File No. AI 10-30-07355

IN THE COURT OF APPEAL

B E T W E E N:

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

Plaintiffs (Respondents on Appeal),
(Appellants on Cross Appeal),

- and -

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

Defendants (Appellants on Appeal),
(Respondents on Cross Appeal)

FACTUM OF THE APPELLANTS ON APPEAL MANITOBA TELECOM SERVICES INC., and MTS ALLSTREAM INC. (as successor to MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.)

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INDEX

FACTUM OF THE APPELLANTS ON APPEAL MANITOBA TELECOM SERVICES INC., and MTS ALLSTREAM INC. (as successor to MTS COMMUNICATIONS INC., MTS MOBILITY INC. and MTS ADVANCED INC.)

LIST OF AUTHORITIES (FOUND IN BOOK OF AUTHORITIES ("BofA"))

OVERVIEW

1. This Appeal arises from the Government of Manitoba's decision to privatize the Manitoba Telephone System Inc. and its subsidiaries (collectively "MTS") and the interpretation of the legislation that was passed to effect that privatization, namely the *Manitoba Telephone System Reorganization and Consequential Amendments Act* **[AB, Tab 1306]** (the "*Reorg. Act*"). The intention of the *Reorg. Act*, which is apparent from the plain language of subsection 15(2)(a), was to ensure that the pension benefits of MTS employees did not adversely change as result of the privatization. Under the *Reorg. Act*, an independent actuary, Clifford Fox ("Fox") was appointed by the Provincial Auditor to assess the equivalency of the benefits provided for under the new pension plan established by MTS pursuant to subsection 15(2) of the *Reorg. Act* (the "New Plan"). He certified that the benefits were equivalent.

2. While the plaintiffs attack the procedure by which Fox arrived at his determination, MTS submits that Fox's conclusion was correct in law and indeed was the only determination that could have been made under the *Reorg. Act.* The evidence is clear that the benefit formula used to calculate a member's entitlement and the benefit cheques received by pensioners did not change under the New Plan. It is admitted by the

plaintiffs, and acknowledged by the Honourable Justice Bryk (the "Trial Judge"), that if "benefits" under the *Reorg. Act* is given its ordinary pension law meaning, the benefits were equivalent.

3. At trial, the plaintiffs asked the Court to set aside Fox's opinion because he failed to apply a special definition of "benefits" that would include entitlements not normally recognized as pension benefits, most notably, rights to initial surplus, ongoing surplus and governance in a pension plan. The plaintiffs relied heavily on alleged procedural deficiencies in Fox's determination of equivalency. They also relied on a perceived entitlement to the use of surplus under the *Civil Service Superannuation Act* **[AB, Tabs 1307 – 1317]** (the "*CSSA*") and the plan created pursuant to the *CSSA* (the "Old Plan") that is not expressed anywhere in that legislation. Finally, the plaintiffs claimed that certain statements made by William Fraser, the former President and Chief Executive Officer of MTS ("Fraser") and a Memorandum of Agreement dated November 7, 1996 ("MOA") entered into among MTS, certain employee representatives, and the Government of Manitoba, recognized an employee entitlement to certain benefit enhancements, even though neither the statements nor the MOA say anything about any such entitlement.

4. Notwithstanding the difficulties in the plaintiffs' case, the Trial Judge found in their favour. On January 10, 2010, the Trial Judge issued his decision. His Lordship declared the March 5, 1997 opinion issued by Fox to be invalid. His Lordship also ordered the defendants to pay to the plaintiffs $43.343 million plus interest at the New Plan rate of return from January 1, 1997. This monetary liability has now grown to an amount of approximately $90 million. He dismissed the plaintiffs' claims as they related to control of ongoing surplus and governance.

5. As will be set out more fully below, there is no support in the jurisprudence, the relevant plan texts, or the legislation, for the sweeping relief which the Trial Judge awarded the plaintiffs. From a pension law perspective, the Trial Judge's decision has been described by one commentator as "Alice in Pensionland" because of its disregard for elementary pension law principles.[1]

6. Despite the compendious trial record, this appeal largely involves questions of law. Much of the evidence led at trial was of questionable, if any, relevance. Further, the Trial Judge repeatedly admitted and relied upon the testimony of witnesses as to their understanding of both documents and legislation to influence his

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[1] Gary Naschen, "Alice in Pensionland" (March 30, 2010), **[BofA TAB 1]**

interpretation and ultimate findings. Having erred by relying upon the subjective testimony of witnesses, the Trial Judge compounded his error by disregarding the plain words of the legislation and documents.

7. Further, the Trial Judge's decision reflects a misunderstanding of even the most rudimentary concepts of pension law. His Lordship misunderstood actuarial surplus and failed to appreciate that surplus cannot "belong" to employees[2] in an ongoing plan.[3] It is not a thing, but a circumstance in which a plan finds itself at a given point in time. It is a fleeting concept that can disappear from one moment to the next. A circumstance cannot belong to anyone. The case law is uniform on this point.

8. It is indeed notable that the Trial Judge failed to refer to a single pension case, despite lengthy Reasons for Judgment **[AB, Tab 1406]** (the "Reasons"). The Trial Judge's misunderstanding of actuarial surplus also explains his finding that MTS misappropriated assets "belonging" to employees by taking contribution holidays. This finding is inconsistent with numerous cases that demonstrate that the taking of contribution holidays is

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[2] For the purposes of this factum, the term "employees" is used broadly and includes all employees and former employees of MTS who participated in the Old Plan and their contingent beneficiaries.

[3] Although the Trial Judge purported to acknowledge that surplus could not be owned by employees, he remarkably found (in the same paragraph of the Reasons) that surplus "belonged" to the employees under the Old Plan. See paragraph 46 of the Reasons.

not an improper use of plan assets. Furthermore, as discussed below, even assuming contribution holidays could be an improper "use" of actuarial surplus, there was no evidence to support a finding that any "initial surplus" was actually used to take contribution holidays.

9. The Trial Judge also placed undue emphasis on the fact that the assets in the Old Plan transferred into the New Plan all arose from employee contributions. This fact, while acknowledged, is irrelevant as it relates to ongoing surplus in a pension plan. When an employee contributes to a pension plan, he or she parts with his or her money and in effect purchases with that money a set of obligations placed upon the employer. While in some cases employees may reclaim surplus *on wind-up* of a plan, the law is clear that absent a clear stipulation in the plan text, plan members have no interest in surplus in an ongoing plan regardless of who made the contributions. To hold otherwise is inconsistent with the nature of a defined benefit plan.

10. The Trial Judge also placed undue emphasis on the idea or notion that any surplus that existed as part of the transfer amount had some unique status at law because it came into the New Plan at its inception, as opposed to having arisen later under the New Plan. This distinction is irrelevant. Where the liabilities of a plan are not crystallized on

wind-up, surplus is no less actuarial surplus because it is transferred from one ongoing plan into another ongoing plan that assumes its liabilities.

11. By focusing unduly on surplus, the Trial Judge failed to appreciate that the employees received everything to which they were entitled, under the *CSSA*, the New Plan, and the MOA. They have continued to receive all of their promised benefits. MTS has ensured that the benefits have been funded as required by law and has contributed significantly more into the New Plan than the employees over the past decade.

12. In spite of all of these considerations, the Trial Judge awarded the plaintiffs a judgement of approximately $90 million. The legal basis for this liability is not apparent from the Reasons. The function of reasons is to explain to the losing party why that party lost. However, the Reasons do not accomplish this result. Under the *CSSA*, which is the legislation governing the Old Plan, the plaintiffs could never have expected such a judgment. It was admitted at trial (by the plaintiffs' witness Raymond Erb) that there existed no basis under the *CSSA* for the employees to compel any given use of surplus. The *CSSA* is silent on surplus and gives no rights to plan members to control the use of surplus, much less to receive a judgment for it. Inexplicably, the employees have now obtained such a judgment (under

the New Plan) and have obtained it, perversely, on the basis that they lost something they had under the plan constituted under the *CSSA*.

13. What entitles the plaintiffs to this, or any, judgment is not apparent. The *Reorg. Act* creates no cause of action for damages in favour of anyone. While the *Reorg. Act* obligated MTS to provide benefits in the New Plan that were equivalent in value on the implementation date to the pension benefits enjoyed under the Old Plan, it created no private-law civil remedy for breach of that section. Rather, it provided that, if the independent actuary appointed under the *Reorg. Act* determined that MTS had not provided for equivalent benefits, MTS was entitled under subsection 15(4) of the *Reorg. Act* to take any steps necessary to resolve the concerns of the independent actuary. Because of the Trial Judge's erroneous conclusion that he could substitute his decision for that of the independent actuary, MTS never had the opportunity to do so.

14. Even if one were to accept the plaintiffs' allegations that Fox's procedure was suspect, there is no basis in law to grant a damage remedy consequent on setting Fox's opinion aside. The Trial Judge appears to have found that through some combination of the *Reorg. Act,* the MOA and the statements made by Fraser, MTS promised the employees that they

would be able to enjoy benefit enhancements equal to the amount that became known as the "Initial Surplus".

15. If MTS's liability was predicated on the statements of Fraser, there is no explanation from the Trial Judge as to the precise interpretation and legal effect he gave to those statements. Indeed, MTS, for the purposes of this appeal, has to guess at the basis for any such legal effect, given that the statements could not at law amount to a contract and did not satisfy the test for any actionable misrepresentation.

16. The situation is no clearer with the Trial Judge's findings on the MOA. The Trial Judge's apparent finding that the MOA was breached was predicated on the importation into the MOA of obligations not expressed therein. MTS did exactly what it promised to do under the MOA. Yet according to the Trial Judge's interpretation of the MOA, there existed another promise to provide benefit enhancements equal to the value of the "Initial Surplus" notwithstanding that such a promise was not contained anywhere in the MOA.

17. Further, the Trial Judge's significant damage award (apparently for breach of the MOA, although this is not clear) does not take into account section 5 of the MOA, which required any disputes concerning the MOA to be resolved by the independent actuary. The employees had

ample opportunity, on seeing the New Plan text, to invoke section 5 of the MOA to seek redress. Yet they never invoked this right. Instead they sought, after several years, to obtain by litigation an unconditional ***entitlement*** to benefit enhancements that was never agreed to by MTS and to which the plaintiffs had no entitlement.

18. MTS, like any litigant, has a right to meaningful appellate review of these questionable findings, which are contrary to the governing agreements, plan texts and legislation. The opacity, and in some cases the incoherence, of the Reasons come perilously close to frustrating this right. MTS faces an immense liability as a result of the Trial Judge's decision, yet the Reasons do not answer even the most basic questions as to whether MTS was found liable in contract, tort or on the basis of some completely novel theory involving a perceived breach of a statute.

19. In structure, the Reasons are little more than a narrative articulating the Trial Judge's perspective on the evidence followed by statements of the remedies awarded. This approach is improper in any case. But it is especially improper in a pension case, given the complexity of pension law and the precedent the cases establish. To be credible, a decision in a pension case must do more than simply prefer one side of the story. The losing side, such as MTS, must be able to comprehend, as a

matter of law, why the plaintiffs' case was accepted over that of MTS. The Reasons fail utterly in this regard.

20. As explained below, the plaintiffs' case was groundless. It had no foundation in the law or in the jurisprudence. The Reasons, which comprise some 535 paragraphs, lack coherent reasoning and disclose no legal foundation for the judgment. There being no legal basis for the relief sought, this Honourable Court should allow the appeal, dismiss the claim and set aside the judgment, with costs.

FACTS

21. On January 1, 1997, the Government of Manitoba privatized MTS and continued it as a publicly traded company. Prior to privatization, MTS was a Crown corporation. Its employees and former employees were members of the Old Plan. **[AB, Tabs 1307 - 1317]**

22. As set out above, the Government implemented the privatization pursuant to the terms of the *Reorg. Act*. The issues in this appeal concern the interpretation of that legislation and whether MTS implemented the New Plan in accordance with the provisions of the *Reorg. Act* and provided employees with benefits that were equivalent on the implementation date of January 1, 1997. **[AB, Tab 1306]**

23. Because pension plans (and the transfer of employees and assets between plans) are central to this appeal, we first define basic pension terminology and funding concepts. Thereafter, we set out the most relevant sections of the *Reorg. Act* and then provide the material facts.

A) Pension Terminology

24. There are two main categories of pension plans. ***Defined benefit plans*** guarantee employees specific benefits on retirement. Under defined benefit plans the employer is usually responsible to make contributions which ensure that the plan can cover the expected future benefits that will be paid out to retiring employees. Actuaries are generally retained to estimate the contributions needed. Should the actuary determine that the funds in the plan are greater than the amount needed to cover future benefits, the plan is said to be in ***surplus.*** The Old Plan and the New Plan were both defined benefit plans.

25. If the plan is in surplus, and if the legislation and plan documents permit, the employer may take a ***contribution holiday***, whereby the employer's contribution obligations are reduced as a result of the fact that there are surplus monies in the fund at the precise moment of evaluation. Should the actuary determine that the plan has less money than

needed to cover future benefits, the plan is said to be in ***deficit.*** In such a case, the employer is required to make the necessary contributions to ensure that those benefit obligations are met.

***Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at paras. 10, 20, BofA TAB 2**

26. In this case, it is particularly important to define the two distinct uses of the term "surplus" that have been employed. The Trial Judge described the distinction as follows **[R.F.D., para. 135]**:

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

27. The confusion between the terms flows from a failure on the part of the Trial Judge to distinguish between the *meaning* of each term and the *role* each term plays in this case. The meaning of the two terms is clear. What is referred to in the first sentence of the above quotation as "initial surplus" (i.e. the difference between the Transfer Amount and 50% of the accrued liabilities transferred to the New Plan) may be called for ease of reference the "Initial Surplus". The "redefined" term (i.e. the

difference between the Transfer Amount[4] and the Pension Reserve paid into the New Plan by MTS) may be called the "Cash Differential".

28. When the *Reorg. Act* uses the term "surplus" as being part of the Transfer Amount it clearly means "Initial Surplus". The only reason that the concept of "Cash Differential" is relevant in this case is because, as the Trial Judge noted (and as is apparent from the Trial Judge's use of the term "*re*defined" in paragraph 135), the parties agreed among themselves that the amount of the surplus at issue would be *quantified* as being equal to the Cash Differential. This amount was referred to as the initial transfer excess in the New Plan text.

B) Pension Funding

29. The concept of funding is also important. The Trial Judge correctly adopted the following definitions provided by the defendants **[R.F.D., para. 24]**:

> a) Funding of Existing and Accrued benefit Entitlements
>
> This is a normal usage of the term and has associated with it the concepts of "fully funded", "underfunded" and "contribution holidays". It is also sometimes referred to as "pre-funding" because it refers to the payment into the pension plan of monies in advance of when they are required to be paid out. A fully-funded plan is one which has sufficient assets to pay now the present value of all

[4] The term "Transfer Amount" is defined in subsection 15(1) of the *Reorg. Act*. See paragraphs 61 and 62 of the factum below.

> accrued pension benefits to date for existing employees/retirees.
>
> ...
>
> c) Funding of Pension Benefit Payments When Due
>
> Here funding is used in the sense of making the pension benefit payments when they fall due. It refers to the time of actual payment of benefits to a member and is sometimes called "pay-as-you-go" funding.

C) The Provisions of the *Reorg. Act*

30. Subsection 15(2)(a) of the *Reorg. Act* is fundamental. The section sets out the benefits MTS was to provide under the New Plan.

> (a) the new plan ... 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 *CSSA*] or to which any other person has or would have become entitled under [the *CSSA*] by virtue of the death of an employee; [emphasis added]

31. Subsection 15(3) required an independent actuary to review the New Plan to ensure that its benefits were "equivalent in value", as required by subsection 15(2):

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

32. Subsection 15(4) required MTS to address any concerns raised by the independent actuary:

> 15(4) The ***corporation shall take any steps*** necessary to ***resolve*** any ***concerns raised by the independent actuary*** in a report prepared for the purposes of subsection (3). [emphasis added]

33. The transfer of assets and liabilities from the Old Plan to the New Plan is set out in subsections 15(5) and (7):

> 15(5) The transfer amount shall be determined and adjusted ... and shall be transferred from the fund to the trust fund under the new plan on or before the date prescribed in the regulations.
>
> 15(7) ***All liabilities of the fund*** to the persons described in clause (2)(a) and ***all rights and obligations*** of the fund under any related agreements are ***assigned to and assumed by the corporation and shall become liabilities, rights, and obligations of the trust fund under the new plan*** on the date of transfer of the transfer amount pursuant to subsection (5). [emphasis added]

34. Finally, subsection 15(11) addresses the effect of an agreement made November 7, 1996 ("MOA"), to be discussed further below:

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

D) Scheme of the Old Plan

35. The Old Plan was enacted by the Legislature of the Province of Manitoba in 1939. It was created to provide pension benefits for employees

of the Government and the Crown agencies. The Old Plan is registered for purposes of minimum pension standards under the *Pension Benefits Act* (Manitoba) C.C.S.M. e. P 32 **[AB, Tabs 1318 – 1324]** ("*PBA*"). It is also registered for tax purposes under the *Income Tax Act* (Canada) R.S.C. 1985 c. 1 **[AB, Tab 1326]** ("*ITA*").

(i) Funding of the Old Plan

36. Initially, the Old Plan was funded by employee contributions which were matched by the Government dollar for dollar. In 1961, an agreement was reached between the Government and the Manitoba Government Employees Association, whereby, in exchange for improved benefits, the Government was no longer required to "match" employee contributions. The Government discontinued matching funding and used the resulting accumulated revenue for other Government purposes.

37. Accordingly, from 1961 onward, rather than matching employee contributions, the Government was only required to pay its 50% contribution toward benefits on a "pay-as-you-go" basis, i.e. when benefits came due each month the Government would pay 50% of the pension benefits from general revenues. The pay-as-you-go funding was specifically mandated by the *CSSA*. The Old Plan was also exempted by regulation from the employer funding requirements under the PBA. Simply

put, after 1961 MTS (and most other employers under the *CSSA*) made no contributions to the plan on behalf of employees but rather paid 50% of the benefits at the time the benefits were actually paid.

38. Employees were required to contribute a percentage of their annual earnings to the Old Plan through regular payroll deduction. In exchange for their contributions, employees became entitled to receive benefits upon their termination of employment, retirement or death. The benefits are calculated in accordance with a formula based on the individual employee's earnings and length of service. **[AB, Tab 1307, s. 26]**

39. The critical distinction in funding between the Old Plan and the New Plan was that in the Old Plan employees were responsible for prefunding 50% of their pension benefits. In the event of a deficit on the employees' side the employees were liable to make up the deficiency. However, under the New Plan, MTS was solely responsible to fund any deficits that arose under the New Plan. The plaintiffs were well aware of this distinction in funding arrangement and the benefit they gained from this change. **[AB, Tab 462, para. 19, pp. 4013 – 4014]**

40. The *CSSA* prohibits the return of employee contributions, except in certain limited circumstances upon death or disability. **[AB, Tab 1307, s. 47]**

(ii) The Adjustment Account in the Old Plan

41. Of the contributions made by employees, 10.2% was allocated annually to a superannuation adjustment account (the "Adjustment Account"). The purpose of the Adjustment Account was to finance 50% of the annual cost-of-living allowance increases ("COLA increases") granted to employees as a result of increases to the Consumer Price Index ("CPI").

42. In recognition that COLA increases were increasingly costly to fund, the *CSSA* was amended in 1990 to prevent the granting of COLA increases in excess of 2/3 of the CPI increase for the year, unless the actuary of the Old Plan determined that the balance of the Adjustment Account would be sufficient to provide for full CPI increases for the following 20 years. This test, known as the "20-year pre-funding test", had not been met in any year prior to the trial.

43. Even with a target of 2/3 of CPI, the COLA increases under the Old Plan were not guaranteed. In fact, each COLA increase was subject to further reduction if the granting of the increase would result in an unfunded liability in the Adjustment Account. **[AB, Tab 1307, s.33(7), (7.1), (8)]**

(iii) Negotiation for Benefit Improvements

44. The *CSSA* was also amended in 1990 to codify the negotiation process for benefit improvements under the Old Plan. Any benefit improvements under the Old Plan were funded at least 50% by employees, and often times more. As the Trial Judge noted **[R.F.D., para. 49]**:

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

45. Notably, and despite the negotiation process, employees were not entitled to compel the Government to improve benefits, even if the Old Plan was in surplus.

(iv) Unfunded Liabilities of the Old Plan

46. An actuarial valuation report on the Old Plan was conducted at least triennially. A separate actuarial valuation report on the Adjustment Account was conducted annually. These reports disclosed a significant increase in the unfunded liabilities of the Adjustment Account in the years leading up to the privatization. **[AB, Tab 228, pp. 1739, 1742]; [AB, Tab 1351, pp. 10118, 10121]; [AB, Tab 1339, pp. 9974 - 9975]**

(v) The Pension Reserve

47. On its own initiative, and because of the increasing unfunded liability, MTS decided in 1987 to create a pension reserve (the "Pension Reserve") within its corporate assets to recognize its pension obligations under the Old Plan. Each year, MTS would set aside assets in the Pension Reserve for benefits accruing, as calculated by an actuary.

(vi) The Term "Pension Benefits"

48. The term "pension benefits" is not defined under the *Reorg. Act.* Rather, the term is defined in the *CSSA*, which is understandable given the fact that the *CSSA* constitutes the "plan text" for the Old Plan.[5] Under the *CSSA*, the term is defined as follows:

> "pension benefit" means the aggregate monthly or other periodic payments of superannuation allowance to which an employee is or may become entitled under this Act upon retirement or to which any other person is entitled under this Act by virtue of the death of the employee after his retirement;

49. Other Canadian pension legislation defines "pension benefits" in a similar and consistent manner. This legislation is as follows:

The *PBA* (Manitoba):

> "pension benefit" means the aggregate annual, monthly or other periodic amounts to which an

[5] See paragraph 12 of the Reasons.

> employee is or will become entitled upon retirement or to which any other person is entitled under a pension plan by virtue of the death of the employee after his retirement; **[AB, Tab 1318, p. 9617]**

The *Teachers' Pensions Act* (Manitoba):

> "pension benefit" means the aggregate monthly or other periodic amounts to which a teacher is or will become entitled under this Act upon retirement or to which any other person is entitled by virtue of the death of the teacher after his retirement;
>
> **[BofA, TAB 3]**

PBSA (Canada):

> "pension benefit" means a periodic amount to which, under the terms of a pension plan, a member or former member, or the spouse, other beneficiary or estate of a member or former member, is or may become entitled. **[AB, Tab 1325, p. 9689]**

E) Passage of the *Reorg. Act*

(i) The Employees' Concerns

50. During consideration of the *Reorg. Act* in Bill form in 1996, the plaintiffs and their representatives expressed various concerns to the Government and MTS about the proposed transfer of their pensions to a private sector employer. A group of interested employees and pensioners formed a committee known as the Employee Retiree Pension Committee ("ERPC") to lobby the Government on their behalf.

51. The plaintiffs and their representatives arranged to meet with Fraser on July 16, 1996. An ERPC representative, Kenneth Beatty

("Beatty"), sent a letter to Fraser in advance of the meeting to set out the group's concerns. Following the meeting, Beatty sent a second letter (the "Second Letter") to Fraser summarizing the information provided at the meeting.

52. The Second Letter set out what it referred to as "employees' principles", including the following two principles **[R.F.D., para. 68; AB, Tab 292, p. 2365]**:

> 1. The transfer amount estimated between 350 Million Dollars to 400 Million Dollars is the employees' money, having arisen out of the employees' contribution to the Civil Service Superannuation Fund or out of their share of the surplus in the said Fund.
>
> 2. Neither the Province of Manitoba nor MTS has any right to the "transfer amount".

53. Of particular concern to the employees was the "Initial Surplus" portion of that transfer amount. Beatty sent a further letter dated August 6, 1996 **[AB, Tab 299]** in which he raised a number of questions, including the following:

> "QUESTION 5
>
> ....
>
> b) Will the employees' "surplus portion" of the transfer amount be used to enhance the employees' share of the benefit improvements?
>
> c) Will the employees "surplus portion" of the transfer amount be used to reduce the employer's cost to the plan?"

54. Fraser responded by letter dated August 27, 1996 **[AB, Tab 313]** as follows:

> "Question 5...
>
> (b) and (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]

55. Fraser repeated this statement in a letter to plaintiffs' counsel, Brian Meronek ("Meronek") dated October 23, 1996 **[AB, Tab 383]**:

> You have expressed a concern that any surplus accumulated as a result of employees' contributions to the CSSF may be used to "***finance MTS' 50% share of the benefits already accrued***". As I stated in my August 27, 1996 letter, the surplus will not be used to reduce MTS' cost of, and share of contributions to, the new pension plan. [emphasis added]

56. On October 31, 1996, Meronek, on behalf of ERPC, made a presentation to the legislative committee considering Bill 67 (the *Reorg. Act*) **[AB, Tab 409]**. The next day, a petition from Old Plan members was presented to the Legislature. Glen Findlay, the Minister responsible for MTS ("Findlay"), asked Fraser for an update on various pension issues. In response, Fraser sent a memorandum dated November 6, 1996 **[AB, Tab 434]**. The memorandum reiterated the statement given to Meronek on October 23, 1996:

> MTS has undertaken that any such surplus will not be used ***to reduce MTS's cost or share of contributions to the new pension plan***. This information was communicated by letter to Mr. Brian Meronek on October 23, 1996. [emphasis added]

(ii) The MOA

57. On November 7, 1996, Government representatives convened a meeting to reach agreement on the plaintiffs' outstanding concerns. The plaintiffs, MTS and the Government subsequently signed the MOA on November 7, 1996. **[AB, Tab 440]**

58. Paragraph 3 of the MOA, referred to by the Trial Judge as "the most controversial and contested provision"[6], set out the parties' agreement with respect to the "Initial Surplus":

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

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[6] See para 153 of the Reasons.

59. As can be seen from the text of the MOA, MTS agreed to place the "Initial Surplus" into the new pension plan trust fund discussed below to fund future cost of living adjustments. This is precisely what was done with those monies.

60. Section 5 of the MOA provided a clear remedy in the event of any dispute:

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

61. Once the MOA was signed, the Bill incorporating the *Reorg. Act* was amended to recognize the MOA (subsection 15(11)). The Bill was also amended to provide for an independent actuarial review to verify that the New Plan would provide benefits of equivalent value (subsection 15(3)), and to provide that MTS was to be responsible for resolving any concerns (subsection 15(4)). **[AB, Tab 1306, s. 15(3)]**

F) Scheme of The New Plan

62. MTS established the New Plan effective as of the implementation date, January 1, 1997. In accordance with subsection 15(5) of the *Reorg. Act*, all liabilities of the Old Plan for employees were assigned to and assumed by MTS and became liabilities of the New Plan. This

transfer of liabilities was contingent upon the transfer of the Transfer Amount from the Old Plan to the New Plan.

63. The "Transfer Amount" was defined in subsection 15(1) of the *Reorg. Act* as a proportionate share of the assets of the Old Plan "including any surplus", as of the implementation date, based on the liabilities of the CSSF for benefits accrued or payable to employees relative to the total liabilities of the CSSF to all Old Plan beneficiaries. This amounted to approximately 21.5% of the assets of the CSSF. An amount of approximately $424 million was transferred from the CSSF to the New Plan. **[AB, Tab 947, p. 6106]**

64. MTS was also required by the Regulations under the *Reorg. Act* to make an initial contribution to the New Plan. MTS transferred the entire value of its Pension Reserve, approximately $383 million, to the New Plan in early 1997. **[AB, Tab 947, p. 6106]**

65. The plaintiff's and MTS ultimately agreed that the "Initial Surplus" on creation of the New Plan was $43.343 million. **[R.F.D., para. 135]**

66. As contemplated by the *Reorg. Act*, the New Plan was drafted to comply with the *Pension Benefits Standards Act, 1985* (Canada)

("*PBSA*") since the MTS employees would come within federal jurisdiction upon privatization. The New Plan is registered under both the *PBSA* and the *ITA*. **[AB, Tab 711]**

67. MTS replicated the formula benefits of the Old Plan as closely as possible in the New Plan, within the limits of the *PBSA*. As the Trial Judge noted on several occasions, ***there was no dispute that the benefits under the New Plan payable upon termination, retirement and death were the same as under the Old Plan on the implementation date***, and that the employees' contributions did not change **[R.F.D., paras. 393, 510]**:

> [***the employees] always acknowledged that the benefits payable on retirement, death, or other termination of employment were the same under each plan.***
>
> ...
>
> The concerns which were being voiced by the employees/retirees were several but what is clear is that the actual benefits to be provided by the New Plan was not one of them. ***Relatively early in the privatization process the employees' retirees satisfied themselves that the New Plan would produce the same pension benefits as had the Old Plan and that the costs to the employees for those benefits would remain unchanged.*** [emphasis added]

68. In fact, in some respects, the benefits provided under the New Plan were better. For example, as promised under the MOA, the New Plan provided for guaranteed COLA increases of 2/3 of CPI to a maximum of

4%. It also provided for COLA increases in any lump sum payments upon termination, a benefit which was not provided under the Old Plan.

(i) The Adjustment Account in the New Plan

69. In order to replicate the Adjustment Account under the Old Plan, MTS created a similar account under the New Plan ("MTS Adjustment Account") to fund the COLA increases. MTS included a 20 year pre-funding rule identical to the one that existed in the Old Plan. **[AB, Tab 711, s. 15(4)]**

70. The $43 million "Initial Surplus" was credited to the MTS Adjustment Account in accordance with section 3 of the MOA, together with matching amounts of employee and employer contributions, for an initial total of $105 million. **[AB, Tab 711, s. 16.7(c)]; [AB, Tab 923, p. 5955]**

71. Since Revenue Canada (as it was then known) would not permit MTS to segregate the MTS Adjustment Account from the other assets of the New Plan, it was established as a notional account. Actuarial valuations of the MTS Adjustment Account were conducted annually. These valuations indicate that, as of January 1, 2008, pensioners had received approximately $74.2 million in COLA increases since the inception of the New Plan. Once adjustments for employer and employee

contributions, payments, and investment returns of the MTS Adjustment Account are taken into account for that 11 year period from the implementation date, an amount well in excess of the $43 million "Initial Surplus" has been paid for COLA increases under the New Plan. **[AB, Tab 1356, p. 10183]**

72. John Corp ("Corp"), an actuary called by the plaintiffs as part of their case, acknowledged that the $43 million "Initial Surplus" was to go into the MTS Adjustment Account to fund the minimum COLA payment and that the COLA account was subject to the 20 year pre-funding rule. **[Direct Examination of Corp, September 11, 2008, pp. 24 – 25] [Cross-Examination of Corp, September 11, 2008, p. 7]**

73. The 20 year pre-funding provision of the New Plan was identical to the Old Plan and was included in the draft plan texts that were provided to the plaintiffs for review in November and December, 1996. The plaintiffs did not comment or raise any concerns regarding the 20 year pre-funding rule. This was confirmed by the lead witness for the plaintiffs, Harry Restall, Chair of the ERPC ("Restall") **[Cross-Examination of Restall, June 4, 2008, p. 33]**:

> Q All right. And having seen the, the plan text, sir, on and after November 11, you didn't raise, at any time, that the

> 20-year pre-funding was something that was inappropriate?
>
> A No.
>
> Q No.
>
> A. Not at that time.
>
> Q No. And to your knowledge, your actuary, Mr. Ellement or any of the other plaintiff unions or retirees didn't raise?
>
> A. Not that I know of.

74. The plaintiffs also did not comment, or raise concerns, regarding the 20 year pre-funding rule, throughout 1997 and 1998. Only much later did they claim that MTS had breached the MOA because the "Initial Surplus" had been allocated to the MTS Adjustment Account. The Trial Judge agreed with the plaintiffs that "Initial Surplus" should not have been so allocated but should have been used for benefit improvements instead **[R.F.D., para. 483]**:

> Even though the employees/retirees agreed the initial surplus could be transferred to the COLA account in the New Plan, they were entitled to have those funds used to enhance employee benefits. They were not aware nor did they agree to the initial surplus being used to increase the value of the COLA account so as to bring it closer to the 20 year pre-funding requirement as that concept was never discussed.

75. The plaintiffs' actuary, Louis Ellement ("Ellement"), admitted in cross-examination that the plaintiffs based their expectations regarding the MOA on what MTS had the ability to do, not what it was obligated to do:

> Q Are we talking about whether MTS had the ability to do something under the plan, or are we talking about whether MTS was obliged under the memorandum of agreement to do something in that regard?
>
> A Well, the answer, I think, to both is yes. Yes and yes. They weren't obliged to do it, but they had the ability to do it.
>
> Q All right. ***So you agree then, on your interpretation of the MOA, there was no obligation on MTS to do these things, but you say they had the ability to do them?***
>
> A ***Yes***.
>
> [emphasis added] **[Cross-Examination of Ellement, September 22, 2008, pp. 96-97]**

76. Ellement's "interpretation" of the MOA, upon which the allegations in the Fresh-As-Amended Statement of Claim are based, was not arrived at until years after the MOA was signed and a year after the original Statement of Claim was issued. In cross-examination, he admitted that the interpretation of the MOA on which the plaintiffs' claim is now based came to him in an "epiphany":

> Q You can't recall. By your own admission -- and I'm using your words, sir -- ***you had to review the MOA -- this document -- many times to come up with the interpretation?*** That's the words you used?
>
> A ***Yes***.
>
> Q ***All right. How many times we talking about, sir; half a dozen? Twenty? Forty?***
>
> A Are you finished, or do ...
>
> Q Well, I can keep on --
>
> A I'd say --

Q -- but let's ...

A ***I would say probably half a dozen times.***

Q All right.

THE COURT: How many?

THE WITNESS: Half a dozen.

BY MR. OLSON:

Q ***And when did you arrive at the interpretation after reviewing it half a dozen times, sir?***

A I would say would be well into, probably into '99, some -- nineteen -- in the year 1999, 2000.

Q All right. So that's some -- and I want to be fair to you -- over two years and something, perhaps just less than three, or three-ish?

A ***Yeah, two to three years, yeah.***

Q It took you to develop your interpretation of what this document meant?

A Yes.

The one, one thing that was always clear to me was that the -- and I said it before -- was that the initial employee surplus was to be used as a, a special reserve to improve benefits beyond what was already there.

Q What we know is that you apparently hadn't come up with these interpretations at the time the statement of claim was issued, is that fair?

A What, what was the date of the statement of claim?

Q It was, I believe, September of '99; September 20 of '99.

A I can't recall. I don't, I don't -- there was, there's several versions of that claim. There's a -- I think it's up to re-re-re-amended statement of claim, so

I ...

Q Ms. Troup will give you a copy, sir. I don't see any reference to a claim being advanced for what you say is the proper interpretation of the November 7 MOA.

A Yes.

Q Is that correct?

A Yes.

Q ***So it was sometime, would it be fair to say, sometime after the statement of claim was issued in September of '99 you had, what, an epiphany, and it came to you what it meant?***

A ***I, it was sometime in a, in a, in around that time and it would appear to be after the, that date that the understanding, a full understanding came to me.***

Q I see. And that understanding, as I understand it, sir -- and please correct me if I'm wrong -- that one component of your understanding is that the 43 million, roughly, excess was to be placed in the adjustment account but it was to be above -- if I can put it that way --

A Yes.

Q -- the guarantee?

A Yes.

Q And what, it was --

THE COURT: Sorry? And it was to be what?

MR. OLSON: Above the guarantee, that is, not to be used for any funding of surplus until you got above the two-thirds of four percent, as I understand Mr.

Ellement's --

THE WITNESS: Yeah. It was not to be used to, to pay for the two-thirds of four.

[emphasis added] **[Cross-Examination of Ellement, September 22, 2008, pp. 83-85]**

77. Further, Ellement was not at the November 7, 1996, meeting when the MOA was signed nor was he consulted prior to his principals executing the document. **[Cross-Examination of Ellement, September 22, 2008, p. 81]**

(ii) Funding of the New Plan

78. The main difference between the Old Plan and the New Plan is that, pursuant to the *PBSA*, MTS is required to fund the New Plan in accordance with the recommendations of its actuary in order to meet both going concern and solvency funding requirements. The plaintiffs were aware of the change in the funding arrangement. **[AB, Tab 462, para. 19, pp. 4013 – 4014]** The initial actuarial valuation report for the New Plan indicated that it had a going concern unfunded liability. In the years following, with the generation of significant investment income, the New Plan was in a surplus position that allowed it to take "contribution holidays" by applying surplus to cover its current service costs. However, as the Trial Judge specifically noted, this has been more than offset by the deficits that MTS has had to fund since then:

> The last several years have proved that the cost to MTS is significantly greater than it would have been under the Old Plan. As well, their financial contribution in recent years has greatly exceeded that of the employees. While this fact does not bear on whether or not the plans were equivalent

> in value on the implementation date, it underlines the fact that the guaranteed benefits including annual COLA which the retirees receive annually are funded disproportionately by MTS in harsh economic times. [para. 305]

79. In fact, excluding the Pension Reserve that was contributed as of the implementation date, MTS had contributed more than $224 million to the New Plan between 1997 and 2007. These contributions by MTS exceeded the employees' contributions by more than $120.75 million during that same time period. **[AB, Tab 1376, p. 10524]**

80. Despite MTS' funding challenges of recent years, the employees and former employees of MTS and their beneficiaries have received payment from the New Plan of all benefits to which they were entitled or have since become entitled to receive, not only in respect of their period of membership in the Old Plan, but also, in respect of their period of membership in the New Plan. They have also received their guaranteed annual cost-of-living increases.

(iii) Independent Actuarial Review of the New Plan

81. Immediately following passage of the Bill in its amended form, the Provincial Auditor appointed an independent actuary, Fox, to carry out the review of the New Plan contemplated by subsection 15(3) of the *Reorg. Act*.

82. Following consultations with MTS and representatives of the plaintiffs, Fox produced a draft report dated February 18, 1997 **[AB, Tab 806]** in which he concluded that the benefits of the New Plan, as of the implementation date, would not be equivalent in value to those of the Old Plan. At the request of the Provincial Auditor, Fox provided a copy of the draft report to him. Without Fox's knowledge or authorization, the Provincial Auditor forwarded the draft report to MTS. **[R.F.D., paras. 276, 278]**

83. On March 5, 1997, Fox issued his final report ("Fox's opinion") **[AB, Tab 840]**. Fox determined that the value of the benefits provided under the New Plan were "at least equivalent in value" to the pension benefits provided under the Old Plan based on certain assumptions set out in his report. [para. 293]

84. The plaintiffs filed the Original Claim in relation to this matter on September 21, 1999. It sought various declaratory and injunctive relief in relation to the *Reorg. Act* and the operation of the New Plan focusing on the defendants having taken contribution holidays in 1998 and 1999 without prior approval of the plaintiffs. The claim was subject to a number of amendments over the following years which changed not only the nature of the plaintiffs' claims, but the nature of the relief sought as well. In particular, the Amended Statement of Claim filed on June 16, 2000, for the first time

raised an issue with respect to the alleged breach of the MOA and alleged "Undertakings" that were given to the plaintiffs by the defendants. **[AB, Tabs 1392, 1394, 1395, 1396, 1398, 1400]**

85. The Trial Judge declared that Fox's opinion was "invalid and of no force and effect" due to the process that had been followed in the preparation of the report.

86. In light of his finding that Fox's opinion was invalid, the Trial Judge concluded that it would be "in the best interests of all concerned to substitute my decision for the opinion of Fox...". **[R.F.D., para. 459]**

87. With respect to the issue of "Initial Surplus", the Trial Judge concluded as follows:

> Under the Old Plan, the funds representing the initial surplus would have been utilized for the benefit of retirees.... 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. [para. 518]

88. The Trial Judge dismissed the plaintiffs' claim with respect to control over ongoing surplus and governance.

ISSUES

A) Did Bryk J. misapprehend pension law in Canada and the nature of actuarial surplus?

B) Did Bryk J. misapprehend MTS's funding obligations under the New Plan?

C) Did Bryk J. err in his interpretation of the *Reorg. Act*?

D) Did Bryk J. err in his interpretation of the MOA?

E) Did Bryk J. err in his approach to the Undertaking?

F) Did Bryk J. err in his approach to damages?

G) Did Bryk J. err in substituting his own decision for the decision of the Independent Actuary?

H) Did Bryk J. err in his selection of the appropriate remedy for any breach that he found?

STANDARD OF JUDICIAL REVIEW

89. On the following pages MTS sets forth a series of issues arising from the decision of the Trial Judge. The standard of review applicable to each issue is as follows:

A) Whether the Trial Judge misapprehended the pension law in Canada: The nature of actuarial surplus is a question of law, and the standard is correctness.

B) Whether the Trial Judge misapprehended MTS's funding obligations under the New Plan, and in particular, whether the taking of a contribution holiday constituted an improper use of surplus. This is a question of law, and the standard is correctness.

C) Whether the Trial Judge erred in his interpretation of the *Reorg. Act* raises a question of law as to the interpretation of words used in a statute: The standard of review is correctness. In particular, a question arises whether the Trial Judge erred in accepting the interpretation of the words in the statute as suggested by the witnesses Praznik and Levy: Again, the standard is correctness.

D) Whether the Trial Judge erred in his interpretation of the MOA, which raises questions of law, and whether his view was coloured by

employee expectations. The standard of review is that of correctness. Whether the Trial Judge erred in failing to give the words used in the MOA their plain and ordinary meaning is also a question of law and the standard is correctness.

E) Whether the Trial Judge erred in his interpretation of the "Undertaking" raises questions of law as to the proper approach in interpretation of documents. The standard of review is correctness. Further, whether the Trial Judge erred in finding the document to have created enforceable legal obligations is a question of law, and the standard is correctness.

F) Whether the Trial Judge erred in his approach to damages raises questions of law, and the standard is correctness.

G) Whether the Trial Judge erred in substituting his own decision for that of the Independent Actuary raises questions of law as to the remedies on judicial review. The standard of review is correctness.

H) Whether the Trial Judge erred in creating a money judgment by way of declaratory relief in a matter of judicial review, in face of a specific remedy contained in legislation. This raises questions of law and the standard is correctness.

ARGUMENT

A) Did Bryk J. misapprehend pension law in Canada and the nature of actuarial surplus?

(i) Overview

90. The Trial Judge's disposition of this case depends upon his finding that there existed an identifiable surplus that "belonged" to the employees. This finding is wrong in law. To the extent this case concerns surplus at all, it concerns actuarial surplus. Actuarial surplus only exists on paper and cannot "belong" to anyone.

91. By effectively treating the initial surplus as if it were a "bag of money", the Trial Judge disregarded well-settled pension law jurisprudence (including jurisprudence from the Supreme Court of Canada) as to the nature of surplus. His Lordship also disregarded the text of the *CSSA*, the *Reorg. Act* and the MOA.

92. The Trial Judge's errors can be summarized as follows:

a) first, actuarial surplus (such as that existing in the CSSF), exists only on paper and cannot be "owned" by employees (nor, indeed, by anyone), while a plan is in operation; and

b) second, even if actuarial surplus were an asset capable of being "owned", which it is not, the employees' theory that they

owned the "Initial Surplus" and were *entitled* to control it, finds no support in the *CSSA* or the law.

(ii) The Trial Judge's Reasons

93. The Trial Judge's reasons, while lengthy, provide little foundation for many of His Lordship's most important conclusions. It is apparent that the Trial Judge accepted the plaintiffs' theory that the "Initial Surplus" coming into the New Plan from the CSSF was an "identifiable" asset belonging to the employees. At para. 313 of his Reasons, His Lordship found that **[R.F.D., para. 313]**:

> "if there is one fact which the plaintiffs have established beyond all doubt, it is that as of the date of implementation of the New Plan, there was an identifiable and calculable employee surplus paid in."

94. MTS does not dispute that the "Initial Surplus", as contemplated by the definition of "transfer amount" in subsection 15(1) of the *Reorg. Act*, contained assets which had been contributed by the employees. However, MTS disputes the Trial Judge's finding as to what flows from that fact. The fact that the employees contributed money to the Plan does not justify the Trial Judge's conclusion that they therefore possessed an entitlement to control its use. Indeed, the New Plan, like the *CSSA* before it, gave the employees no such entitlement.

95. The Trial Judge's reasons also contain several conclusory statements concerning the "intention" of the parties. By example, His Lordship finds:

a) "It was clear to all that the surplus belonged to the employees/retirees" **[R.F.D., para. 46]**;

b) "I am satisfied the initial surplus as of the implementation date was intended to be used exclusively for the same purposes as it had under the Old Plan" **[R.F.D., para. 315]**;

c) "Because of the unique nature of the Old Plan, assets were a direct result of employee contributions and thus surpluses were readily identifiable. I am satisfied on the evidence that entitlement to the utilization of that surplus was never in issue" **[R.F.D., para. 466]**;

d) "I therefore conclude the initial surplus was intended to be used solely for the purpose of enhancing pension benefits as it had under the Old Plan" **[R.F.D., para. 483]**; and

e) "Having determined that the employees/retirees are to be reimbursed *their* initial surplus. . . " **[R.F.D., para. 519]**

96. The Trial Judge offered these statements in support of his conclusion that the "Initial Surplus" "belonged" to the employees and that they were entitled to use it to have their benefits increased. The Trial Judge imposed a liability on MTS that will likely exceed $90 million based, in large part, on these conclusions. Yet, His Lordship provides no guidance as to how generic intentions or expectations are enforceable at law, or indeed even justiciable.

(iii) Jurisprudence Concerning Actuarial Surplus

97. Further, the Trial Judge's conclusions about surplus cannot be reconciled with Canadian pension law jurisprudence as to the nature of surplus and the nature of employees' interest in surplus when a pension plan is ongoing as in the present case.

98. The leading case is the 1994 decision of the Supreme Court of Canada in *Schmidt v. Air Products*, which squarely considered the nature of a plan member's interest in surplus when a plan is ongoing. Even where plan members have a specific entitlement to receive surplus assets on dissolution, the Supreme Court makes it clear that they have no interest in surplus while the plan is ongoing:

> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. **Neither the employer nor the employees have a specific interest in this**

> **amount, since it only exists on paper**, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [emphasis added]

***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R.611 at para. 89, BofA TAB 4**

***Bower v. Cominco Ltd.*, 2003 BCCA 537 at paras. 97-100, BofA TAB 5**

99. Subsequent jurisprudence confirms that, in an ongoing plan (as opposed to one that is being wound up or partially wound up), actuarial surplus forms no part of the plan members' entitlement. In *Potter v. Bank of Canada*, in fact, the Ontario Court of Appeal struck as untenable at law a claim by employees that they were entitled to damages resulting from the employer's alleged improper payment of plan expenses from a trust fund:

> "... the claim for direct payments would give the class members more than they are entitled to receive from the Plan. **Since the Plan is ongoing, their entitlement as beneficiaries is to receive the defined benefits provided in the Plan. They can claim no more.** See *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 654." [emphasis added]

***Potter v. Bank of Canada*, 2007 ONCA 234 at para. 23, BofA TAB 6**

100. A plan is "ongoing" for the purpose of ascertaining entitlement to surplus so long as the employees continue to receive their promised benefits and so long as the plan is not wound up. Surplus crystallizes in a defined benefit plan when the plan winds up. Only then does an actual

surplus, that is capable of belonging to anyone, exist. As the Québec Court of Appeal notes in *Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec:*

> ... during the life of the plan the retirees cannot claim an entitlement to an increase in pension benefits because of the existence of a surplus. **For a right to demand a part of the surplus to exist, winding-up must take place, either in full or, if the applicable act so provides, in part.** [emphasis added]
>
> ***Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec,* 2005 QCCA 304 at para. 75, BofA TAB 7**

See also *Bower v. Cominco Ltd.*, 2003 BCCA 537 at para. 100, BofA TAB 5

101. These principles are well established and have been accepted by the Supreme Court of Canada. In *Buschau v. Rogers Communications Inc.*, Deschamps J. held as follows:

> Before termination of a plan, **a surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them.** A pension surplus can be used to justify a contribution holiday if this is permitted by the plan, but the surplus can also disappear if investment earnings are lower than anticipated. **Since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. As the Court said in Schmidt, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654)...** [emphasis added]
>
> ***Buschau v. Rogers Communications Inc.*, 2006 SCC 28, at para. 17, BofA TAB 8**

***Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, at paras. 71, 107, BofA TAB 2**

102. In this case, it would have been possible for the Province to have accomplished a partial wind-up of the Old Plan that would have crystallized the liabilities of the Old Plan. Then the actuarial surplus would have become an actual surplus to which the employees may possibly have become entitled. But the Province did not take this course of action. Subsection 15(7) of the *Reorg. Act* provides that MTS would assume the liabilities of the CSSF in relation to the MTS employees. Nothing therefore crystallized when the New Plan was created and the "Initial Surplus" was transferred.

103. Because surplus is only an actuarial concept, it does not make any sense to treat surplus as a "bag of money" that can belong to anyone. Rather than being a ***thing***, actuarial surplus is a ***circumstance*** in which an ongoing plan finds itself at a specific point in time. Actuarial surplus fluctuates with the financial markets. A surplus on one day could well be a deficit days later. For this reason, the case law makes clear that plan members do not have any rights in this ephemeral circumstance until the Plan's liabilities have crystallized. And even then, as *Schmidt* makes clear, employees only have such an entitlement if the plan or trust documentation gives the employees the right to surplus on wind-up.

***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at para. 89, BofA TAB 4**

104. In this case, the Plan's liabilities did not crystallize through wind-up or otherwise. There is no provision in the *Reorg. Act*, or elsewhere, for a partial wind-up of the CSSF. Indeed, the option of terminating the employees' involvement in the CSSF and then re-establishing a pension Plan in MTS was considered but not pursued. **[Towers Perrin Report, AB, Tab 256, pp. 1946 - 1953]; [Letter from John Corp to Mel Myers, July 12, 1996, AB Tab 285]**

105. The MTS Plan is accordingly an ongoing Plan. The case law concerning employee rights to actuarial surplus in an ongoing plan, or more particularly the lack of such rights, should have mandated the result in this case. Yet, the Trial Judge did not cite, or ever refer to, a single pension law case concerning surplus. The Trial Judge's decision is contrary to the well-established jurisprudence and should be set aside for this reason alone.

(iv) Untenable Distinction Between Initial and Ongoing Surplus

106. Because there was no partial wind-up of the Old Plan, it is difficult to understand the Trial Judge's distinction between any Initial Surplus that may have existed at the inception of the New Plan and ongoing surpluses in the New Plan. In purporting to interpret the MOA, the

Trial Judge distinguished between initial and ongoing surpluses in assessing employee entitlements **[R.F.D., paras. 506-507, 526-528]**:

> Ultimately, MTS determines whether surpluses, if and when they exist, are to be used to enhance pension benefits or for other purposes such as contribution holidays. As they are solely responsible for unfunded liabilities, it seems reasonable they should have ultimate control over the use of ongoing surplus. In fact, Restall and others on behalf of the employees/retirees agreed that was not an unreasonable position for MTS to take.
>
> This arrangement does not create an inequality in benefits in favour of MTS. ***The benefit of its exclusive control over ongoing surpluses is offset by its sole responsibility for ongoing liabilities***.
>
> . . .
>
> . . . [T]he concept that the employees/retirees should have entitlement to surpluses created by their contributions without the obligation to contribute their share to liabilities is, in my view, inequitable and unfair. In other words, the quid pro quo for the employer being responsible for all unfunded liabilities was the opportunity to utilize surpluses by taking contribution holidays such as occurred during the first few years following the implementation of the New Plan.
>
> The fairness of that concept was agreed to by witnesses including Restall, who testified on behalf of the plaintiffs. I agree. There is an inherent unfairness in an arrangement which requires one party to be responsible for unfunded liabilities but enables both parties to share in the surpluses.
>
> The fact that the Old and New Plans were fundamentally different in respect of funding persuades me that ***the employees/retirees could not realistically expect to enjoy the same arrangement in relation to sharing ongoing surplus.*** Having said that, the pre-condition would be that both sides contributed equally at the

> inception of the plan. That did not happen. [emphasis added]

107. The Trial Judge does not explain how any initial difference between the contributions by "both sides" is material to the question of whether the employees should have control over any "Initial Surplus" paid into the New Plan. The Trial Judge did not appreciate that the rationale for his treatment of ongoing surplus applies with equal force to any "Initial Surplus". Under the Old Plan, because the employees did not have the benefit of any Government guarantee to cover the employees' 50% liability for the payment of Plan benefits, the employees bore all of the risks associated with any use of surplus they might choose to make. Once a benefit in a Plan is improved, the benefit becomes a liability of the Plan regardless of whether the assets used to fund it are still there. Under the Old Plan, if the employees were able to achieve the implementation of a certain benefit improvement funded with surplus on a certain day, they were exposed 100% to the risk of a market correction occurring later that could diminish the value of the assets already allocated to fund that benefit.

108. Under the New Plan, however, MTS, *not* the employees, bears 100% of the downside risk of any benefit improvement.[7] Giving the

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[7] As will be discussed below, the Trial Judge's misunderstanding is acute in his dismissive treatment at paras 127 and 128 of Fraser's evidence when Fraser made precisely this point in his testimony.

employees the *right* to spend surplus simply because that surplus happened to have been ascertained as of an arbitrary moment in time gives them something they never had under the Old Plan, namely, the right to benefit enhancements the funding for which is 100% hedged by someone else. On the Trial Judge's own reasoning, therefore, the distinction between initial and ongoing surplus is untenable and irrelevant.

(v) The Fallacy of the Plaintiffs' Position

109. Without any guidance from the case law, the Trial Judge found that the employees had an ***entitlement*** to the actuarial surplus and to be compensated if the surplus was not employed in accordance with the plaintiffs' wishes. The core of the Trial Judge's reasoning on this point is summarized as follows **[R.F.D., para. 46]**:

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

110. The Trial Judge does not identify an evidentiary basis for his conclusion that there was a common belief that the surplus "belonged" to the employees. Even if there were such a common belief, the Trial Judge provides no indication of how such a "belief" could, as a matter of law, become an enforceable right. As a matter of law, the mere fact that an employee contributes assets to a pension plan does not create any special right to control that money. Both the *Kerry* and *Schmidt* cases, which are the leading cases on contribution holidays and surplus entitlement, involved contributory plans, yet neither case makes any relevant distinction whatsoever between employer and employee money.[8] Once the money goes into the Plan, entitlements to it are governed by the Plan texts, without regard to who paid the money in.

***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, BofA TAB 4**

***Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, 107, BofA TAB 2**

111. With that in mind, neither the *CSSA*, nor the *Reorg. Act*, say anything about the surplus "belonging" to the employees, much less about what such an expression might mean. The only time the *Reorg. Act* even mentions surplus is in the definition of "transfer amount" in subsection

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[8] *Schmidt* considers the question of whether there may be a resulting trust in relation to employee contributions, but such a trust could only ever come into existence if the New Plan were terminated with all of its liabilities being satisfied. Even on termination, any argument for a resulting trust for employee contributions made under the *CSSA* would have to contend with section 47 of the *CSSA*, which precludes a refund of any employee contributions except as specifically provided for under the *CSSA*.

15(1). As to the *CSSA*, it is telling that Ellement, the retirees' actuary, acknowledged that nothing in the *CSSA* said anything about surplus, much less anything about surplus being an asset that could be spent by the employees. **[Cross-Examination of Ellement, Sept 22, p. 77]**

> Q And I believe you acknowledged this earlier, sir, that under the *CSSA* there is no provision that deals with the handling of surplus?
>
> A I did acknowledge that?
>
> Q I'm asking.
>
> A No, I, I, I -- there may not be specific words in the act that say this is what you do with surplus, but there is a process and protocol that's been in place for decades and exists to this day for dealing with surplus.
>
> Q I know there's been a practice followed, sir. I asked you whether there is something in the act, to your knowledge, that deals with how surplus is to be treated.
>
> A Not that I'm aware, but it goes without saying they have a definite – they have a, the liaison committee's in the act, the advisory committee's in the act, and they meet, they have minutes, they discuss, and that's my answer.

112. It is also worth observing that, while people use terms like "belong" in the popular sense, the law understands rights of property differently. As one commentator noted,

> . . . property refers to a state-enforced right of exclusion over things, good (generally) against the world. . . .The power to exclude means more than a right of physical expulsion; it includes the idea that an owner holds a *monopoly* over whatever rights of use, transfer, income, etc., are recognized as part of a given proprietary package. . . .

Ziff, *Principles of Property Law*, 4th ed. at page. 5, BofA TAB 9

113. For something to "belong" to someone at law that person must have the exclusive right to do what he or she wants with it, to the exclusion of others. As the Trial Judge himself implicitly acknowledged (in paragraph 46 of his reasons), rights of property involve rights to control that property. **The Trial Judge even acknowledged such characteristics of ownership were not available to the employees in this case,** yet the Trial Judge inexplicably found that MTS violated a supposed "entitlement" of the employees to benefit improvements funded with "Initial Surplus". The Trial Judge stipulated that under the Plan as it existed under the *CSSA*, "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***..." **[R.F.D., para. 517]**

114. The Trial Judge nowhere explains the source of any such "entitlement" to the extent that it flows from any property right of the employees. Indeed, there is no basis for the implication of any such right based upon the Plan text or the text of the *CSSA*.

115. The governing legislation and the Plan documentation are the exclusive source of employees' rights under benefit plans. As Gillese J.A.

held in *Burke v. Hudson's Bay Company*, rights of members under pension plans do not arise based upon courses of conduct and expectations over time. The exclusive source of rights of plan members is the Plan text:

> the trial judge writes that where a pension plan is not terminated or wound-up, in the absence of legislative directives, "it is reasonable to look at the history of conduct of the parties to determine what their expectation in respect of surplus was at any point in time". If this statement means that the parties' rights and obligations are to be decided on the basis of conduct, rather than the governing legal documents, I must respectfully disagree. Schmidt is clear.

***Burke v. Hudson's Bay Company* 2008 ONCA 394 at para. 37, BofA TAB 10**

116. Gillese J.A. relied upon the decision of the Supreme Court of Canada in *Schmidt v. Air Products* in arriving at this conclusion. Her Honour relied upon the stipulation of Justice Cory at p. 655: "[T]he courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it." These principles are also reflected in the decision of the Supreme Court of Canada in *Buschau*, where Deschamps J. held that "Entitlement is determined by consulting the Plan, the Trust agreement .... and the relevant legislation."

***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at para. 90, BofA TAB 4**

***Buschau v. Rogers Communications Inc.*, 2006 SCC 28, at para. 17, BofA TAB 8**

***Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, at para. 86, BofA TAB 2**

117. Before the passage of the *Reorg. Act*, the pension ***entitlements*** of MTS employees were set out in the *CSSA*. The *CSSA* is silent on the issue of surplus, as Ellement acknowledged in cross-examination. The *CSSA* is an Act of the Manitoba legislature and can only be changed by the Manitoba legislature. As the Trial Judge acknowledged at paragraph 299 of his reasons, amendments to the legislation would be required in order to do anything with surplus. **[R.F.D. para. 299]**

118. The employees had no power to compel any changes to the *CSSA*, which governed their rights as members of the Old Plan. The plaintiffs' witness Raymond Erb, a member of the Liaison Committee of the CSSF, admitted as much in cross-examination **[Cross-Examination of Raymond Erb, September 5, 2008, p. 1]**:

> Q Mr. Erb, yesterday you referred to the discussions that occurred periodically between the liaison committee and the advisory committee under the CSSF scheme as similar to collective bargaining?
>
> A That's correct.
>
> Q All right. You'll acknowledge, of course, that there was no ratification process by members of any improvement that, or any agreement that might have been reached?
>
> A By the general membership?

Q Yes.

A No.

Q Right. And there was no recourse that the liaison committee had if they couldn't elicit an agreement on any point; that is, you couldn't strike, force it to a conclusion, take some proceedings under labour legislation, nor was there any other recourse available to you?

A No, there was no job action whatever.

Q Or anything else that would assist you in forcing a conclusion to the issue?

A Just -- no, there was no, no procedure.

119. The Trial Judge erred by finding that the employees had enforceable rights in relation to surplus. No such rights exist in the terms of the *CSSA*, which is the primary Plan document. All the employees had was a right to negotiate about surplus. As this Court has noted, the right to negotiate, by itself, has no value. It does not constitute consideration that would support a simple contract, much less form the basis for a proprietary entitlement.

***P.P (Portage) Holdings Inc. v. 346 Portage Avenue Inc.* (1999), 177 D.L.R. (4th) 358 (MBCA) at para. 24, BofA TAB 11**

***Courtney & Fairbairn Ltd. v. Tolaini Bros. (Hotels) Ltd.*, [1975] 1 All E.R. 716 (CA) at p. 720, BofA TAB 12**

120. MTS acknowledges that assets in the CSSF derives from employee contributions. But it does not follow that any of these assets "belong" to the employees in any sense that implies legal control over

them. This final conclusion must be supplied by something further mentioned in the text of the *CSSA* or in some plan documentation. The employees pointed to no such clear stipulation. Neither did the Trial Judge.

121. The plaintiffs' argument (and ultimately the judgment in this case) depends upon an unstated and fundamentally false premise about surplus and defined benefit plans. A defined benefit plan is not an investment vehicle. An employee's contributions to a defined benefit plan are not invested for his or her benefit and then returned.[9] Rather, an employee participating in such a plan parts with his or her money in exchange for a set of obligations placed upon the employer, i.e. to pay the defined benefits under the Plan. The employee also benefits from the unconditional nature of that promise — the employee contributions could disappear as a result of a market correction, but the employer remains liable to pay the benefits.

122. In summary, the Trial Judge's view of the employees' interest in surplus was:

a) contrary to the Canadian jurisprudence;

b) not supported by the text of the plan; and

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[9] Indeed, and as noted above, section 47 of the *CSSA* expressly *prohibits* a refund of employee contributions except as provided for under that Act.

c) inconsistent with the fact that the Old Plan and New Plan are, and always have been, defined benefit plans.

123. The Trial Judge's concept of employee ownership of surplus was central to his view of the case. The sweeping remedy ordered by the Trial Judge (including issuing judgment to the plaintiffs for $43 million with interest compounded at the Plan rate of return, which no member of a defined benefit plan has any right to expect), depended on this underlying assumption about the employees' ownership of surplus. For this reason alone, the Trial Judge's decision must be reversed.

B. Did Bryk J. misapprehend MTS's funding obligations under the New Plan?

(i) Overview

124. Much of the Trial Judge's reasoning assumes that MTS misappropriated assets belonging to the employees by taking contribution holidays. The first issue discussed above concerns the Trial Judge's errors with respect to the employees' rights in relation to surplus. However, the Trial Judge made equally serious errors in his apparent conclusion that contribution holidays taken by MTS somehow used employee surplus.

125. The Trial Judge did not consider binding case law concerning contribution holidays in an ongoing defined benefit plan. The Trial Judge's

approach to contribution holidays also failed to appreciate the material differences in the way in which the Old Plan and New Plan were funded and the vital distinction between ***paying*** benefits and ***funding*** benefits under a plan.

126. These basic misconceptions led the Trial Judge to find a misappropriation of surplus in the absence of any evidence demonstrating such a misappropriation.

(ii) Contribution Holidays Are Not a Misuse of Surplus

127. The Trial Judge makes bald conclusions as to the use of the "Initial Surplus" by MTS, without any evidence to justify his conclusions. Typical of the Trial Judge's approach is the conclusion expressed at paragraph 503 of the Trial Judge's reasons **[R.F.D., para. 503. See also paras. 316, 337, 483, and 518]**:

> As of the date of implementation of the New Plan, the initial surplus amounted to $43.343M. It was not recorded as a liability[10] under the New Plan. Rather, it was co-mingled with the other assets resulting in a surplus which enabled MTS to take contribution holidays for several years. The employees/retirees were never given an opportunity to use those funds as intended to either increase COLA benefits or to enhance pension benefits overall. The employees/retirees have been deprived of the benefits which that initial surplus could have provided.

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[10] The Trial Judge cites no support in the evidence and the law for the unorthodox proposition that the amount of an actuarial surplus in a plan should ever be recorded as a plan liability.

128. The basis for the Trial Judge's conclusory statement that MTS used employee surplus to take contribution holidays is not apparent from, nor supported by, the evidence.

129. In the first year of the New Plan's operation, MTS did not take a contribution holiday. The first contribution holiday was taken in 1998 when the actuary calculated the minimum required employer funding to be zero. In 1997, MTS contributed $11.732 million to the New Plan. In the same year, the New Plan assets (which now included amounts contributed by the employees as well as by MTS), experienced investment gains of $92.507 million. During the first year, therefore, the Plan assets grew by some $104.239 million. Accordingly, there were plenty of assets in the plan available for MTS to take contribution holidays without touching any "assets" of the employees, even if one accepts the employees' fallacious assumption that identifiable assets in an amount equal to the "Initial Surplus" belonged to them. **[Manitoba Telecom Services Inc. Valuation Report, AB, Tab 947, pp. 6104, 6106]**

130. How could the Trial Judge conclude, without referring to any evidence, that MTS took contribution holidays using employee money? The Trial Judge's ruling is especially perplexing in light of the well-settled law that contribution holidays are a permissible use of surplus, even where

relevant trust documentation *prohibits* the use of plan assets other than for the exclusive benefit of plan members. As the Supreme Court of Canada notes in *Schmidt v. Air Products Canada Ltd.*: "because no money is withdrawn from the fund by the employer, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits."

***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at para. 95, BofA TAB 4**

***Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 68 BofA TAB 2**

131. Even if one disregards the Supreme Court of Canada jurisprudence and subscribes to the fiction that MTS, in taking contribution holidays, *could* have wrongfully misappropriated employee money, it is unclear how such a finding could be made in circumstances where there is only one fund and the employee "assets" are not identifiable *in specie*. There were assets that could have justified the taking of contribution holidays without touching the alleged employee money. In light of that fact, more was required than the Trial Judge's bald conclusion in respect of contribution holidays that were taken.

132. Lastly, the Trial Judge commented that post reorganization performance was irrelevant **[R.F.D., para. 338]**, yet he then focussed on

only one aspect of post reorganization performance (contribution holidays) while ignoring another aspect of post reorganization performance (relative contributions to the New Plan) which would bear equal relevance given his line of thinking. In that regard, the evidence before the Trial Judge was clear and undisputed that, in terms of contributions, from its inception on January 1, 1997 to the end of 2007, MTS had contributed $224,011,584 to the New Plan which was more than twice the amount contributed by the employees ($103,254,382) to that point in time **[AB, Tab 1376, p. 10524]**. This differential in contributions in favour of MTS of $120,757,202 is more than 3 ½ times the so called "Initial Surplus" which gave rise to the Trial Judge's concerns. His consideration of only one aspect of the New Plan performance underlines his apparent misconception regarding funding issues. Surely if the fact that MTS failed to make contributions in certain years was relevant, so too would be the respective contributions made by the parties over time.

(iii) This Case was Never About Funding In Any Event

133. More fundamentally, since the taking of contribution holidays does not involve the use of plan assets, consideration of whether a contribution holiday could have or should have been taken by an employer is really a question not about asset misappropriation, but rather, about the

extent of MTS's funding obligations given the requirements of the Plan as certified by the actuary from time to time.

134. The expert evidence is consistent on this point. Both experts agree that the question of whether and how a plan must be funded is purely a question of timing. From this perspective, both experts agree that this case is not about funding. The plaintiffs' expert witness, Levy nowhere indicates that MTS could be regarded as having taken contribution holidays with employee money. Indeed, in direct examination, Levy admitted that "no part of my opinion is related to the amount of the company contributions, and, therefore, whether I take them into account or not makes no difference to my opinion." **[Examination-in-Chief of Levy, October 8, 2008, p. 3]**

135. Furthermore, in cross-examination, Levy further acknowledged that the question of how an employer funds a plan is solely an issue of timing. This is apparent in the following exchange with counsel for MTS concerning paragraph 4 of Levy's second Report **[Cross-Examination of Levy, October 8, 2008, p. 31]**:

> Q. . . .
> Paragraph four, in the middle of that paragraph, after referring to the unlikelihood that there would be any

> litigation that we've already talked about, sir, you made this statement:
>
> "The amount of MTS' cash contributions are solely a timing issue, and are not relevant to the position of the Plaintiffs."
>
> Is funding relevant or not, sir?
>
> A. The present value of the funding is, the timing of it is not.

136. This evidence is entirely consistent with the key evidence of the defendants' expert, Brian FitzGerald ("FitzGerald"). In his evidence in chief, FitzGerald was directed to his Report where he gave evidence substantially to the same effect as Levy's **[Examination-in-Chief of FitzGerald, November 6, 2008, p. 29]**:

> Q. ... And you conclude with the statement:
>
> "Whether the employer sets aside the money now [or] later doesn't affect the value of the benefits being provided."
>
> A. That's right.
>
> Q. And I think, Mr. Levy, in his report, ends up saying it's just a question of timing.
>
> A. Yes.

137. The gravamen of the employees' complaint is that they lost something they had under the *CSSA*. Contribution holidays are solely a funding issue, but under the *CSSA*, the employees never had an entitlement to *any* funding whatsoever. It is therefore mystifying how the Trial Judge could find that MTS's contribution holidays defeated any expectation the employees may have had under the Old Plan. The Trial

Judge simply had no basis to find that the employees lost something they never had under the *CSSA*.

C) Did Bryk J. err in his interpretation of the *Reorg. Act*?

(i) Overview

138. The Trial Judge also erred in his interpretation of the *Reorg. Act*. The *Reorg. Act* contains clear stipulations as to the form of pension plan MTS was to provide. It specified that the New Plan was to provide for "benefits" which, on the implementation date, were "equivalent in value" to the pension benefits that existed under the *CSSA*.

139. The intention of the *Reorg. Act* is apparent from the plain language of the legislation. The Legislature wanted to ensure that MTS employees' pension benefits did not decrease as a result of the privatization of MTS. Put differently, an MTS retiree was not to notice any reduction in the money he or she received every month as a result of transferring to the New Plan. Applying accepted cannons of statutory construction strengthens the plain and obvious meaning of subsection 15(2)(a).

140. Nevertheless, the Trial Judge disregarded both elementary pension law principles and basic rules of statutory interpretation. The result

was a strained and artificial interpretation of subsection 15(2)(a), which the words of the subsection will not bear.

(ii) The Text of the Section

141. The critical section in the *Reorg. Act* is subsection 15(2)(a) thereof, which provides as follows:

> 15(2) On or prior to the implementation date, the corporation shall establish
>
> (a) the New Plan which shall provide for ***benefits*** which on the ***implementation date*** are equivalent in value to the ***pension benefits*** to which the employees have or may have become entitled ***under The Civil Service Superannuation Act*** or to which any other person has or would have become entitled under The Civil Service Superannuation Act by virtue of the death of an employee [emphasis added]

142. This critical section was unchanged from the first version of the Bill[11]. However, His Lordship somehow found that by November of 1996 (when the *Reorg. Act* was passed), the word "benefits" had acquired a special meaning that greatly expanded the scope of that term. **[R.F.D., para. 515]**

143. The independent actuary review that is at issue in this litigation was expressly linked with the concept of benefits that are "equivalent in value" under subsection 15(2)(a) of the *Reorg. Act*:

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[11] The Bill received first reading on May 27, 1996.

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

144. MTS submits that the meaning of these sections is clear. The New Plan, as contemplated by subsection 15(2)(a), was to be structured so as to ensure that the employees were not prejudiced. They should, on the day after privatization, receive the same benefits they received, or would have been entitled to receive, before privatization.

145. A layperson's view of the plain language of the section is not inconsistent with the view of a pension lawyer. The reasons of Bryk J. were reported in the specialized pension reporting service, *Canadian Cases on Pensions and Benefits*. The report of the case is accompanied by an annotation by the Editor-in-Chief of the reporter. In the annotation, the author articulates a straightforward reading of the section:

> One would have thought that the statutory reference to "benefits" should be understood as a reference to the defined benefits set forth in the old and new pension plans' respective benefit formulas. This would have entailed a straightforward comparison of the plans' basic retirement benefits, any early retirement subsidies, surviving spouses' death benefits, and the like, an exercise which actuaries are often called upon to perform when measuring proposed employee compensation at a new employer against remuneration at the old employer

. . .

> Moreover, one would have thought that the reference in the legislation to the term "value" and the designation of an "actuary" to determine the requisite equivalence in value would have made crystal clear that the legislator's intent was to order a relatively simple quantitative comparison, not to engage in a qualitative assessment of the plans' respective legal features which, at least in the case of governance, are not even capable of reduction to any particular numerical value.
>
> **Gary Nachshen, "Annotation to T.E.A.M. v. Manitoba Telecom Services Inc." (2010), 79 C.C.P.B. 284, BofA TAB 13**

146. If indeed this plain and commonsense reading of the word "benefits" is accepted, there remains little, if any, substance to the plaintiffs' case. A lead plaintiff, retiree Restall, admitted in his testimony that, from the point of view of his benefit cheque, nothing changed:

> Q Just -- you were a retiree for some years before January 1 of '97, Mr. Restall?
>
> A Yes, I was.
>
> Q And will you confirm that ***there was no change in the dollars that you were receiving under your pension payments on and for the months after January 1, '97 than you had been receiving under the CFS in December and in the few months preceding that?***
>
> A Yes.
>
> Q They were the same?
>
> A ***They were the same.***
>
> [emphasis added] **[Cross-Examination of Restall, June 3, 2008 p. 61]**

147. Furthermore, the Trial Judge on several occasions observed that Restall's experience was typical. A plan member under the New Plan would not notice any difference between the benefits he or she received before privatization and the benefits he or she received after privatization:

> [the employees] always acknowledged that the benefits payable on retirement, death or other termination of employment were the same under each plan.
>
> . . .
>
> The concerns which were being voiced by the employees/retirees were several but what is clear is that the actual benefits to be provided by the New Plan was not one of them. ***Relatively early in the privatization process, the employees/retirees satisfied themselves that the New Plan would produce the same pension benefits as had the Old Plan*** and that the costs to the employees for those benefits would remain unchanged.
>
> . . .
>
> Notwithstanding the use of the word "benefit" in s. 15(2)(a), I am not convinced the intention was to restrict that word in the manner as suggested by the defendants and their expert FitzGerald. **There never was any issue about those benefits.**
>
> [emphasis added] **[R.F.D., paras. 393, 510, 514]**

148. Having formed the view that the financial benefits under the New Plan were indeed equivalent in value to those enjoyed under the CSSF, the Trial Judge nevertheless concluded that "benefits" meant something more than financial benefits. As will be noted below, however,

the Trial Judge was required to violate some of the most fundamental rules of statutory interpretation to arrive at this result.

(iii) The Trial Judge's Misinterpretation of the Section

149. The Trial Judge did not accept the straightforward interpretation of subsection 15(2)(a). Rather, the Trial Judge found that **[R.F.D. para. 515]**:

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

150. The Trial Judge's conclusion as to the interpretation of the word "benefits" under subsection 15(2)(a) is difficult to understand for a number of reasons.

151. First, the Trial Judge refers to unspecified "undertakings and assurances" made to the employees by the government, to the wording of the MOA, and to the insertion of subsection 15(11) into the Act as evidence somehow that "benefits" was intended to have an expanded meaning. All of these events occurred in the weeks preceding the November 7, 1996 meeting leading to the MOA and shortly thereafter. As noted above, however, the word "benefits" was in the *Reorg. Act* from the first draft of the Bill in the Spring of 1996 and was neither changed nor redefined during the

months that followed. The Trial Judge does not explain how the word "benefits" acquired new meaning based on events that occurred outside the legislature without any change being made to the legislation.

152. Second, the only change to the legislation to which the Trial Judge referred to support his expanded definition of "benefits" does not support His Lordship's interpretation. Subsection 15(11) of the *Reorg. Act* was indeed inserted into the legislation after the meetings and discussions giving rise to the MOA. The subsection, however, simply provides that "Nothing in this section is to be interpreted as nullifying the effect of an agreement executed on November 7, 1996 by the representatives of The Manitoba Telephone System, the Government of Manitoba and employees on the subject of pension issues." In the Trial Judge's interpretation, "the MOA was to **supersede** any other provision of section 15 of the *Reorg. Act*." This is not what the section says. [emphasis added] **[R.F.D., para. 513]**

153. It is not apparent, nor does the Trial Judge explain, how the insertion of this confirmatory section evidences an intention to expand or give special meaning to the word "benefit". Indeed, if anything, the amendment supports the opposite conclusion. If an expanded definition of benefit already existed in the legislation, there would have been no need to "protect" the MOA from the effect of the legislation.

154. Far more telling are the amendments to the *Reorg. Act* that were ***not*** made in November, 1996. If issues of surplus entitlement and governance were intended to form part of the definition of "benefits" under the legislation, it would have been a simple matter to insert clarifying language. Indeed, Meronek, on behalf of the employees, made a presentation on October 31, 1996 to the Legislative Committee Assembled to Consider the Passage of Bill 67. In his presentation, Meronek squarely raised concerns that the right to employee surplus was "lost, obscured, or plainly overlooked" in the drafting of the *Reorg. Act*. If, as the Trial Judge surmised, the word "benefits" was always intended to embody "issues of surplus", the legislation could easily have been amended to rectify the "obscurity" identified by Meronek. Neither the legislation nor the MOA were so amended. **[Presentation to the Legislative Committee Assembled to Consider the Passage of Bill 67, AB, Tab 409, p. 3575]**

155. Instead of considering objective circumstances surrounding the drafting and passage of the Act, the Trial Judge improperly relied on subjective evidence as to what the legislation meant, notably the testimony of a Government witness, Darren Praznik ("Praznik"). **[R.F.D., paras. 181, 220, 222] [Examination of Praznik, Sept. 8, 2008, p. 78]**

156. By so doing, the Trial Judge erred. Courts have repeatedly warned of the dangers of relying upon the testimony of Government witnesses in interpreting legislation. Legislation is passed by an incorporeal body, namely, the legislature. Evidence as to what individual members of the legislature meant by the language in legislation is entitled to little, if any, weight.

Reference re s. 94(2) of the *Motor Vehicle Act*, [1985] 2 S.C.R. 486 at paras. 49- 52, BofA TAB 13

***Ontario (Ministry of Natural Resources) v. Ontario Federation of Anglers and Hunters*, [2001] O.J. No. 750 (Ont. Div. Ct.) at paras. 15 - 20 , BofA TAB 14**

157. The Trial Judge's approach to the admissibility and relevance of such evidence was also inconsistent with the Trial Judge's own ruling in the course of the trial.[12] The defendants' counsel at trial, Mr. Olson, objected to Praznik giving evidence as to the intention of the Government in relation to dealings with the Liaison Committee of the CSSF. The Trial Judge ruled, correctly, that Praznik could not give evidence about the intention behind any piece of legislation. In his reasons, the Trial Judge seems to have overlooked his earlier ruling. **[R.F.D., paras. 131, 134, 136 – 137, 139 - 140]; [Examination of Praznik, Sept 8, 2008, pp. 7-11]**

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[12] It is also difficult to reconcile the weight that the Trial Judge placed on Praznik's evidence with the Trial Judge's own observations that Praznik's understanding was "somewhat lacking"; that he had "limited knowledge"; and that his evidence was "somewhat convoluted." See paras 165,166,167 of the Reasons.

158. The testimony of Praznik is even more unreliable in light of his limited involvement in the drafting of the *Reorg Act*. By his own admission, at the time the legislation was drafted Praznik was only "on the periphery" of the process. He acknowledged that he was not the Minister responsible for the CSSF, nor was he the Minister responsible for the *Reorg Act*. He also acknowledged that he was not privy to any of the meetings between MTS and Erik Stefanson, one of the Ministers responsible for the *Reorg Act*. **[Cross-Examination of Praznik, September 9, 2008, pp. 11, 15-16, 26]**

159. Apart from his reliance on the questionable testimony of Praznik, the Trial Judge gives no indication as to how "issues of surplus, both initial and ongoing, as well as issues of governance" fall within the concept of a pension "benefit". In coming to this conclusion, and in rejecting the meaning of "benefit" offered by the defendants' expert FitzGerald, the Trial Judge appears to have relied on the evidence and expert report of the plaintiffs' witness Levy as to the question of whether the benefits of the New Plan were equivalent in value to the benefits provided for under the *CSSA*.

160. Like the Trial Judge, the plaintiffs' expert proceeded in error. First, Levy's opinion proceeded on the incorrect assumption that the *Reorg. Act* required MTS to provide an equivalent plan to the Old Plan. The Act

says no such thing. Subsection 15(2)(a) of the *Reorg. Act* requires MTS to provide equivalency of benefits, not equivalency of plans. **[Expert Report to Levy dated December 4, 2004, AB Tab 1363, para. 16]**

161. Second, and more fundamentally, Levy's opinion on equivalence is based on his view that employee expectations (not set out in the relevant plan texts) were entitlements and therefore benefits. As noted below, this approach was unsound. Tellingly, Levy admitted in cross-examination that ***he had not even read the provisions of the CSSA before preparing his opinion***. **[Cross-Examination of Levy, October 8, 2008, p. 70]**

162. Rather, Levy's opinion as to equivalence was predicated entirely upon his conclusion that what the employees may have ***expected*** to receive under the *CSSA* was, in fact, an entitlement, notwithstanding that there existed no mechanism to enforce such expectations:

> Q And although you accept that your reports don't accurately reflect things that you were told and that you really should have used the word expectation rather than a right or an entitlement, did you appreciate that the Act called for a comparison of benefits to which they were entitled?
>
> A Yes.
>
> Q I see. And so you elevated expectation to a right or an entitlement for purposes of commenting upon Mr. Fox's report?

A I would prefer to describe it as I took a broad view, as I have described yesterday, rather than a narrow view.

Q Of what?

A Of what that language meant.

Q What language, sir?

A Have or may have become entitled.

Q A broad view meaning they may have or they expected they might get something in the future. And that's how you were interpreting entitled?

A Yes. I included, I included that well, really for the reasons I discussed yesterday, particularly that if you look at this test as on or prior to the implementation date, if it's okay, but the corporation has the unilateral right, subsequent to the implementation date, to on its own create an imbalance, take it from the -- make it no longer equivalent, that that, in itself, is not equivalent in value. Ultimately, of course, this is an issue for the court, not an issue for the experts.

Q I appreciate that, sir, but I'm just trying to ascertain how you have addressed it and, and **I gather you confirm that you what -- my words, elevated an expectation to a right or entitlement for the purposes of your definitions?**

A Yes.

[emphasis added] **[Cross-Examination of Levy, October 8, 2008, pp. 21 - 22]**

163. It is critical to note that Levy's opinion, and indeed the plaintiffs' entire case on equivalence, depends upon Levy's unsupported surmise that employee expectations were entitlements. Indeed, in his testimony in

chief, Levy admitted that the defendants' expert, FitzGerald, was correct on the issue of equivalence if employee entitlements are to be defined by what the relevant texts say:

> ***If one puts on blinders and says, What do the words on the paper say, Mr. FitzGerald is right that they're not significantly different.*** [emphasis added] **[Examination of Levy, October 7, 2008, p. 71]**

164. With all due respect to Levy, when one carefully analyzes the plan texts and statutory provisions to ascertain members' rights under a defined benefit plan, one is not "putting on blinders." Rather, one is following the clear direction of the Courts outlined above which hold that employee entitlements are defined by plan texts and not by employee expectations.

***Burke v. Hudson's Bay Company*, 2008 ONCA 394**
at para. 37, BofA TAB 10

***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611**
at paras. 95, 196 McLachlin J. dissenting but not on this point, BofA TAB 4

***Buschau v. Rogers Communications Inc.*, 2006 SCC 28**
at para. 17, BofA TAB 8

165. In light of Levy's failure even to read the *CSSA*, the text governing employees' rights, and in light of his misplaced reliance on employee expectations, there was no factual foundation for Levy's expert opinion. The Trial Judge erred in giving it any weight.

166. Further, elevating expectations into entitlements in the manner proposed by Levy (and adopted by the Trial Judge) will likely have unforeseen consequences for relations between the Government and those public employees still in the CSSF. If MTS employees, while in the Old Plan, had ***entitlements*** to the use of surplus, presumably other government employees in the Old Plan still have those rights. In this respect the Trial Judge may have unwittingly given thousands of Manitoba public employees and pensioners rights not otherwise set out in the *CSSA*.

(iv) The Section Means What it Says

167. The Trial Judge's interpretation of subsection 15(2)(a) of the *Reorg. Act* ignores the plain language of the section. The section requires MTS to establish a pension plan. That plan was to provide for "benefits" that were equivalent in value to the "pension benefits" to which employees had or may have become "entitled" to under a specific piece of legislation, i.e. the *CSSA*.

168. The legislature could have used specific wording to convey the meaning ascribed to subsection 15(2)(a) by the Trial Judge. It did not do so.

169. The legislature's use of the words "pension benefits" plainly demonstrates an intention that MTS was required to match the "pension benefits" under the *CSSA*. Indeed, the term "pension benefit" is defined under the *CSSA* **[AB, Tab 1307, p. 9461]**:

> "pension benefit" means the aggregate monthly or other periodic payments of superannuation allowance to which an employee is or may become entitled under this Act upon retirement or to which any other person is entitled under this Act by virtue of the death of the employee after his retirement;

170. It must be presumed that the legislature uses language carefully and consistently. The exercise of statutory interpretation thus presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter. This presumption is especially strong where it is apparent that two statutes were intended to operate together.

***Foster v. Foster* 2007 MBCA 96 at paras. 37 - 39, BofA TAB 16**

***Manitoba (Provincial Municipal Assessment Commissioner) v. Seagram Co.*, 2003 MBCA 128, at para. 49, BofA TAB 17**

***R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 30, BofA TAB 18**

***Claridge Development (Hawthorne) Ltd. v. British Columbia*, 1999 BCCA 702 at para. 17, BofA TAB 19**

171. Even apart from any other rule relating to the use of companion statutes to interpret undefined terms, the plain intention of the legislature is that "pension benefits" was intended to connote the monthly or periodic

monetary benefits to which an employee is *entitled*. It would have been irrational for the Manitoba legislature to point MTS to the *CSSA* as the baseline for its New Plan's benefits, use the very same word in the *Reorg. Act* to describe that baseline, and yet intend that "pension benefits" bear a very different, and significantly broader, meaning in the *Reorg. Act* from that which it bears under the *CSSA*.

172. The absurdity of this result is apparent when one considers the uniformity of treatment of the term "benefits" among statutes dealing with pension entitlements. The *PBSA*, under which the New Plan was required to be registered, defines "pension benefit" as meaning "a periodic amount to which, under the terms of a pension plan, a member or former member, or the spouse, common-law partner, survivor or other beneficiary or estate or succession of a member or former member, is or may become entitled." **[AB Tab 1325, p. 9689]**

173. Both statutory definitions (as well as the definitions of "pension benefit" in other pension legislation) are consistent with the commonsense understanding of the terms "benefits" and "pension benefits" outlined above. The terms refer to the stream of money payments that employees receive in the form of benefit cheques each month. Such a meaning for the term "benefit" is all the more compelling when it is considered that the

legislature placed the determination of equivalence in the hands of an actuary and not an arbitrator. Actuaries can easily compare the value of two streams of financial benefits but are singularly unqualified to adjudicate complex questions of entitlements that follow from expectations that are said to have evolved over time. **[*Pension Benefits Act* (Manitoba), AB, Tab 1318, p. 9617]; [*Teachers' Pensions Act* (Manitoba), BofA, TAB 3]**

174. This concept of "benefit" is also consistent with the jurisprudence, which provides that entitlements to actuarial surplus are not pension benefits in an ongoing pension plan.

***Baxter v. Ontario (Superintendent of Financial Services)* (2004), 192 O.A.C. 293 (Ont. Div. Ct.) at paras. 65 - 67 , BofA TAB 20**

***Lennon v. Ontario (Superintendent of Financial Services)* (2006), 51 C.C.P.B. 140 (F.S. Trib.) at para. 78 , affirmed at (2007), 63 C.C.P.B. 245 (Ont. Div. Ct.), BofA TAB 21**

175. In light of the foregoing, MTS submits that there is only one plausible and legally correct interpretation of subsection 15(2)(a) of the *Reorg. Act*. On both a plain and purposive reading, the subsection's evident intention was to ensure that members did not feel any adverse impact on the pension benefits they received each month as a result of the privatization of MTS. This result was achieved.

D) Did Bryk J. err in his interpretation of the MOA?

(i) Overview

176. The Trial Judge also erred in his interpretation of the MOA. In essence, the Trial Judge found that MTS had breached the MOA by taking contribution holidays between 1998 and 2003. **[R.F.D., para. 513]**

177. As discussed above, the Trial Judge's reasoning was predicated on a fundamental misunderstanding of the nature of contribution holidays and ignores the plain language of the MOA. As he did in interpreting the *Reorg. Act*, the Trial Judge disregarded the relevant texts and elevated employee expectations to contractual entitlements that superseded what was actually agreed to in the MOA.

178. The relevant terms of the MOA are as follows **[AB, Tab 439]**:

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

> 4. The draft pension text will be available Nov. 11, 1996 and employee/retiree representatives will have until Nov 25, 1996 to submit any requests for amendments before the plan is submitted for registration.
>
> 5. In the event of any dispute in relation to the matters described in paragraphs two and three above an actuary appointed by the Provincial Auditor as proposed by the Act (Bill 67) will resolve any dispute.

179. The primary section of the MOA that is in dispute is section 3. The terms of the agreement can be divided into two classes, those obligations which were unconditional, and those which were subject to certain conditions or contained an element of discretion on the part of MTS. The unconditional obligations under the MOA required MTS to guarantee a minimum COLA adjustment of 2/3 of CPI to a maximum CPI of 4% and to allocate "Initial Surplus" to the New Plan to fund cost of living adjustments. MTS complied with both of these obligations. **[Final Plan Text, [AB, Tab 711], s. 15.7, 16.7 and 16.8]**

180. The controversy concerns the two conditional obligations under the MOA, which are:

a) if the cost of living adjustment account in any particular year "is able" to fund a higher increase, then a higher increase would be given in that year;

b) in subsequent years, the financial position of the COLA account was to be reviewed by the Plan actuary. If sufficient additional assets exist in the account beyond those required for the stated COLA increase (for a particular year) then the MOA provides a discretion in the company to increase benefits provided that the Plan liability as a whole does not increase.

181. With respect to the first conditional obligation, the MOA is silent as to what it means to be "able" to fund a higher COLA increase. MTS had reasonably set the COLA account up to mirror the manner in which the Adjustment Account operated under the *CSSA*. Indeed, the operation of the account was consistent with the position taken by Meronek in his letter to Fraser of September 25, 1996. Meronek wrote: "We are of the view that the most appropriate use of the [initial] surplus would be to apply it to an Indexing Account, which you say MTS will set up and administer on the same basis as the Superannuation Adjustment Account for indexing purposes, in order to pre-fund future cost of living requirements." **[AB, Tab 348]**

182. Subsection 15.4 of the Plan text adopted the concept of a 20-year pre-funding requirement that already existed under the *CSSA* for exactly the same purpose, i.e., to measure the ability of an account to fund

a higher COLA increase. As acknowledged by the plaintiffs' actuary, Ellement, a measure of the account's "ability" to fund a higher increase (such as the 20-year pre-funding requirement) assures that all members of the Plan are treated fairly. **[Examination in Chief of Ellement, September 15, 2008, p. 32]**

183. As one of the lead plaintiff witnesses, Restall, acknowledged, notwithstanding that the 20 year prefunding requirement was not concealed or hidden from anyone, and indeed was plainly set out in subsection 15.4 of the Plan text, the employees did not raise any concerns about it after seeing the Plan text **[Cross-Examination of Restall, June 4, 2008, p. 33]**:

> Q All right. And having seen the, the plan text, sir, on and after November 11, you didn't raise, at any time, that the 20-year pre-funding was something that was inappropriate?
>
> A No.
>
> Q No.
>
> A Not at that time.
>
> Q No. And to your knowledge, your actuary, Mr. Ellement or any of the other plaintiff unions or retirees didn't raise it?
>
> A Not that I know of.

184. When the purpose behind a 20 year pre-funding requirement is taken into consideration, it is easy to understand: (a) why it is a prudent

measure of a plan's ability to fund ongoing cost of living increases; and (b) why the employees did not object to it when they saw it in the Plan text. A large initial cost of living increase benefits current retirees at the expense of future retirees:

> Q Okay. And how does this particular concern relate then to the 20-year prefunding concept?
>
> A That concept, of 20-year prefunding, was introduced to make sure the account would not provide more than two-thirds of inflation until such time as they had enough assets in the fund for the next 20 years to meet a hundred percent of inflation.
>
> Q But what was the reason for inserting that, that formula?
>
> A Essentially, to bring the increases back to two-thirds of inflation until you had sufficient assets to give a hundred percent.
>
> Q And in terms of a severity, what kind of a test was that to meet?
>
> A Okay. It was a very, very difficult test to meet.
>
> Q And what was the purpose behind making it difficult?
>
> A That the indexing account would better -- would pay two-thirds of inflation, ***but it would be fairer to all of the participants, all the retirees, in the sense that if you pay a hundred percent every year, for a number of years, then it puts in jeopardy future retirees.***
>
> [Emphasis Added] **[Examination of Ellement, September 15, 2008, p. 32]**

185. With respect to the second conditional obligation, namely, the possible increase in benefits, MTS was not required to increase benefits because there was never any excess surplus in the COLA account. Put another way, the "Initial Surplus" was not itself sufficient to permit anything other than the payment of cost of living increases at the rate of 2/3 of CPI to a maximum CPI of 4%.

186. The employees have not demonstrated how the structure of the COLA account violated section 3 of the MOA. Further, the employees saw the Plan text (to implement the MOA) which made clear that the COLA account would be a notional account containing a 20 year pre-funding requirement. **[Examination of J Trach, September 10, 2008, p. 59, 60] [Cross-Examination of Ellement, September 22, 2008, p. 91] [Cross Examination of Restall, June 4, 2008, p. 33]**

187. The employees did not complain about any supposed breach of the MOA through 1997 and 1998. They did not do so, MTS submits, because the Plan text was entirely consistent with the MOA. The "Initial Surplus" went into the COLA account and was in fact used to fund ongoing cost of living increases.

188. The "Initial Surplus" was used in the New Plan COLA Account exactly as originally suggested by Meronek and set out in paragraph 3 of the MOA. It is undisputed that:

a) the "Initial Surplus" was credited to the COLA Account; and the COLA Account was set up on the same basis as the CSSF Adjustment Account. The wording of the operation of the New Plan COLA Account mirrors the wording of the *CSSA* provisions covering the operation of the CSSF Adjustment Account. Both were subject to the 20 year prefunding rule; and

b) the "Initial Surplus" was used to pre-fund future cost of living requirements.

189. The employees now claim to have expected MTS to operate the COLA account in a manner that went beyond what was required under the terms of section 3 of the MOA. In cross-examination, Ellement admitted that his expectations as to what would occur under the MOA related not to what MTS was obliged to do, but rather what it had the ability to do **[Cross-Examination of Ellement, September 22, 2008, pp. 96-97]**:

> Q Are we talking about whether MTS had the ability to do something under the plan, or are we talking about whether MTS was obliged under the memorandum of agreement to do something in that regard?

> A Well, the answer, I think, to both is yes. Yes and yes. They weren't obliged to do it, but they had the ability to do it.
>
> Q All right. So you agree then, on your interpretation of the MOA, there was no obligation on MTS to do these things, but you say they had the ability do to them?
>
> A Yes.

(ii) The Trial Judge's Interpretation of the MOA

190. The Trial Judge largely accepted the plaintiffs' submissions that MTS's obligations under section 3 of the MOA should be defined by employee "expectations" (with respect to their "ownership" of surplus) rather than by the plain words of the agreement. Just as the Trial Judge erred with the *Reorg. Act*, the Trial Judge focussed not upon the language of the MOA, but rather, on employee expectations.

191. The Trial Judge began his analysis with a cautionary note as to the significance of the intervening years (between the MOA and the trial) and an acknowledgement of the conflicting evidence as to what was intended by section 3 of the MOA **[R.F.D., para. 325]**:

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

> undoubtedly became blurred with respect to many of the details.

192. Notwithstanding the Trial Judge's acknowledgment of the frailties of recollection, and the conflicting evidence, the Trial Judge nevertheless found a definitive meaning for the MOA:

> However, when analyzing the entire process of privatization and recognizing the manner in which initial surplus had been utilized under the Old Plan combined with the fact that the Government and MTS made assurances that the initial surplus belonged to the employees/retirees and that they would control its distribution, ***the meaning of paragraph 3 of the MOA acquires blinding clarity***. In order to accomplish passage of the *Reorg Act* in the fall of 1996, the Government appreciated it had to persuade the employees/retirees the plans would mirror one another subject to the legislation governing the New Plan. Of particular importance was the use of the initial surplus and while its ultimate use was never specifically identified by the employees/retirees, I am satisfied the intention of both parties was to permit them to utilize it in the same fashion as they had under the Old Plan. [emphasis added] **[R.F.D., para. 326]**

193. However, the "blinding clarity" which the Trial Judge describes overlooks the clear words of section 3 of the MOA, the conflicting evidence and established principles of contractual interpretation.

194. Based upon the testimony of employees as to what they intended, and based upon Praznik's testimony as to his understanding of the meaning of the MOA, the Trial Judge imposed an "interpretation" of the MOA that had no regard to its specific terms, but rather, regarded the MOA

as simply a vehicle to vindicate employee expectations about their perceived "ownership" of the surplus **[R.F.D., para. 318]**:

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

195. The Trial Judge employed entirely the wrong approach to contractual interpretation. While agreements are to be interpreted to effect the parties' intentions, it is axiomatic that "intention" from this point of view is objective: it involves interpreting the words as reasonable persons would have used them. Evidence as to what any person subjectively intended (especially with the benefit of hindsight) has no place in this determination. As the Alberta Court of Appeal has recently noted: "parties to the contract are not entitled to provide evidence on what they think the contract means. Neither contracting party is entitled to call evidence that 'I think it means X'."

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.,
2010 ABCA 126 at para. 16, BofA TAB 22

***Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129**
at para. 54, BofA TAB 23

***Dinney v. Great-West Life Assurance Co.*, 2009 MBCA 29**
at para. 58, BofA TAB 24

196. The Trial Judge's disregard of the text of the MOA is further apparent in that, in interpreting the parties' obligations, he makes no reference to section 5 of the MOA, which is an integral part of the agreement. It is clear that the parties could not, and did not, arrive at a definitive Plan text that day to implement what was agreed. As such, section 5 was included to permit the employees to correct any perceived inadequacies in the manner in which the Plan text put in place the arrangements provided for under the MOA. However, this section was never invoked by the employees. This fact alone tells against the interpretation now advanced by the plaintiffs. In Manitoba, as in other provinces in Canada, subsequent conduct is admissible as an indication of the objective meaning of a contract. The employees' prolonged silence in the face of Plan language that unequivocally set out how the COLA account was to operate is compelling evidence that the interpretation now advanced by the employees and accepted by the Trial Judge is not a reasonable interpretation of the MOA.

***Dinney v. Great-West Life Assurance Co.*, 2005 MBCA 36**
at paras. 57-59, BofA TAB 25

***Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, (1995), 24 O.R. (3d) 97 (ONCA) at pp. 8-9 , BofA TAB 26**

197. Further, the complete package agreed-upon by MTS (in the context of the MOA) included a significant and valuable guarantee. MTS agreed to guarantee a cost of living increase of 2/3 of CPI up to a ceiling of 4%. Such guarantee would apply (and employees would receive cost of living increases) whether or not the plan was in surplus, and whether or not there existed sufficient assets in the COLA account to fund such an increase. The guarantee, which did not exist under the CSSF, is a significant enhancement which the employees are now enjoying. **[Examination of McInnes, October 15, 2008, p. 32]**

198. It is grossly unfair to render a damage award of approximately $90 million based upon perceived flaws in the structure of the COLA account that were raised long after the fact. The employees did not object when they saw the Plan and did not invoke the dispute resolution procedure under the MOA to deal with any alleged deficiencies. In the circumstances, the Trial Judge had no jurisdiction to find a breach of the MOA to the extent that any such breach was predicated on alleged defects that could have been rectified by invoking section 5 of the MOA.

E) Did Bryk J. err in his approach to the Undertaking?

(i) Overview

199. In several items of correspondence and one memorandum delivered between August and November of 1996, Fraser made a statement (collectively the "Statements") that has come to be known as the "Undertaking." The Statements were initially made in response to a specific question from an ERPC member, Beatty. They have taken on a life of their own.

200. The Statements were "this surplus [i.e. the "Initial Surplus"] will not be used to reduce the employer's cost of, and share of contributions to, the new pension plan." The Trial Judge viewed the Statements as a promise not to take contribution holidays. The Trial Judge heavily relied upon this interpretation in pronouncing judgment against MTS. MTS submits that the Trial Judge's interpretation of the Statements takes them out of context and imposes on them a meaning that they were never intended to have.

201. Furthermore, for the Statements to have the effect that they were given, it was necessary for the employees to establish more than that they were simply made. To be enforceable as a contract, the employees

needed to establish what consideration they gave for the Statements, and that they were intended to be a contractual promise to all of the employees. If the Statements are to be actionable as a misrepresentation, the employees needed to establish that they related to an existing fact, that they were misleading as to that existing fact, that the employees relied upon them in a reasonable manner, and that the employees suffered losses as a result of that reliance.

202. The Reasons do not disclose whether, and on what basis, the Statements are legally enforceable. Yet MTS faces a significant liability based in large part on what the Trial Judge decided the Statements meant. MTS is entitled to know why it faces this liability, and is entitled to know exactly what legal effect the Statements had. The Trial Judge's Reasons, however, provide no basis for meaningful appellate review of his conclusions on this issue.

203. Given the inadequacy of the Trial Judge's Reasons concerning the interpretation and the effect of the Statements, this Court is entitled to review the matter afresh and to come to its own conclusion as to the interpretation and effect of the Statements.

(ii) The Statements and their Meaning

204. The Statement was made on three separate occasions:

a) the statement was first made in a letter on August 27, 1996 replying to specific questions from Beatty;

b) the statement was repeated in a further letter on October 23, 1996 replying to specific questions from Meronek;

c) the statement was again repeated in a briefing memorandum on November 6, 1996 from Fraser to Findlay, the Minister responsible for MTS.

205. The Statements can only be interpreted in the contexts in which they were made. The first statement was made in response to a specific question from Beatty. In a letter dated August 6, 1996 **[AB, Tab 299]**, Beatty asked Fraser several specific questions. He numbered them for ease of reference:

> QUESTION 5
>
> 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:
>
> . . .

b) Will the employees' "surplus portion" of the transfer amount be used to enhance the employees share of the benefit improvement?

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

206. Fraser directly answered Beatty's questions **[AB, Tab 313]**. In doing so, Fraser made the first of the Statements:

> 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.

207. Neither Beatty nor Fraser were talking about actuarial surpluses in general terms. Their correspondence concerns any "Initial Surplus" ***in the transfer amount***. Fraser refers in definite terms to "the surplus" and "this surplus." As noted above, actuarial surplus is not a "bag of money". It is a circumstance in which a plan finds itself at a specific point in time. The value of Plan assets can fluctuate and actuarial estimates of liabilities can grow, such that it is only possible to speak of an actuarial surplus as of a specific moment in time. Therefore, when Fraser speaks of any use of "this surplus" he could only be speaking of the "use" that would be made of any surplus ***on the implementation date***.

208. There was only one possible "use" of any surplus portion of the Transfer Amount on the implementation date. Given the "Initial Surplus", and depending upon the funded status of the New Plan on the implementation date, MTS could have assured a fully-funded Plan by transferring only part of its Pension Reserve into the New Plan. Fraser's evidence was that this logical implication of his initial statement to Beatty was precisely what he meant by it. McInnes and Solman testified to the same effect. Indeed, given the circumstances in which the statement was made, McInnes could not understand what else could have been meant by it. **[Cross-Examination of McInnes, October 20, 2008, p. 48]; [Examination in Chief of Fraser, October 22, 2008, p. 34]; [Examination in Chief of Solman, November 3, 2008, p. 85-86]**

209. The Trial Judge was critical of the MTS witnesses based on the consistency in their interpretation of the Statements. It is difficult to see why. If one understands that actuarial surplus is not a thing but a snapshot of a Plan's position at a given moment in time, then it is only natural to speak of "using" any such surplus at the moment the surplus is ascertained. With due respect to the Trial Judge, his criticism of the MTS witnesses' interpretation reflects the Trial Judge's erroneous impression

that actuarial surplus is a tangible thing that sat in the New Plan until it was later used.

210. As discussed more fully below, the Trial Judge disagreed with Fraser's interpretation and construed the Statements as an assurance that any actuarial surplus in the Plan existing *after* the implementation date could not be used to take contribution holidays. The Trial Judge was plainly mistaken in this interpretation because the August 27 statement on its face only refers to an actuarial surplus arising at a specific point in time. MTS made no use of the "Initial Surplus" on the implementation date. Indeed, as noted above, even if contribution holidays could be described as a "use" of surplus, MTS did not take contribution holidays in the first year of the New Plan's operation.

211. The August 27 statement was repeated in a letter from Fraser to Meronek on October 23, 1996. Like the August 27 statement, the October 23 statement was given in reply to a specific question. On September 25, 1996, Meronek wrote to Fraser asking whether MTS planned to "match" the amount of any "Initial Surplus" coming over from the CSSF **[AB, Tab 348]**. The form of Meronek's question confirms that the employees' concern was that MTS could escape responsibility for funding 50% of the Plan's *accrued* liabilities by failing to match the Transfer Amount

dollar for dollar. Meronek's expressed concern, therefore, was with responsibility for Plan liabilities and not with Plan funding.

212. Fraser replied to Meronek's letter on October 23, 1996 **[AB, Tab 383]**. In doing so, he directly and truthfully responded to the specific question he was asked:

> You have expressed a concern that any surplus accumulated as a result of employees' contributions to the CSSF may be used to "*finance MTS' 50% share of the benefits already accrued.*" As I stated in my August 27, 1996 letter, the surplus will not be used to reduce MTS' cost of, and share of contributions to, the new pension plan. Moreover, you should note that section 21 of the PBSA provides that for contributions made after December 31, 1986, the employer must pay at least 50% of the pension benefit. *The Civil Service Superannuation Act* has a similar requirement which was adopted for contributions made after December 31, 1984.

213. Taken in context, it is simply not possible to interpret Fraser's statement to Meronek as a promise not to take contribution holidays in the future. Contribution holidays may be taken by an employer in a defined benefit plan when the plan is in a surplus position and where such surplus exceeds the normal cost of benefits minus the amount of any employee contributions. "Normal cost" is defined under the *Pension Benefits Standards Regulations* (which govern the MTS Plan) as "the cost of benefits, excluding special payments, ***that are to accrue*** during a plan year, as determined on the basis of a going concern valuation." Meronek's

concern related to MTS's share of benefits "already accrued." Contribution holidays, by definition, relate to normal costs that, again by definition, could only accrue later. **[AB, Tab 1327]**

214. The exchange of correspondence that led to the Statements on which the Trial Judge placed such heavy reliance thus had nothing to do with contribution holidays that may be taken in the future. This fact is obvious from the content of Meronek's letter to Fraser. Meronek was concerned that an initial imbalance between employer and employee contributions could somehow lead to the employees paying for more than 50% of the cost of their accrued benefits. Fraser responded by assuring him that, as a matter of law, the employer's ultimate liability to pay 50% of accrued benefits could not be reduced on account of any "Initial Surplus". It is unclear how the Trial Judge could find that Fraser's repetition of the statement could somehow expand the scope of the statement so as to make it responsive to a question that Meronek was not even asking.

215. The final statement was contained in a memorandum from Fraser to Findlay **[AB, Tab 434]**, the Minister responsible for MTS. This memorandum was not addressed to the employees. The November 6 statement in its entirety provides as follows:

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

216. This statement was not a direct communication to the employees. Nowhere in the record is there an indication that MTS directly communicated anything to the employees to suggest that it was making any commitments with respect to its future funding obligations.

(iii) The Trial Judge's Interpretation of the Statements

217. The Trial Judge's interpretation of the Statements unfairly reflects both an improper suspicion of MTS's motives and a misapprehension as to how defined benefit plans function **[R.F.D., paras. 127-128]**. The Trial Judge did not interpret the Statements objectively and in context, but rather treated the meaning of Fraser's words as an issue of credibility:

> [127] The following exchange between Fraser and the court underlines the frailty of Fraser's evidence on that point:
>
> > A Yes. I mean, Harry's concern was that if there was a surplus in the employee side of the fund, that it not be reduced to -- not be used to reduce MTS's transferring of all of their funds into it. So in other

words, we talked earlier that the figure of 383 million dollars I think was the amount transferred; Harry's concern was that we wouldn't reduce that amount by any surplus in the employee side. In other words, if there was 43 million surplus there, we wouldn't take it off the three eighty-three and just put three forty in, and I gave him that assurance that we had no intention of doing that and would not do that.

•••

THE COURT: I don't -- you're saying if there was a surplus of 43 million dollars on the employee side and, and the pension reserve fund had a, was valued at 383 million, your assurance was that you wouldn't take money, you wouldn't reduce the amount of the pension fund being transferred?

WITNESS: Yes.

THE COURT: I don't understand why you would need that assurance. You're transferring less than they are, in any event; why would they need an assurance that -- I'm not sure I'm understanding your answer and so I ...

A Well, to be honest, I mean, I always thought that Harry was, well, in my mind -- not, certainly not trying to put words in, in Harry's mind, but when I listen to him, I mean what I took away was some sort of hybrid that it was a combination of a defined contribution plan and a defined benefits plan, so that when the employees had a surplus in theirs, that they would use that or potentially have the mechanism to use that to enhance benefits and that those benefits would then create higher obligations, higher funding needs, higher potential deficits that were a hundred percent belonging to the employer. And that just never made any sense to me.

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

218. The Trial Judge's disbelief of Fraser is unfair to Fraser. The Trial Judge made no attempt to put the Statements in context. As noted above, Fraser was answering specific questions from both Beatty and Meronek. In his letter to Fraser, Meronek suggested to Fraser that he had not answered Beatty's question concerning whether MTS would match any "Initial Surplus" portion of the transfer amount. Meronek was squarely asking Fraser about what MTS was going to transfer into the New Plan. What Fraser was being asked fully explains the meaning Fraser placed upon the statement he made in response to Meronek's question.

219. Further, the Trial Judge's belittling reference to Fraser's attempt to explain himself illustrates the Trial Judge's misunderstanding of the difference between the New Plan and the CSSF regime. Fraser's concern about "Initial Surplus" triggering greater employer obligations was valid from the employer's perspective. Because actuarial surplus can disappear if, for example, the value of plan assets falls, treating *any* surplus, including "Initial Surplus", as unspent money earmarked for benefit improvements necessarily increases the employer's risk. Once any surplus is allocated to

benefit improvements, the employer bears 100% of the increased liabilities regardless of whether the surplus later disappears. The Trial Judge's disbelief of Fraser on the interpretation of the Statements reflects the Trial Judge's basic misunderstanding of how the New Plan was to work. Because it was based on an error of law, the Trial Judge's disbelief of Fraser on the meaning of the Statements is entitled to no deference from this Court.

220. Equally flawed is the Trial Judge's reference to extraneous evidence to interpret the Statements **[R.F.D., paras. 472-473, 479-481]**. Having taken the Statements out of context, the Trial Judge relied heavily on the evidence of Praznik to interpret them:

> [473] The following testimony by Praznik supports my conclusion that both the Government and MTS understood the "initial surplus" was to be used solely to enhance employee benefits even though the logistics of how that was to occur had not yet been resolved:
>
> The principle that was discussed at the time was to protect the money, that it wasn't to be used for the purposes of MTS' [sic] employer, it was to be protected for the employees. And how that was given life in the detail of the plan thereafter is for both those parties to work out. But the principle, the principle that the agreement, my understanding was to enshrine that that money was protected in a way, it was surplus paid in by pensioners, being transferred to the new plan and it was for their benefit. It was their money and it needed to be protected.
>
> . . .

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

221. With respect, it was an error of law for the Trial Judge to accept legal advice from Praznik as to the legal meaning of the Statements after having neglected to consider them objectively in their context and after having rejected, based upon a misunderstanding of the governing pension law principles, the evidence of the maker of the Statements.

(iv) The Legal Effect of the Statements

222. In reliance on this flawed reasoning, the Trial Judge made the following finding as to the legal effect of the Statements:

> [483] I therefore conclude the initial surplus was intended to be used solely for the purpose of enhancing pension benefits as it had under the Old Plan. ***It was not to be used to reduce MTS's cost of or share of contributions to the New Plan either at the time of transfer or in the future.*** Even though the employees/retirees agreed the initial surplus could be transferred to the COLA account in the New Plan, they were entitled to have those funds used to enhance employee benefits. They were not aware nor did they agree to the initial surplus being used to increase the value of the COLA account so as to bring it closer to the 20 year pre-funding requirement as that concept was

> never discussed. Ultimately, the initial surplus resulted in a financial status for the New Plan which enabled MTS to take contribution holidays for several years after the plan's inception. That was precisely what they and the Government agreed not to do and what they told the employees/retirees would not happen.[13] [emphasis added] **[R.F.D., para. 483]**

223. This statement appears to have been one of the foundations for the Trial Judge's significant damage award. The Reasons provide no explanation as to the basis for his award. The Trial Judge does not explain how his interpretation of the Statements somehow imposed an enforceable legal obligation on MTS.

224. Were the Statements enforced as a contract? Were they enforced as a misrepresentation? Meaningful appellate review of the Trial Judge's decision requires that these questions be answered, but the Trial Judge's Reasons provide no explanation. MTS submits that there is no defensible legal basis to enforce the Statements.

225. First, there is no basis in the record for the Trial Judge to have found that the Statements were enforceable as a contract. The Statements were offered as answers to specific requests for information, not as a contractual commitment. A contract is an exchange of promises, acts, or

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[13] While from the Reasons it is difficult to understand the precise legal effect that the Trial Judge gave to the Statements, it appears that it was the Trial Judge's intention to enforce his interpretation of them. This paragraph is the concluding paragraph to a section whose heading is "Were there any undertakings by MTS and/or the Government regarding the use of the initial surplus in the New Plan?"

acts and promises, as a result of which each side receives something from the other. The Trial Judge made no finding as to what consideration the employees gave to support enforcement of the Statements as a contractual promise not to take contribution holidays. There is no evidence that the employees offered anything to MTS in exchange for a contractual promise not to take contribution holidays. A bare undertaking unsupported by consideration is *nudum pactum* and unenforceable.

***Watson v. Moore Corporation Ltd.* [1996] 7 W.W.R. 564 (BCCA) at para. 15 , BofA TAB 27**

***Canada West Tree Fruits Ltd. v. T.G. Bright & Co.* [1990] 6 W.W.R. 89 (BCCA), BofA TAB 28**

226. Furthermore, there is no basis in the Trial Judge's Reasons or in the evidence to conclude that the Statements are actionable as a misrepresentation. First, the Statements are not representations at all. They are at best statements as to how MTS will act in the future. To be actionable as a misrepresentation, the representation must not be a promise but rather a representation as to an existing fact.

***Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.* 2002 MBQB 230 at paras. 62-64, affirmed 2006 MBCA 69, BofA TAB 29**

***Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 78 O.R. (3d) 561 (ONCA) at paras. 76-77, BofA TAB 30**

227. Even assuming the Statements amount to representations, the plaintiffs cannot meet the test to establish liability in negligent misrepresentation. The elements of a cause of action for negligent misrepresentation are described in the decision of the Supreme Court of Canada in *Queen v. Cognos Inc.* as follows:

a) there must be a duty of care based on a "special relationship" between the representor and the representee;

b) the representation in question must be untrue, inaccurate, or misleading;

c) the representor must have acted negligently in making the misrepresentation;

d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

***Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, BofA TAB 31**

228. Even assuming the first element of the test could be satisfied, the record in this case discloses no basis on which the final four requirements could be satisfied. First, as noted above, when considered in

context, the Statements were not untrue, inaccurate or misleading. The only way in which the Statements could be construed as inaccurate or misleading would require the Court to ignore the context in which the Statements were made and to accept the plaintiffs' erroneous belief that actuarial surplus is a distinct "bag of money" owned by the employees. As also noted above, the record does not disclose that any "Initial Surplus" was actually used to take contribution holidays.

229. Second, Fraser did not act negligently in making the Statements. Fraser's Statements were consistent with the jurisprudence on actuarial surplus. As noted above, the Statements only make sense when interpreted as MTS interpreted them. As actuarial surplus, any surplus portion of the transfer amount only existed at a specific point in time. It was not negligent for Fraser to refer to the use of any such surplus as not having any effect on MTS's actions on the implementation date.

230. As to the last two components of the test, reliance and detriment, there is no evidence of reliance on the Statements other than sporadic and self-serving after the fact statements to suggest that the employees relied on the Statements. The record does not disclose that the employees changed their position in any way based upon the Statements. It is unclear how they could have relied on them. Any detriment suffered by

the employees was not caused by any actions they took in reliance on the Statements. It was occasioned, if at all, by the privatization of MTS and the passage of the *Reorg. Act*.

231. Finally, even if the plaintiffs could be said to have relied in some unspecified way on the Statements, such reliance would not have been reasonable. The plaintiffs had an opportunity to negotiate for a contractual promise not to take contribution holidays if they thought that this could be achieved under the MOA. But the MOA is silent on contribution holidays. It was unreasonable for the plaintiffs to assume that the Statements, made in response to specific questions (that had nothing to do with Plan funding on an ongoing basis), were an enforceable promise not to take contribution holidays.

F) Did Bryk J. err in his approach to damages?

232. The Trial Judge also erred in granting a damage award equal to the entire amount of the Initial Surplus. The Trial Judge explained that, had the employees remained in the Old Plan, they would, *in fact*, have negotiated benefit increases with it and such increases would, *in fact*, have been granted. The critical paragraph is paragraph 518 of the Trial Judge's Reasons:

> ***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. [emphasis added] **[R.F.D., para. 513]**

233. As with much of the Trial Judge's reasoning, these Reasons are opaque. But it is apparent that the Trial Judge considered that the plaintiffs had lost something they had under the Old Plan because, in practice, had the employees remained under the Old Plan, they would in fact have been able to negotiate benefit enhancements.

234. As a measure of loss, this approach is directly contrary to the decision of the Supreme Court of Canada in *Hamilton v. Open Window Bakery Ltd.* In that case, the Court considered an award of damages for repudiation of a 36 month contract that was terminable at will on three months notice. The Trial Judge had awarded damages for the entire unexpired portion of the contract notwithstanding the right to terminate, awarding only a 25% adjustment to reflect the possibility the defendant might have exercised its right to terminate. Both the Ontario Court of

Appeal and the Supreme Court of Canada held that this approach was wrong. As Arbour J. held:

> under the general principle applicable in breach of contracts with alternative performances enunciated above, it is not necessary that the non-breaching party be restored to the position they would likely, as a matter of fact, have been in but for the repudiation. Rather, the non-breaching party is entitled to be restored to the position they would have been in had the contract been performed.

***Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 17, BofA TAB 32**

235. The measure of damages for breach of contract is to put the plaintiff in the position he would have been had the defendant done what he or she was *required* to do. The function of damages is to place the plaintiff not in the position he or she *in fact* expected to be, but rather, to put the plaintiff in the position he or she would have been in had the defendant done what it was required to do under the contract.

***Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 11, BofA TAB 32**

236. The Trial Judge referred extensively to what the plaintiffs subjectively expected, but did not consider what he was required to consider, which was: ***What was MTS specifically required to do, and are the plaintiffs worse off because MTS did not do what it was specifically required to do?***

237. The Trial Judge's exclusive focus on expectations and not on categorical obligations is a fundamental error requiring his decision to be set aside.

G. Did Bryk J. err in substituting his own decision for the decision of the Independent Actuary?

(i) Affirmation of the Fox Conclusion

238. The principal submission of the defendants is that there is equivalence in the value of benefits between the Old Plan and the New Plan: that "benefits" do not include expectations; and that there was no breach of the terms of the MOA. In short, Fox's opinion was correct, despite the procedural flaws that marred the process he followed. That opinion can and should be affirmed by this Honourable Court. Only if there is a reluctance to affirm Fox's opinion then the defendants urge that this alternative argument be favourably considered.

(ii) Appointment of a New Independent Actuary

239. The Trial Judge decided to substitute his opinion for that of the actuary appointed by the Provincial Auditor as contemplated in subsection 15(3) of the *Reorg. Act*.

240. The Trial Judge had no right to do so, and his subsequent decision to make an award of $43.343 million, plus interest, plus costs, was

beyond the jurisdiction of a Judge of the Court of Queen's Bench (and equally beyond the jurisdiction of the Manitoba Court of Appeal).

241. It is the defendants' submission that the Courts of Manitoba can properly set aside the decision of the actuary, Fox, as being neither fair nor independent. The process is that of judicial review under which an administrative decision or opinion can be set aside by the Court on procedural grounds; but the Court does not, and cannot, substitute its decision for that which has been set aside.

242. Confusion arises in the present case because the initial Statement of Claim seeks declaratory and injunctive relief, instead of seeking judicial review in administrative law terms.

243. Essentially, the Statement of Claim blends a claim for declaratory relief – including a declaration that the plaintiffs are entitled to a monetary judgment - with judicial review of the opinion of Fox. The Trial Judge granted only two declarations out of the many sought by the plaintiffs. By way of declaratory relief, the Trial Judge: (a) set aside the opinion of Fox; and (b) declared that the plaintiffs are to receive a sum of money to be used to enhance pension benefits. It is the defendants' submission that, having set aside the actuary's opinion on administrative

law principles, the Trial Judge was precluded from substituting his opinion for that of Fox. The Trial Judge should have ordered a new review by an actuary appointed for that purpose by the Provincial Auditor. That is the process required on judicial review. Moreover, that process is reinforced in the present case by the very terms of the *Reorg. Act*. The Act provides that the actuary appointed by the Provincial Auditor has the sole responsibility of determining equivalence of value of benefits of the New Plan as opposed to the Old Plan. The Act also gives statutory approval of the MOA, paragraph 5 of which states that the same actuary is to "resolve any disputes" concerning the MOA. In simple terms, the Act provides the remedy, and there is no room for the Court to fashion a remedy of its own.

244. If this Honourable Court concludes that the New Plan provides benefits of equivalent value to the Old Plan it can, and should, affirm that conclusion of Fox, without endorsing the methodology by which Fox reached his decision. By reaching the same conclusion, this Court would not be substituting its opinion for that of the actuary, but affirming his conclusion despite procedural flaws.

245. Alternatively, if this Court finds itself unable to reach the same conclusion as Fox, the defendants submit that the only available remedy, consistent with administrative law principles, and the remedy implicit in the

Reorg. Act, is to order that the statutory process contemplated in the *Reorg. Act* must now be undertaken again. However, some direction should be provided to the new "independent actuary" concerning the process he or she will undertake and provide clarity as to the legal interpretation of the applicable provisions of the *Reorg. Act*.

246. The Trial Judge decided to grant a monetary judgment in favour of the plaintiffs of $43.343 million which he characterized as the amount of the "Initial Surplus". It is apparent that the Trial Judge arrived at that figure on the basis in part that the money belonged to the plaintiffs under the terms of the MOA.

247. Just as there was no jurisdiction to substitute his decision for that of an independent actuary appointed by the Provincial Auditor, so too, there was no jurisdiction for the Trial Judge to make an award for an alleged breach of the MOA. As the Trial Judge himself noted at paragraph 8 of his Reasons, the responsibility to resolve disagreements under the MOA was assigned to that same independent actuary appointed by the Provincial Auditor. The MOA was given statutory status when the *Reorg. Act* was amended to add subsection 15(11) which provides that nothing in section 15 was to be interpreted as nullifying the effect of the MOA. The MOA was elevated to the status of a statute and the Trial Judge had no

jurisdiction to usurp the function of the actuary to resolve disagreements under that legislation.

(iii) Decision of the Trial Judge

248. The Decision of the Trial Judge is plain enough. He found that the decision of Fox was unfair and was not independent. The Trial Judge concludes this section of his Reasons at paragraph 454 where he states that:

> "... I conclude that Fox owed the employees/retirees a higher standard of fairness than they received."

249. Later in that same paragraph:

> "The reasonable expectation of the employees/retirees that the process would be fair was not met."

250. At paragraph 459 of his Reasons, the Trial Judge concludes:

> "... it to be in the best interests of all concerned to substitute my decision for the opinion of Fox in relation to the following issues."

251. One such issue was whether the opinion of Fox was "independent" as called for by subsection 15(3) of the *Reorg. Act.* Not surprisingly, the Trial Judge found, at paragraph 462, that Fox:

> "was not independent *vis-à-vis* the office of the Provincial Auditor."

252. At paragraph 463, the Trial Judge writes that Fox permitted himself to be treated as an agent of the Provincial Auditor rather than as an independent actuary.

253. The Trial Judge concludes this section of his Reasons at paragraph 465 in these words:

> "Ultimately, the independence of the independent actuary was compromised to an extent that his final opinion on equivalence has to be set aside."

254. The defendants agree that the determination by Fox was neither fair nor independent but submit that it was nevertheless correct and can be affirmed notwithstanding the procedural flaws. Nor do the defendants contest the statement in paragraph 459 of the Reasons, that the Trial Judge was under no obligation to "return this matter to Mr. Fox for reconsideration". Quite so – but if the opinion of Fox warranted being set aside, the Trial Judge was obligated to return the matter to a newly appointed actuary for consideration.

255. The defendants submit that the Trial Judge was profoundly wrong in concluding that he had the jurisdiction to substitute his decision for that of Fox, and to conclude that the "Initial Surplus" was effectively owned by the employees/retirees, and should somehow be repaid, together with interest at the Plan rate of return.

256. It would appear from the Reasons that the Trial Judge gave virtually no consideration as to whether he had the jurisdiction to substitute his decision for that of Fox. This major question is dealt with in a matter of less than 1½ pages out of Reasons which extend to 170 pages.

257. Under the heading "Available Remedies", the Trial Judge refers to three decisions of the Supreme Court of Canada (in paragraphs 456, 457, and 458), and then concludes at paragraph 458 that:

> "The above authorities satisfy me that I am not required to return this matter to Fox for reconsideration. Given the passage of time, it would be impractical to do so. Having heard the evidence, I conclude it to be in the best interests of all concerned to substitute my decision for the opinion of Fox ..." **[R.F.D., para. 458]**

258. For similar reasons, the Trial Judge's decision concerning the MOA, must also be set aside. Commencing at paragraph 484, and continuing to paragraph 515, the Trial Judge considers whether there has been compliance with the MOA. He concludes that while there has been no breach of the MOA with respect to governance and ongoing surplus, there was a breach of its terms with respect to the "Initial Surplus". The Trial Judge concluded (at paragraph 518) that the MOA gave rise to contractual obligations with respect to the "Initial Surplus", which the Trial Judge quantified at $43.343 million. At paragraph 503 he concludes that the

employees/retirees have been deprived of the benefits which the "Initial Surplus" could have provided, and at paragraph 518 he rules:

> "That money must be returned to the plaintiffs together with interest."

259. However, the MOA stipulated that any disagreement related to any matters described in paragraphs 2 and 3 of the MOA would be resolved by the independent actuary appointed by the Provincial Auditor as provided by the *Reorg. Act*. Moreover, the MOA was incorporated by reference into the statute pursuant to subsection 15(11) of the *Reorg. Act*. The stipulation that disagreements concerning the MOA would be solved by the same process as the determination of equivalency, has the status of a legislative enactment. Indeed, the legislature was wise to entrust responsibility to resolve disagreements related to the MOA to the same person charged with determining the equivalency of the value of benefits, because the tasks are inextricably linked. If the value of benefits are equivalent, there can be no contractual obligation giving rise to a monetary judgment under the MOA. The Trial Judge wrongly exceeded his jurisdiction in making an award based upon breach of the terms of the MOA.

(iv) The Legislative Scheme in Section 15 of the *Reorg. Act*

260. The defendants submit that section 15 of the *Reorg. Act* established a mandatory scheme to determine equivalency of the value of benefits. Subsection 15(3) establishes a statutory process that is designed to have the opinion on equivalency determined by someone other than a Judge (or even a lawyer). The determination of equivalency was seen as being uniquely an actuarial function rather than a legal determination. It has been noted that subsection 15(11) of the *Reorg. Act* was an amendment to the Act added as a consequence of the MOA. Once again, the legislative intent is that disputes concerning the implementation of the MOA should be determined by the same person who is charged with responsibility to determine equivalency of benefits - someone other than a Judge. The Manitoba Legislature concluded that that individual should be an independent actuary.

261. Subsection 15(4) is of vital importance in interpreting the legislative intent. The legislation anticipates the possibility that the independent actuary might find that the New Plan was not equivalent in some measure. In that event, the defendant MTS was to "take any steps necessary to resolve any concerns raised by the independent actuary in a report prepared for the purpose of sub-section 3." By substituting his

opinion for that of an independent actuary, the Trial Judge negated subsection 15(4) entirely, making it impossible for MTS to work out a satisfactory basis to reach equivalency. It is clear that the legislature opted for non-judicial remedies from the beginning to the end.

262. Subsection 15(3) states that the process outlined for determining equivalency is to be initiated "as soon as possible" after the *Reorg. Act* received royal assent. It is acknowledged that royal assent occurred some 13 years ago. However, as a result of a wide variety of events during those 13 years, this is indeed the earliest possible time for the Provincial Auditor to appoint an independent actuary to review the New Plan to determine whether the benefits were equivalent in value as of the implementation date.

(v) The Authorities Relied Upon by the Trial Judge

263. As noted, the Trial Judge found support for his conclusion that he could substitute his decision for that of Fox in three Supreme Court of Canada cases. These decisions do indeed support the Trial Judge's right to set aside Fox's opinion upon judicial review, but that does not entitle him to substitute his own decision.

264. In the case of *C.U.P.E. v. Ontario* (Minister of Labour), 2003 SCC 29 the Court gave some direction to the Minister of Labour as to the qualifications which the Minister must take into account in appointing the chairperson of certain arbitration boards. But the majority decision makes no suggestion that the Court has the jurisdiction to make such appointments. That responsibility remains with the Minister.

***C.U.P.E. v. Ontario* (Minister of Labour), 2003 SCC 29, BofA TAB 33**

265. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, the chairman for an administrative tribunal made a decision that Mobil contended was wrong in law. Mobil sought an order to quash the chairman's decision on the basis that Mobil was entitled to a hearing by the full administrative board – not just the chairman. The Supreme Court determined that the chairman's decision was legally correct, and therefore there would be no point in allowing a further hearing before the full administrative tribunal, because the full board would now be bound to agree with the chairman's decision or a legal interpretation that had been approved by the Courts. There is nothing in this case, and in particular in the passages from the reasons of Iacobucci J. cited by the Trial Judge that supports his decision to substitute his opinion for that of Fox.

***Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1SCR 202, BofA TAB 34**

266. In *Moreau-Bérubé v. New Brunswick* (Judicial Council), 2002 SCC 11 the respondent Moreau-Bérubé was a Provincial Court Judge in New Brunswick who, during the course of a Court process, made some derogatory comments about Acadians living in a particular region of New Brunswick. Complaints were referred to an inquiry panel of the Judicial Council which recommended that she receive a reprimand. However, the Council as a whole determined that she should be removed from office. Both a reviewing Court of Queen's Bench Judge and the New Brunswick Court of Appeal concluded that the Judicial Council decision should be set aside, but the Supreme Court of Canada unanimously restored the decision of the Judicial Council. Commencing at paragraph 74 of the Reasons, Arbour J. deals with the question of whether there had been a breach of procedural fairness, and the conclusion was that there was no such breach. It is an important case dealing with an important subject, but it does not speak to the question of a reviewing Judge's jurisdiction after having made a finding of such a breach.

***Moreau-Bérubé v. New Brunswick* (Judicial Council), 2002 SCC 11, BofA TAB 35**

267. The cases cited by the Trial Judge as giving him authority to render the decision that an independent actuary appointed by the

Provincial Auditor might make are simply of no assistance. On the contrary, they confirm that the proper course on judicial review is to remit the matter back to the administrative adjudicator. There continues to be a statutory regime in place for the purpose of determining equivalency and for the purpose of resolving disputes arising out of the MOA.

268. The Trial Judge seemed to think that a return to the statutory process was "impractical". With respect, the process is entirely practical, with a new Provincial Auditor to appoint an independent actuary. It is open to the Court to provide some instruction concerning the process to be followed to ensure procedural fairness, including resort (if that becomes necessary) to the operation of subsection 15(4).

(vi) The Submission of the Plaintiffs at Trial

269. In addition to the authorities relied upon by the Trial Judge as providing a legal basis for the remedy he imposed, counsel for the plaintiffs suggested that the decision of this Honourable Court in determining preliminary issues justified the Trial Judge in substituting his opinion for that of Fox. It is worth noting that in the plaintiffs' written argument, which runs on to 899 paragraphs spread over 276 pages, only one slender paragraph deals with what the defendants contend constitutes one of the major issues

in this case. Specifically, the plaintiffs' written argument contains this paragraph:

> "295. The Court of Appeal has made it clear that Fox's opinion can be appealed. It would be absurd to send this matter back to Fox or another independent actuary when this Court has had the benefit of 13 weeks of evidence and lengthy arguments to sort out the questions concerning equivalency. This Court is best placed to resolve the matter once and for all."

270. This single three sentence paragraph may have emboldened the Trial Judge to do what was neither written, suggested, implied, or even contemplated by the Court of Appeal in its decision, referred to in the plaintiffs' written argument. No doubt the Fox opinion can be set aside as not the product of an independent mind, nor of a fair minded decision maker. But it is simply wrong to carry the matter one step further and suggest that the Trial Judge can usurp the function of an independent actuary appointed by the Provincial Auditor.

271. It must be noted that the defendants strenuously contested the above statement contained in the plaintiffs' written argument. In the reply submissions of the defendants of February 13, 2009, there is a section under the heading "Remedies" commencing at paragraph 231, at page 108, and at paragraph 233 the following appears:

> ".....if the plaintiffs are successful in obtaining a declaration that Fox's opinion is void, it is submitted this

> Court has no jurisdiction to then effectively "rewrite" Fox's determination as to whether the benefits under the New Plan were equivalent in value as required by clause 15(2)(a) of the *Reorg Act*. It is submitted that under section 15(3) of the *Reorg Act*, this jurisdiction was given exclusively to the independent actuary appointed under the *Reorg Act*. Accordingly, this Court is precluded from making any findings with respect to equivalency or from ordering any relief that would allegedly flow from such a finding."

272. And later, at paragraph 242 of the written argument:

> "At paragraph 612 of their written argument the plaintiffs write that "there is no appeal procedure specified in the Act..." They use this as the basis to say that Fox owed a duty of fairness. It is irreconcilable for the plaintiffs to then say that there is an appeal right to this Court which justifies this Court rewriting the New Plan. The existence of an appeal right is consideration for the Court in determining the level of fairness (if any) required of an administrative tribunal because the Court is precluded from hearing an appeal of the tribunal's decision. The plaintiffs cannot say Fox's decision should be set aside because of this duty of fairness and then use the reverse rationale (there is an appeal right) to ask this court to rewrite the New Plan."

273. The Trial Judge does not respond to these concerns expressed in the defendants' written argument, other than to write that it would be in the best interests of all concerned to substitute his decision for that of Fox.

274. Regard must be had to the decision which is the genesis for the invitation that the plaintiffs presented to the Trial Judge, namely, *Telecommunications Employees Association v. Manitoba Telecom Services*, 2007 MBCA 85. The case dealt with preliminary Motions in the

same litigation that is again before the Court of Appeal. At a certain point after a legal action was commenced, both Singleton, the Provincial Auditor, and Fox, the appointed independent actuary, were added as party defendants. Both of these defendants, along with MTS, brought Motions for Summary Judgment dismissing that part of the proceedings that concerns the determination of equivalency under section 15 of the *Reorg. Act*. Singleton and Fox also asserted that they were not necessary parties to the litigation and should be released. The matter was first heard by Kennedy, J. of the Court of Queen's Bench, who dismissed all of the defendants' Motions. On appeal, this Court allowed the appeal of the individual defendants since they were not necessary parties to the litigation, but dismissed the appeal of MTS. The appeal panel consisted of Scott C.J.M. and Monnin and Hamilton J.J.A. with the Reasons for Decision by the Chief Justice.

275. The central issue raised by MTS was whether the report of the independent actuary was "deemed" to be correct by virtue of subsection 15(1) of the *Reorg. Act*. Had its Motion for Summary Judgment succeeded, a Trial would still have been required to determine whether there was a breach of the MOA.

276. From the outset, the Court made it clear that the decision would be strictly confined to the issues before the Court: whether Summary Judgment should be granted. At paragraph 17 of the Reasons, Scott C.J.M. writes:

> "Since the employees' action will be proceeding to Trial in any event with respect to the alleged breach of the November agreement, it is important that I confine my findings to those matters that are essential to decide the issues before the Court."

277. It is clear that it was not the intention of the Court to address the issue of what remedy would follow a decision to set aside the Fox report.

278. The Reasons for Decision follow this pattern:

a) a delineation of the essential facts as contained in Affidavit evidence.

b) a review of the Decision of Kennedy J.

c) a consideration of whether Singleton and Fox were necessary parties when only declaratory relief was sought against them.

d) a consideration of section 15, and in particular, subsection 15(10), and whether that provision provided MTS with a defense to any claim based on equivalence of benefits.

279. It is the last area that is germane to the present appeal. At paragraph 80 to 84, Scott C.J.M. provides a quick summary of the respective positions of the defendants and the plaintiffs. He then sets forth the principles of statutory interpretation that apply to section 15, and then concludes at paragraph 99 in these words:

> "Having regard to the principles and authorities just reviewed, it is my opinion that Section 15(10) does not preclude the employees from challenging the decision of the independent actuary."

280. The defendants do not contest the statement that the decision of Fox can be, and was, successfully challenged and set aside by the Trial Judge. But the Judgment by Scott C.J.M. is silent as to the remedy that flows from a successful challenge.

281. The defendant MTS argued further that it was entitled to Summary Judgment on the basis that there was no "genuine issue" for Trial in view of the deemed consent provision in subsection 15(10). It was argued that Fox was not subject to the rules of procedural fairness, and in any event, his decision was binding unless patently unreasonable. Needless to say, that argument also failed. At paragraph 114, Scott C.J.M. wrote:

> "In my opinion, the Motions Court Judge got it right when he declined to grant Summary Judgment in favour of MTS. MTS has not discharged its fundamental obligation to

> demonstrate a *prima facie* case that a valid claim in law with respect to equivalency has not been advanced by the employees."

282. There is nothing in the Reasons for Decision even hinting at the appropriate remedy in the event that the challenge to the Fox opinion was successful. To suggest such an interpretation could or should be read into the Reasons is disrespectful to the Court which announced, at the outset, the intention to restrict the decision to the four corners of the case as presented.

H. Did Bryk J. err in his selection of the appropriate remedy for any breach that he found?

283. Absent a determination by this Court that the Fox opinion is correct, despite procedural flaws, the defendants' claim that the only available remedy is to place the issue of equivalency of the value of benefits into the hands of an independent actuary appointed by the Provincial Auditor. Similarly, that same independent actuary will deal with the disagreement between the parties as to the meaning of the MOA.

284. These are the remedies chosen by the Manitoba legislature. Fortunately, there is a new Provincial Auditor in place who can appoint a qualified and independent actuary to provide the necessary opinion or opinions. We need not be concerned about the transgressions of Singleton or Fox.

285. There can be no doubt that, however the plaintiffs pleaded their claim, the Trial Judge dealt with the opinion of Fox on the basis of judicial review of an administrative decision. The Trial Judge did not state in specific terms that the opinion was incorrect or wrong. Indeed the Trial Judge conceded that valid actuarial opinions are subject to substantial variations **[R.F.D., para. 387]**. The Fox opinion was set aside as being procedurally unfair and not the product of an independent mind. These are traditional grounds for judicial review. Moreover, the cases relied upon to set aside the opinion of Fox were all cases of judicial review in administrative law terms.

286. The consequences of a successful application for judicial review is almost invariably to start the process again, which in the present case is to have the current Provincial Auditor appoint a new actuary to make the determination required under subsection 15(3) of the *Reorg. Act*, (and to resolve any dispute with respect to the MOA.)

287. In the text, Administrative Law in Canada, 4th Edition, by Sara Blake, at page 219 the author writes:

> "On judicial review, the court's power is limited to quashing the decision. It may not issue the order the tribunal should have made had it not erred, because a court does not have the statutory authority to exercise the discretion conferred on the tribunal. A statutory right of appeal may give the

> court authority to make the order on behalf of the tribunal, but the court should not do so where the decision requires application of the tribunal's policy expertise."
>
> "In addition to quashing the order, a court may refer the matter back to the tribunal to be reconsidered. If the court issues directions to be followed on reconsideration, the directions must clearly state what the tribunal may or may not do. .....Directions may be given to avert unfair procedure or excess of power, but not to direct the result of the tribunal's reconsideration on the merits. .....If the decision maker who originally heard the matter is no longer in office, the matter must be heard anew by the incumbent."
>
> **Sara Blake, *Administrative Law in Canada*, 4th ed., BofA, TAB 36**

288. The case law, and in particular, cases decided by the Supreme Court of Canada, support the conclusion that upon setting aside the opinion of Fox, the matter must be remitted to a newly appointed actuary. For example, in *Jehovah Witnesses Congregation of St. Jerome v, Village of Lafontaine,* (2004) 2 S.C.R. 650, the Court set aside the decision of the municipal council to refuse a rezoning of certain land, without providing reasons, as unfair under the circumstances. Having done so, the Court ordered that the matter be remitted back to the municipality for reconsideration, despite the objection of the applicant that its application would again be rejected, but this time with proper reasons. The Court held that the authority over zoning matters was entrusted to municipalities by the legislature.

Jehovah Witnesses Congregation of St. Jerome v, Village of Lafontaine,
(2004) 2 S.C.R. 650, BofA TAB 37

289. Yet another example is the case of *Baker v. Canada (Minister of Citizenship and Immigration)* (1999) 2 S.C.R. 817. In this case Mavis Baker was contesting a deportation order on compassionate grounds. Her application was considered by an immigration officer who rejected what appeared to be a strong case, and without providing reasons. The decision of the immigration officer was set aside on the basis of lack of fairness, but the Court studiously avoided substituting its decision for that of the immigration officer. Instead the matter was remitted to the Minister "for redetermination by a different immigration officer."

Baker v. Canada (Minister of Citizenship and Immigration)
(1999) 2 S.C.R. 817, BofA TAB 38

290. Although not a case of judicial review, perhaps the most significant authority is the decision of the Supreme Court in *Terrasses Zerolego Inc. v. Regie des installasions olympiques,* (1981) 1 S.C.R. 94 (the Terrasses case.)

Terrasses Zerolego Inc. v. Regie des installasions olympiques,
(1981) 1 S.C.R. 94, BofA TAB 39

291. The case affirms the general principle that where the determination of a possible dispute is conferred by legislation to a particular adjudicator, the Court should not intervene by way of a declaratory

judgment to interrupt that process. The case is doubly important in terms of the Trial Judge's decision in the present case with respect to the MOA, where an "independent actuary" was given no opportunity to resolve disputes relating to the MOA. The Trial Judge wrongly assumed the jurisdiction to decide that there had been a breach of the MOA, and that it should be remedied by a payment of $43.343 million, plus interest, plus costs. These were not matters for him to decide by a declaratory order.

292. In the *Terrasses* case the applicant was the owner of the Olympic Village in Montreal which was constructed in contemplation of the Olympic Games, but with the post-Olympics intent that the facilities would be available to the greater public. The Province of Quebec passed legislation transferring ownership to the defendant – a publicly owned agency. The legislation provided that the applicant was to be compensated by an arbitration committee appointed by the Government. Section 27 of the Act stated that compensation "shall include" the investment of the applicant, the value of promotional and managerial services respecting construction of Olympic Village, and interest as fixed by the arbitrators.

293. The applicant sought an interpretation of section 27, hoping for a declaration providing an interpretation that the words "shall include" were not exclusionary of other sorts of compensation.

294. When the case ultimately reached the Supreme Court, Chouinard J., for a unanimous Court, approbated this portion of the Reasons for Decision of Tourgeon J.A. in the decision of the Quebec Court of Appeal:

> "I am of the view that the Superior Court should not intervene by a declaratory judgment when the legislator has specifically provided that the matter is to be decided by some other tribunal. Both English and Canadian precedents would appear to lead to that conclusion.
>
> I think it can be said that Canadian authorities [sic] is to the effect that the Superior Court should not use its declaratory power when a lower tribunal has been created by the legislator to decide some particular issue."

295. Later in his reasons Chouinard J. also quotes from the reasons of Lord Herschell in the House of Lords decision in *Barraclough v. Brown* (1897) A.C. 615 at 620, to this effect:

> "...I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."
>
> ***Terrasses Zerolego Inc. v. Regie des installasions olympiques,* (1981) 1 S.C.R. 94 at page 9, BofA TAB 39**

296. Chouinard J. himself wrote these words at page 8:

> "... There is no basis in the Act for concluding that the legislator intended to make any court other than the arbitration committee responsible for determining the items claimed, on the basis of which various sums are to be determined for inclusion in the compensation to be paid. On the contrary and the reason is precisely because the legislator intended to make the arbitration committee

> responsible for determining the compensation and the items included in it.
>
> Accordingly, appellants were not asking the Superior Court to determine the arbitration committee's jurisdiction, but rather to supplant the latter and determine what the Act requires the arbitration committee to determine."

297. The *Terrasses* case is important. It reinforces the basic concept that declaratory orders by a superior court are inappropriate to determine the very issues that the legislator has assigned to third party adjudicator.

298. The *Terrasses* case was not one of judicial review. The arbitration committee had not yet been named, let alone begun its work. In that sense it was similar to the potential replacement of Fox as independent actuary. That individual will decide what factors will decide equivalence in the value of benefits. That individual will determine whether equivalency has or has not been achieved, and if not, to identify the "concerns" that MTS must then resolve to achieve equivalency. That individual will be the one to resolve disputes relative to the MOA.

299. This Court's decision in *Bojkovic v. Rentz Bros. Inc. et al* also confirms the principle that, absent an affirmation of the Fox conclusion, the process must be restarted with the appointment of a new independent actuary.

***Bojkovic v. Rentz Bros. Inc. et al*, 2010 MBCA 17, BofA TAB 40**

300. The circumstances of the *Bojkovic* case are completely different from the present dispute, but the principle decided is precisely the same. When there is a statutory remedy there is no jurisdiction in the Court to prefer its own remedy under the authority of its inherent jurisdiction. The *Bojkovic* case is not one of judicial review, where the Courts are restricted to the remedy of remitting the matter back for reconsideration. The *Bojkovic* case is simply one where the available remedies are set forth in a statute.

301. The principle established by the *Bojkovic* case is simply this: where a statute mandates the remedy, that course must be followed, and there is no "inherent authority" for the Court to provide an alternative.

302. The actual circumstances of the *Bojkovic* case could not be much more different from the present case. The plaintiff Bojkovic filed a Caveat against the title to property registered in the name of the defendant Rentz Bros. Inc. The basis for the Caveat was the plaintiff's claim that he had sold the property to the defendant under a partnership scheme, but became an unpaid vendor when the intended partnership disintegrated.

303. The plaintiff's claim as unpaid vendor was $150,000. Independently, the plaintiff commenced an action in the Court of Queen's Bench claiming larger damages based on an alleged breach of contract.

304. The defendants were anxious to proceed with the commercial development of the property, but could not do so because of the plaintiff's Caveat. The defendants elected to pay the $150,000 into Court and moved to have the Caveat discharged. The defendants succeeded before a Court of Queen's Bench Motions Judge, but that decision was set aside on appeal.

305. The Motions Judge had discharged the Caveat based on the inherent jurisdiction of a Superior Court. On appeal, this Court concluded that the provisions of *The Real Property Act* were the only grounds for discharging a Caveat and that "inherent jurisdiction" had no application.

306. In the Reasons for Decision, at paragraph 48, Hamilton J.A. comments:

> "Section 150 and Section 163 provide the two remedies that were available under the Act to Rentz Bros. to seek a discharge of the Caveat. The respondents do not rely on either of them. Nevertheless these sections are crucial to the appeal as they are at the heart of the plaintiff's argument that they preclude the Court exercising its inherent jurisdiction."

307. Hamilton J.A. notes (in paragraphs 61 to 64) that inherent jurisdiction is often discussed in the context of preventing an abuse of process but is not necessarily limited to that. Citing a previous decision of

the Court of Appeal, it is observed that "inherent jurisdiction cannot be invoked 'so as to conflict with a statute or a rule'."

308. Hamilton J.A. draws the conclusion (in paragraph 71) that the inherent jurisdiction of the Court does not permit the Court to exercise its discretion beyond that afforded to it by the Act, unless there has been an abuse of its own process.

309. The concluding paragraph of the Reasons reads as follows (at paragraph 73):

> "The judge erred in law when he relied upon the inherent jurisdiction of the court. Clearly he erred when he stated that s. 163 provided him with inherent jurisdiction. He also erred when he relied on Pelisek as authority for the order that he made, when that decision concerns this court's power to control its own process to avoid abuses by a vexatious litigant."

310. It is the submission of the defendants that the *Bojkovic* case applies in full force to the present appeal.

311. The *Reorg. Act* establishes the sole process (the remedy) to determine whether there is equivalency in the value of benefits. It is to be determined by an actuary appointed by the Provincial Auditor. The legislation contemplates no other remedy. It was specifically <u>not</u> intended that the question of equivalency be decided by the Courts. That is made abundantly clear by a consideration of subsection 15(4) of the *Reorg. Act.*

The *Reorg. Act* also provides the remedy for disputes that might arise with respect to the MOA. Accordingly, the only remedy available to the Trial Judge, absent affirmation of the Fox conclusion, was resubmission of the matter to the Provincial Auditor in order that they can reappoint a new independent actuary.

Conclusion

312. The defendants submit that the plaintiffs' action was misconceived from the beginning and made worse by the subsequent amendments. An application for judicial review, followed by a new administrative process, could have brought about a satisfactory solution in a relatively short time. Instead, a Statement of Claim seeking declaratory orders of all kinds was pursued, and led to lengthy discoveries, expert witnesses, a lengthy Trial and an unenforceable Judgment. What is to be done now?

313. The defendants urge that this Honourable Court conclude that there was equivalency in the value of benefits as of the implementation date, and on that basis the appeal should be allowed and the entire claim of the plaintiffs dismissed with costs to the defendants. In the event that this conclusion is not the decision of the Court, then the defendants claim that the issues must be remitted to a newly appointed independent actuary for

determination of both equivalency in the value of benefits, and to resolve any possible breach of the MOA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2010.

TAYLOR McCAFFREY LLP

Per: _____
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