.

[179] MTS's claim for total control over the use of initial and ongoing surplus to balance their ultimate funding responsibility would be legitimate, in my view, only if their initial investment in the New Plan was equal to that of the employees/retirees. However, the initial surplus originated from the Old Plan where MTS had no such ultimate funding responsibility. It is therefore difficult to understand why they would absolute control over the initial surplus in the New Plan.

[180] On November 8, 1996, two significant amendments were made to the ***Reorg Act***. The first added the independent actuary provision to ensure that equivalency in value of benefits was achieved. The second provided that the MOA superseded any of the other provisions under s. 15 of the ***Reorg Act***. The aforementioned amendments (Agreed Document 453) are reproduced herein:

> **Independent actuary to review plan**
> **15(2.1)** As soon as possible after this Act receives royal assent, the Provincial Auditor shall appoint an independent actuary to review the plan proposed by the corporation for the purposes of clause (2)(a) to determine whether the benefits under the proposed plan are equivalent in value as required by that clause.
>
> **Concerns of independent actuaries to be addressed**
> **15(2.2)** The corporation shall take any steps necessary to resolve any concerns raised by the independent actuary in a report prepared for the purposes of subsection (2.1).
>
> ...
>
> **Effect of agreement**
> **15(8.1)** Nothing in this section is to be interpreted as nullifying the effect of the agreement, or any part thereof, executed on November 7, 1996 by representatives of The Manitoba Telephone System and of the

> employees, and by the Minister and one other representative on behalf of government, on the subject of pension issues.

[181] The following comments of Praznik put into perspective whether or not the issues reflected in the provisions of the MOA were intended to fall within the definition of "equivalence" in s. 15(2.1) of the ***Reorg Act***:

> Yes. As the Deputy Government House Leader who was present in that capacity and part of the, the proceedings, my, my recollection very much was that we wanted to ensure that the agreement we reached on the 7th gave the pensioners the guarantees that we intended it to be. We wanted to give it the force of law. We wanted to incorporate it in the statute so it would have the force of the Legislature behind it. And whatever was in the plan, the document, whatever MTS had been planning for its pension plan, would be overridden by that agreement. This agreement was to be the law of the Province of Manitoba and have the force of the law, and that was our intent in putting it into the particular document. And that covered the broader issue or the broad sense of equivalency. We wanted to make sure that status quo equivalency of moving the plan from the Civil Service Superannuation Fund over to the new company was on an equivalent basis, and I believe my colleague, Mr. Findlay, who was the Minister responsible, spoke, spoke to that into the House and I certainly -- we were -- I was in concurrence with his, his comments on it.

2. <u>Plan Text</u>

[182] On November 11, 1996, ERPC received a copy of the draft plan text from MTS.

[183] On November 12, 1996, a letter under the signatures of Barker and Solman recommended that the Board of Commissioners pass a resolution adopting the plan text for the New Plan which was to become effective January 1, 1997. It was essentially the same as the draft version approved by the Board of Commissioners on November 5, 1996. It was anticipated that while some changes might be required by either Revenue Canada or OSFI, they were not expected to be substantive. The letter also indicated that the actuarial

valuation of the New Plan would be available February 3, 1997. None of this information was communicated to ERPC.

[184] After receiving the draft plan text on November 11, 1996, ERPC had it reviewed by Ellement. His initial observation was that the draft plan text introduced discretionary controls over benefits and funding to MTS which had not previously existed. Those included discretion over the use of initial surplus, the funding of the COLA guarantee under s. 15, the future use of ongoing surplus at the discretion of MTS, the future use of surplus on a wind-up basis, and the duties and responsibilities of the Pension Committee (Agreed Document 462).

[185] According to Restall, those were matters which ERPC would have wanted to know about prior to signing the MOA.

[186] ERPC understood they would have an opportunity to review the draft plan text and submit their observations and recommendations for change by November 25, 1996. Thereafter, they believed there would be further opportunities to discuss and negotiate recommended changes to the plan text before it was presented for registration.

[187] On November 19, 1996, a memorandum was sent to Solman by ERPC setting out their concerns with respect to the draft plan text.

[188] The first proposed change was that the "Pension Committee" be given duties and responsibilities similar to those performed by the CSSF Board in its administration of the Old Plan. This committee was to be referred to as the "Administration Board". Further, all references bestowing absolute or

discretionary authority on MTS were to be changed to provide that the recommendation or approval of the Administration Board was mandatory, and especially so in dealing with funding requirements and surpluses.

[189] The second concern was the absence of any reference to exclusive utilization of initial surplus to fund cost of living adjustments in accordance with paragraph 3 of the MOA or Fraser's November 6, 1996 memo. Moreover, there were also recommendations relating to use of ongoing surplus.

[190] On November 21, 1996, at a meeting between representatives of MTS and ERPC, the aforementioned issues were discussed.

[191] Solman prepared a chart (Agreed Document 493) which purported to set out the issues raised by ERPC and the treatment of those issues under the Old Plan, ERPC's perception of that treatment, ERPC's current demands and MTS's response to those demands. This document was prepared to inform Barker and Fraser on where the parties stood on the various issues, at least according to Solman's perception. Testifying, Solman left the impression the entire document was completed at one time. However, on the first page, it makes reference to a November 21, 1996 meeting with the Union/Retiree Committee during which she says they made known their concerns regarding the Pension Committee. That entry would lead one to believe the document was prepared after that meeting had occurred. However, on page 2, there is a reference to MTS not being in agreement with a specific item which was "To be discussed further on November 21, 1996." That entry suggests the document was prepared prior to

the November 21, 1996 meeting. Although nothing of significance turns on this document, it leaves some questions unanswered as to when and why it was prepared.

[192] The final entry on the document, however, provides that actuaries representing all parties were to discuss alternatives, i.e. on the issues where no agreement had been reached. It then goes on to say, *"MTS must ensure that our interests are protected since any liability that does arise is MTS' and therefore any sharing of surplus must be limited."* The use of the word "limited" is of interest because it indicates the opportunity of some sharing of surplus by the employees/retirees. It does not say decisions relating to the sharing of surplus are to be within the exclusive domain of MTS.

[193] On November 22, 1996, the Board of Commissioners passed a resolution approving the November 8, 1996 pension plan text for registration. They delegated authority to senior MTS officers to make changes so as to ensure compliance with the ***ITA*** and ***PBSA*** so long as those changes were not substantial.

[194] ERPC was not made aware that the draft plan text which they were in the process of reviewing and to which they were proposing significant amendments had already been approved by resolution of the Board of Commissioners.

[195] By memo dated November 25, 1996 (Agreed Document 485), Ellement provided Williams with a list of proposed changes to the pension plan text which had been advanced at the meeting on November 21, 1996. Ellement cautioned

that this submission was not intended to comprehensively cover all of ERPC's concerns. Generally speaking, the proposed changes related to technical wording changes, substantive wording changes, and substantive changes relating to the issues of governance, funding and utilization of surplus.

[196] On behalf of CEP, Corp also wrote to Williams on November 25, 1996 (Agreed Document 490) requesting changes. Corp provided Ellement with a copy of his letter acknowledging it included some things that Ellement's did not but that it was not nearly as comprehensive as Ellement's. He added he had no objection to anything Ellement had raised in his letter to Williams.

[197] Restall wrote to Solman on November 26, 1996 (Agreed Document 496) confirming an understanding the plan text would not be submitted for registration until MTS and ERPC reached agreement on the wording in relation to the changes which were being proposed by ERPC. Solman responded on November 27, 1996 (Agreed Document 503) advising that MTS was reviewing the proposed amendments with its actuary. Solman reiterated MTS's commitment to working with ERPC in an effort to resolve any concerns in relation to the New Plan. She then concluded by saying MTS was proceeding with the registration of the plan text as is. Notwithstanding Solman's apparent commitment, it would appear that MTS was not prepared to consider ERPC's proposed amendments to the plan text since it was being submitted for registration as is.

[198] Obviously concerned with Solman's reply, Restall wrote to her again on November 28, 1996 as a follow-up to a telephone conversation he had with her earlier that day. Apparently, new timelines were agreed to which required MTS to respond by December 2, 1996 to the concerns raised by Ellement in his November 25, 1996 correspondence. It was also agreed that a meeting would be held as soon as the ERPC had reasonable opportunity to study MTS's response, that MTS would make every effort to resolve the issues contained in Ellement's November 25, 1996 letter but that if it felt an impasse had been reached, MTS would proceed with registration of the New Plan text. Ultimately, MTS agreed not to register the New Plan text prior to December 6, 1996.

[199] In his letter, Restall also reminded MTS that the schedule which MTS now felt compelled to adhere to could have been avoided had ERPC received a copy of the plan text in August or September. He also reminded Solman of the understanding arising from the November 7th evening meeting that ERPC was assured by Praznik and T. Stefanson that their concerns would be addressed and reflected in the plan text (Agreed Document 507).

[200] On December 2, 1996, in a letter to McInnes (Agreed Document 541), Williams provided draft wording for the plan text with respect to the use of actuarial surplus. The proposed wording would have incorporated the following changes:

- the Company is not permitted to take surplus refunds while the plan is on-going,

- the Company must make contributions if an unfunded liability or solvency deficiency exists or if surplus is less than the greater of the current service cost or next six months benefit payments,
- if "spendable" surplus is available, the Company may use half of it to reduce contributions and the Pension Committee may use the other half to improve benefits accrued to date, and
- plan wind-up, the amount of surplus after expenses is first determined. Then, the actuary will determine the member and Company portions. The Pension Committee may then allocate surplus among plan beneficiaries.

[201] At trial, Williams indicated his December 2, 1996 correspondence to McInnes was not a recommendation but merely draft wording in the event MTS decided to incorporate those concepts. Williams took the trouble to re-draft several sections of the draft plan text. He says he took that initiative as a result of discussions with Ellement and Corp. It is hard to imagine him taking those steps without at least having had some conversation if not direction from MTS.

[202] On that same day (December 2, 1996), Solman wrote to ERPC and CEP setting out MTS's final position which was that it was not prepared to entertain any amendments with respect to the issues of governance or use of ongoing surplus except for removing its discretion to refund to itself any of the ongoing surplus. The latter was really not a concession as MTS was precluded from refunding any portion of the surplus by the applicable legislation.

[203] MTS offered the same justification for refusing to consider ERPC's proposals relating to initial surplus. While acknowledging ERPC's suggestion that the initial surplus be placed in the COLA account to provide for future cost of living increases, no mention was made of the fact that the COLA account was a notional account nor was any reference made to the 20 year pre-funding

requirement. It should be kept in mind ERPC still considered the COLA account as a "safe haven" for the initial surplus where it could not be accessed by MTS to reduce its costs.

[204] This letter was the first reference made by MTS to a governance document. The draft in its then current form was available as early as November 8, 1996 and could have been provided to ERPC on November 11th at the same time as the draft plan text. Here again, ERPC was under the impression the Pension Committee would mirror the functions of the Liaison and Advisory Committees under the Old Plan and that it would be the vehicle through which issues of use of employee surplus would be determined. This misapprehension could have been avoided had MTS provided ERPC with a draft of the governance document on a timely basis.

[205] On December 3, 1996, ERPC and CEP finally received a draft of the governance document. In Restall's estimation, it did not provide the employees/retirees the same level of participation through the Pension Committee as did the Liaison Committee under the Old Plan. While the Pension Committee was entitled to make recommendations regarding the use of ongoing surplus, there was nothing it could do if the recommendations were not accepted. Under the Old Plan, in practice, the surplus was never used other than by recommendation of the Liaison Committee but admittedly, it also could do nothing more than recommend.

[206] ERPC and CEP also received a revised draft plan text on December 3, 1996.

[207] On December 6, 1996, Ellement and Williams met to discuss various issues including how the COLA account was to be funded and specifically to request changes to ss. 5.11 and 5.12 of the ***Reorg Act***. According to Ellement, Williams was to review those sections to see whether any changes were needed in light of the concerns of ERPC as expressed by Ellement.

[208] ERPC had still not received any satisfactory response from MTS with respect to the issues of use of surplus and governance. Ellement and Corp agreed to recommend a formula for use of surplus which would proportionally divide the ongoing surplus between employees and employer based on their respective contributions. They also proposed a requirement of a two-thirds majority vote of the Pension Committee before any changes could be made to the aforementioned formula. At that point in time, they were still awaiting a response from Williams with respect to how the COLA account was to be funded.

[209] The result Ellement and Corp were seeking in relation to their proposed change relating to governance was to increase the authority of the Pension Committee so as to replicate the Old Plan which required consensus with respect to the use of ongoing surplus.

[210] On December 20, 1996, Solman again rejected the proposals and reiterated MTS's position with respect to the use of surplus and governance. In

other words, MTS intended to maintain full discretion with respect to the use of surplus and complete authority over the plan.

[211] At the end of December, both ERPC and CEP made one final attempt to deal with issues of surplus and governance but were unsuccessful.

[212] The final pension plan document dated January 30, 1997 with an effective date of January 1, 1997 was never agreed upon by plan members, nor was the governance document.

G. INDEPENDENT ACTUARY

1. Process of Appointment

[213] Following the MOA, the ***Reorg Act*** was amended to include paragraphs 15(3) and (4) relating to the appointment of an independent actuary and 15(11) relating to the precedence of the MOA over any other provision in s. 15.

[214] The provisions of s. 15(3) are very clear. It required the Provincial Auditor to *"appoint an independent actuary to review the plan proposed by the corporation for the purposes of clause (2)(a) to determine whether the benefits under the proposed plan are equivalent in value as required by that clause."* It is clear from the ordinary meaning of the language used that the sole function of the Provincial Auditor was to appoint an independent actuary.

[215] The *Canadian Oxford Dictionary*, Oxford University Press, 1998, provides the following definitions of "independent":

> **1 a** ... not depending on authority or control. ... **2 a** not depending on another person for one's opinion or livelihood. ... **3** unwilling to be under an obligation to others. ... 5 not depending on something else for its

> validity, efficiency, value, etc. ... **6** impartial; conducted or originating outside a given institution, group, etc. ...

and "equivalent":

> **1** ... equal in value, amount, importance, etc. **2** corresponding or having the same relative position or function. ... **4** having the same result or effect. ...

[216] It would be reasonable to infer, given the mandate of the independent actuary, he or she would have some expertise in the area of concern.

[217] Section 15(4) required the independent actuary to prepare a report after having completed his/her review and the corporation was to take any steps necessary to resolve any concerns raised by the independent actuary in that report.

[218] Section 15(2) required MTS, on or prior to the implementation date, to establish a New Plan"

> ... which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may become entitled under *The Civil Service Superannuation Act* or to which any other person has or would have become entitled under *The Civil Service Superannuation Act* by virtue of the death of an employee.

[219] Section 15(10) deemed the plan members to consent to the termination of their participation in the Old Plan, to the assignment and transfer of assets, liabilities and agreements from the Old Plan to the New Plan, and to the determination of all rights under the New Plan without reference to the ***CSSA***, the Fund, or any trust or trust agreement relating to them.

[220] As has already been discussed, the Government had concerns about its ability to pass the ***Reorg Act*** on a timely basis or at all because of the concerns

being raised by plan members. The November 7, 1996 meetings and resulting MOA were an attempt by the Government to address and placate the concerns of the employees/retirees. The addition of s. 15(11) underlined the extent of the Government's concern and reinforced the validity of the MOA.

[221] In order to further satisfy the concerns raised by the employees/retirees, s. 15(3) was added to assure them that what they had been promised in s. 15(2) and in the MOA would in fact be delivered.

[222] In July 1996, Singleton was appointed Provincial Auditor for a 10-year term. The Provincial Auditor's office was independent of the Government and part of its mandated responsibility was to review and comment on Government policies and fiscal practices. It was for that very reason the Government chose the Provincial Auditor to appoint the independent actuary. The actuary's review was to be free from interference by the Government, the employees/retirees, MTS, as well as the office of the Provincial Auditor. The Government took that step to satisfy the concerns raised by the employees/retirees so that the ***Reorg Act*** could be passed without delay. It is also fair to say the Government was concerned that the employees/retirees, as the Old Plan's largest stakeholder, be assured their pension rights and benefits would not be diminished or diluted by the transfer to the New Plan.

[223] The Government placed itself under severe time constraints in attempting to effect the implementation of a new pension plan in a relatively short period. As a result, the same time constraints were placed on those persons charged

with the responsibility of creating the New Plan text, on the employees/retirees in reviewing the proposed plan text and on their having a reasonable opportunity to discuss and address their concerns, and ultimately, on the selection of the independent actuary and the time afforded him to complete his review.

[224] The process leading to the appointment of an independent actuary began with a telephone call from Benson to Singleton asking whether he thought it would be appropriate for the ***Reorg Act*** to be amended to have the Provincial Auditor's office appoint the independent actuary to review the plan to determine equivalency.

[225] In his testimony, Singleton described his understanding that the Provincial Auditor's role was to be more than one of merely appointing an independent actuary. He perceived that role to include facilitating, assisting, reviewing and evaluating not only the process but the ultimate conclusion reached by the independent actuary. There is ample evidence of the involvement of Singleton, Warren Arthur Johnson (Johnson), the then Assistant Provincial Auditor, and Thomas William Paterson (Paterson), a former audit principal in the Provincial Auditor's office. Examples of their involvement and occasional interference are provided throughout this judgment.

[226] Singleton made no attempt to identify actuaries who might be capable and qualified to undertake the independent review. His rationale was that many of the potentially available actuaries would be conflicted because of their involvement with the interested parties but he took no actual steps to verify who

was or wasn't in that position. He was of the belief that the urgency of appointing the independent actuary did not afford him the time to do so.

[227] Fox, who was ultimately appointed to conduct the review, was a member of the Alexander Consulting Group Limited (Alexander Group) which had been previously engaged by the Provincial Auditor of Manitoba on September 30, 1994 to provide unrelated services which included the following:

(a) periodic advice regarding matters related to the Government of the Province of Manitoba's various pension liabilities;

(b) meet on an as-requested basis regarding specific pension matters; and

(c) provide written or other verbal reports or presentations, if necessary, from time to time on these pension matters.

[228] The fact that Fox was reliant on the Provincial Auditor's office for this and other work is one of the factors which brings into question his independence.

[229] Singleton's only endeavour to ascertain whether Fox was in conflict with any of the interested parties was to ask him that question without making any further inquiries to confirm his response. As it turned out, he was not.

[230] The agreement by which the Provincial Auditor's office had engaged The Alexander Consulting Group Limited in 1994 (Agreed Document 203) was a standard agreement used for engaging the services of professionals to do work on its behalf. It included phrases such as:

> 1(1) ... provide the services ... in a professional manner satisfactory to the Provincial Auditor.

1(2) The consultant shall comply with all reasonable directions and requests of the Provincial Auditor.

1(3) All reports to be prepared by the Consultant ... shall be satisfactory in form and content to the Provincial Auditor ...

...

3.(c) shall comply with any rules or directions made or given by the Provincial Auditor with respect to safeguarding or ensuring the confidentiality of such information, data, reports, documents or materials.

The persons or firms so retained were referred to as "agents", and although they would do independent audits and provide opinions to the Provincial Auditor, their working papers would be reviewed. If they were determined to be satisfactory, the Provincial Auditor would express its own opinion based on the financial statements that were produced.

[231] Singleton viewed the arrangement with Fox as being much the same. He testified it was his responsibility to do "due diligence" to satisfy himself that Fox did thorough research but not to comment on his opinion. The evidence discloses that Singleton may not have restrained himself to that extent and that he in fact played a much greater role in the process of defining the term "equivalent in value" and contributing to Fox's ultimate opinion on equivalence than was ever intended by the legislation.

[232] Under that contractual arrangement, the entity whose services were retained performed under the authority and control of the Provincial Auditor's office to the extent that the contract could be terminated by the Provincial Auditor by giving 30 days written notice to the entity.

[233] It is abundantly clear the office of the Provincial Auditor considered the appointment of Fox to be the same as the contractual retaining of the services as aforementioned. The Provincial Auditor did not even prepare a separate agreement setting out Fox's mandate or remuneration.

[234] Singleton admitted he made no reference checks to determine Fox's background or experience in relation to the matter at hand. Fox himself admitted that prior to 1987, he had very limited involvement with Government pension plans and no direct experience with the ***CSSA***. He also conceded he did not feel confident or comfortable deciding issues of ownership of surplus, a question he felt was more legal than actuarial.

[235] In my view, Singleton totally misapprehended his role. It was to appoint an independent actuary to perform a specific function as set out in s. 15(3) of the ***Reorg Act***. It is reasonable to assume the Provincial Auditor's office would provide logistical assistance to Fox as he might request from time to time. Instead, from the outset, the Provincial Auditor's office involved itself in the entire process and in doing so, infringed on Fox's independence or at least left the perception of having done so.

[236] From Fox's perspective, his firm had previously been retained by the Provincial Auditor's office in relation to other matters and he undoubtedly anticipated more work in the future. He does not appear to have understood this assignment as being completely different from his previous involvement with the Provincial Auditor's office and did not seem to grasp the requirement not

only to be completely free and independent from all forms of influence but as well to be perceived as such by the parties who were required legislatively to assume and accept his independence.

[237] Fox's first meeting with Singleton, Johnson and Paterson pursuant to his appointment as an independent actuary occurred on November 28, 1996. At that meeting, it was confirmed that the terms of the September 30, 1994 contract would apply to this assignment.

2. <u>Process of Determination of the Definition of "Equivalent in Value"</u>

[238] As the phrase "equivalent in value" was not an actuarial term, Fox considered it necessary to consult with interested parties so as to arrive at a consensus about the meaning. He drafted a letter which was to be sent to all interested parties in order to provide them with an opportunity to address this issue. As this was the first missive to the interested parties and particularly to the plan members, it was important for it to reflect his independence. In fact, Singleton, Paterson and Johnson all had significant involvement in making revisions.

[239] The letter that was ultimately sent (Agreed Document 596) was on the letterhead of the office of the Provincial Auditor and under Singleton's signature. It informed "interested parties" that he had appointed Fox as the independent actuary *"who will be acting as my agent, to render an opinion on the 'equivalent in value' question"*.

[240] I choose to reproduce the balance of the letter as it strongly suggests that Fox's ultimate opinion would not be his own but rather would be one shared with the Provincial Auditor's office:

> ...
>
> For the benefit of the parties to the MTS Pension Plan, I believe it is appropriate to outline the steps that will be followed prior to providing our opinion:
>
> 1. Meet with the relevant parties to obtain input as to their understanding of what is meant by "equivalent in value".
>
> 2. Formulate consensus on the meaning of "equivalent in value". This will be communicated to all interested parties prior to the determination of our opinion.
>
> 3. Review the finalized MTS Pension Plan (i.e. the MTS Pension Plan Text) that is to be filed for registration with OSFI and Revenue Canada.
>
> 4. Compare the relevant sections of the MTS Pension Plan Text with the provisions of the Civil Service Superannuation Act to determine whether "equivalent in value" is achieved.
>
> 5. Provide the actuary's opinion on the extent to which "equivalent in value" has been achieved to the President and Chief Executive Officer of MTS, together with any recommendations we may have as to changes which we believe are required to achieve "equivalent in value". The Act provides that the Corporation shall take any steps necessary to resolve concerns raised by the actuary. We believe it would be appropriate to incorporate the changes with those requested by the regulatory bodies.
>
> 6. Review the re-amended MTS Pension Plan Text changes prior to its resubmission to the regulatory bodies and issue the final actuary's opinion to all parties.
>
> If you have any comments on the proposed approach, please contact Mr. Tom Paterson at 945-3920.

[241] At trial, Fox testified it was up to him alone to determine the meaning of equivalent in value even though at his examination for discovery, he stated he

believed a definition would have to be arrived at by way of consensus with the Provincial Auditor. While it may be impossible to determine ultimately whether or not Fox was influenced by the Provincial Auditor's office in arriving at a definition of "equivalent in value", there are several reasons for that perception to have arisen.

[242] Fox and Paterson met with Corp and Hadfield representing CEP at 9:00 a.m. on December 19, 1996 and with representatives of TEAM including Restall at 9:35 a.m. the same day. Both groups were considered to be interested parties with whom Fox wanted to consult in order to arrive at a consensus about the meaning of the words "equivalent in value". Neither Paterson nor Fox had an independent recollection of what was discussed at the meeting and were therefore completely reliant on their notes. Although both testified they attempted to capture the gist of those discussions, it is clear their notes did not provide a verbatim or even comprehensive recording of those discussions.

[243] I am satisfied the intent of both TEAM and CEP was not to present a final definition of the phrase "benefits ... equivalent in value" but to present the same concerns which they had previously raised, those being the use and control of initial and ongoing surplus, governance, and initial asset transfer. Restall confirmed those to be the issues of concern in his January 2, 1997 letter to Fox (Agreed Document 717).

[244] Provided in the letter were copies of the December 10, 1996 memorandum from ERPC to Solman requesting changes to the plan text, a response from Solman dated December 20, 1996 essentially denying most of ERPC's proposals and a December 23rd memorandum from ERPC to Solman repeating their initial requests.

[245] ERPC and CEP raised the same issues at their December 19th meetings with Fox. Clearly, they considered use and control of initial and ongoing surplus and governance to be benefits which they thought Fox should take into consideration in formulating his opinion.

[246] Fox also met with representatives of MTS and received written submissions as to the meaning of "equivalent in value" from both Solman and Williams. The position they advanced was that equivalency related only to financial benefits and that surplus, funding of benefits and governance were not to be included within that definition. Curiously, Fox had received that opinion prior to December 17, 1996, the date of Singleton's letter inviting interested parties to schedule meetings with Fox.

[247] Apart from the optics of MTS having the first opportunity to present their opinion on equivalency to Fox even before the letter requesting that opinion was sent out, the order in which Fox received information is immaterial. It was reasonable for Fox to inform himself of the positions of all of the interested parties, some of which were diametrically opposed to one another. The question is whether Fox ultimately established his own definition of equivalency or

whether he was unduly influenced in that process by any of the parties or by the Provincial Auditor's office.

3. Evolution of the Definition of "Equivalent in Value"

[248] By January 29, 1997, Fox had consulted with all of the interested parties and had received their opinions on the definition of "equivalent in value". By letter dated January 29, 1997 to Paterson (Agreed Document 752), he provided a draft letter which he felt could be *"used as a base for the communication to interested parties."* He observed that the concluding portion of that draft letter *"may need a bit of work or could be excluded altogether if appropriate."*

[249] Under the heading "Background", Fox correctly identified his function under s. 15(2)(a) of the ***Reorg Act***. He explained that since "equivalent in value" was not normal actuarial accounting terminology and was capable of having many different interpretations, he considered it appropriate to discover the meanings the interested parties placed on those words. He also recognized and acknowledged that the ***PBSA*** and the ***ITA*** contain certain restrictions which might preclude the inclusion of certain provisions found in the ***CSSA***.

[250] Fox acknowledged his various sources of information which included MTS and the union representatives. He then went on and identified the following which he considered relevant in determining the meaning of equivalent in value:

> ...
>
> i) Whether the benefits available to members and their beneficiaries under the MTS pension plan and the CSSA are equivalent. Where there are differences in the benefits, we will decide whether the difference is material. Any differences in the CSSA and the MTS

plan that are the result of PBSA or ITA requirements will be included for completeness only.

ii) Whether the funding of the benefits available at the implementation date and the use of any surplus funds that arise on the implementation date are equivalent to the premiums under the CSSA. Since the funding arrangements under the MTS plan will be different than the funding arrangement under the CSSA we must be assured that at the implementation date that benefits have been funded in an equivalent manner and that surplus funds generated by employee contributions are not inappropriately used by the employer.

...

[251] Fox's concluding remark was an expression of hope and expectation that MTS would seek and accept the input of members via the Pension Committee. He apparently was unsure of the appropriateness of this comment and sought input from the office of the Provincial Auditor as to its inclusion. He sought no such input with respect to the main text of his draft letter.

[252] Testifying at trial, Fox confirmed his belief that the use of surplus and funding of benefits were important considerations in his determination of equivalency.

[253] Fox also acknowledged that the determination of equivalency was to be his and his alone. He maintained that was what ultimately occurred. However, what transpired between January 29, 1997 and the time he released his final opinion raises considerable doubt about that assertion. As will be seen, the office of the Provincial Auditor became very involved in editing and re-drafting Fox's initial opinion letter. Moreover, at his examination for discovery, he admitted the definition of equivalency was to have been arrived at by consensus

between him and the Provincial Auditor. These conflicting statements raise further doubt as to what actually transpired.

[254] Without Fox's knowledge or approval, the office of the Provincial Auditor significantly revised his January 29th draft. On January 31, 1997, Paterson forwarded the revision to Fox and asked him for his "thoughts". Paterson also commented the revision had been made "short & sweet" at Johnson's suggestion (Agreed Document 764).

[255] At trial, Johnson had no recollection of any discussion with Paterson in relation to keeping it "short & sweet". In fact, Johnson denied having any discussion whatever about Fox's definition of equivalency with either Paterson or Singleton. He confirmed, however, that such discussions between Paterson, Singleton and Fox occurred.

[256] This first revision of Fox's initial draft (Agreed Document 765) deleted all reference to the use of surplus as an issue to be considered in determining equivalency. Even though the document was stamped "DRAFT FOR DISCUSSION PURPOSES ONLY", it showed Singleton rather than Fox as its author. The document is rife with references to "my correspondence", "we considered", "we have established", clearly representing that Singleton and/or the Provincial Auditor's office were presenting the document jointly with Fox. As previously mentioned, Fox had no input into the preparation of this document.

[257] On receiving the aforementioned revision, Fox amended the provision relating to the funding of benefits to read:

> ... the funding of benefits should be shared equally by the employees and the employer as intended by the CSSA.

Fox's explanation of that change was that he wanted to ensure that the employee and employer contributions were at least equal both on the implementation date and going forward to the next evaluation.

[258] There was a further revision to the aforementioned draft by a person other than Fox (probably Paterson). The revision identified the funding of benefits as a secondary objective. Fox disclaimed ownership of that revision and stated he never considered funding to be a secondary objective.

[259] A further revision (Agreed Document 772) was prepared by the Provincial Auditor's office under Singleton's name. Fox had no input in this revision which was substantially different than the previous. According to Fox, he did not draft it and he also agreed it varied significantly with his definition of equivalency in that it did not reference the funding of benefits and did not specifically reference surplus.

[260] There were further drafts with further revisions (Agreed Documents 780, 781 and 782) about which Fox had no knowledge or involvement. Those drafts emanated from the Provincial Auditor's office and it would appear that both Paterson and Singleton were involved in their formulation.

[261] On February 3, 1997, Paterson provided Fox with a copy of the latest revision. He invited Fox to provide his comments respecting the changes. Following some discussion between Fox and Paterson, and at Fox's insistence, the paragraph relating to funding was reinstated as a "secondary objective".

[262] Without Fox's knowledge or approval, Singleton sent the draft definition to Fraser and asked for his comments. Singleton chose not to send a draft to either ERPC or CEP, stating he saw no reason to do so.

[263] After having reviewed the draft definition, Fraser advised Singleton the definition of equivalency should be restricted to the actuarial opinion on whether the financial benefits were equivalent and that the definition should not include the funding of benefits, surplus or governance. He pointed out to Singleton that the New Plan would be funded, a theme that MTS had long been promoting. On that basis alone, Fraser argued the New Plan was far superior to the Old Plan.

[264] At trial, Singleton said he recalled one aspect of that discussion with Fraser even though he denied any such recollection at his examination for discovery. The one aspect he was able to recall was that the only objective set out in the ***Reorg Act*** was the determination of equivalence in value and that there was no secondary objective. On that basis, Singleton unilaterally and without Fox's knowledge or approval, deleted the funding paragraph that Fox had previously reinstated.

[265] The degree to which Singleton perceived his involvement in the process is illustrated by his evidence that he had not considered whether Fox had a role in interpreting the objectives of the ***Reorg Act*** and did not know whether Fox may have held a different interpretation of that objective.

[266] At that time, Singleton had not seen the MOA nor was he aware that the employees' initial contribution into the New Plan was approximately $43.343M more than the employer's contribution.

[267] When asked at trial whether the removal of the funding paragraph narrowed the definition of equivalency, Singleton was equivocal with his answer. However, on being referred to a similar question which had been put to him on cross-examination on his affidavit where he had admitted the definition of equivalence was narrowed with the removal of that clause, he agreed that had been his answer and that it was truthful.

[268] A letter dated February 5, 1997 on the letterhead of the office of the Provincial Auditor under Singleton's signature was sent out to all interested parties. It set out the narrower and more restricted definition of equivalency. Fox testified he did not see that document before it was sent out and that the definition of equivalency provided therein was not his.

[269] Singleton admitted he unilaterally revised the definition of equivalency and sent the letter out without Fox's approval. When asked why he raised no objection, Fox was unable to provide any explanation. A reasonable inference would be that his previous relationship with the Provincial Auditor's office created a situation where he was unwilling to confront the Provincial Auditor and risk possibly jeopardizing future retainers.

4. Determining the Issue of "Equivalent in Value"

[270] After Singleton's February 5, 1997 letter containing the definition of equivalency had been circulated, Fox proceeded with the task of determining whether the two plans were equivalent in value. During that process, he composed several drafts in which he concluded the benefits were not equivalent because MTS's contribution on implementation date was less than that of the employees and because the employees did not have the same control of the ongoing surplus as they had under the Old Plan.

[271] In his last draft opinion dated February 18, 1997 (Agreed Document 806), Fox concluded there to be essential agreement on the part of the employees/retirees as to the benefits payable upon death, termination, disability and retirement. Actually, those issues had never been in dispute. From the outset, the concerns raised by the employees/retirees related to issues of surplus, funding and governance. Those were the issues in dispute which motivated the Government to amend the ***Reorg Act*** to include the provision for the appointment of an independent actuary.

[272] Fox listed the following recommendations (Agreed Document 806, document #21672) without which he concluded the New Plan would not provide benefits equivalent in value to the benefits enjoyed under the Old Plan:

> ...
>
> i) The participating employers in the MTS Plan should only be allowed to take a contribution holiday or to reduce their contributions to the MTS Plan once there is a surplus (subject to ii) below) and their contributions have in aggregate equaled the level of the employee's contributions transferred from the CSSA

> Plan for service to December 31, 1996. The inclusion of this kind of protection will prevent MTS and other participating employers from utilizing surplus funds generated by employee contributions to finance the Company's share of the costs of the accruing benefits. In addition, the wording in Section 16.11 should be amended to ensure that the surplus funds within the pension adjustment account [cannot] be allocated to other purposes until the contributions allocated to the adjust[ment] account by employers are equal to the contributions made by the employees as of the implementation date. Another way to accomplish the above would be for MTS to transfer into the fund an amount equal to the employee contributions on the implementation date.
>
> ii) A section on sharing of emerging ongoing surplus funds should be included in the text. This section would allocate surplus funds in proportion to the contributions made by each party. The portion of the surplus that emerges as a result of employee contributions must be used to improve benefits or reduce employee contributions and the portion of the surplus emerging from employer contributions can be used in a manner deemed appropriate by the participating employers.
>
> iii) Section 14.2 should be amended to require MTS and the CSSA to develop an appropriate reciprocal transfer agreement. If this were done then employees of MTS would have the same pension protection that they had prior to the privatization.
>
> ...

[273] Fox added a supplemental comment on the issue of governance. He suggested a reasonable amendment to governance would be the requirement of the approval of two-thirds of the Pension Committee to amend those sections of the plan dealing with surplus utilization and the funding of benefits.

[274] In making his recommendations, Fox indicated he was mindful of several issues. They included a concern about funding and the recognition that under the Old Plan, the funding arrangement was essentially equal, the difficulty for any party other than MTS to amend the plan text once it has been finalized, and

the fact that surplus in the Old Plan was never a concern because it belonged to the employees.

[275] In his testimony, Fox maintained that the items referenced in his February 18, 1997 draft opinion were merely considerations and were not necessarily reflective of his final conclusions. As I see it, the language used is more suggestive of conclusions than of considerations.

[276] At Singleton's request, Fox sent him the February 18, 1997 draft, presumably for his review and commentary. Once again, the question arises why Fox provided Singleton with the draft for commentary when the opinion was to be his and his alone. It is suggestive of an unjustifiable deference on the part of Fox to the office of the Provincial Auditor.

[277] Further evidence of that deference was Fox's attendance on the morning of February 19, 1997 at a meeting convened by Singleton which also included Paterson and Johnson. Fox stated he had no recollection of that meeting but nevertheless did not deny his attendance. Nor did he dispute the suggestion that Singleton dominated the meeting by expressing his view that the issues of surplus, funding and governance had no linkage to whether or not the benefits in the two plans were equivalent in value.

[278] Without Fox's knowledge or authorization, Singleton forwarded Fox's February 18, 1997 draft opinion to MTS but not to any of the representatives of the employees/retirees.

[279] Another meeting with Fox, representatives of MTS, and staff from the Provincial Auditor's office was scheduled for February 19, 2007 at 3:00 p.m. Fox prepared an agenda for that meeting and one of the items for discussion was "major concerns from our review". Although he explained that by use of the word "our", he really meant his review, I considered it to be just another example of Fox's mindset at the time. He was not functioning independently from the office of the Provincial Auditor.

[280] Arguably, Fox's February 18, 1997 draft opinion represented and reflected his views at the time, a fact that he reluctantly admitted under cross-examination. At trial, he insisted that he revised his final draft based on the information he received from MTS at the February 19, 1997 meeting.

[281] The information he received from Barker at the February 19, 1997 meeting was as follows:

(a) an actuarial valuation which was almost completed was likely to disclose an unfunded liability as of the date New Plan would be implemented;

(b) that the employer normal costs arising out of the first actuarial valuation would be higher than the employee contributions; and

(c) in 1992, the employee surplus in the Old Plan was used to totally fund a benefit improvement without any contribution from the employer.

[282] At trial, MTS took the position that the information relating to the use of the employee surplus in 1992 had been deliberately withheld by TEAM, that it was information of which Fox had been previously unaware, and that it was relevant to his deliberations.

[283] The evidence which I have accepted indicates that Fox had been previously made aware of that information. Meronek made a presentation to the Legislature on October 31, 1996, and both Fox and MTS were provided with copies. In that presentation, Meronek went through the history of how the surplus had been used in the Old Plan for the previous 20 years including the fact it was used to pay both ends of benefit improvements on a number of occasions.

[284] Under cross-examination, Fox admitted he had become aware, within weeks or perhaps a month of his appointment, that *"the independent actuary provision was added after employees/retirees made presentations to the legislature about their concerns".*

[285] Fox also testified he "believed" he had been *"provided with the presentation that the employees/retirees made to the legislature".*

[286] In addition to the information relating to the 1992 use of employee surplus, Barker's staff had provided her with a briefing note addressing some of the other issues raised by Fox in his draft opinion. Barker relied on that information and communicated it to Fox at their meeting. Unfortunately, the briefing note contained inaccurate information in two respects. It erroneously

stated that Revenue Canada would not have permitted MTS to match the employees' $43.343M initial surplus as it would have created a surplus that would have exceeded their limit. It was also wrong in stating that the $43.343M initial surplus had been "used up" in providing employees/retirees with a benefit in the form of an account that was closer to the 20 year pre-funding which ultimately triggered larger COLA awards. The evidence was that the very manner in which the COLA account was set up precluded any possibility of it ever achieving 20 year pre-funding status. ERPC never considered that the 20 year pre-funding requirement would apply to the initial surplus and were unaware of that. They believed the COLA account presented as a safe haven for the initial surplus.

[287] Fox chose not to meet again with the employee/retiree representatives or to even disclose to them the fact that he had a meeting with representatives of MTS and had received additional information from them.

[288] Following his meeting with MTS representatives, Fox made significant and substantial revisions to his draft report.

[289] The information provided to Fox by Singleton and/or Barker at the February 19, 1997 meetings appears to have been sufficient to cause him to change his opinion. In particular, it appeared to persuade Fox that the employees had no control over their surplus in the Old Plan and that the Liaison Committee had not agreed to completely finance the 1992 benefits.

[290] After his afternoon meeting with Singleton and Barker, Fox telephoned Johnson seeking clarification of concerns Singleton had expressed earlier that day. I conclude that both Singleton's comments and the information which Barker provided influenced Fox to change his previously held opinion about equivalence of benefits.

[291] At the time he was preparing his report, Fox requested a copy of the initial actuarial valuation report which he felt important for him to review. It had been completed on February 27, 1997 but Fox was never provided with a copy by MTS for reasons that were never explained.

[292] As it turns out, the initial actuarial valuation report showed an unfunded liability on an actuarial basis of $7M. However, Buck Consultants, the New Plan actuaries who prepared the report, chose not to use the market value of the assets. Had they done so, the New Plan valuation would have showed a substantial surplus. While there is some difference of opinion among actuaries, there appears to have been nothing improper in the non-use of the market value of assets. However, it resulted in a significantly bleaker financial picture of the New Plan as of the date of implementation.

[293] Fox's final opinion was contained in a March 5, 1997 letter to Singleton (Agreed Document 840). Its brevity easily accommodates its almost complete reproduction below:

...

<u>Opinion</u>

Upon review of the most recent certified copy of the MTS Plan, the terms of the CSSA as amended and all other relevant documents currently available, the value of the benefits provided under the MTS Plan are at least equivalent in value to the benefits provided under the CSSA, based on the following assumptions.

<u>Assumptions</u>

- MTS will make every effort to enter into a reciprocal arrangement with the CSSA so that the portability of benefits to MTS Plan members to the CSSA employers will be preserved.
- The initial actuarial valuation of the MTS Plan will reveal an unfunded actuarial liability (even after MTS transfers its full reserve and the appropriate transfer is made from the CSSA) and that MTS' share of the actuarial normal cost will exceed the share of the actuarial normal cost contributed by employees.
- MTS will develop an appropriate unregistered supplemental pension arrangement to provide the benefits not permitted by the Income Tax Act.

I would be pleased to discuss the above opinion at your convenience.

[294] Fox's closing sentence offering to discuss his opinion with Singleton is yet another example of his apparent unwillingness to proceed without Singleton's approval. From the time of his appointment, there was a perceived dependence by Fox on Singleton and/or members of his staff in formulating an opinion as to whether benefits were equivalent in value. The relationship between Fox and Singleton has clearly clouded that issue making it difficult to accept Fox's assertion that his ultimate opinion was not influenced by others and in particular by Singleton and Barker.

[295] Fox's mandate was to provide a comprehensive report and recommendations. His March 5, 1997 opinion letter fell far short of that mark. It provided neither analysis nor reasons for the decision.

[296] Fox stated the following expectations also played a role in causing him to change his opinion:

(a) he expected the governance of the plan to be done by consensus between employer and employees;

(b) he expected MTS would consult with employees before using the surplus and that if they did not, the employees could take legal action. In fact, he stated he would have inserted some type of protection for the employees so as to prevent MTS utilizing the surplus without the agreement of employees;

(c) he expected MTS would act in good faith, would be even-handed and forthright with employees and that they would not by-pass the Pension Committee. More specifically, Fox felt the Pension Committee would recommend the use of surplus;

(d) Fox did not expect MTS to take contribution holidays without first consulting with the employees via the Pension Committee;

(e) finally, Fox expected the initial surplus to be used for the employees' benefit in accordance with the MOA. He expected the employee initial surplus to show up as a liability for future cost of living increases in which case it wouldn't have been available to MTS to take contribution holidays.

[297] Fox included these expectations as recommendations in the initial draft. I am unconvinced the unwillingness to do so in his final draft was the result of an independent thought process.

H. COMPARISON OF GOVERNANCE IN PRACTICE IN THE OLD AND NEW PLANS

[298] Under the Old Plan, the ***CSSA*** was the ultimate authority. In order to make any changes to the Old Plan, the Government was required to present a bill to the Legislature to amend the ***CSSA*** and only if the bill was passed did the amendment take effect.

[299] From time to time as surpluses occurred, the employees were permitted to recommend usage for that surplus through their representatives on the Liaison Committee. They did not have the ultimate authority to implement those changes. That always rested with the Legislature. However, in practice, an agreement was always reached between the Liaison and Advisory Committees after some period of negotiation. The Advisory Committee would always obtain direction from the Government as to whether or not to agree to the proposals put forward by the Liaison Committee and therefore, whenever consensus was reached, it was always accepted by the Government and implemented by passage of a bill in the Legislature.

[300] Often, Governments did not want to add to their overall costs of the plan and as a result, the total cost of improved benefits recommended by the Liaison Committee was paid out of the employee surplus. There were other occasions when the Government contributed a share of the cost of those improvements. Ultimately, it was always the decision of the Government as to whether or not it was prepared to make a financial contribution. Thus, it was impossible for the employees through the Liaison Committee to impose a financial obligation on the Government which it did not want.

[301] Under the Old Plan, the Government paid its 50% share of liabilities from time to time as it was billed. The employees' 50% share of liabilities was paid out of their contributions combined with whatever additional revenue was created through investment. If liabilities exceeded contributions, each side would have to ante up to cover their share. On the other hand, if surpluses existed, it was only on the employees' side as the Government contributed only enough to cover its actual share of the costs. (In this context, "Government" includes MTS and other Crown corporation employers.)

[302] The degree of cooperation which existed between the Liaison and Advisory Committees was, to a large extent, dependent on who was the Government of the day. However, regardless of the political stripe of Government, the arrangement worked and both sides through their representatives on their respective committees were always able to reach consensus in relation to the use of surplus.

[303] Unlike the Old Plan where all of its provisions were encompassed by the ***CSSA***, the New Plan had its own plan text and governance summary. It had to be registered under the ***PBSA*** and had to meet the requirements of Office of the Superintendent of Financial Institutions (OSFI) which was responsible for the administration of the ***PBSA***. It also had to meet the requirements of the ***ITA***. Accordingly (and this was acknowledged by all concerned), certain aspects of the Old Plan could not be "mirrored" by the New Plan as they would have been inconsistent with the requirements of OSFI and the provisions of the ***PBSA*** and the ***ITA***.

[304] A major distinction between the Old and New Plans was that the New Plan was fully funded. In other words, MTS was required to pay their share of the cost of benefits "up front" just as did the employees. There were also additional payments required depending upon the financial status of the Fund. The employees were guaranteed benefits for which they were required to pay a fixed amount. Any cost over and above was the sole responsibility of MTS.

[305] It was MTS's position that a fully-funded plan offered greater protection than the "pay-as-you-go" arrangement under the Old Plan. The last several years have proved that the cost to MTS is significantly greater than it would have been under the Old Plan. As well, their financial contribution in recent years has greatly exceeded that of the employees. While this fact does not bear on whether or not the plans were equivalent in value on the implementation date, it underlines the fact that the guaranteed benefits including annual COLA

adjustments which the retirees receive annually are funded disproportionately by MTS in harsh economic times.

[306] Because MTS was ultimately responsible for any unfunded liability in the plan, it deemed it essential to have ultimate control over the administration of the plan. By comparison, under the Old Plan, it did not have automatic responsibility for unfunded liabilities even though the Government and Legislature had ultimate control.

[307] The ***PBSA*** established the employer as the administrator of the pension plan. It also mandated (s. 7.(8)) that the administrator was to be:

> ... responsible for administering the pension plan, including the pension fund in accordance with this Act and the regulations, and for filing the required documents in accordance with this Act and the regulations.

[308] Section 7.(3)(b) of the ***PBSA*** required the employer to establish a Pension Committee with duties as hereinbefore set out.

[309] ERPC was aware the New Plan had to comply with the provisions of the ***PBSA*** and that the employer was mandated to be the administrator of the plan. However, the wording in the November 6, 1996 memorandum relating to governance obviously created greater expectations on the part of ERPC. The memorandum acknowledged the concerns of ERPC of not having adequate representations on the "body governing" the New Plan. The memo went on to set out a proposal made by MTS that the *"composition of the governing body emulate the composition of the present Civil Service Superannuation Board"*. It was to have been made of a number of employee/retiree representatives and an

equal number of employer representatives. The Chairman was to be appointed by management.

[310] Notwithstanding the express wishes of ERPC to be involved in the administration of the plan, the ***PBSA*** clearly precluded that. At best, the employees/retirees were entitled to representation on a Pension Committee which would have performed, among others, the combined functions of the Advisory and Liaison Committees.

[311] One of the potential functions of the Pension Committee was to provide assistance to the administrator of the plan where such assistance was requested. The administrator was not required to accept any recommendations of the Pension Committee. The interaction between the administrator and the Pension Committee therefore would be dependent on the willingness of the administrator to receive and consider such assistance.

[312] The fact that the administrator approved contribution holidays by MTS without so much as informing the Pension Committee speaks to the degree of non-cooperation that has existed. Unfortunately, cooperation is not something that can be legislated and while it is regrettable that the administrator under the New Plan appears to have chosen to ignore the potentially valuable contributions from the employee/retiree representatives, an "us/them" environment seems to have evolved due in no small part to this litigation.

I. INITIAL SURPLUS

[313] If there is one fact which the plaintiffs have established beyond all doubt, it is that as of the date of implementation of the New Plan, there was an identifiable and calculable employee surplus paid in. The parties have now agreed the initial surplus is to be defined as the amount that the employee contribution exceeded their one-half of the actuarial liability for the benefits. That amount is $43.343M.

[314] Historically, under the Old Plan, any surplus was always used to enhance employee benefits and/or supplement the COLA account.

[315] I am satisfied the initial surplus as of the implementation date was intended to be used exclusively for the same purposes as it had under the Old Plan. It was also the wish of ERPC that future surpluses be treated in the same fashion. I recognize, however, that here there is a distinction between use of initial surplus and use of future surpluses. The initial surplus is readily identifiable as having been created exclusively by employees under the Old Plan. Ongoing surpluses in the New Plan are created as a result of contributions of both employee and employer.

[316] Utilization and control of the initial surplus was certainly one of, if not the main issue raised by ERPC. While representatives of MTS attempted to place their own interpretation on paragraph 3 of the MOA, I find it to be nothing more than a *post facto* attempt to support and legitimize their use of that surplus for the purpose of contribution holidays.

[317] As a means of protecting the initial surplus from utilization by the employer, ERPC suggested placing it in the COLA account to be used to fund future COLA adjustments or other plan benefits. That suggestion was incorporated in the MOA.

[318] The ***Reorg Act*** clearly states that nothing in s. 15 is to be interpreted as nullifying the effect of the MOA. I find it to have been the clear intention of all parties for the initial surplus to be used only for improvement of pension benefits in the same manner as under the Old Plan on the understanding that any such improvement did not increase the liability of MTS. It was not to be used to reduce MTS's costs by taking contribution holidays or in any other fashion. The decision on the utilization of those funds was to be based on the recommendations of the employee/retiree representatives on the Pension Committee which recommendations were expected to be implemented.

[319] Defendants have raised several arguments in relation to the interpretation of paragraph 3 of the MOA. They maintain the meaning was clear and unequivocal and that it accommodated the wishes of the employees/retirees to place the initial surplus into the COLA account to be used to fund COLA increases.

[320] Unlike the Old Plan, the New Plan did not have a separate COLA account. All of the funds in the New Plan were comingled in one account with the COLA account being set up as a notional account in accordance with the requirements of the ***PBSA***. It is true the inclusion of the initial surplus in the accounting of the

COLA account brought it closer to the 20 year pre-funding requirement. If the 20 year pre-funding requirement was ultimately achieved, it would have permitted COLA increases in excess of two-thirds of CPI, a result ERPC would have found favourable. However, unknown to ERPC at the time, the 20 year pre-funding requirement was incapable of ever being reached by virtue of the manner in which the COLA account was set up.

[321] Defendants further point to the fact that the issue of utilization of the initial surplus for increased COLA benefits was not raised by the employee/retiree members of the Pension Committee for almost four years following implementation of the New Plan. Defendants question why they did not make that proposal to the Pension Committee much earlier if that had been their intention.

[322] It must be kept in mind that the employees/retirees were not told the COLA account in the New Plan was to be a notional account nor were they told the 20 year pre-funding requirement was to be implemented. Without that information on November 7, 1996, the employees/retirees were not in the position to understand the ramifications of the transfer of the initial surplus into the COLA account. While they were unable to utilize surplus under the Old Plan to increase the COLA adjustment beyond two-thirds of CPI because of the 20 year pre-funding requirement, they were able to use such surpluses for other improvements to pension benefits.

[323] ERPC was not aware how the assets in the new COLA account were to be valued or that a CANSIM rate of interest would be applied. FitzGerald, in his January 7, 2008 report (Exhibit 43), defines the CANSIM rate as follows:

> The CANSIM rate is the rate prescribed for crediting interest on employee contributions under pension plans registered under the PBSA as an alternative to using the fund rate of return. The advantage of the CANSIM rate is that it is relatively stable from year to year and does not suffer from the volatility of the stock market. In particular it cannot give rise to negative returns.

[324] ERPC had no control over the administration of the COLA account. They were unaware that by virtue of how the COLA account was valued and the interest rate that was to be applied, it could never achieve the 20 year pre-funding requirement. Had they known that to be the case, it is highly unlikely they would have agreed to the placement of the initial surplus into the COLA account. In effect, what they did was give up control over the use of the initial surplus which was a result they never intended.

[325] Defendants argue in the alternative there was no *consensus ad idem* respecting the terms of the MOA which means it cannot be binding nor can there be a resulting breach. When one considers and dissects the evidence given at trial from witnesses for both parties, there is some evidence to support that argument. After all, the trial took place more than 10 years after the events about which the parties testified. In the intervening years, memories undoubtedly became blurred with respect to many of the details.

[326] However, when analyzing the entire process of privatization and recognizing the manner in which initial surplus had been utilized under the Old

Plan combined with the fact that the Government and MTS made assurances that the initial surplus belonged to the employees/retirees and that they would control its distribution, the meaning of paragraph 3 of the MOA acquires blinding clarity. In order to accomplish passage of the ***Reorg Act*** in the fall of 1996, the Government appreciated it had to persuade the employees/retirees the plans would mirror one another subject to the legislation governing the New Plan. Of particular importance was the use of the initial surplus and while its ultimate use was never specifically identified by the employees/retirees, I am satisfied the intention of both parties was to permit them to utilize it in the same fashion as they had under the Old Plan.

[327] One final consideration is the fact that the employees/retirees did not institute privatization nor were they seeking a New Plan. They were perfectly happy with their participation in the Old Plan, the manner in which it operated, and the opportunity to determine the use of surpluses. While negotiations regarding the use of the surplus often took extended periods of time, the practice had operated successfully for a number of years. There was some suggestion of dissatisfaction with the Old Plan by the employees/retirees to the extent that they were looking for a joint trusteeship arrangement but for all practical purposes, those were discussions and nothing more. The employees/retirees were forced to leave the Old Plan and enter a New Plan and the ***Reorg Act*** made provision for their deemed consent. The employees were concerned with several issues but the main one appeared to be the fact that

their contribution into the New Plan would exceed that of MTS. That excess amount was identifiable, had always been deemed to belong to the employees and they were not prepared to hand it over to MTS to be used to reduce their costs.

[328] As to when and why the employees/retirees raised the objections they did, it must be understood that MTS developed the plan, controlled the dissemination of plan and governance information and controlled plan administration which included valuation of assets and determination of interest rate for the COLA account. Had they chosen to do so, they could have shared all that information with the employees/retirees but chose not to because it was in their best interests at the time. That being the case, any criticism being directed at the employees/retirees for failing to raise matters on a timely basis must be considered in that light.

J. CONTRIBUTION HOLIDAYS

[329] Under the Old Plan, contribution holidays were a non-issue as the plan was not funded. The employers paid only the amounts required to cover their share of liabilities. Any surplus in the Old Plan was the result of employee contributions only. The New Plan is a Defined Benefit (DB) Plan. It pays a benefit to the plan member on retirement or certain other event. The benefit is determined by a pension benefit formula contained in the New Plan text. The benefit is not related directly to any individual contributions made by the employee.

[330] In addition to the benefits being defined, the contributions made by the employees in the plan are also defined and remain constant. The employer contribution is the unknown factor and can vary depending on the financial status of the plan.

[331] MTS is required to fund the New Plan when an unfunded liability exists. An unfunded liability occurs when the actuarial liability (i.e. the amount required to pay existing and future obligations of the plan) exceeds the invested assets of the New Plan. The ***PBSA*** requires MTS to fund the unfunded liability by "special payments" amortized over a prescribed period of time. Those special payments are determined based on the deficiencies calculated on a "going concern" basis and/or a "solvency" basis. Plan members or employees are never required to contribute more than their defined contribution to make up the deficiencies.

[332] When a plan has assets which exceed its liabilities, it is said to have surplus assets. When this occurs, it is appropriate for the surplus to be taken into account in determining whether or not the employer must make contributions in order to fund the plan.

[333] When the New Plan is in a surplus position, the New Plan text and ***PBSA*** allow for a "contribution holiday" which is a reduction, in whole or in part, of the normal cost contribution MTS would otherwise be required to make in any given year. The value of a contribution holiday can never exceed MTS's annual normal costs which are in the range of $10M to $14M. MTS's exposure to funding

special payments either on a going concern or solvency basis has no such limitation.

[334] When a contribution holiday is taken, the surplus is reduced by the amount of the contribution holiday. While the taking of a contribution holiday does not actually remove money from the plan, it results in MTS not being required to pay its normal cost that year.

[335] The ***ITA*** prohibits employers from contributing excess amounts into a pension plan as a way to shelter income from tax. At any given time, there is a maximum amount of surplus that can remain in a pension plan. Frequently, contribution holidays are taken so as to reduce the amount of surplus in a pension plan to avoid violating ***ITA's*** surplus rules.

[336] As a general principle, it can be said contribution holidays ease the funding burden on an employer during good economic times to offset significant funding costs in less favourable economic times.

[337] The initial surplus transferred into the new account resulted in an actuarial surplus which enabled MTS to take contribution holidays for several years immediately following the plan implementation. In the minds of the employees/retirees, that was in contravention of MTS's express undertaking not to use that surplus to reduce its cost or share of contributions to the New Plan.

[338] MTS points to the fact that in the years following privatization and the implementation of the New Plan, they have paid far more by way of normal costs and special payments than the combined contributions of the employees even

taking into account the initial surplus. In fact, both sides have presented evidence as to what has occurred financially both in the Old Plan and in the New Plan since January 1, 1997. While that information is of interest, it hardly bears on the issues which this court has been asked to resolve, and in particular, the issue of whether or not MTS was entitled to utilize the actuarial surplus in the New Plan which included the initial surplus to take contribution holidays without the express authority or even knowledge of the employees/retirees.

[339] There is no question but that the ***PBSA*** and the New Plan text both permit the taking of contribution holidays when the financial circumstances warrant. That is a non-issue.

[340] MTS refutes any obligation on its part to have matched or pre-funded the New Plan on a 50/50 basis and says that concept is not in accord with a defined benefit plan. That argument would be more persuasive where the defined benefit plan is one that is newly created.

[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.

K. EVIDENCE

1. Agreed Documents

[342] The parties tendered 1,302 documents contained in 20 large three-ring binders. The majority were multi-paged. They were tendered by consent subject to the following proviso:

...

> *The parties agree to the admission into evidence of the 1302 documents by consent. It is agreed amongst the parties that by consenting to the admission of the documents in such manner, none of the parties are to be considered as having accepted the truth of the contents of all of the documents and all parties reserve their rights to challenge what is stated in the documents, lead further evidence which may or may not be inconsistent with the documents and argue as to the interpretation, relevancy and weight to be given to the documents.*

[343] An additional 51 documents were filed as exhibits during the trial with another four filed for purposes of identification only. The evidence was presented over a 13-week period.

2. Witnesses

[344] Other than Fox, Singleton, Levy and FitzGerald, all of whose evidence will be assessed under separate headings, a total of 13 witnesses testified.

[345] Plaintiffs called a total of eight witnesses.

[346] The first and longest in duration was Restall, a retired employee of MTS whose involvement included membership on the Liaison Committee, Chairmanship of the EPC, and membership in the Pension Committee. He was a

plaintiff on his own behalf and also on behalf of certain retired employees or widows/widowers thereof of MTS.

[347] Raymond Erb (Erb), also retired, was a former member of MGEU, now known as Manitoba Government and General Employees Union (MGGEU). He also served on the Liaison Committee, on the CSSF Board with time served on the Investment, Compensation, Finance and Audit Committees of that Board.

[348] Trach was a plaintiff on his own behalf and also on behalf of all unionized employees of MTS which unions included TEAM, IBW and CEP. He was an employee of MTS from 1970 to January 1, 2007. During the 1980's, he was an alternate member on the Liaison Committee.

[349] Praznik was the only member of the Government called to testify. During his time as an MLA, he served as Minister of Labour which portfolio included responsibility for the ***CSSA*** and the ***PBA***. While he no longer held that portfolio in 1996, as Deputy House Leader, he was asked by the Premier to involve himself in the discussions between the employees/retirees and MTS in order to facilitate an agreement so that the ***Reorg Act*** could be passed and the New Plan implemented. He attended both the afternoon and evening meetings on November 7, 1996. His was the only evidence to provide a Government perspective of the events which were occurring at the time.

[350] Corp was an actuary with the firm of Eckler Partners Ltd. during the time of privatization. He had familiarity with pension plans and with the Old Plan in particular. He was retained by CEP and provided them with actuarial advice

during the privatization process. As such, he had direct involvement with the people involved in that process.

[351] Ellement is a principal actuary in his own firm Ellement & Ellement Ltd., Consulting Actuaries. He began his actuarial career with Turnbull and Turnbull in 1974 and remained with them until mid-1996. His work was largely in the area of pensions including extensive involvement with the CSSF from 1976. He was retained by ERPC to provide actuarial consulting advice regarding privatization.

[352] Johnson is a former Assistant Provincial Auditor. He occupied that position during privatization and testified about his role in that process.

[353] Paterson is a former Audit Principal in the Provincial Auditor's office and held that position during privatization. He described his role in the privatization process including his interaction with Fox.

[354] Defendants' first witness was McInnes. As of April 2002, she became Vice-President and Treasurer of Manitoba Telecom Services Inc. and her duties included responsibility for the MTS pension plan. Between 1994 and 2002, she was Manager of Corporate Investments at which time she was responsible for the MTS Pension Reserve as well as some aspects of accounting with respect to the pensions. She is a member of the Pension Committee, a member of the Investment Committee and is the administrator for the pension plan since becoming Treasurer in 2002 succeeding Solman in that role. She was fully involved in the development of the New Plan text and the entire privatization process.

[355] Following McInnes was Fraser who was the President and Chief Executive Officer (CEO) between 1994 and 2006. While he was not as intimately involved with the development of the plan text as were McInnes and others, he had overall control of that process by virtue of his position.

[356] Next was Williams, an actuary currently involved with PBI Actuarial Consultants. During the 1980's and 1990's he was with Turnbull and Turnbull and Towers Perrin and between 1996 and 2003 with Buck Consultants. During the course of his career as an actuary, he had experience with pension plans including the Old Plan. He was retained by MTS in May of 1996 to assist in the development of the New Plan text and in that capacity was closely involved with the MTS staff in the summer and fall of 1996. He also provided actuarial advice and performed actuarial valuations for the New Plan.

[357] Following Williams was Barker, a chartered accountant, who became Treasurer of MTS in 1987. She became Vice-President of Finance in 1994 and remained in that position until becoming Chief Financial Officer (CFO) in 2001. She was also involved in the development of the New Plan.

[358] Solman followed Barker as the defendants' next witness. Between 1995 and 2002, she was Treasurer with MTS. She worked closely with McInnes on the Pension Reserve, privatization and management of the New Plan. After privatization, as the MTS Treasurer, she was the administrator of the New Plan and oversaw its management. She was also a member of the Pension and

Investment Committees and presented recommendations to the Audit Committee for their approval.

[359] The nature and length of these proceedings prohibits the summarizing of evidence of each witness individually. Throughout this judgment, reference has been made to the testimony of many of the witnesses as it applied to a specific area of concern. Except where specifically called into question, the evidence of all of the aforementioned witnesses was, by and large, presented fairly and credibly considering the time that has elapsed since privatization and the perspective of the side for whom they were testifying. With those qualifications, I concluded that the aforementioned witnesses all attempted to present their evidence in a reasonably objective manner and to it I attached general credibility.

3. Fox and Singleton

[360] Both Fox and Singleton, who have previously been identified and whose significant roles in the privatization process have been described, were both declared adverse witnesses on application by plaintiffs' counsel. As such, they were deemed to have not been called by either party and were subject to cross-examination by counsel for both sides.

[361] I was unable to extend the same findings of credibility to the evidence of Fox and Singleton as I was to all other witnesses. Throughout this judgment, I have directed criticism at both relative to the manner in which they conducted themselves during the privatization process. In testifying at trial, I found them

to be less than forthright in many critical areas of their testimony. In other situations they, and particularly Singleton, sought refuge in what he claimed to be an inability to recall.

[362] Each played a vital role in the privatization process. To a large extent, the manner in which they conducted themselves during that process led to many of the issues presently before the court. I found their evidence on those issues to be unsatisfactory and when in conflict with the testimony of others, I preferred the latter.

4. Experts' Evidence

[363] Each side retained the services of an actuary to provide an opinion whether the pension benefits under the New Plan were equivalent in value to those benefits provided by the Old Plan. Neither side contested the qualifications of the opposition's expert and for good reason. Both are eminently qualified to provide expert evidence on the topic of pension plans. Each of the experts admitted that the opinion which Fox had been asked to provide was not so much an actuarial opinion as one based on the interpretation of the phrase "benefits equivalent in value".

(a) Levy

[364] Levy was retained by the plaintiffs to assess Fox's methodology and opinion respecting MTS's compliance with the actuarial requirements of the ***Reorg Act*** and secondly, but more importantly, to provide his opinion on the issue of equivalency of benefits between the two plans.

[365] Levy authored two reports, the first dated December 9, 2004 (Exhibit 40) and the second dated June 24, 2008 (Exhibit 41). The latter was in response to the "Report on Manitoba Telecom Services Inc. Pension Matter" dated December 28, 2007, prepared by Brian A.P. FitzGerald (FitzGerald), the defendants' actuarial expert.

[366] Levy concluded that both Fox's methodology and conclusion were flawed for a variety of reasons.

[367] According to Levy, Fox's opinion of equivalency was based on three assumptions, the most relevant of which was that the New Plan would show an unfunded liability and that the employer normal costs would be greater than the employee contributions. Fox believed those assumptions would be supported by an actuarial valuation report of the New Plan as of January 1, 1997 which was in the process of being prepared by Williams, MTS's consultant. Levy pointed out that Fox did not review the actuarial report prior to rendering his opinion. (It is to be recalled that same was not provided to Fox by MTS.) Levy pointed out that had Fox reviewed the actuarial valuation, he would have been aware it was prepared to determine the funded status of the plan as of January 1, 2007 and the contribution which MTS and its subsidiaries would be required to pay at the plan's inception rather than for the purpose of determining equivalence in value.

[368] The actuarial valuation disclosed an unfunded liability of $7M only because an actuarial rather than market valuation was used to value the assets. Had a market valuation of assets been used, Levy said there would have been a surplus

of $56M which would clearly have invalidated one of Fox's assumptions rendering invalid his opinion that the plans were equivalent in value.

[369] Levy went further and said that even if Fox knew the unfunded liability had been created by the actuarial valuation and found that to be acceptable, he failed to consider that the unfunded liability would not be funded by MTS but rather would be funded by assets already in the plan with $56M to spare. Levy pointed out that the interest alone from that $56M excess would have easily covered the difference between the employer and employee share of normal cost. That being the case, Fox's assumption of the employer assuming a greater share of the normal cost was also incorrect.

[370] On the basis of the $56M surplus as calculated by Levy, he concluded that ongoing surpluses in the New Plan were more likely than unfunded liabilities. Therefore, MTS's argument that the plan was designed so as to enable MTS to reap all of the benefits of favourable experiences since it would be required to bear all of the risks of unfavourable experiences was flawed. Fox took into consideration the fact that the employer's greater than equal contribution of future costs made the plan more beneficial to the employees/retirees. However, in making that assumption, he failed to consider that there was unequal funding at the outset. In other words, without having taken into consideration the employees' greater initial contribution, he ought not to have taken into consideration the employer's greater than equal contribution of future costs.

[371] Levy was also critical of the placement of the initial surplus into the COLA account. The purported purpose was to bring the COLA account closer to reaching the 20 year pre-funding requirement so that COLA benefits of greater than two-thirds of CPI could be paid. However, the COLA account was created in a manner such that there was virtually no likelihood of it ever reaching the 20 year pre-funding status. As the COLA account was a notional account and the $49M was actually deposited into the plan trust account, it resulted in MTS being able to take contribution holidays for several years following the inception of the plan. Levy concluded that the initial surplus was utilized by MTS to take their contribution holidays. I agree with that conclusion.

[372] Levy observed a fundamental difference between the COLA accounts in the Old and New Plans. Under the Old Plan, employees had the opportunity of transferring surpluses from the main Fund into the Adjustment Account to finance payment of COLA increases equal to two-thirds of CPI or more. Additionally, that surplus could be used for other pension benefits if the employees so wished and if agreement could be reached with the Advisory Committee. During privatization, both the Government and MTS assured the employees/retirees that the initial surplus would not be used to reduce MTS's share of funding obligations. MTS placed a different interpretation on that undertaking and utilized that surplus to take contribution holidays.

[373] Levy went further and said that because both employer and employee contributions were comingled, it would be impossible for the employees to utilize

any surplus arising from their contributions alone either to increase COLA benefits or to enhance other plan benefits. As such, Levy concluded the operation of the new COLA account was less beneficial to the employees than was the operation of the Adjustment Account under the Old Plan. According to Levy, had Fox taken that into consideration, he would have concluded the plans were not equivalent in value.

[374] Levy's final criticism of Fox's methodology and opinion was that it did not consider issues of governance, indexing, benefit guarantees, the process for changing employee contribution rates and benefit entitlements, management of investment plan assets and plan administration, all of which he considered to be plan benefits.

[375] Levy concluded that Fox's methodology was flawed and that his opinion that the benefits under the two plans were equivalent in value cannot stand.

[376] Levy then went on to describe the methodology he would have used. Generally speaking, he presented a model for the New Plan which he said replicated the Old Plan and which could have been implemented.

[377] Levy's second report dated June 24, 2008 was essentially a critique of FitzGerald's December 28, 2007 report which concluded that Fox's opinion was correct. I will discuss and critique FitzGerald's reports under a separate heading.

[378] Levy testified for two days in direct and cross-examination during which time he explained and/or expanded some of his conclusions and the facts upon which they were based.

[379] Regarding the amounts of $49M and $43.343M, both of which have been referred to as the initial surplus, he explained that the $43.343M represented the difference between the initial employer and employee contributions into the New Plan. The $49M amount represented the difference between the amount transferred by the employees and their 50% of the actuarial liability as of the date of inception of the New Plan.

[380] Levy expressed his own view as to the meaning of the phrase "equivalency in value". It differed from Fox's definition which related to the comparison between the payments the retired employees actually received under the Old Plan and what they were expected to receive under the New Plan. That, according to Levy, was a restricted definition. His own definition of equivalence in value meant that the New Plan *"either had to precisely replicate all aspects of CSSF or there could be tradeoffs, but if there were tradeoffs, the pluses and minuses had to be offset. It had to be worth the same amount."*

[381] Levy opted for the broader definition of equivalence in value while FitzGerald, in his report, opted for the more restricted definition. FitzGerald did say that even under the broader definition, his conclusion was that benefits under both plans were equivalent in value.

[382] Levy was critical of Fox's acceptance, without analysis, of Williams' evaluation, especially in light of the fact that Williams was MTS's consultant during the privatization process. In fairness, he was not accusing Williams of any impropriety in his method of valuing assets. While he disagreed with that

methodology and did not consider it to be an acceptable method in these unique circumstances, his point was that Fox should have inquired as to how Williams arrived at those numbers rather than simply accepting them at face value.

[383] Both Levy and FitzGerald made reference to the technique of "smoothing" or "smoothed valued" in their reports and in their testimony. FitzGerald described that technique as follows in paragraph 55 of his December 28, 2007 report (Exhibit 42):

> 55. ... The market value of an asset is the price it changed hands at when a sale took place on a certain day. In fact, assets are bought and sold at different prices during a day of trading and the value that we refer to as the market value is the price at which the last trade of the day took place. If there is no trade there is no market value and even if there is a trade on one day there is no guarantee that the price will be the same on the next day. When valuing the assets of a pension plan we are concerned with assets which have not been sold but that will be held for some time into the future. If prices progressed smoothly from day to day then market values, i. e. yesterday's prices would be a good proxy for today's value. But unfortunately they do not. They fluctuate from day to day, sometimes wildly. And when they are fluctuating we are never sure whether they are in the middle of the range of fluctuation, at the top, or at the bottom. Smoothing techniques combine values from more than one day to determine a value between the two extremes and therefore better predicting the direction of future values.

[384] In explaining his disagreement with the use of a smooth value in determining the value of the assets for the purpose of funding in the initial audit, Levy described it as a biased high-cost value. He considered it to be a means by MTS to achieve two different ends, namely, smoothing out their cash contribution requirements and secondly, enabling MTS to legitimately take a tax deduction for the entire amount that was transferred into the New Plan from the Pension Reserve.

[385] Levy considered it appropriate to use a broader definition of the term "benefits" which included governance, use of surplus and funding. In his opinion, the New Plan was inferior to the Old in all of those categories.

[386] Levy also concluded the COLA guarantee under the New Plan was not an improvement under the Old. His rationale was that surplus could be and was transferred into the COLA account in the Old Plan from time to time to ensure the COLA benefit was always two-thirds of CPI. He considered the guaranteed cap of 4% of inflation under the New Plan to be a negative. As well, Levy observed that the cap combined with the method of valuing assets initially which permitted MTS to use the entire Pension Reserve as a tax write-off resulted in a saving of $40M in taxes in 1997 alone and other significant amounts up to and including the year 2000. The total tax saving was estimated to be in the range of $160M. That tax saving created a significant benefit to MTS stockholders.

[387] Levy agreed that actuaries could honestly hold different opinions on issues and particularly so in respect of choices of assumptions and methods. He also acknowledged it was possible for two actuaries to legitimately arrive at different results looking at the same issues.

[388] As stated earlier, Levy presented an alternative model for the New Plan which he maintained would have more closely mirrored the operation of the Old Plan. It was possible, he said, to monitor employee contributions and thus determine employee surpluses by use of notional accounts. However, he admitted that would also mean that if the employees' share fell into a deficit

position, they would be required to make up that deficit by way of increased contributions or decreased benefits. He acknowledged that was not the case in the New Plan where MTS was solely responsible for all unfunded liabilities and that the employees had no responsibility other than the fixed payments they were required to make which were identical to those under the Old Plan.

(b) FitzGerald

[389] Defendants' expert FitzGerald provided three reports, the first dated December 28, 2007 (Exhibit 42), the second dated January 7, 2008 (Exhibit 43) and the last dated July 31, 2008 (Exhibit 44). The first report provided FitzGerald's opinion, the second provided some clarification of the first and as well included some additional information, and the last was a critique of Levy's initial report.

[390] In his retainer by MTS, FitzGerald was asked to respond to the following questions:

(i) Did Fox have a reasonable basis on which to conclude that the benefits provided under the new MTS plan were at least equivalent in value to the benefits provided under the ***CSSA***?

(ii) Could the new MTS plan be administered in accordance with the plaintiffs' position having regard to the requirements of OSFI, the ***ITA*** and the general actuarial principles?

[391] In considering the first question, FitzGerald perceived three ways in which it could be answered, depending on the application of different interpretations of the phrase "equivalent in value".

[392] His first definition of equivalent in value required that benefits payable on retirement, death or other termination of employment were in the same amounts in each plan or if they were not individually identical, that they had the same value in aggregate.

[393] As has been previously observed, this was never a concern of the employees/retirees. They always acknowledged that the benefits payable on retirement, death or other termination of employment were the same under each plan.

[394] According to FitzGerald, Fox needed to look no further than whether the benefits payable under each of the two plans were identical and having done that and concluded that they were, he would have fulfilled his function.

[395] However, Fox went further and considered whether the benefits had the same value in aggregate. FitzGerald concluded that since the benefits in the two plans were equal, and the employees were not contributing more for those benefits than they had under the Old Plan, the value of the benefits had to be at least as good. This conclusion was based on the assumption that issues of security, governance and surplus were left out of the equation.

[396] Supporting his conclusion of equivalence in value, FitzGerald cited a number of improvements under the New Plan including the COLA guarantee,

contributions including those made prior to 1984 being credited with market-related interest rates and the funding requirement of MTS under the ***PBSA***.

[397] FitzGerald disagreed with Levy's argument regarding the use of the smoothing technique in valuing the initial assets. He maintained that the smoothing technique was appropriate because the MTS plan was a successor plan with a history of asset values from which a smoothed value could be derived. In contrast, a new plan starting from scratch has neither assets nor a cash transfer from a previous plan sponsor. Under those circumstances, according to FitzGerald, there is no investment history to rely upon to derive an actuarial value. Here, as a substantial part of the opening assets came from the MTS Pension Reserve, FitzGerald deemed the smoothing technique to be appropriate. In my opinion, FitzGerald needed to take into account the fact that the greater portion of assets being transferred to the New Plan, i.e. the employees' portion, had always been valued under the Old Plan using market valuation.

[398] FitzGerald also concluded it was not necessary for MTS to top up its share of assets by $43.343M or $49M, depending on which definition of initial surplus was used, by way of an equalization payment. Under the Old Plan, MTS was required to make pay-as-you-go payments rather than matching contributions. That being the case, FitzGerald concluded there would be no reason for MTS to even up the contributions going into the New Plan. The rigidity of FitzGerald's opinion was evidenced by his refusal to acknowledge the existence of an initial

surplus and that it was made up of surplus employee contributions under the Old Plan, a fact which he reluctantly conceded under cross-examination.

[399] The second definition of equivalent in value considered by FitzGerald was one that included an assumption that security and governance conditions were essentially the same in both plans.

[400] On the issue of security, after attempting to weigh the risks of a public sector as opposed to a private sector plan, FitzGerald could only say it was not possible to determine with certainty whether the security of the promised pension benefits had increased or decreased in the New Plan.

[401] On the issue of governance, FitzGerald correctly observed that the CSSF Board under the Old Plan had no power to amend the ***CSSA*** and that only the Legislature could do so. He also properly understood the functions of the Advisory and Liaison Committees as being to provide proposals for changes such as benefit improvements. Ultimately, those changes required amendment to the ***CSSA*** which could only be achieved by a change in the existing legislation. The New Plan governance document provided for a Pension Committee which acted as an advisory committee to the Board of Commissioners. As with the Advisory and Liaison Committees, it had no decision-making powers. Those were within the exclusive jurisdiction of the Board of Commissioners.

[402] Using those comparisons, FitzGerald opined there to be equality between the two plans in the area of governance.

[403] FitzGerald's third definition of equivalence in value added the issue of access to surplus. If it remained consistent between the two plans, a definition of equivalence in value would be met.

[404] FitzGerald quickly answered this question by saying he found no evidence of employee surplus nor did he find any provision under the ***CSSA*** for control of any such surplus. Moving from that position, he grudgingly admitted the existence of employee surplus under the Old Plan. However, he emphasized that employees had no control over that surplus but merely had an opportunity under the Old Plan to make proposals regarding its use.

[405] Finally, as to the reference to employee surplus in the November 6, 1996 memo, FitzGerald understood its meaning to be that MTS intended to transfer the entire Pension Reserve to the New Plan. As that was accomplished, he concluded that MTS lived up to its undertaking that surplus and employee contributions would not be used to reduce MTS's cost or share of contributions to the New Plan. FitzGerald admitted that definition was not his own but rather was imparted to him by counsel for MTS. Mention of that fact is not intended to direct any criticism towards counsel for MTS but to simply to show that the interpretation FitzGerald used was not his own but was one that has been advanced by MTS since the inception of this litigation.

[406] The second question FitzGerald was asked to address was whether the New Plan could be administered in accordance with the plaintiffs' position (i.e.

Levy's proposals) having regard to the requirements of OSFI, the ***ITA*** and general actuarial principles.

[407] This question related exclusively to the application of the $43.343M additional surplus and whether it could be included in the determination of the unfunded liability under the New Plan. It also raised the question of whether the fact that MTS had agreed to allocate that amount to the COLA account under the New Plan amounted to double counting.

[408] Pursuant to the relevant legislation, FitzGerald pointed out MTS had no choice but to place the $43.343M into the plan trust fund as the COLA account was notional.

[409] FitzGerald also observed that Levy's proposed model assumed the Old Plan worked on a matched contribution basis. In fact, for the most part, the MTS contributions were pay-as-you-go. What Levy described as an excess of employee contributions over employer contributions at any time, i.e. employee surplus, in fact simply represented a difference in timing as to when either side made its payments.

[410] FitzGerald concluded that the New Plan could not be administered as proposed by Levy.

[411] At trial, FitzGerald made the following comment which underlines why the opinions of experts such as himself and Levy cannot be taken as being determinative of the issue in question:

> ... the value test that was used, measuring the unfunded liability, was based on two calculations. On the one hand, what is the actuarial liability

> and on the other hand, what is the value of the assets? And the reason that I would be concerned about that is, is there is more than one answer for both of those numbers and when you put the answers together the differential varies. So you could have a finding by one actuary that there was equivalence and by another that there was not, simply because there is a range of acceptable ways of calculating those liabilities and assets. [Emphasis added.]

[412] Applying that observation to Fox's analysis, FitzGerald stated:

> ... Fox looked at the valuation that was done at the time and came to the conclusion that there was an unfunded liability. Another actuary, having done that -- if another actuary had done that valuation, it would not have been unreasonable for him to come up with a different answer, which might have been that there was no unfunded liability.

[413] Levy also made similar comments. The fact is, within accepted actuarial principles, various methods and techniques can be applied resulting in different results. To some extent, the ultimate goal which a party seeks to achieve determines the techniques and assumptions utilized by the actuary.

[414] When one understands that the function of the actuary is measuring events which will happen in the future, it explains the need to make assumptions and to apply varying techniques and interest rates so long as they are within the parameters of acceptable actuarial practice.

[415] On the question of whether or not MTS should have been required to match the employee initial contribution into the New Plan, FitzGerald's response was that he did not see any such requirement under the ***CSSA*** and to impose that obligation on MTS would amount to a change. FitzGerald's thought process in arriving at that conclusion ignores the fact that employee contributions were accounted for separately in the Old Plan and thus the surplus created by their contributions was readily identifiable. He was most reluctant to concede that

point until well into his cross-examination. As was pointed out by Levy, the employee payment into the New Plan was not only greater than that of the employer, but it also covered the employees' 50% share of its liabilities, and inevitably meant that the parties were not starting off on an equal footing. That was recognized by all of the players in the privatization process and it was that concern about protecting initial surplus for the exclusive use of the employees that resulted in the MOA.

[416] In reference to the issue of the 4% of CPI capped for COLA benefits under the New Plan, FitzGerald testified he was told the new COLA account was designed to reproduce the Adjustment Account in the Old Plan. He did admit to being unaware of the fact that from its inception, the design of the COLA account in the New Plan rendered it incapable of ever achieving the 20 year pre-funding status such as to enable it to grant COLA benefits greater than two-thirds of CPI. That being the case, FitzGerald admitted 4% amounted to a cap. He also admitted there was no such restriction on the Adjustment Account in the ***CSSA*** provided that it had sufficient funds to meet the 20 year pre-funding requirement. Evidence adduced revealed that the financial status of the Adjustment Account in the Old Plan is such that the 20 year pre-funding requirement is also unlikely to be met in the foreseeable future. That being the case, the only distinguishing feature between the two COLA accounts is that the COLA benefit up to 4% of CPI is guaranteed under the New Plan but is dependent on financing from the employee surplus under the Old Plan.

[417] In comparing the security offered by the respective plans, FitzGerald agreed that while legislation in a public sector plan could result in increased contributions, the Board of Commissioners was not precluded in any fashion from increasing employee contributions as well.

[418] On the issue of governance and use of surplus, FitzGerald agreed his opinion of equivalency of benefits could not stand if in fact the employees under the Old Plan had some degree of control over the use of employee surplus. That they did not was an assumption made by FitzGerald based on his understanding of the use of surplus. FitzGerald's understanding was that under the Old Plan, there had to be an agreement between the Liaison and Advisory Committees as to the use of surplus and that there were no other competing bodies that could make recommendations. The New Plan did not have the same consensus requirement between employee and employer representatives on the Pension Committee. FitzGerald also agreed that apart from the Pension Committee, the Administrator could also make recommendations regarding the use of surplus. FitzGerald said he was aware there was equal representation between employer and employees on the CSSF Board and that body determined the rate of interest to be applied to the Adjustment Account. The Board of Commissioners had no such employee representation and it was the body responsible for determining the rates of interest.

L. LAW

1. Procedural Fairness

[419] The question to be answered is whether Fox owed a duty of procedural fairness to the plaintiffs and if so, at what level?

(a) Did Fox owe plaintiffs a duty to act fairly?

[420] Fox's mandate was statutorily created by s. 15(3) of the ***Reorg Act*** which provides:

> **Independent actuary to review plan**
> **15(3)** As soon as possible after this Act receives royal assent, the Provincial Auditor shall appoint an independent actuary to review the plan proposed by the corporation for the purposes of clause (2)(a) to determine whether the benefits under the proposed plan are equivalent in value as required by that clause.

[421] It was the Government's undertaking to the employees/retirees that they could rely upon the opinion of an independent actuary rather than upon representations made by it and MTS as to the provisions in the New Plan. For the most part, the plan text and governance provisions of the New Plan were deliberately withheld from the employees/retirees except for a two-week period in mid-November 1996 when they were given the plan text and a brief opportunity to review same. In that short time frame, the employees/retirees were not given a reasonable opportunity to discuss the more significant concerns they had raised. The Government promised those concerns would be addressed and resolved through the MOA and that in addition, as a further assurance, an independent actuary would determine whether the benefits in the two plans were equivalent in value. There was a *quid pro quo* involved in that the

Government's assurances induced the employees/retirees to permit passage of the ***Reorg Act*** and the completion of the privatization process. It was in the Government's best interest that the privatization process not be delayed and that the timetable they had set out be met. Added to the mix was the deemed consent of the employees/retirees to the termination of their participation in the Old Plan and to the assignment and transfer of assets, liabilities and agreements from it to the New Plan. Plaintiffs argued that deeming provision was tantamount to an expropriation and that the same rules of procedural fairness applied.

[422] Defendants argue the onus is on plaintiffs to establish that Fox owed a duty to the employees/retirees to act fairly in determining the question of equivalency. They must then prove he breached that duty.

[423] Both plaintiffs and defendants invite the court to consider the case of ***Cardinal v. Kent Institution***, [1985] 2 S.C.R. 643, in support of their respective positions. Specifically, they refer to the following comment of Le Dain J. at paragraph 14:

> ... This court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of the individual: ...

[424] The facts in ***Cardinal***, *supra*, are that a number of inmates who had rioted were transferred to another institution and placed in segregation on the Director's oral instructions. Notwithstanding recommendations from the Segregation Review Board that the order of segregation be lifted, the Director

continued the segregation without informing the inmates of his reasons or giving them an opportunity to be heard.

[425] Ultimately, the Supreme Court concluded that the Director's failure to afford the inmates a fair hearing on the question of whether he should act in accordance with the recommendation of the Segregation Review Board rendered their continued segregation unlawful and ordered they be released into the general population of the penitentiary.

[426] The principle to be taken from ***Cardinal*** is that there is a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. Defendants argue, *inter alia*, that none of the aforementioned criteria are present.

(i) *Was Fox a public authority?*

[427] The determination of whether or not Fox was a public authority must be made contextually. Here, the Government, attempting to assure the employees/retirees they would be treated fairly in transferring from the Old Plan to the New Plan, provided for the appointment of an independent actuary to determine the question of equivalence. The appointment was pursuant to the ***Reorg Act***. The duties he was to discharge were pursuant to that statutory provision which, in my view, establishes him as a public authority.

[428] The decision of my colleague McCawley J. in ***Bellemare v. Caisse Populaire de Saint-Boniface Ltee.*** 2001 MBQB 25, (2001), 154 Man.R. (2d) 103 (Q.B.), supports me in that conclusion.

(ii) *Was Fox's decision an administrative decision not of a legislative nature?*

[429] The second criterion was whether Fox's decision was an administrative decision not of a legislative nature.

> To be considered a "legislative" decision, the exercise of the power must generally consist of two elements: (1) generality: the power is of a general application and will not be directed at a particular individual; (2) its exercise must be based on broad public policy grounds. ...
>
> (Guy Régimbald, *Canadian Administrative Law*, 1st Ed., LexisNexis, 2008, at p. 240)

[430] Defendants refer to the decision in ***New Brunswick Broadcasting Co. Limited v. Canada Radio-Television and Telecommunications Commission*** (1984), 55 N.R. 143 (F.C.A.). It involves a Cabinet directive to an agency specifying classes of applicants to whom licences may be issued and it was found to be legislative in nature.

[431] While Fox's appointment was pursuant to the ***Reorg Act***, his decision on equivalency was to be his own and not of a legislative nature. Moreover, he was not asked to make a broad policy decision which would affect a diverse group of people with dissimilar interests. Rather, his mandate was directed at a specific group of approximately 7,000 employees/retirees of MTS whose interests were similar.

[432] As Fox's decision was not intended to have a broad application relating only to a specific group of people with a similar interest, I find it to have been an administrative decision.

(iii) *Was Fox's opinion one which affected the rights, privileges or interests of an individual?*

[433] The third element was whether Fox's opinion was one which affected the rights, privileges or interests of an individual.

[434] I find Fox's determination to have been specific in nature. While it affected a numerically large number of people, they were all of a very specific category.

[435] The importance of Fox's decision to the employees/retirees was immense. To many, if not most, their pension was extremely important in that the benefits represented their main source of income in retirement years. Employees plan for and rely upon the availability of that income in their retirement years. I therefore find Fox's decision to be one which affected the rights, privileges and interests of an identifiable group of individuals to whom his decision was of the utmost importance.

[436] All of the necessary criteria having been established, I conclude that Fox owed a duty of fairness to the plaintiffs.

(b) What level of procedural fairness was owed by Fox to the plaintiffs?

[437] Plaintiffs and defendants agree that ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, at paras. 23 to 27, sets

out five factors to be considered in determining what level of procedural fairness arises in any given case:

(a) The nature of the decision being made and the process followed making it;

(b) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(c) The importance of the decision to the individual or individuals affected;

(d) The legitimate expectations of the person challenging the decision; and

(e) The choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

(i) *The nature of the decision being made and the process followed making it*

[438] In ***Baker***, *supra*, L'Heureux-Dubé J. commented on this factor at para. 23:

> ... One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra,* at page 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of the administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. ...

[439] Admittedly, the ***Reorg Act*** did not prescribe a specific process but rather left it to the independent actuary to establish one. Nonetheless, the nature of the decision was extremely important, especially to the employees/retirees but also to MTS as the administrator of the New Plan.

[440] Ostensibly, the process established by Fox and the Provincial Auditor gave all of the interested parties an opportunity to make representations. Fox conceded he did not have a definition of "equivalent in value" at the outset, stating it was neither an actuarial term nor concept. That being the case, he instituted a process where all of the parties would be heard. Having established that process, it was imperative that all of the parties were given equal opportunities to be heard. Ultimately, that did not happen. After having received representations from both MTS and the employees/retirees, Fox met with and listened to the opinions of both Singleton and Barker. This occurred after Fox had composed his initial draft opinion concluding the two plans were not equivalent in value. The aforementioned meetings influenced him to deviate from that initial position.

[441] In establishing a process, it was incumbent upon Fox to adhere to it.

(ii) *<u>The nature of the statutory scheme and the terms of the statute pursuant to which the body operates</u>*

[442] Para. 24 of ***Baker*** explains the second factor:

> ... The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required

> when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: ...

[443] The ***Reorg Act*** provides no appeal procedure. The decision of Fox was determinative of the issue, and the parties were precluded from submitting any further information or requests. On that basis, a higher duty of fairness was owed.

(iii) The importance of the decision to the individual or individuals affected

[444] Para. 25 offers the following:

> ... The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. ...

[445] Defendants acknowledge that a person's pension impacts his or her life. They point out that the pension benefits under the New Plan were the same as they were under the old. They say Fox's decision related to issues such as ongoing surplus, funding and governance, none of which personally impacted on any individual employee/retiree.

[446] While it is true the benefits paid under both plans were identical, the use of surplus and governance impacted on the likelihood of those benefits being improved as they were from time to time under the Old Plan. Plaintiffs point to substantial increases in pension benefits under the Old Plan since privatization. As the employees/retirees benefitted from use of surplus and governance while participating in the Old Plan, it is easy to understand their interest in those issues under the New Plan, given the fact they have opportunity through representation

on the Pension Committee to propose that ongoing surplus be used to enhance pension benefits.

[447] Fox's decision was of the utmost importance to the employees/retirees as it was their only way of being assured they were not giving up any benefits by transferring to the New Plan.

(iv) *The legitimate expectations of the person challenging the decision*

[448] Defendants argue that the doctrine of legitimate expectations does not apply where a function is legislative in nature (***Aasland v. British Columbia (Ministry of Environment, Lands and Parks)*** (1999), 19 Admin. L.R. (3d) 154 (B.C.S.C.)). However, I find Fox's function was not legislative in nature.

[449] The applicability of the doctrine of legitimate expectations is stated by L'Heureux-Dubé J. in ***Baker*** at para. 26:

> ... As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: ... Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: ...

[450] The employees/retirees had a legitimate expectation that a certain procedure would be followed. It was a procedure established by Fox and Singleton. The employees/retirees could reasonably have expected to have been consulted at that stage of the process where, because of additional information received from Singleton and Barker, Fox was considering changing his opinion. Fair process cried out for the employees/retirees being given a further

opportunity to address those issues. However, not only were they not invited to make further representations, the fact of Fox's meetings with Singleton and Barker were withheld from them. The employees/retirees had every right to expect that the procedure being followed would be fair to all parties. In these circumstances, the duty of fairness was not discharged.

> *(v)* *<u>The choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances</u>*

[451] Fox had no particular expertise in determining what procedures were appropriate for the function he was required to perform. He understood, however, that he had to give an opportunity to all of the interested parties to be heard regarding their definition of equivalence in value. After his initial meetings, he understood that the employees/retirees were advocating a broader definition which included issues of funding, governance and surplus while MTS and the Provincial Auditor were proposing a narrower definition excluding those considerations.

[452] After completing the draft of his first opinion, Fox sent it to Singleton who, without Fox's knowledge or authority, forwarded it to Fraser. Noting that Fox's opinion tended to favour the employees/retirees' definition of equivalence, Singleton took it upon himself to meet with Fraser, then to meet with Fox and express his own view (and that of Fraser) and finally to permit Barker to provide

additional information. That was a marked departure from the procedure which had been initially put into place.

[453] As L'Heureux-Dubé J. stated at para. 28 in ***Baker***:

> ... Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[454] Having analyzed the aforementioned factors, I conclude Fox owed the employees/retirees a higher standard of fairness than they received. Plaintiffs have satisfied me that both the Provincial Auditor's office and MTS wrongfully interfered in the process which, in all likelihood, influenced Fox's opinion on equivalency. The reasonable expectation of the employees/retirees that the process would be fair was not met.

2. <u>Standard of Review</u>

[455] Having made a finding of procedural unfairness, the issue of standard of review becomes moot and therefore requires no further consideration.

3. <u>Available Remedies</u>

[456] As Binnie J. explained in ***C.U.P.E.***, supra, at para. 100, it is for the courts to provide the legal answer to procedural fairness questions. Similarly, in ***Moreau-Bérubé v. New Brunswick (Judicial Council)***, [2002] 1 S.C.R. 249, at para. 74, Arbour J. stated that where an application for judicial review raises

procedural fairness or natural justice issues, no assessment of the appropriate standard of review is required.

[457] It is neither necessary nor appropriate to return this matter to Fox for reconsideration. As Iacobucci J. stated in ***Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board***, [1994] 1 S.C.R. 202, at p. 228:

> In light of these comments, and in the ordinary case, Mobil Oil would be entitled to a remedy responsive to the breach of fairness or natural justice which I have described. However, in light of my disposition on the cross-appeal, the remedies sought by Mobil Oil in the appeal *per se* are impractical. While it may seem appropriate to quash the Chairman's decision on the basis that it was the product of an improper subdelegation, it would be nonsensical to do so and to compel the Board to consider now Mobil Oil's 1990 application, since the result of the cross-appeal is that the Board would be bound in law to reject that application by the decision of this Court.

[458] He went on to say at p. 229:

> Likewise, it is apt to cite *R. v. Monopolies and Mergers Commission*, [1986] 1 W.L.R. 763 (C.A.). In that case, a Chairman interpreted a statute administered by his Commission in order to determine whether a take over proposal had been abandoned. When he decided that abandonment had, in fact, occurred, he stopped a monopolies and mergers reference at the threshold stage. Upon judicial review, the Court of Appeal held that the Chairman had properly interpreted the statute, but the court also held that he had no statutory authority to act alone. Nonetheless, the discretionary remedies at the disposal of the court were withheld, at least partly because "[g]ood public administration is concerned with substance rather than form" and because the Commission "would have reached and would now reach the same conclusion as did their experienced chairman" (p. 774). Given the circumstances of this case as I have described them, this statement is accurate here, although I would reiterate its exceptional character and would not wish to apply it broadly.

[459] The above authorities satisfy me that I am not required to return this matter to Fox for reconsideration. Given the passage of time, it would be impractical to do so. Having heard the evidence, I conclude it to be in the best

interests of all concerned to substitute my decision for the opinion of Fox in relation to the following issues.

M. ISSUES

1. Opinion of Independent Actuary

    (a) Is it conclusive of the matters in issue?

2. Initial Surplus

3. MOA

1. Opinion of Independent Actuary

(a) Is it conclusive of the matters in issue?

[460] The amendment to the ***Reorg Act*** to provide for the appointment of an independent actuary whose function would be to assess both plans to determine whether the benefits in the New Plan were equivalent in value to those under the Old Plan was intended to be a security blanket for the employees/retirees. As they had no opportunity for involvement in the creation of the New Plan, the function of the independent actuary was to give them assurance that they were not giving up any benefits by transferring to the New Plan.

[461] Singleton appointed Fox without determining his background and experience in pension matters or his knowledge and familiarity with the Old Plan. He made no effort to determine whether there were other available, more experienced actuaries who might have been more suitable for the task at hand. His explanation for not doing so was that most of the actuaries were involved with the various parties in some fashion or other. However, he made no specific

inquiries nor could he identify which of the potential available actuaries were so conflicted. By way of explanation, Singleton said he had been placed under time constraints by the Government when they asked him whether his office would be prepared to make the appointment. Singleton need not have accepted the task of appointing the independent auditor if he did not feel he had the time to do so properly. The Provincial Auditor's office was under no obligation to the Government and could easily have refused the Government's request or at the very least, made sure it had sufficient time to screen potential candidates.

[462] Even more disturbing is the fact that Fox was not independent vis-à-vis the office of the Provincial Auditor. The phrase "independent actuary" in s. 15(3) of the ***Reorg Act*** implied independence from not only the interested parties but from the office of the Provincial Auditor itself. This wasn't to be the usual situation where the Provincial Auditor appointed an agent for some specific function. The importance of the independence of the actuary was to assure all parties, but particularly the employees/retirees, that every effort was being taken to ensure they would be fairly treated and that the benefits in the New Plan on the implementation date would be equivalent in value to the pension benefits which the employees/retirees enjoyed under the Old Plan. That assurance together with the precedence being given to the MOA over all other provisions in the ***Reorg Act*** was meant to persuade the employees/retirees that their interests would be protected.

[463] Fox's previous involvement with the office of the Provincial Auditor has been detailed. It is clear that from the outset, he permitted himself to be treated as an agent of the Provincial Auditor rather than as an independent actuary.

[464] Throughout the process, Fox permitted the Provincial Auditor's office to impose its will on him in relation to the manner in which meetings were set up, in relation to the selective provision of information to MTS and not to the employees/retirees, and ultimately to involving itself in the formulation of an opinion that was supposed to have been within Fox's exclusive province. While Fox maintained his final opinion on equivalence was his and his alone, there is evidence which supports a finding that he was influenced to alter his final opinion by both the Provincial Auditor's office and MTS.

[465] Ultimately, the independence of the independent actuary was compromised to an extent that his final opinion on equivalence has to be set aside. To do otherwise would be to perpetrate an injustice upon the employees/retirees.

2. Initial Surplus

(a) Were there any undertakings by MTS and/or the Government regarding the use of the initial surplus in the New Plan?

[466] Because of the unique nature of the Old Plan, assets were a direct result of employee contributions and thus surpluses were readily identifiable. I am satisfied on the evidence that entitlement to the utilization of that surplus was never in issue. There was often disagreement on how the surplus would be used

but ultimately the controversy was resolved and the surplus was either paid into the Adjustment Account to increase COLA benefits or utilized for other benefit improvements.

[467] In 1996, when the process of privatization began, both MTS and the Government understood there would be an employee surplus transferred into the New Plan. The amount of that surplus had not yet been determined but the parties were aware it would be significant. As the employees/retirees became aware of plans for privatization, they also became concerned about how the initial surplus would be utilized and by whom. They wanted to ensure that, as in the past, they would be able to utilize it for the benefit of retirees, both present and future. They were very concerned that MTS not have the opportunity to utilize those funds to reduce its share of cost or contributions after privatization.

[468] As the Government had set its own timeline for implementation of the New Plan, that being the fall session of the Legislature in 1996, it had committed to privatization. As well, MTS had issued a share prospectus. Adherence to that timeline was therefore important.

[469] Privatization was the initiative of the Government and not of the employees who were being compelled by legislation to leave the Old Plan with which they were quite comfortable and to go into the unchartered waters of a New Plan. The Government and MTS were aware the employees/retirees would raise concerns, among them being the use of initial surplus.

[470] A group of employees/retirees organized themselves into ERPC. CEP also made known its concerns through its actuary Corp. Almost immediately, the issue of use of initial surplus was raised specifically in the following questions posed by Beatty in a letter to Fraser on August 6, 1996 (Agreed Document 299):

> b) Will the employees['] "surplus portion" of the transfer amount be used to enhance the employees['] share of the benefit improvements?

and

> c) Will the employees['] "surplus portion" of the transfer amount be used to reduce the employer's cost to the plan?

[471] In response to those questions, Fraser responded in a letter dated August 27, 1996 (Agreed Document 313) with the following undertaking:

> ... However, this surplus will not be used to reduce the employer's cost of, and share of contributions to, the new pension plan.

[472] At trial, MTS through its various witnesses attributed a meaning to that phrase which I am not prepared to accept. The meaning advanced was that MTS would transfer the entire Pension Reserve into the New Plan and not reduce that amount because of the initial surplus.

[473] The following testimony by Praznik supports my conclusion that both the Government and MTS understood the initial surplus was to be used solely to enhance employee benefits even though the logistics of how that was to occur had not yet been resolved:

> The principle that was discussed at the time was to protect the money, that it wasn't to be used for the purposes of MTS' employer, it was to be protected for the employees. And how that was given life in the detail of the plan thereafter is for both those parties to work out. But the principle, the principle that the agreement, my understanding was to

> enshrine that that money was protected in a way, it was surplus paid in by pensioners, being transferred to the new plan and it was for their benefit. It was their money and it needed to be protected.

[474] On November 1, 1996, a petition was presented to the Legislature with approximately 1,525 signatures from plan members demanding that the initial surplus be used exclusively to provide or enhance employee benefits under the New Plan and as well, that the New Plan "mirror" or "look alike" the Old Plan. Obviously, the number of signators to the petition troubled the Government and raised concerns about its ability to pass the ***Reorg Act*** as envisaged. Findlay requested an update from Fraser as to the concerns of the employees/retirees and how those concerns might be addressed. In his November 6, 1996 memorandum (Agreed Document 434), Fraser made the following representations on behalf of MTS regarding the use of the initial surplus:

> **Potential Surplus of Contributions to the Civil Service Superannuation Fund**
>
> Pensioners have expressed concerns that the anticipated surplus in employee contributions to the Civil Service Superannuation Fund (CSSF) may be used to finance MTS' share of funding obligations.
>
> MTS has undertaken that any such surplus will not be used to reduce MTS's cost or share of contributions to the new pension plan. This information was communicated by letter to Mr. Brian Meronek on October 23, 1996.

[475] Throughout the implementation and in particular, prior to the MOA, employees/retirees were literally kept in the dark about the New Plan other than receiving general information which MTS chose to provide through information bulletins or information sessions.

[476] Praznik made the following comments as to the concern of the Government at this time:

> And around this time, the Premier, in my capacity as Deputy House Leader, asked me to play a role to try to broker-negotiate-facilitate an agreement with the pension unions and pensioners that would satisfy their concerns, resulting in necessary amendments to satisfy their concerns that would have - - allow the bill then to proceed without these being issues attached to the bill.

[477] The meeting at noon on November 7, 1996 involving Benson, Fraser, Solman, T. Stefanson, Findlay, Yaffe and Praznik was called to discuss the contentious issues being raised by the employees/retirees. According to Praznik, one of the key concerns was that the initial surplus not be used to reduce MTS's share of funding obligations.

[478] Praznik testified it was not his Government's intention to use the initial surplus for the privatized MTS in any way.

[479] As to the meaning of *"any such surplus will not be used to reduce MTS's costs or share of contributions to the new pension plan"*, Praznik testified he understood it to mean that MTS would not use any of the initial surplus in any way for their benefit or for the benefit of the shareholders of the new company. Praznik also testified no one at the meeting disagreed with that point of view. Finally, Praznik also confirmed the aforementioned words had no connection with the fact the Pension Reserve was being transferred into the New Plan in its entirety.

[480] Clearly, the intention of MTS and the Government was to ensure the employees/retirees that their concerns were being addressed so that the ***Reorg Act*** would be passed in accordance with the Government's timetable.

[481] Defendants argue that at the very least, there was confusion as to the meaning of the representation relating to the use of initial surplus and accordingly, there was no *consensus ad idem* on that issue. I cannot accept that argument in light of Praznik's evidence. While defendants attempted to discredit him as being uninvolved and uninformed, there is no dispute over the fact that he was requested by the Premier to facilitate an agreement between MTS and the employees/retirees. He attended the meeting at noon on November 7, 1996. Defendants failed to call anyone who attended that meeting to rebut that aspect of Praznik's evidence.

[482] Finally, the evidence of the employees/retirees on that point was also clear and consistent at least from the aspect of their concern about utilization of the initial surplus and their understanding of the representations made by MTS in that regard.

[483] I therefore conclude the initial surplus was intended to be used solely for the purpose of enhancing pension benefits as it had under the Old Plan. It was not to be used to reduce MTS's cost of or share of contributions to the New Plan either at the time of transfer or in the future. Even though the employees/retirees agreed the initial surplus could be transferred to the COLA account in the New Plan, they were entitled to have those funds used to enhance

employee benefits. They were not aware nor did they agree to the initial surplus being used to increase the value of the COLA account so as to bring it closer to the 20 year pre-funding requirement as that concept was never discussed. Ultimately, the initial surplus resulted in a financial status for the New Plan which enabled MTS to take contribution holidays for several years after the plan's inception. That was precisely what they and the Government agreed not to do and what they told the employees/retirees would not happen.

3. MOA

(a) Has there been compliance with the MOA?

[484] Prior to the parties entering into the MOA, there were several financial issues which had already been addressed. Generally speaking, that portion of the assets from the Old Plan attributable to MTS employees was to be transferred in total into the New Plan. It was also understood the assets so transferred would exceed the employees/retirees proportionate share of liability and as such, there would be an initial surplus, the amount of which was yet to be determined. Finally, it was agreed the entire Pension Reserve would be transferred into the New Plan. Whether or not those transfers of assets from the Old Plan would result in a fully-funded New Plan was yet to be determined.

[485] To say that the MOA was hastily negotiated would be an understatement. The Government was apparently not aware all outstanding issues had not yet been resolved as late as the morning of November 7, 1996. In an "11^{th} hour"

attempt to resolve those issues, a meeting was convened in the early evening of November 7, 1996.

[486] The outstanding issues which were of greatest concern to the employees/retirees were use of initial and ongoing surplus and governance. The MOA also dealt with other issues such as a review process for the transfer of assets from the old to the New Plans, employee/retiree opportunity to review and propose amendments to the draft pension plan text and resolution of disputes relating to the agreement.

[487] The employees/retirees were at a serious disadvantage going into the meeting. While they had made their concerns known to both MTS and the Government on various occasions, they still had not been provided with a copy of the draft plan text or the draft governance summary. They were unfamiliar with how the plan was to be administered and as a result, were somewhat at the mercy of MTS and Government officials. While their ability to propose more comprehensive changes was thereby limited, their identification of the issues most important to them was not.

[488] On November 8, 1996, the ***Reorg Act*** was amended by the addition of s. 15(11) which provided that nothing in s. 15 was to be interpreted as nullifying the effect of the MOA.

[489] The inclusion of that clause underlines the importance of the MOA and the commitment by both MTS and the Government to its provisions.

[490] Plaintiffs argue there has been non-compliance with the MOA on the following issues:

(i) governance,

(ii) initial surplus,

(iii) ongoing surplus.

(i) *Governance*

[491] Plaintiffs say that while they have no dispute with the makeup of the Pension Committee, its purpose and function is not as represented in Fraser's 1996 memorandum to Findlay.

[492] Plaintiffs argue they were misled into believing they would have equal representation on the body which ultimately administered the New Plan. They point to Fraser's November 6, 1996 memo as confirmation of that undertaking. However, the plaintiffs were aware prior to November 6, 1996 that the ***PBSA*** required the employer to be the plan administrator. While it is true there was employee representation on the CSSF Board, the focus throughout the trial was on the function of the Liaison Committee and its opportunity to determine the use of employee surplus by negotiation with the Advisory Committee. I am satisfied the employees/retirees were expecting the same opportunity to deal with surplus under the New Plan and that representation on the Board of Commissioners was less of an issue.

[493] The employees/retirees were given the representation on the Pension Committee as set out in paragraph 1 of the MOA. They expressed no

displeasure with the independence or qualifications of the individual appointed Chairperson of that Committee.

[494] From the outset, MTS made clear its position of refusing to give up control over the use of ongoing surplus. Time and time again, they emphasized that since there were no limitations on their liability to fund the New Plan, they were entitled to control the use of ongoing surplus. For the most part, all parties seem to agree that was not an unreasonable or unrealistic position to be taking. Nonetheless, the plaintiffs have maintained their right to determine use of their portion of the ongoing surplus in the New Plan.

[495] My interpretation of the MOA, does not support plaintiffs' argument regarding the use of ongoing surplus. Paragraph 3 does not address who determines how the surplus in the COLA account is to be used but merely states that it can be used to increase pension benefits provided the liability for the pension plan in total does not increase as a result of that change in benefits.

[496] The employees/retirees have equal representation on the Pension Committee. As such, they have the opportunity to make recommendations relating to use of ongoing surplus. To date, the Pension Committee has not seen fit not to entertain any such proposals or to put them forward as recommendations. That does not mean it will not happen in the future.

[497] Under the Old Plan, it often took years of negotiation before the Liaison Committee had its recommendations accepted by the Advisory Committee and then implemented by way of amendment to the ***CSSA***. However, the essential

difference was that any surplus that was created was a result of employee contributions only. Here, any surpluses that may arise are the result of contributions from both employee and employer. Plaintiffs have advocated that the respective contributions of employees and employers should be tracked separately so that the employee portion of the surplus can be dealt with as it had under the Old Plan. Such an arrangement, without the accompanying responsibility for unfunded liabilities, would place the employees/retirees in a better position than they enjoyed under the Old Plan.

[498] The employees/retirees proposed an amendment to governance which would require the approval of two-thirds of the Pension Committee to amend those sections of the plan dealing with surplus utilization and the funding of benefits. Those rights did not exist under the Old Plan.

[499] Finally, the employees/retirees raised the issue of their non-representation on the Board of Commissioners, pointing to the fact they had equal representation on the CSSF Board. That did not appear to be a front-line issue. I am unable to conclude that the lack of employee/retiree representation on the Board of Commissioners deprives them of any governance rights that they enjoyed under the Old Plan. Ultimately, both the CSSF Board and the Board of Commissioners rely on actuarial advice received from the plan actuary in making decisions regarding matters such as interest rates.

[500] The governance provisions under the New Plan could not be identical to those under the Old Plan due to statutory requirements and the fundamental

difference in funding. Keeping that in mind, I am not persuaded the employees/retirees have been deprived of any significant governance prerogatives.

(ii) *Initial Surplus*

[501] Paragraph 3 of the MOA provided the initial surplus would be "allocated to the new pension plan trust fund to fund future cost of living adjustments." The employees/retirees agreed to that arrangement. They were primarily concerned with protecting the initial surplus from utilization by MTS to reduce its own costs. They assumed the COLA account in the New Plan would be treated the same as under the Old Plan and that they would have an opportunity to utilize those funds to either increase COLA adjustments or to finance other pension benefits.

[502] As much as the defendants argue the MOA was complied with in that respect in that the initial surplus was allocated to the new pension plan trust fund COLA account which in turn brought that account closer to meeting the 20 year pre-funding requirements, that was not the understanding or the intention of the employees/retirees. They understood they would have access to the initial surplus to be utilized in the same fashion as surpluses had been utilized under the Old Plan.

[503] As of the date of implementation of the New Plan, the initial surplus amounted to $43.343M. It was not recorded as a liability under the New Plan. Rather, it was comingled with the other assets resulting in a surplus which enabled MTS to take contribution holidays for several years. The

employees/retirees were never given an opportunity to use those funds as intended to either increase COLA benefits or to enhance pension benefits overall. The employees/retirees have been deprived of the benefits which that initial surplus could have provided.

(iii) *Ongoing Surplus*

[504] The MOA also addressed use of ongoing surplus in paragraph 3. It provided that "if sufficient additional assets exist in the account beyond those required for the stated COLA increase for a particular year then pension benefits may be increased provided that the liability for the pension plan in total does not increase due to the change in benefits."

[505] The opportunity to use surplus in the COLA account for enhanced pension benefits exists. The governance provisions enable the Pension Committee to make recommendations for the use of ongoing surplus in that fashion. That it has not occurred to date is attributable to MTS utilizing that surplus to take contribution holidays and as well, the depressed economic conditions during the past few years which have resulted in unfunded liabilities rather than surpluses.

[506] Ultimately, MTS determines whether surpluses, if and when they exist, are to be used to enhance pension benefits or for other purposes such as contribution holidays. As they are solely responsible for unfunded liabilities, it seems reasonable they should have ultimate control over the use of ongoing surplus. In fact, Restall and others on behalf of the employees/retirees agreed that was not an unreasonable position for MTS to take.

[507] This arrangement does not create an inequality in benefits in favour of MTS. The benefit of its exclusive control over ongoing surpluses is offset by its sole responsibility for ongoing liabilities.

N. SUMMARY

1. Definition of "Equivalent in Value"

[508] Throughout the privatization process, the Government repeatedly stated the Old Plan would mirror the New Plan to the extent possible. This assurance was given for a variety of reasons. The Government was asking a significant number of participants in the Old Plan to transfer to a New Plan about which they knew very little. As others have stated, pension plans are sacrosanct in that they represent retirement income, which in many cases represents the largest portion of a retiree's income. The ***Reorg Act*** imposed on the retirees and employees a deemed consent to the transfer from the Old Plan to the new which, under the circumstances, amounted to a leap of faith on the part of the employees/retirees. They had a long and successful history with the Old Plan as well as a comfort level afforded by some participation in its administration. Privatization of MTS was not an employee initiative and so the very least the Government could offer was a new pension plan which was as close to the Old Plan as possible and at least equivalent in benefits.

[509] Privatization was beneficial to the Government in removing a significant liability from its ledgers. It was critical that the legislation privatizing MTS be passed at the fall session of the Legislature in 1996. The concerns which had

been raised by the employees/retirees were potentially problematic for the Government in that regard. Upon discovering that all of the concerns which had been raised by the employees/retirees had not been addressed and resolved, the Government called a meeting of the interested parties in an attempt to broker an agreement. The MOA was a result of those efforts.

[510] The concerns which were being voiced by the employees/retirees were several but what is clear is that the actual benefits to be provided by the New Plan was not one of them. Relatively early in the privatization process, the employees/retirees satisfied themselves that the New Plan would produce the same pension benefits as had the Old Plan and that the costs to the employees for those benefits would remain unchanged. The issues which remained of concern and which were identified to Benson on November 7, 1996 were initial and ongoing surplus and governance. Those were the issues discussed on November 7th and which were addressed in the MOA.

[511] The circumstances surrounding the meetings on November 7th were somewhat unusual. The Government was surprised there were unresolved issues and called the meeting with virtually no notice to the employees/retirees. Apart from the lack of notice, the employees/retirees still had not had any opportunity to review the plan text or the governance summary and as a result, were far from being fully informed. Negotiations during the meeting consisted of face-to-face discussions between Government and employee/retiree representatives. Further discussions were conducted by telephone with Fraser

who remained at his office. The end result was that the MOA was not as clearly worded as might otherwise have been the case had the employees/retirees been given reasonable notice together with background information.

[512] Following the MOA, the ***Reorg Act*** was amended to add two significant provisions. The first was that an independent actuary would be retained to determine whether the New Plan provided for benefits which on the implementation date were equivalent in value to the pension benefits to which employees had or may have become entitled under the Old Plan.

[513] Also added to the ***Reorg Act*** by way of amendment was s. 15(11) which provided that the MOA was to supersede any other provision of s. 15.

[514] Notwithstanding the use of the word "benefit" in s. 15(2)(a), I am not convinced the intention was to restrict that word in the manner as suggested by the defendants and their expert FitzGerald. There never was any issue about those benefits.

[515] The circumstances leading up to the MOA, the various undertakings and assurances made by the Government, the wording of the MOA and the inclusion of s. 15(11) by way of amendment following the November 7, 1996 meeting all persuade me that "benefits" was intended to include issues of surplus, both initial and ongoing, as well as issues of governance.

2. Initial Surplus

[516] The initial surplus paid into the New Plan by the employees/retirees has been valued at approximately $43.343M. The employees/retirees never received

the benefit of those funds which were utilized by MTS to take contribution holidays. The employees expected those funds to be available to them to enhance pension benefits, an expectation which was confirmed by the MOA.

[517] I do not accept defendants' argument that placement of those funds into the COLA account in the New Plan brought that account closer to the 20 year pre-funding requirement and thus created a benefit to the employees. Even though the employees/retirees agreed to have the initial surplus transferred into the COLA account, it was never their intention to be deprived of the use of those funds but that they were to be available to either improve COLA benefits or to enhance other plan benefits so long as such improvements did not result in increased cost to the employer without its consent.

[518] Under the Old Plan, the funds representing the initial surplus would have been utilized for the benefit of retirees upon an acceptable recommendation by the Liaison Committee. It was a benefit they expected and to which they were entitled, moreover, it was a benefit contractually agreed to pursuant to my interpretation of paragraph 3 of the MOA. The actions of MTS in utilizing those funds for the purpose of contribution holidays breaches that agreement. I have concluded that money must be returned to the plaintiffs together with interest at the New Plan rate of return from January 1, 1997 to the date of payment.

[519] Having determined that the employees/retirees are to be reimbursed their initial surplus plus interest, several logistical problems need be resolved.

[520] First, the precise amount of money to be repaid must be determined. Having decided the interest rate to be applied, I expect the parties will be able to identify that amount plus interest. If not, further evidence may have to be adduced and arguments submitted in that respect.

[521] The more difficult problem appears to be the manner in which those funds are to be utilized and on whose determination. The intention of this decision is to place the employees/retirees in the same position they were at the time of implementation of the New Plan. Under the Old Plan, they would have been required to negotiate utilization of that surplus. It seems only reasonable they should have the same opportunity under the New Plan. However, with the difference in governance between the two plans, implementation of a proposal made by the employee/retiree representatives on the Pension Committee might be more difficult to achieve. Here again, the parties should have an opportunity to arrive at a mutually agreeable implementation process. Should they be unable to do so, it may be necessary to receive further evidence and submissions from both parties.

3. <u>Surplus</u>

[522] Perhaps the greatest benefit enjoyed by the employees/retirees was their ability to utilize ongoing surplus to enhance COLA adjustments or other plan benefits. That process has been described.

[523] The employees/retirees allege they have been deprived of that benefit under the New Plan. They claim to no longer have the opportunity to utilize surplus created by their own contributions as they had under the Old Plan.

[524] Under the Old Plan, the employee contributions were readily identifiable and in fact, made up the plan assets as the employer was not required to make ongoing contributions or pre-fund as required under the New Plan. Under the Old Plan, if there were insufficient assets to cover the cost of benefits payable to retirees, the employees would have been required to either increase their contributions or the benefits would had to have been reduced. Under the Old Plan, there was a separate COLA account into which COLA contributions were deposited.

[525] Under the New Plan, the ***PBSA*** required the employer to fund the plan on an ongoing basis. There were certain funding objectives that had to be met by the employer and if they were not, it was the employer and not the employees who were required to make additional contributions. There was an additional funding requirement on the employer on a solvency basis. In a nutshell, it meant that all contributions from both employer and employees were placed into one fund with the obligation on the employer to make up any shortfall. The employees were assured both their contributions and benefits would remain unchanged regardless of the economic climate.

[526] Plaintiffs argued it would have been possible to account for the contributions of the employees and employers separately by establishing notional

accounts in similar fashion to the notional COLA account in the New Plan. While this may have been possible, MTS witnesses testified that would have been onerous. More importantly, the concept that the employees/retirees should have entitlement to surpluses created by their contributions without the obligation to contribute their share to liabilities is, in my view, inequitable and unfair. In other words, the *quid pro quo* for the employer being responsible for all unfunded liabilities was the opportunity to utilize surpluses by taking contribution holidays such as occurred during the first few years following the implementation of the New Plan.

[527] The fairness of that concept was agreed to by witnesses including Restall, who testified on behalf of the plaintiffs. I agree. There is an inherent unfairness in an arrangement which requires one party to be responsible for unfunded liabilities but enables both parties to share in the surpluses.

[528] The fact that the Old and New Plans were fundamentally different in respect of funding persuades me that the employees/retirees could not realistically expect to enjoy the same arrangement in relation to sharing ongoing surplus. Having said that, the pre-condition would be that both sides contributed equally at the inception of the plan. That did not happen.

[529] My conclusion is that the employees/retirees are not entitled to share in the ongoing surplus in the New Plan assuming there to have been equal initial contribution from both sides. In order to achieve that status, the initial surplus contributed by the employees must be made available to them in some fashion.

4. Governance

[530] Plaintiffs argue the governance provisions of the New Plan have seriously curtailed their opportunities to be involved in plan administration. The most important is the loss of opportunity to determine the use of ongoing surplus. Other aspects include non-involvement on the Board of Commissioners which precludes a voice in other administrative matters such as establishment of interest rates for the plan itself and for the COLA account.

[531] Having determined the employees/retirees are not entitled to the use of ongoing surplus under the New Plan, the ability to determine the use of ongoing surplus becomes moot.

[532] I am satisfied plaintiffs enjoy equivalent opportunities under the New Plan to those enjoyed under the old. The provisions of the ***PBSA*** are determinative of who administers the plan. The employees/retirees have equal representation on the Pension Committee, a forum from which they can make proposals regarding plan administration including use of ongoing surplus.

O. CONCLUSION

[533] I therefore declare that:

(a) Fox's March 5, 1997 opinion on equivalency is invalid and of no force and effect; and

(b) plaintiffs will receive payment from the defendants in the amount of $43.343M plus interest at the New Plan rate of return since

January 1, 1997 to date of payment which is to be used to enhance pension benefits on the understanding that the enhanced benefits will not result in an increase of MTS's costs.

[534] In all other respects, the plaintiffs' claim is dismissed.

P. COSTS

[535] Given the fact that there remain unresolved matters relating to quantification and the manner of utilization of initial surplus, the issue of costs can be deferred until those matters have been addressed and resolved. At that time, if the parties are unable to agree on costs, the parties will be given an opportunity to make submissions.

J.