Date: 20141128
Docket: CI 99-01-14589
(Winnipeg Centre)
Indexed as: Telecommunications Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.
Cited as: 2014 MBQB 236

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
TELECOMMUNICATIONS EMPLOYEES ASSOCIATION OF MANITOBA INC. – INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 161, COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 7, INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION 435, HARRY RESTALL, ON HIS OWN BEHALF AND ON BEHALF OF CERTAIN RETIRED EMPLOYEES OR THE WIDOWS/WIDOWERS THEREOF OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC. AND MTS ADVANCED INC., and LARRY TRACH, ON HIS OWN BEHALF AND ON BEHALF OF ALL UNIONIZED EMPLOYEES OF MANITOBA TELECOM SERVICES INC., MTS COMMUNICATIONS INC., MTS MOBILITY INC., MTS ADVANCED INC. AND ALL UNIONIZED EMPLOYEES OF MTS MEDIA INC. WHO WERE TRANSFERRED TO YELLOW PAGES GROUP CO. PURSUANT TO A SALE ON OCTOBER 2, 2006 Plaintiffs	Brian J. Meronek, Q.C., Kris M. Saxberg and D. Tomas Masi for the Plaintiffs, excepting Unifor Local 7 (formerly Communications, Energy and Paperworkers Union of Canada Local 7) and International Brotherhood of Electric Workers, Local Union 435 Robert L. Zaparniuk for the Plaintiff Unifor Local 7 (formerly Communications, Energy and Paperworkers Union of Canada Local 7) Tony M. Marques for the Plaintiff International Brotherhood of Electric Workers, Local Union 435
- and -	Kevin T. Williams for the Defendants
MANITOBA TELECOM SERVICES INC. and MTS ALLSTREAM INC. (as successor to MTS COMMUNICATIONS INC., MTS MOBILITY INC., and MTS ADVANCED INC.) Defendants	Dave G. Hill for the Retiree Ken Beatty Order delivered: November 28, 2014

BRYK J.

Introduction

[1] The parties jointly move for an order approving the Pension Plan Surplus and Implementation Agreement ("Implementation Agreement") dated September 24, 2014. The negotiations resulting in the Implementation Agreement were conducted pursuant to my directive in ***Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.***, 2010 MBQB 11, 248 Man.R. (2d) 31.

[2] That directive was upheld by the Supreme Court of Canada in ***Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services Inc.***, 2014 SCC 11, [2014] 1 S.C.R. 142, where Rothstein J., on behalf of a unanimous court, stated (at paras. 88-89)

> Upon concluding that the New Plan violated the *Reorg. Act* and the MOA, the trial judge ordered that the Initial Surplus that was transferred to the New Plan ($43.364 million, the amount agreed to by the parties) plus plan rate interest was to be made available to the plan members for enhancements to pension benefits. He ordered the parties to "negotiate utilization of the Funds and arrive at a mutually agreeable implementation process" and, in the event agreement is not possible, to "submit further evidence and/or submissions to the Court for determination of utilization of the Funds and the implementation process ....
>
> Having agreed with the trial judge's conclusions with respect to liability, I would reinstate this remedial order to negotiate, and remand the matter to the trial judge, should the parties prove unable to reach an agreement. In the course of negotiations, parties should bear in mind any applicable restrictions imposed by the *ITA* and the *PBSA*. Any negotiated arrangement — be it recording a liability in favour of plan members of an amount negotiated by the parties in the PBAA or establishing a separate unregistered pension plan as referred to in the record or some other solution — must comply with these restrictions.

Background

[3] The action involved a dispute between the defendants ("MTS") and its employees, retirees and plan members ("plan members") over $43.343 million in surplus pension contributions ("initial surplus"). The initial surplus represented the plan members' over-contribution into the new pension plan ("New Plan") which MTS was required to establish when it was privatized effective January 1, 1997.

[4] At trial, I determined that the initial surplus belonged to the plan members and awarded judgment against MTS on January 19, 2010, "in the amount of $43.343M plus interest at the New Plan rate of return since January 1, 1997 to date of payment which is to be used to enhance pension benefits on the understanding that the enhanced benefits will not result in an increase of MTS's costs" (at para. 533(b)).

[5] As to the utilization of that initial surplus, I stated (at para. 521):

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

[6] Earlier, I had explained (at para. 518):

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

[7] I pause here to emphasize that the words "money must be returned to the plaintiffs together with interest at the New Plan rate of return from January 1, 1997 to the date of payment" must be understood in the context of my remarks in para. 521.

[8] The Manitoba Court of Appeal overturned the trial decision and dismissed the plaintiffs' claim (2012 MBCA 13, 275 Man.R. (2d) 185). The Supreme Court of Canada reversed that decision and reinstated the trial judgment, including the remedial order for the parties to negotiate.

[9] It is important to note that the Supreme Court adopted verbatim portions of the trial judgment relating to the implementation process. The manner of distribution of the initial surplus was either to be negotiated and approved by or, alternatively, determined by the trial judge.

[10] Prior to privatization, MTS was a provincially owned Crown corporation, and its employees/retirees were members of a pension plan ("Old Plan") established under ***The Civil Service Superannuation Act***, C.C.S.M., c. C120 ("the ***CSSA***"). At the time of privatization, MTS employees/retirees numbered

approximately 7,000. Since then, that number has grown by approximately 2,300.

[11] Under the Old Plan, in addition to a Board of Directors, there were also Liaison and Advisory Committees. The Liaison Committee was made up of approximately 40 members representing approximately 40,000 employee members of the Old Plan (that number included employees of other Crown corporations as well as employees of the Government of Manitoba). The Advisory Committee was made up of representatives of the Government of Manitoba and Crown agencies. The purpose of the committees was to conduct negotiations to effect changes to the Old Plan by agreement. It was a specific function of the Liaison Committee to propose and then negotiate benefit improvements for plan members.

[12] From time to time, whenever there was a surplus in the Old Plan as determined by the Plan actuary, the Liaison Committee would initiate a list of improvements the members wanted. The cost of those improvements would then be determined by the Plan's actuary, and to the extent they were affordable, the Liaison Committee would begin to negotiate their implementation with the Advisory Committee. It frequently took a long time to reach agreement, but ultimately agreement was always reached with respect to the use of surplus. There was never an instance where an agreement reached by the Liaison and Advisory Committees as to the use of surplus was rejected by the Government or not passed by the Legislature.

[13] It is important to note that utilization of surplus under the Old Plan was never only for the exclusive use of those employees/retirees who had contributed to that specific surplus. The benefits funded by that surplus were intended for all eligible employees/retirees on a "go-forward" basis.

[14] Since 1996, when the idea of privatization of MTS was first advanced by the then Government of Manitoba, to the present, the interests of the employees/retirees has always been represented by the plaintiffs. As well, since the inception of this action, the Telephone Retirees Association of Manitoba Inc. ("TRAM") has provided funding, support and guidance during the course of litigation. According to its President, David Gnutel ("Gnutel"), TRAM currently has approximately 2,000 members, making it the largest organized group of members affected by this action.

[15] During the litigation, the International Brotherhood of Electric Workers, Local Union 435 ("IBEW") was represented by Brian Meronek, Q.C. ("Meronek"), Kris Saxberg ("Saxberg") and Tomas Masi ("Masi"). During the negotiations and discussions leading to the Implementation Agreement, IBEW was represented by Tony Marques ("Marques"). As well, during that process, the current non-union employees of MTS were represented by Paul Beauregard ("Beauregard"), Chief Corporate and Strategy Officer and Corporate Secretary for MTS.

The Negotiation Process

[16] After the Supreme Court decision in January 2014, in accordance with the remedial order, counsel for the parties began a negotiation process with respect to the implementation of the initial surplus. In addition to the participation of the aforementioned, Messrs. Larry Trach ("Trach") and Harry Restall ("Restall"), as original plaintiff representatives and present and former elected retiree representatives respectively on the MTS Pension Committee; Tom Levy ("Levy") of Segal Consulting Group, an independent actuary with extensive experience in pension matters and an expert who was collectively retained by the plaintiffs and called to provide expert evidence at the trial on their behalf; Towers Watson, the Plan actuary; MTS representatives; and Ari Kaplan ("Kaplan"), an acknowledged expert in Canadian pension law with extensive experience and expertise relating to the distribution of surplus from pension plans who was retained on behalf of all of the parties to provide various legal opinions on implementation issues, all played key roles in the negotiations.

[17] The Supreme Court directed that steps be taken to ensure that the interests of all relevant beneficiaries be protected (at para. 90):

> In MTS's submissions on costs, it suggested that the organizations that have been acting on behalf of the plan members represent only unionized and retiree plan members, which may not include all of the relevant beneficiaries. If required to review any implementation process arrived at by the parties or reach his own determination as to the appropriate implementation process, the trial judge should ensure that the process adequately protects the interests of all of the relevant beneficiaries.

[18] It also directed that the parties ensure compliance with any applicable restrictions imposed by the ***Income Tax Act***, R.S.C. 1985, c. 1 (5th Supp.), or the ***Pension Benefits Standards Act, 1985***, R.S.C. 1985, c. 32 (2nd Supp.) (at para. 89):

> .... In the course of negotiations, parties should bear in mind any applicable restrictions imposed by the *ITA* and the *PBSA*. Any negotiated arrangement ... must comply with these restrictions.

[19] Prior to the execution of the Implementation Agreement, preliminary approval from the Office of the Superintendent of Financial Institutions ("OSFI") and from Canada Revenue Agency ("CRA") was obtained.

Issues

[20] During the negotiation process, several issues were identified which required consideration and resolution. Reference will be made to some of the more important of those issues and their resolution. In his October 28, 2014 report, Kaplan identified those issues and described the parameters within which each one was considered. I make no apology for quoting extensively from that report, which I accepted and endorse completely.

(a) Surplus Calculation

[21] Before any implementation steps could be taken, it was necessary to calculate the precise amount available for distribution. The parties ultimately agreed that the amount available for distribution as of June 30, 2014, would be

$140 million plus two per cent interest per annum until the date of the order approving the Implementation Agreement minus the expenses associated with the distribution process.

[22] Kaplan offered these observations (Kaplan Report, paras. 2.1, 2.1.1):

> .... In my opinion, the methodology adopted by the parties for determining the Distributable Surplus is reasonable and, moreover, all other terms in the Agreement should be measured against this key term, which is a compromise by all parties, when considering the overall reasonableness of the settlement and for gauging the reasonableness of any particular feature of the Agreement.
>
> .... There was also discussion that in the event there was no settlement reached the Court would be asked to look at a wider range of potential outcomes and in actuality the surplus could range as at January 1, 2014 from a low below $130 Million to as high as $146M. ....

(b) Fixing the Interest Rate

[23] After the surplus was quantified, it became necessary to fix a rate of return. Kaplan addressed that issue with the following comments (Kaplan Report, para. 2.1.2):

> .... In conjunction with these principles, the parties settled on an amount of surplus as at June 30, 2014 being $140M inclusive of all fund growth through to that date and the key point is that this figure was a significantly negotiated outcome with all parties compromising and it takes into account the range of surplus outcomes and the principles for determining growth since the date of the SCC judgment. The parties settled on an interest regime fixing the rate of return at 2% per annum through to the date of Court Approval. This decision insulates the Plan members from any adverse market experience ....

(c) Surplus Expenses

[24] While the plaintiffs were awarded costs on a solicitor and client basis at all levels, the issue of costs associated with the distribution was not specifically

addressed. What constituted surplus expenses and whose responsibility it would be to pay same was one of the issues negotiated. In describing the considerations involved in those negotiations, Kaplan observed (Kaplan Report, para. 2.1.3):

> The parties have agreed that the $140M in Distributable Surplus will be net of the parties' reasonable settlement and implementation costs, fees and expenses, and these are called "Surplus Expenses". The parties have defined what is included and excluded within this definition and have agreed to other expenses which will be paid by MTS directly. At the time of settlement the parties estimated approximately $3.1M in Surplus Expenses and the final number will be deducted from the surplus prior to distribution to Plan members. ....

[25] There was considerable discussion concerning surplus expenses and whether they should be paid from the surplus prior to distribution, or from the New Plan's pension fund, or by MTS directly.

[26] The trial judgment provided (at para. 535):

> Given the fact that there remain unresolved matters relating to quantification and the manner of utilization of initial surplus, the issue of costs can be deferred until those matters have been addressed and resolved. ....

[27] The parties were also mindful of the costs awarded by the Supreme Court (at para. 91):

> The appeal is allowed with costs throughout, including those for the application for leave to appeal in this Court, on a solicitor-and-client basis, to be paid out of the New Plan trust fund ....

[28] Kaplan then concluded (Kaplan Report, para. 2.1.3):

> .... I supported the parties' agreement on Surplus Expenses. First, deducting expenses from the surplus prior to distribution is a common

> feature in surplus distributions as it gives Plan members a direct stake in being accountable for how much (or little) administration should be involved in settling their surplus shares. The parties have accomplished this with the Surplus Implementation Committee, which gives members a direct voice in monitoring expenses. Moreover, the pension fund rate of return has historically taken into account various expenses so deducting implementation administrative expenses from the surplus growth is not foreign to these parties.
>
> Second, it was not preferable for MTS to be solely responsible for Surplus Expenses because then Plan members would be monitoring company decisions over whether a particular implementation expense was reasonable or necessary and this could give rise to disagreement. Third, the Plan could have been a source for expenses however the Plan is currently underfunded meaning that this option was equivalent to MTS being solely responsible for the expenses. Also, were expenses to be paid out [of] the Plan that would unduly benefit Exited Members at the expense of Active Members and Inactive Members since the latter groups continue to be subjected to the ongoing risks of the Plan's funding while Exited Members bear no going-forward risk in or relationship to the Plan.
>
> Finally, I supported the agreement on Surplus Expenses because it was part of the overall framework for settlement including most importantly the primary agreement on the amount of Distributable Surplus. There is no material distinction to the parties agreeing to distribute $140M in surplus with $3M being deducted from that surplus, as they have done, or to agree that MTS directly pays $3M in expenses while the parties quantify the surplus at $137M.

(d) Surplus Sharing Group

[29] It was necessary to determine who the beneficiaries of the judgment would be. Ultimately, the parties agreed to an expanded, rather than a restricted, list. Kaplan concurred with that decision (Kaplan Report, para. 2.2):

> .... The parties have agreed to include as eligible to benefit from the judgment 9,372 current and former Plan members, including survivors, beneficiaries, estates and eligible ex-spouses, which comprises every person who has ever participated or had a benefit in the MTS Plan between the date it was established on January 1, 1997 and January 1, 2010 when the Plan was closed to new members.

[30] Following the execution of the Implementation Agreement, information sessions were established so as to inform all potential beneficiaries of the provisions of said Implementation Agreement and to explain the rationale behind same. Potential beneficiaries were given the opportunity to ask questions and/or raise concerns about any facet of the Implementation Agreement. One of the concerns raised was with respect to the inclusion of persons whose employment commenced after January 1, 1997, to January 1, 2010. Mr. Dave G. Hill ("Hill") represented Mr. Ken Beatty ("Beatty") at the hearing of this motion and argued that the list of recipients should be restricted to those who had contributed to the initial surplus. In my decision at trial, I concluded that the implementation process was to mirror as closely as possible the procedure utilized under the Old Plan. The enhanced benefits from surpluses had always been utilized for all employees/retirees on a go-forward basis and not restricted to those who had actually contributed to the surplus. The Implementation Agreement conforms with this directive.

(e) Member Exclusions

[31] As part of the process to determine the surplus sharing group, the issue of who would not be included in that group was discussed, and persons who would be excluded were identified.

[32] Kaplan attended several of the information sessions and, as well, advised the negotiating parties on that issue. He described the rationale for those exclusions as follows (Kaplan Report, para. 2.2.2):

> .... First, I advised that the core group of approximately 7,000 members and former members directly affected by the *Reorg Act* should be included in the Surplus Sharing Group because it was their pension assets and liabilities that were transferred from the CSSA Plan into the MTS Plan's pension fund. ....
>
> Second, I advised the parties that one group who should be excluded from the distribution are members of the CSSA Plan who worked at the Crown-owned MTS prior to 1997 and whose assets and benefits were not transferred into the MTS Plan because they transferred their benefits out of the CSSA Plan prior to privatization or were receiving a pension or survivor benefit from the CSSA Plan and have since passed away. Even though these persons, who I describe as "past members" of the CSSA Plan, come within the definition of "employee" in the *Reorg Act*, and they contributed to the Initial Surplus, their pension liabilities and assets were not transferred to the new MTS Plan because they no longer had any benefits in the Plan at the time of the transfer. .... In my opinion, because these past members have no entitlement to any of the Initial Surplus, they may be excluded from the Surplus Sharing Group, need not be given notice of the proposed settlement and have no standing in the Litigation to object to the Agreement.
>
> Third, I advised the parties that as they negotiate the Sharing Group's composition they should be mindful of all classes of Plan members who may be legally or equitably entitled to receive a benefit from the surplus. I advised the parties that the *Pension Benefits Standards Act* (the "PBSA") does not mandate a particular result with respect to who should benefit from the Initial Surplus and who should be excluded.
>
> I advised the parties that Plan beneficiaries with a current entitlement in the Plan including new members who joined on or after January 1, 1997 ("New Members") ought to benefit from the surplus distribution. In coming to this view, I am mindful that Rothstein J. in the SCC decision stated (at para. 88) that the Initial Surplus "was to be made available to the plan members" and he defined "plan members" (at para. 1) as "approximately 7,000 employees and retirees of Crown MTS and its subsidiaries [who] had their assets and pension rights transferred" to the new MTS Plan.
>
> In my opinion, Rothstein J. was not making a holding that core group members are the exclusive beneficiaries of the Initial Surplus. In my view, the SCC and the trial judgment left it open to the parties

> representing all the beneficiaries of the MTS Plan's pension trust fund (including parties representing core group members and current members) to negotiate an implementation plan and within this to determine who should comprise the Surplus Sharing Group. Rothstein J. stated that the "implementation process arrived at by the parties ... should ensure that the process adequately protects the interests of *all of the relevant beneficiaries*." (emphasis added). ....

[33] Kaplan goes on over several pages to provide reasons for the inclusion of new members in the initial surplus distribution. He concludes with the following (Kaplan Report, para. 2.2.3):

> .... In the end, the parties agreed to include all 9,372 current and former Plan members including exited members and non-vested members citing principles of even-handedness, closure and finality to the Litigation, reduction of potential litigation risk from excluding certain classes of member, the inability to re-write history going back 17 years and restitution principles including if a plan amendment made in 1997 it would have likely benefited all members. ....

(f) Surplus Allocation

[34] The parties were directed by both the trial judge and the Supreme Court to attempt to negotiate a formula for the allocation of the initial surplus. The following comments of Kaplan describe the various categorizations of recipients (Kaplan Report, para. 2.3):

> .... The parties have agreed on an allocation formula for allocating the surplus amongst the Surplus Sharing Group with the benefit of concurrence between the Plan Actuary and the Plaintiff' Actuary. The governing principle driving agreement on the allocation formula was based on fairness and equity for all members of the Surplus Sharing Group. This was achieved as follows.
>
> First, each member was allocated an Individual Surplus Allocation based on a "proportionate share" of the surplus, using an "index value", based on the value of the member's benefits earned in the Plan compared to the total of all members' benefit value. This method recognizes all

> aspects of a member's participation in the pension plan including their pension value, age, earnings and service.
>
> Second, the parties agreed to a compensatory aspect to the Individual Surplus Allocation formula based on restitution principles recognizing who would have benefited most had a benefit enhancement been made to the Plan in 1997 on account of the Initial Surplus. The parties agreed to a formula taking into account the value of future projected benefit payments from the Plan as at December 31, 2013 *and the accumulated value of actual benefit payments made from January 1, 1997*. The result leads to a significant weighing of the surplus being distributed to core group members. This can be justified because they created the Initial Surplus and they have been the longest subjected to the funding risks of the Plan as well as to the uncertainty arising from the *Reorg Act* with respect to parties' rights and obligations under the Initial Surplus.
>
> Third, the parties agreed to adjust this formula to offer each member of the Sharing Group a minimum allocation of $1,000. This primarily benefits New Members and in particular current employees with relatively shorter service and lower-wages. It is not uncommon in surplus distributions to include a minimum threshold surplus share and in my opinion, this case is particularly appropriate to include a minimum benefit to compensate for the uncertainty arising from the *Reorg Act* to *all* affected persons with respect to their pension surplus rights.
>
> Fourth, the parties have agreed to fix the payment to Non-Vested Members at a cap of $500 and make eligibility for this payment time-limited. As stated, non-vested members have no legal entitlement to pension benefits or surplus and the parties agreed to set aside a fixed pool of funds for non-vesteds on fairness grounds because they participated in the Plan during this period of uncertainty. ....

(g) Surplus Payment

[35] The method of payment to the various categories was an important aspect of the implementation process. Kaplan described the manner in which that issue was decided (Kaplan Report, para. 2.4):

> .... In designing the Individual Surplus Payments, I observed that the parties did due diligence on which options were feasible given taxation and regulatory constraints and they tested and balanced the effect of options for members where available against their primary principle namely that any distribution solution should be administered without

> undue delay, cost-effectively and with the fewest taxation and regulatory obstacles.
>
> Active employee members of the Sharing Group will receive a lump sum distribution of surplus in cash payable from outside the pension fund, payable directly by MTS. This method is consistent with the SCC's direction that "some other solution" can be agreed to by the parties in the event there are taxation or regulatory restrictions that make a pension enhancement impracticable. The advantage of this direct payment method for actives is that MTS is able to administer through payroll a direct transfer at source to the member's personal RRSP (or to the group-RRSP sponsored by MTS) if the employee has sufficient contribution room.
>
> For Inactive Members and Exited Members, a Plan amendment will be made, subject to regulatory approval, granting each member a lump sum surplus payment from the Plan on account of a benefit upgrade. In addition, Retired Members and Beneficiaries who retire before July 1, 2013 will have an option to receive part of their surplus payment as an increase to their monthly pension. Due to ITA restrictions, this option is only feasible for members who are currently receiving a pension payment from the Plan.
>
> All Individual Surplus Payments are subject to ITA requirements. The parties consulted with taxation professionals and the general understanding is that all members who receive a lump sum cash payment from either MTS or the Plan, as the case may be, will have to immediately pay income tax on the amount received. As a general rule, Canada Revenue Agency treats the receipt of surplus from a pension plan as cash income in the year of receipt. This is not treated as pension income eligible to be transferred to a locked-in retirement savings arrangement such as a LIRA nor is it eligible for pension income splitting. The parties understood that not everyone will be happy about paying the tax man this way and as stated they did their due diligence and balanced tax concerns against the principle of cost-effectiveness of administration and avoiding undue delay. ....

(h) Counsel Fee

[36] The Implementation Agreement calls for a counsel fee of $700,000 to be paid to plaintiffs' counsel, D'Arcy & Deacon LLP ("the firm"), collectively by MTS, Telecommunications Employees Association of Manitoba Inc. – International Federation of Professional & Technical Engineers, Local 161 ("TEAM"), IBEW and

Unifor Local 7 ("Unifor"). Subject to court approval, an additional $2 million would be paid to the firm as a counsel fee and deducted *pro rata* from that portion of the initial surplus attributable to retired members, deferred members, exited members and non-union members.

[37] On this issue, Kaplan commented as follows (Kaplan Report, para. 2.5):

> .... I advised the parties that I would not opine on any fee agreement, assess any client expectations or instructions with respect to this fee, or opine on entitlement to the fee, this being a matter between counsel and their clients and within the jurisdiction and discretion of the court.
>
> I did opine on the reasonableness of the quantum being asked to be approved ($2M), measured as against the relative success of the plaintiffs, the litigation risk incurred by the counsel and the size of the ultimate award and advised those parties who asked me that I believed the ask was reasonable. This issue also came up in the Member Roadshows and a presentation slide was dedicated to the counsel fee and there were a number of questions asked at these meetings of my view of the fee.
>
> What I advised the parties and members who asked me is that the plaintiffs enjoyed a uniquely and exceptionally successful result in Canadian pension jurisprudence in that it is the only appellate case I am aware of where pension plan members were awarded an immediate exclusive entitlement to a pension surplus from an ongoing pension plan. As mentioned, Rothstein J. went to lengths to distinguish the "case-specific legislation and unique features of the pension plan at issue", on which the appeal entirely rested, from "previous cases involving entitlement to the actuarial surplus in a defined benefit pension plan". Moreover, the length of the proceedings lasted 15 years illustrating that the risks incurred were commensurate with the complexity of the case not least of which due to the Manitoba Court of Appeal decision and risk that the SCC would not have granted leave. During this entire period, the surplus was professionally invested in a managed pension fund allowing it to grow from $43.3M upward to $140M. ....

[38] All of the parties have consented to payment of the $700,000 counsel fee and all but Unifor and IBEW have agreed to the $2 million counsel fee. The

latter two unions are not objecting to that payment, but rather have left it to the court's discretion.

[39] However, concerns were raised by several individuals as to the appropriateness of and/or entitlement to the $2 million counsel fee.

[40] In support of its request, the firm informed the court as follows:

> The Firm is requesting that this Court approve payment of the sum of $2.0 million from the Distributable Surplus which is to be deducted on a pro rata basis from all members who were not unionized employees as of January 1, 2014 (i.e. employees represented by TEAM, IBEW or Unifor) **(Note: The actual counsel fee is approximately $1.74 million after taxes [$2.0 million – $260,000])**. This request means that unionized employees as of January 1, 2014 are not affected since their share of the counsel fee has been paid directly by their unions. For all others, including non-union active employees and retirees/beneficiaries (inactives) as at January 1, 2014, it is estimated, if the counsel fee is approved, their payments will be reduced by approximately 1.82%; which is the same level of deduction that the unionized employees will have paid toward the counsel fee through their unions.
>
> [D'Arcy & Deacon LLP motion brief re counsel fee, para. 9]

[41] There are numerous factors that justify the counsel fee requested by the firm, and they are discussed below with reference to criteria set out in a commentary to Rule 3.6-1 of the ***Code of Professional Conduct***. The criteria include:

- the unprecedented result of the litigation;
- the risk assumed by the firm;
- the fact the firm charged less than market rates throughout the litigation; and

- the retainer agreements between the firm and its clients.

(D'Arcy & Deacon LLP motion brief re counsel fee, para. 13)

[42] The firm pointed out that their actual legal fees at the Court of Appeal exceeded the fixed charge fee by $94,464.85, and that this amount was written off and never passed on to clients. Further, legal costs were capped at the Supreme Court of Canada and the rates charged by the firm's lawyers were reduced by $100 per hour each for Meronek and Saxberg to facilitate the appeal proceeding.

[43] Since 1996, the firm reports that they endured 17 years of pre-litigation and litigation and invested almost 12,400 hours from 1999 until the end of the Supreme Court hearing, which time does not include time spent on the implementation of the award in 2010, nor does it include pre-litigation services provided from August 1996, when privatization was announced and the firm initially retained, to the commencement of the litigation.

[44] The firm points out the following financial concessions which they made with respect to funding:

- Significantly reducing the firm's overall hourly rates throughout the litigation. The average hourly rate over the course of the litigation was $232 per hour. A market rate would have been at least $375 per hour for two senior partners of a large law firm. If Toronto-based pension lawyers were hired, the market rate would have been much higher.

- At $375 per hour, the fees would have been $4.65 million versus what the firm charged of $2.87 million; a difference of $1.78 million.
- Capping legal fees at the Court of Appeal, such that the firm wrote off at least $94,000 of legal fees.
- Capping legal fees at the Supreme Court of Canada level, such that the firm would not have been able to recoup $60,000 had the plaintiffs lost. MTS has since paid the $60,000 as part of the solicitor and client costs award.
- Not charging for solicitor/client communications and meetings, which was estimated over the course of the litigation to be more than $75,000. Most accounts show the no-charge items; however, there were also many client communications that were not recorded because of the no-charge arrangement.
- Giving one of the funding clients, IBEW, a full year of extended time to pay its share of the Court of Appeal charges, since it could not afford to pay otherwise. No interest was charged on amounts paid over the course of the year.
- Photocopying charges, which were the majority of disbursement charges in this case, were discounted by 40 per cent. The cost of this discount to the firm's bottom line was approximately $200,000.

(D'Arcy & Deacon LLP motion brief re counsel fee, para. 20)

[45] D'Arcy & Deacon LLP also point out that it was their strong recommendation to proceed with the application to the Supreme Court of Canada for leave to appeal. Its commitment to do so at reduced fees ultimately allowed the matter to proceed.

[46] Insofar as the quantum of the counsel fee of $2 million is concerned, the firm provided numerous examples of cases where both lower and considerably higher counsel fees were approved.

[47] Apart from the justification advanced by the firm, it is important to note that all but two of the parties support payment of the $2 million counsel fee, while the two parties who have not consented have nonetheless not voiced any opposition.

[48] In my view, the comments of the following individuals are particularly relevant in the determination of this issue.

[49] In a supplemental affidavit sworn October 24, 2014, Gnutel deposes as follows (at paras. 10-11):

> During the course of the current roadshows and meetings held by TRAM with its members and through the receipt of written correspondence, there was minimal opposition to the payment of this counsel fee and TRAM fully supports it.
>
> I base my determination on the following:
>
> (a) The review of a thorough legal analysis prepared by D'Arcy & Deacon LLP and shared with all parties;
>
> (b) The comments made by Ari Kaplan during the course of the negotiations, which were repeated at the various roadshows wherein he indicated that this result was one of the highest surplus awards that he is aware of in Canada, and the only surplus award that he is aware was awarded in an ongoing pension plan;

(c) The fact that MTS paid approximately $7 million in legal costs throughout the litigation;

(d) [The] fact that MTS estimated the Plaintiffs' legal costs at $7 million in both its Annual Report and Press Release following the Supreme Court of Canada decision, ...;

(e) The independent legal advice received from the national law firm of Gowlings.

[50] In his supplemental affidavit sworn October 24, 2014, Trach makes the following comments (at paras. 9, 11-12, 15-16):

> The Plaintiffs were desirous of seeking leave to appeal to the Supreme Court of Canada, but were extremely concerned about the costs associated with seeking leave, and for costs at the Supreme Court, if the leave to appeal was successful. As a result, in order to allow the leave application, and subsequently the Supreme Court hearing, to proceed, the unions and TRAM entered into an agreement with D'Arcy & Deacon LLP in which D'Arcy & Deacon LLP would reduce its hourly rates and cap its fees, but in return, it was expected that if the clients were asked, D'Arcy & Deacon LLP would receive a counsel fee, if the Leave Application and the Supreme Court of Canada appeal was successful. ....
>
> Without the efforts of D'Arcy & Deacon LLP and specifically without it reducing its rates; capping its fees, not charging for certain aspects of its services; and allowing for accommodation in the payment of bills, the Plaintiffs would never have been able to proceed with and see this action to its successful conclusion. ....
>
> I am satisfied that the counsel fee sought by D'Arcy & Deacon LLP pursuant to paragraph 29(c) of the Implementation Agreement is fair and reasonable.
>
> The counsel fee sought by D'Arcy & Deacon LLP represents approximately 1.8% of each individual's surplus distribution amount and is recoverable from all inactive and non-union active members who jointly will receive a total of approximately $109 million.
>
> Aside from the approximate $225,000 that TRAM has contributed to help finance the action, for which TRAM has received full reimbursement, no inactive member or non-union member has paid any money towards the approximate 16 years of litigation costs leading up to the result achieved.

[51] In his supplemental affidavit sworn October 24, 2014, Restall deposes (at paras. 4-6):

> I have been involved with D'Arcy & Deacon LLP since 1996 and have witnessed firsthand the extraordinary difficulties and prolonged obstacles faced in this lawsuit to arrive at this unprecedented result.
>
> Throughout the course of explaining to plan members the results of the Implementation Agreement, specifically the counsel fee, there has been little negative comment and certainly none addressed to me.
>
> The counsel fee sought by D'Arcy & Deacon LLP represents approximately 1.8% of each individual's surplus distribution amount and is recoverable from all inactive and non-union active members who jointly will receive a total of approximately $109 million.

[52] Finally, because of concerns expressed by IBEW and Unifor about Kaplan rendering a legal opinion on the propriety and amount of the counsel fee being sought by the firm, TRAM obtained a further independent legal opinion from the national law firm of Gowlings in order to satisfy its members that the request was reasonable. A report dated October 24, 2014, was provided by Gowlings under signature of Malcolm N. Ruby ("Ruby") addressing the following three issues:

(a) entitlement of the firm to a counsel fee as the plaintiffs' firm throughout the litigation;

(b) reasonableness of a counsel fee of $2 million being sought by the firm from inactive and non-union plan members (retirees and others); and

(c) appropriateness of the counsel fee coming from inactive and non-union plan members as opposed to MTS.

[53] In brief, the report concluded that the firm was entitled to a counsel fee subject to the court's discretion, that the fee sought by the firm was modest and that it was common for some or all legal fees to be paid from the initial surplus.

Conclusion

[54] I am satisfied that the parties have complied with the directive provided in the trial judgment and confirmed by the Supreme Court of Canada. With the assistance of experts, the parties and their counsel have negotiated what I consider to be a fair and reasonable Implementation Agreement. Needless to say, there will be a small number of persons who, for a variety of reasons, are dissatisfied with the Implementation Agreement and that is to be expected. However, for the vast majority of recipients, the Implementation Agreement negotiated by their representatives is both fair and equitable. The efforts of all involved in the negotiation process are to be applauded.

[55] In these brief reasons, I have attempted to address *inter alia* some of the concerns raised by the few who voiced disapproval or opposition. I have carefully reviewed and considered those objections and have concluded that the Implementation Agreement that was reached on September 24, 2014, complies with the intention of the trial judgment and with the additional directives imposed by the Supreme Court of Canada.

[56] Accordingly, the relief sought in the notice of motion is granted, with the following order:

1. This Court orders and appoints Harry Restall, Larry Trach and the Telephone Retirees Association of Manitoba Inc. ("TRAM") as representing all Non-Vested Members and Inactive Members of the Manitoba Telecom Services Inc. and Participating Subsidiaries Employee Pension Plan, OSFI Reg. 56972 (the "Plan"), as described in Appendix B of the Pension Surplus and Implementation Agreement, dated September 24, 2014 (the "Implementation Agreement"), i.e. Deferred, Retired, Beneficiaries, Deceased and Cashed-Out Members, pursuant to Queen's Bench Rule 10.01.

2. This Court further orders and appoints Telecommunications Employees Association of Manitoba Inc. – International Federation of Professional & Technical Engineers, Local 161 (formerly Telecommunications Employees Association of Manitoba Inc.) ("TEAM") as representing all of its current members who are also active members of the Plan, pursuant to Queen's Bench Rule 10.01.

3. This Court further orders and appoints International Brotherhood of Electric Workers, Local Union 435 ("IBEW") as representing all of its current members who are also active members of the Plan, pursuant to Queen's Bench Rule 10.01.

4. This Court further orders and appoints Unifor Local 7 (formerly The Communications, Energy and Paperworkers Union of Canada, Local 7)

("Unifor") as representing all of its current members who are also active members of the Plan, pursuant to Queen's Bench Rule 10.01.

5. This Court further orders and appoints the defendants, Manitoba Telecom Services Inc., and MTS Inc. (as successor to MTS Communications Inc., MTS Allstream Inc., MTS Mobility Inc., and MTS Advanced Inc.) (collectively hereinafter referred to as "MTS") as representing all Non-Union Members of the Plan as set out in Appendix B of the Implementation Agreement, pursuant to Queen's Bench Rule 10.01.

6. This Court further orders and declares that the Implementation Agreement, unanimously entered into by the parties, reflects a settlement between the parties which is fair, reasonable and in the best interests of all persons who have a past, present, future, contingent or unascertained interest in the Plan and who may be affected by this proceeding (collectively the "affected persons"); and that the Implementation Agreement is in compliance with the Judgments of the Court of Queen's Bench (Winnipeg Centre) and the Supreme Court of Canada in these proceedings.

7. This Court further orders and declares approval of the Implementation Agreement, which is attached hereto and forms part of this Order.

8. This Court further orders and declares that the Implementation Agreement is binding upon all parties to the subject action; and more

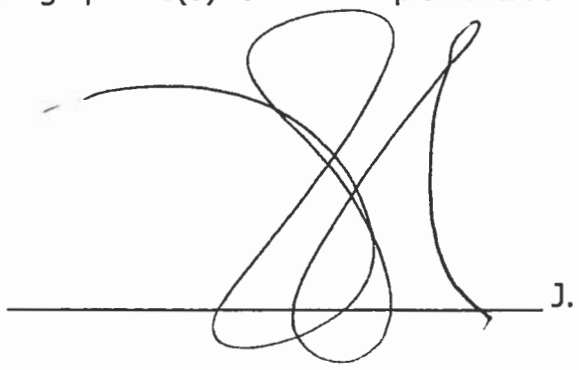
particularly, all parties or affected persons or parties or persons potentially affected pursuant to the Judgment of the Court of Queen's Bench of Manitoba (Winnipeg Centre) and the Supreme Court of Canada in these proceedings.

9. This Court further orders and authorizes MTS to distribute the funds referred to by way of the Implementation Agreement in keeping with the provisions of said agreement, specifically that of the approximate $140 million Distributable Surplus, approximately $28 million will be paid directly by MTS (less any Court-approved expenses where applicable) in order to facilitate one or more lump sum payments to current employee members of the Plan and the remaining approximate $112 million (less any Court-approved expenses where applicable) will be paid to recipients directly by the Plan (in the form of one or more lump sum payments or, for some Members [as said term is defined in the Implementation Agreement], enhanced benefits), with the resulting Plan deficit (along with other deficits in the Plan) to be funded by MTS into the Plan as and when required by the existing solvency funding rules in accordance with applicable pension legislation.

10. This Court further orders and approves the counsel fee requested by D'Arcy & Deacon LLP in paragraph 29(c) of the Implementation Agreement.

11. This Court further orders that subject to fulfilling the terms of the Implementation Agreement, all parties to these proceedings are released, fully discharged and saved harmless from any and all liability in respect of any act or omission with respect to the Surplus (as said term is defined in the Implementation Agreement), the negotiation and signing of the Implementation Agreement, and any and all claims associated with the within litigation as set out and further particularized in paragraph 17 of the Implementation Agreement.

12. This Court further orders that, upon compliance of paragraph 28 of the Implementation Agreement by the parties of said agreement, including the filing by MTS of the Certificate of Completion (as said term is defined in the Implementation Agreement) with this Honourable Court, the parties to the Implementation Agreement are hereby released and fully discharged from each other and from any and all liability as set out and further particularized in paragraph 28(d) of the Implementation Agreement.



J.