Date: 04 October 2006
Docket: CI 99-01-14589
Indexed as: Telecommunication Employees Association of Manitoba Inc. et al v. Manitoba Telecom Services Inc. et al
Cited as: 2006 MBQB 224
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

Telecommunication Employees Association of Manitoba Inc., Communications, Energy and Paperworkers Union of Canada Local 5 and Local 7, International Brotherhood of Electric Workers, Local Union 435 and 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., MTS Advanced Inc., and Larry Trach, on his own behalf and on behalf of all unionized employees of Manitoba Telecom Services Inc., MTS Communications Inc., MTS Mobility Inc. and MTS Advanced Inc.,

Plaintiffs,

Brian J. Meronek, Q.C.
Kris M. Saxberg
R. Ivan Holloway
for the Plaintiffs

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- and -

Manitoba Telecom Services Inc., MTS Communications Inc., MTS Mobility Inc., MTS Advanced Inc., Jon Singleton and Clifford Fox,

Defendants.

E.W. Olson, Q.C.
Shane I. Perlmutter
for the Defendants, Manitoba Telecom Services Inc., MTS Communications Inc., MTS Mobility Inc., MTS Advanced Inc., and Clifford Fox

Ted E. Bock
for the Defendant, Jon Singleton

JUDGMENT DELIVERED:
October 4, 2006

KENNEDY, J.

[1] The Manitoba Telecom Services Inc. (MTS) and the Provincial Auditor seek an order for summary judgment dismissing this action against Jon Singleton (the Provincial Auditor and Clifford Fox (an independent Actuary).

[2] The Plaintiffs ("TEAM" also referred to as "Employees") allege MTS did not provide benefits that were equivalent in value to what the Employees and/or Retirees enjoyed under the old plan as required by the Act.

[3] This application by MTS representing Fox is based on the fact that his opinion on equivalence is not open to challenge and as a result there is no genuine issue for trial affecting him. Singleton relies on the protection of the Provincial Auditor's Act and the Act, it is alleged, also excludes him from being sued leaving no genuine issue for trial affecting him.

[4] MTS also bases its' position in part on the inclusion in the applicable legislation of the "November Agreement" and the "Memorandum of Understanding" which are the mechanism to remedy the Plaintiffs' claims. The Plaintiffs however take the view that these sections are provisions put in place to remedy issues arising with the new plan, but are not the processes to address fundamental error in relation to "equivalence" as of the date of implementation and accordingly Fox's opinion is subject to challenge. Furthermore the Plaintiffs say the November Agreement has already been breached, which is a matter for the trial itself.

[5] Singleton argues that the action against him should also be dismissed, on grounds which arise out of legislation protecting the Provincial Auditor from this action. In effect it is alleged the legislation protects him from a claim for his conduct unless bad faith is established.

[6] The Plaintiffs' oppose the motions and provide extensive material to be reviewed by the motions judge including 10 lengthy affidavits, 6 volumes of cross examinations, 125 pages of argument plus several volumes of case law supporting their position.

[7] The Plaintiffs argued the amount of material in itself, warrants that the matter go to trial while MTS says that this action against Fox is primarily a legal one and because of his legislated appointment, he cannot be sued. It is also argued that practically speaking a dismissal at this point would save considerable trial time.

[8] The Manitoba Court of Appeal has commented on such situations but warns against this approach simply based on there being a large volume.

[9] The Court of Appeal also addressed the practical issue and saving trial time. In the following decisions the court indicated that an application for summary decision was the appropriate time to deal with the matter of whether there was a "genuine issue for trial" and the summary judgment court should not "throw up its hands", so to speak and send the issues to the trial judge to save time.

[10] The cases referred to dealing with the issue of a "genuine issue" for trial are numerous but the following case involving the tort of misfeasance, the court

said in ***Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*** (1995), 123 D.L.R. (4th):

> The test to be met was further stated as follows by the Ontario Court of Appeal in ***Ungerman (Irving) Ltd. et al. v. Galanis and Haut*** (1991), 4 O.R. (3rd) 545 at p. 551 regarding the mirror rule for summary judgment in Ontario:
>
> > It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for resolution, the requirements of the rule have been met. It must be clear that a trial is necessary.... *Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists....*
> >
> > It is a sensible general proposition that, if there is an issue of credibility, a trial is required and summary judgment should not be granted....
> >
> > (italics mine)
>
> And, at p. 552
>
> > ...the proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility....
>
> Scott C.J.M. stated as follows in ***Canadian Imperial Bank of Commerce v. Derksen Brothers Holdings Ltd. et al*** (1995), 100 Man.R. (2d) 224 (C.A.) at p. 232:
>
> > This case is an example of the onus facing a Defendant in an application for summary judgment in which the Plaintiff has presented a strong prima facie case. It is not enough in response to set forth, voluminously, a complex set of interwoven facts in an effort to induce the court to throw up its hands and say, in effect, "Let the trial judge sort out this mess." The time to "sort it out" is in response to the Plaintiff's application. Failure to advert to the real issues and to present facts that are capable of forming the basis for a real defence on the merits will result in the Plaintiff's application being successful.

While the above case deals with the onus on a Defendant who is responding to a Plaintiff's motion for summary judgment, the quote demonstrates the heavy onus on a party responding to such a motion.

> Finally, Helper J.A. held as follows in ***Atlas Acceptance Corp. Ltd. et al. v. Lakeview Development of Canada Ltd. et al*** (1992), 78 Man. R.(2d) 161 (C.A.) at p. 167:
>
> > [35] It is not enough for a party opposing a motion for summary judgment to avert to evidence that may be forthcoming at trial to support its claim. The affidavit evidence must establish that the evidence upon which the party relies does in fact exist and, if accepted, will establish the claim presented... .

[11] For this Court to consider the Defendants' position, it must delve through all the material anyway and having done so it is just as practical for this court to make the substantive decision on whether there is a genuine issue for trial, and deal with the issue one way or another.

[12] The applications by Jon Singleton (Singleton), Manitoba's Provincial Auditor, and Clifford Fox (Fox), the Independent Actuary selected by him, for summary judgment dismissing this action against them are based on the premise that neither of them may be sued and as such there is no genuine issue. There are contrary allegations raised by the Plaintiffs dealing with issues of credibility against both Defendants.

PRIVATISATION OF MTS AND THE PROCESS USED

[13] The Defendants' mandates were established by legislation to facilitate the privatization of the Manitoba Telephone System. The task was by determining equivalency between the prior pension plan under CSSF and a new plan established by MTS, as of the implementation date of the new plan.

[14] The issues between the parties focuses on the treatment of the pension fund's surplus, treatment of the fund's deficiency and governance of the fund as these matters are contained in the opinion of Clifford Fox.

[15] The legislation under *The Manitoba Telephone System Reorganization and Consequential Amendments Act* (the "Act") regarding the appointments of Fox and Singleton and their mandates are found under section 15 of the Act and are as follows:

> **Employee benefit definitions**
>
> **15(1)** In this section and in clause 29(d)
>
> **"employee"** means a present or former employee of the corporation or of an affiliate of the corporation;
>
> **"fund"** means The Civil Service Superannuation Fund constituted under *The Civil Service Superannuation Act*;
>
> **"implementation date"** means the date prescribed by the regulations after which the corporation is responsible for all benefits to which the persons described in clause (2)(a) are entitled under the new plan;
>
> **"new plan"** means a registerable pension plan established by the corporation and registered under the *Income Tax Act* (Canada) and the *Pension Benefits Standards Act*, 1985 (Canada);
>
> **"transfer amount"** means that part of the assets of the fund, as at the implementation date, determined by multiplying the total assets of the fund

including any surplus by a fraction, the numerator of which is the amount of the actuarial liabilities of the fund for benefits payable or accrued to the persons described in clause (2)(a) based upon an actuarial valuation and the denominator of which is the amount of the actuarial liabilities of the fund for benefits payable or accrued to all persons entitled to benefits from the fund based upon an actuarial valuation;

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

New plans established

15(2) On or prior to the implementation date, the corporation shall establish

(a) the new plan which shall provide for benefits which on the implementation date are equivalent in value to the pension benefits to which employees have or may have become entitled under *The Civil Service Superannuation Act* or to which any other person has or would have become entitled under *The Civil Service Superannuation Act* by virtue of the death of an employee; and

(b) a funding arrangement which shall provide for group insurance benefits for employees which on the implementation date are equivalent in value to the insurance benefits provided in the plan of insurance under *The Public Servants Insurance Act*.

Independent actuary to review plan

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

Concerns of independent actuary to be addressed

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

Deemed consent

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

(a) to termination of their participation in the fund;
(b) to the assignment and transfer of assets, liabilities and agreements from the fund to the new plan;
(c) to the determination of all rights under the new plan without reference to *The Civil Service Superannuation Act*, the fund, or any trust or trust agreement relating to them; and
(d) to termination of their participation in the group insurance plan established under *The Public Servants Insurance Act* and to the assignment and transfer of monies and investments, liabilities and agreements related to such group insurance plan.

November Agreement

15 (11)

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

[16] The application to dismiss the declarations against Fox, along with the relevant allegations in the Statement of Claim is predicated upon the position that Fox, being independent, can make the decision which stands whether it is right or wrong and it cannot be altered or set aside. MTS argues that as an independent actuary appointed by the Provincial Auditor by legislation, the impeachment of Fox's decision on equivalency is not available. Furthermore, the Defendants argue that because of the nature of his appointment he has the right to be wrong and

the opinion is not subject to judicial review. If this were so then there is no genuine issue for trial against him.

[17] In Singleton's case, being appointed under Provincial Legislation, he is protected from being sued unless it can be established that the Provincial Auditor acted in "bad faith". The Employees allege his credibility is in issue and that his conduct may amount to "bad faith".

[18] The Defendants were added as parties by consent part-way through the pre-trial process with the pleadings being amended and re-re-re-amended. On the eve of the trial (with dates set) the Defendants now argue that the case against them should be dismissed. One wonders why the objections to these Defendants being added were not raised at the time. While not argued as such, the "non objection" to the lengthy examinations of a multiplicity of witnesses along with the examinations and cross examinations, at a much earlier date almost amounts to being estopped from doing so now.

[19] The Defendants' argument flows from the position that the lack of a genuine issue can be based firstly on the applicable law and secondly on the affidavit material filed in support of their position. Fox's argument is that his appointment protects him from any review and as there is no privative clause allowing an appeal, which it is argued the Plaintiffs are doing by this litigation, his application for summary judgment should be allowed.

[20] Singleton argues he has the protection of legislation, even if he is in error or negligent, except where his actions are conducted in bad faith. The employees

allege Singleton did act in "bad faith" by exceeding his jurisdiction and usurping Fox's determination of equivalency and the declaratory relief against him should stand.

[21] The evidence and arguments in these proceedings are lengthy and complex and I will keep in mind that this court is not to decide the substantive issue but to determine based upon the evidence and upon taking a "hard look" at the law and the evidence whether there are genuine issues to be determined at trial.

BRIEF FACTUAL ISSUES FROM PLEADINGS

[22] The claim against these Defendants is for a number of Declarations (fully set forth in paragraphs 1f,g,g(i),g(ii),h,i,i(i),i(ii),i(iii),j,k,k(i),k(ii),k(iii),l) of the pleadings. In brief, the allegations are that both Defendants acted inappropriately in carrying out their stated tasks as set out in the legislation affecting them.

[23] The remedy sought by the Plaintiffs is to declare the opinion of Clifford Fox dated March 5, 1997 invalid and a declaration, that the true determination made by Fox contained in a letter to Singleton dated February 18, 1997, is as contained in that letter.

[24] A further declaration is sought that Jon Singleton, by aiding Fox in reaching his opinion, was in effect fettering or interfering with Fox's legislated independence. It is also alleged that as he exceeded his jurisdiction interfered with Fox's independence and thereby acted in "Bad Faith".

[25] The Plaintiffs are employees or former employees of the Manitoba Telecom System before it was privatized. On privatization, the pension fund into which the employer and employees contributed was to result in a fund which when valued on the designated implementation date; Fox was to determine whether the former plan and the present plan were equivalent.

[26] The legislation also provides that when the funds are merged the details would be deemed to be consented to, based on sec. 15(10). This section deemed the Plaintiffs to consent to the termination of the old fund, the transfer of assets and liabilities, all prior rights and trust agreements, termination in the insurance fund and assignment of investments and liabilities to insurance plan.

[27] This deeming clause does not deem the two plans to be equivalent but was for the purpose of putting closure to the interests of the employees in the previous plan following the finding of equivalence.

BASIS OF ALLEGATIONS AGAINST FOX AND SINGLETON

[28] The Plaintiffs' claims against Fox and Singleton are set out in various declarations against them as indicated above. In more specific terms, they relate to allegations of interference by Singleton influencing the determinations made by Fox, wrongfully interfering and changing Fox's report, usurping his role, collaborating with employees of the Defendants and otherwise changing, substituting or replacing the review and report made by Fox and knowingly exceeding his jurisdiction.

[29] With respect to Fox it is also alleged he acted in excess of his jurisdiction allowing Singleton to interfere with the exercise of his independent role. The Plaintiffs allege the determination that Fox made in his letter of March 5, 1997 is invalid and of no force and effect and because it was influenced and changed by Singleton and it is the February 18, 1997 report that ought to stand.

[30] Because the legislation appointed Fox with exclusive power in determining equivalency between the two pension plans and how that matter was to be determined, MTS argues the matter ends there and removes any genuine cause of action against Fox.

[31] If the matter does not end there according to MTS, it becomes a question of whether the report was administrative or legislative and whether it was public or private. The exercise would also raise the question of which standard of scrutiny applies. The right to review Fox's opinion, MTS argues is not available because Fox's role is a legislated appointment which cannot be questioned.

DOES FOX HAVE THE RIGHT TO BE WRONG

[32] It is the Defendants' position that section 15(3) of (the "Act") is determinative of the issue i.e. as to the opinion on equivalency. This section it is argued, gives exclusive jurisdiction to Fox to make an independent determination. What if however the Actuary did not act independently?

[33] Fox is an actuary and by that very qualification, an expert in analyzing numbers, values, complex financial criteria and also possesses a certain ability in valuing pension plans or the like.

INDEPENDENCE AFFECTED BY NON-OBJECTIVE ASSISTANCE

[34] There is a presumption that with these qualifications Fox was capable of the task he was facing. (To that extent it would not ordinarily be necessary to hear submissions from others unless Fox were to seek out information to assist in coming to his own decision.) He may however be wrong on certain matters as experts in many fields on occasions are. Experts may make errors on advice they give and in their opinions.

[35] In this case Fox admitted in evidence, he was not an expert in pension plan comparison, and he admitted he needed help. This case raises the question of whether he might turn to some other person to make the fundamental recommendations on equivalency. In doing so, if he relied on Singleton, and his colleagues, without giving the employees an opportunity to present their opinion, the opinion rendered by Fox could be viewed as not his opinion, possibly unfair and potentially in error. Procedural Fairness would apply because of the impact that error may have on the financial welfare of the employees. To seek advice from others not knowing if the advice is sound or not does a disservice to the employees. Furthermore, denial of equal access to information provided to the

Actuary by MTS, so it might be corrected or argued, is clearly contrary to procedural fairness.

[36] Should his decision, with an admission of inexperience relative to and notwithstanding the assistance he received, be subject to review? There was substantial pension benefits at stake for the employees now and in the future and a mistake could well lead to substantial long term losses to the employees on retirement and considerable gain to the employer. Did the new plan have that effect? Evidence was adduced on behalf of both parties as to the equivalency of the plans and different conclusions were reached. Should the opinion on this point be subject to review with the application of fairness as the standard?

[37] The discovery of how the employees' pension surplus was being used was not made until some time later prompting in part, this litigation. It was also later alleged that the legislated provision intended to provide a remedy respecting the fund in what is referred to as "the November Agreement" that this clause had been breached. This clause was not to alter existing rights. The clause states:

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

[38] The Plaintiffs take the position that the November Agreement has been disputed and this issue will be determined at trial and may have a distinct effect

on the equivalency issue. The question also attaches here; does a breach of the November agreement affect the issue of equivalency?

WAS A DUTY OWED TO ANYONE

[39] The obligation to determine equivalency was imposed on Fox for the benefit of the persons who had an interest in the fund. The Government in setting up the process was doing so to provide a neutral independent person that would determine equivalency. The mandate appears to be intended to safeguard the interests of both parties with an end result that both parties would be satisfied that the objective was reached. The duty of the independent actuary was to achieve that task and in the course of that determination a duty was owed to all parties having an interest in the fund and its benefits.

[40] A duty was owed, in my view, to the employees and employer. A duty to the employees and MTS to be correct was imposed upon Fox. The Government expected independence from the actuary, not incompetence, inexperience or outside influence. The Government's expectation in legislating as it did was entitled to correctness and it is this factor which is called into question in the handling of the surplus, the deficit and the governance of the plan.

[41] If the opinion of March 5, 1997 is found to be incorrect, the Plaintiffs seek a declaration that the February 18, 1997 opinion be the correct opinion (See para 1(k)(i) of the Re-Re-Re Amended Statement of Claim).

[42] Several issues of fairness have been raised as well as correctness which entail a review as to why the actuary took the action he did and gave the opinion he did, which might directly affect the interests of the employees and may well have the effect of diminishing the full benefits available to present and future employees. I take it for granted that because of the amount of money involved it was not the Government's intention to tolerate any significant error in determining equivalency. Errors were not acceptable because of the interest of the employees who relied on the fund's benefits in some cases long into the future.

[43] The November Agreement as indicated appears to address various corrections however when the fundamental structure of equivalency is called into question, because it was prepared, reviewed or interfered with by Singleton or others, the application of the Agreement may not be correct. What is in issue is whether the approach taken in arriving at equivalency is correct.

[44] The Plaintiffs' (the TEAM) argument is predicated upon evidence that allegedly raises a plethora of errors and contradictions contained in Mr. Fox's evidence which the Plaintiffs say justifies the entire matter being put before a judge in the course of a trial. The Plaintiffs argue that this case is about rights and in particular whether or not the report addressed the issues properly and came to the correct conclusions in finding there was equivalency.

FOX WAS CONFUSED IN THE TREATMENT OF THE SURPLUS

[45] The Plaintiffs' argument centered on there being numerous inconsistencies between Fox's direct affidavit evidence and his cross examination giving rise to contradictions in whether the pension surplus contained in the old fund was transferred to the new plan or not. There are references that Fox took the surplus into consideration and there is documentation that the calculation of the surplus and its allocation was so complicated Fox said it could not be determined. This issue is fundamental in the minds of the Plaintiffs who say ought to have been correctly included in the equivalence determination between the two funds.

[46] Mr. Fox indicated that he considered the surplus but in the process he concluded that the employees would be entitled to what they had received previously and that <u>if the fund were not sufficient they could always challenge the matter in court.</u> It is clear that Fox's mandate was to include the surplus as one of the equivalence components and because a variety of unforeseen possibilities could occur in the future the employees argue the handling of this issue by Fox was not a fair treatment of the surplus.

[47] More particularly, the evidence is conflicting in that there are occasions when it was stated that the surplus was included and others where it was merely regarded as being considered.

[48] It was apparent to the employees that the initial surplus meant more money for some benefits to them and ought to have been squarely included in the

equalization between the old and new fund. There was evidence that the surplus was used to defer the costs of the employer and not for employee benefits.

[49] The March 5, 1997 report, which is the final report from the actuary, makes no reference to the use of the surplus which was a dramatic change between the February draft and the March report.

USE OF SURPLUS BY MTS TO TAKE A "CONTRIBUTION HOLIDAY"

[50] Counsel for MTS explained the balancing effect between surplus and deficits and the entitlement of MTS to take a "contribution holiday", apparently not well accepted by the Plaintiffs, but it was explained, that where the surplus based on investments produces a surplus, MTS may use the surplus and take a "contribution holiday" legitimately because when a deficit occurs due to a fall in value of the investments and/or interest rates, MTS is bound to make up the deficit from its resources, to fund the difference. These issues based on the record of examination and cross examination are not easily understood and contain what was referred to as a polycentric input of factors and whether the process benefits the Plaintiffs is seriously questioned.

[51] MTS argues that the process to balance the surplus against the obligation by MTS to fund the deficit when that occurs is the basis on which the fund operates. The employees argue otherwise and that the employer is not to take a contribution holiday without the consent of the employees which it did not receive following implementation.

[52] Brenda McInnes was project leader for the creation of the new plan and presently Treasurer for MTS.

Cross Examination on Affidavit of Brenda McInnes, April 18, 2006

159	**Q**	You have already confirmed that MTS took a contribution holiday beginning in 1998 and ending the first quarter of 2003; correct?
	A	Correct.
160	**Q**	And you will agree that surplus in the new plan has only been used for contribution holidays?
	A	Yes.
161	**Q**	And it has not as of yet been used for benefit improvements?
	A	There is no surplus in the plan at this point in time, and at no point in time have we changed the benefits in the plan other than to grant cost of living increases.
162	**Q**	Right. And there was surpluses in the plan in 1998?
	A	Yes, through 2002.
163	**Q**	Those surpluses were not used to enhance benefits?
	A	No, other than granting of the COLA which is in the plan already.

[53] Mr. Fox's own evidence confirms that there was confusion in his attempted explanation of the process which he presented in his Power Point explanation.

QUESTIONS POSED BY TEAM

Q. Do you consider the right to decide on how surplus is used as a benefit as is the case under the CSSA?

A. The members of the new MTS Plan have not lost any of their rights. MTS is now providing a fully funded indexed benefit that you did not have before. If the use of these "Trust Funds" by MTS is ever an issue, a court will decide whether MTS has acted appropriately.

QUESTIONS POSED BY TEAM

A. The why assumes that the answer to the first question is Yes that the employer has the right. I was not asked to

> determine rights, I was asked to determine whether the benefits were of equivalent value. Again whatever MTS does can ultimately be decided by a court of law.

APPOINTMENT OF MR. FOX BY AUDITOR GENERAL

[54] The Auditor General, Jon Singleton was given the responsibility of appointing an independent actuary and there is no claim that in this particular case the actuary when appointed was anything other than independent. The Auditor, Mr. Jon Singleton, hired Mr. Fox and beyond his hiring someone independent he had no authority under the legislation relative to the preparation of his report on the various issues included in equivalence. It is noteworthy that Mr. Fox had not prepared any documentation of this nature in the past and in many respects was not familiar with how the pension fund operated.

[55] Much of the evidence supporting the employee's position provided in these proceedings was based upon the evidence of Mr. Harry Restall, (a former employee of MTS and familiar with the benefits offered). His affidavit and the cross-examination came from discussions that he had with Mr. Fox and information he had on Mr. Jon Singleton. His evidence for the most part was not contradicted.

CREDIBILITY ISSUES

[56] The Plaintiffs argue that Mr. Singleton played more of a role in preparing the final report than was appropriate given that the task was assigned to Mr. Fox. Fox had the right and opportunity of canvassing various parties to obtain

information and assess the important components of equivalence from the TEAM, however, the evidence it is argued, suggests that Mr. Singleton spent a considerably greater amount of time on this project, (exhibit 55 to Mr. Restall's Affidavit). This evidence points out that Singleton had put in approximately 177 hours while exhibit 54 shows Fox spent only 155 hours.

[57] There are numerous pieces of correspondence in Mr. Singleton's hands which were forwarded to other persons, associated with him, for review and consideration, which leads the Plaintiffs to conclude that the final report was contributed to and substantially edited by Singleton and others. There was no authority given to Singleton that he might seek the approval or have the draft opinions vetted by Singletons colleagues or by MTS without giving the same opportunity to "the employees".

[58] There are several examples where the Plaintiffs allege Singleton himself appears to have misconstrued his own responsibility when he writes, for example, communications referring to Mr. Fox as **his** agent, and on other occasions where he refers to "our report". These are subsequently changed but it leaves to doubt that references to Mr. Fox receiving recommendations or amendments to his report reflect a greater role played by Singleton in finalizing the report than it should. The amendments are not trivial and included wholesale changes to the report.

[59] The changes made by Singleton to the final report raise an issue of his credibility as to how much input he actually had or alternatively how important he regarded his responsibility to assist Fox.

[60] Other areas which have been argued create at least an issue of credibility and concern about who was the actual author of the report and Fox's independence. If as alleged Singleton provided the basis for a portion of the report prepared by Fox which included Singleton's ideas and suggestions, the final report including Singleton's material may not have been able to be adequately critiqued by Fox, who was not as informed or familiar with the subject matter. He may not have necessarily been able to tell whether or not Singleton's contribution was correct.

[61] The evidence of Mr. Restall was that Singleton also drafted the letter of equivalency sent out to interested parties.

[62] There are after the fact, circumstances which do not paint Mr. Fox in the best of light. His acknowledgement that he double billed for his time put his integrity in question. One might question his credibility and conclude he may also have accepted other's opinion of equivalency and thereby compromised his independence. His credibility is a matter that only the court can determine on hearing all of the evidence at trial. As indicated above

> ...the proposition that an issue of credibility precludes the granting of summary judgment applies only when what is said to be an issue of credibility is a genuine issue of credibility....

[63] In respect to the time Fox actually spent and remuneration claimed for preparing the report, Mr. Fox admitted that he had indeed double billed for his report. The hours that he recorded were double the number he actually spent in as much as he was to receive $125 per hour, but he doubled his hours which doubled his income for this project.

[64] The issue of what equivalent value is has been the subject of interpretation. The definition is found at exhibit 23(d) to Restall's Affidavit and contains provisions which were amended by Mr. Singleton (See Exhibit 18).

[65] It is apparent from the evidence as well, that unknown to Mr. Fox, Singleton sought out Mr. W. Fraser's (President and Chief Executive Officer of MTS) response to the document and although it was suggested that the letter was never received or lost, MTS' productions in these proceedings contained the draft which one could only deduce was the same one that went to Mr. Fraser.

[66] Singleton's cross-examination reflects the process followed in vetting Fox's opinion with others, nor did Singleton consider it an advantage to MTS if he provided information to Fox from one side only.

Cross Examination on Affidavit of Jon Singleton, May 3, 2006

727 Q If you look over at the next, look over at the document proper, you will see what has been added is,
"A secondary objective will be to assess whether the contributions to finance benefits on implementation are shared equally by the employees and employer as intended by the CSSA."

A Yes, I see that.

728 Q Your evidence is that you don't have a recollection of sending this to Mr. Fraser?

A That's correct.

730	**Q**	And you never talked to Mr. Fox to get his input as to whether it was necessary to send the document to Mr. Fraser?
	A	I don't recall.
731	**Q**	And you knew by that time that Mr. Fox had already talked to MTS representatives about MTS's take on what definition of equivalency in value meant?
	A	Yes, I must have known that at the time.
732	**Q**	It is Mr. Fraser's evidence that you called him. You can't speak to that?
	A	I have no reason to doubt the fact that he is correct.
733	**Q**	In any event, there would be no reason to send this draft to MTS, would there?
	A	Well, if you are asking me if it would be necessary and essential to do that, I would say no, it is not.
734	**Q**	There would be no reason at all?
	A	There is no reason not to either.
737	**Q**	But why? Why are you determining whether he should have an opportunity to get his take on it? What authority did you have, sir, to do that?
	A	I just thought—if, in fact, I did, I would have thought it was a reasonable thing to do.
738	**Q**	Why was it reasonable, sir? There was no need to, was there? You are giving Mr. Fraser an opportunity to comment on a draft of equivalency in value?
	A	That's correct.
739	**Q**	Was that because you wanted MTS to be able to vet the work that Mr. Fox was doing?
	A	Well, since I can't recall ever sending it to him or the conversation, I really can't comment on that.
464	**Q**	So you didn't consider that one side having an advantage over another in terms of giving their thoughts, with respect to whether the plans were equivalent in value, was a relevant consideration?
	A	That's correct.

[67] Singleton took it upon himself to express the view that it was unnecessary to provide the "employees" with some of the information given by MTS to Fox. In these circumstances such conduct may well be a breach of natural justice, bearing in mind that the employees are a large but identifiable group, all of whom stand to

loose financially if the result reached was in error. As was said in ***Kane v. University of British Columbia*** (1980 1 S.C.R. 1105 para. 32 quoting (Bd. Of Education v. Rice 1911 AC 179 at 182 (H.L.):

> *The tribunal must listen fairly to both sides giving both parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views".*

[68] The evidence shows that a request was made to Singleton or Fox for the same information as had been provided to MTS. This information was relevant to the issue and was requested in writing although it was not ever provided to the Plaintiffs, allegedly denying them of the position being taken by MTS and the opportunity to respond.

[69] The same request came from Mr. Restall himself but again the information was not forthcoming (See Exhibit 43). It was apparent that Employee members were asking for information, yet Singleton took it upon himself not to share it with the plan members. (See Exhibit 33 and 34). The information was material sent to Fox by MTS in support of its position and in some cases critical of the position of the employees.

Paterson

[70] Exhibit 34 is a draft which was sent by Mr. Henderson and Fox indicating "our review", again indicating that the draft was prepared jointly in some fashion.

[71] Fox's evidence was that "unless things are done insofar as funding and surplus are concerned there would be no equivalence". Those provisions however were not included.

[72] Concerns were expressed by several, including Cheryl Barker (Vice President of Finance and Chief Financial Officer of MTS), who had expressed these concerns at a meeting that things were wrong with the Fox report. The meeting, which involved several persons, Barker recalled, included discussions of unfunded liability and the use of the surplus under the old plan, all of which was discussed in the absence of anyone from the Plaintiffs but would have been important to the employees.

[73] Brenda McInnes also reports that the actuarial evaluation was never provided to or seen by Fox before the final March 5, 1997 report was prepared, which in itself reflects either a lack of due diligence or fairness. It only makes sense that an actuarial evaluation ought to have been considered by Fox.

[74] These various issues require clarification and if they are in error, they require a remedy.

[75] The Defendants on the other hand are seeking protection from further examination or cross examination, based upon the legislation which it is argued precludes any challenge to Fox's report. The Defendants did not appear to have objected to the giving of evidence and cross examination in pre-trial preparation. If protection is available to either Fox or Singleton why would counsel not protest the extensive examination and cross examination or object to the current use of this voluminous material at the time.

CLIFFORD FOX'S MANDATE AS AN INDEPENDENT ACTUARY

[76] Fox was not restricted nor directed by legislation as to how he would go about his task. He was entitled to seek the help he needed, consult and interview the persons knowledgeable in this field. He was entitled in other words to go about the task as he saw best. There is however no evidence that Singleton was more knowledgeable than Fox, in fact there is no evidence that he was more or less experienced than Fox and absent that expertise, Singleton may have unintentionally erred in whatever advice he gave Fox.

[77] The notion of "independence" gave Fox the right to make his own decision on the meaning of "equivalence" – and to decide what factors to take into account.

[78] If he were inexperienced at the task, which he freely admitted, he could choose whoever was knowledgeable in determining his designated equivalence. It was not up to Singleton to provide his own advice or to seek assistance from his colleagues.

[79] Even of greater significance as indicated earlier is the absence of any reference to either an appeal or review of the actuary's report. The legislation does not preclude an appeal, nor does it state that Fox's decision is final and binding. Fox himself was of the belief that if he were wrong on the pension surplus, resort may be made to the court.

[80] The legislature in making the appointment through the Provincial Auditor was accepting of the opinion arrived at by an independent actuary – no

qualifications were required except for independence and the qualifications of an actuary. It would be unfair if a major error were made in determining equivalence affecting the future financial base of the employees' benefits without a remedy to review the actuary's decision.

[81] The question is did those acting in an advisory way or research capacity go beyond the limits and unduly influence the result? There are certainly appearances that existed. The employees have a high degree of suspicion that the project was misconstrued by both Fox and Singleton and that the results were not only unfair but incorrect.

[82] Whether he chose the correct information or relied wrongfully on the information provided, he certified that the final opinion was his, the task he set out to perform. If however the final opinion was patently incorrect there ought to be an avenue available to correct it. This is a matter the court should decide.

CONTRIBUTION HOLIDAY AS AN ISSUE

[83] Both the Plaintiffs and the Defendants in the course of determining if there is a valid genuine issue for trial have advanced issues which are trial issues. How the new plan functions is described at length by both sides with the Plaintiffs claiming that MTS is taking money from the plan in what is referred to as a contribution holiday and this action according to the Plaintiffs is indicative of inequality or proof that the new and the old plans are not equivalent.

[84] The Defendants MTS say taking a contribution holiday is appropriate to remedy imbalance when a sufficient surplus is reached because alternatively when the reverse occurs MTS is required to fund the deficit and bring the balance in the funds back into equilibrium. The fund is assuredly inclined to go up and down as the investment market varies hence when it moves in a direction of a surplus a contribution holiday could take place whereas if the markets decline or interest rates drop and the balance falls below the level at which the pension fund should be maintained then the Defendant is required to fund the deficit. Does this approach favour equivalency and is it a contentious and genuine issue for trial?

[85] Whether this process or other treatment of the fund is consistent with Fox's opinion is also a matter for the court at trial to decide.

[86] A question before me is whether both Fox and Singleton's conduct should be the object of declaratory relief. Does their conduct give rise to this court finding that by their conduct a declaration should be made when neither one of them are the subject of a financial declaratory judgment?

[87] This matter was canvassed thoroughly by Smith, J. ***(Klymchuk v. Cowan*** *45 D.L.R.(2d) 587 at p.5 of Quick Law Report.)* as to whether a declaration might be used in place of a prerogative writ. He made reference to Hallsbury and quoted the following statement of law relating to declaratory orders. The quote is found at page 5 of his judgment as follows:

> *"The remedy by declaration is available to ensure that a board or other authority set up by Parliament makes its determinations in accordance with law, and this is whether the determinations are judicial, disciplinary or administrative..."*

[88] In the material prepared by Donald Brown Q.C. and the Hon. John M. Evans, "**JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA**" under the heading "THE REQUIREMENT OF JUSTISCABILITY", it says at para 1:7310:

> "Because the scope of declaratory relief lacks clear definition, courts have been concerned to ensure that declarations are sought only in respect of matters that are properly the subject of judicial determination. Thus, as a general principle the subject matter of the dispute must be justiciable both in the sense that it must be within the competence of the judiciary to determine, and that it must be one that it is appropriate for a court to decide."

[89] I am of the view that supported by the evidence this is a matter for the courts to decide as the repercussions to the plaintiffs is too substantial to ignore. The authors *Brown and Evans* leave scope for the courts discretion and use the language "reluctant" to grant declaratory relief. In my view this case is a situation where reluctance is out weighed by importance and the protection of 7000 employees. Nor are there any provisions to indicate that an appeal does not lie.

[90] Accordingly I would not dismiss this application because the remedy sought is for declaratory relief.

STANDARD OF REVIEW

[91] It is apparent from the material filed that the employees mistrusted the opinion provided. The parties have differing views on what should have gone into the making of Fox's opinion. The balance reached by Fox changed several times

related to his first draft opinion and the Plaintiffs believe that they were changed by outside influences and in breach of the "Audi Alteram Partem" rule demanding fairness.

[92] A pre-imminent consideration in this case is whether a standard of review can be applied to the actions of Fox in his coming to a conclusion and if he were in error resulting in a declaration setting aside of his opinion.

[93] In considering the issue the authorities are few in dealing with the authority of administrative action of a general nature and decisions of a legislative nature.

[94] In this case the Legislature assigned an independent actuary to carry out the task. His constituency was a discrete group of people not affecting the lives or the work places of the general population and may be taken as affecting only a particular group. The group may be affected at differing levels of financial seriousness but it is the mistreatment, if any, of the fund itself which must be handled correctly.

[95] The Legislature chose through its Auditor General an expert with actuarial skills which are applicable when assessing mathematical relationships and values of related components, but the evidence indicates he may not have experience in determining the fundamental in this case, i.e. pension equivalence in regard to surplus, funding deficit and governance. The admission of inexperience reduces or eliminates deference on the issue of pension comparisons.

[96] In the decision of ***Cardinal v. Kent Institution*** 2 S.C.R. 643, LeDain, J. states:

> There can be no doubt that the director was under a duty of procedural fairness in exercising the authority conferred by Section 40 of the Regulations with respect to administrative disassociation or segregation. This court has affirmed that there is, as a general common law principal, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.
>
> *(Underlining mine)*

[97] Considering the polycentric nature of the opinion Fox offered, again as stated earlier, absent any fraud, his opinion should not ordinarily be questioned, however as indicated he owed a duty to both the employees and the employer as too much was at stake for this discreet group.

[98] This case falls within the category referred to in ***Cardinal***. Here the decision made by Fox requires fairness. The legislation requires independence and does not impose rules and regulations on the Actuary. He had the liberty of proceeding as he saw best and doing so must apply fairness as his decision would affect the interests of each of the employees. Procedural fairness is required so as not to pre-empt the group of employees from equivalence in the new pension plan.

[99] The determination of pension rights were specific to a group of people, if the plans were not equivalent it then affected each individual to a greater or lesser degree since the amount of surplus and funding were important to all members of the group. The purpose was not to divest individuals of pension benefits but if improperly calculated it could have done exactly that and those interested had a

distinct interest in the fundamental nature of the new plan to ensure this would not happen.

[100] According to Restall's affidavit evidence at paragraph 79:

> *Fox further noted that it is important to see the initial actuarial report prepared by Buck Consultants MTS' actuary (the "Buck Report"), dated February 27, 1997, on the New Plan and the actuarial report of Turnbull and Turnbull dated April 23, 1997 establishing the assets to be transferred from the CSSA (the "Turnbull Report"). These reports, he stated, must be reviewed to clarify the concerns he has about funding of the New Plan for benefits accrued to December 31, 1996. Attached as Exhibits "35" & "36" are the Buck and Turnbull actuarial reports. Fox never saw the Buck Report or the Turnbull Report until after these proceedings were commenced. The Buck Report shows a $7 Million unfunded liability on an actuarial basis. However, the liability arises only because of a $63.1 Million write-down of market value assets by Buck Consultants. Had market value of the assets been used to determine funding, the New Plan would have been in a surplus position. (Affidavit of Thomas D. Levy, sworn February 3, 2005)*

[101] The Plaintiffs were unaware that the initial report on the new plan disclosed an unfunded liability based upon a 63.1 m write down and did not have an opportunity to respond.

[102] The equivalency definition was fundamental because the definition may well be determinative of the pension issue. Fox sent his own definition of equivalency to the Provincial Auditor. There would appear to be nothing inappropriate in that measure since it was initiated by Fox, however, the Provincial Auditor redrafted the definition approximately 13 times which demonstrates a heavy level of review of Fox's initial opinion and changes made over those provided by Fox's initial view.

[103] Furthermore, the definition of equivalency was forwarded to Bill Fraser which resulted in Singleton deleting a paragraph dealing with funding. Fox was unaware of the changes when this document was sent to the various interested parties. Fox had included in his definition of equivalency surplus, funding and governance, while the definition circulated to the interested parties did not do so expressly.

[104] Fox mislead the employees. "Fairness" as a standard of review may well not be required in some instances however fairness does not include deliberately misleading the parties. The fund's assets are enormous and intended to support the employees and retired employees in the future. It cannot be taken lightly that the assets in the plan could be transferred based upon the decision of one man who did not have the authority to make changes and may well have short changed the compensation to the employees of the plan and benefited the employer.

[105] The decision made by Fox was not of a legislative nature. His appointment was a legislated act but his decision was his own, or ought to have been and in my view of procedural fairness <u>applies</u>, and was disregarded in many of Fox's decisions.

[106] The section of the legislation governing the authority of the Actuary does not set limitations on him other than he must be independent and address himself to the equivalency of the two plans, as of the date of implementation. The

challenge by the employees is that in arriving at the result the independent Actuary erred in several areas and now seek a remedy.

[107] As already stated, while Fox was appointed by legislation, and therefore deference is to be paid, the Actuary's opinion cannot be completely immune from review. Such steps should only be considered if there is evidence of error which may well seriously injure financially the challenging party. Important evidence is the fact that Fox did not possess the expertise he ought to have to determine equivalence or alternatively hearing from both parties to provide an opportunity for "correcting or contradicting any relevant statement prejudicial to their views..."

[108] The question of whether this opportunity was given or not is a genuine issue for trial.

[109] Before making this decision this court is bound to determine from the legislation, the intent and interpretation. Section 15 directs the opinion is to be given by an actuary, secondly that person is to be independent and thirdly to determine the issue of equivalency of the two pension plans as of the implementation date.

[110] The issues under section 15 are abundantly clear respecting the appointment of an actuary, that he be independent at the time, and the factors to be considered.

[111] In so far as the intent to the opinion being final, the parameters to be considered are the issues of deference to the decision being made, and the absence of a privative clause. The Supreme Court of Canada in ***(Pushpanathan***

v. Canada (Minister of Citizenship and Immigration) *1988 1 S.C.R. 982)* decision refers to weighing various factors to be applied as "pragmatic and functional" reflected in the traditional approach which include "Correctness", "Patent unreasonableness" and "Reasonableness *simpliciter*".

[112] The financial impact of non equivalence on the "employees" is substantial over the course of their receiving pension benefits. Reliance on retirement income for a standard of living has a high degree of importance to each member to insure the right amount is calculated. This achievement requires correctness.

[113] With the various concerns expressed by the employees, should there not be some entitlement to challenge the decision made, not by way of an appeal or prerogative writ, but by way of a review of the validity of the actuary's opinion on equivalency?

[114] If the evidence when examined closely determines that there is an extensive dollar error, there ought to be a right to declare the decision in error or void?

[115] To assure there are no unreasonable errors the court should be able to look at the overall evidence at trial and resolve the apparent conflict between the parties on the issue of equivalency. It should review the conduct of both Defendants not to apply its own opinion but to determine the applicable standard of review and apply the proper remedy.

[116] I am therefore of the view that Fox who clearly is a public officer in as much as he is appointed by legislation, nevertheless is designated to perform the

function of determining equivalency in the pension plans in the interest of a discreet group of persons. He is not establishing policy for the broad public interest and he is to direct his attention at fairly determining equivalency in order that the employees are provided with a fair deal over the long run.

[117] Fox was not in the position, as was the administrator in ***Aasland v. B.C.*** [1999] B.C.J. No. 1104 (BCSC) (the "Grizzly Bear Case") decision where the administrator did not have to act fairly. He was entitled to make a decision in the general public interest to preserve the level of the grizzly bear population for the betterment of the population at large. There is a vast difference between an administrator not consulting and not acting fairly by not consulting everyone affected, because he was given the broad mandate to preserve the grizzly bear population. In this case there is far more at stake for the employees if the equivalency findings were not correct. Hence fairness and correctness are essential components to the review of the actions taken by Fox. The group here consisted of an identifiable number of employees and former employees (approximately 7000) all having a distinct interest in the issue of equivalency of the two plans.

[118] In dealing with a review where someone is designated by the Government in a legislated function, Phillip Jones, Q.C. and Ann S. Da Villars, Q.C., the authors of the text "*Principles of Administrative Law Third Edition*", refer to the duty to be fair, which in this case may be seen by the Plaintiffs that the actions of Fox were not fair. The authors state at p. 215 of the text:

> Finally the duty to be fair does not affect legislative functions at all as it is more fully described in the decision of *Campo Corp. v. Calgary (City)* 1980 12 Alta. L.R. (2d) 379, which states the duty to be fair should not apply to the exercise of legislative powers, particularly delegated legislative powers.

The quote goes on further to say:

> Those cases which say that the exercise of legislative function for an improper purpose is ultra varies do not relate to the procedure used. Hence Campo is not really on point. Indeed for some reason the principals of natural justice have never been applied to the exercise of a legislative power and this principal has not been affected at all by the development of the duty to be fair. The distinction between a legislative function on the one hand and a judicial, quasi judicial or executive one on the other hand will continue to be important.

JON SINGLETON'S ROLE IN PRODUCING AN OPINION

[119] The application for summary judgment by Jon Singleton is brought for the dismissal of the various Declarations and the allegations against him based upon the argument that there is no genuine issue to have him remain in the law suit after considering all of the evidence. The position taken by this Defendant is that he has protection against legal action based on legislation.

[120] The Defendant relies upon Section 20 of ***The Provincial Auditors Act*** which states:

> **Immunity from action or proceeding**
>
> **20** No action or other proceeding may be brought against the Provincial Auditor, an Assistant to the Provincial Auditor or any person employed under the Provincial Auditor for anything done or omitted, in good faith, in the exercise or intended exercise of a power or in the performance or intended performance of a duty or function under this or any other Act or regulation, or any neglect or default in the exercise or

> performance in good faith of such power, duty or function.

The Section cloaks the Provincial Auditor with immunity in the exercise of his powers so long as his actions, even if mistaken, are carried out in good faith.

GOOD FAITH/BAD FAITH

[121] The protection section supporting the Provincial Auditor turns on whether his actions were carried out in good faith, whether or not he was mistaken or knowingly interfered with Fox's independence. As the evidence indicates, there were a number of actions taken by Singleton where he appears to have exceeded his jurisdiction. His jurisdiction was limited to what he was entitled to do under the sections of the legislation appointing him to this task but he would be immune from any action or other proceedings brought against him if it were established that those acts were carried out in good faith.

[122] There is no evidence advanced that there was any personal motivation attached to what might be expressed as an intrusion into the purview of the Actuary's responsibility.

[123] The Auditor is an experienced and knowledgeable individual in the role that he plays. He was selected to appoint the Actuary and was clearly aware that the Actuary was to be independent. Independent by definition entails acting freely and without influence, pressure or coercion. From the evidence adduced, it appears that all of these factors applied to Mr. Fox. Appreciating that Mr. Fox was

appointed by the Provincial Auditor, the Auditor may well have understood that Fox was not as well versed in making comparisons between pension plans as he might be and thereby inferred that he ought to provide the information he did along with the help that he provided in these matters. The question remains, were these actions taken in good faith to attract the protection of Section 20? The decision on this issue is a genuine issue for trial.

[124] The basis of his responsibilities did not extend to anything beyond appointing Fox. There is no reference in the legislation to doing research for Fox, and no authority to change Fox's opinion unilaterally in whole or in part. Fox might well have been entitled to ask for assistance but the evidence here is that these bounds may have been exceeded. These are trial issues notwithstanding that the evidence of his conduct is set forth in the pre-trial examinations. It should be the trial judges' assessment of this conduct that should determine the question of good faith or bad faith and the effect it has on the Actuary's opinion.

EXCEEDING JURISDICTION KNOWINGLY MAY BE BAD FAITH

[125] The evidence tendered by Mr. Singleton in his Affidavit was his belief that throughout his relationship with Fox, who he appointed, his actions were being carried out in good faith and that he believed it was within the purview of his authority and power to do the things that the Plaintiffs claim amounted to interference with the independence of the Actuary.

[126] While the authority provided under Section 15 directs itself to the appointment of the Actuary, it might follow that the Auditor may have believed his responsibilities extended to providing assistance to the Actuary in identifying the parties to contact, providing information relative to the two plans, the old and the new, and offering assistance if asked for by the Actuary in providing the necessary tools and information. These are matters better assessed by the trial judge rather than from the printed word.

[127] MTS takes the position that there is no evidence which would give rise to a belief that the Auditor General, Mr. Singleton, acted in bad faith and that absent evidence of bad faith there is no genuine issue for trial affecting Singleton. This question must be considered by dealing with the issue of exceeding his jurisdiction which ipso facto, may be bad faith. Mr. Singleton took it upon himself that may have led to the employees and retirees being prejudiced. The following Q & A deal with his approach to assisting Fox.

Cross Examination on Affidavit of Jon Singleton, May 3, 2006

484	**Q**	Mr. Fox prepared, we will get into it, is preparing drafts of definition of equivalence and drafts of his opinion; correct?
	A	Yes.
485	**Q**	And we know that MTS received them, that the Plaintiffs didn't; correct?
	A	Okay. I think that's been established, yes.
486	**Q**	Would you agree with me, sir, that the Plaintiffs had every much a right to that material as MTS had?
	A	No.
487	**Q**	And why is that, sir?

> **A** Well, Mr. Fox was in the process of determining an actuarial fact in his view. As long as he had information necessary for him to determine what the right answer was, than that's his job to do.

[128] The court faces whether this approach taken by Singleton to deliberately keep the information from the employees is a matter of "Bad Faith".

[129] Negligence, mistake or lack of appreciation of the terms of reference, in themselves do not necessarily constitute bad faith. Counsel for MTS argues that the actions taken by the Auditor were designed to be of assistance to Fox whom he appointed and that he offered his assistance when, for example, Singleton believed that Mr. Fox was having difficulty and he lent his assistance to him.

[130] The Plaintiffs refer to decisions where immunity may not be granted in cases where bad faith is evident, for example where there is an ulterior motive or the individual is guilty of the tort of public misfeasance or malice in the actions that are taken. MTS argues that none of these are applicable in this case and the Auditor merely provided assistance to Fox.

[131] The issue here relative to the Provincial Auditor is whether he crossed the line in what might be between supervising or directing the Actuary's decision.

[132] These are issues which hearing from the Auditor himself should determine whether Good or Bad Faith applies. The evidence recites a litany of examples where Singleton appears to have exceeded his jurisdiction – these issues ought to be reviewed by the trial judge.

[133] In reviewing much of his involvement with the Actuary the evidence is not contested and not denied by Mr. Singleton.

[134] There are further instances where Singleton provided MTS with documentation and information respecting Fox's report which were not shown to the Plaintiffs and in fact were delayed in being shown the information until relatively recently.

[135] It is also apparent that Singleton played a major role in removing a paragraph from the final report drafted by Fox which had a critical effect on the treatment of the pension fund surplus.

[136] While these actions may well have been carried out on the belief that they fell within the purview of his role pursuant to the legislation, or whether Singleton knew whether his role was far more constrained than he carried out, is a question for the trial judge.

[137] To have made changes in the various reports that were the responsibility of the Actuary and in some cases, doing it without his knowledge, remain a trial issue.

[138] The notes when the issues of equivalency were discussed between Singleton and Fraser resulted in Fraser's notes containing handwritten urging to have Singleton call him about equivalency.

[139] It is very apparent that these issues were discussed and provided to Fox. These issues as well might be more thoroughly examined by the trial judge to determine whether the good faith/bad faith issue existed so as to attract the protection of Section 20 or not.

[140] Bad faith would include acting with ill motive or having an interest in the outcome or some other ulterior motive such as couriering favor of some sort from a party.

[141] Mr. Singleton by his very position as Provincial Auditor would know what it means to appoint an independent actuary and what "independent" meant. To make the decision or assist in it or influence the maker detracts from his independence. It was however not Singleton's mandate to assist in the decision making process much less writing part of the opinion or in removing some provision from the final draft. Singleton admitted he knew that assisting in preparing the opinion did not fall under his jurisdiction. The changes were made without knowledge of Fox at least in one instance. It should be for the court to determine if these factors upon hearing the evidence were a breach of "good faith".

[142] Singleton as Provincial Auditor, is a government official. His role in this capacity might be referred to as a "watch-dog" for the government. His responsibilities would include insuring the objectives of this project were carried out and that would include insuring Fox's independence. Exercising influence over Fox or adding changes to the opinion or consulting with colleagues affects the optics that Fox was not acting independently, a matter which raises a genuine issue for trial.

[143] Are the alleged errors, mistakes and by deliberately exceeding jurisdiction even without proof that Singleton had any motive, sufficient to be categorized as bad faith.

[144] These matters referred to in the relief sought in the pleadings when taking a "hard look" are supported by evidence and are genuine issues that should be determined by the trial judge.

[145] It will be up to the trial judge to determine if sufficient access was given to one side over the other. Considerable reference was made to the entitlement of MTS executives e.g. Barker, Paterson, Singleton, Fraser and others to speak to Fox and influence his thinking on the basic issue – ought the employees to have had the same entitlement, will be for the court to decide the effect of these meetings on the result and was it detrimental or otherwise.

[146] Singleton was particularly diffident in providing documentation which had been put before Fox, to the employees. According to Restall, Fox was influenced to make changes to the opinion after he had already decided that the issue of equivalency should include the surplus and funding components.

[147] The parties have differing views on the inclusion of these issues with the employees believing they ought to be included and Singleton believing otherwise.

[148] On the basis of Restall's evidence it leads one to conclude that Singleton controlled the process and the issues which made up equivalency. For example the definition of equivalency was largely crafted by Singleton as indicated by Singleton's markings (Exhibit 23 E to Restall's Affidavit). The definition was sent

out using Singleton's definition, to the interested parties. The wording in the definition was Singleton's with Fox admitting he did not understand many of the terms, according to Restall's evidence (para. 60 of Restall's Affidavit).

[149] The employees were left in the dark as to the basis for the change in opinion from not equivalent to equivalency between the two plans.

[150] There was never an opportunity given to the employees to comment on three reasons advanced by Barker for the changes.

[151] The evidence provided by actuaries for both sides of the dispute are at odds over whether the two plans are equivalent. Thomas D. Levy, being Chief Actuary of the Segal Co., on behalf of the employees commented adversely on the three reasons given by Barker supporting equivalencies and states that the methodology used by Fox was flawed. Levy concludes the two plans were not equivalent.

[152] One of the basic issues was that the surplus under the present opinion may generate funds that can be used by the employer – this view is strongly opposed by the employees and the use of these funds is a genuine issue for trial.

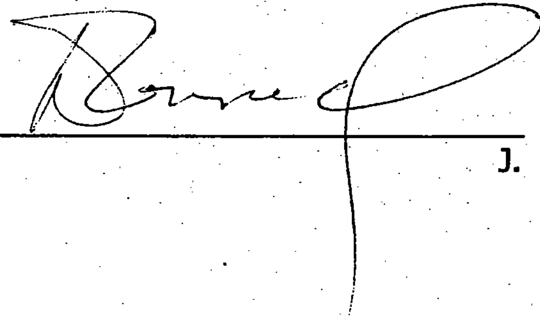
[153] I am therefore left with a view that on these matters there are genuine issues for trial as to whether Singleton breached his mandate and acted in bad faith in his handling of the substantive issues of equivalence between the old and the new pension plan.

[154] In summary I find that in this case that Fox's conduct and his report are subject to a duty of fairness and can be reviewed on that basis. The duty entails

a duty to be fair – applying natural justice principles and allows individuals to present their case fully and fairly in an open process. Fairness allows the parties the opportunity to respond to presentations made. I conclude that there were instances where credibility issues arose and fairness may not have been applied giving rise to genuine issues for trial.

[155] I am therefore of the view based on the information contained in the volumes of affidavit and cross-examination evidence which I found relevant, that there is adequate material supporting the existence of genuine issues for trial involving both Singleton and Fox. I repeat that these findings are supportive of genuine issues **and** not intended to be determinative of the issues referred to above.

[156] The applications for summary judgment to dismiss the actions against the Defendants Jon Singleton and Clifford Fox are dismissed with costs to the plaintiffs.



J.