SUPREME COURT OF CANADA

CITATION: Telecommunications Employees Association of Manitoba Inc. *v.* Manitoba Telecom Services Inc., 2014 SCC 11

DATE: 20140130
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BETWEEN:

Telecommunications Employees Association of Manitoba Inc. — International Federation of Professional & 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. and 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
and
Manitoba Telecom Services Inc. and MTS Allstream Inc. (as successor to MTS Communications Inc., MTS Mobility Inc. and MTS Advanced Inc.)
Respondents

CORAM: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 91)
Rothstein J. (McLachlin C.J. and LeBel, Fish, Cromwell, Moldaver and Karakatsanis JJ. concurring)

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Telecommunications Employees Association of Manitoba Inc. — International Federation of Professional & 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. and 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*

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2014 SCC 11

File No.: 34763.

2013: May 16; 2014: January 30.

Present: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Pensions — Pension plans — Surplus — Members of pension plan having assets and pension rights transferred to new pension plan as result of privatization of employer — Original pension fund having actuarial surplus of 43 million dollars — Actuarial surplus sole result of employee contributions to old plan — Employer using surplus to take contribution holiday — Legislation stating that on implementation date new plan to provide benefits equivalent in value to those which employees were entitled to under old plan — Whether employer violated legal duties — The Manitoba Telephone System Reorganization and Consequential Amendments Act, S.M. 1996, c. 79, s. 15.

On January 1, 1997, Manitoba Telephone System ("Crown MTS"), a Crown corporation, was privatized and became what is now Manitoba Telecom Services Inc. and MTS Allstream Inc. ("MTS"). As a result of the privatization, approximately 7,000 employees and retirees of Crown MTS and its subsidiaries (the "plan members") had their assets and pension rights transferred to a new pension plan. Prior to privatization, Crown MTS employees and retirees were members of a contributory defined benefit plan. Similar to a typical defined benefit plan, eligible employees were required to contribute a percentage of their pensionable earning to the plan fund. However, unlike a typical defined benefit plan, the government as

employer did not contribute to the plan fund. Rather, the government paid its share of the benefits on a "pay-as-you-go" basis, meaning that instead of matching employee contributions at the time they were paid into the pension fund, the government instead paid half of the benefits owed to retirees at the time they became due. The effect of this arrangement was that the old plan's pension fund contained only employee contributions and interest. At the time of privatization, the original pension fund had an actuarial surplus of $43.364 million (the "Initial Surplus"). During the privatization process of Crown MTS, the plan members received several assurances from Crown MTS and the government that any surplus that existed in the old pension fund at the time of privatization would not be used to reduce MTS's cost of, and share of contributions to, the new pension plan. Pursuant to the Act that governed the privatization of Crown MTS ("*Reorg. Act*"), all of the old plan's assets attributable to the plan members, including the Initial Surplus, were transferred to the new pension plan. Section 15(2)(a) of the *Reorg. Act* stated that MTS was required to establish "a new plan which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may have become entitled under [the old plan]". Plan member representatives also signed a Memorandum of Agreement ("MOA") with MTS and the provincial government that made specific provision for the treatment of the Initial Surplus under the new plan. However, the provisions of the new pension plan made it virtually impossible for the plan members to ever receive any benefit funded by the Initial Surplus. Instead, MTS has been able to use the Initial Surplus to take contribution holidays, which allowed it to offset contributions it would otherwise be required to make to the pension fund.

The plan members commenced proceedings seeking payment of the Initial Surplus plus interest to be used to provide enhanced benefits, provided those enhanced benefits will not increase MTS's costs. The trial judge determined that the plan members were entitled to relief. He held that MTS's treatment of the Initial Surplus violated s. 15(2)(a) of the *Reorg. Act* because the benefits provided under the plans were not equivalent in value because the Initial Surplus, which had been accessible to the plan members under the old plan to fund enhancements, was not accessible to them under the new plan. The Court of Appeal allowed MTS's appeal and dismissed the plan members' cross-appeal, concluding that s. 15(2)(a) only required equivalency of the basic superannuation allowance received by plan members under the two plans.

Held: The appeal should be allowed.

Entitlement to an actuarial surplus must always be decided based on the governing legislation. Here, the applicable legislation required the establishment of a new plan that provides benefits that, at its implementation date, are equivalent in value to the benefits provided under the old plan. The inclusion of the word "value" in "equivalent in value" suggests that the phrase should be interpreted as capturing both the benefits paid to the plan members *and* the funding mechanism used to produce those benefits. It is not enough for the monthly payments provided by each plan to be equal. Had s. 15(2)(a) been intended to have such a narrow meaning, there would be no need to refer to the equivalency of the *value* of the benefits. The

statutory context and the legislative history of s. 15 both support the view that s. 15(2)(a) was intended to require more than a simple comparison of the amount paid each month to plan members under each pension plan.

The governing legislation and the unique features of the old plan distinguish this case from previous decisions of this Court involving entitlement to the actuarial surplus in a defined benefit pension plan. The original pension plan was not wound up and the actuarial surplus did not crystallize in that context. However, s. 15(2)(a) of the *Reorg. Act* created a break between the two pension plans. Further, the MOA and the plan text of the new plan isolated and fixed the quantum of the Initial Surplus such that it cannot be considered a typical actuarial surplus. As a result of s. 15(2)(a) and these unique features of the two pension plans, determining whether the benefits of the two plans are "equivalent in value" requires consideration of how much the employees had to contribute to obtain those benefits.

Here, the benefits provided by the old and new plans were not equivalent in value as of the implementation date. For the benefits to be equivalent in value, the means by which those benefits were funded must also have been equivalent, or additional benefits must have been provided to compensate for any funding inequalities. The Initial Surplus is attributable and to be credited exclusively to the employees for the purpose of determining how the new plan was funded. It was the plan members whose contributions solely resulted in the Initial Surplus and who bore the risk in the event of a deficit in the fund during the period in which the Initial

Surplus was generated. MTS did not match the plan members' contribution of $43.364 million — the Initial Surplus — to the new plan on the implementation date. Only MTS benefitted from this excess contribution and plan members received no enhanced benefits funded by the excess contribution. There has therefore not been adherence to the requirements of s. 15(2)(a) in this case.

Cases Cited

Referred to: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273.

Statutes and Regulations Cited

Civil Service Superannuation Act, C.C.S.M. c. C120, ss. 1(1) "pension benefit", 13(3), (5), 22(1)(a), (b), 26(1), 33.

Civil Service Superannuation Amendment Act, S.M. 1989-90, c. 59.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Manitoba Telephone System Reorganization and Consequential Amendments Act, S.M. 1996, c. 79, s. 15.

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.).

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Manitoba. Legislative Assembly. Standing Committee on Public Utilities and Natural Resources, 2nd Sess., 36th Leg., vol. XLVI, No. 15, November 7, 1996, p. 809.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Manitoba Court of Appeal (Chartier, Beard and MacInnes JJ.A.), 2012 MBCA 13, 275 Man. R. (2d) 185, 538 W.A.C. 185, 96 C.C.P.B. 20, [2012] 6 W.W.R. 434, [2012] M.J. No. 52 (QL), 2012 CarswellMan 57, reversing a decision of Bryk J., 2010 MBQB 11, 248 Man. R. (2d) 31, 79 C.C.P.B. 180, [2010] 8 W.W.R. 87, [2010] M.J. No. 15 (QL), 2010 CarswellMan 19. Appeal allowed.

Brian J. Meronek, *Q.C.*, *Kris M. Saxberg*, *D. Tomas Masi*, *James Cameron* and *Andrew Astritis*, for the appellants.

Kevin T. Williams, *Paul B. Forsyth* and *Kyle Dear*, for the respondents.

The judgment of the Court was delivered by

Rothstein J. —

I. Introduction

[1] On January 1, 1997, The Manitoba Telephone System, a Crown corporation, was privatized and became what is now Manitoba Telecom Services Inc. and MTS Allstream Inc. (for simplicity, all of these entities prior to privatization are referred to as "Crown MTS" and after privatization as "MTS"). As a result of the privatization, approximately 7,000 employees and retirees of Crown MTS and its subsidiaries (the "plan members") had their assets and pension rights transferred to a new pension plan. The assets included a $43.364 million "actuarial surplus".

[2] An actuarial surplus occurs in a typical defined benefit pension trust fund when the assets in the trust fund exceed the actuarial estimate of the liabilities of the pension plan at the time of the actuarial assessment. The present case requires us to determine how the case-specific legislation and unique features of the pension plan at issue here affect treatment of an actuarial surplus that had developed as the sole result of employee contributions to a predecessor plan when those funds were rolled into a successor plan.

[3] This Court has considered a number of cases in which the applicable legislation and plan texts have not given plan members the right to an actuarial surplus in a typical defined benefit pension plan. However, entitlement to an actuarial surplus must *always* be decided based on the governing legislation. In this case, the governing legislation leads to a different conclusion regarding the treatment of the actuarial surplus. Here, the applicable legislation required the establishment of a new

plan that provides benefits that, at its implementation date, are equivalent in value to the benefits provided under the prior plan. The actuarial surplus that existed at the time of the transfer of assets from the prior plan must be taken into account when determining whether the new plan fulfills this requirement. The governing legislation and the unique features of the original plan distinguish this case from previous cases involving entitlement to the actuarial surplus in a defined benefit pension plan.

[4] During the privatization process of Crown MTS, the plan members sought assurances from Crown MTS and the government that their pensions would remain secure. One of their chief concerns throughout the process was what would happen to any actuarial surplus that existed in their pension fund at the time of privatization because, during the operation of the original pension plan, such surplus had never been used except for their benefit. The plan members received several assurances from Crown MTS and the government that any surplus that existed in the original pension fund at the time of privatization would not be used to reduce MTS's cost of, and share of contributions to, the new pension plan.

[5] At the time of privatization, the original pension fund had an actuarial surplus of $43.364 million (the "Initial Surplus"). All of the original plan's assets, including the Initial Surplus, were transferred to the new pension plan. However, the provisions of the new pension plan made it virtually impossible for the plan members to ever receive any benefit funded by the Initial Surplus. Instead, MTS has been able

to use the Initial Surplus to take contribution holidays, which allow it to offset contributions it would otherwise be required to make to the pension fund.

[6] The issue in this case is whether MTS — by structuring the new plan such that the Initial Surplus would never be used to the plan members' benefit — violated legal duties that arose in accordance with (1) *The Manitoba Telephone System Reorganization and Consequential Amendments Act*, S.M. 1996, c. 79 (the "*Reorg. Act*"); (2) a Memorandum of Agreement ("MOA") it signed with representatives of the plan members; or (3) other written representations it made to the plan members prior to the privatization that any surplus transferred would not be used to reduce MTS's cost of, or contributions to, the pension plan.

[7] I have concluded that MTS has violated the terms of the *Reorg. Act*, that this conclusion is not inconsistent with the MOA, and that it is unnecessary to decide whether MTS's other written representations had legal effect and were breached. In light of deficiencies in the record and the financial complexity of the issues, I would reinstate the trial judge's order requiring MTS to make the $43.364 million in Initial Surplus plus "interest at the New Plan rate of return from January 1, 1997 to the date of payment" ("plan rate interest") available to the plan members to be used to pay for enhancements to their pension benefits (2010 MBQB 11, 248 Man. R. (2d) 31, at para. 518). Should the parties be unable to settle how the $43.364 million plus plan rate interest is to be made available to plan members, the matter shall be remanded to the trial judge for any necessary determinations.

II. Factual Background

[8] On January 1, 1997, Crown MTS was privatized. As a result of the privatization, approximately 7,000 employees and retirees of Crown MTS and its subsidiaries had their assets and pension rights transferred to a new pension plan.

[9] Resolution of the legal issues in this case requires consideration of the plan members' pension entitlements prior to privatization, the events that occurred leading up to the privatization, and the plan members' pension entitlements under the new pension plan that was created as a result of the privatization.

A. *The Pension Plan Prior to Privatization*

[10] Prior to privatization, Crown MTS employees and retirees were members of a pension plan created by the Government of Manitoba for its employees and the employees of its Crown corporations ("the Old Plan"). The Old Plan was created by statute, which at all times relevant to this litigation was *The Civil Service Superannuation Act*, C.C.S.M., c. C120 ("*CSSA*"). The *CSSA* provided the plan text for the Old Plan.

[11] The Old Plan was a contributory defined benefit pension plan with certain unique features that vary from those of traditional defined benefit plans. Similar to a typical defined benefit plan, under the Old Plan, eligible employees were required to contribute a percentage of their pensionable earnings to the plan fund. Upon

retirement, employees with vested pensions were entitled to receive a monthly superannuation allowance determined by a formula that took into account their years of service and average salary during the best 5 years of their last 12 years of employment. However, unlike a typical defined benefit plan, the government as employer did not contribute to the plan fund. Rather, the government paid its share of the benefits on a "pay-as-you-go" basis, meaning that instead of matching employee contributions at the time they were paid into the pension fund, the government instead paid half of the benefits owed to retirees at the time they became due (trial reasons, para. 25).

[12] The effect of this arrangement was that as of 1961, the Old Plan's pension fund, referred to as the Civil Service Superannuation Fund ("CSSF"), contained only employee contributions and "interest", which, although undefined by the *CSSA*, was in practice, a rate based on the returns on the fund's assets. Those funds would be used to pay for 50 percent of the plan's liabilities to its plan members, with the other 50 percent being paid for by the government on an ongoing basis.

[13] Although it was not legally required to do so, Crown MTS maintained a separate account, referred to as the pension reserve, which was used to ensure that it had enough funds to cover its liabilities under the pension plan. The pension reserve was not a trust fund; the money in the reserve remained available for Crown MTS to use for other purposes, although it never did so.

[14] The Old Plan also provided that plan members' monthly superannuation allowance could be supplemented by cost of living adjustments ("COLA") to account for inflation. Payments of the plan members' share of COLA under the Old Plan were made from a separate account, the Superannuation Adjustment Account ("SAA"). When employees contributed to the Old Plan, a percentage of each contribution was credited to the SAA. The assets of the SAA were held separately from the CSSF and the SAA earned interest at the plan's rate of return.

[15] The amount of COLA to be paid to plan members from the SAA was determined by the plan actuary, based on some fraction of the Consumer Price Index ("CPI"). The target COLA paid from the plan was 2/3 of CPI and COLA of up to 2/3 of CPI was automatically authorized to the extent that doing so would not result in an unfunded liability in the SAA. A prefunding requirement referred to as the "20-year rule" prevented the plan actuary from authorizing COLA in excess of 2/3 CPI if he determined that the SAA had insufficient funds "to make all required adjustment payments on a continuing basis for the immediately ensuing period of 20 years" (*CSSA*, s. 33(7.1)). In other words, the plan actuary could not authorize COLA of, for example, 100 percent CPI if the SAA did not contain sufficient assets to finance 20 years of the plan members' share of the COLA at a rate of 100 percent CPI, (*CSSA*, s. 33(7.1), as per the *Civil Service Superannuation Amendment Act*, S.M. 1989-90, c. 59, in force March 15, 1990). The purpose of the 20-year prefunding requirement was to reduce the likelihood that funds from the SAA would be overspent on current retirees, such that the SAA would be unable to pay COLA to future retirees. The

government was only required to match COLA payments from the SAA that were payable under the *CSSA*.

[16] From time to time, the Old Plan would experience an actuarial surplus, meaning that the amount of funds in the CSSF and SAA exceeded 50 percent of the actuarial estimate of the plan's liabilities. The governance mechanism set out by the *CSSA* allowed the plan members to negotiate with the government to use such surplus to finance enhancements to their benefits. In particular, when surplus existed, the plan's Liaison Committee (which was composed of representatives of plan members) would make proposals for the use of surplus to the plan's Advisory Committee (which was composed of government representatives). Upon an agreement between the committees, the legislature always amended the *CSSA* to implement the enhancements.

[17] Proposals for the use of actuarial surplus were always made at the plan members' initiative and surplus was used only to the plan members' benefit, out of recognition that the surplus was created solely by virtue of employee contributions to the CSSF. However, when an agreement was reached to use surplus funds to pay for enhancements, the government was not required to and at times refused to match the amount paid from the CSSF. Actuarial surpluses were at times used to supplement COLA, but such use of actuarial surplus was sporadic.

[18] At the time that Crown MTS was privatized, the Old Plan had a $43.364 million actuarial surplus. For the purposes of this appeal, the amount of the surplus, as confirmed by the Court of Appeal and accepted by the parties, is not disputed.

B. *The Road to Privatization*

[19] The process of privatizing Crown MTS began in early 1996. In May 1996, the legislature introduced for first reading Bill 67, which would govern the privatization of Crown MTS. Bill 67 ultimately became the *Reorg. Act*. The Bill provided, in the only section devoted to employee benefits, that plan members would be deemed to consent to the termination of their participation in the Old Plan and to have the assets, liabilities and agreements of the Old Plan transferred to a new pension plan (s. 15(10). Section 15(2)(a) of the Bill stated that MTS was required to establish a "new plan which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may have become entitled under *The Civil Service Superannuation Act* [i.e. the Old Plan]" (the "New Plan").

[20] Upon learning of the possibility of privatization, the plan members became concerned about the security of their pensions. Shortly after the introduction of Bill 67, a group of employees and retirees formed the Employee Retiree Pension Committee ("ERPC"). That Committee, along with some of the unions representing employees, sought involvement in privatization discussions to ensure that the pension benefits enjoyed by plan members under the Old Plan would be continued under the

New Plan. One of the plan members' main concerns regarding the security of their pensions was what would happen to the Initial Surplus — which, under the Old Plan, would have been available to pay for benefit enhancements — in the transition to the New Plan. They wanted assurance that it would only be used as it had in the past, that is, to fund pension improvements and to enhance COLA benefits.

[21] The ERPC and the relevant unions engaged in meetings and communications with representatives of MTS, including its President and Chief Executive Officer, William Chisholm Fraser. Throughout the process, the plan members sought access to the plan text that was being drafted by MTS and relevant government officials to govern the New Plan. However, they were consistently refused access to the draft plan text. MTS took the position that it had been given the mandate to create the New Plan and that mandate did not require consultation or negotiation with the employee/retiree groups.

[22] The plan members nonetheless sought clarification from MTS as to how the Initial Surplus would be treated upon privatization. In response, they received assurances that any surplus in the Old Plan would be transferred to the new pension plan and would not be used to reduce MTS's cost of, and share of contributions to that plan. In one letter that the ERPC sent to Mr. Fraser, it posed the following questions regarding treatment of the Initial Surplus:

> Included in the transfer amount defined in Section 15(1) of Bill 67 is a potential employees "surplus portion" of the Civil Service Superannuation Fund (C.S.S.F.). Although the final amount of the said

employees "surplus portion" has not yet been determined by Turnbull & Turnbull, Actuary for C.S.S.F., please provide answers to the following:

a) Will the employees "surplus portion" of the transfer amount become part of the new plan?

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

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

d) Please outline how these employees "surplus portion" will be invested in a separate trust account on behalf of the employees.

e) Will MTS match the contribution of the employees "surplus portion" of the transfer amount by contributing an identical amount to the new plan? [A.R., vol. VII, at p. 104]

[23] Mr. Fraser responded to this letter, stating:

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

(b) & (c) Once the amount of the surplus is determined and transferred to the trust fund, an analysis will be undertaken to determine the most appropriate use of the surplus in connection with the pension plan. However, this surplus will not be used to reduce the employer's cost of, and share of contributions to, the new pension plan. [Emphasis added; A.R., vol. VII, at p. 108.]

In another letter addressed to the ERPC's counsel, Mr. Fraser reiterated that any surplus transferred from the Old Plan would "not be used to reduce MTS' cost of, and share of contributions to, the new pension plan" (A.R., vol. VII, at p. 117).

[24] The plan members also voiced their concerns regarding the Initial Surplus to the legislature. In October 1996, the ERPC made a presentation to the Standing Committee on Public Utilities and Natural Resources, stressing that surplus in the Old Plan had "historically been utilized for the purposes of enhancing benefits" and requesting an amendment to clarify that any surplus existing at the time of the transfer "is not dissipated or otherwise rendered marginal when the employer's liability is determined through subsequent actuarial calculations" (Manitoba, Legislative Assembly, 2nd Sess., 36th Leg., vol. XLVI, No. 7, October 31, 1996, at pp. 295 and 296). The plan members subsequently presented a petition to the legislature with 1,525 signatures, which reiterated their interest in the funds transferred to the New Plan and in having the New Plan mirror the Old Plan to the extent possible.

[25] The government became concerned that the issues that had been raised by the ERPC were not being addressed and about possible opposition to the *Reorg. Act*. The Honourable Glen Findlay, the Minister responsible for Crown MTS, requested an update from MTS on the privatization process and the concerns that had been raised by the ERPC. On November 6, 1996, Mr. Fraser sent a memorandum to Minister Findlay that described the plan members' concern about the treatment of the Initial Surplus and reiterated the message he had communicated to the ERPC: "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" (A.R., vol. VIII, at p. 156).

[26] Despite Mr. Fraser's assurances, the ERPC remained concerned that the plan members' interests were not adequately protected. This led to two meetings on November 7, 1996. First, Jules Benson, Secretary to the Treasury Board, summoned Mr. Fraser to the legislature to discuss the plan members' concerns, including the treatment of the Initial Surplus. Several government officials, including Ministers Findlay, Darren Praznik (Deputy House Leader), and Eric Stefanson (Minister of Finance) were also in attendance.

[27] The same day, Deputy House Leader Praznik and Tom Stefanson, Chairman of the MTS Board of Directors, arranged for a second meeting between representatives from the ERPC, the unions that had also voiced concerns, and Mr. Fraser (by telephone), with the objective of brokering an agreement between the parties. At this point, the plan members had still not been provided with a copy of the draft plan text for the New Plan. However, according to the trial judge's findings, a background assumption during these meetings was that the plan members would retain the influence over the use of the Initial Surplus that they experienced under the Old Plan.

[28] The outcome of the second meeting was the MOA, signed by Mr. Fraser, representatives of the ERPC, representatives of the employee unions, as well as Deputy House Leader Praznik and Minister Eric Stefanson. With respect to the Initial Surplus, para. 3 of the MOA provided:

> Any initial surplus from the CSSF would be allocated to the new pension plan trust fund to fund future cost of living adjustments. In subsequent years the financial position of the COLA Account will be reviewed by the plan's [*sic*] actuary, if sufficient additional assets exist in the account beyond those required for the stated COLA increase for a particular year then pension benefits may be increased provided that the liability for the pension plan in total does not increase due to the change in benefits. [A.R., vol. VIII, at p. 158]

[29] The MOA also provided that the transfer of assets from the Old Plan to the new pension plan would be reviewed by actuaries retained by the employee unions and an actuary retained by MTS, as well as the Old Plan's actuary. Further, in the event of any disagreement regarding the actuarial evaluation or the matters described in para. 3 of the MOA, the matter would be referred to an actuary appointed by the Provincial Auditor.

[30] Following the signing of the MOA, the legislature made three amendments to Bill 67. First, the legislature added s. 15(3), which provided that the Provincial Auditor would appoint an independent actuary to review the terms of the New Plan to determine whether, as of the implementation date, the benefits it provided were "equivalent in value" to those under the Old Plan, as required by s. 15(2)(a). Second, the legislature added s. 15(4), which provided that MTS "shall take any steps necessary to resolve any concerns raised by the independent actuary" in his report. Finally, the legislature added s. 15(11), which clarified that nothing in s. 15 should be interpreted as nullifying the effect of the MOA.

[31] The *Reorg. Act* was passed and received royal assent on November 28, 1996. Accordingly, Crown MTS was privatized, effective January 1, 1997.

C. *The Pension Plan After Privatization*

[32] The *Reorg. Act* required MTS to establish a new pension plan to which the assets and liabilities of the Old Plan attributable to MTS plan members would be transferred. The terms of the New Plan were set forth in the plan text drafted by the government and MTS during the privatization process (the "New Plan Text").

[33] The New Plan is a contributory defined benefit plan. It is not disputed that the New Plan was not materially different from the Old Plan with respect to the ongoing contributions employees were required to make or the monthly defined benefits payable to retired plan members.

[34] However, upon privatization, the New Plan had to be and indeed was registered under the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("*PBSA*") and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"). Compliance with the *PBSA* and the *ITA* required the New Plan to differ in many respects from the Old Plan.

[35] One of the primary differences required by the *PBSA* was that MTS could not continue to operate the pension on the pay-as-you-go model of the Old Plan.

Rather, *PBSA* compliance required MTS to ensure that the New Plan was fully funded on an ongoing basis. In other words, as the trial judge observed:

> MTS was required to pay their share of the cost of benefits "up front" just as did the employees. There were also additional payments required depending upon the financial status of the Fund. The employees were guaranteed benefits for which they were required to pay a fixed amount. Any cost over and above was the sole responsibility of MTS. [para. 304]

The terms of the New Plan Text provided accordingly.

[36] All the assets and liabilities of the Old Plan attributable to MTS plan members, including the Initial Surplus, were transferred to the New Plan. In addition, all of the funds Crown MTS had been maintaining in its pension reserve were transferred to the New Plan. The amount transferred from the pension reserve was equal to slightly more than its 50 percent share of the liabilities that existed at the time of privatization. The effect was that the New Plan was fully funded as of the implementation date, with a surplus approximately equal to the Initial Surplus transferred from the Old Plan.

[37] Because MTS had sole responsibility for the ongoing liabilities of the New Plan, the New Plan Text provided that MTS would have exclusive control over *ongoing* actuarial surpluses that resulted from contributions to the plan fund and earnings of the fund. For instance, consistent with the *PBSA* and the New Plan Text, MTS could use the *ongoing* actuarial surplus in the New Plan to reduce its regular contributions to the pension fund, referred to as a "contribution holiday".

[38] Although the plan members challenged MTS's right to control ongoing actuarial surpluses before the trial court, they abandoned that position on appeal. However, acceptance of MTS's control over ongoing actuarial surpluses in the New Plan should not be confused with the issue of control over and proper use of the Initial Surplus, which is at the centre of this appeal.

[39] Under the New Plan, COLA was administered using a notional account, called the Pension Benefit Adjustment Account ("PBAA"). On the implementation date of the New Plan, an amount equal to the Initial Surplus was credited to the PBAA, along with an amount from the SAA attributable to MTS plan members and a matching amount from MTS.

[40] Similar to the Old Plan, the New Plan Text provided that a percentage of ongoing contributions made by employees would be credited to the PBAA. In the New Plan, employee contributions to the PBAA are matched by MTS at the time they are made. Further, each month the PBAA was credited with certain interest. The interest credited to the account was not based on the plan fund's actual rate of return. Instead, MTS applied an interest rate based on "the average of the yields of five (5) year personal fixed term chartered bank deposit rates", referred to as the CANSIM rate and commonly used for pension plans (A.R., vol. VIII, at p. 39). Between 1997 and 2006, the CANSIM rate was more stable but on average lower than the actual rate of return of the plan fund. When COLA payments were paid to plan members from the New Plan's fund, the PBAA was debited accordingly for the amounts paid.

[41] The New Plan Text, again reflecting the terms of the MOA, provided that MTS would provide monthly COLA of at least 2/3 of CPI, up to a maximum CPI of 4 percent. Further, the New Plan Text, like the Old Plan but not as required by the MOA, provided that the plan actuary's discretion to authorize enhanced COLA beyond the guaranteed minimum was constrained by the 20-year rule. In other words, the plan actuary could authorize COLA at a rate that exceeded the 2/3 CPI minimum only if there were sufficient funds credited to the PBAA to support monthly COLA at that rate for the next 20 years.

[42] However, the trial judge concluded as a finding of fact that despite the placement of the Initial Surplus in the COLA account, "the 20 year [rule] was incapable of ever being reached by virtue of the manner in which the COLA account was set up" (para. 320). I infer that this conclusion was based on a combination of factors. One was that each month the percentage of total contributions to the pension trust fund credited to the PBAA, as provided for by the New Plan Text, was inadequate to fund the monthly guaranteed COLA debited to the PBAA. This factor was noted as early as May of 1996 in a report prepared for MTS regarding transitional issues. The report stated that "stipulated contributions to the adjustment account . . . are probably not adequate to provide cost-of-living benefits at the level granted in recent years" (A.R., vol. VI, at p. 120). A second factor was the use of the relatively stable but low CANSIM rate, also provided for by the New Plan Text, to calculate the interest credited to the PBAA.

[43] These two factors contributed to the debits to the PBAA, over time exceeding credits to that account. (The plan members also argued that the assets credited to the PBAA at the implementation date were insufficient to pay for the guaranteed COLA accrued as of that date.) As a result, each year the account moved further and further away from meeting the 20-year rule imposed by the New Plan Text. For example, by January 1, 2005, the PBAA was at a surplus of $15 million but would require an additional $192 million to fulfil the 20-year rule, while by January 1, 2008, the PBAA was at a deficit of almost $17 million and would require an additional $240 million to fulfil the 20-year rule. The Court of Appeal did not find fault with the trial judge's finding of fact that the 20-year rule was impossible to meet under the provisions of the New Plan Text. Rather, it dismissed the issue on the basis that the plan members accepted the New Plan Text and that the PBAA was operated in accordance with the MOA and the New Plan Text. Although MTS argued before this Court that the finding of the trial judge constituted a palpable and overriding error, it only made general statements about the fact that one could not know how the pension trust fund would perform over long periods of time.

[44] Although the Initial Surplus would virtually never be used to provide enhanced COLA, MTS was able to apply the assets associated with the Initial Surplus against the plan's liabilities when determining whether the New Plan's pension fund was fully funded. As a result, the Initial Surplus of $43.364 million allowed MTS to take contribution holidays, and thus contribute less than it otherwise would have had

to contribute to the New Plan, even as the 20-year rule prevented the provision of any enhanced COLA.

D. *Actuarial Assessment of the Equivalence of the Old and New Plans*

[45] As mentioned above, after the MOA was signed, the legislature amended the *Reorg. Act* to provide that "[a]s soon as possible after this Act receives royal assent, the Provincial Auditor shall appoint an independent actuary to review the plan proposed by the corporation . . . to determine whether the benefits under the proposed plan are equivalent in value as required by that clause" (s. 15(3)). The Provincial Auditor appointed Clifford Fox, who had conducted other work for the Auditor's office in the past, as the independent actuary.

[46] In a March 5, 1997 letter, Mr. Fox expressed his final conclusion that the benefits provided under the New Plan were "at least equivalent in value to the benefits provided under the CSSA" (A.R., vol. X, at p. 69). A detailed discussion of how Mr. Fox reached that conclusion is unnecessary because, as discussed below, the trial judge found that the Provincial Auditor impermissibly interfered with Mr. Fox's independence such that the opinion expressed in his final letter cannot be relied on.

[47] The plan members disagreed with Mr. Fox's conclusion and ultimately commenced these proceedings, seeking various forms of relief. Relevant to this appeal, they sought payment of the Initial Surplus plus interest to be used to provide enhanced benefits, provided those enhanced benefits will not increase MTS's costs.

III. Procedural History

A. *Court of Queen's Bench of Manitoba, 2010 MBQB 11, 248 Man. R. (2d) 31*

[48] Bryk J. held that the plan members were entitled to relief. As an initial matter, he determined that Mr. Fox, the independent actuary appointed by the Provincial Auditor, failed to satisfy the duty of procedural fairness owed to the plan members because the Provincial Auditor's office and MTS impermissibly interfered with his judgment as to the equivalency of the two plans. He concluded, given the passage of time and the best interests of the parties, that the appropriate remedy was to substitute his decision for the Fox opinion.

[49] Neither Bryk J.'s conclusion that Mr. Fox violated his duty of procedural fairness nor his conclusion that it was appropriate to substitute his decision has been challenged in this appeal.

[50] Bryk J. held that MTS's treatment of the Initial Surplus violated s. 15(2)(a) of the *Reorg. Act*, which required that the benefits provided under the New Plan be "equivalent in value" to the Old Plan. In his view, "equivalent in value" "was intended to include issues of surplus, both initial and ongoing, as well as issues of governance" (para. 515). He held that the benefits provided under the plans were not equivalent in this sense because the Initial Surplus, which had been accessible to the plan members under the Old Plan to fund enhancements, was not accessible to them under the New Plan.

[51] Bryk J. also held that the inaccessibility of the Initial Surplus for enhancements violated para. 3 of the MOA, which, in his view, reflected an understanding that the plan members "would have access to the initial surplus to be utilized in the same fashion as surpluses had been utilized under the Old Plan" (para. 502).

[52] On these bases, Bryk J. ordered that the plan members were entitled to receive an amount equal to the Initial Surplus plus interest at the New Plan's rate of return, which was "to be used to enhance pension benefits on the understanding that the enhanced benefits will not result in an increase of MTS's costs" (para. 533). He ordered the plan members and MTS to negotiate and arrive at a mutually agreeable implementation process for the utilization of the funds.

B. *Manitoba Court of Appeal, 2012 MBCA 13, 275 Man. R. (2d) 185*

[53] The Court of Appeal disagreed that s. 15(2)(a) of the *Reorg. Act*'s requirement that the New Plan's benefits be "equivalent in value to the pension benefits" of the Old Plan included the issues of surplus or governance. Applying the definition of "pension benefit" found in the *CSSA*, the Court of Appeal concluded that s. 15(2)(a) only required equivalency of the basic superannuation allowance received by plan members. The Court of Appeal noted that s. 15(2)(a) was not amended when ss. 15(3), 15(4) and 15(11) were added to the section, even though it could have been changed to require equivalency of pension *plans* instead of pension *benefits*.

[54] The Court of Appeal also concluded that para. 3 of the MOA was not violated. As a matter of contractual interpretation, the negotiations and subjective intention of the plan members are irrelevant to interpreting the MOA. The mandatory obligations imposed by para. 3, namely to transfer the Initial Surplus to the PBAA and to use it to fund future COLA, were fulfilled while the conditional obligations, namely to use the Initial Surplus to fund *enhanced* COLA, need not have been fulfilled because the conditions were not met. At common law, the plan members have no right to any surplus generated under an ongoing defined benefit pension plan. The fact that plan members bore the risk of any deficit in the CSSF has no impact on the right to any surplus. The contribution holidays taken by MTS are permissible under pension law.

[55] The Court of Appeal therefore allowed MTS's appeal and dismissed the plan members' cross-appeal. In its view, the New Plan had complied with both s. 15(2)(a) of the *Reorg. Act* and para. 3 of the MOA.

IV. Issues

[56] The only issue raised in this appeal relates to the Initial Surplus. The plan members argue that MTS — by not ensuring that the Initial Surplus remained available for the exclusive use of plan members, structuring the New Plan's COLA account such that it was impossible for the Initial Surplus to be used for COLA enhancements, and using the Initial Surplus to take contribution holidays— violated:

1) section 15(2)(a) of the *Reorg. Act*, which required MTS to establish a new plan that "provide[d] for benefits which on the implementation date are equivalent in value [to the pension benefits]" the plan members were entitled to under the Old Plan;

2) paragraph 3 of the MOA, which provided specific terms for how the New Plan's COLA account was to operate and for the treatment of the Initial Surplus; and

3) the written representations or undertakings of MTS during the privatization process, which stated that the Initial Surplus would not be used to reduce MTS's cost of or contributions to the New Plan.

V. <u>Analysis</u>

A. *Whether MTS Violated its Duty To Establish a Plan that Provided Benefits "Equivalent in Value" to Those Provided Under the Old Plan*

[57] Section 15(2)(a) of the *Reorg. Act* provided that MTS was required to establish

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

The plan members argue that the benefits available to them under the New Plan are not "equivalent in value" to the benefits to which they were entitled under the Old Plan. Under the Old Plan, benefits were funded equally by plan members and the government. Under the New Plan, $43.364 million of the plan members' contribution — the Initial Surplus — was not matched by MTS on the implementation date. Plan members still received the same pension benefits as under the Old Plan, meaning they in effect paid $43.364 million more than MTS into the New Plan to receive the same benefits as they had under the Old Plan.

(1) <u>The Meaning of "Equivalent in Value"</u>

[58] The dispute between the parties with respect to s. 15(2)(a) centres on what it means for the benefits of each plan to be equivalent in value.

[59] MTS argues that whether the benefits provided under the New Plan are "equivalent in value" to the pension benefits provided under the Old Plan requires only a direct comparison of the basic superannuation allowance payable to retired plan members under each plan. If the superannuation allowance that retired plan members would earn under the New Plan is the same as the superannuation allowance that the plan members would have earned under the Old Plan, then s. 15(2)(a) is satisfied.

[60] The plan members argue that "equivalent in value" contemplates a more comprehensive comparison of the benefits provided under the two pension plans. In

addition to a comparison of the basic superannuation allowance that is received by each plan member under each of the two plans, they argue that s. 15(2)(a) requires the Court to consider how those benefits are funded. The contributions of employees to the New Plan exceeded the contributions of MTS, thanks to the Initial Surplus. As a result, the benefits received under each plan are not "equivalent in value" because, unlike benefits under the Old Plan, which were funded equally by plan members and the government, the funding of benefits under the New Plan was not equal.

[61] In my view, the plan members have advanced the better interpretation.

[62] The Court of Appeal's interpretation of s. 15(2)(a) is based on the definition of "pension benefit" in the *CSSA*. The Court of Appeal observed that s. 15(2)(a) of the *Reorg. Act* required the New Plan to "provide for benefits which . . . are equivalent in value to the pension benefits to which employees have or may have become entitled under *The Civil Service Superannuation Act*". The term "pension benefit" was defined in s. 1(1) of the *CSSA* to mean

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

[63] According to the Court of Appeal, this definition of "pension benefit" in the *CSSA* is fatal to the argument that the "pension benefits" referred to in s. 15(2)(a) include anything other than the superannuation allowance payable under the Old Plan. In particular, the Court of Appeal concluded that s. 15(2)(a) should be presumed to

use the same meaning of "pension benefit" that is used in the *CSSA*. Therefore, s. 15(2)(a) mandates a simple comparison of the superannuation allowance payable under each plan.

[64] In my respectful view, this case does not turn on the definition of pension benefits. The issue here is with respect to the phrase "equivalent in value". In my view, interpreting "equivalent in value" to include both the benefits provided by the plans and the means by which those benefits are funded leads to the most reasonable construction of s. 15(2)(a).

[65] In order to fulfill the requirements of s. 15(2)(a), it is not enough for the monthly payments provided by each plan to be equal. Had s. 15(2)(a) been intended to have such a narrow meaning, there would be no need to refer to the equivalency of the *value* of the benefits. The inclusion of the word "value" in "equivalent in value" suggests that the phrase should be interpreted as capturing both the benefits paid to plan members *and* the funding mechanism used to produce those benefits. A simple way of viewing the equivalency in value requirement is to ask whether a reasonable person would prefer to receive benefits under the Old Plan or the New Plan. It is plain to see that a reasonable person would take into account how much they are expected to pay to receive those benefits. All other things being equal, a reasonable person choosing between a contributory pension plan in which employees must make some contributions, versus a non-contributory plan where the employer is the sole contributor would undoubtedly choose the latter plan.

[66] Neither the parties nor the courts below have suggested that the French version of s. 15(2)(a) is inconsistent with this interpretation. Indeed, the statutory context and the legislative history of s. 15 both support the view that s. 15(2)(a) was intended to require more than a simple comparison of the amount paid each month to plan members under each pension plan, namely by taking the funding of the amounts paid into account.

[67] With respect to statutory context, s. 15(3) of the *Reorg. Act*, which was added immediately following the November 7 meeting between members of the legislature, MTS and the plan members which culminated in the MOA, refers explicitly to s. 15(2)(a) and the concept of "equivalent in value". It states:

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

[68] The November 7 meeting was convened to deal with, among other issues, the treatment of the Initial Surplus under the New Plan. As the trial judge found,

> [r]elatively early in the privatization process, the employees/retirees satisfied themselves that the New Plan would produce the same pension benefits as had the Old Plan . . . . The issues which remained of concern . . . were initial and ongoing surplus and governance. Those were the issues discussed on November 7th. [para. 510]

That the legislature, following this meeting, considered it necessary to appoint an independent actuary to review the New Plan to determine whether the benefits it provides were *equivalent in value* to the benefits provided under the Old Plan lends support to the conclusion that the review was intended to be more comprehensive than a simple numerical comparison of the pension benefits provided under each plan, which the plan members had already accepted were equivalent.

[69] The Court of Appeal found it significant that s. 15(2)(a) was not amended at the same time ss. 15(3), (4) and (11) were added in response to plan member concerns, concluding that this omission supported its interpretation of the provision. However s. 15(3) expressly refers to s. 15(2)(a) and is part of the context to be considered when interpreting s. 15(2)(a).

[70] As explained in para. 65 above, determining whether the benefits of the two plans are "equivalent in value" requires consideration of how much the employees had to contribute to obtain those benefits. This interpretation is further supported by the legislative history of the *Reorg. Act*. Professor Sullivan writes that legislative history is admissible "as evidence of specific legislative intent", including "the intended meaning of a particular word", but the "legislative history must be relevant to the interpretation issue facing the court and it must not be inherently unreliable" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 609 and 612 (emphasis added)).

[71] Prior to the passage of the *Reorg. Act*, Deputy House Leader Darren Praznik responded to the ERPC's concerns about, among other issues, the use of the Initial Surplus and whether the language of s. 15(2)(a) was ambiguous with the following statement:

> These are the 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.]

(Legislative Assembly of Manitoba, Standing Committee on Public Utilities and Natural Resources, 2nd Sess., 36th Leg., vol. XLVI, No. 7, October 31, 1996, at pp. 298-99)

[72] On November 7, 1996, during the Standing Committee's clause-by-clause consideration of draft Bill 67 and prior to the signing of the MOA and the amendments to Bill 67, the Honourable Glen Findlay, the Minister responsible for Crown MTS, gave the following response to an inquiry about the plan members' concerns:

> 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 that equivalent will be fair and

reasonable for all concerned, whether it was MTS or the retirees or the future retirees. [Emphasis added; *ibid.*, No. 15, at p. 809.]

This language suggests that Minister Findlay understood "equivalent in value" to mean something more than a simple numerical comparison of the superannuation allowances provided under each plan.

[73] These statements from Deputy House Leader Praznik and Minister Findlay are relevant to the interpretation of the phrase "equivalent in value" as they provide evidence of the Ministers' understanding respecting the concern s. 15(2)(a) was meant to address. Minister Findlay's statement is particularly relevant given that it was made the same day as the meeting at which the Initial Surplus was at issue and immediately before the *Reorg. Act* was amended. There is nothing to suggest that either statement is inherently unreliable.

[74] Although not conclusive, the statements provide persuasive affirmation of the broader interpretation of s. 15(2)(a) as suggested by its wording and legislative context. For these reasons, the phrase "equivalent in value" used in s. 15(2)(a) requires a comprehensive assessment of both the benefits and the funding used to provide those benefits under each plan to determine whether the New Plan fulfills the requirements of s. 15(2)(a).

(2) Whether the Benefits Provided Under Each Plan Are "Equivalent in Value"

[75] As this Court has recognized, the rights and obligations of parties under pension plans are always subject to the relevant legislation (*Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 86). Here, as previously explained, the *Reorg. Act* requires that the benefits provided by the Old and New Plans, including their funding, be compared.

[76] For the purposes of determining how the New Plan was funded as of the implementation date, it is important to emphasize that s. 15(2)(a) of the *Reorg. Act* created a break between the Old and New Plans. Although this break does not amount to the Old Plan having been wound up and the actuarial surplus having crystallized in that context, it does mean that the Initial Surplus was not, on the implementation date, to be treated as "simply part of a larger actuarial surplus in the New Plan", as the Court of Appeal concluded (para. 155). The MOA and New Plan Text indicate that the Initial Surplus was to be treated as a fixed, isolated, and quantified sum to be used for specific purposes. While its quantum was an actuarial estimate, that estimate became fixed when the quantum was transferred from the CSSF to the PBAA.

[77] The Initial Surplus is attributable to employees for the purpose of determining how the New Plan was funded as of the implementation date because it arose as a result of plan members' contributions to the CSSF and because plan members bore the risk of deficit under the Old Plan. The parties to the Old Plan understood that plan members could use actuarial surpluses for their benefit since it was only plan members who contributed to the CSSF. And, the practice under the

Old Plan reveals that plan members usually negotiated to use surpluses to finance enhancements to their benefits.

[78] In a typical defined benefit pension plan, an employer is often at liberty to use an actuarial surplus to fund its future contribution obligations because the employer bears the risk of an actuarial deficit in the pension fund: see A. N. Kaplan and M. Frazer, *Pension Law* (2nd ed. 2013), at p. 93. In this case, however, the government paid its share of the benefits on a pay-as-you-go basis. It was the *plan members* whose contributions solely funded the pension fund and who bore the risk in the event of a deficit in the fund. For these reasons, the Initial Surplus — which was generated under the Old Plan — is attributable and to be credited exclusively to the employees for the purpose of determining how the New Plan was funded.

[79] It is now necessary to consider whether the benefits under the Old Plan and the New Plan were equivalent in value at the implementation date. The Old Plan was designed so that the benefits were equally funded by Crown MTS and plan members (*CSSA*, s. 22(1)). On the implementation date, the trial judge found that "the employees' initial contribution into the New Plan was approximately $43.343M more than the employer's contribution" (at para. 266) (that amount was later changed by the Court of Appeal to $43.364 million due to a clerical error by the trial judge (at para. 242)). The Court of Appeal did not disagree that the Initial Surplus was contributed by plan members.

[80] Since $43.364 million of the plan members' contribution was not matched by MTS on the implementation date, there was a *prima facie* violation of s. 15(2)(a) because the funding of the benefits under the two plans was not equal, and thus the benefits were not equivalent in value. The New Plan can only be held to comply with the requirements of s. 15(2)(a) if the Initial Surplus is reserved for the exclusive benefit of plan members, or if plan members receive some other compensatory benefits of equivalent value. The MOA reserved the Initial Surplus to fund future COLA for plan members. However, the provisions of the New Plan Text regarding the monthly contribution credits and the interest earnings of the PBAA ensured that payment of enhanced COLA benefits would never occur. Instead, MTS was able to use the Initial Surplus to take contribution holidays and thus reduce its contributions to the New Plan. The end result was that only MTS benefitted from the plan members' unequal funding of the New Plan.

[81] MTS argued that its assumption of the risk of deficit in the pension fund and its guarantee of COLA at 2/3 of CPI were additional benefits that offset the Initial Surplus. MTS pointed out in its factum and at the oral hearing that as a result of its assumption of the risk of deficit, in the years following the New Plan's implementation date, it has contributed significantly more than plan members to the New Plan. However, s. 15(2)(a) specifies that the benefits must be equivalent in value "on the implementation date". The contributions by MTS to the New Plan after January 1, 1997 are irrelevant to determining whether the requirements of s. 15(2)(a) were fulfilled.

[82] The trial judge considered the effect of both these changes — assumption of the risk of deficit and COLA guarantee — in his comparison of the plans. In his reasons, he dismissed MTS's assumption of the risk of deficit as an additional benefit because it was "quid pro quo for . . . the opportunity to utilize surpluses by taking contribution holidays such as occurred during the first few years following the implementation of the New Plan" (para. 526). With respect to the COLA guarantee, the trial judge reviewed the evidence about the COLA in some detail. There was no finding by the trial judge that the COLA guarantee was an additional benefit that could offset the Initial Surplus. He ultimately concluded that but for the Initial Surplus, MTS and plan members contributed equally to the New Plan (para. 529). There is no basis for interfering with these findings of the trial judge.

[83] For the reasons above, the benefits provided by the Old and New Plans were not equivalent in value as of the implementation date. For the benefits to be equivalent in value, the means by which those benefits were funded must also have been equivalent, or additional benefits must have been provided to compensate for any funding inequalities. In this case, MTS did not match the plan members' contribution of $43.364 million to the New Plan on the implementation date. Only MTS benefitted from this excess contribution; plan members received no enhanced benefits funded by the excess contribution. Based on the factual findings of the trial judge, there has not been adherence to the requirements of s. 15(2)(a).

B. *Whether the Above Interpretation of Section 15(2)(a) Nullifies the Effect of the MOA.*

[84] As described above, after the November 7 meeting that culminated in the parties signing the MOA, the legislature added s. 15(11) to the draft bill that was subsequently enacted as the *Reorg. Act*. That section provides that "[n]othing in this section is to be interpreted as nullifying the effect of" the MOA. Thus it is still necessary to ensure that the above interpretation of s. 15(2)(a) does not nullify the effect of the MOA, in particular para. 3, which deals with the Initial Surplus and the PBAA.

[85] I agree with the Court of Appeal that para. 3 imposes two "mandatory obligations" on MTS: that MTS must provide a guaranteed minimum COLA of 2/3 of CPI, up to a maximum CPI of 4 percent, and that MTS must allocate the Initial Surplus to the New Plan's trust fund to fund future COLA (at para. 175). The remainder of para. 3 imposes only the conditional obligation that COLA may be enhanced above the minimum 2/3 of CPI "if sufficient additional assets exist in the account beyond those required for the stated COLA increase" (A.R., vol. VIII, at p. 158 (emphasis added)).

[86] I have determined above that s. 15(2)(a) must be interpreted to mean that equivalency in value of the benefits requires taking the funding of those benefits into account, and that based on the factual findings of the trial judge, s. 15(2)(a) was breached. Neither conclusion nullifies the effect of the mandatory or conditional obligations of the MOA.

C. *Whether MTS's Written Representations During the Privatization Process Were Enforceable and, if so, Whether the Representations Were Breached.*

[87] Having concluded that the New Plan violated s. 15(2)(a) of the *Reorg. Act*, and that this conclusion does not nullify the effects of the MOA, there is no need to consider the plan members' argument that Mr. Fraser's written representations that the Initial Surplus would not be used to reduce MTS's cost of or contributions to the New Plan were legally enforceable and were breached.

D. *Remedy*

[88] 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" (A.R., vol. I, at pp. 178-79).

[89] 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.

[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.

VI. <u>Conclusion</u>

[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 (see *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 97).

Appeal allowed with costs throughout.

Solicitors for the appellants: D'Arcy & Deacon, Winnipeg; Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the respondent: Taylor McCaffrey, Winnipeg.