File No. 34763

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

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

APPELLANTS
(Respondents)

- and -

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

RESPONDENTS
(Appellants)

APPELLANTS' FACTUM

(Style of cause continues next page)

D'Arcy & Deacon LLP
2200 – One Lombard Place
Winnipeg, MB, R3B 0X7

Per: Brian J. Meronek, Q.C.
Mr. Kris M. Saxberg
Mr. D. Tomas Masi

Tel.: 204 942-2271
Fax: 204 943-4242
bmeronek@darcydeacon.com
ksaxberg@darcydeacon.com
tmasi@darcydeacon.com

Counsel for the Appellants

Raven, Cameron, Ballantyne & Yazbeck LLP
1600 – 220, Laurier Avenue West
Ottawa, ON, K1P 5Z9

Per: Mr. James Cameron
Mr. Andrew Astritis

Tel.: 613 567-2901 Ext. 225 (Mr. Cameron)
Tel.: 613 567-2901 Ext. 234 (Mr. Astritis)
Fax: 613 567-2921
jcameron@ravenlaw.com
aastritis@ravenlaw.com

Agent for the Appellants

Taylor McCaffrey LLP
9th Floor, 400 St Mary Avenue
Winnipeg, MB, R3C 4K5

Per: Mr. Kevin T. Williams
Mr. Paul Forsyth

Tel.: 204 988-0309 (Mr. Williams)
Tel.: 204 988-0458 (Mr. Forsyth)
Fax: 204 957-0945
kwilliams@tmlawyers.com
pforsyth@tmlawyers.com

Counsel for the Respondents

Supreme Advocacy LLP
100 – 397 Gladstone Avenue
Ottawa, ON, K2P 0Y9

Per: Eugene Meehan, Q.C.

Tel.: 613 695-8855 Ext. 101
Fax: 613 695-8580
emeehan@supremeadvocacy.ca

Agent for the Respondents

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APPELLANTS' FACTUM

PART I – STATEMENT OF FACTS

A. Overview

1. The present case involves a dispute between MTS[1] and its 7000 Employees[2] over $43.364 million (approx. $101 million with interest) in surplus pension contributions (the "Initial Surplus"). Unlike in previous cases considered by this Court, the Initial Surplus is not an actuarial surplus in an ongoing defined benefit plan calculated to determine the employer's funding obligations. Rather, it represents the amount Employees over-contributed to the New Plan that MTS was required to establish when it was privatized by the Manitoba Government (the "Government") on January 1, 1997. The trial judge found that the Initial Surplus belonged to the Employees.

2. There is no dispute that the Government, MTS and Employees all sought to ensure that the Initial Surplus would be set aside to provide Employees with enhanced benefits, as occurred under the Prior Plan. MTS repeatedly undertook that the Initial Surplus would "*not be used to reduce MTS's cost or share of contributions to the new pension plan.*"[3] The parties also signed a Memorandum of Agreement[4] that specified that the Initial Surplus would be placed in the New Plan's cost of living adjustments ("COLA") account to provide enhanced benefits. The legislature incorporated the MOA into the *Reorg Act*[5], which also included a guarantee that the New Plan "*shall provide for benefits which on the implementation date are equivalent in value*" to those benefits in the Prior Plan. An independent actuary was to verify equivalency.

3. Despite these unqualified assurances, Employees received no additional benefits from the Initial Surplus under the New Plan while MTS counted it as part of its overall pension assets, thereby reducing its cost or share of contributions to the New Plan; this is precisely what MTS and the Government had promised would not happen. In contrast, Government employees who remained in the Prior Plan saw their benefits increased by 6-14% during this same period. Those benefit enhancements were primarily funded using the same surplus in the Prior Plan from which MTS employees funded their over-contribution to the New Plan. As a result of these developments the Employees initiated this lawsuit.

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1 For ease of reference, MTS is used herein to refer to the defendants.
2 The term "Employees" is used herein to refer to employees, retirees and plan members collectively.
3 Memorandum dated November 6, 1996 (Exhibit 001-0434) Appellants' Record, hereinafter "A.R.", **Vol. VIII, pp. 156-157**.
4 Memorandum of Agreement dated November 7, 1996 (Exhibit 001-0440) (the "MOA"), A.R., **Vol. VIII, pp. 158-159**.
5 *Manitoba Telephone System Reorganization and Consequential Amendments Act*, S.M. 1996, c. 79 (the "*Reorg Act*"), Appellants Factum, Part VII, hereinafter "A.F.", **pp. 53 and ff.**

4. This case differs significantly from this Court's previous pension cases as it involves the transition from a public to a private plan and the transition from a plan funded on a fixed 50/50 cost of benefits model to one in which the employer's contributions are based on actuarial assessments (i.e. where the funding risk has changed).

5. Following an extensive trial, the trial judge concluded that MTS's actions led to a breach of its undertakings, the MOA, and the provisions of the *Reorg Act*. The trial judge held that undertakings made by MTS had to be considered together with the MOA as part of the overall agreement. He found that all parties intended the Initial Surplus to be used to provide enhanced benefits for Employees but that this objective did not occur because the COLA account was inherently flawed and incapable of ever providing such benefits. The Plan Text did not disclose these defects. Had Employees known of the defects, they would not have agreed to the MOA. The trial judge ruled that the benefits were not equivalent in value on the implementation date.

6. The Court of Appeal's decision to overturn the trial judge's award is based on numerous errors of fact and law. First, the Court of Appeal erred in concluding that the Initial Surplus could not belong to Employees because it was an actuarial surplus in an ongoing plan.[6] The surplus in the present case, however, is a final determination of the amount by which the Employees' initial contribution to the New Plan exceeded the 50% of the cost of benefits they were responsible for funding on the implementation date. It does not represent an ever-changing ephemeral actuarial surplus. Both the Government and MTS recognized the existence of an initial surplus in Employee contributions. In fact, there was no actuarial surplus in the New Plan on the implementation date. The first Actuarial Valuation of the New Plan disclosed a small actuarial deficit.[7] These issues are plainly distinct from those issues addressed in this Court's previous pension jurisprudence.

7. Second, the Court of Appeal erred in concluding that the statutory guarantee of benefits "equivalent in value" only related to the monthly payment of basic benefits and not the funding of those benefits on the implementation date or to issues of governance and ongoing surplus.[8] This interpretation ignores the legislative history recorded in Hansard. While introducing amendments to the *Reorg Act,* the responsible Minister made it clear that the amendments were intended to address Employee concerns regarding the protection of the Initial Surplus and to ensure equivalence in the "broadest sense". The Court of Appeal's analysis also fails to consider that the benefits of the two plans

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6 Reasons for Decision of the Court of Appeal of Manitoba, dated February 10, 2012 (the "C.A.'s decision") at para. 155, A.R., **Vol. I, p. 229**.

7 Trial Exhibit 001-0827, A.R., **Vol. X, p. 45**.

8 C.A.'s decision at paras. 88 and 95, A.R., **Vol. I, p. 205-206, 208**.

cannot be equivalent in value if the same benefits received under the Prior Plan cost $43.364 million more on the implementation date of the New Plan.

8. Third, the Court of Appeal erred in allowing MTS to resile from its clear commitments to Employees regarding the use of the Initial Surplus. The Court erred in concluding that MTS's undertaking not to use the Initial Surplus to reduce its costs under the New Plan was unenforceable and irrelevant to the interpretation of the MOA.[9] This undertaking, along with the history of surplus use in the Prior Plan, was found by the trial judge to be essential background information in order to understand and interpret the MOA, essentially finding that the undertaking was part of the agreement between the parties. The Court of Appeal misapplied the parol evidence rule and incorrectly held that this background information could not be considered in interpreting the MOA. The Court of Appeal also wrongly interfered with the trial judge's findings of fact in relation to the objective intention of the parties that the MOA would be used to provide enhanced benefits.

9. The Court of Appeal similarly erred in finding that there was *consensus ad item* on the Plan Text between Employees and MTS which justified MTS's use of the Initial Surplus.[10] The trial judge found that Employees never agreed to the Plan Text; they never agreed to the set-up of the COLA account; and, in any event, many of the design flaws in the COLA account were not reflected in the Plan Text. The Plan Text could not render MTS's undertakings and the MOA between the parties meaningless.

10. Finally, this case raises an important issue as to whether a recently retired appellate court judge can appear as co-counsel before a panel of the same court. The Appellants are not seeking a specific remedy from this Court if an apprehension of bias is found to exist; rather they seek this Court's guidance on this important question that will impact courts across this country.

B. Factual Background

11. The *Civil* Service *Superannuation Act*[11] establishes the pension plan for Government Employees. Prior to the privatization of MTS on January 1, 1997, some 7,000 MTS Employees belonged to this plan ("the Prior Plan").

12. Under the Prior Plan, the cost of pension benefits was shared 50/50 between the Government and Employees. Employees pre-funded their share of the contributions to a trust fund under the *CSSA*. The Government and Crown Corporations such as MTS did not contribute to the fund. As a Crown entity,

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9 C.A.'s decision para. 159, A.R., **Vol. I, p. 230**.
10 C.A.'s decision paras. 143, 197-198, A.R., **Vol. I, p. 223, 240-241**.
11 *Civil Service Superannuation Act* R.S.M. 1988, c. C120 and amendments thereto ("*CSSA*") A.F., **pp. 44 and ff.**

MTS was exempt from the pre-funding requirements private employers are required to satisfy under *The Pension Benefits Act*[12] and *Regulations*.[13]

13. The Prior Plan trust fund was responsible for paying 50% of the cost of a pensioner's monthly benefit payment when it came due. However, for administrative ease, the trust fund paid 100% of the pensioner's benefit, recovering its 50% overpayment from the Government pursuant to subsection 22(1) of the *CSSA*. Therefore, the Government's payments under subsection 22(1) were not "contributions" to the trust fund, but a reimbursement for the payments previously made by the trust fund on behalf of the Government (the employer's 50% obligation).

14. This unique funding method has been referred to as a "pay-as-you-go" system. This system of matched funding ensured that the cost of benefits was split exactly 50/50. Since all the assets in the trust fund were attributable to Employee contributions and Employees were responsible for any unfunded liabilities in the trust fund, surplus funds had always been used exclusively to improve pension benefits and never to defray employer costs.[14] This use of surplus was never contested despite the fact that the *CSSA* was silent on this issue.

15. The surplus in the Prior Plan trust fund belonged to Employees because the trust fund was only responsible for paying 50% of the cost of benefits. Excess contributions were referred to as surplus, even though there was not a surplus in the Prior Plan as a whole because the Government's 50% end of the bargain was unfunded. Since Employees only had to pay 50% of the benefits paid out to pensioners, it was accepted that they could use their excess contributions to improve benefits. The trial judge found that the Government and Employees believed that any surplus in the Prior Plan was "employees' money".[15]

16. The evidence at trial established that the surplus in the Prior Plan had been used to improve pension benefits on eight occasions between 1970 and 1996.[16] When the Government was not prepared to pay for its 50% share of an improvement, Employees sometimes agreed to pay some or all of the Government's share of costs from their surplus.[17] In 2000, following the privatization of MTS, surplus

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12 *Pension Benefits Act*, R.S.M. 1987, c. P32 (the "*PBA*") A.F., **pp. 67 and ff.**
13 *Pension Benefits Regulations*, Man. Reg. 188/87R, section 26, A.F., **p. 82-83**.
14 Trial Decision, at para. 314, A.R., **Vol. I, p. 109**.
15 Hansard Transcript (Trial Ex. 001-0137) p. 4700, A.R., **Vol. VI, p. 112** and Trial Decision, at para. 134, A.R., **Vol. I, p. 53**.
16 CSSB – History of the Civil Service Superannuation Fund, August 21, 2002 (Trial Ex. 001-1151) ("History of CSSF"), A.R., **Vol. XI, pp. 1 and ff.**, Historic Use of CSSF "Excess" (Surplus) (Trial Ex. 008) ("Historic Use"), A.R., **Vol. XI, p. 54**.
17 Excerpt of Hansard Transcript (Trial Ex.001-0137), A.R., **Vol. VI, pp. 111 and ff.**; Historic Use, A.R., **Vol. XI, p. 54**.

in the Prior Plan was used to increase benefits by between 6-14% for employees who remained in the provincial public service.[18] MTS Employees would have received this benefit increase had they remained in the Prior Plan.

17. The Prior Plan independently provided for COLAs that were funded from a separate account within the Prior Plan trust fund. COLA Awards averaged 73% of inflation in the 20 years before privatization.

18. As of December 31, 1996, the day before the privatization of MTS, the Prior Plan had an employee surplus of $179 million.[19] The *Reorg Act* clearly stated that the assets transferred to the New Plan would include "any surplus" from the Prior Plan.[20] MTS Employees' share of the assets in the Prior Plan was determined pursuant to the *Pension Assets Transfer Regulation*[21] and a valuation determination made by the Independent Actuary[22] to be $424,038,966.[23]

The privatization of MTS and the protection of the Initial Surplus

19. In early 1996, the Government announced that MTS would be privatized effective January 1, 1997. The Government and MTS decided that the pension assets and liabilities of both active and retired Employees would be transferred to MTS, rather than keeping them in the Prior Plan. Doing so enabled MTS to receive a deduction for transferring its pension reserve into the New Plan's trust fund, achieving a tax-free status (in the amount of $383 million) for its first several years as a private company.[24] MTS had created the pension reserve in the 1980s to fund its pay-as-you-go obligations in the Prior Plan; it was unrelated to the Prior Plan's trust fund.

20. The plans to privatize MTS were shrouded in secrecy. From the time Employees learned of the Government's plan, however, they lobbied to ensure that their surplus was protected and used in the same manner as all previous surpluses in the Prior Plan had been used.[25]

21. In the summer and fall of 1996, Employees were given unqualified assurances by both MTS and the Government that the Initial Surplus belonged to Employees, that it would be reserved for benefit

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18 Barrett Memo (Trial Ex. 001-1064), A.R., **Vol. X, p. 202**.
19 Actuarial Report on the Division of Assets of the Civil Service Superannuation Fund as at December 31, 1996 (Trial Ex. 001-0876) ("*CSSA Report*"), A.R., **Vol. X, pp. 74 and ff.**
20 *Reorg Act*, A.F., **pp. 53 and ff.**
21 *Pension Assets Transfer Regulation*, Man Reg 4/97, A.F., **pp. 73 and ff.**
22 Trial Ex. 001-913, A.R., **Vol. X, pp. 111 and ff.**
23 Trial Ex. 001-0917, A.R., **Vol. X, p. 118**.
24 Towers Perrin Report on Withdrawal from CSSA – Report on Transitional Issues and Strategies dated May, 1996 (Trial Ex. 001-0256) ("Towers Report"), A.R., **Vol. VI, pp. 114 and ff.**
25 Trial Decision, at paras. 55 and 59, A.R., **Vol. 1, pp. 23-25**.

improvements, and that it would not be used to reduce MTS's cost or share of future contributions. For instance, on October 23, 1996, William Fraser, the President of MTS, responded to concerns raised by counsel for the Employees by stating that the Initial Surplus *"will not be used to reduce MTS's cost of, and share of contributions to, the new pension plan"*.[26]

22. The Government's publicly stated intention was to not take anything away from Employees when it privatized MTS. Subsection 15(2) of the *Reorg Act* requires that the New Plan "shall provide for benefits which on the implementation date are equivalent in value to [the Prior Plan]..."[27]. Despite this protection, Employees remained concerned that there were no details regarding how this guarantee would be achieved, particularly with respect to ongoing surplus (a matter no longer at issue). Employees were also concerned that the *Reorg Act* 'deemed' them to 'consent' to the expropriation of their pension assets out of the Prior Plan.

23. On October 31, 1996, counsel for Employees made a presentation to the legislative Standing Committee reviewing the privatization of MTS, setting out their concerns with respect to their ownership and use of the employee surplus, as well as maintenance of equal governance of the New Plan. Employees sought clear assurances that the Initial Surplus would not be used to reduce MTS's contribution costs or that the surplus would be matched by MTS upon transfer to the new trust fund.[28] Darren Praznik, the Deputy House Leader, acknowledged the legitimacy of these concerns and outlined the Government's intention to address them.[29]

24. On November 6, 1996, MTS provided a briefing note to Glen Findlay, the Minister responsible for MTS, in response to his request for information regarding Employees' concerns and MTS's response.[30] The November 6th Memo reiterated the commitment MTS had repeatedly made to Employees that the Initial Surplus would not be used by MTS to reduce its pension costs. On November 7, 1996, during the public review of the draft legislation, Minister Findlay repeated this solemn undertaking:[31]

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

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26 Trial Decision, at paras. 79, 93, 94 and 99, A.R., **Vol. I, pp. 32, 37, 39-40**.
27 *Reorg Act*, A.F., **pp. 53 and ff.**
28 Trial Decision, at para. 102, A.R., **Vol. I, p. 41**.
29 Hansard Transcript – October 31, 1996 (Trial Exhibit 001-0410) ("Hansard Transcript – October 31, 1996"), A.R., **Vol. VIII, pp. 138 and ff.**
30 Memorandum from W.C. Fraser to the Honourable Glen Findlay, November 6, 1996 (Trial Exhibit 001-0434) (the "November 6th Memo"), A.R., **Vol. VIII, pp. 156-157**.
31 Hansard Transcript – November 7, 1996 (Trial Exhibit 001-0446) ("Hansard Transcript – November 7, 1996"), A.R., **Vol. VIII, p. 161**.

25. The Government did not want concerns regarding the pension plan to hold up the passage of the *Reorg Act.* Thus, the Government immediately brokered a meeting between MTS and the Employees to reach agreement on the protection of the Initial Surplus and the other matters of concern. Minister Praznik was tasked with working with the parties to resolve these issues.[32]

26. On the evening of November 7, 1996, Employees, the Government and MTS met in what Minister Findlay called "eleventh hour and fifty-ninth minute" meetings to find a resolution to the Employees' outstanding concerns.[33] Employees proposed placing their surplus into a separate account so it could be protected but were told that a separate account was not possible at law.[34] The parties ultimately agreed that the surplus would be placed in the COLA account to fund enhanced benefits. This agreement was set out in an MOA signed that night by the parties.[35] The MOA made no mention of how the COLA account would be set up; the evidence at trial was that there was no discussion of that mechanism at all.

27. The *Reorg Act* was amended the next day in light of the MOA. Subsection 15(3) was introduced to provide for an "independent actuary" to ensure that the equivalence sought by plan members was, in fact, achieved.[36] Subsection 15(11) was also added so that "if there is any disagreement or a misunderstanding between the intent of the sections in the bill and the MOA, that the MOA would take precedence."[37] In introducing the amendments Minister Findlay summarized the discussions between the parties regarding the meaning of equivalence:[38]

> *There had been a lot of discussion around what that means, what equivalency means. [...] Further negotiations happened involving the company and led us to a position yesterday where there was some dissatisfaction with whether there was really a full and complete understanding.*
>
> *Yesterday, we had major, major meetings* [...]. *We all wanted something that was signed that represented the idea of equivalency, that gave comfort to all, that as we passed these sections, exactly what everybody wanted was really going to happen.*

28. The above comments confirm that the legislature believed it had put in place a framework that would ensure that Employees' stated concerns regarding the Initial Surplus were addressed.

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32 Trial Decision, at para. 131, A.R., **Vol. I, p. 52**.
33 Hansard Transcript – November 7, 1996, A.R., **Vol. VIII, p. 192**.
34 Trial Decision, at para. 156, A.R., **Vol. I, pp. 60-61**.
35 The MOA, A.R., **Vol. VIII, pp. 158-159**.
36 Hansard Transcript – November 7, 1996, A.R., **Vol. VIII, p. 162**.
37 Hansard Transcript – November 8, 1996 (Trial Exhibit 001-0453) ("Hansard Transcript – November 8, 1996"), A.R., **Vol. IX, pp. 67** (emphasis added).
38 *Ibid*.

29. The MOA permitted Employees to review a draft of the Plan Text, something the trial judge found MTS had previously refused despite requests by Employees. The Plan Text included provisions relating to the Initial Surplus being placed in the COLA account; however, many aspects of how the account would operate were not included. The Employees' actuary raised serious concerns about the COLA account. He did not agree to how MTS set it up. Moreover, MTS's actuary did not disclose key negative aspects of how the COLA account would function. MTS proceeded to register the Plan Text without Employees' agreement. MTS maintained at trial that it had the sole authority to prepare the Plan Text without consultation or negotiation.[39]

30. Years passed before Employees had the information necessary to appreciate that the design of the COLA account[40] precluded the Initial Surplus from being used to increase their benefits. The trial judge determined that this outcome was the result of a number of factors, the most important of which was that the COLA guarantee liabilities were applied against the COLA account in the actuarial valuation, but most of the COLA guarantee assets were not. None of these issues were raised at the time of the MOA.[41] In 2007, MTS's own actuaries acknowledged that the design and administration of the COLA account was so flawed that it could never have produced additional benefits for Employees.[42] Since MTS did not record a liability in association with the Initial Surplus, which actuarial evidence at trial indicated should have been done, it was able to take contribution holidays that would not otherwise have been available.[43]

31. The Independent Actuary, Clifford Fox, was appointed by the Provincial Auditor pursuant to s. 15(3) of the *Reorg Act* to assess whether the benefits of the two plans were equivalent in value on the implementation date. Initially, Fox concluded that the benefits were <u>not</u> equivalent in value because the Initial Surplus "belonged to Employees", such that they contributed more than 50% of the funding on the implementation date for the same benefits.[44] Unfortunately, based on significant interference in his decision-making by the Provincial Auditor and MTS, Fox was coerced into changing his opinion to state that the benefits were equivalent in value. Fox testified at trial that he continued to disagree with the Provincial Auditor's definition of benefits "equivalent in value on implementation date". The trial

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39 Trial Decision, at paras. 115, 321-323, A.R., **Vol. I, pp. 45-46, 111-112**.
40 Referred to as the Pension Benefits Adjustments Account ("PBAA").
41 Trial Decision, at paras. 320-324, A.R., **Vol. I, pp. 110-112**.
42 Letter from MTS Actuary Laura Samaroo to OSFI, dated May 15, 2007 (Trial Exhibit 001-1288), A.R., **Vol. XI, pp. 51 and ff.**
43 Trial Decision, at paras. 296(e) and 503, A.R., **Vol. I, pp. 103-104, 165-166**.
44 Letter (marked DRAFT) from Cliff Fox to J. Singleton, February 18, 1997 with Appendix I (Trial Exhibit 001-0812) ("Draft Letter"), A.R., **Vol. X, pp. 35 and ff.**

judge found the interference with Fox to be improper, concluding that Fox's final opinion could not stand.[45] MTS did not appeal this finding, agreeing at the Court of Appeal that Fox's final decision must be quashed.

32. The primary reason the Independent Actuary's opinion was nullified was that the Provincial Auditor had unilaterally changed Fox's definition of *"benefits which on the implementation date are equivalent in value",* to exclude the funding of benefits on the implementation date. The trial judge found that the Provincial Auditor's action amounted to improper interference with the Independent Actuary, compromising his independence.

33. Prior to the trial, MTS brought a motion for summary judgment grounded on the theory that the case could be decided without a trial on a legal interpretation of s. 15 of the *Reorg Act.* The motion was dismissed at Queen's Bench and on appeal. The Court of Appeal indicated that a full trial was needed to deal with the question concerning whether "benefits … on… implementation…are equivalent in value":

> *117 In the end, I am left with the view that it is neither appropriate nor convenient that the issues respecting the determination of equivalency be resolved on the basis of affidavit and documentary evidence. As we have seen, the case is one of first impression and the facts are extremely complex. I have little doubt that there will be much "hard swearing" with respect to the roles played by Fox and Singleton and its impact on the determination of equivalency.*[46]

The Trial Judge's decision

34. The trial judge conducted a thorough review of the extensive evidence tendered by the parties. In doing so he noted that, save for certain specific testimony from MTS's key witnesses, he otherwise accepted the evidence before him.[47]

35. The following findings of fact served as the foundation for his legal analysis. First, the Initial Surplus "belonged to Employees" as it represented the amount above 50% of the contributions they were required to contribute to the New Plan[48]:

> *[179] MTS's claim for total control over the use of initial and ongoing surplus to balance their ultimate funding responsibility would be legitimate, in my view, only if their initial investment in the New Plan was equal to that of the Employees/retirees. However, the*

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45 Trial Decision, at para. 454, A.R., **Vol. I, p. 150**.
46 *T.E.A.M. v. Manitoba Telecom Services Inc.*, 2007 MBCA 85, [2007] 10 WWR 385 ("*TEAM*") at para. 117, Appellants' Book of Authorities, hereinafter "A.B.A.", **Vol. I, tab 27**.
47 Trial Decision, at para. 359, A.R., **Vol. I, p. 122**.
48 Trial Decision, at para. 179, A.R., **Vol. I, p. 68**.

> *Initial Surplus originated from the Old Plan where MTS had no such ultimate funding responsibility. It is therefore difficult to understand why they would [have] absolute control over the Initial Surplus in the New Plan.*

36. The trial judge ruled that there had never been any dispute regarding the fact the surplus from the Prior Plan was entirely attributable to excess employee contributions to that plan and that Employees maintained the exclusive right to benefit from the surplus.

37. Second, MTS and the Government had each undertaken that the Initial Surplus would not be used to MTS's benefit to reduce its pension costs.[49] The trial judge found that the Employees, who wanted absolute security that the Initial Surplus would not be used to reduce MTS's contributions, relied on this undertaking, which served as the foundation for the negotiations towards the MOA.[50]

38. Third, it had been the expectation of all parties that the MOA would protect the Initial Surplus to be used to provide increased benefits for Employees. While the MOA was not clearly worded, the ambiguity was because Employees had not been given reasonable notice of these negotiations, which occurred in haste at the 11th hour.[51] Employees were also kept "in the dark" with respect to the privatization process and were not given relevant information regarding the proposed COLA account.[52] Nevertheless, the trial judge found the object of the November 7th meeting and resulting MOA was to reach an agreement so that Employees would be satisfied that the benefits were truly "equivalent in value" and that the Initial Surplus was protected to be used for their exclusive benefit.[53] Indeed, MTS's evidence of the objective intent of the MOA confirmed that the goal was to "use up" the Initial Surplus to provide a benefit to Employees.[54]

39. Fourth, the trial judge rejected MTS's attempts to resile from these earlier commitments, including its evidence that its undertaking meant only that MTS would not use the Initial Surplus to reduce the amount it transferred into the New Plan from its Pension Reserve. The trial judge noted the frailty of Fraser's testimony on this point and that Minister Praznik, who signed the MOA on behalf of Government, supported the Employees' key factual assertions at trial.[55]

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49 Trial Decision, at paras. 136 and 137, A.R., **Vol. I, p. 53**.
50 Evidence of Harry Restall (May 5, 2008), p. 56, A.R., **Vol. II, p. 162**; Evidence of Larry Trach September 5, 2008, p. 45, A.R., **Vol. III, p. 78**.
51 Trial Decision, at para. 511, A.R., **Vol. I, pp. 168-169**.
52 Trial Decision, at paras. 203 and 475, A.R., **Vol. I, pp. 75-76, 157**.
53 Trial Decision, at para. 220, A.R., **Vol. I, p. 79-80**.
54 Evidence W.C. Fraser (Oct. 23, 2008) p. 110, A.R., **Vol. V, pp. 115**; and MTS Briefing Note dated Feb. 19, 1997 (Trial Exhibit 001-0813), A.R., **Vol. X, pp. 40-41**.
55 Trial Decision, at para. 160, A.R., **Vol. I, pp. 62-63**.

40. Fifth, the design flaws in the COLA account rendered it incapable from the outset of using the Initial Surplus to benefit Employees.[56] The Trial Judge explained that Employees could not have anticipated this design defect given that they were not informed about the way the account would operate; information they needed prior to signing the MOA.[57] Accordingly, the trial judge found that the Employees would not have agreed to the MOA had they known that the structure of the COLA account could deprive them of their surplus.[58] The flawed design of the COLA account also frustrated the intention of parties that the Initial Surplus would not be used to reduce MTS's pension costs. Rather it was to produce enhanced benefits for Employees over time. The flawed COLA account resulted in MTS being permitted to contribute less to the plan over time than it would have if the Initial Surplus did not exist.

41. In light of the above findings of fact, the trial judge concluded that subsection 15(2) of the *Reorg* Act had been violated and that MTS had breached its agreement with Employees. With respect to the *Reorg Act*, the trial judge held that one could not determine whether the benefits were equivalent in value on the implementation date without considering the use and application of the Initial Surplus. This position corresponded with the actuarial evidence including the conclusion of the Independent Actuary prior to the improper interference that nullified his decision.[59] The trial judge concluded that the two plans were not equivalent in value because, under the New Plan, Employees paid more than 50% on the implementation date for benefits that only cost them 50% under the Prior Plan.[60] As such, MTS's actions in structuring the COLA account led to a breach of subsection 15(2) of the *Reorg Act*.[61]

42. Moreover, the trial judge ruled that the amendment incorporating the MOA into the *Reorg Act* was to ensure that the guarantees in the MOA received legislative protection and that the legislation was interpreted in light of the parties' intent to protect the Initial Surplus. Similarly, the addition of a provision for an Independent Actuary (s. 15(3)) was to assure Employees that their interests in the Initial Surplus would be protected.[62] There was never an issue concerning whether the defined benefit formula and other benefit provisions in the New Plan were equivalent to the same benefits in the Prior Plan.

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56 Trial Decision, at paras. 286, 320 and 373, A.R., **Vol. I, pp. 99-100, 110-111, 126-127**.
57 Trial Decision, at paras. 184-185, 203, 322, A.R., **Vol. I, pp. 70, 75-76, 111**.
58 Trial Decision, at paras. 324, 502, 517, A.R., **Vol. I, pp. 112, 165, 170**.
59 Trial Decision, at paras. 249-252, A.R., **Vol. I, pp. 89-90**.
60 Trial Decision, at para. 373, A.R., **Vol. I, pp. 126-127**.
61 Trial Decision, at paras. 503 and 518, A.R., **Vol. I, p. 165-166, 170**.
62 Trial Decision, at para. 462, A.R., **Vol. I, p. 153**.

43. The trial judge also explained that the guaranteed COLA in the New Plan could not be viewed as an offset for the taking of the Initial Surplus, since the Prior Plan provided better COLA[63] and the guarantee was already fully pre-funded by Employees from their one-half share of the liabilities on the implementation date ($375 million). The evidence at trial established that the guarantee was in the draft pension plan months before the November 7 MOA. Furthermore, if the Initial Surplus was payment for the guaranteed COLA, MTS would have said so rather than repeatedly undertaking not to use the Initial Surplus to reduce its future pension costs.

44. The trial judge also concluded that MTS breached its agreement in two ways. First, he found that, "unknown to [Employees] at the time, the 20 year pre-funding requirement was incapable of ever being reached by virtue of the manner in which the COLA account was set up".[64] The trial judge thus held that MTS's actions in setting up the COLA account deprived Employees of their right to benefit from the Initial Surplus. Second, the trial judge concluded that, by not enhancing benefits as required by the MOA, MTS was able to take contribution holidays. The trial judge ruled that "...the basic premise was the protection of the Initial Surplus so that it was available exclusively for funding of improved pension benefits including COLA increases above [the Guarantee]."[65]

45. The trial judge ordered that the Initial Surplus be paid back to the Employees in the form of enhanced pension benefits, as originally intended, with interest.[66]

The Court of Appeal's decision

46. The Court of Appeal overturned the trial judge's decision on a correctness standard, claiming that pure questions of law could be extricated from the determinations of mixed fact and law made by the trial judge. The Court of Appeal identified the following errors:

47. First, the Court of Appeal concluded that the Initial Surplus could not belong to the Employees as it was actuarial in nature. The Court stated that the common law principles of pension law, developed in surplus cases dealing with actuarial surplus in ongoing plans, applied equally to the present case. The Court also concluded that the New Plan was not actually a "new plan", since the Prior Plan was neither terminated nor wound up. The Court said nothing of the fact that the Employees' involvement in the Prior Plan had clearly ceased or of the change in funding structures between the two plans.

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63 Trial Decision, at para. 373, A.R., **Vol. I, pp. 126-127**; and Civil Service Superannuation Board Pension Cost-of-Living Adjustments – 1977 to 1998, dated May 27, 1999 (Trial Exhibit 001-1001), A.R., **Vol. X, pp. 181 and ff.**

64 Trial Decision, at para. 320, A.R., **Vol. I, pp. 110-111**.

65 Trial Decision, at para. 165, A.R., **Vol. I, p. 64**.

66 Trial Decision, at para. 518, A.R., **Vol. I, p. 170**.

48. Second, the Court of Appeal concluded that the word "benefits" in the *Reorg Act* did not require consideration of the manner in which benefits were funded on the implementation date (i.e. the existence of the Initial Surplus). Instead, it relied on the use of the term "benefits" in general pension legislation, limiting the definition to include only whether monthly payments were reduced by privatization, a matter it acknowledged had never been in dispute between the parties.[67] The Court did not address the legislative history that expressly tied the question of equivalence into the Employees' concerns regarding the Initial Surplus, or the statements by the Government that equivalence was to be given the "broadest meaning".

49. Third, the Court of Appeal held that MTS's undertakings were of "no legal effect" since they were not contracts and there was no indication that they were relied on by Employees, contradicting the trial judge's factual finding on this point. Accordingly, the Court concluded that the trial judge had erred in relying on anything other than the final text of the MOA, which recorded the consensus and intention of the parties.[68] The Court held that the unqualified undertakings given by MTS and relied on by the Government in passing the *Reorg Act* were "simply the provision of information in response to specific questions".[69]

50. The Court proceeded to interpret the MOA in isolation from its undertakings. Despite acknowledging that the objectives of the parties were not achieved, the Court explained that the Plan Text was a contract between MTS and its Employees and that its strict terms had been met: MTS had made the required notional contributions but the 20-year pre-funding requirement in the Plan Text had not been met. The Court further found that nothing prevented MTS from taking five years of contributions holidays as it was entitled by general pension law to make use of an actuarial surplus in this way. The Court reached the above conclusions notwithstanding that the Initial Surplus produced no additional benefits for Employees, which was the acknowledged intent of all parties, and MTS had undertaken not to use the Initial Surplus in this manner.

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67 C.A.'s decision at para. 93, A.R., **Vol. I, p. 207**.
68 C.A.'s decision at paras. 160-164, A.R., **Vol. I, pp. 230-231**.
69 C.A.'s decision at para. 160, A.R., **Vol. I, p. 230**.

PART II – QUESTIONS IN ISSUE

51. The present appeal raises the following issues:

a. Did the Court of Appeal err in reviewing this case on a correctness standard?

b. Did the Court of Appeal err in determining that the Initial Surplus was the same as an actuarial surplus in an ongoing defined pension plan?

c. Did the Court of Appeal err in overturning the trial judge's conclusion that the benefits of the two plans were not equivalent in value on the implementation date?

d. Did the Court of Appeal err in concluding that the undertaking was unenforceable and that MTS had not breached the MOA?

e. Does an apprehension of bias exist where a recently retired appellate court judge argues a case before a panel of the same court?

PART III - STATEMENT OF ARGUMENT

A. The Standard of Review

52. The standard of review for an appeal from a trial judge's decision was established by this Court in *Housen*.[70] *Housen* dictates that questions of law are to be reviewed on a standard of correctness, while questions of fact, or mixed fact and law, can only be interfered with where a trial judge commits a palpable and overriding error. Absent the misstatement or misapprehension of an established principle of law, the trial judge's conclusions warrant deference.

53. The issues in the present case all involved questions of mixed fact and law that could not be disentangled. The trial judge did not incorrectly disregard established pension law principles since those principles did not apply to the unique facts of this case. Interpreting the MOA also turned on whether the parties intended the MOA to represent the entire agreement between them. The question of whether benefits were equivalent in value on the implementation date could only be decided with the assistance of expert actuarial evidence; indeed, the clear evidence accepted at trial established that the funding of benefits on the implementation date (i.e. the Initial Surplus) was an important factor in

[70] *Housen v. Nikolaisen*, [2002] 2 SCR 235 ("*Housen*"), at paras. 7-37, A.B.A., **Vol. I, tab 10**.

determining if the benefits were equivalent in value. This issue also required consideration of the MOA since it was incorporated into the Reorg Act.

54. In carrying out its analysis, the Court of Appeal effectively disregards and overturns numerous findings of fact made by the trial judge[71]:

- The surplus in the Prior Plan belonged to Employees (para. 46);
- The Government and Employees believed that surplus in the Prior Plan belonged to Employees and acted accordingly (paras. 46-49 and 134);
- The Government did not want the Initial Surplus to be used for the privatized MTS in any way (para. 478);
- The hallmark of the Prior Plan was that the cost of benefits was shared 50/50; therefore Employees should not pay more than 50% for accrued benefits on the implementation date of the New Plan (paras. 15, 179, 340, 341 and 529);
- The funding of benefits on the implementation date is a relevant consideration in determining if the benefits on implementation are equivalent in value (paras. 181, 252 and 515);
- MTS and the Government had clearly undertaken that the Initial Surplus would be used for enhanced employee benefits and not by MTS to reduce its pension costs (paras. 318 and 483);
- The MOA and the undertaking are to be read together in determining the agreement between the parties (para. 326);
- The MOA provided that the Initial Surplus would be deposited into the COLA account in the New Plan with the common objective to provide enhanced benefits (paras. 317-318 and 483);
- The ambiguity in the MOA was the result of the 11th hour nature of the negotiations and the fact that Employees had been kept in the dark regarding the details of the New Plan (paras. 485, 487, 511);
- The pension plan and COLA account designed by MTS were inherently flawed and incapable of using the Initial Surplus to provide increased benefits for Employees. Had

[71] Paragraphs referenced below are from the Trial Decision A.R., **Vol. I, pp. 3 and ff.**

Employees known this to be the case, they would not have agreed to the MOA (paras. 286, 324 and 328); and

- Employees ultimately received no benefit from the Initial Surplus. Since the Initial Surplus was not recorded as a liability under the New Plan, MTS's pension costs were reduced by the amount of the Initial Surplus which allowed contribution holidays. (paras. 483, 296 (e) and 503)

55. Compounding this improper interference, the Court of Appeal simply got the facts wrong on numerous important points.[72] Rather than challenging specific findings made by the trial judge, the Court simply asserts numerous "facts" for which there is no support; in many cases contradicting the trial judge's findings. The Court of Appeal's approach highlights the dangers of appellate courts failing to provide the appropriate deference to the trier of fact.

B. The Court of Appeal erred in treating the Initial Surplus as an actuarial surplus in an ongoing defined benefit pension plan

56. The Court of Appeal erred in overturning the trial judge's finding that the Initial Surplus belonged to Employees and that the New Plan was, in fact, a new pension plan. In doing so, the Court of Appeal relied on this Court's previous pension jurisprudence to hold that, since the Prior Plan had not been formally wound up, the Initial Surplus was simply an actuarial surplus in an ongoing plan that the employer was entitled to use to take contribution holidays. The Appellants maintain that the MTS plan was a new plan and that the jurisprudence relied on by the Court of Appeal is plainly distinguishable from the case at hand.

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[72] The Court of Appeal makes the following factual errors: that the Government paid 100% of Employees' benefits out of the CSSF (para. 7); that the employer paid into the trust fund in the Prior Plan just as it does today (para. 145); that the Employees had no right to surplus in the Prior Plan, let alone actuarial surplus (para. 206); that the Initial Surplus was simply part of a larger actuarial surplus in the New Plan (para 155); that the first draft of the Plan Text was provided to Employees...and the Plan Text was accepted but for issues relating to governance and ongoing surplus (para. 197); that the Plan Text was a contract between Employees and MTS (para. 7, 143 & 168); that the first two undertakings made by MTS were the provision of information only (para. 160); that the November 6, 1996 undertaking was rejected and not relied on by Employees (para. 25 & 162); that there was no meaningful distinction between the Prior Plan and the New Plan (para. 144); that the assets of the employees in the Prior Plan were not quantified (para. 152); that the Initial Surplus was to be allocated to the Trust Fund to fund future guaranteed COLA (para. 177); that there was no objective meeting of the minds between the parties, only the Employees' subjective expectations; and that the Employees knew and accepted the notional credits and debits to the COLA account in the New Plan (para. 180), A.R., **Vol. 1, pp. 9-10, 15, 55-56, 58-60, 62-63, 65, 67-69, 73, 77**. The impact of these errors will be dealt with in further detail below.

57. The Court of Appeal sets out what it claims are the common law principles that govern defined benefit pension plans. These principles include: that employer contributions to a defined benefit plan are made annually on the basis of an actuarial estimate of the amount needed; that neither party has a right to surplus while the plan is in operation, as it only exists on paper; and that the employer can use actuarial surplus to take a contribution holiday, provided the plan wording or legislation does not prohibit it.[73]

58. The circumstances of the present case, however, set it distinctly apart from this Court's previous pension jurisprudence. Unlike an actuarial surplus in an ongoing plan, which represents an ever-changing assessment of the extent to which the assets of the plan are sufficient to meet its future liabilities, the Initial Surplus represents a final determination of the amount by which the Employees over-contributed to the New Plan on the implementation date. Put another way, the Initial Surplus was a one-time calculation that will never change based on future actuarial valuations of the New Plan. It represents real money that was physically transferred out of the *CSSA* trust fund (i.e. investments were unwound and liquidated) and into the New Plan trust.

59. Accordingly, the Initial Surplus was the amount by which Employee contributions exceeded 50% of the liabilities in the New Plan on the implementation date, taking into account all prefunding for the cost of the COLA guarantee for all benefits accrued. It represents the actual (as opposed to actuarial) surplus of employee contributions from the Prior Plan to the New Plan. The transfer of the Initial Surplus to the New Plan thus results in an over-contribution as of the implementation date of the New Plan that the parties and the legislature sought to protect.

60. The above considerations highlight the distinction between the identification and calculation of the Initial Surplus versus ongoing actuarial valuations of the New Plan done for the purposes of determining MTS's contributions for the future accrual of benefits (i.e. its "current service cost"); two different calculations for two completely different purposes.

61. There is no dispute that the parties and the Government recognized and affirmed the existence of the Initial Surplus. It is a species of surplus that has never been considered by this Court. The Initial Surplus was a relevant factor that had to be considered by the parties and the Government to ensure that Employees would not be disadvantaged by the privatization of MTS. The evidence at trial was that the parties and the Government viewed surplus in the Prior Plan as belonging to Employees, and, for this reason, always used the actuarial surplus in the Prior Plan to enhance benefits. This circumstance is very different from the typical defined benefit pension scheme described by the Court of Appeal.

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[73] C.A.'s decision at paras. 146-148, A.R., **Vol. I, pp. 224-226**.

62. The Prior Plan and the New Plan are also based on two fundamentally different funding models. Although MTS's contributions under the New Plan are based on actuarial valuation, the Initial Surplus in this case was the product of the Employees' contributions under the Prior Plan, in which the parties were statutorily required to split the pension costs 50/50. As the Independent Actuary explained in his February 18 draft opinion, (which was rendered before he was interfered with) this fact was the most important consideration in determination whether the benefits of the two plans were equivalent in value on the implementation date:[74]

> *(i) The actual level of funding of the pension benefits accrued to December 31, 1996 is very important. Under the CSSA the funding arrangement was one that attempted to provide benefits that were 50% funded by the employer and 50% funded by the employee. [emphasis added]*

63. The Court of Appeal makes a number of factual errors related to this issue. The Court's finding that the "Initial Surplus was simply part of a larger actuarial surplus in the New Plan" is plainly wrong.[75] There was no actuarial surplus in the New Plan on the implementation date. The first Actuarial Valuation revealed a $7 million unfunded liability.[76] This unfunded liability occurred because the plan actuary chose to use an actuarial smoothing of assets in his calculation of overall plan assets. This smoothing technique resulted in a substantial write down of assets.[77]

64. The Court of Appeal likewise erred in concluding that the MTS plan was not a "new plan" since the Prior Plan had not been completely wound up. Whether the entire Prior Plan was formally wound up to crystallize the surplus is irrelevant in this case since the involvement of the MTS Employees clearly came to an end and their assets in the Prior Plan were quantified and physically transferred to the New Plan. It cannot be said that the trial judge made a palpable or overriding error in concluding that the New Plan was, indeed, a new plan for pension purposes, and that the Initial Surplus was an actual surplus of contributions made by the Employees to the New Plan, arising out of their participation in the Prior Plan.

65. To the extent that the Court of Appeal in the present case relied on the Ontario Court of Appeal's decision in *Burke v. Hudson's Bay*,[78] it failed to properly interpret the *dicta* from that decision.

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74 Draft Letter A.R., **Vol. X, pp. 35 and ff.** (Trial Exhibit 001-0812).
75 C.A.'s decision at para. 155, A.R., **Vol. I, p. 229**.
76 First Actuarial Evaluation of the New Plan as at January 1, 1997 (Trial Exhibit 001-0827), A.R., **Vol. X, pp. 43 and ff.**
77 First Actuarial Valuation of the New Plan (Trial Ex. 001-0827), A.R., **Vol. X, pp. 43 and ff.**
78 *Burke v. Governor and Co. of Adventurers of England Trading into Hudson's Bay*, 2008 ONCA 394 ("*Burke v. Hudson's Bay*"), A.B.A., **Vol. I, tab 3**.

Although Justice Gillese confirms that past history cannot trump the governing legal documents, she maintains that the rights and obligations flow from the circumstances of each case.[79] Indeed, this Court in *Burke* emphasized that its decision depended on the "text and context" of the Plan before the Court, noting that "[e]ach situation must be evaluated on a case-by-case basis".[80] This Court in *Schmidt* confirmed:[81]

> *Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly employees.*

66. The Court of Appeal's broad-brush approach to the present case fails to satisfy this requirement, which is particularly evident given that it was the stated intent of all parties at the outset of the New Plan that the surplus from the Prior Plan not be used in the manner that it was. The Court of Appeal's decision implies that all pension cases are to be governed in the same manner, regardless of the facts found at trial. The Appellants disagree. There is no basis to overturn the trial judge's finding that the Initial Surplus was an actual surplus that belonged to Employees and that MTS gave an undertaking that it would not use it to reduce its costs.

67. Even if the Initial Surplus was actuarial in nature, the Court of Appeal acknowledged that an employer cannot use the actuarial surplus to take a contribution holiday where the plan prohibits it. As will be detailed below, the *Reorg Act* and the agreement between the parties clearly establish that the Initial Surplus would not be used to reduce MTS's pension costs. This Court's decision in *Schmidt* emphasized the importance of legislatures taking steps to deal with issues such as pension surplus directly, rather than leaving them to be addressed based on the contractual and other rights that flow from the initial pension plan.[82] The Court of Appeal cast aside the legislature's efforts to do so in the present case.

C. The Court of Appeal erred in overturning the trial judge's conclusion that the benefits of the two plans were not equivalent in value on the implementation date

68. The Court of Appeal failed to interpret the guarantee in subsection 15(2) of the *Reorg Act* – which provided that the New Plan *"shall provide for benefits which on the implementation date are*

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79 *Ibid*. at paras. 37, 98.
80 *Burke v. Hudson's Bay Co.,* [2010] 2 SCR 273 ("*Burke*") at para. 96, A.B.A., **Vol. I, tab 3**.
81 *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 ("*Schmidt*") at 669, A.B.A., **Vol. I, tab 26**.
82 *Schmidt, supra,* at 674.

equivalent in value" – in light of the broader context and the unique circumstances surrounding its enactment. A review of the statements by the responsible Ministers and the MOA that was incorporated into the legislation demonstrates that the legislature sought to ensure that the Initial Surplus contributed by Employees would remain available for their exclusive use in the New Plan, as it had in the Prior Plan. The Court of Appeal ignored this context, as well as Employees' ownership of the Initial Surplus, and instead based its analysis solely on the use of the term "benefits" in general pension legislation. This interpretation casts aside the legislature's intent and strips the protections in the *Reorg Act* of their fundamental purpose.

69. It is trite law that legislation is to be interpreted in light of its entire context, such that the words of the statute are read harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This Court has repeatedly held that the full context includes reliance on legislative history where it is of an institutional quality and provides insight into the intent of the legislature.[83]

70. Legislative history that clarifies a statute's purpose can provide a compelling basis on which to depart from even seemingly well-defined statutory language. In *Re Canada 3000 Inc.,*[84] the legislative history led this Court to interpret the term "owners" to exclude individuals who were legal title holders, who would otherwise fall within the ordinary meaning of the term. The Court explained that the Hansard evidence confirmed there was no intention to depart from the existing regulatory framework and extend liability to individual owners. Similarly, in *Celgene Corp.*,[85] this Court relied on the consumer protection object of the *Patent Act* and the related legislative history to depart from the commercial law definition of the term "sold".

71. The trial judge in the present case properly read the *Reorg Act* in light of the unique circumstances surrounding its enactment and the legislature's clear intention to protect the Initial Surplus for Employee use. To start, the legislative process in the days immediately preceding the passage of the *Reorg Act* focused on the need to promptly address Employee concerns that they could lose the benefit of surplus contributions they had made to the Prior Plan. The public statements by the responsible Minister, including statements made in introducing the amendments to the *Reorg Act*, leave

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83 *Rizzo & Rizzo Shoes Ltd. (Re)*, [1988] 1 SCR 27 at paras. 21-23, 31-35, A.B.A., **Vol. I, tab 24**; Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed. (Markham: LexisNexis Canada Inc., 2008) ("Sullivan") at pp. 593-594, 608-612, 618, A.B.A., **Vol. II, tab 34**.

84 *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 SCR 865 at paras. 36-61, A.B.A., **Vol. I, tab 4**.

85 *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3 ("*Celgene Corp.*") at paras. 21, 24-30, A.B.A., **Vol. I, tab 4**.

no doubt that the notion of equivalence in subsection 15(2) was intended to include consideration of the Initial Surplus.

72. Employee concerns regarding the protection of the Initial Surplus for employee use had been repeatedly expressed in the fall of 1996 and were the clear subject of the presentation by Employees' counsel to the Standing Committee on October 31, 1996.[86] His presentation addressed the protection of the Initial Surplus, Employees' role in the governance of the New Plan, and MTS's failure to consult with Employees regarding the provisions in the Plan Text. Counsel made the following statement with respect to the Initial Surplus:[87]

> *[...] a surplus in the fund has been identified as set out in the actuarial report which I believe has been tabled before the Legislature. It deals with the situation as at December 31, 1995. [...]*
>
> *There has been no clear indication from MTS that this identified $17.3-million surplus [later determined to be precisely $43.364 million] which clearly belongs to MTS employees and retirees a) will not disappear by virtue of MTS's own actuarial calculations as to employer liability, or b) that the surplus will be matched by MTS upon transfer to the new trust fund.*
>
> *Having arisen out of the employees', retirees contributions to the fund, neither the province nor MTS has any right to the transfer amount. That is a given, but what is equally obvious is that this surplus has historically been utilized for the purposes of enhancing benefits. I have supplied a list of situations where the surplus from the fund has been dedicated to employee-retiree improvements, and in those items where there is an asterisk, those were matched by employer contributions.*

The statements by Government Ministers following this presentation recognized the legitimacy of the Employees' concerns and outlined the Government's intention to address them. Minister Praznik, the Government House Leader, stated:[88]

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

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86 Hansard Transcript – October 31, 1996, A.R., **Vol. VIII, pp. 138 and ff.**, and Trial Decision, at paras. 101-108, A.R., **Vol. I, pp. 40-42**.

87 Hansard Transcript – October 31, 1996, A.R., **Vol. VIII, pp. 140-141**.

88 *Ibid*., A.R., **Vol. VIII, p. 144**.

73. In subsequent statements on November 7, 1996, during the public review of the draft legislation, Minister Findlay assured the legislature that "any surplus in employee contributions to the [Prior Plan] will not, and I stress not, be used to reduce MTS's costs".[89] Minister Findlay went on to emphasize the broad scope to be given to the protections in the *Act*, linking these concerns directly with the notion of equivalence in subsection 15(2):[90]

> *If the Member looks to the legislation, we get up on to 15(2), we talk about equivalent, equivalent in the broadest sense. I think the problem probably comes in as to how you determine that equivalent really happens, and so we have had discussions around an amendment that would give everybody some comfort […].*
>
> *I do not think we are on any different page here. We want to be sure we have equivalency, pure and simple, that is determined by an independent analysis process. That is what we want to move as amendments [...] I think, down within the legislation, we see whether there would be concern that, how do you really determine, and in the fairest possible way, what equivalency is? If it is not equivalent, what do you do to bump it up? [emphasis added]*

74. Following the signing of the MOA, Minister Findlay further explained that the parties wished to have something in writing regarding the notion of equivalence. Minister Findlay made the following statement in introducing the amendments to the *Reorg Act* that resulted from the MOA:[91]

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

75. The legislative history in the present case is of an institutional quality and provides clear evidence of the legislature's intent. Indeed, section 15 of the *Reorg Act* cannot be properly understood without taking into account the repeated statements by Ministers Praznik and Findlay that the notion of equivalence was intended to be broadly understood to cover Employee concerns regarding the future use of the Initial Surplus. This intent is particularly clear given the expert evidence at trial that "equivalent in value" was not a normal actuarial term and its meaning was far from clear.[92]

76. In light of the above, there is simply no merit to the Court of Appeal's conclusion that the legislature's failure to amend subsection 15(2) itself following the signing of the MOA somehow demonstrated its intent to maintain a narrow interpretation of the term "benefits... equivalent in value".

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89 Hansard Transcript – November 7, 1996"), A.R., **Vol. VIII, p. 161**.
90 *Ibid*., A.R., **Vol. VIII, p. 162**.
91 Hansard Transcript – November 8, 1996, A.R., **Vol. IX, p. 67**.
92 Trial Decision, at para. 249, A.R., **Vol. I, p. 89**.

As the trial judge held, the legislature clearly intended that the amendments following the MOA would frame the interpretation of the legislation as a whole and give subsection 15(2) a broad meaning to ensure that the notion of equivalence protected the Initial Surplus for exclusive use by Employees. This interpretation is the only plausible reading of these amendments; particularly where there was never any debate with respect to the level of basic benefits provided by the New Plan. The legislature had already secured Employees' rights in that regard.[93]

77. The trial judge's interpretation of subsection 15(2) is also confirmed by the MOA, which was incorporated into the *Reorg Act* by virtue of subsection 15(11). Minister Praznik testified that the MOA was referenced in the legislation to provide the MOA with "the force of law". As detailed below, the MOA was based on MTS's undertaking that it would not use the Initial Surplus to reduce its pension costs under the New Plan. It also provided that the Initial Surplus would be placed in the COLA account to provide enhanced benefits for Employees. Incorporating this agreement directly into the *Reorg Act* confirmed that the legislature intended to protect more than just Employees' benefit formula. It is important to note that the trial judge read the MOA in conjunction with the unequivocal undertakings made by MTS to Employees, and that the legislature expressly relied on these same undertakings in deciding on appropriate amendments to the *Reorg Act* to ensure that Employees were treated fairly during the privatization process.

78. Contrary to the narrow definition of benefits imposed here, a different panel of the Manitoba Court of Appeal deciding MTS's summary judgment motion found that s.15 of the *Reorg Act* was enacted for the benefit of Employees and should be interpreted as such.[94]

> *91 Section 15(2) mandates that benefits "shall" be equivalent in value. Interpretations therefore that are consistent with or promote this legislative purpose should be adopted; those which might defeat or potentially undermine these legislative purposes should be avoided.*
>
> *92 Here, there can be no doubt that privatization was the primary objective of the Act. But it is also clear that another foundational consideration, or objective of the government, was to provide for equivalent pensions for the 7,000 or so present and past employees of MTS; in other words, to protect and benefit the employees. The legislative history of sec. 15, and the proceedings before The Standing Committee on Public Utilities and Natural Resources, is entirely supportive of this view.*
>
> *93 This beneficial reason for sec. 15 cannot be disregarded….*
>
> *95 Given that pensions were to be fully protected and equivalency was a legislative imperative, a strong argument can be made that the deemed consent in sec. 15(10) only*

93 Trial Decision, at para. 393, A.R., **Vol. I, p. 132**.
94 *TEAM, supra*, at paras. 91-93, 95.

> *relates to the assignment and transfer of equivalent assets; if the assets are not in fact equivalent, then the deemed consent should not apply. (Emphasis added)*

79. Clearly, this panel of the Court of Appeal, which included the Chief Justice, viewed "benefits" to include equivalency of assets transferred to the New Plan. In other words, the funding of benefits is relevant to the determination of "benefits which on the implementation date are equivalent in value." Furthermore, by dismissing the summary judgment motion, this panel of the Court made it clear that fact finding through a trial was necessary to determine the equivalency conundrum. The question of equivalency involved far more than simply importing a simple definition of benefits from another Act.

80. The definition of "pension benefits" in the *CSSA*[95] is completely unrelated to the foundational consideration, or objective of the legislature, in s. 15 of the *Reorg Act* to provide for equivalent pensions to the Employees. The objective of s. 15 is to ensure that Employees' pensions are held harmless from privatization. This "beneficial reason"[96] cannot be disregarded when the term "benefits" is examined. The definition of "pension benefits" in the *CSSA* serves a much more mundane function: to simply facilitate understanding of the provisions of the *CSSA* (which is the Plan Text for the Prior Plan).

81. Moreover, although courts are entitled to look at the use of a term in other statutes, this Court has long cautioned against simply importing the meaning of a term from a statute that may serve a different purpose. In *Miln-Bingham Printing Co.*, for instance, this Court stated:[97]

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

82. Likewise, this Court in *Township of Goulbourn*[98] stated: "A comparison of like statutes enacted by the same Legislature is at most of peripheral assistance in determining the proper interpretation of the statute before the Court." This Court reaffirmed that cautious approach to this interpretive

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95 Court of Appeal Decision, para. 88, A.F., **Vol. I, pp. 205-206**.
96 *TEAM*, *supra*, at para. 93.
97 *Miln-Bingham Printing Co. v. The King*, [1930] SCR 282 ("*Miln-Bingham Printing Co.*") at p. 283, A.B.A., **Vol. I, tab 16**.
98 *Corp. of Goulbourn v. Regional Municipality of Ottawa-Carleton* [1980] 1 SCR 496 ("*Township of Goulbourn*") at p. 515, A.B.A., **Vol. I, tab 7**.

technique in *Janzen*,[99] where Justice Dickson emphasized that the related statutes had a similar purpose and structure.

83. In the present case, the Court of Appeal erred in basing its interpretation of subsection 15(2) on the use of the term "benefits" in general pension legislation, instead of the trial judge's factual findings; the opinions of the actuaries that testified; and the relevant legislative history. The *Reorg Act* was a *sui generis* statute created for the sole purpose of bringing the privatization of MTS into effect. Its unique purpose and structure made comparisons with other pension legislation improper.

84. In addition, the Court of Appeal's narrow interpretation of the *Reorg Act* does not fit with the text of subsection 15(2). The *Reorg Act* goes beyond providing that Employees will receive the same pension benefits under the New Plan. It goes further by guaranteeing that the benefits on the implementation date will be equivalent in value. The notion of "value" incorporates not only the benefits received by Employees, but also, what Employees contribute in exchange for those benefits.[100] The Court of Appeal's narrow definition of "benefits" fails to in any way address the inclusion of the term "value" in this provision.

85. The Independent Actuary testified that the use of surplus and the funding of benefits were important considerations in determining if "benefits...on the implementation date are equivalent in value."[101]

86. The trial judge recognized that the funding of benefits had to be equivalent on the implementation date in order for the benefits to be equivalent in value. He put it this way[102]:

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

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99 *Janzen v. Platy Enterprises Ltd.,* [1989] 1 SCR 1252 ("*Janzen*") at p. 1292. See also *Sullivan*, *supra* at pp. 427-428, A.B.A., **Vol. I, tab 11**.

100 *The Canadian Oxford Dictionary*, 2001, *sv* "value", A.B.A., **Vol. I, tab 33**.

101 Trial Decision, at para. 252, A.R., **Vol. I, p. 90**.

102 Trial Decision, at para. 341, A.R., **Vol. I, pp. 117-118**.

87. The Independent Actuary made the same observation in the report he rendered before he was interfered with:[103]

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

88. If the trial judge's interpretation of the MOA is not upheld, and the MOA does not produce enhanced benefits equal to the Initial Surplus, employees will have paid in effect $43.364 million more to obtain the same benefits they had under the CSSA. Paying more for the same benefits is not equivalent in value. MTS's own expert, Brian FitzGerald, testified that if the same benefits are made to cost more, that is tantamount to reducing benefits.[104]

89. Clearly, the benefits cannot be equivalent in value if the same benefits cost $43.364 million more under the New Plan. The corollary is that MTS must have benefited from the Initial Surplus. The Employees' actuarial expert, Tom Levy ("Levy"), explained why in his evidence:[105]

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

90. Further, the legislature deliberately declined to define "benefits which on the implementation date are equivalent in value", leaving the question of equivalence to be examined and determined through a fair and independent analysis by an actuary. The Government recognized that this valuation question was for an actuary to determine and not a determination that it could legislate. Expert analysis of this nature would have been entirely unnecessary if, as the Court of Appeal concluded, the legislature simply intended to compare monthly benefits.

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103 Draft Letter, (Trial Exhibit 001-0812), A.R., **Vol. X, p. 36**.

104 Evidence of the Defendants, B.A.P. Fitzgerald (Hearing of November 7, 2008), p. 26 of Transcript, A.R., **Vol. VI, p. 43**.

105 Levy Reply Report (Trial Ex. 041), A.R., **Vol. XI, pp. 116 and ff.**

91. Accordingly, the trial judge correctly ruled that the determination of whether the benefits of the two plans were equivalent in value on the implementation date required consideration of the funding of those benefits. Factoring in the funding of benefits, when determining if benefits are equivalent in value, requires consideration of the use of the Initial Surplus. Clearly, benefits cannot be equivalent in value if the same benefits cost $43 million more under the New Plan. This point was confirmed by the fact that Government Employees who remained in the Prior Plan after privatization saw their portion of the ongoing surplus in the public service plan used to provide increases of 6-14% in 2000. Conversely, MTS Employees have seen no increase in benefits, despite having made the same contributions as Employees who remained in the Prior Plan. The Court of Appeal's error on this point is sufficient to reinstate the trial judge's ruling.

D. The Court of Appeal erred in overturning the trial judge's conclusion that MTS breached its undertakings and the MOA

92. The Court of Appeal erred in overturning the trial judge's conclusion that MTS had breached its commitments to Employees regarding the Initial Surplus. The trial judge found on the evidence before him that the undertakings made by MTS served as the foundation for the MOA and that the parties' clear intent in executing the MOA was to put aside and protect the Initial Surplus for future use by Employees. The Court of Appeal, however, ruled that the undertakings made by MTS were of no legal effect and that the trial judge had violated the parol evidence rule by transforming the Employees' expectations into binding obligations on the employer. The Court of Appeal justified its strict interpretative approach by stating that it is only the final document that records the intention of the parties. It said nothing of the fact that both parties led extensive evidence of the negotiations leading up to the signing of the MOA in an attempt to explain the meaning of its terms.[106] The Court of Appeal's analysis is wrong in law and ignores important factual findings made by the trial judge regarding the objective intent of the parties.

93. The MOA must be interpreted in light of the issues and concerns the parties clearly intended for it to address. The trial judge made numerous factual findings that were pivotal to his analysis of the MOA and his conclusion that MTS had breached its terms.

94. First, MTS directly acknowledged the Employees' concerns regarding the Initial Surplus and provided unqualified undertakings on several occasions that it would be protected and not used by

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[106] C.A.'s decision at paras. 172 and 208, A.R., **Vol. I, pp. 235, 243**.

MTS to reduce its costs.[107] The November 6, 1996 memo from Fraser to Minister Findlay addressed this issue squarely:[108]

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

95. The trial judge properly rejected MTS's attempt at the hearing to resile from the above undertaking and claim that it had only promised that the full Pension Reserve[109] would be transferred to the New Plan. Instead, the trial judge accepted Minister Praznik's testimony that everyone in attendance at the November 6th meeting between the Government and MTS officials agreed that this paragraph meant that MTS "would in no way use those dollars that were coming over from the civil service Fund in any way to their benefit".[110] The trial judge noted the "frailty" of Fraser's evidence on behalf of MTS on this issue and stated:[111]

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

96. Second, the trial judge also accepted the evidence of Minister Praznik that the above undertaking, made by MTS on a number of occasions, provided the foundation for the negotiation of the MOA between the parties. Minister Praznik was directly involved in the negotiation and preparation of the MOA and signed the agreement on behalf of the Government. Minister Praznik's testimony supports the trial judge's conclusion that the MOA was intended to operationalize how the Initial Surplus would be protected for future employee use and provide a mechanism to track and account for it. These findings established that the MOA was never intended to exhaustively set out the agreement between the parties.

97. Third, the trial judge found that, although the terms of the MOA were ambiguous, this ambiguity was a result of the fact that the MOA had been "hastily negotiated" at the "11th hour" in order to

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107 Trial Decision at paras. 94 and 121, A.R., **Vol. I, pp. 37, 47-48**.
108 November 6th Memo, A.R., **Vol. VIII, pp. 156-157**.
109 See Trial Decision at paras 50-53, A.R., **Vol. I, pp. 22-23**.
110 Trial Decision at para. 136, A.R., **Vol. I, p. 53**.
111 Trial Decision at paras. 125, 127 and 136-137, A.R., **Vol. I, p. 49, 50-51, 53**.

address Employee concerns regarding the protection of the Initial Surplus while satisfying the schedule for privatizing MTS.[112] For this reason, the trial judge turned to the background evidence presented by both parties to more fully understand its terms.

98. Paragraph 3 of the MOA can be summarized as follows: (1) MTS will provide guaranteed COLA; (2) if the COLA account can afford more than the guaranteed COLA amount, more will be given; (3) the Initial Surplus was to be put in the COLA account; (4) if sufficient assets exist beyond the COLA increase for a particular year, pension benefits may be increased if doing so does not result in an increase in MTS's pension costs.[113]

99. In interpreting the MOA, the trial judge accepted that Employees had sought to have the surplus deposited into a separate account, but agreed to place it in the indexing account when they were informed that the *Pension Benefit Standards Act* precluded the establishment of a separate account. The trial judge rejected MTS's alternative argument that the MOA was not binding as there was no *consensus ad idem* respecting its terms. The trial judge, referencing the broader context in which the MOA was signed, stated:[114]

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

100. The above findings of fact informed the trial judge's interpretation of the MOA. He concluded that the Initial Surplus was to be placed in the COLA account to provide for enhanced COLA (i.e. above the guarantee) and/or pension benefits. It was not being put in the Trust Fund on an equal footing with all other assets. Furthermore, the provision of enhanced benefits coming from the Initial Surplus was not just a "possibility". It was not contingent on some inarticulate factor. It was an absolute benefit that was being qualified as to when and how it would be received; not if it would be received.

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112 Trial Decision at para. 485, A.R., **Vol. I, p. 160-161**.
113 MOA, (Trial Exhibit 001-0440), A.R., **Vol. VIII, pp. 158-159**.
114 Trial Decision at para. 326, A.R., **Vol. I, pp. 112-113**.

101. The trial judge found that the parties both intended that the Initial Surplus be treated like the surplus in the Prior Plan; that is why the last sentence in paragraph 3 of the MOA states that pension benefits can be increased provided that the liability for the plan does not increase (i.e. MTS's costs do not increase). This sentence incorporates past practice from the Prior Plan relating to the use of surplus. In the Prior Plan surplus would sometimes pay both ends of a benefit improvement so that the Government's liability did not increase.

102. The Court of Appeal's interpretation of paragraph 3 of the MOA results from the Court "turning a blind eye" to MTS's undertakings and the past practice regarding the use of surplus in the Prior Plan. It states that the essence of paragraph 3 of MOA is that the Initial Surplus would be allocated to the Trust Fund to fund future guaranteed COLA and possibly enhanced COLA and/or pension benefits.

103. This interpretation runs contrary to the evidence at trial and to the positions MTS argued at trial. For instance, until the Court of Appeal hearing, MTS had never linked the inclusion of the guarantee of COLA to the Initial Surplus. The guaranteed COLA provision was included in the draft Plan Text long before the MOA was negotiated. MTS's evidence was that it included the guarantee based on awards of COLA in the Prior Plan and because OSFI[115] would have required it. The guarantee was not an improvement over the Prior Plan. It was the duplication of an existing obligation.[116] Moreover, the full cost of the guarantee for all accrued benefits was included in the liabilities of the plan as a whole. The Initial Surplus represented an Employee over-contribution above its share of the liabilities, which included the guarantee. Therefore, the Initial Surplus could not have been compensation for the guarantee. Furthermore, if that was the intention, MTS would have said so rather than undertaking not to use the initial surplus. Nor is there a link between the Initial Surplus and the future guaranteed COLA. Future guaranteed COLA is funded in the same way as the future accrual of all benefits, through Employee contributions and MTS's current service costs (i.e. the MTS and Employee yearly payments).

104. The trial judge concluded that MTS breached the MOA in two ways. First, the Plan Text prepared by MTS imposed restrictions on the operation of the COLA account that, unbeknownst to the parties, made it impossible for the Initial Surplus to be used in a manner that would benefit Employees. The trial judge found that, "unknown to [employees] at the time, the 20 year pre-funding requirement was incapable of ever being reached by virtue of the manner in which the COLA account was set

115 Office of the Superintendent of Financial Institutions.
116 Evidence of Pat Solman – Nov. 4 2008 - pp. 89-90, A.R., **Vol. V, pp. 171-172**.

up".[117] The trial judge went on to find that Employees would not have agreed to the MOA had they known the details of how the account would be established. The trial judge properly found that MTS's conduct in setting up the COLA account deprived Employees of their opportunity to benefit from the surplus.[118]

105. In 2007, MTS's own actuaries acknowledged that the design of the COLA account was so flawed that it could never have produced additional benefits for Employees.[119] The expert evidence at trial was that, because the COLA account could not produce additional benefits as intended, MTS's pension costs under the New Plan were reduced by the amount of the Initial Surplus.[120] As of the date of trial, the COLA account had a deficit of $17 million and counting.[121]

106. Second, the trial judge concluded that by not enhancing benefits as required by the MOA, MTS was able to take contribution holidays. The trial judge ruled that "...the basic premise was the protection of the Initial Surplus so that it was available exclusively for funding of improved pension benefits including COLA increases above [the Guarantee]."[122] The underlying facts of this finding were not disturbed on appeal.

(i) The Court of Appeal erred in disregarding MTS's Undertaking that it would not use the Initial Surplus to reduce its contributions to the New Plan

107. The Court of Appeal's conclusion that MTS's undertakings were of no legal effect, and that the trial judge was not entitled to consider extrinsic evidence of the parties' intentions in negotiating the MOA, misstates the rule against parol evidence. First, the parol evidence rule does not prevent statements from the broader factual context in which an agreement was signed from being considered when interpreting a contract. Rather, Canadian courts have adopted *dicta* from the United Kingdom's House of Lords that contract interpretation requires determining the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract. Indeed, "the background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even

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117 Trial Decision at para. 320, A.R., **Vol. I, pp. 110-111**.
118 Trial Decision at para. 324, A.R., **Vol. I, p. 112**.
119 Letter from MTS Actuary Laura Samaroo to OSFI, dated May 15, 2007 (Trial Exhibit 001-1288), A.R., **Vol. XI, pp. 51 and ff.**
120 Trial Exhibit 041 page 16 para 36, A.R., **Vol. XI, p. 131**.
121 Report on Actuarial Valuation of the Adjustment Account as at January 1, 2008 (Trial Exhibit 032), A.R., **Vol. XI, p. 55 and ff.**
122 Trial Decision, at para. 165, A.R., **Vol. I, p. 64**.

(as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax".[123]

108. Second, the parol evidence rule only applies where the parties intend the written document to provide the exclusive record of their agreement.[124] The articulation of the scope of the parol evidence rule was recently confirmed by the Manitoba Court of Appeal itself in *King*,[125] where the Court confirmed that the rule applies only "where the whole of a contract has been reduced to writing [...]" [emphasis added].

109. The British Columbia Court of Appeal has also repeatedly confirmed that the parol evidence rule does not apply to exclude evidence of oral promises that were intended by the parties to be part of the contract. For instance, in *Nevin*,[126] the British Columbia Court of Appeal held that an oral representation committing to an employment term of three and half years could be relied on as the written contract between the parties had not been intended to be a complete statement of the terms of employment. Similarly, in *Turner*,[127] the Court of Appeal rejected an employer's argument that the parol evidence rule precluded reliance on an oral agreement regarding a bonus to be received by an employee; ruling instead that the oral agreement was a precondition to the subsequent purchase agreement between the parties.

110. In *Bank of Montreal*[128] the British Columbia Court of Appeal accepted that where a bank officer had told the defendants that, as joint guarantors, they would only be required to pay half of the principal debt if the principal debtor defaulted, this initial representation could be relied upon either on the basis of promissory estoppel or the creation of a collateral contract. The basic principle of estoppel is that a person is precluded from retracting a statement upon which another has relied. The doctrine of promissory estoppel provides that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promise to be relied on and if

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123 *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167 at paras. 42-44, A.B.A., **Vol. I, tab 30**; see also *Dumbrell v. Regional Group of Companies Inc.,* 2007 ONCA 59 at paras. 53-56, A.B.A., **Vol. I, tab 8**; *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.* (1998), 114 OAC 357 at para. 25-26, A.B.A., **Vol. I, tab 12**; *Certicom Corp. v. Research in Motion Ltd*. (2009), 94 OR (3d) 511 at para. 38, A.B.A., **Vol. I, tab 6**.

124 S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) ("Waddams") at s. 321, A.B.A., **Vol. II, tab 36**.

125 *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, [2012] 3 WWR 269 at paras. 35-50 *et seq* ("*King*"), A.B.A., **Vol. I, tab 13**.

126 *Nevin v. British Columbia Waste Management Corp.*, [1995] BCJ 2301, 129 DLR (4th) 569 (CA) at paras. 9-11, A.B.A., **Vol. I, tab 17**.

127 *Turner v. Visscher Holdings Inc.*, [1996] BCJ 998, 77 BCAC 48 (CA) at paras. 15-16, A.B.A., **Vol. I, tab29**.

128 *Bank of Montreal v. Murphy* (1985), 6 BCLR (2d) 169 ("*Bank of Montreal*") at paras. 7-10, A.B.A., **Vol. I, tab 1**.

the promisee relied on the promise to their detriment. Likewise, this Court has recognized that estoppel by convention may arise not only from an express representation, but by reliance on a shared assumption of fact or law.[129]

111. The Court of Appeal in the present case erred in concluding that the trial judge had violated the parol evidence rule. The evidence accepted by the trial judge confirms that the parties did not intend for the MOA to serve as the exclusive record of their agreement. Also, the MOA was clearly negotiated in furtherance of MTS's previous written and verbal assurances that its would not use the Employees' surplus to reduce its pension costs and that the Initial Surplus would be preserved for Employees' benefit. As the trial judge found, those undertakings provide the shared understanding on which the MOA was negotiated; a point confirmed by the fact that MTS never sought to resile from those commitments prior to the trial. The Court of Appeal failed to address these factual findings that rendered the parol evidence rule inapplicable to the present case.

112. Moreover, the MOA was the outcome of a single night of negotiation that sought to address Employees' concerns regarding the manner in which the employer's previous undertakings regarding the protection of the surplus would be operationalized. The trial judge fairly concluded that, in light of the nature of these 11th hour negotiations and the ambiguity in the MOA, attention had to be given to the previous statements of the parties in order to properly understand their intentions.[130] Even if it was not the case, the doctrines of promissory estoppel and estoppel by convention would nonetheless give legal effect to MTS's undertakings, given that MTS would have reasonably expected Employees to rely on their undertakings and the trial judge's findings that Employees did, in fact, rely on them to their detriment.

113. The parol evidence rule does not require that the written contract be determinative in all instances. Rather, the case law establishes a range of circumstances in which this rule will or will not apply, depending on the particular facts of the case such as whether the parties intended the written contract to constitute the full agreement between them. As such, the trial judge in the present case cannot be said to have committed an error of law as this determination involved applying the law to the facts of the case, especially since the Court of Appeal failed to meaningfully engage with the findings of fact reached by the trial judge that related to this issue. Indeed, it is the Court of Appeal that

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129 *Maracle v. Travellers Indemnity Co. of Canada*, [1991] S.C.R. 50 at p. 57, A.B.A., **Vol. I, tab 15**; *Ryan v. Moore,* [2005] 2 SCR 53 at paras. 4-5, 59, 61-62, 67, 73-74, A.B.A., **Vol. I, tab 25**; *Hepburn v. Jannock Ltd*., 2008 ONCA 847 at paras. 15-18, A.B.A., **Vol. I, tab 9**; *Waddams*, *supra* at s. 195-196; see also *Black's Law Dictionary*, 8th ed., *sv* "estoppel" , A.B.A., **Vol. II, tab 31**.

130 *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 SCR 245 at para. 23, A.B.A., **Vol. I, tab 20**.

misstates the parol evidence rule to improperly overturn the trial judge's conclusions. The trial judge's analysis of this issue does not contain a palpable and overriding error.

(ii) The Plan Text cannot justify the fact that it was impossible for Employees use the Initial Surplus in the New Plan

114. The Court of Appeal's analysis is founded on the erroneous premise that the Plan Text for the New Plan constitutes a "contract" between the parties which fleshed out the MOA and the use of the Initial Surplus.[131] The Court relied on the Plan Text to justify its conclusion that MTS did not breach the MOA, since MTS complied with the Plan Text in terms of the operation of the COLA account. The Court of Appeal erred, however, in treating the Plan Text as an agreement between the parties, when, in fact, it represents a document unilaterally prepared by MTS that ought to have been circumscribed by the undertakings given by MTS and the MOA between the parties.

115. Importantly, the trial judge did not find that the Plan Text was an agreement between the parties. On the contrary, the trial judge emphasized the secretive approach taken by MTS in preparing the Plan Text and its refusal to share it with the Employees until compelled to by the Government. The following facts identified by the trial judge support this conclusion:

- The Plan Text was approved by MTS's Board of Commissioners on November 5, 1996. On November 7, 1996 MTS sent a draft copy of the Plan Text to Revenue Canada and advised Revenue Canada that the *Reorg Act* was expected to be passed by the legislature on November 8, 1996. MTS stated that it was "anticipated that there would be very few changes from the draft copy to the executed copy of the pension document", despite the fact that employees had yet to see the Plan Text and that none of the above information had been shared with them.[132]

- At trial MTS maintained it had been given the mandate to create a new pension plan and that mandate did not require consultation or negotiation with the employees/retirees groups.[133]

- The November 6, 1996 memo from MTS to the Government made it clear that it had undertaken to provide a copy of the Plan Text to employees at the same time as it was filed with the federal government for registration.[134]

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131 C.A.'s decision at paras. 143 and 168, A.R., **Vol. I, p. 223, 233**.
132 Trial Decision at paras. 114-115, A.R., **Vol. I, p. 214**.
133 Trial Decision at para. 115, A.R., **Vol. I, p. 214**.
134 Trial Decision at para. 121, A.R., **Vol. I, p. 216**.

- On November 22, 1996, the Board of Commissioner's passed a resolution approving the November 8, 1996 Plan Text for registration. Employees were not made aware that the draft Plan Text that they were reviewing had already been approved by resolution of the Board.[135]

- MTS was not prepared to entertain any amendments with respect to the issues of governance or ongoing surplus or the COLA account.[136]

- The final pension plan document dated January 30, 1997, with an effective date of January 1, 1997, was never agreed upon by plan members, nor was the governance document.[137]

116. The Court of Appeal provides no basis to depart from the above findings of fact made by the trial judge. Instead, the Court simply asserts the right of MTS to supplement the MOA with additional legal instruments. The Court of Appeal stated:[138]

> *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.*
>
> *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.*

117. Employees were fully entitled to expect, however, that nothing in the Plan Text prepared by MTS would have the effect of undermining the undertakings given by the employer or the MOA agreed to by the parties. Even the Court of Appeal in the present case acknowledged, "[t]he 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)."[139] The Court of Appeal erred in allowing the design of the Plan Text, which was prepared exclusively by MTS, to render that expectation meaningless.

118. Moreover, Employees never agreed to the set-up of the COLA account in the Plan Text. Their actuary, Louis Ellement, raised "red flags" about the operation of the COLA account immediately after receiving the Plan Text in November, 1996. In his December 9, 1996 memo to the ERPC, Ellement

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135 Trial Decision at paras. 193-194, A.R., **Vol. I, p. 240**.
136 Trial Decision at para. 203, A.R., **Vol. I, p. 242**.
137 Trial Decision at para. 212, A.R., **Vol. I, p. 244**.
138 C.A.'s decision at paras. 193-194, A.R., **Vol. I, p. 240**.
139 C.A.'s decision at para. 208, A.R., **Vol. I, p. 243**.

warned that MTS appeared to be arranging the COLA account in a manner "*to avoid the 20 year pre-funding in the Account being met.*"[140] MTS's actuary, Tony Williams, confirmed that he and Ellement did not have a "meeting of the minds" about how the COLA account should be funded and organized.[141] Ellement communicated to MTS's actuary that he was not satisfied with the funding structure of the COLA account in December of 1996.[142]

119. In any event, many of the flaws in the design of the COLA account are not reflected in the Plan Text. Employees and MTS adduced evidence at trial about the complex nature of the COLA account and the confusing way it has been administered. Due to this complexity, and due to MTS's obfuscation, disclosure of all the features and functioning of this account were revealed to Employees on a piece meal basis. As a result, it was years after the establishment of the account that Employees fully understood the nature and extent of the problems. The trial judge found:[143]

> *…[U]nknown to ERPC at the time, the 20 year pre-funding requirement was incapable of ever being reached by virtue of the manner in which the COLA account was set up.*
>
> *[324] ERPC had no control over the administration of the COLA account. They were unaware that by virtue of how the COLA account was valued and the interest rate that was to be applied, it could never achieve the 20 year pre- funding requirement. Had they known that to be the case, it is highly unlikely they would have agreed to the placement of the initial surplus into the COLA account. In effect, what they did was give up control over the use of the initial surplus which was a result they never intended.*
>
> *[328] As to when and why the employees/retirees raised the objections they did, it must be understood that MTS developed the plan, controlled the dissemination of plan and governance information and controlled plan administration which included valuation of assets and determination of interest rate for the COLA account. Had they chosen to do so, they could have shared all that information with the employees/retirees but chose not to because it was in their best interests at the time. That being the case, any criticism being directed at the employees/retirees for failing to raise matters on a timely basis must be considered in that light.*

(iii) The Court of Appeal ignored the special protection provided to equitable and property rights

120. In addition to the principles of estoppel outlined above, the Court of Appeal's narrow interpretative approach also undermines a number of legal norms that were required to inform the

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140 Memorandum dated December 9, 1996 (Trial Exhibit 001-0560), A.R., **Vol. IX, p. 140**.
141 Evidence of the Defendants A.C.L. Williams (October 29, 2008) at p. 12 ("Evidence of A.C.L. Williams"), A.R., **Vol. V, p. 136**.
142 Evidence of A.C.L. Williams at p. 20, A.R., **Vol. V, p. 143**.
143 Trial Decision at para. 320, 324, and 328, A.R., **Vol. I, pp. 110-112, 114**.

Court's analysis. This Court in *Burke* recognized that pension plan administrators are fiduciaries.[144] It defies basic principles of equity to allow the plan administrator/employer to benefit from a perceived vagueness in the relevant statutory and contractual instruments where it had clearly undertaken to preserve these funds to provide enhanced benefits to Employees in the New Plan, in line with past practice. Indeed, it is trite law that, where "common law and equity conflict, equity is to prevail".

121. Further, the Court of Appeal's approach undermines the presumption that the legislature does not intend to expropriate the rights of its citizens unless it uses clear and unmistakable language in doing so. In the present case, where the legislative history leaves no doubt as to the intent to protect the Employees' rights to use the Initial Surplus for their benefit, the Court of Appeal erred in giving the *Reorg Act* an interpretation that allowed MTS to extinguish the Employees' interest and permit MTS to take the benefit of the surplus for itself.[145]

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

122. After the trial judge's decision, MTS engaged new counsel, including Charles Huband as co-counsel, to argue the case before the Court of Appeal. Mr. Huband, a long-standing member of the Court of Appeal, had retired from the bench approximately three years prior to being engaged by MTS in this case. Counsel for the Appellants expressed concern regarding Huband's involvement in this case. At a pre-hearing conference, Chief Justice Scott advised that the matter had been considered and that the appeal panel would consist only of judges who were not members of the Court prior to Huband's retirement from the bench.[146]

123. Shortly before the hearing, the Court of Appeal wrote to counsel and advised that one of the panel judges was a member of the Court prior to Huband's retirement from the bench; that another judge had a close professional and personal relationship with Huband; that Huband was a member of the Court when notices of appeal were filed by MTS relating to the dismissal of their motion for summary judgment; and that Huband was a panel member on an unrelated case in which MTS was a party. In the absence of a motion on the issue, the Court of Appeal required all counsel to state their position on the record at the commencement of the hearing.[147] Counsel for the Appellants noted that

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144 *Burke, supra,* at para. 41; see also: *Schmidt, supra* at pp. 636, 640-641, 645-646, 655-657, 674; *Nolan v. Kerry (Canada) Inc.*, 2007 ONCA 605; [2009] 2 SCR 678 ("Kerry") at paras. 186-194, A.B.A., **Vol. I, tab 18**.

145 *The Queen (B.C.) v. Tener*, [1985] 1 SCR 533 at p. 559, A.B.A., **Vol. I, tab 28**; *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at p. 109-110, 118, A.B.A., **Vol. I, tab 14**.

146 Court of Appeal correspondence [November 23, 2010 letter (BJM)], A.R., **Vol. XII, p. 139**.

147 Court of Appeal correspondence [November 25, 2010 letter (C.A.)], A.R., **Vol. XII, pp. 143-144**.

the involvement of Huband was a recurring distraction but stated that a further delay, given the age of many of the pensioners, was an underlying factor in deciding to proceed with the appeal in any event.[148]

124. The Appellants do not rely on this concern as a ground to overturn the decision below, given the ongoing concerns regarding the length of these proceedings which affect many pensioners who are aging or have already passed away. In light of the importance of this issue, however, the Appellants provide authorities addressing the following issues, should this Court wish to address the matter: the importance of the independence and impartiality of judges to public confidence in the administration of justice;[149] the untenable position counsel are placed in when asked to consent to continuing with a proceeding in these circumstances;[150] the different approaches currently in place at various provincial law societies;[151] and concerns with the arbitrary time limits employed to address this issue that fail to address the primary function served by the restriction.[152]

Conclusion

125. Employees entered the New Plan having over-contributed by $43.364 million, the Initial Surplus. Employees made extensive efforts to protect this over-contribution. Both MTS and the Government

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148 Hearing of December 13, 2010, pp. 2-3, A.R., **Vol. VI, pp. 57-58**.

149 See *R. v. Valente*, [1985] 2 SCR 673 at p. 685, 689, A.B.A., **Vol. I, tab 22**; *R. v. Lippé*, [1991] 2 SCR 114 at p. 139, A.B.A., **Vol. I, tab 21**; *R.D.S. v. The Queen*, [1997] 3 SCR 484 at para. 111, Cory J.and at para. 31, L'Heureux-Dube and McLachlin, JJ, A.B.A., **Vol. I, tab 23**; Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004) ("CJC-EP") at c. 6 Principle E., c. 6 Commentary A.1 – A.3 and c. 6 Principle E.2, A.B.A., **Vol. II, tab 37**; S. Pitel & W. Borotolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal 483 ("Pitel") at p. 498, A.B.A., **Vol. II, tab 35**.

150 Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) at p. 74; CJC-EP, *supra* at c. 6 Principle E.14 - E.15, A.B.A., **Vol. II, tab 32**.

151 The Canadian Bar Association, *CBA Code of Professional Conduct*, (Ottawa: Canada Bar Association, 2009) at c. XIX, commentary 4 prohibits a former judge from appearing before a court of equal or inferior jurisdiction to the one to which he or she was previously appointed unless the governing law society gives permission, A.B.A., **Vol. II, tab 45**. The Law Society of Alberta, *The Rules of the Law Society of Alberta* (Calgary: Law Society of Alberta, 2010), R. 117(b) features the same restriction but is imposed as a condition of reinstatement on the former judge, A.B.A., **Vol. II, tab 46**. Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2010) ("*LSUC Rules*"), R. 6.08 prohibits a former "appellate judge" indefinitely from appearing before any court without the Law Society's permission, which "may only be granted in exceptional circumstances", A.B.A., **Vol. II, tab 43**. Contrary to the above restrictions, the Law Society of Manitoba, *Code of Professional Conduct* (Winnipeg: Law Society of Manitoba, 2010), R. 6.07 states that "[a] judge... must not, for a period of three years, unless the Society approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member...", A.B.A., **Vol. II, tab 40**. This same restriction appears in the following jurisdictions: Nova Scotia (A.B.A., **Vol. II, tab 44**), Saskatchewan (A.B.A., **Vol. II, tab 42**), Newfoundland and Labrador, A.B.A., **Vol. II, tab 41**, New Brunswick (A.B.A., **Vol. II, tab 39**), Federation of Law Societies of Canada (A.B.A., **Vol. II, tab 38**).

152 See *Pitel*, *supra* at p. 513.

recognized the over-contribution and assured Employees that it would not be used to reduce MTS's pension costs. All parties agreed that the objective of the MOA was to produce enhanced benefits through the application of the Initial Surplus. The manner in which MTS structured, administered and valued the New Plan COLA account, however, precluded the Initial Surplus from being used to enhance benefits. As a result, Employees received no benefit from the Initial Surplus while MTS's costs were reduced.

126. The Court of Appeal has subsequently tried to justify why the intent of the parties did not materialize through a formalistic and narrow reading of MOA and *Reorg Act* that frustrates the intent of the legislature and the parties at the time. Such an approach is both wrong in law and leads to an inequitable result. The legislative history in the present case leaves no doubt that the legislature intended to protect Employees' right to continue to use the surplus as they had under the Prior Plan. There is no support for the Court of Appeal's attempt to read the guarantees in the *Reorg Act* in a manner that is entirely divorced from the unique circumstances in which it was enacted. Similarly, the MOA between the parties was clearly founded on MTS's undertaking that it would not use the Initial Surplus to reduce its pension costs. In these circumstances, the Court of Appeal could not ignore the trial judge's findings of fact and allow the Plan Text prepared by MTS to undermine the agreement between the parties. The Court of Appeal's decision fails to examine both the text and context surrounding these legal instruments.

PART IV - SUBMISSIONS ON COSTS

127. The Appellants maintain that the costs associated with all stages of this appeal should be recovered on a full indemnity basis from the New Plan's trust fund. In *Kerry*,[153] Gillese J.A., explained that public policy dictates that legal costs be paid from a pension fund where proceedings are brought: (1) to ensure the due administration of the pension trust fund; or (2) for the benefit of all of the beneficiaries.[154] The present case satisfies these criteria.

128. This Court in *Kerry* noted a number of factors courts have considered in determining whether litigation was concerned with the due administration of the trust. These factors include whether the

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153 *Kerry, supra* at paras. 10-12.

154 Note: in *Nolan v. Kerry (Canada) Inc.*, 2007 ONCA 605 at paras. 10-12, Justice Gillese also explained that costs are historically awarded from the pension fund in cases involving the determination of surplus entitlement, A.B.A., **Vol. I, tab 18**. See also: *Schmidt, supra, at* p. 675, where the costs of all parties were paid from the pension fund on a solicitor and client basis. *Burke v. Governor and Co. of Adventures of England Trading into Hudson's Bay,* 2008 ONCA 690 at paras. 10-15, A.B.A., **Vol. I, tab 2**.

litigation was primarily about the construction of the plan documents, whether it clarified a problematic area of law, whether it was the only means of clarifying the parties' rights, and whether it had an effect on other beneficiaries of the trust fund.[155] The present case, which is primarily concerned with the construction and interpretation of the *Reorg Act* and the MOA, and focuses on the parties' intention with respect to the future use of the Initial Surplus, fits these criteria. These are novel questions of law not previously resolved.

129. The present appeal was also for the benefit of all plan beneficiaries. This case is readily distinguished from *Kerry*, where a successful claim would only have benefited a particular class of plan members and it was unclear as to the extent to which the proceedings were supported by all plan members.

130. In these circumstances, it is fair and just for any costs to be borne from the pension fund. The Employees, due to the privatization of MTS, were involuntarily removed from the Prior Plan and placed into the New Plan that they had minimal influence in establishing. As well, the surpluses resulting from the Prior Plan had always been available to Employees as they were the exclusively the product of employee contributions and interest in the Prior Plan.

131. Payment of all costs from the New Plan is particularly appropriate given that all parties agree that the final decision of the independent actuary, who was statutorily *designated* to deal with these disputes, could not stand given the improper interference with his decision-making process. In these circumstances, Employees had no choice but to proceed before Courts.

PART V – ORDER REQUESTED

132. The Appellants request that the appeal be granted. In addition, the Appellants request costs on a full indemnity basis paid out of the New Plan Trust Fund in any event of the result.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, this 1st day of March, 2013.

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

[155] *Kerry*, *supra*, at para. 126.