IN THE MATTER OF an arbitration in connection with the Memorandum of Agreement relating to surplus sharing under the Canadian Broadcasting Corporation Pension Plan and to cost management under the Canadian Broadcasting Corporation Supplementary Health Care Plan made as of the 22nd day of May, 2009 and pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17

B E T W E E N:

CANADIAN MEDIA GUILD, ASSOCIATION OF PROFESSIONALS AND SUPERVISORS OF THE CANADIAN BROADCASTING CORPORATION, ASSOCIATION DES RÉALISATEURS, SYNDICAT DES TRAVAILLEUSES ET TRAVAILLEURS DE RADIO-CANADA, and CBC PENSIONERS NATIONAL ASSOCIATION

Claimants

-and-

CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA

Respondent

AWARD

I. INTRODUCTION

1. The Claimants have brought a claim pursuant to Schedule "C" of the Memorandum of Agreement relating, *inter alia*, to surplus sharing under the Canadian Broadcasting Corporation's Pension Plan and to cost management under its Supplementary Health Care Plan made as of May 22, 2009 (the "MOA").

2. On December 16, 2019, the Canadian Broadcasting Corporation/Société Radio-Canada ("CBC/Radio-Canada") gave notice to the Claimants that CBC/Radio-Canada sought to terminate the MOA with an effective date of March 31, 2020.

3. The primary issue in this arbitration is whether CBC/Radio-Canada was entitled to terminate the MOA on reasonable notice in light of a failed 10-year review required under the MOA.

4. The resolution of this issue turns on the interpretation of the MOA.

5. CBC/Radio-Canada argues that there is an implied term in the MOA that a party has a right to terminate the MOA on reasonable notice after a failed 10-year review. The Claimants argue that there is no such implied right to terminate and that the MOA is therefore a perpetual agreement.

6. Framed this way, the parties say that the choice is binary – either there is a right to terminate or the MOA is perpetual.

7. Neither party alleges that the other had breached the MOA during the 10-year review or otherwise prior to CBC/Radio-Canada providing its notice to terminate.

8. For the reasons that follow, I conclude that this is not a proper case to imply the right to terminate as urged by CBC/Radio-Canada. I agree with the Claimants that the MOA is a perpetual agreement, however, with an important caveat. I leave open the question of whether, if there is a failed 10-year review, the *status quo* might operate in an unfair or inequitable manner to one of the parties, and if so, whether the aggrieved party has recourse to the arbitration process set out in Schedule "C" to the MOA to address the unfairness.

9. I frame this caveat in the form of a question because the parties did not specifically address the issue of such a caveat in their original closing submissions. I discuss this matter further below.

10. There is also an issue of whether the Syndicat des Travailleuses et Travailleurs de Radio-Canada (the "STTRC")[1] is a party to the MOA. I conclude that it is.

II. FACTUAL BACKGROUND

(a) The Parties

[1] The STTRC was formerly named the Syndicat des Communications de Radio-Canada ("SCRC").

11. CBC/Radio-Canada is a federally-regulated Crown Corporation and is Canada's national public broadcaster pursuant to a mandate set out in the *Broadcasting Act*.[2]

12. CBC/Radio-Canada is a party to the MOA. The other parties are (a) the Canadian Media Guild (the "CMG"), the Association des Réalisateurs (the "AR"), the Syndicat Canadien de la Fonction Publique (the "SCFP"), the Association of Professionals and Supervisors of the Canadian Broadcasting Corporation (the "APS") and the Syndicat des Technicien(ne)s et Artisan(e)s du Réseau Français de Radio-Canada (the "STARF"), each of which represents a bargaining unit of CBC/Radio-Canada employees (hereinafter collectively referred to as the "Unions"); and (b) the CBC Pensioners National Association (the "CPNA"), which represents, *inter alia*, a group of former CBC employees.

13. An issue in this arbitration is whether the STTRC, which participated in the arbitration, is a successor of SCFP and STARF so as to be a party to the MOA.[3]

(b) The MOA

14. The MOA was executed on May 22, 2009 with an effective date of January 1, 2010.

15. In general terms, the elements of the MOA:

    (a) settled a number of pieces of litigation, including 24 grievances, a class action with respect to pension surplus and the role and powers of the Consultative Committee on Staff Benefits (the "CCSB");

[2] SC 1991, c. 11 (the "*Broadcasting Act*")
[3] In this award, I sometimes refer to the Claimants' and the Unions interchangeably. Nothing turns on this.

(b) set up a surplus sharing arrangement for the CBC Pension Plan (the "Pension Plan") under which CBC/Radio-Canada and the eligible member groups share equally any available pension surplus; and

(c) provided a cost management plan for the Supplementary Health Care Plan (the "SHCP").

16. The MOA is comprised of four main parts:

(a) Part I addresses surplus sharing in the Pension Plan;

(b) Part II addresses cost management under the SHCP;

(c) Part III addresses the role and powers of the CCSB; and

(d) Part IV sets out provisions of general application.

17. Seven Schedules are attached and form part of the MOA:

(a) Schedule "A" lists the grievances that were subject to withdrawal;

(b) Schedule "B" sets out tables and illustrations setting out how pension surplus available for sharing is to be determined under different solvency scenarios;

(c) Schedule "C" sets out provisions on arbitration and the resolution of disputes relating to the MOA;

(d) Schedule "D" sets out the roles and powers of the CCSB;

(e) Schedule "E" illustrates the Adjustment Factor defined in Section 8(iv) of the MOA;

(f) Schedule "F" includes a chart of projected contributions to the Health Care Fund ("HCF"); and

(g) Schedule "G" includes a chart of projections for the SHCP and HCF from 2009 to 2019.

18. More specifically, Part I of the MOA provides that if there is a surplus in the Pension Plan, CBC/Radio-Canada and the eligible member groups would share the surplus on a 50-50 basis.

19. Part II sets out the agreement between the parties about how to address the anticipated significant increase in the costs of funding the SHCP. In essence, CBC/Radio-Canada agreed to be responsible for any increase in the SHCP's baseline costs of up to 4% annually (and higher depending on the Treasury Board appropriation increase).

20. Also in Part II, the Unions agreed that, beginning on January 1, 2010, for a 10-year period, employees' negotiated wage increases would be reduced by 0.1% each year, with CBC/Radio-Canada contributing an equivalent amount into a Health Care Fund (defined above as "HCF"). The HCF would be used to fund increases to the SHCP's baseline cost that exceeded the costs that CBC/Radio-Canada was required to pay.

21. Part III and Schedule "D" of the MOA address issues relating to the CCSB. The fourth paragraph of Schedule "D" states as follows:

> Also in the spirit of the agreement, the parties agree that the CCSB or a sub-committee will examine the current provisions of the collective agreements in order to review the operating principles of the CCSB and to ensure a uniform, harmonious and acceptable process for all concerned parties.

22. Part IV of the MOA sets out a number of general provisions:

(a) Section 14 provides that certain disputes related to the allocation of the net available surplus in the Pension Plan and calculations made by CBC/Radio-Canada under the MOA must be submitted to arbitration;

(b) Schedule "C" of the MOA provides that any dispute arising out of or relating to the MOA shall be determined by a single arbitrator. It reads:

> Any controversy or dispute arising out of or relating to this Memorandum of Agreement, including (without limitation) its negotiation, validity, existence, breach, termination, construction or application, or the rights, duties or obligations of any Party shall be referred to and determined by arbitration before a single arbitrator in accordance with the *Ontario Arbitration Act*, 1991 S.O. 1990 c. 17 or the provisions of the Code of Civil Procedure of Quebec (the "*Act*"), as applicable, and the Procedures set out in this Schedule "C".

(c) Section 24 states:

> CBC/RADIO-CANADA remains committed to maintaining a defined benefit pension plan for Eligible Employees as defined under Part I of this Memorandum of Agreement;

(d) Section 26 of the MOA provides the MOA may only be amended by written agreement of all the parties. It provides that no amendment may be made to the MOA to add the SCRC (the former name of the STTRC) as a party unless all provisions of the MOA apply to that party (subject to any agreed adjustments);

(e) Section 27 sets out the parties' agreement that the commitments under the MOA are interconnected:

(i) CBC/Radio-Canada would not have agreed to the undertakings under Part I without an agreement from the Unions under Parts II, III and IV;

(ii) The Unions would not have agreed to the undertakings under Parts II, III and IV without an agreement from CBC/Radio-Canada under Part I;

(iii) CBC/Radio-Canada would not have agreed to the undertakings under Part II without an agreement from the Unions, the CPNA and Mr. Waterson (the representative plaintiff in the class action) under Parts I, III and IV; and

(iv) The Unions, the CPNA and Mr. Waterson would not have agreed to the undertakings under Parts I, III and IV without an agreement from CBC/Radio-Canada under Part II.

23. Section 27 of the MOA ends with the following paragraph:

> Consequently, if any material provision of this Memorandum of Agreement is determined to be invalid or unenforceable in whole or in part, such that either CBC/RADIO-CANADA, the Unions, the CPNA or Mr. Waterson would not have entered into this Memorandum of Agreement without such provision, considering the representations reflected by the previous paragraph in this Section 27, this Memorandum of Agreement shall terminate. In such event, the Parties hereby undertake to renegotiate in good faith, with a view to concluding arrangements as nearly as possible the same as those contained in this Memorandum of Agreement.

24. Section 33 of the MOA is critical to the issues in dispute in this arbitration. It reads:

> 10 YEAR REVIEW
>
> The Parties agree to review the terms of this Memorandum of Agreement every ten years commencing in 2019.

25. The MOA does not provide for a unilateral right of termination nor does it say that it is a perpetual agreement.

III. THE ISSUES

26. There are two issues in this arbitration:

(a) Is this an appropriate case to imply a right of unilateral termination into the MOA or to conclude that the MOA is a perpetual agreement?

(b) Is the STTRC a party to the MOA?

IV. ANALYSIS AND LAW

The Principles of Contractual Interpretation

27. The general principles governing contractual interpretation are well established and are not in dispute in this case. The relevant principles are as follows:

(a) Contractual interpretation is for the most part an exercise in giving effect to the intentions of the parties at the time they entered into the contract.[4]

(b) The interpretation of the contract always begins with the words it uses. All of the various aspects of the contractual interpretation exercise are rooted in the actual language chosen by the parties.[5]

(c) A contract is to be construed as a whole with meaning given to all of its provisions. One provision should not be read in isolation but should be considered in harmony with the rest of the contract, its purposes and commercial context.[6] Individual words and phrases must be read in context of the entire document.[7]

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[4] *Sattva Capital Corp v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*") at para. 47.
[5] *Sattva*, para. 57.
[6] *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 ("*Ventas*") at para. 24 ; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 SCR 619 ("*M.J. B. Enterprises*") at para. 44.
[7] *Sattva*, paras. 47, 57; *Ventas*, para. 24.

(d) Contractual interpretation involves giving meaning to words in their proper context, including the surrounding circumstances in which a contract has arisen, often referred to as the "factual matrix". In *Sattva Capital Corp v. Creston Moly Corp.*, the Supreme Court of Canada said:

> To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning: "No contracts are made in a vacuum: there is always a setting in which they have to be placed."[8]

(e) The factual matrix includes only facts objectively known to the parties at the time of contracting. It does not include evidence of the parties' negotiations (except in the most general ways) or their subjective intentions. A contextual analysis, however, cannot be allowed to overwhelm the meaning of the words the parties have used.[9]

(f) The surrounding circumstances may include the object and purpose of the contract, sometimes referred to as the "genesis and aim of the transaction". They can also include the background of relevant facts known to the parties, or that can be taken to have been known by them, at the time of contract formation.[10] It is the background which may deepen an understanding of what the parties intended.[11]

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[8] *Sattva*, para. 47, quoting *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 at p. 574, per Lord Wilberforce.
[9] *Sattva*, paras. 57-58.
[10] Geoff Hall, *Canadian Contractual Interpretation Law* (4th ed. 2020) ("Hall"), p. 32.
[11] *Sattva*, para. 57.

(g) The factual matrix does not include the subjective intention of the parties or events subsequent to contract formation.[12]

28. A second body of law relevant to this case is that relating to implying terms into a contract. This line of cases addresses the question of how and whether to imply a unilateral right to terminate a contract on reasonable notice when the contract does not have a fixed termination date nor a right of the parties to unilaterally terminate. These principles, which are complementary to contractual interpretation more generally, are discussed in more detail below under "Implication of Terms into a Contract".

The Language of the MOA

29. As set out above, the contractual interpretive exercise begins with the language in the contract itself.

30. CBC/Radio-Canada argues that the language in the MOA favours its interpretation that the parties intended that there be an implied right that each party could terminate the MOA on reasonable notice to the other.

31. CBC/Radio-Canada points out that Section 33 of the MOA does not limit the matters to be addressed in a 10-year review and that all aspects of the MOA could be subject to a review. As such, Section 33 is a strong indicator that the MOA contemplates that if a review does not lead to a satisfactory result for all the parties it could be terminated by one of them upon reasonable notice.

32. I do not accept that the fact that a 10-year review may encompass all of the aspects of the MOA points to a conclusion that the parties intended there to be a right to terminate if the

[12] *Sattva*, para. 59; *Ventas*, para. 24. I address subsequent conduct evidence below.

review is unsuccessful. There is nothing in the language of Section 33 that supports this conclusion. The "review" required by Section 33 is of the "terms" of the MOA, but does not refer to the addition of new terms such as a right to unilaterally terminate the MOA.

33. In my view, the language the parties used in Section 33 points in the opposite direction. The use of the words "every" and "commencing" in Section 33 suggest that the parties intended that the reviews would take place at each 10-year interval beginning in 2019 and continuing into the future. That intention is inconsistent with an interpretation that the parties intended that each party have a right to terminate the MOA on reasonable notice after the first 10-year review. In my view, the language in Section 33 is more consistent with the MOA being a perpetual agreement than an agreement into which one should imply a unilateral right to terminate.

34. It would have been a simple matter for the parties to have specifically provided for a right of termination or to have stated that the MOA expires in 2019, unless renewed, had that been their intention. They did not do so. Equally, however, they did not spell out that the MOA was intended to be a perpetual agreement.

35. As mentioned, the contractual interpretation exercise requires a court to consider a contract as a whole and to arrive at an interpretation, if possible, giving meaning to all of the provisions.[13] The Court should strive for an interpretation that permits the provisions to be read harmoniously and consistent with one another.[14]

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[13] *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (C.A.) ("*Scanlon*") at para. 89, quoting from *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at p. 425, endorsed in *Austin v. Bell Canada et. al*., 2020 ONCA 142 at para. 26.

[14] *Ventas*, para. 24.

36. CBC/Radio-Canada submits that to treat the MOA as a perpetual agreement or as being incapable of being terminated by a party fails to give effect to Section 26 which provides that the MOA may only be amended by a written agreement of the parties.

37. CBC/Radio-Canada says that if the Claimants are correct that there is no right to terminate, there would be no recourse if the parties disagreed on changes to the MOA or if one party refused to make any changes to the MOA at all. A review process would be rendered meaningless because there would be no incentive for a party to fix an imbalance in its favour and no consequence for its refusal to amend the MOA. This unreasonable result should be avoided when interpreting the contract.

38. However, it seems to me that the need for agreement to amend the MOA cuts both ways. On the one hand, as CBC/Radio-Canada argues, without a right to terminate there may be little or no incentive for the party in whose favour an imbalance operates to agree to amend the MOA. That party might simply prefer the *status quo*. However, it is also important to note that if there is a right to unilaterally terminate the MOA, the circumstances may be such that one party would benefit from simply exercising that right and ending the MOA in the circumstances as they exist at the time. In either situation, there may be no incentive for one of the parties to agree to an amendment to address the imbalance.

39. The present arbitration is a good example of both situations. CBC/Radio-Canada argues that if there is not a right to terminate and the MOA is perpetual, the *status quo* will be unfair to it. The Claimants will not make adjustments to the funding of the SHCP that are necessary to bring the original bargain into balance and the Unions would continue to have the benefit of surplus sharing and the defined benefits pension plan.

40. On the other hand, the Claimants argue that if CBC/Radio-Canada has a right to unilaterally terminate the MOA, CBC/Radio-Canada will have received the benefit of having many pieces of litigation terminated. CBC/Radio-Canada will also have the benefit of the almost $40 million paid into the HCF while at the same time being able to walk away from its commitments under the MOA to share pension surplus equally and to provide a defined benefit pension plan. Thus, both parties argue that adopting the interpretation urged by the other would operate unfairly or inequitably to it.

41. In addition, both sides submit that, unless their interpretation is adopted, there would be no incentive for the other side to make concessions during the course of a 10-year review. The binary approach of the two positions put forward by the parties therefore raises the prospect of unfairness to one or the other party. It also raises the prospect that, under either interpretation, one of the parties would not have an incentive to negotiate in a manner that is likely to achieve agreement because of the prospect of the other party gaining a benefit from the adoption of its interpretive position.

42. In my view, the requirement in Section 26 of the MOA that the MOA may only be amended by written agreement of the parties is neutral. It does not point in favour of one interpretation or the other.

43. CBC/Radio-Canada also points out that Section 27(a) through (d) of the MOA makes it clear that Parts I through IV of the MOA are interconnected. For example, CBC/Radio-Canada only agreed to share pension surpluses in exchange for, *inter alia*, the Claimants' participation in the health care cost management arrangement under Part II. CBC/Radio-Canada says that it is evident that, at the very least, Part II of the MOA might have to be renegotiated. Since the entire MOA was "a package deal", if there is no

agreement on amending Part II, there should be an implied right to terminate the entire MOA.

44. Similarly, CBC/Radio-Canada argues that Section 27 makes it clear that CBC/Radio-Canada would not have agreed to its undertakings under the MOA without the other parties' undertakings under Part III relating to ensuring a uniform, harmonious and acceptable CCSB process.

45. I agree that Section 27 provides that the MOA is a package deal. However, in my view, it does not necessarily follow from that that the parties intended to provide a unilateral right to terminate.

46. In my view, Section 27 as well as Sections 18 and 28 favour the interpretation urged by the Claimants. In those Sections, the parties address the issues of the partial application, the termination and the indefinite suspension of the MOA in specified circumstances. They did not, however, provide for a unilateral right of termination. Having specifically addressed circumstances in which the MOA would be wholly or partially ineffective, their failure to include a unilateral right of termination is consistent with a conclusion that they did not intend to include such a right.

47. Section 27 also provides that if any material provision of the MOA is determined to be invalid or unenforceable in whole or in part, such that the parties would not have entered into it, the MOA shall terminate. Significantly, however, Section 27 goes on to provide that in such an event, the parties undertook to renegotiate in good faith, with a view to concluding arrangements as nearly as possible the same as those contained in the MOA. This undertaking reflects a commitment to the permanence of the arrangements in the

MOA and is inconsistent with the notion that each party would have a unilateral right to terminate.

48. CBC/Radio-Canada also argues that the language in Schedules "B" and "C" to the MOA supports the interpretation that the parties intended there be a right to terminate. I disagree.

49. Schedule "B" addresses the use of surplus under the Pension Plan and includes a phrase that reads, "assuming the Memorandum of Agreement is renewed in 2019 as per the current terms". In my view, this language falls short of supporting a conclusion that the parties intended to provide a right of termination. The word "renewed" relates to the "current terms" of the MOA. The language does nothing more than indicate that the example provided in Schedule "B" would apply upon a renewal under the current terms. It would not apply if the parties had agreed upon different terms.

50. CBC/Radio-Canada also relies on the language in Schedule "C", the arbitration clause. Schedule "C" refers to disputes arising from the "termination" of the agreement. CBC/Radio-Canada argues that this indicates that the MOU could be terminated in a manner that would lead to a dispute between the parties. Its inclusion in Schedule "C" would be illogical if the MOU could only be terminated by agreement or where parts have been determined to be invalid or unenforceable. I do not agree.

51. Schedule "C" is a broad arbitration provision, relating to "any controversy or dispute arising out of or relating to [the MOA]", including "termination". It appears to me that the inclusion of "termination" in Schedule "C", as one example in a non-exhaustive list, simply confirms the mutual intention of the parties that any and all disputes regarding the MOA would go to arbitration to be resolved within the four corners of the MOA. Indeed one can

imagine a dispute about whether the termination referred to in Section 27 has been triggered because there is a disagreement about whether the invalid provision is material or whether a party would have entered into the MOA without the provision that had been found to be invalid. One could also imagine a dispute arising after a termination under Section 27 about whether a party is negotiating in good faith to reach a new agreement. These disputes would arguably be disputes arising from a "termination" and therefore come within Schedule C.

52. Finally the Claimant's position is supported by the fact that the parties expressly specified some time limits for certain provisions in the MOA but not for others. Sections 9(a) and 10(a) of the MOA (dealing with the contributions required to set up the HCF) provide that contributions will be made "beginning in 2010 and in each calendar year thereafter until 2019 inclusive". However, there are no end dates set out for commitments in other parts of the MOA. For example, the provisions setting out the operation of the HCF apply "[e]ffective in 2010, and for each subsequent year", with no time limitation. Similarly, in Part I (Section 3(a)) of the MOA (dealing with surpluses in the Pension Plan), the MOA sets out obligations "beginning with the first Actuarial Valuation filed on or after December 31, 2009", again with no end date.

53. In summary, I am satisfied that the language of Section 33 of the MOA read together with other provisions in the MOA favours an interpretation that the parties did not intend to agree to a right of unilateral termination by a party and is consistent with an interpretation that the parties intended the MOA to be perpetual.

Surrounding Circumstances

54. As set out above, as well as looking at the words the parties use in the contract, contractual interpretation involves giving meaning to those words in their proper context, including the surrounding circumstances objectively known to the parties at the time of formation of the contract.[15] Below, I review the factual matrix and conclude that the surrounding circumstances of the MOA are more consistent with the interpretation that the parties intended the MOA to be perpetual than with the implication of a unilateral right to terminate.

55. To begin, a significant circumstance is that the parties entered into the MOA after several years of protracted litigation related to pension plan surpluses. According to Daniel Oldfield (the chief negotiator of the MOA on the union side and a member of the CCSB), the initial dispute arose "when the CBC reported or the CBC pension board of trustees reported a significant pension surplus, more than $600 million, and the CCSB had passed a motion demanding a payout of a certain amount. CBC rejected that."[16] In respect of the surplus, a class action was commenced, the Unions filed 24 grievances, and Denis Nadeau rendered an arbitration decision which was subject to judicial review. At the time the parties entered into the MOA, these disputes about pension surplus sharing had been going on for years and the parties had spent considerable sums in fighting over these issues.

56. The MOA was intended to put an end to all of this litigation. Pursuant to the MOA, all of the litigation was withdrawn or settled on the basis of the mutual covenants set out in the MOA. In a joint statement at the time, the parties said that the MOA "puts to rest nearly

[15] *Sattva*, paras. 47, 57.
[16] Transcript Volume 1, February 24, 2022, p. 90-91.

ten years of debate and litigation between the Corporation and the Unions and pensioners on the matter of surplus sharing."

57. Under the MOA, CBC/Radio-Canada agreed to share pension surpluses with the employees on a 50-50 basis. In Section 24 of the MOA, CBC/Radio-Canada said it remains committed to maintaining a defined benefit pension plan.[17] Given that an important purpose of the MOA was to put an end to outstanding litigation, it seems unlikely that the Unions would have agreed to end their pension-related litigation and, at the same time, agreed that CBC/Radio-Canada would have the right to terminate the MOA after the litigation was ended, thereby avoiding CBC/Radio-Canada's commitments under the MOA relating to the pension plans. At the same time, the ending of the litigation is consistent with a conclusion that the parties intended the MOA to be a perpetual agreement. There is no suggestion in the record that, if the MOA was terminated, the withdrawn litigation would or could be resumed. The history of the pre-existing litigation and the benefit to CBC/Radio-Canada in ending the pension related litigation tends to support an interpretation that the parties did not intend to include a right to terminate in the MOA after the litigation had been ended and thereby eliminate a significant amount of the Unions' *quid pro quo* for doing so.

58. Another important part of the surrounding circumstances relates to the parties' agreement to create a health care fund to offset any increases to the cost of the SHCP in excess of 4%. In 2009, the HCF was projected to receive $41,462,714 from contributions of 0.1% by the

[17] It is not clear if the Unions take the position that this commitment is in perpetuity.

employees taken from salary increases over a 10-year period.[18] Absent such an agreement those increases would have gone to the employees.

59. The MOA created the HCF and the rules governing contributions (Section 9), salary adjustments (Section 10), and the operation of the HCF (Section 11). It also established the Health Care Sub-Committee of the CCSB charged with reviewing the financials of the HCF and making recommendations to the CCSB for implementation (Section 12).

60. If the MOA could be terminated unilaterally, the monies contributed by the employees prior to termination, which could be very significant, would no longer be subject to the agreed rules and procedures set out in the MOA. The surrounding circumstance that is relevant here is that, in the event of a termination, the parties did not have any other agreement that would govern the operation or management of the HCF.

61. Along the same lines, the parties did not address the ramifications of unilateral termination with respect to many of the commitments in the MOA, despite there being no existing agreement to address those issues even where a party had already performed some of its commitments under the MOA. For example, if the MOA could be unilaterally terminated, some of the questions that could arise would be: What would happen to the withdrawn grievances, the settled class action, or the motion for leave to appeal in the judicial review proceeding? Could the parties now rely on the Arbitrator Nadeau's award or the judgment of Justice Rousseau concerning the powers of the CCSB which they had agreed not to rely on under the terms of the MOA? What would happen to the amendments to the Pension Plan and trust agreements which were required to be made under Section 23 of the MOA

[18] Schedule "F of the MOA sets out, for illustrative purposes only, the projected contributions to the HCF. As of 2020, the HCF was projected to contain $37,683,986: SHCP Financial Results, June 2020.

to give effect to the agreement on pension surplus sharing? What would happen to any surplus in the Pension Plan or to funds the employees had already contributed to the HCF?

62. The termination of the MOA could trigger a wide range of issues that would potentially involve a reconsideration of most of the main aspects of the MOA: the withdrawal of litigation, the use to be made of money in the HCF, and any surplus in the Pension Plan. Termination of the MOA would likely lead to a whole new generation of disputes on subject matters that the MOA was intended to resolve. The failure to specifically address those ramifications is consistent with a conclusion that the parties did not intend to provide for a unilateral right to terminate the MOA.

63. In making the above observations, I am mindful of the arbitration process set out in Schedule "C" to the MOA which provides a mechanism for resolving disputes arising from, among other matters, the termination of the MOA. As I explain below, I leave open issues relating to the scope of the arbitration process in Schedule "C" as I do not consider that those issues come within my jurisdiction in this arbitration. That said, it seems unlikely that the parties would not address in the MOA at least some of the issues that would arise in the event of unilateral termination and instead leave them to an arbitration process which, in effect, is just more litigation.

64. In *1397868 Ontario Ltd. v. Nordic Gaming Corporation (Fort Erie Race Track)*, the Ontario Court of Appeal addressed a similar issue as that in this arbitration: should a contract without a fixed term be interpreted as a perpetual agreement or as one in which the Court would imply a right of a party to unilaterally terminate?[19]

[19] *1397868 Ontario Ltd. v. Nordic Gaming Corporation (Fort Erie Race Track),* 2010 ONCA 101 ("*Nordic Gaming*")

65. At paragraph 27, the Court observed that there were some aspects of the surrounding circumstances which could point to a perpetual agreement. One of the parties had spent a large amount of money installing fixtures on the premises it had leased. The Court commented that it may be argued that it would be unusual for a party to agree that a contract could be terminated where a significant initial investment was needed.

66. Similarly, in the present case, it would be unusual for the Unions to agree to withdraw all of its pension related litigation if the MOA could be terminated after the withdrawal had been completed.

67. CBC/Radio-Canada argues that there are six circumstances that support its position that the parties intended that the MOA could be terminated after a failed 10-year review.[20]

68. First, CBC/Radio-Canada relies on evidence to the effect that the purpose of the 10-year review referred to in Section 33 was to allow the parties to see how the agreements in the MOA were working and if they were working as intended. According to Mr. Oldfield:

> There were lots of reasons to come back and review what had actually happened over that first 10 years. […] One is at the conclusion of the 10 years, the agreed upon contribution of employees would have concluded, and we had no way of knowing whether it would serve the purpose it was intended to serve, that it would actually serve as the – as a cushion. […] It would give us a chance to assess potential legislative changes that had come along or practices within pensions. Again, it was seen as a good period of time to allow the deal to function and then review it to see if it was doing […] what we intended it to do.[21]

69. With respect to the purpose of the 10-year review, Monique Marcotte (then Vice President of People and Culture, CBC/Radio-Canada) testified, "this was a very unique agreement

[20] I do not include the relationship of the parties in this paragraph. I address that issue in paragraphs 144 to 152. below.
[21] Transcript Volume 1, February 24, 2022, p. 117.

between the parties and that following a 10-year period, it provided an ability to make changes if something that had been negotiated wasn't working or needed to be adjusted."[22]

70. Similarly, Patricia Vincent (then Executive Director of Total Rewards and Wellness, CBC/Radio-Canada) explained:

> Well, there had never been a deal like this in the past. We had no experience in how the Health Care Fund would work, nor would we find our pension plan in a surplus position on a windup basis.
>
> And there were a lot of unknowns. And it was important that we have that ten-year period to ensure it had enough time to, you know, to run and so that we could get experience with it.
>
> But also recognizing that we had to have a point in time to determine whether or not it was something that was mutually beneficial or, that length of time, whether issues arising that we needed to adjust or fix. Or did the agreement even need to continue.[23]

71. While each of the quotes may be evidence of the subjective views of one person, the fact that similar statements were made by individuals on both sides is sufficient for them to be admissible under the surrounding circumstances principle.

72. The statements, however, indicate the shared feeling that, when conducting a review, the parties should attempt to adjust the MOA to take account of changes required by new or unforeseen circumstances. The statements do not go so far as to suggest that the review would be an opportunity to simply renegotiate the MOA or to unilaterally terminate it if one of the parties no longer liked the deal it had made or if the parties could not agree on adjustments.

73. The commitment contained in Section 33 of the MOA is subject to the obligation to conduct the review in good faith. In contractual interpretation, considerations of good faith inform

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[22] Transcript Volume 6, October 12, 2022, p. 699.
[23] Transcript Volume 5, September 19, 2022, pp. 605-606.

the process of giving effect to the parties' intentions. There is a good faith obligation to have appropriate regard to the legitimate contractual interests of the other contracting partner and not seek to undermine those interests in bad faith. However, this is not a duty of disclosure or of fiduciary loyalty and does not require a contracting party "to serve those interests" or to subvert its own commercial interests to those of the other party.[24]

74. Accepting that the purpose of Section 33 was to see what is working and what is not working or to address unforeseen circumstances, the parties would be under a good faith obligation to conduct the review in a manner that has regard for the purpose of the section.[25] That said, I do not read into Section 33 an additional intention that a party could terminate the MOA if a review fails to provide an outcome that satisfies one of the parties. Just as the review was not intended to provide an opportunity to renegotiate the entire MOA from the start, it should not be interpreted as an opportunity to unilaterally terminate the entire MOA because one party is no longer happy with the bargain in the MOA.

75. Next, CBC/Radio-Canada argues that the terms of the two Agreements in Principle ("AIP") that preceded the MOA support its proposed interpretation. The May 1, 2008 AIP (the "May 2008 AIP") provided that employees' wages would be reduced by 0.1% over a 10-year period and also provided for a "full and complete review of the plan [referring to what would become the Health Care Plan under Part II of the MOA] after 10 years".[26]

76. The June 9, 2008 AIP (the "June 2008 AIP") expanded on the notion of "full and complete review" for Part II to all of the terms and conditions of the MOA.[27]

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[24] *Bhasin v. Hyrnew*, 2014 SCC 71 ("*Bhasin*") at paras. 65, 70; *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage Distric*t, 2021 SCC 7 ("*Wastech*") at paras. 73-74.

[25] In this arbitration, no one has argued that there has been a breach of a duty of good faith in conducting the 10-year review. As I explain below, I leave open the possibility of this issue being raised in a different arbitration.

[26] Appendix C (Supplementary Health Care Plan Process): "Full and complete review of the plan after 10 years".

[27] Appendix C (Supplementary information related to SHCP process) under "Decision process for changes to SHCP" heading: "A full and complete review of the terms and conditions of the Memorandum of Agreement will be conducted

77. Thus, while the May 2008 AIP provided that only Part II would be subject to a full and complete review after 10 years, the June 2008 AIP expanded that concept so that the entire MOA would be subject to a "full and complete" review in 10 years. CBC/Radio-Canada says this highlighted the significance of the review process.

78. In my view, the evolution of the language from the May 2008 AIP to the June 2008 AIP through to the MOA in 2009 is not of assistance to CBC/Radio-Canada's position. The interpretation exercise is focused on the actual MOA that the parties entered into in 2009. As I have indicated above, I am satisfied that the language of the MOA is more consistent with an interpretation that the parties did not intend to provide a unilateral right of termination. Some of the language in the AIPs makes reference to a "full and complete review". That language is different than the language in the MOA that does not describe the review as "full and complete". The difference leaves open the question as to why the parties made the change. It could be argued that they intended something other than the "full and complete review" set out in the AIPs. Notably, in Section 32 of the MOA, the parties agreed that the two AIPs were superseded by the MOA.

79. Importantly, the June AIP used very similar language to that in the MOA in referring to the review. In the June 2008 AIP, the parties agreed that "A full and complete review of the terms and conditions of the [MOA] will be conducted <u>every</u> 10 years, <u>commencing</u> in 2019."[28]

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every 10 years, commencing in 2019." See also Appendix B (supplementary information related to the agreement on surplus sharing): "The parties will re-examine the terms and conditions of the agreement on surplus sharing every 10 years, commencing in 2019".

[28] [Emphasis added.]

80. In the MOA, they provided, "the Parties agree to review the terms of this [MOA] every ten years commencing in 2019."[29]

81. As outlined above, I consider that the use of the words "every" and "commencing" are indicative of an intention that the review would carry on past the original 10-year period and subsequent reviews. The June 2008 AIP, in my view, indicated the same intention.

82. CBC/Radio-Canada's third argument is that its position on the interpretation of the MOA is supported by the contemporaneous communications by the Claimants to their members. In these communications, made at the time they were seeking approval for the June 2008 AIP, the Unions described the MOA as a 10 year plan.

83. The first communication on June 13, 2008 referred to "a ten-year plan" but only in the context of the health benefits side of the MOA. The same document also indicated that "[w]here there is a surplus [in the Pension Plan] to be shared, it will be shared equally" between CBC/Radio-Canada and Pension Plan participants. The communication did not mention a 10-year limit for the pension sharing agreement[30] or any other commitments in the MOA, leaving open the argument that when the parties intended to attach a time limit to commitments in the MOA, they said so. Failure to attach a time limit to the commitments relating to pension plan surplus sharing and a defined benefits pension plan lend support to a contrary intention.

84. The second document referred to by CBC/Radio-Canada is an undated CCSB FAQ. Similar to the June 13, 2008 communication, this document referred to "a ten-year plan", but again

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[29] [Emphasis added.]

[30] With respect to pension sharing, this document says "The deal also ensures the continuation of the plan on a financially stable footing."

only in the context of the description of the health benefits side of the MOA. Again, it does not set out a time limit for the pension surplus sharing agreement.

85. The third document is a SCRC document that referred to the MOA as a "10-year agreement". Again, this document refers to a 10-year period only in relation to the health benefits provision.

86. Finally, in June 2008, the President of the CPNA, Mr. Racicot, informed its members about the June 2008 AIP saying, "this 10 year agreement runs from 2009 to 2019 and provides employees and pensioners with their fair share of future pension surpluses." Mr. Racicot had attended the negotiations and his members were only impacted by Part I of the MOA relating to pension plan surpluses. CBC/Radio-Canada argues that Mr. Racicot's statement is consistent with its interpretation of the MOA.

87. I note that Mr. Racicot's reference to "10 year agreement" is not consistent with CBC/Radio-Canada's proposed interpretation. While the provisions relating to the health care provisions were clearly a 10-year agreement, CBC/Radio-Canada does not argue that the other provisions in the MOA were also a 10-year agreement. Rather, it argues that the parties had the right to terminate on giving reasonable notice upon a failed 10-year review. There is a difference between a fixed term agreement for 10 years and an agreement that provides a right of termination that may or may not be exercised after 10 years. Mr. Racicot does not make any reference to a right to terminate.

88. In addition, elsewhere in his memorandum, Mr. Racicot said, "[m]ore specifically, from a pension surplus point of view, the settlement means that: Pensioners' and employees' share of <u>any future surplus</u> will be 50%". In these circumstances, it is difficult to attach much weight to Mr. Racicot's statement.

89. Given that CBC/Radio-Canada relies on the Unions' communications with their members at the time they were seeking ratification of the June 2008 AIP, it is reasonable to consider that, in the document actually seeking ratification dated September 15, 2008, the Unions did not make any reference to a 10-year period for the entire MOA nor to a party's right to unilaterally terminate the MOA. They also did not refer to the MOA being a perpetual agreement. The Unions did refer to the 10-year period for Part II provisions relating to the health care plans.

90. In my view, the communications by the Unions to their members relied upon by CBC/Radio-Canada do not support a conclusion that the parties intended that each party would have a unilateral right to terminate the entire MOA as urged by CBC/Radio-Canada. In my view, those communications are equivocal.

91. CBC/Radio-Canada's fourth argument relating to the surrounding circumstances is that the significance of the commitments in the MOA cannot be understated given the context in which the parties entered into the MOA. The 50-50 pension surplus sharing was described as "unique" by the Claimants in the communications to their members and in the ratification document, as well as by Mr. Poirier (an actuary for the Pension Plan) in his evidence. In addition, CBC's commitment to a defined benefit plan was contrary to the pension landscape in Canada at the time and inconsistent with the economic and political circumstances faced by CBC at the time the MOA was negotiated.

92. CBC/Radio-Canada also argues that its agreement to not rely on the Nadeau award and the Rosseau judgment benefitted the Unions as did its agreement to forgo the notional $89 million agreement made in 2000.[31]

[31] Section 25 of the MOA reads: "CBC/RADIO-CANADA confirms that it will not avail itself of the $89 Million notional reserve set aside in the Canadian Broadcasting Corporation Pension Plan fund in 2000."

93. CBC/Radio-Canada submits that in these circumstances, it would be surprising for any employer to make such commitments in perpetuity without any right to unilaterally end the commitments. Had the parties intended that to be the case, they would have used clear language to indicate that intention. In *Nordic Gaming*, the Court stated, "A perpetual relationship […] can involve significant commitments by both parties and has the potential for substantial long-term effects. One might expect that an intent to be bound in this manner would be expressly stated."[32]

94. Importantly, however, CBC/Radio-Canada's commitments to the pension sharing arrangement and the defined benefit pension plan must be viewed in light of what CBC/Radio-Canada received in return. Those potential benefits included a resolution or termination of the 24 grievances, judicial review appeal and the class action, all of which related to the Unions' claims for sharing of pension plan surpluses.

95. In addition, the MOA provided a complex framework for pension sharing in the future that included a mechanism for limiting sharing and helping CBC/Radio-Canada fund further deficits if the financial situation called for it. In addition, CBC/Radio-Canada received the benefit of the employees' commitments with respect to the establishment of a health care fund to help with future SHCP costs.

96. To some extent, CBC/Radio-Canada's argument in this respect requires a revisiting of the deal the parties bargained for in 2009. CBC/Radio-Canada's point is, in effect, that unless one implies a unilateral right of termination into the MOA, this is a bad deal for CBC/Radio-Canada. It is difficult at this stage, when interpreting the language the parties agreed upon, to weigh the relevant benefits to each side of one interpretation or the other.

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[32] *Nordic Gaming,* para. 17.

For contractual interpretation purposes, those benefits must be viewed at the time the parties entered into the MOA, not in light of current circumstances.

97. This argument sounds very similar to an argument that CBC/Radio-Canada makes having regard to the principles relating to commercial reasonableness when interpreting a contract. I address the issue of commercial reasonableness in more detail in the next section of this Award.

98. CBC/Radio-Canada's fifth argument is that the terms and requirements of the *Broadcasting Act* are circumstances that support its position that the parties did not and could not enter into an agreement in perpetuity. If the parties had intended the MOA to be perpetual, there would be communications to and from CBC/Radio-Canada's Board of Directors seeking such a mandate before entering into the MOA. In addition, one would also expect to see communications or approvals with respect to the perpetual nature of the MOA to or from the Pension Board, and other governmental authorities. There are no such communications.

99. CBC/Radio-Canada also argues that under the *Broadcasting Act* at the time, Directors of CBC/Radio-Canada were appointed for terms not exceeding 5 years and that the 5-year term supports its argument that the MOA was not intended to be a perpetual agreement.

100. In my view, these arguments add little to the interpretive exercise. I note that there is nothing in the *Broadcasting Act* preventing CBC/Radio-Canada from entering into agreements for more than 5 years or continuing past the expiration of a Director's term. Presumably, the deal was approved by CBC/Radio-Canada's Board of Directors. However, there is no evidence of the Board being told that the deal would be limited to the 5-year terms of approving Directors. In any event, CBC/Radio-Canada's position in this

arbitration is not that there is a 5-year term but rather that a party could terminate the agreement after a failed 10-year review.

101. There is also no evidence that CBC/Radio-Canada sought ministerial or other governmental approval. Even if it did, it is very doubtful whether such evidence would be admissible as surrounding circumstances given that there is also no evidence that the Claimants would have been aware of such steps or ought to have been aware of them.

102. Finally, CBC/Radio-Canada argues that if I were to conclude after considering the general principles of contractual interpretation that the MOA is ambiguous, I could have regard to subsequent conduct evidence.

103. Evidence of the behaviour of the parties after the execution of the contract is not part of the factual matrix.[33] Evidence of post contractual conduct is only admissible to assist in contractual interpretation "if the contract remains ambiguous after considering its text and its factual matrix."[34] If ambiguity remains, subsequent conduct "may help to show the meaning the parties gave to the words of the contract after its execution and may support an inference concerning their intention at the time they made the agreement."[35] Even when admissible, evidence of subsequent conduct must be treated with caution because it "has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language."[36]

104. CBC/Radio-Canada argues that I should consider the evidence that in 2015, Mr. Laurin (a union employee) commented to Ms. Marcotte (a CBC executive) that the MOA could be "reviewed" or "brought to an end" in 2019, as well as CBC/Radio-Canada's evidence that

[33] *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 ("*Shewchuk*") at para 41.
[34] *Shewchuk* at para 46.
[35] *Shewchuk* at para 48.
[36] *Shewchuk* at para 42.

CBC/Radio-Canada never heard the Claimants take the position that the MOA was perpetual at any time prior to June 2019.

105. Ms. Marcotte's evidence was that "all of the conversations I had regarding the MOA were specifically with [Mr. Laurin], and the conversation of what would happen to the 0.1 percent that had been put into the health care fund if the MOA was not renewed." Ms. Marcotte testified that Mr. Laurin "wanted us to be on notice that the union's position was that the funds from the health care fund needed to be returned to the employees." Before June 2019, Ms. Marcotte had not heard from any union representatives that the MOA would continue unless all parties agreed to terminate.[37] In my view, these comments fall well short of indicating that the parties intended to provide a unilateral right to terminate all of the MOA on reasonable notice after an unsuccessful 10-year review.

106. Further, CBC/Radio-Canada's evidence that it did not hear the Claimants take the position that the MOA was a perpetual agreement at any time prior to June 2019 falls short of meeting the test for the admission of subsequent conduct evidence set out in *Shewchuk v. Blackmont Capital Inc*. This type of evidence is used cautiously because it has the potential to undermine the certainty of a written contract.[38] As the Court of Appeal cautioned in *Shewchuk,* "parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time."[39] Moreover, the subsequent conduct itself may be ambiguous: "the fact that a party does not enforce his strict legal

[37] Transcript Volume 6, October 12, 2022, pp. 694-695.
[38] *Shewchuk*, paras. 41-50.
[39] *Shewchuk*, para. 43.

rights does not mean that he never had them."[40] The parties' subsequent conduct is relevant only to inferentially establish their intentions at the time they executed their contract.[41]

107. The fact that CBC/Radio-Canada did not hear the Claimants take the position that the MOA is a perpetual agreement until June 2019 is not evidence that helps glean the intentions of both parties going back to the formation of the contract. It is, moreover, action or inaction by a single party. Subsequent conduct evidence normally involves the actions of both parties to an agreement.[42] Inaction by one party is more equivocal than specific joint actions.

108. In summary, I conclude that the surrounding circumstances are more consistent with the interpretation of the MOA urged by the Claimants that the agreement was intended to be perpetual rather than with the implication of a unilateral right to terminate.

Commercial Reasonableness

109. Commercial contracts must be interpreted in accordance with sound commercial principles and good business sense.[43] This principle is grounded in the intention of the parties and is part of the contextual analysis.[44] Since contractual interpretation is an objective exercise, commercial reasonableness cannot be judged solely from the perspective of one of the contracting parties, but rather must be assessed objectively, "since what might make good business sense to one party would not necessarily do so for the other."[45] While a party cannot avoid its contractual obligations simply because the bargain that they entered into

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[40] *Shewchuk*, para. 44, quoting Stephen Waddams in *Canada Squae Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.) at p. 261.
[41] *Shewchuk*, para. 50.
[42] *Shewchuk*, paras. 41, 53; *Thunder Bay (City) v. Canadian National Railway Company*, 2018 ONCA 517 at paras. 63, 66.
[43] *Scanlon,* para. 88.
[44] Hall, s. 2.6 – Commercial Efficacy.
[45] *Kentucky Fried Chicken Canada v. Scotts Food Services Inc*., 1998 CanLII 4427 (ON CA) at para. 27.

was undesirable or unusual, commercially absurd interpretations should be avoided.[46] However, the concept of commercial reasonableness ought not to be used to second guess the bargain the parties have made.[47]

110. CBC/Radio-Canada argues that the significance of CBC/Radio-Canada's commitment under the MOA cannot be understated, in light of the economic and political circumstances faced by CBC/Radio-Canada at the time the MOA was agreed to. The MOA was unique with respect to pension surplus sharing and a defined benefits plan. It was contrary to the pension environment in Canada at the time.

111. In these circumstances, CBC/Radio-Canada argues it would be surprising for any employer to make the types of commitments it made in the MOA in perpetuity. Without any ability to unilaterally end the commitments, the parties would have to use clear language to indicate such an intention. If the Claimants are correct, the only way CBC/Radio-Canada could end its commitments for pension surplus sharing and a defined benefits pension plan would be if all of the parties agreed. Because of the environment at the time of the MOA, even a time-limited commitment to surplus sharing and a defined-benefit pension plan would have been a win for the Unions and CPNA.

112. Relying on the Ontario Court of Appeal's decision in *Scanlon v. Castlepoint Development Corp.*, CBC/Radio-Canada argues that commercial contracts need be construed in accordance with sound commercial principles and good business sense. The Court in *Scanlon* quoted from the Supreme Court's decision in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* that "an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in

[46] *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60 at para. 144.
[47] *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 SCR 888 ("*Consolidated Bathurst*") at 901.

the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result."[48] It is important to remember, however, that the commercial efficacy principle is not a trump card or pursued as its own policy goal. Rather, it is grounded in the intentions of the parties in furtherance of the goal of accurately giving effect to the parties' intentions. The law generally favours a commercially sensible construction because a commercial construction is more likely to give effect to the intention of the parties. As stated by the House of Lords, "The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."[49]

113. CBC/Radio-Canada submits that the Claimants' position that the MOA is a perpetual contract, and that the *status quo* ought to remain in perpetuity, is not supported by the evidence and is commercially unreasonable. At the time of the MOA both parties gave up certain rights with respect to the existing litigation. CBC/Radio-Canada gave up its right to rely on the recent judicial review decision in its favour and it also agreed not to access any of the $89 million notional reserve set aside in the CBC Pension Plan in 2000.

114. I do not accept that the principle of commercial reasonableness points in favour of implying a right to unilaterally terminate the MOA. It is important to bear in mind that the question of whether a transaction is or is not commercially reasonable, as in all aspects of contractual interpretation, is considered at the time of contract formation. As Mesbur J. noted in *Credit Security Insurance Agency Inc. v. CIBC Mortgages Inc.*:

> What the court must look at, however, is whether, from the inception of the contract there should be an implied right to terminate. One does not look at the circumstances at the time that one of the parties wishes to

[48] *Consolidated Bathurst*, pp. 901-902.
[49] *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 at 251 (H.L.), applied in Canada in *Peacock Inc. v. Reliance Foundry Co.*, [2001] B.C.J. No. 226 at para. 97 (B.C.S.C.) and others.

> terminate to see if it is then commercially reasonable. One must look at the time of the formation of the contract to make that determination.[50]

115. As mentioned above, the MOA was the result of protracted negotiations over many years. There was obviously a good deal of give and take. Each side achieved benefits and made concessions. The main points included the following: The Unions gave up a significant amount of litigation respecting pension surplus and agreed that employees would contribute approximately $40 million to the HCF over 10 years. CBC/Radio-Canada agreed to share pension surplus on a 50-50 basis and committed to continue a defined benefit plan. CBC/Radio-Canada also gave up a claim to a notional pension reserve and agreed not to rely on a judicial review decision.

116. Many of CBC/Radio-Canada's arguments about commercial reasonableness challenge the wisdom of the bargain because no employer in the environment at the time would have agreed to such commitments without a right to terminate. I say perhaps, perhaps not. It strikes me that the benefits to CBC/Radio-Canada were very significant and, as pointed out above, many of those benefits would continue if the MOA was terminated.

117. The cases addressing commercial reasonableness emphasize that what is reasonable must be viewed through the lens of both parties to a contract. CBC/Radio-Canada's argument largely ignores the trade-off aspect of the MOA.

118. Moreover, I do not have any evidence of what would be reasonable or unreasonable in a deal like the MOA. This is not surprising given that the MOA is a unique, one-off contract.

119. CBC/Radio-Canada also argues that the unreasonableness of the Unions' position is demonstrated by what happened in the review process. The Claimants made it clear from the outset that they were content with the MOA as it stood and would not engage in a

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[50] (2006), 268 D.L.R. (4th) 725 at para. 33, aff'd 2007 ONCA 287 ("*Credit Security*").

meaningful way in addressing the adjustments CBC/Radio-Canada was seeking. There is no evidence to support the notion that the Unions would be willing to address the concerns that CBC/Radio-Canada had with the MOA.

120. Accepting for the moment that CBC/Radio-Canada is correct, it seems to me there are two responses. First, if CBC/Radio-Canada wishes to assert that the Unions did not negotiate in good faith, they could assert that position in an arbitration. They have not done so but I leave open that possibility.

121. Second, if I were to imply a unilateral right to terminate, the imbalance CBC/Radio-Canada complains about in the negotiations in the 10-year review could easily go the other way. Knowing that it could unilaterally terminate, CBC/Radio-Canada could insist on changes to the pension surplus sharing arrangement and the defined benefits plan and, if it was rebuffed, terminate the MOA. It would then be left with the benefit of the withdrawn litigation and the $37 million to the HCF. There would be little incentive for CBC/Radio-Canada to not insist on the changes that benefit it. As Mesbur J. said in *Credit Security*, "how can it be said that a party has an obligation to bargain away the very right it has bargained for, and if agreement is not reached, the other party may simply terminate?"[51] Similarly, in *Shaw Cablesystems (Manitoba) Ltd. v. Canadian Legion Memorial Housing Foundation (Manitoba)*, the Manitoba Court of Appeal held that a termination clause should not be implied "for the purpose of allowing [a party] to compel renegotiation of the contract terms."[52]

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[51] *Credit Security*, para. 46.
[52] *Shaw Cablesystems (Manitoba) Ltd. v. Canadian Legion Memorial Housing Foundation (Manitoba)* (1997), 143 D.L.R. (4th) 193 (Man. C.A.) ("*Shaw*") at para. 36.

122. Finally, CBC-Radio-Canada argues that the HCF, which had $37 million, was largely inaccessible to CBC/Radio-Canada. The Claimants' position was that there was no obligation on the Unions to contribute additional monies to the Fund after 2019 or to take steps to allow it to be accessible to CBC/Radio-Canada. CBC/Radio Canada argues that on the Claimants' theory of the case, CBC/Radio-Canada would be required to provide 50-50 pension surplus sharing and would receive nothing in return. CBC/Radio Canada argues that this imbalance is not commercially reasonable. As I mentioned, the question of whether a transaction is commercially reasonable is considered at the time of contract formation. The imbalance CBC/Radio-Canada takes issue with in this regard is, if anything, an imbalance in 2019. If a bargain has proven to be improvident or disadvantageous over time, that does not mean it was not commercially sensible at the time the contract was formed.[53] The purpose of the commercial efficacy principle is not to protect business people from absurd results of their own contracts.[54]

123. In summary, I conclude that the principle of commercial reasonableness does not change the interpretation that emerges from the language of the MOA and the surrounding circumstances.

Implication of Terms into a Contract

124. CBC/Radio-Canada argues that this is a proper case to imply a provision giving the parties a right to unilaterally terminate the MOA upon giving reasonable notice after a failed 10-year review.

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[53] *Nipissing*, para. 70; *Northrock Resources v ExxonMobil Canada Energy*, 2017 SKCA 60 at para. 22.
[54] *ICI Paints (Canada) Inc. v. J.M. Breton Plastering (1984) Co.*, [1992] N.S.J. No. 473 (N.S.C.A.)

125. In addition to considering the general provisions that apply to the interpretation of contracts when considering a request to imply a provision, the Court should also have regard to the principles laid out by the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*.[55] In that case, the Court held that terms may be implied into a contract based on the intention of the parties where the implied term is necessary to give business efficacy to the contract, or where it meets the "officious bystander test", such that the parties would say, if questioned, that they had obviously assumed that such a provision would be in the contract. The Court did not determine if these are separate tests, but said that both formulations focus on the intention of the parties.[56]

126. The Court cautioned that when dealing with implied terms, a court must be careful not to base its decision on the intention of reasonable parties as opposed to the parties to the agreement. That is why there must be a certain degree of obviousness to it. If there is evidence of a contrary intention an implied term may not be found.[57]

127. Finally, the Court said that when determining the intention of the parties, attention must be paid to the express terms in the contract in order to see if the implication is necessary and fits in with what has clearly been agreed upon.[58]

128. The Unions do not argue that the test set out in *M.J.B. Enterprises* is a standalone test for the implication of provisions into a contract, nor do they argue that it displaces the other principles applying to contractual interpretation, including those in *Nordic Gaming* and related cases. Rather, they submit that the test in *M.J.B. Enterprises* is a tool to assist the

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[55] *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 SCR 619 ("*M.J. B. Enterprises*")
[56] *M.J.B. Enterprises*, paras. 27, 29. Terms may also be implied into a contract based on custom or usage or as the legal incidents of a particular class or kind of contract.
[57] *M.J.B. Enterprises*, para. 29.
[58] *M.J.B. Enterprises*, para. 29.

decision-maker in determining if a proposed implied term has the necessary level of obviousness to justify the implication of the term.

129. CBC/Radio-Canada argues, correctly in my view, that the decision in *M.J.B. Enterprises* did not deal specifically with an implied right to terminate a contract and that the officious bystander test is not referred to in any of the directly applicable Court of Appeal decisions, including *Nordic Gaming*.

130. In my view, the application of the officious bystander test in this case involves a consideration of essentially the same principles that emerge from the general principles of contractual interpretation, *Nordic Gaming* and similar cases. The thrust of all of these authorities is that the Court should consider the intentions of the parties that emerge from the language in the contract, read as a whole, the surrounding circumstances, which include the relationship of the parties, and the principles relating to commercial reasonableness of a particular interpretation.

Nordic Gaming and Related Cases

131. In their submissions, the parties made extensive reference to the decision of the Ontario Court of Appeal in *Nordic Gaming*. Like this case, the agreement in *Nordic Gaming* did not provide a termination date nor did it include a right for the parties to unilaterally terminate. One party argued that the agreement was perpetual and the other argued that the court should imply a right to terminate on reasonable notice. The trial judge found that the agreement was perpetual. The Court of Appeal concluded that the trial judge had made errors in addressing these issues and ordered a new trial.

132. The Court of Appeal indicated that in cases where a contract does not fix a term and there is no provision for termination, a court may hold the contract to be either perpetual or an

indefinite term contract into which the court may imply the right for the parties to unilaterally terminate on reasonable notice. The Court went on to say that in deciding these types of issues, courts typically look to the specific terms of the contract, the relationship between the parties and the surrounding circumstances.

133. Specifically in *Nordic Gaming*, the Court said:

> When the term of the contract is not fixed and there is no provision for termination on reasonable notice, a court may treat a contract as either perpetual in nature or as an indefinite term contract into which the court implies a provision of unilateral termination on reasonable notice [cites omitted]. In determining this issue, courts typically look to the specific terms of the contract as well as to the relationship between the parties and the surrounding circumstances. As the majority of the court explained in Shaw at para. 15, 'the essence of the cases is simply that each of the decisions turns on the particular agreement under consideration and the circumstances surrounding it'.

134. *Nordic Gaming* pointed out that a relationship depending on mutual trust between parties is an indicator of an implied right to terminate upon reasonable notice:

> While at one time there was a presumption that contracts of an indefinite term were perpetual, modern authorities tend to accept that the matter is to be determined on the basis of ordinary principles of interpretation without the aid of a presumption in favour of perpetuity [cite omitted]. Further, some types of contracts, including those of employment, partnership or personal services, which depend upon mutual trust between the contracting parties, naturally give rise to an implied right to terminate on reasonable notice [cite omitted].

135. At paragraph 14 of *Nordic Gaming*, the Court said:

> While at one time there was a presumption that contracts of an indefinite term were perpetual, modern authorities tend to accept that the matter is to be determined on the basis of ordinary principles of interpretation, without the need of a presumption in favour of perpetuity.[59]

[59] *Nordic Gaming*, para. 14, cites omitted.

136. Thus, while the decision in *Nordic Gaming* addresses the particular issues raised in this arbitration, it is important to bear in mind that the general, well-established principles of contractual interpretation govern the interpretive exercise. The *Nordic Gaming* analysis is to be carried out within the context of these principles.

137. The Court in *Nordic Gaming* addressed the dispute by considering three factors: the language of the contract, the relationship of the parties and the surrounding circumstances. I note that the relationship of the parties could also be considered to be part of the surrounding circumstances. Nothing turns on what label is attached.

138. CBC/Radio-Canada argues that the way in which the Court of Appeal addressed each of the three factors referred to above supports its interpretation of the MOA and that this is a proper case to imply a right to terminate. I do not agree that *Nordic Gaming* leads to that conclusion. I will address each factor in turn.

139. The first factor relates to the language of the agreement. In *Nordic Gaming*, the agreement provided that "the agreement will renew annually provided that all the provisions in the agreement are fulfilled." The Court observed that while "the agreement will renew annually, it does not state the agreement is perpetual." It went on to indicate that because the agreement would involve significant commitments by both parties, "[o]ne might expect that an intent to be bound in this manner [meaning perpetually] would be expressly stated".[60] CBC/Radio-Canada argues that the comments of the Court in this regard apply equally to the MOA. I disagree.

[60] *Nordic Gaming*, para. 17.

140. To start, the "renew annually" language in *Nordic Gaming* is neutral. It does not indicate an intention that the agreement is perpetual, but it also does not indicate that there would be a right to terminate.

141. While the language in the MOA does not say that the MOA is perpetual, it does provide that the parties agree to renew the terms of the MOA every 10 years commencing in 2019. As I have found above, this language is more indicative of an intention that the contract be perpetual than an indication that each party would have the right to unilaterally terminate the agreement. The annual review language in *Nordic Gaming* falls short of indicating such an intention.

142. It is also significant that in this case two of the most important commitments of the Unions, the withdrawal of the litigation and the contributions to the HCF, would have been fulfilled before the first 10-year review and there is no suggestion in the MOA that those commitments could be reversed. In *Nordic Gaming* and *Conseil Scolaire Catholique Franco-Nord v. Nipissing*,[61] an "upfront investment" of this type was an indication of the parties' intention to create a perpetual agreement. In *Nordic Gaming,* the Court stated, "Thus, it may be argued that it would be unusual for 139 to agree to enter a contract that could be terminated on reasonable notice where such a significant initial investment was needed."[62] In *Nipissing*, the Court wrote that "it would be unusual in this case for the school board to transfer property to the Municipality in return for a nominal sum plus ongoing services if those services could be terminated unilaterally and potentially prematurely. In that regard, it is of particular significance that the school board was transferring real

[61] 2021 ONCA 544 ("*Nipissing*").
[62] *Nordic Gaming*, para. 27.

property with enduring value.[63] Thus, while the MOA did not spell out that it was perpetual, this type of relationship supports that inference.

143. As mentioned, when addressing issues of contractual interpretation of the type raised in this arbitration, each decision will turn on the particular agreement involved, as well as on the particular surrounding circumstances. In my view, the language in the MOA is different in material respects from the agreement in *Nordic Gaming* and supports an interpretation that the MOA is perpetual.

144. In *Nordic Gaming*, the Court addressed the relationship of the parties as a separate matter from the surrounding circumstances. At paragraph 24, the Court indicated that there were facets of the relationship between the parties that pointed away from a finding that the parties intended to be bound forever. The parties were strangers and had no pre-existing relationship. Under the agreement, the parties would have to work together closely and cooperation would be important. While the agreement was not one of employment, partnership or for the provision of personal services, which are the types of contracts into which courts routinely imply rights of termination, it did involve many of the same components, such as the need for trust, confidence and satisfaction.

145. In *Nipissing*, the Court cautioned that the simple characterization of a contract as a "personal services contract" does not automatically give rise to an implied right of termination on reasonable notice.[64] In *Nipissing,* the application judge found that the relationship between the parties resembled a personal services contract involving the need for trust, confidence and satisfaction and it was the type of contract into which courts routinely imply a term of termination. The Court of Appeal disagreed, holding that the

[63] *Nipissing*, para. 54.
[64] *Nipissing*, para. 39.

services being provided by the Municipality – snow and garbage removal – were not the type of services that would be inappropriate to force the parties to continue to work together where there is no longer trust. It is important to remember that, however the relationship is characterized, the court is still required to examine the agreement in its entire context. This review led the Court of Appeal in *Nipissing* to conclude that the contract was perpetual.[65]

146. In *Shaw*, the company's ongoing obligation to provide cable services was found to be perpetual, despite what could be described as a "service element". Similarly, in *Credit Security*, Mesbur J. found that, though there was a "provision of services element" to the contract, it had only some of the hallmarks of trust and confidence that would normally give rise to an implied right to terminate on reasonable notice. Ultimately, it was a commercial contract for the provision of a product in which "Credit Security was to retain a long-term proprietary interest for which it was to be paid".[66]

147. CBC/Radio-Canada argues that the type of relationship between the parties – current or former employees of CBC/Radio/Canada and trustees on the board for the pension plan – and subject matter – health benefits and pensions – are exactly the type where "trust, confidence and satisfaction" are paramount, militating in favour of implied termination rights. I disagree. The MOA does not fall into the categories of contracts which naturally give rise to an implied right to terminate on reasonable notice. It is not an employment, partnership or personal services contract. Moreover, the relationships created by the MOA do not engage any of the concerns that underlie those types of contracts, such as the need

[65] *Nipissing*, paras. 74, 79.
[66] *Credit Security*, para. 33.

for "a level of trust and continuous performance" to the extent that it would be "inappropriate to force such parties to continue working together".[67]

148. In addition, while the MOA is not an agreement between strangers, it does not create relationships that requires the parties to work together cooperatively, for example, in a situation in which a court would be unwilling to order specific performance.[68]

149. Part I of the MOA sets out a detailed scheme for the allocation of surpluses that might arise in the CBC Pension Plan. The parties simply have to follow the terms of their agreement and do not require continuing discretionary cooperation.

150. Similarly, Part II creates the HCF and also contains detailed provisions on how that Fund is to be funded, when funds can be used, what reports are to be provided and ongoing oversight by a sub-committee of the CCSB. Again, the implementation of the agreement does not require continuous discretionary cooperation the way an employment or personal services contract would.

151. Part III of the MOA confirms the agreement of the parties concerning the role and powers of the CCSB, which is a committee that pre-existed the MOA, and that operates outside the MOA, pursuant to provisions in various collective agreements. Evidence about the operation of the CCSB after the parties entered in the MOA is not helpful in addressing the intention of the parties at the time of contract formation.

152. In summary, I conclude that the relationship of the parties created by the MOA does not point in favour of an implied right to terminate. Unlike the situation in *Nordic Gaming*, the relationship between the parties is equivocal as to whether the parties intended to provide for a unilateral right to terminate with reasonable notice or for a perpetual agreement.

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[67] *Nipissing*, paras. 37, 55.
[68] *Nordic Gaming*, paras. 23, 24.

153. The Court in *Nordic Gaming* also considered the surrounding circumstances of the agreement. These circumstances were completely different than the surrounding circumstances in this case. Above, I have concluded that the surrounding circumstances in this case are more consistent with the interpretation that emerges from the language in the MOA that the parties intended the agreement to be perpetual rather than subject to a unilateral right to terminate.[69]

STTRC

154. The second issue I address is whether the STTRC is a party to the MOA.

155. The STTRC submits that I should find it to be a party to the MOA:

(a) by operation of Section 34 of the MOA;

(b) by operation of Schedule "D" of the MOA and the fact that a recommendation was made by CCSB to include STTRC as a party to the MOA; or

(c) by operation of Section 43 of the Canada Labour Code.

156. CBC/Radio-Canada disagrees. It argues that STTRC was and is not a successor to any of the signatories to the MOA, either directly or indirectly. That being the case, the STTRC is not a party to the MOA under any of the three bases set out above.

157. I am satisfied that the STTRC is a "successor" to two of the unions that were original signatories to the MOA (SCFP and STARF) within the meaning of Section 34 of the MOA. As a successor to these unions, the MOA is binding on and inures to the benefit of the STTRC.

158. At the time the MOA was signed in 2009, STARF and SCFP were parties. STARF held the bargaining rights for all technical, production and trade personnel, excluding

[69] In paragraphs 65-66 above, I referred to one of the references in *Nordic Gaming* relating to surrounding circumstances.

supervisors and similar personnel. The SCFP held bargaining rights for all administration and administrative support personnel, excluding supervisory and similar personnel.

159. In addition, the SCRC, which subsequently became STTRC, held bargaining rights for all on-air personnel and all persons employed mainly on program design, preparation, co-ordination and finalization, excluding producers, supervisors and similar personnel. Notwithstanding that the SCRC (later the STTRC) was not a party to the MOA, it negotiated a clause in its collective agreement with CBC/Radio-Canada under which employees in its bargaining unit deposited 0.1% of basic salary increases into a segregated fund from 2010 to 2019.

160. On July 3, 2015, the Canada Industrial Relations Board ("CIRB") ordered a new bargaining unit structure for CBC/Radio-Canada that would be comprised of two units. Unit 1 was comprised of "all personnel working for Société Radio-Canada in the Province of Quebec and in Moncton, New Brunswick, excluding personnel covered by other certification orders, producers, supervisors and similar personnel" ("Unit 1").[70] The employees formerly represented by the SCRC, SCFP and STARF became part of this newly merged bargaining unit.

161. CIRB issued an order for a vote to determine which bargaining agent would represent the members of Unit 1. The SCRC won the representation vote, and therefore became the bargaining agent for Unit 1 by order of CIRB dated October 8, 2015.

162. In 2021, SCRC changed its name to STTRC and asked CIRB to amend the October 8, 2015 order to reflect the change in name. The Board issued a decision granting the amendment on July 6, 2021.

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[70] Unit 2 is composed of: all producers working for the Société Radio-Canada in the province of Quebec and in Moncton, New Brunswick.

163. In light of the above reorganization of bargaining units, STTRC now represents those employees formerly represented by two of the original signatories to the Agreement; SCFP and STARF.

Section 34 of the MOA

164. Section 34 of the MOA provides:

> SUCCESSORS AND ASSIGNS
>
> This Memorandum of Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective spouses, beneficiaries, successors, assigns, heirs, administrators and executors.[71]

165. The ordinary principles of contractual interpretation apply to Section 34.

166. STARF and SCFP were parties to the MOA in their capacities as the representative of two separate groups of employees. SCRC (now STTRC) won the right to represent and now represents some of those same employees.

167. The word "successors" in Section 34 of the MOA is not defined. Courts have relied upon various definitions of the word "successors" in a variety of circumstances:

(a) "One that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession";[72]

(b) "a person or thing that succeeds to another";[73]

(c) "one who succeeds another in office, function, or position";[74]

(d) "Term with reference to corporations, generally means another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of first corporation";[75] and

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[71] [Emphasis added.]
[72] *Taylor Ventures Ltd. (Trustee of) v. High Meadow Holdings Ltd*., 2008 BCCA 80 at para. 18.
[73] *Kealy v. Charles*, 1992 CanLII 1737 (BC SC)
[74] *Ibid.*
[75] *Re Penn Central Transportation Co. and Canada Southern Railway Co*., [1971] 3 O.R. 247 ("*Re Penn Central*")

(e) "One who succeeds another in an office, dignity, function or position".[76]

168. As the Ontario High Court noted in *Re Penn Central Transportation Co. and Canada Southern Railway Co*., however, "it is clear that the word [successor] can, and is, used with a wide variety of meaning depending upon the context in which it appears."[77]

169. It would seem obvious that one of the ways a union "succeeds" or "follows" another union is by securing bargaining rights that were formerly held by the other union. The role of the Unions in entering into the MOA was as the representative of a group of employees. A successor union steps into the shoes of the predecessor union and assumes the union's rights and responsibilities with regard to the representation of those employees in the bargaining unit.

170. CBC/Radio-Canada submits that the process by which SCRC (now STTRC) came to represent the employees formerly represented by SCFP and STARF argues against the interpretation that STTRC is a successor union within the meaning of Section 34 of the MOA. CBC/Radio-Canada commenced an application under Section 18.1 of the Canada Labour Code seeking to consolidate bargaining units for its employees. As set out above, CIRB determined that there would be two new bargaining units after a representation vote. SCRC won the vote and was confirmed as the certifying bargaining agent of Unit 1 which included employees of the former SCFP and STARF.

171. Thus, CBC/Radio-Canada argues that because the SCRC (now STTRC) was now representing a new bargaining unit and not the old bargaining units, it is not a successor to SCFP and STARF.

172. I do not accept this argument.

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[76] *Brown v. Belleville (City)*, 2012 ONSC 2554.
[77] *Re Penn* Central, para. 32.

173. In my view this argument ignores the facts that after the CIRB order, SCRC represented the same groups of employees as were previously represented by SCFP and STARF. In the context of the MOA, the reality is that the change in the representative union does not alter or effect the types of commitments made in the MOA on behalf of those employees. It would be an unusual result if a change of a representative union for the same group of employees would allow a party to avoid its obligations under the MOA.

174. CBC/Radio-Canada also argues that because the relationships among the parties to the MOA are governed by the Canada Labour Code, the reference to "successors" in Section 34 of the MOA is intended to refer to two successors as contemplated by that legislation.

175. I do not accept this argument. In its closing submissions, CBC/Radio-Canada recognizes that the MOA was not a collective or employment agreement, but rather is a commercial agreement. The MOA included parties that did not have a statutory collective bargaining relationship with CBC/Radio-Canada under the Labour Code; the CPNA is a party to the MOA, as is the representative plaintiff, Mr. Waterson, in the class action. The content of the MOA has been described as unique and was the product of lengthy negotiations covering a variety of subject matters. The MOA is not a statutorily governed collective agreement. For contractual interpretation purposes, in my view, the MOA is akin to a standalone commercial agreement.

176. In summary, I do not accept that the definition of "successor" in the MOA was intended to refer to successors for purposes of the Canada Labour Code. I am satisfied that the STTRC is a successor within the meaning of Section 34 of the MOA.

177. In view of the conclusion I have reached with respect to Section 34 of the MOA, I do not find it necessary to address the other two bases that STTRC has argued would entitle it to be treated as a party to the MOA.

The Caveat

178. In paragraph 8 above, I said that my conclusion that the MOA is a perpetual agreement is subject to a caveat. I leave open the question of whether, if there is a failed 10-year review and the *status quo* operates in an unfair or inequitable manner to one of the parties, the aggrieved party has recourse to the arbitration process set out in Schedule "C" to the MOA to address the unfairness.

179. The parties did not address this issue in their closing written submission. During oral argument I asked a number of questions about the issue and that led me to ask the parties to make written submissions on how I should address this matter.

180. I thank the parties for their submissions. In view of the approach I am adopting, I do not find it necessary to address those submissions other than to say that the parties each had a somewhat different positions in answer to my questions.

181. In this Award, I have decided the issues raised by the parties in this arbitration and nothing more. My decision does not address the availability, the scope or the powers of an arbitrator under Schedule "C" of the MOA in the event of an unsuccessful 10-year review. I leave those issues as well as the issue relating to any allegations of a breach of good faith performance during the 10-year review for another day and another arbitrator.

V. AWARD

182. Accordingly, for the foregoing reasons, I make the following Award:

(a) A Declaration that the MOA is a valid and subsisting contract between the parties and that the notice of termination dated December 13, 2019 by which CBC/Radio-

Canada purported to give three months' notice of its intention to terminate this agreement is of no force or effect and does not operate to terminate the MOA;

(b) An Order that CBC/Radio-Canada forthwith recognize STTRC as a full party to the MOA, and meet with the CCSB to reach any necessary agreements on the implementation of this Order.

183. I note that the Claimants ask for the following additional relief in their Claim:

(a) An Order that CBC/Radio-Canada immediately provide financial reports for 2020 and 2021 to the Health Care Sub-Committee constituted under the Memorandum and to the CCSB, in the format provided in the years 2010 to 2019, inclusive;

(b) A Direction and Order that the HCF is at all times to be governed in accordance with the MOA and that CBC/Radio-Canada is to meet with the other members of the CCSB to resolve any breaches that may have taken place between 2019 and the date of the Award; and

(c) Arbitrator to remain seized of any disputes arising out of the interpretation, application, operation, implementation or alleged violation of the Award.

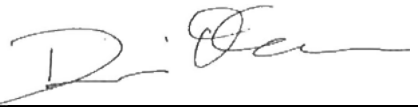
184. If the parties wish to make written submissions with respect to this additional relief, I would ask them to do so within the next two weeks.

VI. SECTION 44(1)

185. Under s. 44(1) of Ontario's *Arbitration Act, 1991*, the parties have 30 days from the date of this Award to notify the Arbitrator about errors or oversights that need correction.

Seat: TORONTO, ONTARIO

ALL BY ORDER OF THE TRIBUNAL THIS 9th day of June, 2023.



THE HONOURABLE DENNIS R. O'CONNOR, K.C.