Citation: Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al., 2012 MBCA 13

Date: 20120210
Docket: AI 10-30-07355

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Richard J. Chartier
Madam Justice Holly C. Beard
Mr. Justice Alan D. MacInnes

B E T W E E N:

TELECOMMUNICATION EMPLOYEES ASSOCIATION OF MANITOBA INC. – INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 161, COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., and LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC., MTS ADVANCED INC., and ALL UNIONIZED EMPLOYEES OF MTS MEDIA INC. WHO WERE TRANSFERRED TO YELLOW PAGES GROUP CO. PURSUANT TO A SALE ON OCTOBER 2, 2006	)	***C. R. Huband,*** ***P. B. Forsyth*** *and* ***K. T. Williams*** *for the Appellants* ***B. J. Meronek, Q.C.,*** ***K. M. Saxberg,*** ***L. R. Bernas*** *and* ***D. T. Masi*** *for the Respondents, excluding Communications, Energy and Paperworkers Union of Canada Local 7* ***R. L. Zaparniuk*** *and* ***D. R. Kochan*** *for the Respondents Communications, Energy and Paperworkers Union of Canada Local 7* *Appeal heard:* ***December 13 to 15, 2010*** *Judgment delivered:* ***February 10, 2012***
(Plaintiffs) Respondents	)	

Appeal from: 2010 MBQB 11, 248 Man.R. (2d) 31
See: 2005 MBQB 259, 206 Man.R. (2d) 39; 2006 MBQB 224, 209 Man.R. (2d) 49; 2007 MBCA 85, 214 Man.R. (2d) 284; 2008 MBQB 114, 229 Man.R. (2d) 19; 2008 MBQB 265, 233 Man.R. (2d) 201; 2008 MBQB 273, 71 C.C.P.B. 309; 2008 MBQB 290; and 2010 MBQB 13, 249 Man.R. (2d) 96

- and -

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

(Defendants) Appellants

MacINNES J.A.

1 The plaintiffs sued the defendants for various relief arising from their alleged loss of pension rights and benefits upon the privatization of The Manitoba Telephone System effective January 1, 1997.

2 The plaintiffs are, or are representatives of, the employees and retirees (including their successors) of the defendants. I will refer hereinafter to the plaintiffs as the "Employees" and to the defendants as "MTS."

3 The action proceeded to trial in 2008 and judgment was delivered January 19, 2010, wherein the report of an independent actuary as to equivalency in the value of pension benefits was set aside and MTS was ordered to pay the Employees the sum of $43,343,000 plus interest. All other claims of the Employees for relief were dismissed.

4 MTS now appeals the monetary judgment against it and the Employees cross appeal in respect of certain claims for relief which were dismissed.

BACKGROUND

5 In 1939, the Government of Manitoba (Manitoba) introduced a pension plan for its employees and those of its Crown corporations and agencies. That pension plan was created by statute, which at all times material to this litigation was *The Civil Service Superannuation Act*, C.C.S.M., c. C120 (the *CSSA*). The *CSSA* was both the constating legislation and the plan text for that pension plan (the Prior Plan). At inception and continuing until 1961, both the employee members and the employers made regular monthly contributions to the Prior Plan. Those contributions were paid into a trust fund called the Civil Service Superannuation Fund (CSSF), out of which the pension benefits were paid to retirees.

6 In 1961, an agreement was reached between Manitoba and the employees' association whereby, in exchange for improved benefits, Manitoba was no longer required to pay into the CSSF regular monthly contributions matching those made by the employee members.

7 Thus, after 1961, the CSSF was made up only of the employee contributions, together with income earned thereon. When the pension benefits came due to the retirees each month, Manitoba would pay from its consolidated revenue fund into the CSSF an amount equal to 50 per cent of the pension benefits due the retirees. The full amount of the pension benefit payment due the retirees was then paid out of the CSSF to them, 50 per cent coming from the "pay-as-you-go" contribution from Manitoba and the other 50 per cent coming from the accumulated contributions of the employees to the CSSF.

8 Included in the pension benefit payments were annual cost of living adjustments (COLA) set forth in the Prior Plan. The Superannuation Adjustment Account (the SAA) was established under the Prior Plan for the purpose of COLA. Monies were credited to the SAA from the employees' pension contributions into the CSSF as mandated by the Prior Plan. COLA was paid out of the CSSF to the retirees as part of their monthly pension benefit payment. Contributions to the COLA portion of the monthly pension benefit were made equally by the employees from the SAA and by Manitoba as part of its "pay-as-you-go" contribution to the pension payments.

9 As at December 31, 1996, there were approximately 42,000 employee/retiree members of the Prior Plan, of which approximately 7,000 were active or retired employees of MTS.

10 *The Manitoba Telephone System Reorganization and Consequential Amendments Act*, S.M. 1996, c. 79 (the *Reorg Act*) received royal assent November 28, 1996, to take effect (subject to certain exceptions, see s. 39 thereof) January 1, 1997.

11 Pursuant to the *Reorg Act*, The Manitoba Telephone System ceased to be a Crown corporation and was continued as a publicly traded corporation. The active employees of the old corporation were continued as employees of MTS. In addition, the active employees, the retirees and their successors who had been members of the Prior Plan were continued as members of the pension plan of the newly privatized MTS created under s. 15 of the *Reorg Act*.

12 Ultimately, the new pension plan consisted of s. 15 of the *Reorg Act*, the Memorandum of Agreement (the MOA), the New Plan text (the

Plan Text) and the Trust Agreement (which created the Trust Fund for the new plan), which hereinafter collectively are called the New Plan. The pension rights and benefits enjoyed by the Employees under the Prior Plan were transferred to and continued under the New Plan.

13 I have set out in Schedule A to this judgment the provisions of the documents comprising the New Plan which, in my opinion, are relevant to the issues on this appeal.

14 The pension assets of the Prior Plan attributable to the Employees were transferred to the New Plan Trust Fund (the Trust Fund), as were the corresponding pension liabilities, the latter of which were assumed by MTS, all as provided for in the *Reorg Act*.

15 As the pension benefits payable to the employees under the Prior Plan were contributed to equally by the Employees and Manitoba, it was understood that a determination would be made as to the value of the pension assets of the Prior Plan attributable to the Employees which were being transferred to the New Plan, as compared with 50 per cent of the value of the pension liabilities attributable to the Employees which were being assumed by MTS.

16 Both the Employees and MTS anticipated that there would be a surplus in the value of such assets as compared with 50 per cent of the pension liabilities assumed by MTS. The Employees were thus concerned that this surplus be recognized and used for their benefit.

17 It was determined that the value of such assets was $424,000,000 and that the value of the pension liabilities assumed was $750,000,000, one-half

of which was $375,000,000. The difference was quantified by the trial judge at $43,343,000, and became known as the "Initial Surplus."

18 Unlike the Prior Plan, which was funded by the employer on a "pay-as-you-go" basis, the New Plan was not. Under the New Plan, MTS was required to contribute monthly to the Trust Fund, as were the Employees. The Employees' contributions continued to be the same as they had been under the Prior Plan. MTS's contributions were determined annually on the basis of actuarial calculations, although it is common ground that, but for those years in which it took a contribution holiday (about which more will be said later), its annual contributions exceeded those of the Employees.

19 Under the New Plan, the Pension Benefit Adjustment Account (the PBAA) was established for purposes of COLA. It was a notional account, about which more will be said later. Following the initial contributions made into that account at inception, the Employees and MTS funded it equally on a monthly basis. As well, income earned on the PBAA was attributed to it.

20 Under the Prior Plan, the Employees were required to fund pension deficits. Under the New Plan, they are not. Their sole obligation under the New Plan is to make their monthly prescribed contributions and MTS is solely responsible to fund the balance of the full cost of their pensions, including guaranteed COLA, pursuant to the terms of the Plan Text and without regard to any deficits that may arise under the Trust Fund. As well, while the annual COLA adjustment was not guaranteed under the Prior Plan, it is guaranteed by MTS under the New Plan.

21 The Employees first learned of the possibility of the privatization of MTS in February 1996. In May 1996, Bill 67 (which ultimately was passed as the *Reorg Act*) was introduced for first reading in the Legislature. Shortly thereafter, the Employee Retiree Pension Committee (ERPC) was formed. Harry Restall was elected its Chair. As well, certain of the unions representing the Employees became involved. The involvement of the ERPC and of the unions in question was to ensure that the pension benefits which the Employees enjoyed under the Prior Plan would be continued under the New Plan.

22 The ERPC retained Louis Ellement to assist it in its efforts and to provide advice in that regard. The plaintiff Communications, Energy and Paperworkers Union of Canada Local 7 (CEP), though it proceeded independently of the ERPC, operated on a parallel course with it. CEP retained John Corp. Both were actuaries conversant with defined benefit pension plans, including, in particular, the Prior Plan. Mr. Restall was likewise conversant with the Prior Plan, having been a member of the Liaison Committee, a committee mandated under the Prior Plan to represent the employees in consultations respecting pension benefits under the Prior Plan.

23 Thereafter, there were meetings and communications between representatives of MTS, including its then President, William Fraser, and representatives of the Employees, including Mr. Restall, one Kenneth Beatty (who was then retired, having been a lawyer employed by MTS as the head of its Legal Department), the two actuaries, Mr. Ellement and Mr. Corp, and the Employees' legal counsel, Brian Meronek, Q.C.

24 On October 31, 1996, Mr. Meronek, on behalf of ERPC, made a presentation to the Standing Committee on Public Utilities and Natural Resources, the Legislative Committee considering Bill 67. He explained the concerns of the Employees who were members of the Prior Plan and advocated for amendments to s. 15 of the Bill. On November 1, a petition from Employees who were members of the Prior Plan was presented to the Legislature expressing their concerns.

25 At the request of the Minister responsible for MTS, a memorandum under Mr. Fraser's signature was provided dated November 6, 1996, giving the Minister an update on various issues with respect to implementation of the New Plan. A copy of that memorandum was provided that day to Mr. Restall by a senior employee of Manitoba. He inquired as to whether the memorandum was acceptable in satisfying the Employees' concerns respecting the New Plan. Mr. Restall advised that it was not. Later that day his committee, the ERPC, confirmed Mr. Restall's response.

26 This led to a meeting on November 7, 1996, for the purpose of reaching an agreement on the Employees' outstanding concerns. An agreement was reached and the Employees, MTS and Manitoba signed the MOA on November 7, 1996.

27 By this time, MTS had been working on drafting the Plan Text for the New Plan. A draft of the Plan Text was provided to the Employees and their advisors. Thereafter, there were correspondence and meetings between the Employees' advisors and MTS with respect to the Plan Text. These resulted in some amendments to it. Ultimately, the Employees' representatives signed off on the Plan Text with the exception of two issues, those of governance and the ability to share in ongoing surplus under the New Plan.

28 The Plan Text had to be submitted to and accepted by the Canada Revenue Agency and by the Office of the Superintendent of Financial Institutions and registered under both the *Income Tax Act* (the *ITA*), and the *Pension Benefits Standards Act, 1985* (the *PBSA*). This occurred.

29 Equivalency in the value of pension benefits under the New Plan with those under the Prior Plan was mandated by s. 15(2)(a) of the *Reorg Act*.

30 Following execution of the MOA, three amendments were made to Bill 67 on November 8, 1996. Section 15(3) was added. It provided that the Provincial Auditor would appoint an independent actuary, who was to review the New Plan to determine whether the benefits under it were equivalent in value to those under the Prior Plan, as required by s. 15(2)(a). At the same time, s. 15(4) was also added by amendment. It required that MTS take any steps necessary to resolve any concerns raised by the independent actuary in his report as to equivalency of benefits.

31 The Employees' concern relating to the Initial Surplus was addressed in the MOA. This led to the third amendment, the addition of s. 15(11), which provided that nothing in s. 15 was to be interpreted as nullifying the effect of the MOA.

32 Clifford Fox was appointed as independent actuary. On March 5, 1997, he reported that the pension benefits under the New Plan were equivalent in value to those under the Prior Plan. It was not long thereafter that the Employees began a process to obtain background information leading to the Fox report, which ultimately culminated in commencement of this action against MTS.

33 The relief sought by the Employees in their action at trial was described by the trial judge as follows (at para. 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.

34 In his judgment, the trial judge found that Mr. Fox had not acted fairly or independently and declared that his opinion on equivalency was invalid and of no force and effect. He also concluded that it was "neither necessary nor appropriate" (at para. 457) to return the matter to Mr. Fox for reconsideration. Instead, he proceeded to decide the issues raised before him by the Employees.

35 The trial judge decided that the "benefits" referred to in s. 15(2)(a) of the *Reorg Act* included issues of surplus, both initial and ongoing, as well as issues of governance. He then proceeded to find MTS in breach of the MOA, which he characterized as a breach of contract. He held that the Initial Surplus, being $43,343,000, had effectively been taken by MTS by

way of contribution holidays and should be returned by MTS to the Employees, plus interest. He concluded that the Employees had not been "deprived of any significant governance prerogatives" (at para. 500) and had no right to ongoing surpluses, assuming the initial contributions of MTS and the Employees were equalized in the New Plan. He made no mention of any tort claims, including misrepresentation.

36 The trial judge thus:

(a) declared that Mr. Fox's March 5, 1997 opinion on equivalency was invalid and of no force and effect;

(b) ordered that the Employees would receive payment from MTS in the amount of $43,343,000 plus interest at the New Plan rate of return from 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; and

(c) dismissed the Employees' claim for relief in respect of governance and their claim to entitlement to share in ongoing surpluses under the New Plan.

37 From that decision, MTS has appealed and the Employees have cross appealed.

THE APPEAL AND CROSS APPEAL

38 There were certain concessions made by both MTS and the Employees in their written and oral submissions before this court. MTS

agreed that the opinion on equivalency of the independent actuary, Mr. Fox, dated March 5, 1997, should be set aside and be of no force and effect. The Employees abandoned their appeal from the trial judge's dismissal of their claim to be entitled to share in ongoing surpluses under the New Plan.

39 In the result, the issues before this court on appeal and cross appeal are the following:

THE APPEAL

1. Did the trial judge misapprehend pension law in Canada and the nature of the actuarial surplus?

2. Did the trial judge misapprehend MTS's funding obligations under the New Plan?

3. Did the trial judge err in his interpretation of the *Reorg Act*?

4. Did the trial judge err in his interpretation of the MOA?

5. Did the trial judge err in his approach to the Undertaking?

6. Did the trial judge err in his approach to damages?

7. Did the trial judge err in substituting his own decision for the decision of the independent actuary?

8. Did the trial judge err in his selection of the appropriate remedy for any breach that he found?

THE CROSS APPEAL

1. Did the trial judge err in failing to find that the Initial Surplus should be quantified as the amount by which the Employees' contributions exceeded their one-half of actuarial liabilities?

2. Did the trial judge err by finding that there was equivalency in value in terms of governance by failing to find that the Employees' approval is required before MTS can make any changes to the level of benefits or the structure of benefits under the New Plan?

Issue 7: Did the trial judge err in substituting his own decision for the decision of the independent actuary?

40 I propose to deal firstly with this issue as it is my view that if MTS is correct in its argument that the trial judge did so err, then not only should determination of equivalency in value of benefits be remitted to a newly appointed independent actuary pursuant to s. 15(3) of the *Reorg Act*, but so too, pursuant to para. 5 of the MOA, should the dispute between the Employees and MTS pertaining to the matters described in para. 3 of the MOA.

41 In effect, if I accept MTS's argument on this issue, then, but for the trial judge's declaration setting aside the Fox opinion on equivalency (about which no dispute now exists), all of the remaining issues on the appeal would be encapsulated in the remission for determination by an independent actuary.

42 As regards the question of equivalency in benefits, ss. 15(2)(a), 15(3) and 15(4) of the *Reorg Act* provide:

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* ....

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.

Concerns of independent actuary to be addressed
15(4) 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 (3).

43 As regards the issue in dispute pertaining to para. 3 of the MOA, it and para. 5 of the MOA are as follows:

> 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 costs of living adjustments. In subsequent years the financial position of the COLA Account will be reviewed by the plans [*sic*] 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.
>
> 5. In the event of any dispute in relation to the matters described in paragraph ... three above an actuary appointed by the Provincial Auditor as proposed by the Act (Bill 67) will resolve any dispute.

44 MTS argues that the question whether the trial judge erred in substituting his own decision for that of the independent actuary raises questions of law as to the remedies available on judicial review and that the standard of review is that of correctness.

45 The Employees agree that the standard of correctness applies to this issue, being one relating to the appropriate remedy available to the trial judge.

46 I do not agree with the parties' submissions. In my view, the question raised by this issue is not one for which there is only one right answer. Rather, the answer is dependent upon the overall circumstances which inform the decision of the trial judge and is a discretionary decision for which the standard of review is one of great deference.

47 This was described by Freedman J.A. of this court, who wrote in *Towers Ltd. v. Quinton's Cleaners Ltd. et al.*, 2009 MBCA 81, 245 Man.R. (2d) 70 (at para. 25):

> A discretionary decision ... is reviewed on appeal according to a highly deferential standard, often described in this way; see **Elsom v. Elsom**, [1989] 1 S.C.R. 1367; 96 N.R. 165 (at p. 1375):
>
> > ... [A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice. ...

That standard of review is not restricted to matters of family law, but is universally applicable to discretionary decisions made by trial judges.

ARGUMENT

48 MTS says that the trial judge had jurisdiction to set aside Mr. Fox's opinion as being neither fair nor independent, characterizing this aspect of the case as an application for, and decision in the nature of, judicial review.

49 However, MTS submits that the trial judge could not substitute his decision for the opinion being set aside. Rather, it asserts that the trial judge should instead have ordered a new review by a new independent actuary appointed by the Provincial Auditor and should have remitted the matter for that purpose.

50 As well, MTS argues, relying on para. 5 of the MOA, that the trial judge had no jurisdiction to award damages in respect of any dispute concerning the MOA, including alleged breaches thereof. This too, it says, should have been remitted for determination by the independent actuary.

51 MTS asserts that the Legislature clearly opted for a non-judicial remedy in respect of the issue of equivalency of benefits and that the parties themselves agreed, pursuant to para. 5 of the MOA, for a non-judicial remedy in respect of disputes concerning the matters referred to in para. 3 of the MOA. Thus, the only remedy available to the trial judge, absent affirmation of the Fox report, was to remit the matter to the Provincial Auditor for appointment of a new independent actuary, who would then undertake the tasks outlined for him or her in s. 15(3) of the *Reorg Act* and para. 5 of the MOA.

52 The Employees acknowledge that in a judicial review proceeding the usual remedy after quashing a decision is remission of the matter to the

original tribunal for reconsideration. They assert, however, that this action was not one for judicial review. Rather, they say that their claim was a hybrid involving a claim not only for a declaration of invalidity, but also claims for breach of contract, negligent misrepresentation and damages, claims which are not amenable to resolution by judicial review.

53 They also argue that to remit the matter at this stage would be inconsistent with the object and purposes of the *Reorg Act* in that the position of the independent actuary was not intended to be a continuing position or office. Rather, it was a process mandated to be performed as soon as possible following royal assent of the *Reorg Act*. They say the process envisaged by the *Reorg Act* has now been spent. They make the same argument with respect to the MOA. The clear intent of both was that issues between the parties pertaining to all aspects of the transfer of pension benefits and obligations would be resolved quickly.

54 As well, the Employees assert that to remit the matter to a new independent actuary would be a remedy inferior to the lengthy litigation and trial that has already taken place to decide all of the issues and would result only in further delay and additional expense in respect of a procedure that has already gone on for over 13 years at considerable expense.

55 In addition, the Employees argue that it is too late for MTS to invoke a jurisdiction argument. They say that MTS ought to have raised this issue a long time ago, but did not, and instead chose to participate fully in the litigation process and trial.

56 Further, CEP argues that *The Arbitration Act,* C.C.S.M., c. A120, and, in particular, s. 7 thereof, applies so that if MTS wished to have the issues of

equivalency of pension benefits, governance and use of the Initial Surplus determined by arbitration, it ought to have moved for an order staying the action. CEP argues that, not having done so, the matter should not now be remitted for an arbitral decision.

ANALYSIS

57 It is settled law that the usual practice in administrative matters involving judicial review is to remit the matter to the originating administrative tribunal, rather than have the court resolve the dispute on its merits. As well, a court's jurisdiction to consider a matter may be constrained by specific statutory provisions assigning certain matters to designated bodies or individuals. It is also the case, however, that *The Court of Queen's Bench Act*, C.C.S.M., c. C280, provides wide powers to that court to resolve disputes that come before it.

58 In my opinion, this case is not a judicial review application dressed up as an action. Rather, this case essentially raises issues of private law between the Employees and MTS having to do with the pension rights of the Employees and the pension obligations of MTS. While it is correct that the supervisory jurisdiction of the court was invoked by the Employees in respect of Fox's opinion, there was much more to this case as pleaded and litigated, such that the case extensively engaged the trial court's original jurisdiction, thus, in my view, expanding the remedial options available to the trial judge.

59 Therefore, whether to remit the issue of equivalency under the *Reorg Act* and the relevant issues arising from the MOA to the independent

actuary for determination pursuant to s. 15(3) of the *Reorg Act* and para. 5 of the MOA, or to decide the case on the merits, was ultimately a decision within the jurisdiction and discretion of the trial judge.

60 The process contemplated by s. 15(3) was not that of arbitration, but of valuation. The difference between the two was described by Walker J. in *Montgomery Agencies Ltd. v. Krischke* (1989), 76 Sask.R. 143 (Q.B.), where he wrote (at para. 8):

> .... The distinction between valuation and arbitration is usually expressed by saying that an arbitrator is appointed to determine a certain matter ... for the purpose of settling a dispute which has arisen between the parties, but that a valuer is appointed to determine such a matter before any dispute has arisen and with the object of preventing any dispute (39 Halsbury's Laws of England (3d Ed.) 1, at p. 4). An arbitration presupposes a controversy or difference to be decided, and arbitrators proceed in a judicial way. On the other hand, a valuation is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate the controversy but to avoid one. ....

See also *Pfeil v. Simcoe & Erie General Insurance Co. and McQueen Agencies Ltd.* (1986), 45 Sask.R. 241 (C.A.), and *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564.

61 While para. 5 of the MOA was more akin to one contemplating the arbitration of a dispute as opposed to a valuation so as to avoid a dispute, I note that, in both situations, the designated decision-maker was a one-time appointee who was not required to have any adjudicative skills from an administrative law perspective or otherwise, nor was there any provision establishing or giving direction as to the form or structure of such a resolution process.

62 It was and is beyond dispute that many of the Employees are elderly and to further delay the decision of these issues was not in their interests. Moreover, there were no steps taken by MTS to seek a stay of the action and a determination of the issues by an independent actuary. Nor did MTS make any serious objection, if at all, until raised on appeal, to the Employees proceeding with their entire claim as they did. Privatization occurred effective January 1, 1997. The trial was decided approximately 13 years later, the action having continued for more than 10 years. Those factors, together with the time and expense already incurred and the additional time and expense attendant upon remission of the matter, are valid considerations in the analysis and determination by the trial judge as to whether to remit or to retain the matter and decide it.

63 While the usual course is to remit, there is considerable jurisprudence which makes clear that the factual circumstances may give rise to the judge deciding in his or her discretion not to remit, but to decide the issues raised in the litigation. It cannot be said that the trial judge, in deciding this issue, misdirected himself, nor can it be said that his decision was so clearly wrong as to amount to an injustice. Indeed, in all of the circumstances, it is my opinion that the trial judge correctly exercised his discretion in deciding not to remit the matter, but rather to decide the issues raised and fully litigated by the parties.

64 In light of this conclusion, it is not necessary to address *The Arbitration Act* argument.

65 I now turn to consider Issue 3 on this appeal.

Issue 3: Did the trial judge err in his interpretation of the *Reorg Act*?

66 This issue raises the question of the trial judge's interpretation of ss. 15(2)(a) and 15(11) of the *Reorg Act.*

67 MTS argues that this issue, being one of interpretation of the words of a statute, raises a question of law for which the standard of review is correctness.

68 The Employees argue that this issue is one of mixed law and fact and that the standard of review is the more deferential standard of palpable and overriding error.

69 In my opinion, this issue is one of statutory interpretation, for which the standard of review is correctness. While one does not look only at the words to be interpreted, still, the essence of the issue is, and the task for the trial judge was, to interpret correctly the meaning of the legislative provisions in question.

ARGUMENT

70 MTS argues that the intention of the *Reorg Act*, apparent from the plain language of the legislation, was to ensure that the Employees' pension benefits did not decrease as a result of the privatization of MTS; that is, that a retiree was not to notice any reduction in the amount of money he or she received each month as a result of transferring to the New Plan.

71 MTS asserts that s. 15(2)(a) of the *Reorg Act* contained a clear stipulation as to the form of pension plan MTS was to provide, namely, the New Plan was to provide for "benefits" which, on the implementation date,

were "equivalent in value" to the "pension benefits" that existed under the Prior Plan.

72 It asserts that the trial judge disregarded both elementary pension law principles and the basic rules of statutory interpretation and, thus, erred by importing a strained and artificial interpretation to s. 15(2)(a) which the words of that section were not intended to, and will not, bear.

73 MTS argues that while the term "benefits" was not specifically defined under the *Reorg Act*, it is clear that it was to have the same meaning as "pension benefits" under the *CSSA*, where it was a specifically defined term, namely, "the aggregate monthly or other periodic payments of superannuation allowance to which an employee is, or may become entitled under this *Act* upon retirement or to which any other person is entitled under this *Act* by virtue of the death of the employee after his retirement."

74 In addition, MTS argues and relies upon the presumption of statutory interpretation that the Legislature uses language carefully and consistently to achieve harmony, coherence, and consistency between statutes dealing with the same subject-matter. It says that this presumption is especially strong where, as here, it is apparent that two statutes were intended to operate together.

75 As well, MTS argues that the normal or usual meaning of "benefits" in the context of pension plans is that of the amount which an employee will become entitled to receive upon retirement, or is receiving following retirement, under a pension plan. In support of that assertion, MTS refers to the definition of "pension benefit" in other Canadian pension legislation, at the relevant time, including:

- *The Pension Benefits Act*, C.C.S.M., c. P32. Prior to May 31, 2010, section 1(1) thereof defined "pension benefit" to mean 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.

- *The Teachers' Pensions Act*, C.C.S.M., c. T20. Section 1(1) thereof defined "pension benefit" to mean the aggregate monthly or other periodic amounts to which a teacher is or will become entitled under this *Act* upon retirement or to which any other person is entitled by virtue of the death of the teacher after his retirement.

- The *Pension Benefits Standards Act, 1985*. Section 2(1) thereof defined "pension benefit" to mean the periodic amount to which, under the terms of a pension plan, a member or former member, or the spouse, other beneficiary or estate of a member or former member is or may become entitled.

76 MTS points to the fact that Bill 67, which became the *Reorg Act*, was amended following execution of the MOA. It was then that s. 15(3), 15(4) and 15(11) were added. Notably, it says, there was no amendment of s. 15(2)(a). That section was identical upon passage of the *Reorg Act* in November 1996 to its language when introduced for first reading in the Legislature in May 1996 as Bill 67.

77 MTS asserts that it would have been very simple for the Legislature to amend s. 15(2)(a) when the other amendments were made, had it intended to change the meaning of "benefits" and enlarge the meaning beyond the

definition contained in the Prior Plan.

78 MTS argues that there is only one plausible and legally correct interpretation of s. 15(2)(a). It submits that, on both a plain and purposive reading, the evident intention of s. 15(2)(a) was to ensure that the Employees did not feel any adverse impact on the pension payment they received each month as a result of the privatization of MTS. MTS asserts that this result was achieved and has been so admitted by the Employees.

79 The Employees argue that the intention of the Legislature in enacting s. 15 of the *Reorg Act* was that the New Plan be equivalent to the Prior Plan in all items of importance respecting their pensions.

80 They assert that the intent was to replicate for them all of the benefits which they had enjoyed under the Prior Plan. They say that this included not simply the payment of their monthly pensions, but more, including an entitlement under the New Plan to the Initial Surplus and to share in ongoing surpluses and in governance.

81 The Employees refer to the presentation made by their counsel on October 31, 1996, to the Legislature's Standing Committee on Public Utilities and Natural Resources, and the negotiations leading to the MOA. They submit that those, and their expressions of concern made to MTS and Manitoba as the matter of privatization moved forward, were recognized by the Legislature when, on November 8, 1996, it amended Bill 67 by the addition of ss. 15(3), 15(4) and 15(11). They argue that the effect of s. 15(11) was to separate and protect the provisions of the MOA, including the use of the Initial Surplus, from every clause in s. 15 of the *Reorg Act*, such that whatever was in the Plan Text would be overridden by the MOA.

82 The Employees argue that the effect of s. 15(11) was to cause equivalency in value under s. 15(2)(a) to mean equivalency of plan in areas of funding, surplus and governance. Thus, they assert that "benefits" came to include governance rights which the Employees had under the Prior Plan and which in their submission ought to be equivalent under the New Plan.

ANALYSIS

83 In respect of this issue, the trial judge, in his judgment, wrote (at paras. 512-15):

> 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.
>
> 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.
>
> 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.
>
> 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.

84 In my opinion, the trial judge erred in his interpretation as to the meaning of "benefits" under s. 15(2)(a) of the *Reorg Act*. This occurred, in my view, because he did not focus upon the relevant legislation to determine what exactly "benefits" meant under s. 15(2)(a).

85 Rather, the trial judge drew upon the evidence of many of the Employees' witnesses who testified as to their understanding of the expectations of the Employees concerning what was to be accomplished by virtue of the *Reorg Act* and the MOA. This included the evidence of the Employees' actuarial expert, Thomas Levy, whose evidence the trial judge accepted over that of MTS's actuarial expert, Brian FitzGerald.

86 But, like the trial judge, Mr. Levy did not focus on the pivotal question, namely, what exactly "benefits" meant under s. 15(2)(a). He admitted that he had not read the *CSSA* before testifying. He described his task as being a comparison of "programs" not of "pension benefits." He admitted that he treated the Employees' expectations as rights and that he had opined as to whether they were equivalent in value to that which the Employees described as rights they had under the Prior Plan.

87 The evidence at trial was that "equivalency in value" was not a normal actuarial term, but, in my opinion, it is not difficult to discern the meaning of the phrase. What needed to be done, but was not, was to first determine the meaning of what it was that was to be equivalent in value, namely, the benefits. In my view, that meaning is clear. There is no ambiguity as to it in the language of s. 15(2)(a).

88 Section 15(2)(a) of the *Reorg Act* provides:

> **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* ....

While "benefits" was not a defined term under the *Reorg Act*, there can be no doubt that it was meant to equate to the "pension benefits" under the *CSSA*. "Pension benefit" was a defined term under the *CSSA*, namely:

> **"pension benefit"** means the aggregate monthly or other periodic payments of superannuation allowance to which an employee is or may become entitled under this Act upon retirement ....

Neither governance nor surplus (either initial or ongoing) was included in this definition.

89 The cardinal rule of statutory interpretation today is that set forth in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, wherein the Supreme Court adopted with approval the statement of principle first enunciated by Professor Elmer A. Driedger in *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87 (at para. 21):

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

This principle has effectively nullified the plain-meaning rule alone and calls for the words of the text to be read in their entire context.

90 As MTS argued, there is a presumption of statutory interpretation that the Legislature uses language carefully to achieve harmony, coherence and consistency between statutes dealing with the same subject-matter. This presumption is especially strong in instances as exist here, where there is express reference in s. 15(2)(a) to the other statute and it is apparent that both statutes (the *CSSA* and the *Reorg Act*) were intended to operate together.

91 In my opinion, there is also no doubt as to the intent of the Legislature. Section 15(2)(a) of the *Reorg Act*, as passed, is identical to that provision as it was when introduced for first reading in Bill 67 in May 1996. It was not changed in any way thereafter notwithstanding the ongoing discussions between the Employees and MTS, the submission made by the Employees' counsel to the Legislature's Standing Committee considering the proposed legislation at second reading, nor as the result of the discussions which followed with Ministers of the Crown, including the Minister then responsible for MTS, or the meeting which negotiated and led to execution of the MOA.

92 As well, I note, as the parties have argued, that following the negotiation and execution of the MOA, there were three amendments made to Bill 67 on November 8, 1996, namely, the addition of ss. 15(3), 15(4) and 15(11). Clearly, the Legislature was open to amending Bill 67 prior to its passage. It would have been easy for it to amend s. 15(2)(a) and require equivalency in value of the pension plans as opposed to equivalency in the value of benefits had it been disposed to do so. Yet it did not.

93 This, in my view, provides powerful, if not conclusive, evidence of its intention that the benefits under the *Reorg Act*, which were to be equivalent in value to the pension benefits under the *CSSA*, were to be the pension benefits as that term was defined under the *CSSA*, namely, the aggregate monthly or other periodic payments of superannuation allowance to which an employee is or may become entitled under the *CSSA* upon retirement.

94 In reaching his conclusion on equivalency of benefits, I note that the trial judge found that s. 15(11) provided that the MOA was to supersede any

other provision of s. 15. That clearly is wrong. What the section said was that nothing in s. 15 was to override the provisions of the MOA, not that the MOA was to override or supersede the provisions of s. 15.

95 Whether this may have led the trial judge to conclude, as he did, that "benefits" was intended to include issues of surplus, both initial and ongoing, as well as issues of governance, is impossible to say. But as I have said, I find his interpretation, both of the meaning of "benefits" under s. 15(2)(a) and of the effect of s. 15(11) in respect of the MOA, to be in error.

96 Having determined the meaning of "benefits" under s. 15(2)(a), I conclude that such benefits under the New Plan were equivalent in value to the pension benefits under the Prior Plan. Indeed, having determined the meaning of "benefits," as I have, there was no issue between the parties as to equivalency in value. Counsel for the Employees so indicated in their submissions, witnesses for the Employees so admitted at trial, and the trial judge so stated in his judgment most clearly (at para. 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. ....

97 I will now turn to address Issues 1, 2, 4 and 5 of the appeal. I have chosen to deal with these issues together because, in my view, each is related to the other and must be considered together in order to decide the essential question whether or not the trial judge correctly concluded that MTS had

breached the MOA by utilizing the Initial Surplus to take contribution holidays, thus effectively taking the Initial Surplus from the Employees, and therefore should be ordered to return the amount of the Initial Surplus, $43,343,000 plus interest, to the Employees.

Issue 1: Did the trial judge misapprehend pension law in Canada and the nature of the actuarial surplus?

Issue 2: Did the trial judge misapprehend MTS's funding obligations under the New Plan?

Issue 4: Did the trial judge err in his interpretation of the MOA?

Issue 5: Did the trial judge err in his approach to the Undertaking?

98 MTS asserts that each of these issues raises a question of law and that the standard of review in connection with each is that of correctness.

99 The Employees assert that each of these issues raises a question of mixed law and fact and that the standard of review is that of palpable and overriding error.

100 In the recent decision of *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man.R. (2d) 63, this court had occasion to consider the standard of review in contractual interpretation matters, which, in my view, is the essence of Issues 2, 4 and 5 relating, in particular, to the MOA.

101 In *King*, Steel J.A. wrote (at paras. 20-23, 26):

> Until recently, the standard of review in contractual interpretation matters was always considered to be a question of law reviewable by an appellate court on a standard of correctness (Geoff R. Hall,

Canadian Contractual Interpretation Law (Markham: LexisNexis Canada Inc., 2007) at 106-107).

At present, the standard of review is dependent on the nature of the question. The appropriate standard will depend upon the degree to which the trial judge made factual findings based on the particular case in question to come to his decision. So, for example, errors of law reviewable on a standard of correctness, in the area of contractual interpretation, include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. See **Prairie Petroleum Products Ltd. v. Husky Oil Ltd. et al.** (2008), 231 Man.R. (2d) 1; 437 W.A.C. 1; 2008 MBCA 87, at para. 36; **Plan Group et al. v. Bell Canada** (2009), 252 O.A.C. 71; 96 O.R. (3d) 81; 2009 ONCA 548, at para. 135, Gillesse, J.A., dissenting; and **Midnight Marine Ltd. v. Underwriters, Lloyd's London** (2010), 302 Nfld. & P.E.I.R. 85; 938 A.P.R. 85; 325 D.L.R. (4th) 254; 2010 NLCA 64, at para. 44.

A trial judge's determination of the factual matrix or surrounding circumstances, drawing inferences from a finding of fact, findings as to credibility or good faith, consideration of extrinsic evidence and consideration of the evidence as a whole, are questions of fact and reviewable on a standard of palpable and overriding error (Hall, at p. 109), or the functional equivalent of "palpable and overriding error" such as, "clearly wrong", "unreasonable" or "not reasonably supported by the evidence". See **H.L. v. Canada (Attorney General) et al.**, [2005] 1 S.C.R. 401; 333 N.R. 1; 262 Sask.R. 1; 347 W.A.C. 1; 2005 SCC 25, at para. 110. And see **Castledowns Law Office Management Ltd. v. 1131102 Alberta Ltd. et al.** (2009), 454 A.R. 328; 455 W.A.C. 328; 78 R.P.R. (4th) 1; 2009 ABCA 148, at para. 61, by Slatter, J.A.

Most commonly, issues of contractual interpretation raise questions of mixed fact and law. Generally, a question of mixed fact and law arises when the trial judge applies the legal principles to the language of the specific contract in the context of the relevant facts and inferences. Such questions are generally reviewable on the palpable and overriding error standard (Hall, at p. 109).

However, the palpable and overriding error standard is applicable to questions of mixed fact and law **only** where they are inextricably intertwined. If the question of law can be separated or "extricated" from the factual considerations involved and the task of interpretation is to put meaning to the words, then it can be treated as

> a question of law and evaluated on the standard of correctness. See **Prairie Petroleum**, at para. 36; **Bell Mobility Inc. v. MTS Allstream Inc.** (2009), 236 Man.R. (2d) 167; 448 W.A.C. 167; 2009 MBCA 28, at paras. 30-35; **Barcode Systems Inc. v. Symbol Technologies Canada Inc. et al.** (2008), 225 Man.R. (2d) 312; 419 W.A.C. 312; 2008 MBCA 47, at para. 29.

102 In this case, the trial judge had to ascertain and correctly apply the common law principles respecting defined benefit pension plans, and, in particular, the meaning, nature and effect of actuarial surplus and contribution holidays, as well as contract law. All of this informed and was necessary to the correct interpretation of the MOA and determination of the essential question which I have stated in para. 97 of these reasons.

103 Thus, I would conclude that the standard of correctness would apply to Issues 1 and 2. As regards Issues 4 and 5, while they raise questions of mixed law and fact, it is my opinion that there are extricable legal questions raised to which the standard of correctness would apply.

ARGUMENT

ARGUMENT OF MTS ON ISSUES 1 AND 2

Issue 1: Did the trial judge misapprehend pension law in Canada and the nature of the actuarial surplus?

104 MTS argues that the trial judge's disposition of this action depended upon his finding that there existed an identifiable surplus that "belonged" to the Employees. It says this finding is wrong in law.

105 MTS asserts that the surplus of assets over liabilities which existed in the CSSF at the time of transfer to the New Plan was an actuarial surplus,

something which cannot be owned by or belong to the employees while the pension plan is in operation.

106 MTS says that a pension plan is in operation so long as the employees continue to receive their promised benefits and the plan is not wound up. Surplus crystallizes in a defined benefit pension plan when the plan winds up. Only then does an actuarial surplus become an actual surplus that is capable of belonging to anyone.

107 MTS asserts that s. 15(7) of the *Reorg Act* provided that MTS would assume the liabilities of the CSSF in relation to the Employees. Thus, the Prior Plan was not terminated or wound up in respect of the Employees, but continued as an operating plan, the New Plan. Nothing crystallized and the Employees had no rights to the surplus (which was an actuarial surplus) transferred from the Prior Plan.

108 MTS says that the trial judge did not refer to any jurisprudence regarding pension law and surplus, and thus, without any such guidance, found that the Employees had an entitlement to that surplus and a right to be compensated, if such surplus was not used in accordance with their wishes. This, MTS asserts, was clear error.

109 MTS argues that, as a matter of law, the mere fact that an employee contributes money to a pension plan does not create any right to control that money. Once the money is contributed to the plan, entitlement to it is governed by the plan text and/or trust agreement without regard to who paid the money in, as is the case with any general trust. While in a given case the common law may be altered by the provisions of an applicable statute, agreement or plan text, MTS says that that did not occur here. Nothing in

the Prior Plan or the New Plan provides any support for the Employees' theory that the surplus belonged to them and/or that they were entitled to control it.

110 MTS submits that for something to belong to someone at law, that person must have the exclusive right to do with it what he or she wants, to the exclusion of others. It says that the trial judge acknowledged that such characteristics of ownership were not available to the Employees in this case, yet inexplicably found that MTS violated a supposed "entitlement" of the Employees to benefit improvements funded with the surplus. Nowhere, however, did the trial judge explain the legal source of any such "entitlement."

111 MTS agrees that the assets in the Prior Plan were derived from the Employees' contributions, but says it does not follow that any of those assets belonged to the Employees in any sense that implies legal control over them. MTS therefore asserts that the Employees' argument and, ultimately, the judgment in this case depend upon an unstated and fundamentally false premise about surplus in an ongoing defined benefit pension plan.

112 MTS argues that the trial judge's conclusions as to the Employees' interest in surplus were contrary to Canadian pension jurisprudence, were not supported by the text of the Prior Plan or the New Plan and were inconsistent with the fact that both plans are, and always have been, defined benefit pension plans. It says that the trial judge's concept of the Employees' ownership of surplus was central to his view of the case and that the sweeping remedy ordered by him, including the judgment in favour of the Employees for $43,343,000 plus interest, depended upon this underlying

and erroneous assumption about the Employees' ownership of surplus. Thus, argues MTS, the trial judge's decision must be reversed.

Issue 2: Did the trial judge misapprehend MTS's funding obligations under the New Plan?

113 MTS argues that the trial judge made equally serious errors in his apparent conclusion that contribution holidays taken by MTS somehow used the Initial Surplus. Again, says MTS, the trial judge failed to consider binding case law concerning contribution holidays in an ongoing defined benefit pension plan.

114 MTS asserts the law is well settled that contribution holidays are a permissible use of surplus. They do not result in any money or assets being withdrawn from the plan trust fund. They do not encumber the fund, nor do they reduce or affect the earned pension benefits of the employees.

115 Alternatively, MTS says that, even if one were to disregard the jurisprudence, it is unclear how the trial judge's finding could be made in circumstances where, as here, there was only one Trust Fund and the Initial Surplus, while identifiable in amount, was not identifiable *in specie*. It says the evidence clearly shows that there were assets which could have permitted the taking of contribution holidays without touching the Initial Surplus. MTS argues that the trial judge made bald conclusions as to the use of the Initial Surplus by MTS without any evidence to justify his conclusions. His conclusory statement that MTS used the Initial Surplus to take contribution holidays, it asserts, is not apparent from or supported by the evidence.

116 The evidence, says MTS, disclosed that in 1997, the first year of the New Plan's operation, MTS did not take a contribution holiday. Rather, it contributed $11,732,000 to the Trust Fund. In that year, the Trust Fund assets, which included the annual amounts contributed by the Employees as well as by MTS, experienced investment gains of $92,507,000 and the plan assets grew by over $100,000,000.

117 Thus, MTS contends that there were substantial assets in the Trust Fund available for it to take a contribution holiday when it first did so in 1998 and thereafter without touching any of the Initial Surplus, even if one were to accept the Employees' fallacious assumption that the Initial Surplus belonged to the Employees.

ARGUMENT OF THE EMPLOYEES ON ISSUES 1 AND 2

Issue 1: Did the trial judge misapprehend pension law in Canada and the nature of the actuarial surplus?

Issue 2: Did the trial judge misapprehend MTS's funding obligations under the New Plan?

118 The Employees argue that the trial judge was not required to provide a treatise on pension law. They say the general principles of pension law relied upon by MTS have no application in this case because the Prior Plan is a government pension plan which is unique in that the funding is fundamentally different from the defined benefit pension plans which existed in the legal authorities relied upon by MTS.

119 The Employees also assert that the New Plan is not an ongoing plan, but a new plan. They rely upon s. 15(1) of the *Reorg Act*, which defined "new plan" as the plan to be created by MTS. They say there are several

other references to "new plan" in s. 15. They argue there were no assets in the Trust Fund until assets were received by the transfer of the amount from the CSSF, which money was not to be transferred to the New Plan without the benefit of equivalence.

120 The Employees argue that there was no provision for a partial wind-up of the Prior Plan because government plans do not wind up and that any option of terminating involvement in the Prior Plan was made unilaterally by MTS without impetus or input from the Employees.

121 The Employees submit that MTS never argued during the privatization process that it was entitled to the Initial Surplus. The Employees accept the trial judge's finding that, since MTS bore the sole risk for unfunded liabilities under the New Plan going forward, it was fair that MTS would control surplus. They assert that, for the same reason, the Initial Surplus should not be scooped by MTS when it arose under the Prior Plan by reason only of the Employees' contributions and where, under the Prior Plan, the risk resided with the Employees in terms of their funding obligations. They say that if the entitlement to ongoing surplus under the New Plan, as found by the trial judge, is based on a risk/reward scenario, then the same should apply with respect to the Initial Surplus in terms of the Employees' entitlement, based on the risk to which they were exposed in the Prior Plan.

122 The Employees argue that the MOA and the evidence of all witnesses was that the Initial Surplus had a particular application: to benefit Employees, not MTS. They assert that it superseded or overrode any contrary wording, or the absence of wording to that effect, in the Plan Text.

ARGUMENT OF MTS ON ISSUES 4 AND 5

Issue 4: Did the trial judge err in his interpretation of the MOA?

123 MTS argues that the trial judge erred in his interpretation of the MOA by finding in essence that MTS had breached the MOA by taking contribution holidays between 1998 and 2003.

124 It asserts that the trial judge's reasoning was predicated on a fundamental misunderstanding of the nature of contribution holidays and that it ignored the plain language of the MOA. It says that he disregarded the relevant documents and elevated Employee expectations to contractual entitlements that exceeded and superseded what was actually agreed to in the MOA.

125 MTS submits that it set up and operated the PBAA consistent with the position advanced by the Employees' counsel in a letter which he wrote to Mr. Fraser on September 25, 1996, and exactly as provided in the MOA. It argues that, while the MOA was silent as to the concept of a 20-year pre-funding requirement with respect to the PBAA, that requirement was provided for in s. 15.4 of the Plan Text and was known to the Employees and their representatives prior to the inception date of the New Plan. As well, the 20-year pre-funding requirement was a provision that existed under the *CSSA* for exactly the same purpose in respect of the SAA, the equivalent account under the Prior Plan, namely, to measure the ability of the SAA to fund COLA at a higher rate than the guaranteed rate.

126 The 20-year pre-funding requirement related to the funded status of the PBAA. Where, in the opinion of the plan actuary, the actuarial value of

the assets in the PBAA were sufficient to ensure its ability to make all guaranteed COLA payments on a continuing basis for the immediately ensuing period of 20 years, the 20-year pre-funding requirement would be met.

127 MTS says that the Employees' actuary, Mr. Ellement, confirmed on cross-examination that the 20-year pre-funding requirement better assured that all members of the New Plan, the retirees and those to become retirees, would be treated fairly. As well, MTS refers to the evidence of Mr. Restall that he was aware of the 20-year pre-funding requirement set out in s. 15.4 of the Plan Text and that neither he, nor, to his knowledge, Mr. Ellement, nor any of the other Employees' unions or representatives raised the 20-year pre-funding requirement as a concern prior to, at, or for some considerable time following the implementation date.

128 MTS argues that the Employees were aware of the Plan Text which made clear that the PBAA would be a notional account containing a 20-year pre-funding requirement and that they have not demonstrated how the structure of the PBAA violated para. 3 of the MOA. Rather, says MTS, the Plan Text was entirely consistent with the MOA, the Initial Surplus went into the PBAA and, as required, it was in fact used to fund ongoing cost of living increases.

129 MTS asserts that the Employees' claim is based upon their expectations that MTS would operate the PBAA in a manner that went beyond what was required under the terms of para. 3 of the MOA. It refers to Mr. Ellement's admission on cross-examination that his expectation as to what would occur under the MOA related not to what MTS was obligated to do under it, but to what it had the ability to do.

130 MTS argues that the trial judge essentially accepted the Employees' submissions that MTS's obligations under para. 3 of the MOA should be determined by the Employees' expectations rather than by the plain words of the agreement and that, just as with the *Reorg Act* and his erroneous conclusion as to the meaning of "benefits," the trial judge erroneously focussed upon the Employees' expectations rather than upon the language of the MOA and the Plan Text.

Issue 5: Did the trial judge err in his approach to the Undertaking?

131 MTS says that, in two items of correspondence and one memorandum, Mr. Fraser made a statement that has come to be known as the undertaking (the Undertaking). The statement was that the Initial Surplus "will not be used to reduce MTS's cost of, or share of contributions to, the New Plan." The statement was first made in a letter dated August 27, 1996, from Mr. Fraser to Mr. Beatty, replying to a specific question of Mr. Beatty. The statement was repeated in a letter dated October 23, 1996, to Mr. Meronek, replying to specific questions from him. The statement was again repeated in a briefing memorandum on November 6, 1996, from Mr. Fraser to Mr. Findlay, the Minister then responsible for MTS.

132 MTS argues that the trial judge viewed the Undertaking as a promise not to take contribution holidays and relied heavily upon this interpretation in giving judgment against MTS. MTS submits that the trial judge erred in his interpretation of the Undertaking. It argues that the Undertaking was not enforceable as a contract. Nor was it actionable as a misrepresentation.

133 MTS asserts that the reasons for judgment do not disclose whether, or on what basis, the Undertaking is legally enforceable. It says there is no basis in the record for the trial judge to have found that the Undertaking was enforceable as a contract. The statements now described collectively as the Undertaking were offered as answers to specific requests for information, not as a contractual commitment. It says that a contract is an exchange of promises, acts, or promises and acts, as a result of which each side receives something from the other. The trial judge made no finding as to what consideration the Employees gave to support enforcement of the Undertaking as a contractual promise not to take contribution holidays. There is no evidence that the Employees offered anything to MTS in exchange for such a contractual promise and a bare undertaking unsupported by consideration is unenforceable as a contract.

134 MTS also asserts that there is no basis in the reasons or in the evidence to conclude that the Undertaking is actionable as a negligent misrepresentation. It argues that the Undertaking was not as to an existing fact(s), but, at best, a statement as to how MTS would act in the future. It says that to be actionable as a misrepresentation, the representation must not be a promise, but rather a representation as to an existing fact. Even if the Undertaking amounted to a representation, MTS argues that the Employees cannot meet the test to establish liability for negligent misrepresentation. It asserts that the Undertaking was not untrue, inaccurate or misleading, it was not relied upon by the Employees in a reasonable manner or at all, and there is no evidence as to damages suffered by the Employees as a result. In addition, the record does not disclose that any of the Initial Surplus was actually used to take a contribution holiday.

135 MTS argues that while the Employees may have had the opportunity to negotiate for a contractual promise not to take contribution holidays, the fact is that they did not. The MOA is silent on the issue of contribution holidays.

ARGUMENT OF THE EMPLOYEES ON ISSUES 4 AND 5

Issue 4: Did the trial judge err in his interpretation of the MOA?

Issue 5: Did the trial judge err in his approach to the Undertaking?

136 The Employees say that they contributed $424,000,000 to the assets in the New Plan, whereas the liabilities being assumed by MTS totalled $750,000,000, one-half of which was $375,000,000. Thus, their contributions in assets exceeded one-half of the assumed liabilities by $49,000,000. They assert that if the MOA does not produce enhanced benefits for the Employees, the effect is that the Employees have paid $49,000,000 for the same benefits which they had under the Prior Plan. Paying more for the same benefits is not equivalent.

137 The Employees assert that the trial judge was entitled to receive parol evidence at trial concerning the objective intent of the parties and the general factual matrix within which the MOA was created. They say that the modern principles of contractual interpretation permit judges to consider contractual language in light of the objective evidence relating to the factual matrix or surrounding circumstances of the agreement.

138 The Employees say the trial judge was correct in his finding that the November 7, 1996 meetings and the resulting MOA were an attempt by

Manitoba to address and placate the concerns of the Employees. They argue that the evidence of the witnesses directly involved in negotiating the MOA is fairly consistent, namely, that the Initial Surplus was to be used for new benefits in the form of higher COLA than the guarantee, and/or for other improvements. The only real differences in position, say the Employees, are whether the 20-year pre-funding requirement applies and, related to that, the proper constitution of the PBAA.

139 The Employees argue that the subject of a 20-year pre-funding requirement was not discussed on November 7, 1996, or included specifically in the MOA. As well, the Employees say there was no discussion of the PBAA being a notional account, of how the account would work in practice, of what interest rate would be applied, of lump sum transfers out of the account, or of what assets would go into the PBAA other than the Initial Surplus.

140 The Employees assert that all of the witnesses agreed that the objective of the MOA was to achieve a benefit for employees and that the hope was that, by placing the Initial Surplus into the PBAA, that account would grow sufficiently to produce enhanced benefits for the Employees.

141 The Employees say that they wanted to know if MTS was going to match the Initial Surplus and, if not, wanted assurances that MTS would not use it to reduce its funding obligations.

142 The Employees argue that one fact is beyond dispute in this case, namely, that the Initial Surplus did not lead to any benefit enhancement. They say that this is because of the operation and design of the notional PBAA. They argue that the PBAA exists only on paper as credits and

debits, but that there is no physical account. The pluses and minuses that MTS unilaterally chose to apply to the account made it inevitable that the account would not produce any benefits. They argue that the assets related to the COLA guarantee are not even credited to the PBAA and that, in short, the account is a sham. They assert that MTS's talk about the PBAA and the 20-year pre-funding requirement is a shell game which hides the truth of what really happened, namely, that MTS did exactly what it promised it would not do: it used the Initial Surplus to reduce its "cost or share of contributions" to the New Plan.

ANALYSIS

143 In this case, as I have previously stated, the *CSSA* was not only the constating legislation, but the plan text for the Prior Plan. The New Plan consists of s. 15 of the *Reorg Act*, the MOA, the Plan Text and the Trust Agreement. The MOA is a contract between Manitoba, the Employees and MTS. The Plan Text is a contract between the Employees and MTS.

144 While the Employees described the Prior Plan as a "hybrid plan," both the Prior Plan and the New Plan are defined benefit pension plans. The essence of such a plan is that, upon retirement, the employees, in exchange for contributions and services, are guaranteed payment of a pension determined by a formula set forth in the plan itself. This was so under the Prior Plan, notwithstanding that only the employees made regular advance contributions to the CSSF, whereas the employer funding was done on a "pay-as-you-go" basis, and notwithstanding that the employees were required to contribute further money if the pension fund was in deficit.

145 Under the Prior Plan, the contributions of both the employees and the employer were paid into the trust fund and the pension benefits were paid out of it pursuant to the pension benefit formula stipulated in the plan. The same is true under the New Plan as it relates to the Employees and MTS.

The Law

146 The trial judge's task in deciding the issues before him was succinctly stated by Rothstein J. in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 (at para. 86):

> .... The role of the courts is to ascertain and uphold the rights of the parties in accordance with the applicable statutory and common law and the terms of the relevant documentation. ....

147 The basic common law principles applicable to a defined benefit pension plan and relevant to the issues to be decided in this appeal have been set out clearly in several recent leading cases decided by the Supreme Court of Canada, including, in particular, *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Nolan*; and *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273.

148 Those relevant principles which can be gleaned from the jurisprudence, including the three Supreme Court cases in question, are:

- Contribution to a defined benefit pension plan is made each year on the basis of an actuarial estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost."

- In a contributory defined benefit pension plan, the employees must contribute a set amount, which is usually a defined percentage of salary. The employer's contribution to the fund is the amount equal to the difference between the employee contributions and the amount which the actuary determines is needed to cover the current service costs of the plan.

- While a plan which takes the form of a trust is in operation, all contributions made by the employees and the employer are made into the trust and become property of the trust.

- Where the plan actuary determines that the estimated value of the assets in the trust fund at a specific point in time is greater than the estimated value of all of the liabilities of the fund at that time (i.e., pension benefits owed or to be owed members), the fund is said to have an actuarial surplus.

- Where the plan actuary determines that the estimated value of the assets in the trust fund at a specific point in time is lower than the estimated value of all of the liabilities of the trust fund at that time, the fund is said to be in deficit.

- While a plan which takes the form of a trust is in operation, any surplus is simply an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary at the time of valuation.

- It is only when a defined benefit pension plan is terminated or wound up that the assets and liabilities of the pension plan crystallize and the existence of a surplus, if any, can be calculated and/or determined. Such a surplus is an actual surplus as distinct from an actuarial surplus as described above. The employees may then become entitled to some right to such actual surplus, depending upon the terms of the plan/trust.

- When an actuarial surplus is determined to exist, the employer may take a contribution holiday, in which event the surplus is used to cover the employer's contribution obligations to the fund.

- Contribution holidays may be taken in such a circumstance so long as the legislation and plan documentation permit. Even when not expressly permitted to do so by the legislation and plan documentation, where the plan documentation provides that funding requirements will be determined by actuarial practice, the employer may take a contribution holiday unless other plan wording or legislation prohibits it.

- To take a contribution holiday does not reduce the corpus of the fund, nor does it amount to applying the monies contained in the fund to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. Their entitlement is to receive from the trust fund upon retirement the defined benefits guaranteed them under the pension plan from the trust and, depending upon the terms of the trust, to receive a share of any surplus remaining upon termination of the plan.

149 I refer, as well, to the comments of Gillese J.A. in the Ontario Court of Appeal decision of *Burke et al. v. Hudson's Bay Co. et al.*, 2008 ONCA 394, 236 O.A.C. 140, where she wrote (at paras. 35, 37):

> The pension plan text is a contract between the employer and the employee. It governs the administration of the pension plan, providing for such things as eligibility for membership in the plan; benefits on events such as retirement, termination and death; the method by which the plan will be funded; and the method by which the pension plan will be administered.
>
> I wish to make two further comments .... The first comment arises as a result of para. 173 of the reasons of the trial judge. In that paragraph, the trial judge writes that where a pension plan is not terminated or wound up, in the absence of legislative directives, "it is reasonable to look at the history of conduct of the parties to determine what their expectation in respect of surplus was at any point in time". If this statement means that the parties' rights and obligations are to be decided on the basis of conduct, rather than the governing legal documents, I must respectfully disagree. **Schmidt** is clear. So too are the myriad of other pension cases decided to date in which surplus has been an issue. The starting point for any determination of the rights and obligations of the parties to a pension plan is the Plan documentation.

Was the Prior Plan Terminated or Wound-up?

150 The Prior Plan was neither terminated nor wound up. That is made clear from ss. 15(5) and 15(7) of the *Reorg Act*. The former provided effectively that the assets of the CSSF attributable to the contributions from the Employees (including income earned thereon) be transferred into the Trust Fund under the New Plan. The latter provided that the liabilities of the CSSF to the Employees be assigned to and assumed by MTS and become liabilities, rights and obligations of the Trust Fund under the New Plan.

151 The Employees have argued that the New Plan was a "new plan" and is so defined as such under s. 15 of the *Reorg Act*. However, the use of the phrase "new plan" does not mean that the Prior Plan was wound up or terminated as regards the Employees.

152 Had that been its effect, the assets attributable to the Employees would have been quantified, the liabilities due the Employees would have been actually determined, not actuarially estimated, and the surplus, if any, would have become an actual surplus, to be dealt with pursuant to the terms of the Prior Plan, which gave the Employees no right to surplus. There would have been no assets transferred to, nor liabilities assumed by, the Trust Fund of the New Plan, nor any need for para. 3 of the MOA.

The Initial Surplus at Common Law

153 It is true that the common law principles relating to defined benefit pension plans can be overridden by the language of the applicable statute and/or the terms of the relevant documentation. But as a starting point, and subject to such altering language, the common law principles apply.

154 The result is that, in this case, but for any such overriding provisions, what is known as the Initial Surplus was simply an actuarial surplus in the Prior Plan. That is, it was the excess in the estimated value of the assets in the CSSF attributable to the Employees which flowed from their contributions only, over the estimated value of 50 per cent of the pension liabilities owed to them at the material time, that is, January 1, 1997, the implementation date of the New Plan. This was so notwithstanding that the Initial Surplus was the result of contributions made solely by the Employees.

155 Thus, at common law, the Initial Surplus was simply an actuarial surplus in an ongoing defined benefit pension plan. Being an actuarial surplus, neither the Employees nor MTS had any legal entitlement to it. Moreover, as the New Plan was a continuation of the Prior Plan for the Employees, the Initial Surplus was simply part of a larger actuarial surplus in the New Plan.

Displacement, if any, of Common Law Principles

156 This leads then to consideration whether the common law principles established by the jurisprudence of the Supreme Court of Canada and other courts have been displaced by the *Reorg Act*, the MOA, the Plan Text or the Trust Agreement. In particular, one must determine the meaning and legal effect of the MOA and whether MTS breached the MOA.

157 It is true, as the evidence discloses and the trial judge correctly found, that there was great concern expressed by the Employees as to the Initial Surplus and the fact that they did not want to lose what they considered to be the source of a benefit to which they felt entitled in respect of those funds. That concern was much discussed by the Employees, MTS and, latterly, Manitoba. Ultimately, the concern found recognition in the MOA and the Plan Text. As well, whatever the MOA gave the Employees in respect of the Initial Surplus was protected by the addition of s. 15(11) of the *Reorg Act*, which provided that nothing in s. 15 of the *Reorg Act* could be interpreted as nullifying the effect of the MOA on the subject of pension issues.

The Undertaking

158 I have already referred at para. 131 to the Undertaking made by Mr. Fraser, which, on each occasion, contained essentially, if not exactly, the same statement, that the Initial Surplus would not be used to reduce MTS's costs or share of contributions to the New Plan. The Employees assert that they have placed reliance upon it and the trial judge appeared to do so as well.

159 In my opinion, the Undertaking, consisting of all three statements, had no legal effect between the Employees and MTS.

160 The statement made on the first two occasions was simply the provision of information in response to specific questions asked by Mr. Beatty on the first occasion and by Mr. Meronek on the second. The evidence does not support any intention of the parties to treat either statement as contractual in nature. Nor was there any mutual promise from the Employees, or any evidence of consideration.

161 The third statement was contained in a briefing memorandum from Mr. Fraser to Mr. Findlay, the Minister then responsible for MTS. That briefing memorandum contained other statements as well concerning issues relevant to the intended New Plan which had not yet been resolved between the Employees and MTS. Again, the evidence does not support the existence of mutual promises, of consideration, or of an intention between MTS and the Employees to contract. Indeed, the Employees were not a party to the briefing memorandum, which was from MTS to the Minister.

162 Moreover, it is clear from the evidence that on November 6, 1996, a senior government official gave a copy of the briefing memorandum to Mr. Restall and asked him whether its contents would be acceptable to resolve the concerns of the Employees. Mr. Restall rejected it, saying that it would not. He subsequently inquired of his Committee, which confirmed his position. Accordingly, even if there were some basis for asserting that the statement contained in the briefing memorandum was contractual in nature, it was rejected.

163 The rejection of the briefing memorandum led to the meeting of November 7, 1996, the negotiation of the MOA and its execution. The MOA, not the Undertaking, was the agreement.

164 As regards the possibility of the Undertaking constituting a negligent misrepresentation(s), thus giving rise to tortious liability, the trial judge made no such finding. Thus, I need not address the point. Were I required to do so, however, I would dismiss such an argument for several reasons, not the least of which being that, since the Undertaking was rejected, there clearly was no reliance upon it by the Employees.

The MOA

165 There is no doubt that the MOA contained several provisions which related closely to the issues described in the November 6 briefing memorandum. However, the matter of concern in respect of the issues under consideration on this appeal pertained to the use of the Initial Surplus. The only part of the MOA which dealt with the Initial Surplus was para. 3, which provided for its use as follows:

> 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 plans [*sic*] 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.

166 It appears clear that para. 3 of the MOA responded to the concerns of the Employees relative to the Initial Surplus. This is evidenced by the Employees' counsel's letter dated September 25, 1996, to Mr. Fraser, which stated amongst other things:

> . . . . .
>
> (d) You speak of **the most appropriate use** of the surplus. We are of the view that **the most appropriate use** of the surplus would be to apply it to an Indexing Account, which you say MTS will set up and administer on the same basis as the Superannuation Adjustment Account for indexing purposes, in order to pre-fund future cost of living requirements.
>
> There are many reasons why we believe this use of the surplus presently extant in the CSSF is appropriate including the following:
>
> . . . . .
>
> 2. Under the current plan, retirees only get indexing in response to two-thirds of inflation and only to the extent that the Superannuation Adjustment Account has funds. Applying the surplus to the Indexing Account will assist in ameliorating this deficiency which would otherwise persist for many years before retirees would be able to get cost of living increases based on a higher percentage of inflation.
>
> 3. There is every reason to believe that there will be a shrinkage in the employee account in the future and therefore, a reduction in

> employee contributions to assist in funding the indexing portion of the benefits. At the present rate of 10.2 percent of employee contributions, there will not be enough funds in the account sufficient to cover even a one percent cost of living increase in the future.
>
> . . . . .

This letter was copied to the Employees' representatives.

167 Another provision of the MOA, para. 4, required that the draft pension plan text would be made available November 11, 1996, to the Employees' representatives, who would have until 5:00 p.m., November 25, 1996, to submit any requests for amendments before the Plan Text was submitted for registration. It is clear from the evidence that the draft was provided to the Employees' representatives on or about November 11 and that discussions and correspondence between them and MTS continued well into late December 1996. More will be said about this later.

168 There is no dispute that the MOA was a contract between Manitoba, MTS and the Employees. As well, the Plan Text was a contract between MTS and the Employees.

169 In *King*, Steel J.A. wrote (at para. 60):

> The cardinal principle of contractual interpretation is, of course, to give effect to the intention of the parties as expressed in their written agreement. The goal is to determine the intent of the parties at the time of the execution of the contract. See **Manulife Bank of Canada v. Conlin et al.**, [1996] 3 S.C.R. 415; 203 N.R. 81; 94 O.A.C. 161, at para. 79.

170 Steel J.A. continued (at paras. 70, 72-73):

> While the surrounding circumstances may be referred to even in the absence of ambiguity, those circumstances, or factual matrix, should consist of objective evidence of the background facts at the time of

> the execution of the contract, not the subjective evidence of one party's intention or of the negotiations leading to the final contract. See **Eli Lilly** [[1998] 2 S.C.R. 129], at para. 54, **Moore Realty Inc.** [2003 MBCA 71, 173 Man.R. (2d) 300], at para. 19, and **Prenn v. Simmonds** [[1971] 3 All E.R. 237 (H.L.)], at p. 240.
>
> So, generally, the factual matrix will include, among other things:
>
> ...
>
> - evidence of the objective intention of the parties.
>
> But not,
>
> - evidence of the subjective intention of the parties;
>
> - evidence of the negotiations; and
>
> - evidence of the subsequent conduct of the parties after the contract was entered into.
>
> In summary, when interpreting a contract, the court's search for the intention of the parties is aided by reference to the surrounding circumstances or factual matrix at the time of the execution of the contract as viewed objectively by a reasonable person at the time of the signing of the contract. See Fridman [*The Law of Contract in Canada*, 4th ed. (Toronto: Thomson Canada Limited, 1999)], at p. 478; **MacMillan Bloedel Ltd. v. British Columbia Hydro and Power Authority**, [1993] 2 W.W.R. 127; 19 B.C.A.C. 215; 34 W.A.C. 215; and **Moore Realty Inc.,** Hamilton, J.A., at para. 18.

171 There is good sense for the rationale that the evidence of negotiations not form part of the factual matrix in contract interpretation cases. This was explained by Hamilton J.A. in *Moore (Geoffrey L.) Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man.R. (2d) 300, where she adopted the comments of Lord Wilberforce, writing (at para. 20):

> In the well-known decision **Prenn v. Simmonds**, [1971] 3 All E.R. 237; [1971] 1 W.L.R. 1381 (H.L.), Lord Wilberforce began by noting the obvious reasons why evidence of negotiations should be excluded (at p. 240):

> There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in cl 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (although the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words?

172 In my opinion, the same reasoning would apply for rejection from the factual matrix of evidence of the subjective intention of the parties, namely, that it is only the final document which records a consensus and the exercise is to determine the intention of the parties at the time of execution of the contract from the language used by the parties in the contract.

173 Let me then consider para. 3 of the MOA.

174 As is apparent, para. 3 imposed certain mandatory and certain conditional obligations upon MTS.

175 The mandatory obligations were that any Initial Surplus from the CSSF would be allocated to the Trust Fund to fund future COLA, that there would be a COLA account, and that MTS would provide a guaranteed minimum COLA of two-thirds of the Consumer Price Index (CPI) with a maximum CPI of four per cent.

176 The conditional obligations were that if following review in subsequent years by the plan's actuary there were sufficient additional assets

in the COLA account beyond those required for payment of the guaranteed COLA increase for a particular year, then an enhanced COLA or an increase in pension benefits would be given for that year, provided that the liability for the pension plan in total was not increased due to such change.

177 The essential provision of the MOA was that the Initial Surplus from the CSSF would be allocated to the Trust Fund to fund future guaranteed COLA and possibly enhanced COLA and/or pension benefits.

178 In my view, it is clear from para. 3 of the MOA, when read with the Plan Text, that the Initial Surplus was to be used to pay the annual guaranteed COLA and possibly some enhanced benefit by way of COLA or otherwise, beyond such annual guaranteed adjustment. But, such enhanced benefit would be paid only upon compliance with certain stipulated conditions.

Creation and Operation of the PBAA

179 It was known to the parties that, under the New Plan, by virtue of the *ITA* and the *PBSA*, MTS was not able to have more than one fund for the New Plan. Accordingly, all of the pension monies under the New Plan had to be held in the Trust Fund at inception and on an ongoing basis. Thus, MTS was prevented by law from creating a "real" separate account or fund for purpose of COLA or otherwise, and, in order to comply with the MOA, was required to create a notional account, the PBAA.

180 The Initial Surplus, certain other initial contributions and the ongoing contributions on account of COLA made by both the Employees and MTS were notionally (i.e., on paper) credited to the PBAA and the guaranteed

COLA payments and enhanced COLA or benefits, if any, were to be determined by the New Plan actuary and notionally debited to the PBAA. The evidence is clear that all of this was known to and accepted by the Employees.

181 I note that, although the SAA was a real account under the Prior Plan, the COLA component of the Employees' pension payment under the Prior Plan was not paid to them from the SAA, but from the CSSF, the trust fund under the Prior Plan, just as the guaranteed COLA component of the Employees' pension payment under the New Plan was paid to them not from the PBAA, but from the Trust Fund.

182 The foregoing was provided for clearly in the Plan Text. Section 2.28 defined "fund" (which I have been calling the Trust Fund) as being the fund established for the purposes of the New Plan and in accordance with the terms and provisions of the Trust Agreement, and provided that all contributions to the New Plan were to be made into, and the pension benefits and expenses under the New Plan were to be payable out of, it.

183 Section 2.38 defined the PBAA as an account established under the New Plan, as described in ss. 16.7 to 16.9, for the purpose of determining adjustments to pension benefit payments. Sections 16.7, 16.8 and 16.9 pertain to the establishment and maintenance of the PBAA.

184 Section 16.7 required MTS to create and maintain the PBAA as part of the Trust Fund, to be used for the purpose of determining the amount of pension benefit adjustments. As of January 1, 1997, the PBAA was to be credited with amounts equal to the portion of the SAA (from the Prior Plan) held in respect of members under the Prior Plan who became members of the

New Plan as at January 1, 1997, and an equivalent amount by way of initial allocation from MTS. Section 16.7(c) provided that the PBAA be credited with the Initial Surplus. I note that this provision was not contained in the first draft of the Plan Text, but was inserted into the second draft and carried forward thereafter at the instance of the Employees' representatives.

185 Section 16.8 provided for the ongoing crediting or debiting of the PBAA on a monthly basis. The amount to be credited was the amount of the required contributions to the PBAA from the Employees, namely, 10.2 per cent of their pension contributions, and a matching amount by MTS. In addition, interest on the balance of the account was to be credited at an interest rate determined by MTS. Debited from the PBAA on a monthly basis were the guaranteed COLA payable and any payments made pursuant to s. 16.11 of the Plan Text, which pertained to any enhanced COLA or pension benefits that might be granted out of a surplus in the PBAA in compliance with the 20-year pre-funding requirement.

186 Section 16.9 required MTS to maintain records on the operation of the PBAA, separately identifying amounts debited or credited in respect of the Employees and MTS. It is clear from the evidence that such records of account were maintained and that, while all actual payments of money into or out of the New Plan were made into and payable out of the Trust Fund as required by law, the PBAA had notionally credited to it and notionally debited from it the amounts which it was to receive and to pay out as provided for under the MOA and the Plan Text.

187 As regards interest to be credited to the PBAA, I reiterate that s. 16.8(c) provided that such interest was to be at a rate determined by

MTS. As well, s. 6.1 of the Plan Text provided that the rate should not be less than the CANSIM rate. CANSIM is the acronym for Canadian Socio-Economic Information Management System.

188 The MOA requirement that MTS provide a minimum COLA of two-thirds of CPI with a maximum CPI of four per cent was also provided for in s. 15.7 of the Plan Text. There is no dispute that it was paid as required.

Enhanced COLA or Pension Benefits

189 The entire dispute in respect of Issues 1, 2, 4 and 5 really relates to the Employees' possible entitlement to enhanced COLA or pension benefits over and above the guaranteed minimum amount.

190 As I have already stated, there is no doubt that the Initial Surplus was transferred into the Trust Fund and was notionally allocated to the PBAA. There is also no doubt that the Initial Surplus, the other initial contributions, the ongoing contributions thereafter and the interest earned, as well as the payments made on account of guaranteed COLA, were reviewed annually by the plan actuary for the purpose of ascertaining whether there were sufficient additional assets in the PBAA to permit payment of enhanced COLA or pension benefits in any particular year beyond the guaranteed COLA benefit.

191 The test used by the plan actuary to ascertain that is the 20-year pre-funding requirement. This, together with the interest rate applied to the PBAA by MTS, are the subjects of complaint by the Employees.

192 The Employees argue that the subject of a 20-year pre-funding requirement was not discussed on November 7, 1996, or included specifically in the MOA. That is true.

193 It is also true, as the Employees argued, that on November 7, 1996, there was no discussion of the PBAA being a notional account, or of how the account would work in practice, or of what interest rate would be applied, or about lump sum transfers out of the account, and no discussion of what assets would go into the PBAA other than the Initial Surplus.

194 However, it is wholly unrealistic to believe that the New Plan would be composed of s. 15 of the *Reorg Act* (consisting of 13 subsections) and the MOA (consisting of 5 paragraphs), but nothing more.

195 One need only look at the *CSSA*, which, as I have stated, was not only the constating legislation for the Prior Plan, but also its plan text, to understand that the plan text is a critical document to any pension plan which adds meat to the bare bones of documents such as s. 15 of the *Reorg Act* and the MOA.

196 Indeed, it was expected and understood by the parties that the Plan Text would flesh out the basic provisions of the New Plan as set forth in s. 15 of the *Reorg Act* and para. 3 of the MOA so as to provide for an operating and effective pension plan which complied with the applicable law.

197 The Employees received the advice of and assistance from their actuarial representatives and the ERPC. Their actuarial representatives were experienced in respect of defined benefit pension plans, including the

Prior Plan. They and the ERPC would have been fully aware of the need for the Plan Text and would have expected it as a matter of course. Indeed, para. 4 of the MOA expressly so provided. The evidence is clear that the first draft of the Plan Text was provided to the Employees on or about November 11, 1996, that there were discussions and correspondence which followed, that changes were made as a result and that, ultimately, the Plan Text was accepted by the Employees, but for the outstanding issues of governance and participation in ongoing surplus.

198 The only caveat was that the Plan Text could not purport to nullify the provisions of s. 15 of the *Reorg Act* or the MOA. In my opinion, it did not.

The 20-Year Pre-funding Requirement

199 As regards the 20-year pre-funding requirement, it had applied to the SAA under the Prior Plan since 1990. It was clearly provided for in the Plan Text under the New Plan. The 20-year pre-funding requirement was acknowledged by Mr. Ellement as being a provision to produce greater fairness to retirees on an ongoing basis and by Mr. Restall as being something known to him and to their representatives prior to the implementation of the New Plan and about which there was no objection.

The PBAA Interest Rate

200 As for the interest rate applied to the PBAA, the Employees have asserted that that rate is too low and prevents the PBAA from ever getting to the level which would meet the 20-year pre-funding requirement and permit them to receive enhanced COLA in any given year.

201 The Employees took issue before us with respect to MTS's decision to use the CANSIM rate for the PBAA and argued that the use of it as the interest rate and the set-up of the PBAA resulted in it being a sham. However, they acknowledged in argument that they did not, in their statement of claim or its many amendments, make any such allegation, nor did they allege bad faith on the part of MTS in that regard.

202 As well, as I have stated, the Plan Text provided that MTS could set the interest rate. It also provided that the interest rate would not be less than the CANSIM rate. Both of these facts were known to the Employees and their representatives before and at the time of implementation and were not objected to by them.

The Operation of the PBAA and the Trust Fund

203 The Employees' fundamental assertion was that the intent of the parties and the expectations of the Employees was that the Initial Surplus would be used to provide them with enhancements to their pension benefits and that they have not received such enhancements.

204 They also asserted, and the trial judge accepted, that by taking contribution holidays, MTS had effectively taken the Initial Surplus, which was intended to be used for the purpose of enhancing COLA payments or other pension benefits of the Employees. The trial judge concluded that this taking by MTS was a breach of the MOA and that the remedy required was to order MTS to return the Initial Surplus, together with interest.

205 In my opinion, the trial judge erred in law. In so concluding, he misinterpreted the MOA and misdirected himself on the law as it relates to

defined benefit pension plans, in particular as to the meaning of surplus, the entitlement to and effect of contribution holidays, and the fundamental obligations of MTS under the New Plan.

206 There is no doubt that under the Prior Plan, the Employees had no right to surplus, let alone to actuarial surplus. In my view, however, the MOA imposed obligations upon MTS with respect to the Initial Surplus beyond that which existed under the Prior Plan or pursuant to common law principles. Those obligations were fleshed out in the Plan Text.

207 One must remember that, unlike the Prior Plan, the New Plan guaranteed the Employees a minimum COLA payment. However, the MOA did not go beyond that and unconditionally mandate enhancement to the Employees' pension benefits by use of the Initial Surplus. Rather, as I have already explained, it required only that the Initial Surplus be used to fund future guaranteed COLA and if the state of the COLA account in any particular year was able to fund a higher increase, then a higher increase, or enhancement, would be given for that year.

208 The hope and expectation of both the Employees and MTS was that by creating the PBAA and crediting it with the Initial Surplus and the other contributions to it, all as provided for in the Plan Text, there would be an ability to pay not only the guaranteed COLA, but also possibly an enhanced COLA, or other increased benefits in a particular year(s).

209 While the payment of enhanced COLA or other pension benefits did not occur, it was not by reason of any breach of the MOA by MTS. Indeed, it is my view that MTS complied fully with its obligations under the MOA.

210 The trial judge's conclusion that MTS utilized the Initial Surplus to take contribution holidays and thereby effectively took the Initial Surplus from the Employees and that it thus breached the MOA was in error. His conclusion misinterpreted the New Plan and, in particular, the meaning of surplus, the entitlement of MTS to and the effect of contribution holidays, and the entitlement of the Employees and the obligations of MTS, as employees and employer, under a defined benefit pension plan, none of which was altered by the MOA.

211 The MOA required that the Initial Surplus be allocated to the Trust Fund. There can be no doubt that it was. It was part of the $424,000,000 worth of assets contributed by the Employees to the Trust Fund.

212 The MOA required the creation and maintenance of a COLA account. MTS created such an account, the PBAA. As I have explained, that was required to be a notional account by reason of the *ITA* and *PBSA*. There is no doubt, however, that although the Initial Surplus was actually transferred into the Trust Fund, it was, as well, notionally credited to the PBAA as required by s. 16.7(c) of the Plan Text. There is also no doubt that the PBAA was created and continued in a manner consistent with the terms of the MOA and the Plan Text, including annual actuarial analysis and reporting.

213 The law is clear that contribution holidays do not result in a taking from the corpus of the trust. A contribution holiday occurs when the Trust Fund has an actuarial surplus (i.e., the actuarial value of the trust assets exceeds the actuarial value of the liabilities of the trust), with the result that

an employer is excused from making an actual deposit of funds into the trust at that time. Thus, in taking contribution holidays, MTS did not remove any money or other assets from the Trust Fund.

214 More importantly, however, the PBAA was maintained throughout as required and even in the years when MTS took contribution holidays in relation to the Trust Fund, it nevertheless notionally credited the PBAA with the contributions required from both the Employees and MTS under s. 16.8 of the Plan Text, namely, 10.2 per cent of the annual pension contributions from the Employees and a matching amount from MTS. Thus, although MTS did not make contributions to the Trust Fund in the years it took contribution holidays, it did make its required contributions notionally to the PBAA.

215 Accordingly, when the plan actuary determined the value of the PBAA on July 1 each year, so as to determine and recommend the guaranteed COLA payment for the ensuing year (all as required by the Plan Text), all of the assets required to be credited to the PBAA, including the Initial Surplus, the annual contributions of the Employees and MTS and the income earned, were there. An assessment of the PBAA could then be done as regards the 20-year pre-funding requirement to determine whether an enhancement in COLA or other pension benefits could be made in any given year.

216 Furthermore, pursuant to the common law and s. 15(9) of the *Reorg Act*, the obligation upon MTS continued as regards the payment of the pension benefits, including the COLA component, regardless of the state of the Trust Fund. Had there been an entitlement to enhanced COLA or

pension benefits, MTS would have been legally obligated to make such payment(s), as with all payments, out of the Trust Fund. If there were an actuarial deficit in the Trust Fund, MTS was required by law to make additional contributions to fund the deficit so as to pay not just the guaranteed COLA, but any enhanced COLA or benefits, if owing, by virtue of the state of the PBAA. As a result, regardless of the taking of contribution holidays, MTS was obligated to pay and the Employees were to receive and have received the pension benefits to which they are entitled under the terms of the New Plan.

217 What is absolutely critical here is to understand that regardless of the state of the Trust Fund which entitled MTS to take the contribution holidays which it did, the PBAA, the notional fund, was set up, contributed to and underwent annual accounting and actuarial analysis all as required under the New Plan. Had the PBAA reached the 20-year pre-funding requirement, the Employees would have become entitled to an enhanced COLA payment and/or enhanced pension benefits for a particular year, notwithstanding the state of the Trust Fund, given the obligation upon MTS to pay the guaranteed pension benefits, including COLA, pursuant to the terms of the New Plan.

CONCLUSION

218 I have concluded that there was no breach of the MOA and, as a result, there is no remedy required and no obligation upon MTS to pay the sum of $43,343,000 plus interest to the Employees.

219 In light of my decision respecting Issues 1, 2, 4 and 5, I need not address Issues 6 and 8 of the appeal.

THE CROSS APPEAL

220 Given my decision on the appeal, I need not deal with the cross appeal. Nevertheless, I will do so as the cross appeal was fully argued both in the facta filed by the parties and in oral argument.

221 The Employees assert that the issues raised on the cross appeal relate to findings of mixed law and fact. Thus, they say, the standard of review is that of palpable and overriding error.

222 CEP concurs with and adopts the issues identified and the position advanced by the Employees on the cross appeal and the standard of review.

223 MTS did not advance any position with respect to the standard of review for the issues on the cross appeal.

224 In my view, the issues advanced on the cross appeal do raise questions of mixed law and fact and the standard of review in respect of both issues is that of palpable and overriding error.

Issue 1: Did the trial judge err in failing to find that the Initial Surplus should be quantified as the amount by which the Employees' contributions exceeded their one-half of actuarial liabilities?

ARGUMENT

225 The Employees argue that the intent of s. 15 of the *Reorg Act* was to preserve important pension rights and benefits of the Employees following the process of privatization. The Employees were not to have their pension benefits worsened. In order to achieve this, the *Reorg Act* mandated that MTS shall provide "benefits ... equivalent in value."

226 They argue that the trial judge found that the requirement that benefits be equivalent in value was intended to include the issues of the initial surplus, ongoing surplus, and governance. The term "initial surplus" is found in para. 3 of the MOA. What to do with the "initial surplus" was the major issue discussed on November 7, 1996, which discussions culminated in the drafting and execution of the MOA.

227 The Employees refer to the trial evidence of Mr. Fraser, wherein he testified that the phrase "initial surplus" in the MOA meant the excess above 50 per cent of liabilities coming over from the CSSF.

228 The Employees assert that the trial judge erred in his valuation of the Initial Surplus. They point out that he wrote (at para. 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.

229 However, later in his judgment, the trial judge wrote (at para. 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.

230 The Employees assert that there was no agreement between the parties with respect to redefining the meaning of Initial Surplus. They argue that the trial judge may have been misled by the fact that there was an agreement that the amount of the differential was $43,364,000. They say this occurred when the actuaries for the various parties reviewed the process for the

transfer of assets from the CSSF at the second meeting of a pension committee established pursuant to para. 1 of the MOA and s. 20 of the Plan Text (the Pension Committee) on October 1, 1997. But the Employees maintain there was no agreement to redefine the meaning of Initial Surplus. It was and remained the amount above 50 per cent of the liabilities coming over from the CSSF, which they assert was $49,000,000.

231 The Employees acknowledge that they were aware that under s. 16.7(c) of the Plan Text, the amount of the Initial Surplus was defined to be the difference between the transfer amount from the Prior Plan and the assets contributed to the New Plan by MTS. That difference was to be allocated to the PBAA. They acknowledge, as well, that their actuarial advisors confirmed to MTS that they were satisfied with the proposed change. The Employees say, however, that they acquiesced in this in order to achieve a comprehensive settlement on the overall package of pension issues and argue that their acquiescence does not amount to a binding agreement that contracts them out of their entitlement to the benefit of the full Initial Surplus. They argue that they could agree to accept more, but not less, as the *Reorg Act* required equivalency as a minimum standard.

232 The Employees assert, therefore, that the palpable and overriding error of the trial judge is that the Initial Surplus is now defined and quantified as something less than that to which the Employees are entitled.

233 MTS argues that the Employees' cross appeal on this issue must fail. They assert that the Employees filed their original statement of claim on and over the following nine years and amended it on six occasions, culminating in a "fresh as amended claim" on October 15, 2008. In the

various iterations of the statement of claim, the Employees quantified the Initial Surplus at $43,364,000. In the re-re-re-amended statement of claim, the Employees alleged that "subsequent to the termination of the Prior Plan, it was agreed between the parties that the amount that was transferred from the Prior Plan to the New Plan and which was to be dedicated to COLA adjustments above the 2/3 of 4 per cent guarantee pursuant to the November agreement, was $43.364M."

234 MTS says it filed a statement of defence to three versions of the statement of claim, the last one being to the re-re-re-amended one. It says that in response to the specific allegation made in the re-re-re-amended statement of claim as stated above, it pled that the amount of $43,364,000 represented the estimated difference between the value of the assets transferred from the CSSF into the Trust Fund and the value of the initial contribution made into it by MTS, and that, in accordance with the terms of the MOA, that amount was allocated to the PBAA.

235 MTS says that after execution of the MOA, the Employees reviewed the Plan Text of the New Plan and their initial comments suggested no changes in definition or quantification of the Initial Surplus. On December 2, 1996, the Employees were advised that the Plan Text had been amended to deal with the allocation of the Initial Surplus to the PBAA to fund future cost of living increases. The provision that was inserted into the Plan Text was s. 16.7(c), which provided that the PBAA would be credited with the amount of any initial transfer excess calculated by determining the difference between the total assets transferred from the Prior Plan in respect of the members and the total assets contributed to the New Plan by the

participating employers, which initial transfer excess amount would be calculated as at the effective date.

236 MTS says that Mr. Ellement, the actuary for the ERPC, reviewed the Plan Text containing s. 16.7(c) and advised the members of the ERPC on December 9, 1996, as follows:

> Section 16.7 - Pension Benefit Adjustment Account. Under clause 16.7(c) [t]he amount of the initial employee surplus has been defined to be the difference between the transfer amount from the Prior Plan and the assets contributed to the Plan by the Employers. This difference will be allocated to the Account.

237 MTS says that on December 10, 1996, the ERPC requested that MTS make a change to the wording of s. 16.7(c) of the Plan Text, but on December 23, after further consideration, the ERPC confirmed to MTS that s. 16.7 was acceptable without the suggested change. On December 30, 1996, Mr. Corp also confirmed that the wording of s. 16.7, including s. 16.7(c), was acceptable.

238 MTS argues that, at trial, Mr. Corp confirmed that the Initial Surplus as defined in s. 16.7(c) was agreed to, and testified that the Employees specifically chose that definition because they thought it was going to result in a higher credit to the PBAA.

239 Thus, MTS argues that there was no palpable and overriding error made by the trial judge on this issue. It says that the definition of Initial Surplus was agreed to between the parties as set forth in s. 16.7(c) of the Plan Text, that the amount was $43,364,000 and that that was the amount allocated to the PBAA.

ANALYSIS

240 In my opinion, the trial judge made inconsistent findings in his judgment as to the meaning of Initial Surplus. He appears ultimately to have concluded that the agreed meaning was that Initial Surplus was to be the amount by which the Employees' contribution exceeded their one-half of the actuarial liability for the benefits.

241 However, that appears to be the meaning of the term as initially contemplated by the parties. In my opinion, the meaning of Initial Surplus was in fact agreed to by the parties as it is defined in s. 16.7(c) of the Plan Text, namely, as the difference between the total assets transferred from the Prior Plan in respect of the members and the total assets contributed to the New Plan by MTS, calculated as at the effective date (January 1, 1997).

242 The trial judge also erred in quantifying the amount of the Initial Surplus at $43,343,000. In my view, however, that error was merely a clerical error. The amount ought to have been $43,364,000, as agreed to by the parties.

243 Thus, while the error respecting the meaning of Initial Surplus was indeed a palpable error, it was not, in my view, an overriding error in respect of this issue as the trial judge's quantification of the Initial Surplus was essentially correct.

244 I have already concluded that the Initial Surplus does not fall within the meaning of "benefits" for which equivalency is required pursuant to s. 15(2)(a) of the *Reorg Act*. However, Initial Surplus is a term specifically used in para. 3 of the MOA, which stipulates that "[a]ny initial surplus from

the CSSF would be allocated to the new pension plan trust fund to fund future cost of living adjustments."

245 Consistent with para. 4 of the MOA, the MOA was substantially fleshed out by the Plan Text, as contemplated by the parties. The obligation pursuant to para. 3 of the MOA is expressed under s. 16.7(c) of the Plan Text. There, Initial Surplus was effectively defined and its amount was subsequently quantified by the actuaries representing the parties. Both the definition and the amount were known to the Employees and accepted.

246 The Employees pled this amount in some of the many iterations of their statement of claim and MTS, in its statement of defence, agreed. In argument, Employees' counsel admitted that there had been agreement reached as to the amount.

247 In the result, while there was palpable error in the trial judge's finding of the parties' agreement as to the meaning of Initial Surplus, there was no overriding error in his quantification of that amount. But for a minor clerical error, the trial judge accepted the amount agreed upon by the Employees and MTS.

248 Moreover, there was fairness in the quantification of the amount even if one were to use the definition which the Employees would prefer, namely, the difference between the value of the assets contributed by the Employees and 50 per cent of the liabilities. Even if that definition were applied, the difference between the Employees' contribution and 50 per cent of the liabilities would be $49,000,000 (a difference between their contribution of $424,000,000 as against their share of 50 per cent of the liabilities assumed by MTS, being $375,000,000). But it would only be fair that MTS should

be treated similarly. MTS contributed $383,000,000 to the Trust Fund. MTS's contribution thus exceeded 50 per cent of the liabilities by $8,000,000. The difference between the Employees' over-contribution of $49,000,000 and that of MTS of $8,000,000 is $41,000,000, which is less than the $43,364,000 agreed upon and actually allocated by MTS to the PBAA.

249 There was no overriding error made by the trial judge in his determination of the amount of the Initial Surplus. I would therefore dismiss Issue 1 of the Employees' cross appeal.

Issue 2: Did the trial judge err by finding that there was equivalency in value in terms of governance by failing to find that the Employees' approval is required before MTS can make any changes to the level of benefits or the structure of benefits under the New Plan?

ARGUMENT

250 The Employees assert that the trial judge was correct in his finding that governance was incorporated into the issue of equivalency in value of benefits when comparing the Prior Plan with the New Plan. They say, however, that he committed palpable and overriding error when he concluded that the Employees had not been deprived of any significant governance prerogatives under the New Plan as compared with the Prior Plan.

251 The Employees argue that the trial judge found, on the basis of uncontroverted evidence, that governance by consensus was the order of the day under the Prior Plan. They submit that, in all matters of consequence pertaining to pension benefits under the Prior Plan, the Employees, through

representation on the Liaison Committee, had input such that no changes were made to the Prior Plan by Manitoba or legislated by amendment of the *CSSA* without agreement.

252 The Employees assert that the trial judge was unduly influenced by the provisions of the *PBSA* which required that MTS, as employer, had to be the administrator of the New Plan and had to establish the Pension Committee with certain duties and functions. The Employees argue that nothing in the *PBSA* precludes employees from being involved in the administration of the New Plan, nor does it limit what employees are allowed in terms of input. They say that the trial judge failed to understand there are no restrictions placed upon the inclusion of the Employees in governance under the New Plan, save and except for those imposed by MTS.

253 The Employees submit that, while a Pension Committee was agreed upon and has been established, in reality it is reduced to an advisory role. It argues that the trial judge accepted that the Pension Committee of the New Plan was completely ineffectual and that all of the decisions and determinations with respect to the New Plan are made by the administrator and then are routinely confirmed by the Audit Committee.

254 The Employees argue that the trial judge erred in his findings in terms of equivalency for governance under the New Plan as compared with the governance abilities of the Employees under the Prior Plan. They assert the trial judge unwittingly, though perhaps understandably, in concentrating his efforts on the issue of ongoing surplus, failed to discretely examine the equivalency issue in terms of governance once he had found the issue of governance of ongoing surplus moot. However, that issue was very much alive, say the Employees, and the cryptic assessment of the trial judge in his

conclusion as to governance did not accord with the law or the facts, thus amounting to palpable and overriding error.

255 MTS argues that governance of a pension plan is not a pension benefit under any pension legislation, that it was not a benefit to which the Employees were entitled under the Prior Plan, and that it was not elevated to that status as a result of s. 15(2)(a) of the *Reorg Act*. Accordingly, it asserts that if this court accepts MTS's arguments on the main appeal on the issue of the meaning of equivalency of benefits, then this issue cannot succeed as any perceived ability to control or affect governance is not a benefit subject to the requirement of equivalency under the *Reorg Act*.

256 Further, it argues that, in respect of governance, the MOA required that MTS set up a Pension Committee to be comprised of individuals identified in the MOA and that MTS complied with all of its obligations in that regard.

257 MTS argues that the trial judge reviewed the Prior Plan and the New Plan and his conclusion in respect of governance was correct when he wrote (at para. 532):

> I am satisfied [the] 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.

258 MTS asserts that, although governance is not a pension benefit which required equivalency, a comparison of the Prior Plan and the New Plan demonstrates that there is equivalence with respect to governance between the two.

259 It argues that, under the Prior Plan, the Liaison Committee was to consult with the Advisory Committee, with a view to recommending benefit improvements, including the use of surplus to fund such improvements. MTS says that, under the New Plan, the Employees' representatives on the Pension Committee may recommend benefit improvements, including the use of surplus to fund such improvements.

260 If an agreement can be reached on a recommendation, such recommendation will go forward for consideration by the Audit Committee of MTS. This, says MTS, is like the Prior Plan, where any recommendation would go forward for consideration by Manitoba.

261 Ultimately, MTS has the role and responsibility to approve any recommendation regarding the use of surplus. This, says MTS, is the same as Manitoba's entitlement under the Prior Plan to approve or not approve any recommendation regarding the use of surplus.

262 As such, argues MTS, under both the Prior Plan and the New Plan, the Employees' ability to make recommendations for pension benefit improvements, including the use of surplus to fund such improvements, is substantially, if not wholly, the same.

ANALYSIS

263 As I have already concluded, governance is not a benefit for which equivalence in value, or for that matter, equivalence alone, was required under s. 15(2)(a) of the *Reorg Act*. There is nothing in the *Reorg Act*, the MOA or the Plan Text which required equivalence in governance.

264 For that reason alone, this ground of appeal must be dismissed.

265 Notwithstanding, while the trial judge erroneously concluded that governance was a benefit subject to equivalency under the *Reorg Act,* he went on to conclude, correctly in my view, that he was "not persuaded the employees/retirees have been deprived of any significant governance prerogatives" (at para. 500) and thus dismissed that aspect of the Employees' claim.

266 Although, in my view, there was no basis for granting relief to the Employees on this issue, it is also my view that, when one compares the Prior Plan with the New Plan, there was no basis for the claim. The true essence of the Employees' involvement under the Prior Plan was to have some advocacy role in pursuit of the increase of benefits for the Employees from time to time. But it was nothing more than that. Ultimately, the government of the day had to decide to change the benefits and, in addition, the Legislature had to agree and had to amend the legislation so as to have that occur.

267 Under the New Plan, the Employees, who have equal representation on the Pension Committee to that of MTS, continue to have the advocacy rights formerly enjoyed by the Employees under the Prior Plan. It is for them to persuade the Pension Committee, whereupon a recommendation is advanced to the Audit Committee and, ultimately, if there is to be a change, the change is made by MTS.

268 There is no right given to the Employees to change the New Plan in any respect, nor was there any right given to the Employees to change the Prior Plan in any respect. The only entitlement was and still is to advocate. Indeed, that was accepted by the Employees in their submission

before us on this issue. Their counsel stated that what the Employees really wanted was some meaningful input into the benefits and governance of the New Plan. But he agreed that meaningful input is very different than a right or ability to require change.

269 While the Employees may have considered that they had a greater ability to advocate for change under the Prior Plan than under the New Plan, the essence of what they had was simply an entitlement to advocate and nothing more. That same entitlement exists under the New Plan.

270 There was no palpable and overriding error made by the trial judge on this issue.

271 I would therefore dismiss the cross appeal of the Employees on Issue 2.

DECISION

272 For the reasons given, I would allow MTS's appeal and set aside the judgment against it for $43,343,000 plus interest. As well, I would dismiss the cross appeal of the Employees.

COSTS

273 In light of my disposition of the appeal and cross appeal, a question of costs would normally be raised and determined.

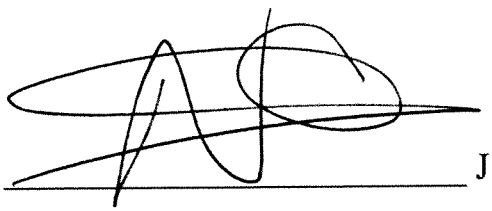
274 However, this appeal came to us without costs having been addressed by the trial judge, the intent being that the parties would appear before him for determination of that issue. In light of that fact and the disposition of the appeal, I would not determine costs at this time.

275 Rather, I would direct that the parties address between themselves the issue of costs with respect to the trial and this appeal. While costs are always in the discretion of the court, the normal practice is that costs follow the event. Having said that, this case is a pension case.

276 Allowing for the ultimate exercise of discretion of the court in respect of costs, I would expect that counsel can inform themselves of the law respecting costs in pension cases and ought to be able to resolve the issue. However, if they cannot do so, then they can obtain a date to return on the issue of costs.

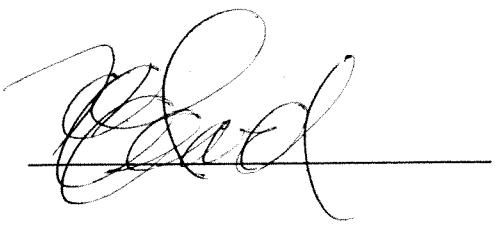
J.A.

I agree:



J.A.

I agree:



J.A.

SCHEDULE A

The Manitoba Telephone System Reorganization and Consequential Amendments Act
(the ***Reorg Act***)

S.M. 1996, c. 79

Employee benefit definitions
15(1) In this section and in clause 29(d),

"employee" means a present or former employee of the corporation or of an affiliate of the corporation;

"fund" means The Civil Service Superannuation Fund constituted under *The Civil Service Superannuation Act*;

"implementation date" means the date prescribed by the regulations after which the corporation is responsible for all benefits to which the persons described in clause (2)(a) are entitled under the new plan;

"new plan" means a registrable pension plan established by the corporation and registered under the *Income Tax Act* (Canada) and the *Pension Benefits Standards Act, 1985* (Canada);

"transfer amount" means that part of the assets of the fund, as at the implementation date, determined by multiplying the total assets of the fund including any surplus by a fraction, the numerator of which is the amount of the actuarial liabilities of the fund for benefits payable or accrued to the persons described in clause (2)(a) based upon an actuarial valuation and the denominator of which is the amount of the actuarial liabilities of the fund for benefits payable or accrued to all persons entitled to benefits from the fund based upon an actuarial valuation;

"trust fund" means the trust fund maintained by the trustee under the new plan.

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 ...

....

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.

Concerns of independent actuary to be addressed
15(4) 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 (3).

Transfer of transfer amount
15(5) The transfer amount shall be determined and adjusted, and the assets to be included as part of the transfer amount determined, in a manner prescribed by the regulations, and shall be transferred from the fund to the trust fund under the new plan on or before the date prescribed in the regulations.

Liabilities assigned and assumed
15(7) All liabilities of the fund to the persons described in clause (2)(a) and all rights and obligations of the fund under any related agreements are assigned to and assumed by the corporation and shall become liabilities, rights and obligations of the trust fund under the new plan on the date of transfer of the transfer amount pursuant to subsection (5).

Corporation and affiliates responsible
15(9) All current and future liabilities of the corporation and its affiliates as employers shall continue to be liabilities of such employers, and the corporation and its affiliates shall be responsible, in accordance with applicable law, for any deficiency in the funding of such liabilities. Neither the Crown nor the fund shall be responsible for any current or future liabilities of the corporation or its affiliates as employers.

Deemed consent
15(10) The persons described in subsection (2) are deemed to consent

(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 ...

....

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.

Crown and fund liability extinguished
15(13) Upon completion of the transfers under subsections (5) and (12), the liability of the Crown and of The Civil Service Superannuation Board is extinguished with respect to

(a) employee participation or entitlement under *The Civil Service Superannuation Act* as it relates to any obligations associated with the fund ...

....

THE MEMORANDUM OF AGREEMENT
(the **MOA**)

1. The Pension Committee will be comprised of eight representatives plus a chair person 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 plans [*sic*] 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 para.s two and three above an actuary appointed by the Provincial Auditor as proposed by the Act (Bill 67) will resolve any dispute.

THE PLAN TEXT

1 - Introduction

1.4 The liability in respect of the pension benefits accrued by Employees and former Employees, Spouses and Eligible Survivors under the Prior Plan prior to the Effective Date shall become the liability of the Plan as at the Effective Date. Assets from the Prior Plan shall be determined in accordance with the provisions of the MTS Reorganization Act and transferred to the Fund established for the purpose of securing the Pension Benefits provided under the Plan. Such transfer shall occur as soon as practicable after the Effective Date. Funding thereafter shall be made in accordance with the provisions of the Plan.

1.5 The full force and effect of this Plan shall be contingent upon obtaining and retaining any registration or approval required under the Applicable Pension Laws and the Income Tax Act.

2 – Construction, Interpretation and Definitions

Definitions

2.8 **"Administrator"** means the Company.

2.10 **"Applicable Pension Laws"** means the *Pension Benefit Standards Act, 1985*, (Canada) and any regulation thereunder and any amendments or substitutes therefor, as well as any similar statute applicable to the Plan and any regulation thereunder adopted by provincial governments.

2.25 **"Effective Date"** means January 1, 1997.

2.28 **"Fund"** means the fund established for the purposes of the Plan and established in accordance with the terms and provisions of the Trust Agreement, to which all contributions to the Plan shall be made and from which the Pension Benefits and expenses under the Plan shall be payable.

2.36 **"Pension Benefit"** means a periodic or lump sum payment to which a Member, Spouse, Eligible Survivor or Beneficiary is or may become entitled under the Plan.

2.37 **"Pension Benefit Adjustment"** means an increase to Pension Benefit payments and to accrued Pension Benefits of deferred vested members in accordance with Article 15.

2.38 **"Pension Benefit Adjustment Account"** means an account established under the Plan, as described in Sections 16.7 to 16.9 for the purpose of determining adjustments to Pension Benefit payments.

2.40 **"Pension Committee"** means the committee established by the Company in accordance with Article 20 to assist the Administrator in administering the Plan.

2.45 **"Prior Plan"** means *The Civil Service Superannuation Act* (Manitoba).

2.48 **"Required Contributions"** means a Member's contributions to the Plan in accordance with Article 5.

2.54 **"Trust Agreement"** means any trust deed or agreement pertaining to the custody of the investments of the Fund which is executed from time to time between the Company and the Trustee, and any amendments which are made to any such trust deed or agreement from time to time.

2.56 **"YMPE"** means the lessor [*sic*] of the Member's Annual Earnings or the Year's Maximum Pensionable Earnings established each year under the *Canada Pension Plan Act*, (Canada).

5 - Contributions

Member Contributions

5.1 Prior to the earlier of a Member's actual Retirement Date, date of termination of employment or death, the Member shall contribute to the Fund in respect of each pay period of the Member with a Participating Employer and, in any event, at least monthly, an amount equal to:

(a) 5.1% of Earnings up to the YMPE, plus

(b) 7.0% of Earnings in excess of the YMPE.

5.9 An amount equal to no less than 10.2% of Required Contributions made hereunder shall be allocated to the Pension Benefit Adjustment Account, which amount shall be determined from time to time by the Administrator based upon the recommendation of the Actuary.

Company Contributions

5.11 Based upon the amounts estimated by the Actuary and subject to Section 16.1, a Participating Employer shall contribute to the Plan such amounts as are necessary to provide for the Pension Benefit, and related Pension Benefit Adjustments, accruing in that year and to fund any unfunded liability and any solvency deficiency in accordance with, and within the time limits specified in, the Applicable Pension Laws. Subject to the Applicable Pension Laws, the liability of a Participating Employer at any time is limited to such contributions as it should have made to the Fund in accordance with the Applicable Pension Laws and the Income Tax Act.

5.12 An amount equal to the amount of Required Contributions allocated to the Pension Benefit Adjustment Account pursuant to Section 5.9 shall be allocated to such Account out of the amounts contributed to the Fund by Participating Employers pursuant to Section 5.11.

6 - Interest Credits

6.1 Interest on Required Contributions under the Plan shall be compounded annually at a rate established by the Administrator from time to time. The Interest in respect of a Member's Required Contributions shall not be less than the effective rate per annum calculated on the basis of the average of the yields of five (5) year personal fixed term chartered bank deposit rates, as published in the Bank of Canada Review as CANSIM Series B14045, over the most recent twelve (12) month period for which the rates are available but not beyond the most recently completed

Plan Year, or such other rate as may be established from time to time pursuant to Applicable Pension Laws.

15 - Pension Benefit Adjustments

Calculation for 20-year Pre-Funding

15.4 Whenever in the opinion of the Actuary, the Pension Benefit Adjustment Account is not in a state of pre-funding to ensure its ability to make all required adjustment payments on a continuing basis for the immediately ensuing period of 20 years, the percentage increase in CPI used to calculate Pension Benefits Adjustments hereunder shall be reduced by 1/3.

Actuarial Reduction in Adjustment

15.5 If, in the opinion of the Actuary, payment in any year of the total Pension Benefit Adjustment provided under this Article would result in an unfunded liability in the Pension Benefit Adjustment Account as at December 31 of the preceding year, the level of the CPI at the end of the year in which the calculation of the Pension Benefit Adjustment is based shall be deemed to be at such a level as will, in the opinion of the Actuary, result in no unfunded liability in the Pension Benefit Adjustment Account. For the purposes of this Section 15.5, an unfunded liability exists where, in the opinion of the Actuary, the actuarial present value of Pension Benefit Adjustments, currently being considered and previously granted, exceeds the value of the Pension Benefit Adjustment Account. Notwithstanding the foregoing, it is understood and agreed that the operation of this Section 15.5 shall not result in the reduction in Pension Benefit Adjustments that have been previously granted and are currently in payment.

Approval of Pension Benefit Adjustment

15.6 A Pension Benefit Adjustment does not become effective until it is approved by the Company and may, at any time before it becomes effective, upon the recommendation of the Actuary and if the Company deems it warranted by prevailing circumstances, be amended by the Company to

reduce the amounts thereof to such lesser amounts as the Company deems advisable. Any Pension Benefit Adjustments shall be subject to limits established under the Income Tax Act.

15.7 Notwithstanding Sections 15.4, 15.5 and 15.6 but subject to Section 15.3, where the percentage increase in the CPI used to calculate a Pension Benefit Adjustment hereunder for a particular Plan Year is 4% or less, such percentage increase in CPI shall not be reduced by more than 1/3 and where such percentage increase in the CPI exceeds 4% it shall not be reduced to less than 2/3 of 4%.

16 - Funding

Actuarial Surplus

16.1 Subject to the provisions of the Applicable Pension Laws, the use of any actuarial surplus, as determined by actuarial valuation, or a portion thereof, shall be determined by the Company, and shall include, but not be limited to, improving Pension Benefits or reducing the contributions of Participating Employers otherwise required under the Plan. Any improvements to Pension Benefits as approved by the Company shall be based upon the recommendations of the Pension Committee. The allocation of any actuarial surplus among the Participating Employers shall be determined by the Company on the advice of the Actuary.

Fund

16.2 The Pension Benefits, and related Pension Benefit Adjustments, provided under the Plan shall be payable from the Fund which shall comprise all contributions under Article 5, transfers to the Plan and investment income thereon net of all distributions in accordance with the terms of the Plan and Trust Agreement.

16.4 The Administrator shall enter into a Trust Agreement with the Trustee which shall be ancillary to the Plan, and which may be amended from time to time. .... If there is any conflict between the provisions of the Plan and the provisions of the Trust Agreement, the provisions of the Plan shall govern.

Pension Benefit Adjustment Account

16.7 The Company shall create and maintain an account as part of the Fund, known as the Pension Benefit Adjustment Account, to be used for the purposes of determining the amount of Pension Benefit Adjustments. As of the Effective Date, the account shall be credited with amounts equal to the following:

(a) the amount of the superannuation adjustment account held in respect of members under the Prior Plan who became Members of the Plan as at the Effective Date,

(b) an amount equivalent to the amount allocated in (a) above representing the initial allocation in respect of Participating Employers, and

(c) the amount of any initial transfer excess that is calculated by determining the difference between the total assets transferred from the Prior Plan in respect of the Members and the total assets contributed to the Plan by the Participating Employers, which initial transfer excess amount shall be calculated as at the Effective Date.

16.8 Thereafter, the Pension Benefit Adjustments Account shall be credited or debited, as the case may be, on a monthly basis with:

(a) the amount of Required Contributions allocated in accordance with Section 5.9,

(b) the amount of contributions by Participating Employers allocated in accordance with Section 5.12,

(c) interest on the balance of this account at a rate as determined by the Company,

(d) the Pension Benefit Adjustments paid in accordance with Article 15, and

(e) any reductions made pursuant to Section 16.11.

16.9 The Company shall cause records to be maintained on the operation of the Pension Benefit Adjustment Account, separately identifying amounts debited or credited in respect of Members and Participating Employers.

Actuarial Valuation of Pension Benefit Adjustment Account

16.11 The Actuary shall determine the financial position of the Pension Benefit Adjustment Account annually as of July 1 of each year. If, at any time, the Actuary's valuation of the Pension Benefit Adjustment Account reveals a surplus in the Pension Benefit Adjustment Account, for the purpose of subsequent valuations of the Pension Benefit Adjustment Account pursuant to this Section 16.11 the Company shall deem such surplus to have been allocated to other purposes of the Fund. For the purposes of this Section 16.11, a surplus exists where, in the opinion of the Actuary, the value of the Pension Benefit Adjustment Account is in a state of pre-funding that ensures its ability to make all required adjustment payments in respect of:

(a) Pension Benefit Adjustments already granted, and

(b) future expected Pension Benefit Adjustments in accordance with Article 15, including adjustments guaranteed under Section 15.7.

Claims on the Fund

16.12 No Member ... shall have any right to, or any interest in, any part of the Fund, except to the extent provided from time to time under the Plan, the Trust Agreement, and the Applicable Pension Laws.

18 – Plan Continuance

Surplus on Discontinuance

18.7 Upon discontinuance of the whole Plan, any assets of the Fund remaining after full provision has been made for the accrued Pension Benefits under the Plan as described in Section 18.5 and for any legal, actuarial or other fees relating to the discontinuance of the Plan, shall be allocated

among the Participating Employers and the Members ... as determined by the Board based upon the written recommendation of the Actuary. ....

20 - Administration

20.1 The Plan shall be administered by the Administrator. ... [T]he Board shall establish a Pension Committee and such other committees as deemed necessary by the Board to perform such functions as the Board may specify ....

20.2 The roles and responsibilities of the Pension Committee shall be set out in the Manitoba Telecom Services Inc. and Participating Subsidiaries Pension Plan Governance document as amended from time to time with the approval of the Board.

THE TRUST AGREEMENT

ARTICLE I
DEFINITIONS

1.1 The following terms set out herein with initial capital letters shall have the meanings assigned below:

Beneficiaries: shall mean any person entitled to receive benefits or other payments under the Plan and may include the Company.

. . . . .

Trust Fund: shall mean all money and assets paid and delivered to the Trustee, and acceptable to the Trustee, together with any earnings, profits and increments thereon and all assets from time to time substituted therefor, less authorized payments therefrom.

ARTICLE II
ESTABLISHMENT AND ACCEPTANCE OF TRUST

2.3 **Beneficiaries**

.... [A]ny claim for or right to any benefit or payment of any amount, including a surplus amount, shall be governed solely by the terms of the Plan and applicable legislation.

ARTICLE III
CONCERNING THE TRUSTEE

3.1 **Responsibilities of the Trustee**

The Trustee shall:

. . . . .

3.1.7 Receive all contributions under the Plan or other transfers of assets to the Trust Fund made by the Company or any other person or persons under this Trust Agreement;

. . . . .

ARTICLE VIII
AMENDMENT AND TERMINATION
OF TRUST AGREEMENT

8.3 Surplus on Termination

In the event of the termination of the Plan, in whole or in part, or termination of this Trust Agreement, any assets remaining in the Trust Fund, after the satisfaction of all liabilities under the Plan, shall revert to the Company, provided that any payment of surplus shall be made pursuant to a Direction of the Company and subject to satisfactory evidence being provided to the Trustee that such approvals of appropriate federal or provincial authorities as may be required under any legislation or regulations have been obtained, as well as any other documentation as may be required by the Trustee to fulfil its obligations.