Date: 2012 07 20
Docket: S-1-CV-2008 000116

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHERN EMPLOYEE BENEFITS SERVICES

Plaintiff

- and -

RAE-EDZO COMMUNITY SERVICES AUTHORITY AND
TLI-CHO COMMUNITY SERVICES AGENCY

Defendants

Trial of an action claiming solvency liability payment from an employer member of a pension plan.

Heard at Yellowknife, NT, on September 12-16, 2011

Reasons filed: July 20, 2012.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Plaintiff: Ron A. Skolrood and Lisa C. Chamzuk

Counsel for the Defendants: Jonathan Ptak, Murray Gold, and J. Bida

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REASONS FOR JUDGMENT

Introduction

[1] The Plaintiff, the administrator of several benefits plans, claims a sum of over $1,200,000.00 from the Defendants as a payment required upon withdrawal or termination from a pension plan (the "Plan"). The Defendants counterclaim for reimbursement of contributions to the Plan in the amount of $99,528.05. The central issues in the case are the applicability and interpretation of a policy which the Plaintiff claims makes the Defendants liable.

[2] A number of witnesses were heard at the trial. For the most part, the evidence of the lay witnesses is consistent, although each side urges a different interpretation of certain events and documents. Each side also presented actuarial evidence.

[3] The terms "funding on the basis of solvency" or "solvency funding" and "funding on a going concern basis" were used throughout the trial and will be used in these reasons for judgment. I have taken their meaning from the evidence of the actuaries. When I use the terms "funding on the basis of solvency" and "solvency

funding", I mean funding a pension plan on the basis of what would be required to pay out liabilities assuming that the plan winds up or terminates on a specific date. When I use the term "funding on a going concern basis", I mean funding a pension plan on the basis of what will be required to pay out liabilities based on the assumption that the plan will continue indefinitely. This is also referred to as an "unfunded liability".

Overview of the Factual Background

[4] The Plaintiff Northern Employees Benefits Services ("NEBS") is a non-profit corporation incorporated under the *Canada Corporations Act*, Part II, R.S.C. 1970, c. C-32. It administers several benefits plans, primarily group benefits insurance and pension plans, including the Plan that is the subject of this litigation. The majority of NEBS' members are employers who are municipalities or community governments in the Northwest Territories and Nunavut as well as local housing associations; the Plan beneficiaries are the employees of those employers.

[5] NEBS is the successor to the Community Employees' Benefits Program Board ("CEBPB"), established under the *Community Employees' Benefits Act*, S.N.W.T. 1995, c. 21, ("*CEBA*") which was in turn the successor to the Municipal Employees Benefits Program Board, established under the *Municipal Employees Benefits Act*, R.S.N.W.T. 1988, c. M-17. Both of those Boards administered a program of benefit plans, primarily for employees of municipalities in the Northwest Territories and what is now Nunavut.

[6] In 1998, the *Community Employees' Benefits Program Transfer Act*, S.N.W.T. 1998, c. 30, provided for members of CEBPB to apply to incorporate a corporation under Part II of the *Canada Corporations Act* which was to acquire and assume the administration of the benefits program under CEBA and to assume the assets and liabilities of CEBPB, which was dissolved. As a result of that, NEBS was incorporated as a not for profit corporation and it took over the administration of the benefits program in 1999.

[7] The Defendant Rae-Edzo Community Services Authority ("RECSA") was, at the relevant time, an employer with employees who were covered by the pension Plan and a group benefits plan administered by NEBS. The Plan is a defined benefit plan, meaning that a specified level of pension income will be paid when

members of the Plan retire. The fund used to generate that income is derived from contributions made by the employer and the employees and investment returns on the contributions.

[8] The Plan was regulated under the federal *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("*PBSA*") until 2004, when the Office of the Superintendent of Financial Institutions advised that it had determined that the Plan was exempt from the *PBSA*. The Board of NEBS then committed to voluntary compliance with the provisions of that *Act* and pursued discussions with the Government of the Northwest Territories ("GNWT") and Government of Nunavut about how the regulatory void might be filled. Those discussions have not resulted in any new regulatory regime.

[9] Under the *PBSA*, pension plans are to be funded in accordance with prescribed tests and standards for solvency. Pension plans may be exempted from that requirement by regulation. As noted above, the *PBSA* no longer applies to NEBS.

[10] In August of 2005, RECSA advised NEBS that a number of its employees were being appointed to the public service of the GNWT and so would be terminating their membership in the pension Plan and group benefits plan. NEBS sent RECSA the form required for an employer to terminate its membership, but the form was never filled out and returned to NEBS. As will be explained further on, NEBS continued to consider the employees as members of the pension Plan and RECSA made pension contributions and group insurance premiums on behalf of those employees until April 2006.

[11] Eventually, after RECSA stopped paying contributions and premiums, NEBS suspended RECSA from participation in the plans and subsequently terminated RECSA's membership in NEBS. NEBS claimed a payment representing RECSA's share of the solvency deficiency in the Plan pursuant to NEBS' Policy on Joining or Terminating Membership in NEBS (the "Policy"). In brief, the payment claimed represents RECSA's share of the amount by which the pension Plan's liabilities exceed its assets based on a hypothetical winding up of the Plan on the effective date of termination of RECSA's participation in the Plan.

[12] NEBS advances its claim against both RECSA and the Defendant Tli-Cho Community Services Agency ("TCSA"). NEBS takes the position that they are two separate entities, however the Defendants say that RECSA and TCSA are essentially one and the same.

[13] RECSA and TCSA advance a counterclaim for the pension contributions and group insurance premiums that RECSA says were not owing to NEBS but were paid by mistake or in order to obtain pension adjustment information from NEBS after its employees were appointed to the GNWT.

[14] The above is just an outline of the main facts. I will say more about the facts when analysing the issues. The main issues, in my view, are whether NEBS had the authority to impose the solvency deficiency payment by way of the Policy in such a way that it is binding on RECSA; and whether the circumstances of RECSA's termination bring it within the Policy. If the resolution of those issues does bring RECSA within the Policy, the next issue is the correct interpretation of the Policy so far as the calculation that it requires. Additional issues are the relationship between RECSA and TCSA and whether NEBS should reimburse them as sought in the counterclaim.

[15] 1. Did NEBS have the authority to impose the solvency deficiency payment by way of the Policy in such a way that it is binding on RECSA?

A. NEBS' corporate bylaws and the Policy

[16] To determine whether NEBS had the authority to impose the payment by way of the Policy, a review of NEBS' bylaws is necessary.

[17] NEBS' governing bylaw upon its incorporation in 1999 provided that employers who were participating employers under *CEBA* automatically became members in NEBS. Under the 1999 bylaw, employers are the members of NEBS and the employees of those member employers are referred to as participating employees. The participating employees participate in the benefits of the plans administered by NEBS.

[18] RECSA had been a participating employer under its predecessor's name, Rae Edzo School Society, since 1981 and so automatically became a member of NEBS on its incorporation in 1999.

[19] The 1999 bylaw was amended in 2004, but the amendments are not material to this decision except as I will specify. The significant parts of the bylaw for purposes of this decision are as follows (references are to the 1999 version):

> 1. **Definitions.** In these bylaws, unless the context requires otherwise:
>
> "Benefits plan" means a particular insurance program, pension plan or other benefits arrangement offered to one or more participating employees
>
> "Benefits program" refers to all benefit plans offered or administered by the Corporation
>
> ...
>
> 4.6 **Termination of membership.** The membership of any member may be terminated or the member's right to participate in a specific benefit program may be terminated by the Board if the member fails to pay any fee, levy, premium, assessment, contribution or other sum due to the Corporation within sixty days after it is due, provided, however, that the Corporation shall give the member and the member's participating employees not less 30 days written notice prior to terminating the member and its participating employees. Such termination of membership may apply to all programs or a specific benefit program only as may be specified in the notice.
>
> 4.7 **Resignation.** Any member of the Corporation may resign as a member of the Corporation or from participation in a particular benefit plan only by consent of the Board, which consent shall not be unreasonably withheld. As a condition of the member's approval to resign or to withdraw from a specific benefit plan, the Board may require proof that notice of the member's intent to resign or withdraw (as the case may be) has been given to the member's participating employees who would be affected by the member's resignation or withdrawal from a specific benefit plan. The Board shall consider a member's request to resign as soon as reasonably practicable after receipt of the request and any supporting documents. The Board shall specify in any resolution accepting the resignation the effective date of the member's resignation, which shall not be more than 120 days after the date of approval of the member's application to resign.

4.8 **Obligations on Resignation or Termination.** Where the Board accepts the application of a member to withdraw from the benefits program or a specific benefit program, or terminates the membership of the member in the benefits plan or a specific benefit plan, the Board shall, in accordance with the terms of the benefits program or the specific benefit plan and any enactments of Canada regulating pension plans, determine:

(a) whether benefits are payable to or vested in persons formerly under the benefits program or specific benefits plan and the amount and nature of those benefits; and

(b) the amount of any outstanding balance to be refunded to or paid by the member and its participating employees.

10.1 **Board to Manage.** The board may do such things as it considers necessary and advisable for the proper administration of any benefits plan offered by the Corporation. The Board shall not be obligated to obtain the approval of any member for any such matters unless expressly required by any written agreement with the member, these bylaws, the Corporation's Letters Patent, or any law applicable to the Corporation. Without limiting the generality of the foregoing, the Board may, without approval of the members:

(a) establish such policies and procedures as it considers necessary or advisable for the administration of its affairs and the administration of the benefits program in particular;

...

10.2 **Changes to Benefits Plans.** The Board may make changes to a benefit plan and determine the dates on which the changes are to take effect, provided, however, that:

(a) the Board shall give notice in writing of any proposed change to the benefit plan to members and their participating employees not less than 30 days before the effective date of such proposed change; and

(b) the Board shall inform the members and their participating employees of the estimated effect of the proposed change on future contributions.

> 10.3 **Retroactive Changes to Benefits Plans.** The Board may make a retroactive change to a benefit plan and determine the dates on which the changes are to take effect from, provided, however, that:
>
> (a) the amount of contributions payable by members or their participating employees cannot be increased retroactively;
>
> (b) benefits under the plan shall not be reduced retroactively unless such reduction is required to comply with the requirements of an enactment governing the plan.
>
> 14.1 **Enactment and Repeal of By-laws**. By-laws of the Corporation may be enacted, and the by-laws of the Corporation repealed or amended, by by-law enacted by a majority of the Board at a meeting of the Board and sanctioned by an affirmative vote of a majority of the members at a meeting of members duly called for the purpose of considering such by-law; provided always that the repeal or amendment of a by-law of the Corporation shall not be enforced or acted upon until the amendment has been filed with Industry Canada.

[20] In March 2002, the Board of NEBS amended some policies it had inherited from its predecessor, CEBPB. One of those policies was the Policy on Joining or Terminating Membership in the NEBS Pension Plan. It was amended to include a new section, 3.5.7, which is at issue in this case:

> 3.5.7 Employer Obligations Upon Termination
>
> Where an Employer Member terminates and the Pension Fund solvency is less than 100%, the Board shall require that employer to make solvency/unfunded liability payments in respect to the employer's specific liabilities for active, deferred and retired members. These liabilities, as a share of the Plan's total liabilities, are determined by actuarial valuation, the cost of which shall be paid by the Employer Member who requests termination.

B. Background to the adoption of section 3.5.7

[21] Mr. Adams, the Chief Executive Officer of NEBS, testified that section 3.5.7 was adopted not long after the NEBS Board had increased employer and employee contributions to the pension Plan. The increase in contributions was imposed because of a valuation report that said that contributions at the time were not

sufficient to fund the Plan. The Board was concerned that employers might be unhappy with the increase in contributions and choose to leave the Plan. If their departure resulted in a solvency deficiency, in other words, in insufficient assets to pay liabilities on a hypothetical windup of the Plan, the employers remaining in the Plan would be left to deal with it. The Policy on Joining or Terminating Membership was silent on a departing employer's obligation in that regard and so NEBS decided to address it by adding section 3.5.7.

[22] In 2003, as required by the *Pension Benefits Standards Act*, NEBS established a Pension Committee, which was to be separate from the Board and operate independently of it. Under its terms of reference, the Pension Committee administers the pension Plan. The Board continues to administer the group benefits plan. The Pension Committee formally adopted the Board's policies as its own, including the Policy on Joining or Terminating Membership with section 3.5.7.

[23] The 1999 bylaw required employer members of NEBS and their employees to make contributions to the pension Plan (s.11). When the bylaw was amended in 2004, s. 11 was changed to provide that the Pension Committee may make policies respecting pension Plan contributions, including policies respecting the obligations of members and participating employees to pay contributions.

C. The Plan text

[24] The pension Plan text includes the following section:

> 13.05 The Board shall administer the Plan and shall decide all matters in question with respect to the operation, administration and interpretation of the Plan in a manner consistent with Applicable Legislation, the Plan and good governance standards of practice for a public-sector, multi-employer plan.

[25] The Plan text does not contain any requirement that a departing employer make any special payment. It does contain section 4.10, referring to contributions, which reads in part as follows:

> 4.10 A Participating Employer shall contribute each year to the Plan amounts not less than those recommended by the Actuary and approved by the Board as being necessary to provide the benefits accruing in that year and to amortize any solvency deficiency or unfunded liability in accordance with the funding procedures and

> within ten (10) years from the date on which the solvency deficiency emerged and within fifteen (15) years from the date on which a going concern deficiency emerged. ...

[26] Section 4.10 of the Plan is similar to s. 13 of the Regulations under the *Municipal Employees Benefits Act*, which stated:

> 13. Every participating municipality shall pay an amount equal to 5% of the aggregate of the earnings paid to members each month in respect of their current service which, when added to the members' contributions made under section 12 of these regulations, provides for funding of benefits under the standards for solvency prescribed for pension plans by the laws of Canada.

D. How NEBS communicated section 3.5.7 to its employer members

[27] Section 3.5.7 was adopted by the Board of NEBS in March 2002. It was not distributed to the employer members, but in a bulletin dated March 2002, that was sent to employer members, NEBS refers to the recent increase in pension Plan contributions and states that the Board has approved some policies, including the Policy on Joining or Terminating Membership in NEBS. It advises that the policies may be obtained from the NEBS office. However, it makes no reference to the obligation imposed on departing employers by the new section 3.5.7.

[28] The NEBS Chairman's Report of May 2002, which was presented at NEBS' annual general meeting that month, also refers to the Board having approved the Policy on Joining or Terminating Membership. That Report also refers to increases in contribution rates payable by employers and employees and explains that the increases were considered necessary to maintain the assets of the pension fund to meet the retirement benefit commitments to employee Plan members. The Report says nothing, however, about a payment to be made by a departing employer.

[29] The May 2004 Chairman's Report refers to there having been a solvency valuation that shows an unfunded liability and explains unfunded liability as a calculation based on the hypothetical situation of the Plan being immediately terminated and all Plan members being paid out. It states that "while such a situation will not occur", NEBS is required by legislation to take action to address the unfunded liability and describes the action to be taken as changes to benefits in

order to reduce liabilities. Again, there is no reference to a payment on termination of an employer's membership.

[30] The May 2005 Chairman's Report says that valuation of the plan on a solvency basis continues to be a concern and that the Pension Committee must ensure there are sufficient funds to meet the pension promise to members. It also states that although immediate termination of the plan "will not occur with a public sector Plan such as NEBS, the Pension Committee has agreed to voluntarily comply with the solvency repayment requirements of the Pension Benefits Standards Act (1985) until the regulation of our Plan is clarified". Again, there is no statement that employers could be required to make a payment pursuant to section 3.5.7. of the Policy.

[31] Mr. Adams, the Chief Executive Officer of NEBS, testified that NEBS' policies were on its website. NEBS would also provide copies to member employers upon request. However, there was no distribution of policies to employer members generally until the summer of 2005, when they were included in a Program Information Manual that was sent out. Mr. Adams could not say when exactly the Manual was sent out or when it would have been received by employers, so it is not clear that RECSA even had the Manual before the events of August 2005. The Program Information Manual does state that termination from the pension Plan is a partial plan windup and in such cases employers are required to make any solvency or unfunded liability payments in respect to the liabilities of current active employee members, deferred members or pensioners; it also states that the Pension Committee will decide on the payments to be made.

E. Positions of the parties

[32] NEBS take the position that its Board has, and at the relevant time had, the authority to make policies that are binding on its members and that section 3.5.7 is therefore binding on RECSA. NEBS also takes the position that it had the authority to do so without the consent of its members and that the notice given to them was sufficient in the circumstances.

[33] RECSA takes the position that NEBS does not have the authority to make policies that are in conflict with its bylaws on matters that are not merely administrative. It argues that because the bylaws provide for an employer

member's obligations on termination, those obligations can be varied only by way of a bylaw amendment.

F. Analysis

[34] Consideration of NEBS' power and authority to impose section 3.5.7 as a policy binding on its member employers involves two things: the powers that NEBS has under its constituting documents and the powers that it has as the administrator of the pension Plan.

[35] The powers given to NEBS' Board in its bylaws on incorporation must be taken to have been agreed to by employers upon choosing to become members of NEBS. Similarly, those employers who automatically became members of NEBS when it took over the benefits programs from *CEBPB*, should be deemed to have agreed and undertaken to observe the bylaws of NEBS. There is a contractual relationship between the employer member and NEBS, which is governed by the bylaws: *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555.

[36] NEBS' bylaws specifically provide for the obligations of a member on resignation or termination from one or more of the plans administered by NEBS (s. 4.8); in the instance of resignation or termination, NEBS' Board must determine the amount of any outstanding balance to be refunded or paid by the member and its participating employees.

[37] NEBS argues that the reference to outstanding balance includes a payment based on solvency or unfunded liability. However, in my view the wording does not support that argument. Rather, s. 4.8 clearly refers to amounts such as contributions, fees or levies that are outstanding at the date of resignation or termination. The calculation of a solvency or unfunded liability payment cannot be said to be an outstanding balance, since it does not exist until calculated by an actuary. Nor is it an amount that could be refunded. The addition of "and its participating employees" at the end of s. 4.8(b) suggests that the amount to be refunded or paid is one that could also be refunded to or paid by an employee. Only a contribution payment, premium or similar payment could fall into that category, not a payment based on solvency or unfunded liability.

[38] In my view, therefore, s. 4.8 of the bylaws does not require an employer to make a solvency or unfunded liability payment.

[39] NEBS also relies on the Board's power in s. 10.1 of the bylaws to "do such things as it considers necessary and advisable for the proper administration of any benefits plans offered by NEBS" without the approval of the members, including to "establish such policies and procedures as it considers necessary or advisable" for the administration of the benefits program. NEBS argues that s. 3.5.7 is valid as an exercise of those powers.

[40] The powers in s. 10.1 are to be exercised for the administration of the benefits programs and plans. In my view, administration in this context must be taken to mean day to day management, since elsewhere, in s. 10.2, the Board's ability to make substantive changes to a benefit plan are provided for and require notice. Placing what could be, as in this case, a substantial financial obligation on a departing employer cannot be characterized as an aspect of day to day management.

[41] It is also clear that the power of the Board to act under s. 10.1 without the approval of its members is subject to the bylaws: "The Board shall not be obligated to obtain the approval of any member for any such matters unless expressly required by ... these bylaws ...". Since the bylaws specifically provide for the obligations of a member on resignation or termination, those obligations can only be varied by way of an amendment to the bylaws pursuant to s. 14.1, which requires sanction or approval by vote of a majority of the members at a special meeting. Therefore, even if s. 10.1 can be said to give the Board the power to require the payment described in s. 3.5.7, or to make a policy requiring such payment, it cannot be done without the approval of the members of NEBS.

[42] If one looks at the issue from the perspective of what employer members agreed to on joining NEBS, it is clear that they agreed that their obligations on resignation or termination would be as set out in s. 4.8 and that NEBS could change those obligations only so long as it followed the procedure in s. 14.1. The Board's ability to make policy about administration without the consent of the members cannot eliminate or override the specific requirement of the consent of a majority of members as required by s. 14.1 of the bylaw in order to make a significant change to an obligation set out in that bylaw.

[43] It is also necessary to consider that NEBS as the administrator of the Plan owes a duty to the Plan beneficiaries to ensure that their interests are protected. The nature of a pension plan is also contractual and the pension plan document is the paramount or dominant legal document: *Dinney* v. *Great-West Life Assurance Co.*, 2009 MBCA 29. Courts have shown deference to trustees in the interpretation of pension and trust documents: *Neville* v. *Wynne*, [2005] B.C.J. No. 2778, 2006 BCCA 460. However, the issue at hand is not simply interpretation of the Plan text, it is the power NEBS has under its bylaw.

[44] The NEBS Plan deals largely with the rights and obligations of its employee members. In relation to its participating employers, it requires in clause 4.10 that they contribute yearly to the Plan amounts not less than those recommended by the actuary and approved by the Board as being necessary to provide the benefits accruing in that year and to amortize any solvency deficiency or unfunded liability within certain periods of time. Clause 4.10 clearly deals with ongoing contributions by the employer and not a payment on resignation or termination. This is evident as well from clause 4.13(c), which says that the s. 4.10 contributions are to be paid within 30 days after the end of the period in respect of which employees' deductions are made. The employer funds its pension promise to its employees by way of these contributions. There is no other provision in the Plan that deals with payment to be made on resignation or termination of an employer.

[45] The Plan also states, in clause 13.05, that NEBS' Board shall administer the Plan and decide all matters in question with respect to the operation, administration and interpretation of the Plan in a manner consistent with applicable legislation, the Plan and good-governance standards of practice for a public sector, multi-employer plan. While this gives the Board wide powers, it cannot be said to permit the Board to make a significant change to the obligations of its members when those obligations are addressed in the bylaws. To do that, the Board has to seek an amendment of the bylaws.

[46] Just as an amendment to a bylaw requires notice, proposed changes to the pension Plan require advance notice to member employers and participating employees pursuant to s. 10.2 of the bylaw. To the extent that s. 3.5.7 of the Policy can be considered a change to the Plan, it requires notice of both the change to the Plan and the effect of same on future contributions.

[47] As I have stated, section 4.10 of the Plan text refers to the issues of solvency deficiency and unfunded liability, but it seeks to address them by way of the regular contributions to be made by employers. As I will discuss further on, NEBS decided not to address those issues through the regular contributions, even though it was advised to do so.

[48] There is no question that NEBS could have followed the procedure for amending its bylaws so as to change the obligations of a member on resignation or termination to include payment of amounts such as solvency or unfunded liability payments, assuming of course, that it got the required sanction of its members. However NEBS decided to proceed by way of a policy instead, without consulting with its member employers and without clearly bringing the existence of the requirement for an unfunded liability or solvency payment to the attention of those employers. NEBS says that notwithstanding that the employers' obligations are set out in the bylaws, a significant change can be made to those obligations by simply enacting a policy. I do not accept that argument. The change was not a mere administrative matter, such as prescribing the form required to effect termination or requiring that certain information be provided. The change in this case amounts to a claimed liability in excess of one million dollars.

[49] I agree with the Defendants that this case is somewhat similar to *Forest Industrial Relations Ltd. v. Weyerhaeuser Co.*, 2009 BCSC 733, [2009] B.C.J. No. 1126. There, the plaintiff company relied on a resolution of its board of directors to claim from the defendants contribution to a notional contingency liability fund to cover potential liabilities to its employees. It had subscription agreements with the defendants from whom it claimed the contribution and those agreements had been terminated. The subscription agreements provided only for monthly contributions to the fund; they imposed no obligation for a payment upon termination of the agreement. The Court held that the Board resolution for payment on termination was not within the Board's capacity to make because the power to impose the payment was not found in the plaintiff company's constitution or bylaws or the subscription agreements with the departing defendants.

[50] The situation in this case is not quite the same in that the Board does, under NEBS' bylaws, possess the power to make policies. However, for the reasons already given, I find that the power to make policies cannot be interpreted as

conferring a power to change obligations set out in the bylaws by way of a policy instead of a bylaw amendment.

[51] In *Forest Industrial*, the Court also looked at the course of dealings between the parties to determine whether they gave rise to an implied term authorizing the plaintiff's board to require contributions other than by payment of the monthly amounts prescribed by the subscription agreements. The Court found that there was no evidence to substantiate an implied term.

[52] In this case, NEBS argues that RECSA by its conduct should be taken to have accepted s. 3.5.7 of the Policy and the obligation it imposes. NEBS points to the testimony of RECSA'S finance officer, Ms. Wedzin, that she does not recall if she received the Chairman's Reports or the information about NEBS having adopted policies. Although she acknowledged receiving bulletins from NEBS, she said that she did not take steps to obtain copies of policies or to inform herself about the policies that applied to RECSA's membership in NEBS.

[53] After Mr. Adams was advised verbally by Ms. Wedzin about the RECSA employees being appointed to the GNWT, he sent her a letter in which he referred to employers having the obligation upon termination to pay solvency/unfunded liability payments. Mr. Martin, the CEO of TCSA who was very involved with RECSA and to whom Ms. Wedzin went for assistance, testified that when he reviewed that letter, he did not understand the reference to solvency/unfunded liability and he so turned it over to the Human Resources Department of the GNWT for advice. He testified that he cannot remember if anyone had spoken to him about the solvency issue but said that even if they had, it would not have meant anything to him because he did not understand it.

[54] NEBS submits that this evidence indicates that no one in RECSA was paying attention to the material sent to them by NEBS and that Mr. Martin was not interested in the existence and consequences of the policies. I would not characterize the evidence that way. I think it is clear from Mr. Martin's evidence that RECSA was lacking staff and relied to a large extent on him, even though he was an employee of TCSA. Once Mr. Martin became aware of the solvency issue, he believed that it was something the GNWT should deal with since there was no one knowledgeable about pension issues within RECSA or TCSA and the GNWT

had caused the RECSA employees to become part of the public service, leading to the issues with NEBS.

[55] What is more important, however, is that since NEBS knew why section 3.5.7 had been adopted and what its consequences would be, NEBS had the obligation to communicate that clearly. It did not do so. Instead of describing section 3.5.7, and what it would mean for employer members, in its bulletins or a special notice or the annual Chairman's Reports, NEBS merely announced that the Policy on Joining or Terminating Membership had been amended. In my view, that was inadequate notice of a change that could have a significant financial impact on a member employer.

[56] The evidence indicates that NEBS was concerned that some member employers might take exception to the requirement for payment on termination. In my view that makes clear and timely disclosure of s. 3.5.7, the reason for it, and its impact even more important. NEBS later realized that this was a problem. Mr. Adams testified that at some point after 2005, employers wanting to join NEBS were provided with a copy of the Policy on Joining or Terminating Membership in NEBS and had to sign an application form which included the employer's undertaking to abide by NEBS' policies. Those employers were therefore aware of s. 3.5.7 and agreed to be bound by it.

[57] In my view, this case can be distinguished from *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74, cited by NEBS. In the latter case, the argument put forward was that the employer had not contracted to participate in the pension plan at all. The Court found that the employer's conduct showed that it had contracted to participate and having done so, it was bound by minimum funding requirements set out in legislation.

[58] I find there is no basis in the evidence from which to conclude that RECSA should be found to have acquiesced in the liability payment provided for in s.3.5.7 or that it was an implied term of RECSA's agreement with NEBS.

[59] In any event, the issue of communication does not affect NEBS' ability to impose the liability payment by way of policy instead of a bylaw amendment. In my view, NEBS did not have the power to proceed that way and s. 3.5.7 is not binding on RECSA for that reason.

[60] 2. Do the circumstances surrounding RECSA's termination bring RECSA within s. 3.5.7?

[61] Even if NEBS did have the power to impose the liability payment by way of a policy instead of a bylaw amendment, in my view section 3.5.7 does not apply to the circumstances of RECSA's termination.

[62] It is clear from Mr. Adams' letter of August 11, 2005 to Ms. Wedzin at RECSA, that Mr. Adams interpreted or characterized the appointment of the 14 RECSA employees to the GNWT as a resignation of RECSA from NEBS' plans that would invoke the Policy on Joining and Terminating Membership. He provided Ms. Wedzin with the forms required for NEBS to terminate its membership in the group benefits plan and the pension Plan. In the letter, Mr. Adams states that there are several considerations for termination, among them the membership status of the Dogrib Community Services Board (TCSA's predecessor), which will be reconsidered at the same time as RECSA's application.

[63] In his letter of August 24, 2005, responding on behalf of RECSA, Mr. Martin stated that the 14 RECSA employees were direct appointed to the GNWT and that this would result in those employees terminating their pension and insurance coverage with NEBS as of August 15, 2005. Mr. Martin, who was of the view that RECSA and TCSA were one organization, wrote that "TCSA/RECSA will still require employer coverage for Jim Martin, Chief Executive Officer".

[64] Mr. Adams' next letter of August 24, 2005 did not address the continuation of employer coverage for Mr. Martin, but simply referred to the requirements for termination of a participating employer member.

[65] Mr. Martin did not respond to Mr. Adams' last letter. Mr. Martin had copied his August 24 letter to the Director of Employee Relations for the GNWT. He testified that he expected that the GNWT would resolve the situation. There was reference in the evidence to meetings that involved Adams, Martin and a representative of Employee Relations, but it appears that nothing was resolved. Mr. Martin testified that there was confusion about the status in NEBS of the employees who had been appointed to the GNWT. The employees were now employees of the GNWT, even though they continued to do the same work they had

done as employees of RECSA. Presumably upon appointment to the GNWT, however, they were eligible for benefits coverage through the GNWT.

[66] It is not clear to me from the evidence why there was confusion about the employees' status in NEBS. Section 3.09 of the pension Plan text says that an employee's membership in the Plan is terminated on the date of termination of employment with a participating employer. However, Mr. Adams testified in cross-examination that because of some unspecified regulations, he was not certain that the employees were government employees after their appointment, that they might not have become part of the public service. Since there was no submission made at trial that the employees had not, in fact, become GNWT employees, I assume that this was a mistake on Mr. Adams' part, one that for some reason was not rectified in the discussions with the GNWT and Mr. Martin. In any event, I understood Mr. Adams to say in his testimony that that is what he thought at one time, but that at some point he came to base his belief that the employees were still RECSA employees on the fact that RECSA did not properly withdraw from the pension Plan or group benefits plan.

[67] NEBS continued to treat RECSA as a member employer and sent it invoices for contributions. Ms. Wedzin testified that initially she put the invoices aside as she was told by Mr. Martin that the GNWT would resolve the situation. However in early 2006, she needed information about pension adjustments for RECSA's employees' T4 slips. She testified she was told by NEBS that they would not provide the information while RECSA's account was not up to date. In his testimony, Mr. Adams confirmed that NEBS requires that payments be up to date before pension adjustment information is provided.

[68] Ms. Wedzin consulted with Mr. Martin, who told her to pay the invoices. Ms. Wedzin paid the amounts owing for September 2005 to January 2006 and received the pension adjustment information. She subsequently went on maternity leave and later discovered that in her absence a casual worker had paid invoices through to April 2006 by mistake. She instructed the casual worker not to pay any more.

[69] In his testimony, Mr. Martin confirmed that he directed Ms. Wedzin to pay NEBS' invoices for the outstanding contribution payments because of the pension adjustment issue. He had not received direction from the GNWT about resolution

of the issues with NEBS, but believed that the GNWT would make an adjustment or reimbursement for the contributions paid. Ms. Wedzin later made him aware of the invoices that had been paid by casual staff during her absence on maternity leave.

[70] NEBS objected to some of this evidence as hearsay, in particular the evidence of Ms. Wedzin that the casual staff had paid invoices by mistake. It is hearsay, but even without it, the rest of the evidence supports the conclusion that the invoices paid by the casual staff were paid by mistake or without authority. From the testimony of both Ms. Wedzin and Mr. Martin, it is clear that their intention in paying the invoices for September to January 2006 was so that the pension adjustments could be obtained; it is also clear that they did not intend to pay or direct payment of any invoices beyond those. It is a reasonable conclusion, therefore, that the casual staff mistakenly paid the invoices in Ms. Wedzin's absence.

[71] Mr. Adams continued to seek a response from RECSA about its membership in NEBS. He directed his inquiries to both Mr. Martin and to officials in the GNWT. In an electronic message of June 6, 2006, Mr. Adams states that RECSA continues to be a participating employer member of NEBS and its employees remain eligible for benefits under the benefits plans and continue to accrue credited service in the pension plan and monthly contributions continue to be charged. In an electronic message dated July 4, 2006, Mr. Adams states that NEBS will proceed on the assumption that RECSA is no longer seeking to withdraw from the NEBS program.

[72] I have referred earlier to Mr. Adams' testimony that he was not certain that the appointed RECSA employees were government employees. There is no evidence before me as to what, if anything, the GNWT did to clarify the situation or respond to the electronic messages I have just referred to. It is clear from Mr. Martin's evidence that he received the messages but did not respond to them. He testified that although he wanted the matter resolved, and had had discussions about it with the GNWT, it was not clear to him what its status was. But the confusion was about the status of the employees in NEBS, not whose employees they were.

[73] Further complicating the matter is the fact that Mr. Martin believed that RECSA and TCSA were one organization and that coverage for him as the Chief Executive Officer of that one organization would continue. To add to this, there is evidence that RECSA had an employee, Ms. McPherson, who was not appointed to

the GNWT but remained with RECSA after August 15, 2005 until the end of the year. Ms. Wedzin testified that she was not permanent staff and was paid from a scholarship program, however pension adjustments were provided for her along with the employees who were appointed to the GNWT. However, Mr. Martin did not refer to her in his letter of August 24, 2005, when he stated that coverage with NEBS would need to continue for him.

[74] Two of the RECSA employees who had been appointed to the GNWT made claims on the insurance coverage they had through NEBS even after August 15, 2005. Those claims are in the total amount of $14,759.00 and were submitted for payment through to October 2006.

[75] The end result is that in October 2006, NEBS gave notice to RECSA that its membership in the pension Plan and the group benefits plan would be suspended unless contributions and premiums owing were paid by a certain date. Final notice was given in December 2006. In April 2008, NEBS terminated RECSA as a participating employer and its employees as members of the NEBS pension Plan, effective May 31, 2006, the last date for which contributions had been paid. It also terminated RECSA from the group insurance plan and as an employer member of NEBS for failure to pay amounts owed, effective November 1, 2006.

[76] The wording of section 3.5.7 contemplates termination requested or applied for by the employer member. It refers to "Where an Employer Member terminates" and "the Employer Member who requests termination". RECSA did not request termination. Mr. Martin's correspondence of August 24, 2005, simply notified NEBS that 14 RECSA employees were terminating their insurance and pension coverage with NEBS as they had been appointed to the GNWT. Ultimately, NEBS terminated RECSA.

[77] NEBS argues, however, that by withdrawing all of its active employees from coverage in the plans they were enrolled in and by ceasing to make contributions on behalf of those employees, RECSA effectively terminated its membership in NEBS, even if it did not fill out the forms required for it to do so. NEBS says that RECSA should not be permitted to rely on its own failure or refusal to comply with the technical requirements of termination. It argues that by refusing or failing to respond to Mr. Adams' inquiries about the status of the RECSA employees, and

eventually ceasing to pay any contributions or premiums, RECSA basically abandoned its membership in the benefits plans.

[78] While this argument appears on its face to have some merit, I would not accede to it in this case. This was an unusual situation because RECSA did not withdraw its employees from the benefits plans or seek to withdraw itself from them. The employees were appointed to the GNWT. Even after their appointments, for reasons that are not clear, there was confusion about their status in NEBS. Although RECSA did not help matters by not responding to NEBS' requests for clarification and status updates, Mr. Martin also was not getting the direction that he was seeking from the GNWT. So just as NEBS takes the position that it would have been imprudent for it to terminate the employees' coverage, absent some direction from the GNWT, Mr. Martin was not willing and perhaps was simply not able, to commit to a position on the employees' status. In a sense, then, both NEBS and RECSA were caught in a bind.

[79] However, it was NEBS that was insisting that RECSA file forms for termination of its participation in the benefits plans. Had NEBS simply treated the 14 employees who were appointed to the GNWT (and it had Mr. Martin's letter of August 24, 2005 confirming that had happened) as employees who were no longer employed by RECSA and therefore ineligible to continue as employee members of the benefits plans, that would have left RECSA as an employer member, although one without any employees after Ms. McPherson left RECSA's employment. NEBS and RECSA would then have been left with the issue whether RECSA could continue as a member in NEBS the corporation or a member in NEBS' benefits plans at all.

[80] In my view, NEBS' insistence on treating the employees as if they continued to be employed by RECSA and demanding payments for contributions for them helped to confuse things. I come back to the point that RECSA did not request termination. NEBS terminated RECSA. I do not see any room in 3.5.7 for a "deemed" resignation, which is essentially what NEBS is arguing. NEBS' bylaws clearly distinguish between resignation of an employer member (s. 4.7) and termination of an employer member by NEBS for failure to pay amounts due (4.6). The language of s. 3.5.7 of the Policy is restricted to termination at the request of the employer, which amounts to resignation. That is not what happened here.

[81] Accordingly, I find that the circumstances in which RECSA was terminated do not fall within s. 3.5.7.

3. *Did RECSA continue as a member of NEBS under TCSA'S membership?*

[82] RECSA takes the position that it operates as a combined entity with TCSA, the membership of which was to continue as stated in Mr. Martin's letter of August 24, 2005 and does in fact continue to date. Therefore, RECSA says that it actually continued in NEBS under TCSA's membership.

[83] There is clearly a relationship between RECSA and TCSA and there was between some of their predecessors as well. Both Mr. Martin and Ms. Wedzin testified that they considered RECSA to be part of TCSA. Ms. Wedzin, who was an employee of RECSA, consulted with and took direction from Mr. Martin, who was the Chief Executive Officer of TCSA, about financial matters such as the invoices received from NEBS. Mr. Martin sometimes wrote policy for RECSA's Board. He was put forward by RECSA to be examined for discovery in this case. It was he who wrote to NEBS on August 24, 2005 with a list of the employees who had been appointed to the GNWT and who was involved in the discussions with NEBS and the GNWT about the status of the employees' membership in NEBS.

[84] Mr. Adams testified that he accepted that Mr. Martin was authorized to speak on behalf of RECSA in their dealings. He also testified that he was aware that there was a connection between RECSA and TCSA.

[85] Whatever the overlap in functions or operation of the two Defendants, or how they may have presented themselves or were accepted by others, the most important consideration is their legal status.

[86] TCSA was established as a body corporate by the *Tlicho Community Services Agency Act*, S.N.W.T. 2005, c. 7, which came into force August 4, 2005. Under that statute, TCSA took over the functions, rights and obligations of the Dogrib Divisional Education Council and the Dogrib Community Services Board. The Dogrib Community Services Board was established by the *Dogrib Community Services Board Establishment Order*, R-044-97 to manage health facilities in Rae-Edzo and other communities. It was continued as a Board of Management in 1998 by the *Dogrib Community Services Board Order*, R-061-98.

[87] The Orders establishing and continuing the Dogrib Community Services Board were made under the *Hospital Insurance and Health and Social Services Administration Act*, R.S.N.W.T. 1988, c. T-3, s. 10 (c) of which validates the Dogrib Community Services Board as a Board of Management and s. 12 (1) of which declares a Board of Management to be a body corporate. The Dogrib Community Services Board became a member of NEBS in 2001, although only its Chief Executive Officer was enrolled as an employee member of the benefits plans.

[88] As for TCSA's other predecessor, the Dogrib Divisional Education Council, it was the successor to the Dogrib Divisional Board of Education.

[89] RECSA is the successor to the Rae Edzo School Society ("RESS"). RESS was an employer member under the *Municipal Employees Benefits Act* since 1981 and continued through with membership in NEBS. In 1989, the education programs delivered by RESS were taken over by the Rae Edzo Education Council, pursuant to an Agreement (Memorandum of Understanding dated June 19, 1989) with the Commissioner of the Northwest Territories. It is not clear from the evidence whether RESS actually became the Rae Edzo Education Council, although it seems not since RESS continued its membership in NEBS under its own name. In 2000, NEBS was advised that RESS had changed its name to RECSA.

[90] There is evidence of a relationship between the predecessors of TCSA and RECSA. For example, as indicated, by the 1989 Agreement the Rae Edzo Education Council was to take over the duties of RESS. The Dogrib Divisional Board of Education was to have a supervisory role over the Rae Edzo Education Council, but the Council would hire and pay staff. The Agreement appears to have been signed by Mr. Martin, who was at the time the Superintendent of the Dogrib Divisional Board of Education. Mr. Martin later became the Chief Executive Officer of the Dogrib Community Services Board before TCSA was created and then became the Chief Executive Officer of TCSA.

[91] Despite some of the uncertainties in the history, I am satisfied that legally, TCSA and RECSA are separate entities with separate legal status. This is also reflected in the fact that they had their own bank accounts and filed their own tax returns, as testified by Mr. Martin. They (and their predecessors) retained separate enrolment status in NEBS. Although much of RECSA's funding came from TCSA

(and presumably its predecessors), that does not detract from their separate legal status.

[92] Mr. Martin's involvement in both RECSA and TCSA and some of their predecessors may have caused a perception (on both his part and the part of others) that they were one organization. He testified that RECSA was not functioning very well by the summer of 2005 and that its employees, apart from Ms. Wedzin, were janitorial and kitchen staff. There were no employees in positions of authority to assist with issues such as the NEBS issue. Mr. Martin provided that assistance. However, that does not affect the legal status of RECSA and TCSA.

[93] Although in closing submissions, counsel for RECSA and TCSA appeared to accept their separate corporate status, he argued that the corporate status is misleading and it is the operational overlap that is important. However, it is clear as I have said that the two maintained separate accounts with NEBS, which is contrary to the idea of any operational overlap so far as the relationship of the two Defendants with NEBS goes. Both Mr. Martin and Ms. Wedzin were very clear as to who employed them: Mr. Martin testified he was employed by TCSA and Ms. Wedzin testified she was employed by RECSA. Membership in NEBS is by employer.

[94] For these reasons, I am not persuaded by the argument that RECSA's membership in NEBS continued through TCSA's membership. RECSA put some emphasis on Mr. Adams' August 11, 2005 letter to Ms. Wedzin, in which he said that among the considerations on the issue of RECSA's termination is reconsideration of the Dogrib Community Services Board membership. TCSA says that this indicates that NEBS treated RECSA and the Dogrib Community Services Board (TCSA's predecessor) as one entity. Mr. Adams testified that he knew that there was a connection between the two. I do not draw any significance from the comment as this was at the time that TCSA was coming onto the scene and taking over from the Dogrib Community Services Board so the latter's membership would be the subject of reconsideration if only for that reason.

4. Does section 3.5.7 of the Policy provide for a payment based on solvency liability?

[95] Although it is not necessary in light of the findings I have made above, I will go on to address the expert evidence and the meaning of section 3.5.7.

[96] Earlier in these reasons I have outlined some of the background as to how section 3.5.7 came to be adopted by NEBS. The following further background will give context to the experts' opinions.

[97] The NEBS pension Plan has had a solvency deficiency since at least 2004. In other words, if the Plan were to wind up immediately, there would be insufficient assets to pay the liabilities in the Plan, those liabilities being the pensions payable to member employees.

[98] The Board adopted clause 3.5.7 at its March 2002 meeting to address the possibility of a solvency deficiency in the Plan. A briefing note for that meeting, prepared by Mr. Adams, says that an important consideration being introduced is the Board's discretion to require members who terminate from the pension Plan at a time when the Plan has a solvency deficiency, to make special payments on this deficiency. A further briefing note for the same meeting refers to advice from the CCRA (Canada Customs and Revenue Agency) to the effect that NEBS can hold withdrawing members responsible for continuing to make unfunded liability payments. The briefing note also refers to a possible "negative reaction" of employers to a requirement that they continue to make special payments after withdrawal.

[99] The minutes of the March 2002 Board meeting also refer to the CCRA:

> CCRA allows the plan sponsor to hold withdrawing members responsible for continuing to make unfunded liability payments when the fund is less than 100% solvent. The Board agreed to include this provision in the policy and to make the withdrawing member responsible for the cost of the actuarial valuation of these liabilities.

[100] Mr. Adams acknowledged that the reference to unfunded liability payments in the minutes is a reference to payments on a going concern basis, which is not the same as a solvency deficiency basis.

[101] In June 2003, NEBS submitted a financial plan to OSFI, setting out how it would address any solvency deficiency in the Plan, which it intended to do by decreases in plan benefits. OSFI expressed a number of concerns about that, but ultimately, in 2004, said that it would not be involved because the Plan was not

regulated by the *PBSA*. This left the Plan, so far as NEBS was aware, as the only unregulated pension plan in Canada.

[102] Mr. Adams testified that, concerned about this unique situation, NEBS commissioned a "Go Forward" report in June 2004. The Report recommended that NEBS commit to voluntary compliance with the *PBSA* and that it make a number of changes to the Plan. It also recommended that NEBS have the Plan's funded position regularly valuated by an actuary on both a going concern and solvency basis. The Board and the Pension Committee adopted these recommendations.

[103] The Report expressed the view that the 5 year amortization requirement in *PBSA* was "harsh for public service plans such as ours where it is extremely unlikely that the Plan will be wound up". This resulted in the Board and the Pension Committee approving a 10 year solvency amortization period instead.

[104] Mr. Adams testified that NEBS recognized that the 8% contribution level adopted in 2002 would mean more than a 10 year amortization period for payment of the solvency deficiency. However, NEBS did not wish to increase contribution rates because that would likely cause some employer members to withdraw from NEBS and at the same time NEBS was expecting that the GNWT would address the situation with legislation.

[105] Mr. Adams acknowledged that despite repeatedly receiving actuarial advice that employer and employee contributions of 8% are not sufficient to fund the Plan on a solvency basis, NEBS' Board would not increase those contributions out of concern that there might be a negative reaction on the part of its employer members.

[106] I have already referred to NEBS' May 2005 Chairman's Report, where the hypothetical situation of the Plan being immediately terminated and all Plan members being paid out is described as a situation that "will not occur with a public sector Plan such as NEBS". In the 2006 Report there is the statement that, "For a public sector plan such as NEBS, termination is hypothetical and will not occur. The Pension Committee and Board do not believe that [solvency] valuations are meaningful, nor should our funding decisions be made on the basis of the solvency position of the Plan".

[107] Against this background, I turn to the expert evidence on the interpretation of section 3.5.7. As a preliminary matter, NEBS argued that the Court should not interpret 3.5.7, but instead defer to it, as the Plan administrator, on the issue of interpretation. NEBS says that the section gives it a discretion as to which approach to use in determining the amount of the termination payment: to do so either on the basis of solvency liability or unfunded liability.

[108] RECSA submits that there is a different between a question of discretion and a question of interpretation and where the matter is simply one of interpretation of a contract or a clause, discretion plays no part.

[109] It is the proper role for the Court to interpret the words of a pension plan and in that regard, the trustees of the plan are in no different position than parties to a contract who have settled upon the language of their choice. Discretion plays no part in such a task: *Massaro v. Labourers' Pension Plan of British Columbia*, [1989] B.C.J. No. 640 (B.C.C.A.). There is no reason why a policy should be any different.

[110] I accept, as the expert witnesses called by the parties testified, that section 3.5.7 is ambiguous in that it does not clearly define how a termination payment is to be calculated. Because it is ambiguous, I can take into account the background of the adoption of section 3.5.7 and the conduct of the parties in deciding how it should be interpreted: *Dinney, supra; Cybulski v. Electrical Industry of Ottawa Pension Plan v. Cybulski* (2001), 30 C.C.P.B. 95 (Ont. S.C.J.).

[111] The opinions of the expert witnesses, as to how they interpret s. 3.5.7, and why, are helpful in that they illustrate the practical consequences of a particular interpretation.

[112] There were no objections to qualification of the parties' respective actuaries as expert witnesses. Both Mr. Vandersanden, who testified for NEBS, and Mr. Lee, who testified for RECSA and TCSA, were permitted to give opinion evidence on the topic of the measurement and reporting of pension plan assets and liabilities on both a going concern and a solvency basis, the preparation of actuarial evaluation reports that disclose the funded position of a pension plan, the requirements of applicable actuarial standards and the provisions of pension standards legislation pertaining to pension funding.

[113] Mr. Vandersanden was NEBS' actuary in 2002. He has given advice to NEBS over the years and he calculated the amount that NEBS claims from RECSA. He did not draft section 3.5.7, but testified that he would have been consulted about it. Despite this close relationship with NEBS, I found that Mr. Vandersanden testified in a fair manner.

[114] Mr. Lee, the Defendants' expert, was involved in preparation of a report (the "Mercer Report") in 2006 that recommended to NEBS that it should be governed by the *Pension Benefits Standards Act* and should fund the pension Plan on a solvency basis. Mr. Lee testified that he has changed his mind since then and now believes that NEBS need not fund the Plan on a solvency basis. However, he also conceded that it would not be unreasonable to fund the Plan that way. The concession lends support to Mr. Vandersanden's opinion.

[115] Both experts were vigorously cross-examined, however did not back down from their respective approaches, although Mr. Lee made the concession that I have noted above.

[116] Both experts agreed that the NEBS pension Plan is in a unique situation because there is no legislation regulating it. They also agreed that section 3.5.7 is ambiguous. For ease of reference, the section says:

> 3.5.7 Employer Obligations Upon Termination
>
> Where an Employer Member terminates and the Pension Fund solvency is less than 100%, the Board shall require that employer to make solvency/unfunded liability payments in respect to the employer's specific liabilities for active, deferred and retired members. These liabilities, as a share of the Plan's total liabilities, are determined by actuarial valuation, the cost of which shall be paid by the Employer Member who requests termination.

[117] Both expert witnesses agreed that the term "solvency/unfunded liability payments" is not a correct actuarial term and that it refers to two completely different approaches to the funding of a pension plan. Both explained that funding on the basis of solvency refers to funding on the basis of a hypothetical plan termination or windup. Funding on the basis of unfunded liability refers to funding

on a going concern basis, that is, based on the assumption that the plan will continue indefinitely.

[118] Based on the wording of section 3.5.7, Mr. Vandersanden is of the view that the amount to be paid by a terminating employer is determined with reference to the following three factors: the solvency position of the pension Plan; the employer's specific liabilities for active, deferred and retired members; and the Plan's total liabilities. The number ultimately calculated represents the employer's pro rata share of the Plan's total solvency deficiency on a hypothetical windup of the plan on the date the employer terminates. The first requirement is that the solvency position of the plan be less than 100%. If it is 100% or more as at the termination date, no amount is payable by the withdrawing employer.

[119] Mr. Vandersanden's rationale for calculating the payment in that way is as follows (quoting from his report):

> 1. An amount is only payable if there is a solvency deficiency; therefore the emphasis appears to be on the Plan's solvency liabilities in excess of the value of solvency assets.
>
> 2. The employer's share of the solvency deficiency is equal to the excess, if any, of the employer's share of the solvency liabilities in excess of the employer's share of the solvency assets.
>
> 3. In an actuarial valuation, the solvency liabilities can reasonably be allocated to an employer as described above, but the solvency assets are not as readily allocated to employers.
>
> 4. Since the calculation referred to in point 2 above is not practical, another approach is required to determine the employer's share of the solvency deficiency.
>
> 5. It is reasonable to employ a calculation that assumes that an employer's share of the solvency deficiency is roughly equal to the employer's share of the solvency liabilities.
>
> 6. [His] proposed calculation determines the employer's share of the solvency deficiency as equal to the employer's share of the solvency liabilities.

[120] Mr. Vandersanden expressed the opinion that 3.5.7 refers to "solvency/unfunded liability payments" for this reason: because a pension fund is

just one "pot of money", any contribution toward a solvency deficit also has the effect of reducing any unfunded liability in the Plan. Therefore, the actuarial valuation would have to determine Plan liabilities on both a solvency and going concern basis. Pension legislation typically permits solvency payments to be reduced based on a portion of the unfunded liability payments; without such legislation, as in this case, the payment required on a solvency basis could include an amount that would have the effect of reducing the unfunded liability as well.

[121] Using the calculation referred to above, Mr. Vandersanden came to a figure of $1,200,000.00 payable by RECSA as at the date of its termination.

[122] Mr. Vandersanden acknowledged that there are some weaknesses in his calculation. For example, there is no way of knowing exactly what RECSA's share of the solvency assets are, so he was unable to use the preferred approach he outlined in point 2 of the calculation set out above. He also used a "rough" equivalency of the employer's share of solvency liabilities to solvency deficiency.

[123] Mr. Vandersanden also agreed on cross-examination that clause 3.5.7. does not differentiate between an employer who terminates membership completely and one who has a hundred employees, all but one or two of which leave its employment; that situation would also leave liabilities in the Plan attributable to that employer, yet significantly reduce its contributions.

[124] Mr. Vandersanden testified that the monthly 8% employer contribution is not sufficient to fully fund the solvency deficiency in the Plan within 10 years or anything close to that. And he acknowledged that Canadian pension legislation for multi employer plans does not impose a requirement that an employer pay a share of solvency deficiency on termination unless it also requires the employer to fund the plan on a solvency basis in the first place.

[125] Although Mr. Vandersanden acknowledged that with public sector pension plans generally, legislation in Canada grants exemptions from solvency funding, he emphasized that one cannot say with any plan that there is no chance of windup. Section 3.5.7 is aimed at the risk that the Plan winds up after an employer terminates and before the solvency deficiency can be addressed, leaving the employers remaining in the Plan facing increased contribution rates in order to address it.

[126] In Mr. Vandersanden's view there are some characteristics unique to NEBS' Plan that make the risk of windup a realistic one: it is a voluntary plan so employers do not have to continue in it; it competes with the GNWT's superannuation plan; many of the participating employers are related in some way such that policy decisions made at a higher level could affect more than one of them at the same time and result in their withdrawal from the Plan; and, compared to other multi-employer, public sector plans which are exempt from solvency funding, the membership in NEBS' Plan is not large.

[127] NEBS argues based on Mr. Vandersanden's evidence and the background to section 3.5.7 that his approach to its meaning and the calculation to be performed is reasonable. The probability of windup or lack thereof is not prescribed as a factor in section 3.5.7., but solvency less than 100% is, so solvency is the focus of the termination payment.

[128] Mr. Lee, RECSA's expert witness, emphasized that the pension Plan is not likely to wind up because it is a public sector plan with a large number of participating employers. The average number of employees of a participating employer in NEBS is small, only 12, so the withdrawal of one employer is unlikely to lead to a winding up of the Plan.

[129] Mr. Lee also emphasized that NEBS does not fund on a solvency basis because the current contribution rate is, and for many years has been, insufficient to fund the solvency deficiency over the 10 year amortization period required by s. 4.10 of the Pension Plan text. He also pointed to the prevalence of exemptions from solvency funding since the mid-2000's for broad based public sector plans in other Canadian jurisdictions and concluded that solvency funding should not be required for the NEBS pension Plan.

[130] In Mr. Lee's view, since there is little or no likelihood that the Plan will be wound up in the foreseeable future, requiring a departing member employer to pay a withdrawal liability equal to a pro rata share of the solvency deficiency could result in a windfall for the employers remaining in the Plan in that it exceeds what is actually required to provide the benefits to which the RECSA employees no longer in the Plan are entitled, assuming that the Plan is not wound up. He testified that one of the disadvantages of solvency funding is that, in a low interest rate

environment, a solvency valuation becomes a very conservative valuation and funding on a solvency basis becomes very onerous.

[131] Mr. Lee takes the view that clause 3.5.7. is unclear in two ways: first, as to whether it requires payment based on solvency or on unfunded liability; and second, as to the extent or timing of the payments to be made "in respect of" the employer's specific liability. In his view, any assessment of a withdrawal liability should, as far as possible, be financially neutral as between the departing employer and the employers continuing in the Plan. He explains this neutrality as meaning that the continuing employers should not have to fund more in the future as a result of one employer's departure, but that the departing employer should also not be required to fund amounts that will reduce the funding required of the employers continuing in the Plan.

[132] The calculation proposed by Mr. Lee (if a withdrawal payment is required) would result from a determination of the amount, if any, by which the amount required to provide the benefits that RECSA's employees are entitled to from the Plan exceeds the amount available in the Plan to provide for those benefits. Mr. Lee proposes that the amount required to provide the benefits is made up of (i) the commuted value actually paid to those of RECSA's employees who accepted a lump sum commuted value transfer in lieu of their entitlement to receive benefits from the Plan in the future and (ii) for the rest of RECSA's employee members of the Plan, the going concern accrued liability for the benefits to which they are entitled, calculated as at the withdrawal date and on a going concern basis since there is little or no probability of Plan windup.

[133] For the amount available in the Plan to provide for those benefits, Mr. Lee proposes that since the Plan has not been funded on a solvency basis, the Plan assets should be allocated at the withdrawal date based on the going concern accrued liabilities attributable to the RECSA employees compared to the total Plan going concern liabilities at the withdrawal date.

[134] I use the term "withdrawal date" above because that was the term used by the witness.

[135] The above methodology leads Mr. Lee to calculate a withdrawal payment of $31,397.00, that with interest would be $46,036.00 as at January 1, 2011.

[136] The difference in the experts' approach may be summarized by saying that Mr. Vandersanden's view is that considering NEBS' wish to address the Plan's solvency deficiency and considering that the trigger for clause 3.5.7. is a solvency deficiency, it makes sense to read the clause as requiring payment based on a solvency liability calculation. On the other hand, Mr. Lee's view is that considering NEBS' expressed view that the Plan will not wind up and its history of not funding for solvency, one should not ignore the reference to unfunded liability in section 3.5.7 and the calculation should be done on that basis and the assumption that NEBS will continue to operate as a going concern. Mr. Lee did, however, say in cross-examination that Mr. Vandersanden's approach, while in his view not a necessary one, is not imprudent.

[137] Having considered the evidence of both Mr. Vandersanden and Mr. Lee, in my view both approaches are reasonable, possible ones. I view Mr. Vandersanden's approach as more logical in that clause 3.5.7. is triggered by the existence of a solvency deficiency and so it would make sense that the clause is designed to address that. However, the various pronouncements by NEBS that solvency funding is not necessary for the pension Plan and NEBS' refusal to increase regular contributions so as to fund the solvency deficiency properly, as well as the references to "unfunded liability" leading up to the Policy and the inclusion of those words in s. 3.5.7, lead me to a couple of possibilities. One is that the inclusion of "unfunded liability" reflects a misunderstanding on the part of NEBS' Board of the actuarial terminology; at one point in his testimony, Mr. Vandersanden said that people often misuse the term "unfunded liability". The other is that the Board wanted to be able to take advice from its actuaries as to which type of payment should be calculated in a given situation. In other words, NEBS wanted options and the discretion to choose the option it would take. While the minutes and other documentation leading up to the adoption of section 3.5.7 and the Board's expressed views after that are not crystal clear on the point, in my view that is the most reasonable interpretation of the section.

[138] I find therefore, that section 3.5.7 gives NEBS a discretion as to calculation of the payment required under that section.

[139] I would add that NEBS' Board and the Pension Committee were appropriately concerned about the solvency liability and their fiduciary duty to the

employee members of the Plan. That concern was heightened because, as Mr. Adams testified, with OSFI no longer in the picture, they were in uncharted waters. With no regulator to turn to, the question would have been whether NEBS should, in effect, exempt itself from the solvency requirements that would have governed it under the *PBSA* had that statute still applied, or that might govern it under any territorial legislation that might be enacted, unless the regulator made the exemption. Despite the Board's view that there was little or no chance of the Plan winding up, it chose a very conservative approach in the way it interpreted s. 3.5.7. In all the circumstances, that was not an unreasonable thing to do.

[140] Ultimately, however, as I have stated above, the problem is that NEBS did not amend its bylaws to make payment of a withdrawal liability, however calculated, an obligation of an employer who resigns or is terminated, nor did it give notice to RECSA or others who were participating employers, of the intent to impose such an obligation.

5. The Counterclaim

[141] RECSA seeks reimbursement from NEBS of the amounts it paid as contributions to the pension Plan and Group Benefits Plan after August 15, 2005, amounting to $99,528.05. RECSA says that since the Plan does not allow or require contributions for former employees, the contributions demanded by NEBS and made by RECSA in the period of time after August 15, 2005, when the RECSA employees had been appointed to the public service, were improper. RECSA says that the initial payments were made under compulsion so as to obtain the pension adjustments needed for income tax purposes, and the later ones were made by mistake.

[142] RECSA points out that the employees who were appointed to the GNWT became ineligible under the pension Plan pursuant to s. 3.09 of the Plan, referred to earlier. They were similarly ineligible under the Group Benefits Plan. RECSA also points out that the contributions were contrary to sections 147.1(7) and (11) of the *Income Tax Act*, which require that pension contributions be made only in respect of employees of the contributing employer.

[143] RECSA also says that there is no evidence that the pension entitlements resulting from those contributions cannot be "rewound" and that there is no harm to

the affected employees because they were accruing public service benefits during the time in question. It says that to allow NEBS to keep the money would amount to unjust enrichment.

[144] NEBS defends the counterclaim, pointing out that RECSA made the contributions with full knowledge of the circumstances. NEBS says that RECSA is saying that the employees were no longer theirs, but seems to be saying as well that it represented for income tax purposes that they were their employees.

[145] NEBS also points out that two of the employees made claims against the group benefits insurance after they had been appointed to the GNWT. These claims total approximately $14,000.00.

[146] The evidence indicates that under the Plan, contribution rates are calculated as a percentage of payroll for the employer's contribution and of salary for the employee's contribution. Mr. Martin testified that prior to August 15, 2005, TCSA would transfer money to RECSA for the employees' salaries; after that date, TCSA transferred the money to the GNWT. It is not clear from the evidence how long this lasted, but presumably it allowed RECSA to have sufficient information upon which to calculate the contributions even though the employees were now GNWT employees. In any event, I am satisfied based on the evidence that the payments should not have been made and were not owing as the employees were no longer employees of RECSA.

[147] It is clear on the evidence that NEBS required that contributions for both the Plan and the Group Benefits Plan, be paid up to date. In January 2006, Mr. Adams sent a letter to Ms. Wedzin saying that the pension adjustments she requested would not be sent to her until the outstanding amounts were paid. Mr. Adams seems to have taken that position because NEBS had not filed the documents to terminate. It is not clear to what extent Mr. Adams' uncertainty as to whether the employees had become part of the public service affected his position on this.

[148] Mr. Martin, who directed Ms. Wedzin to pay the amounts demanded by NEBS, knew that the RECSA employees had been appointed to the GNWT. Although both he and Mr. Adams took some steps to resolve the lingering issues about the employees' status in NEBS by meeting with GNWT officials, Mr. Martin essentially left it to the GNWT to figure it out and provide direction to him; he

testified that he told Ms. Wedzin they would get the matter adjusted with the GNWT. I find that he directed payment of the contributions in order to resolve the pension adjustment issue, but was content to leave reimbursement or adjustment for the GNWT to resolve. I also find on the evidence that the payments made after the pension adjustments were provided were made by mistake.

[149] As to the law that applies in these circumstances, a company is entitled to recover monies made under a *bona fide* mistake of fact; however the claim may be defeated if the recipient of the monies establishes that it materially changed its circumstances as a result of the receipt of the money: *Mobil Oil Canada, Ltd. v. Storthoaks (Rural Municipality)*, [1976] 2 S.C.R. 147.

[150] A party may recover payments made in circumstances of practical compulsion, where the recipient of the payments had no right to receive them: *Knutson v. Bourkes Syndicate*, [1941] S.C.R. 419; *EFP Holdings Ltd. v. British Columbia*, [2002] B.C.J. No. 2473 (S.C.).

[151] The cases on practical compulsion do not specifically require that payment be made "under protest" in order for it to be payment under compulsion, but the fact that payment is protested may be evidence that the payor is acting under compulsion.

[152] Can RECSA be said to have acted in circumstances of practical compulsion? In *EFP Holdings Ltd.*, the practical compulsion for the payor was the closing of a business deal in which it was the vendor; if the deal did not close that day, there was reason to believe the purchaser would back out. In *Knutson*, the payor of the monies was concerned to protect its position under an agreement and to secure title to lands which it was under obligation to transfer to another company.

[153] RECSA did not protest payment in this case. I have found that Mr. Martin instructed Ms. Wedzin to make the payments so that she could get the adjustments and because he fully expected that the GNWT would reimburse RECSA or make some sort of adjustment in its favour. I think it is significant that he made no attempt to speak with Mr. Adams or anyone else at NEBS to try to resolve the issue of the pension adjustments. Mr. Martin's approach to the pension adjustment issue may be contrasted with that of the payor in *EFP Holdings*, where the Court referred to the payor "frantically" attempting to resolve the payment issue. Here, there is no

evidence that anything at all was done to signal to NEBS that RECSA did not view the payments as required.

[154] I do not view the pension adjustment issue as amounting to practical compulsion. There was no attempt to resolve the issue with NEBS. It may be that Mr. Martin found the issue confusing or that he was simply not getting anywhere with the GNWT, but the fact that no effort at all was made to discuss the matter with NEBS makes this a much different situation than what happened in the cases referred to above. For these reasons, I am not satisfied that RECSA has established that it paid in circumstances of practical compulsion.

[155] The other problem is that the payments by RECSA, made without any protest, fed into Mr. Adams' position or perception that RECSA had not properly terminated its membership and therefore still owed contributions, and possibly also his uncertainty as to whether the employees were now GNWT employees. And as a result of receiving the contributions, NEBS continued coverage for the RECSA employees. RECSA got what it paid for.

[156] As to the payments made by the casual staff after Ms. Wedzin went on maternity leave, it is clear that those were made by mistake. However, because there had been no communication to NEBS from either Ms. Wedzin or Mr. Martin, indicating that the payments made by Ms. Wedzin were only for purposes of obtaining the pension adjustments, NEBS continued the coverage on the basis that the employees were RECSA's. And as I have set out above, two employees did make claims on the group benefits insurance. I would treat this as equivalent to a material change in circumstances.

[157] There is no evidence before me as to how or whether the coverage and pension entitlements that are the result of the payments by RECSA can be "rewound". Since it is RECSA that claims the payments, in my view the burden is on RECSA to adduce that evidence.

[158] For the above reasons, I find that the counterclaim must be dismissed.

6. Costs

[159] It follows from the above that both the claim and the counterclaim are dismissed. Costs usually follow the event and since success is divided, it may be appropriate that the parties bear their own costs. However, if counsel wish to make submissions on costs, they may make arrangements to appear before me or submit a joint letter as to the filing of written submissions for my review.

V.A. Schuler
J.S.C.

Dated this 20th day of July 2012

Counsel for the Plaintiff: Ron A. Skolrood and Lisa C. Chamzuk
Counsel for the Defendants: Jonathan Ptak, Murray Gold, and J. Bida

Docket: S-1-CV-2008 000116

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

NORTHERN EMPLOYEE BENEFITS SERVICES

Plaintiff

- and -

RAE-EDZO COMMUNITY SERVICES AUTHORITY AND TLI-CHO COMMUNITY SERVICES AGENCY

Defendants

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
