

**CITATION:** Nortel Networks Corporation (Re), 2010 ONSC 5584

**COURT FILE NO.:** 09-CL-7950

**DATE:** 20101109

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL  
NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,  
NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL  
NETWORKS TECHNOLOGY CORPORATION, Applicants

**BEFORE:** MORAWETZ J.

**COUNSEL:** Fred Myers, Gale Rubenstein and Melaney Wagner, for Ernst & Young Inc.,  
Monitor

Derrick Tay, Alan Merskey and Jennifer Stam for Nortel Networks Corporation et  
al.

W. E. Pepall, for the Former Employees

Thomas McRae, for Nortel Canadian Continuing Employees

G. Finlayson, for the Noteholders

Ken Rosenberg, for the Superintendent of Financial Services

Alex MacFarlane, for the Chapter 11 Unsecured Creditors' Committee

Lyndon Barnes and Geoffrey Grove, for the Board of Directors

Linc Rogers, for Northern Trust Company

Kyla Maher, for Flextronics (Canada) Inc.

Barry Wadsworth, for the CAW

Peter Engelmann and Fiona Campbell, for Susan Kennedy, Court Appointed LTD  
Beneficiaries' Representative

Joel Rochon and Sakie Tambakos, for the Dissenting LTD Beneficiaries

**HEARD:** September 29, 30 and October 1, 2010

## **ENDORSEMENT**

### **Overview**

[1] Ernst & Young Inc. (the "Monitor"), in its capacity as Monitor of Nortel Networks Corporation, Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, the "Applicants" or "Nortel") applies for approval of a proposed methodology for allocation (the "Proposed Allocation Methodology") of the funds held in the Applicants' Health and Welfare Trust (the "HWT") among certain beneficiaries participating in the HWT.

[2] The Monitor also requests (i) an order declaring December 31, 2010 as the deemed Notice of Termination date under the Trust Agreement (defined below) and dispensing with delivery of a Notice of Termination; (ii) authorization for the HWT Trustee (the "Trustee") to make distributions from the HWT to beneficiaries under participating benefits based on the Proposed Allocation Methodology and as directed by the Monitor or the Applicants; (iii) authorization for payment from the corpus of the HWT of the costs of the Trustee or other service providers retained by it in accordance with the Trust Agreement and of any payment agent appointed by it or by the Applicants incurred in carrying out the provisions of the order; and (iv) approval of the retention of Independent Counsel (defined below) for the purpose of the Retainer (defined below).

[3] The Monitor has filed its 51<sup>st</sup> Report and a Supplement to the 51<sup>st</sup> Report in support of the requested relief.

### **Background**

[4] Nortel filed for and obtained protection under the *Companies' Creditors Arrangement Act* ("CCAA") on January 14, 2009.

[5] Although Nortel is insolvent, it continued for more than a year to fund its pre-filing obligations for medical, dental, and certain other benefits to its pensioners, their survivors, and disabled employees; however, it could not continue to do so indefinitely. In the absence of special arrangements, Nortel's benefits payments would have ceased on March 31, 2010.

[6] The Applicants, the Monitor, court-appointed employees' representatives and representative counsel and the CAW-Canada ("CAW") reached an agreement regarding outstanding employment issues, including the payment of benefits during 2010 to, among others, Pensioners and LTD Beneficiaries (both defined below). The agreement was amended and restated on March 30, 2010 (as amended and restated, the "Settlement Agreement") and was approved by this court by Order dated March 31, 2010, and subsequently affirmed by the Court of Appeal for Ontario by Order dated June 3, 2010.

[7] The Settlement Agreement provides that the parties to it "will work towards a Court approved distribution of the HWT corpus in 2010 to its beneficiaries entitled thereto ... and the resolution of any issue necessarily incident thereto." This provision recognizes the importance

and significance of achieving an allocation of the HWT corpus, if possible, before the end of 2010 (when payment of benefits will cease) in order for distributions to be made to individuals based on such an allocation.

[8] Nortel established the HWT on January 1, 1980 as a tax-efficient vehicle through which Nortel would continue to provide employee benefits by agreement between Northern Telecom Limited (a predecessor company to NNL) and Montreal Trust Company (as trustee), and amended by subsequent agreements (collectively, the "Trust Agreement").

[9] The Trust Agreement provides, among other things, that:

- (a) all contributions (from both Nortel and employees) will be held in a single fund (the "Trust Fund"), including all profits, increments, and earnings thereon;
- (b) Nortel may designate as the "Health and Welfare Plan" certain of the following health and welfare plans (and such other similar plan or plans as Nortel may from time to time place in effect): health care; management long term disability; union long term disability; a management survivor income benefit; management short term disability; and a group life insurance; and
- (c) the Trust Fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the Applicants' active and retired employees.

[10] Obligations of the HWT were owed to various beneficiaries with respect to various benefits, including the following:

- post-retirement medical and dental benefits ("Pensioner M&D") and life insurance benefits ("Pensioner Life") to pensioners of Nortel or their eligible dependants ("Pensioners") (approximately 11,000 pensioners and 6,000 spouses);
- long-term disability benefits to active employees with long-term disabilities and their eligible dependants ("LTD Beneficiaries") (approximately 360 individuals and 318 dependants);
- survivor income benefits ("SIBs") to survivors of certain non-unionized Nortel employees ("SIB Beneficiaries") (approximately 80 survivors); and,
- survivor transition benefits ("STBs") to survivors of certain unionized former Nortel employees ("STB Beneficiaries"), payable for a five-year period (approximately 305 survivors currently receiving STBs and 3,000 Pensioners and LTD Beneficiaries on whose deaths their survivors would be eligible for STBs).

[11] This motion concerns the determination of which beneficiaries are entitled to share in the HWT corpus in respect of the following benefits (the "Potential Participating Benefits") on the termination of the HWT:

- (a) Pensioner Life;

- (b) Pensioner M&D;
- (c) life insurance benefits for LTD employees ("LTD Life");
- (d) optional life insurance for active employees, where employees pay their own premiums ("Optional Life");
- (e) optional life insurance for LTD Beneficiaries, where premiums are waived ("LTD Optional Life Benefit");
- (f) medical and dental benefits for LTD employees ("LTD M&D");
- (g) income replacement benefits for Nortel employees on LTD ("LTD Income");
- (h) SIBs
- (i) income benefits currently being paid to survivors of certain unionized former Nortel employees ("STBs – in pay"); and
- (j) income benefits being accrued for pensioners and LTD Beneficiaries on whose death their survivors would be eligible for STBs ("STBs – accrued").

[12] The total liabilities of the HWT are estimated to be approximately \$542.9 million as at December 31, 2010. However, the value of investments held for the HWT at June 30, 2010 is approximately \$77.2 million, although the actual amount of cash available at the date of termination of the HWT is subject to change. For the purpose of the illustrative scenarios in the Monitor's materials, the balance available for distribution at December 31, 2010 is assumed to be in the amount of \$80 million (including a Pensioner Life insurance premium paid by Nortel for 2010 of \$7.8 million).

[13] It is clear that an allocation and distribution of the corpus of the HWT has a serious and significant impact on employee and pensioner claims against the Applicants.

[14] The assets in the HWT are clearly inadequate to address its liabilities. The claimants have an unsecured claim against Nortel for any shortfall, but sadly, any distribution from the Nortel estate is not expected to fully address the claims or to even come close to fully addressing such claims.

[15] Mercer has prepared a report providing a preliminary valuation of certain non-pension post-retirement benefit plans and post-employment plans, estimated as at December 31, 2010 (the "Mercer 2010 HWT Preliminary Valuation") to assist with the analysis with the Proposed Allocation Methodology. It is the basis for distribution of the HWT corpus.

[16] A number of outcomes relating to an allocation of the HWT corpus is possible given:

- (a) the Trust Agreement does not provide clear guidance on which individuals are entitled to participate in a distribution on termination of the HWT, and there are a number of possible interpretations and

- (b) the evolution of Nortel's practices, business, benefits and recordkeeping over the 30 years of the HWT's existence.

[17] The Monitor recommends the Proposed Allocation Methodology based on the advice of counsel with respect to the interpretation of the Trust Agreement. The termination provision of the Trust Agreement (the "Termination Provision") provides:

Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice Termination. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the Trust Agreement and the Health and Welfare Plan shall revert to the corporation.

[18] The Proposed Allocation Methodology, in brief, provides that those beneficiaries whose claims are in pay (that is, those with income claims presently being paid) and those whose claims are certain to be payable at some future date will share in the distribution.

[19] The Proposed Allocation Methodology is as follows:

- (a) the HWT is to be treated as one trust;
- (b) on termination, the following Potential Participating Benefits share *pro rata* in the HWT corpus (based on each such Potential Participating Benefit's respective share of the present value of all such Potential Participating Benefits):
  - (i) Pensioner Life;
  - (ii) LTD Income;
  - (iii) LTD Life;
  - (iv) LTD Optional Life Benefit;
  - (v) STBs – in pay; and
  - (vi) SIBs;(collectively, the "Proposed Participating Benefits");

(c) the following beneficiaries will receive distributions from the Proposed Participating Benefits' *pro rata* share of the HWT corpus:

- (i) Pensioners (including those active employees who will vest by the valuation date and LTD Beneficiaries) for Pensioner Life;
- (ii) LTD Beneficiaries for LTD Income and LTD Life;
- (iii) LTD Beneficiaries participating under Optional Life for LTD Optional Life Benefit;
- (iv) STB Beneficiaries currently in pay for STBs; and
- (v) SIB Beneficiaries currently in pay for SIBs;

(collectively, the "Proposed Participating Beneficiaries")

(d) the amount of the distribution to each Proposed Participating Beneficiary from the Proposed Participating Benefits' *pro rata* share of the HWT corpus will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010, and the Pensioner Life premiums paid for the HWT during 2010 will be treated as a reduction only to the allocation otherwise made to Pensioner Life;

(e) the present value of the Proposed Participating Benefits will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010; and

(f) there will be payment from the HWT on account of any conversion privilege, if any, relating to the Pensioner Life or Optional Life that is exercised by any holder of such right.

[20] The Monitor submits that its recommendation is based on its conclusions regarding four legal issues:

- (a) the HWT constitutes one trust;
- (b) beneficiaries with income claims presently being paid and whose claims are certain to be paid in the future should share in the distribution;
- (c) the assets in the reserve account referred to as Group Life – Part II (related to optional life insurance) should be distributed among HWT beneficiaries eligible to participate upon termination; and
- (d) beneficiaries should participate *pro rata* in the HWT funds.

[21] Counsel to the Monitor prepared a Memorandum of Law (the "Memorandum"), which analyzed how the funds in the HWT were to be distributed pursuant to its interpretation of the Trust Agreement. This Memorandum is attached as Schedule A.

[22] The Monitor also prepared a chart illustrating various allocation scenarios (the "Allocation Chart"). The Allocation Chart is attached as Schedule B.

[23] The Proposed Allocation Methodology is reflected in Scenario 2.

[24] The Monitor is of the view that deeming December 31, 2010 as the date of Notice of Termination of the HWT for the purposes of the Trust Agreement and dispensing with Nortel sending a Notice of Termination to the Trustee will create consistency and avoid confusion between the date of termination of benefits and the LTD Beneficiary termination date of December 31, 2010 pursuant to the Settlement Agreement, the valuation date and the Mercer 2010 HWT Preliminary Valuation and the expected date of termination of the HWT.

[25] Scenario 2 has attracted widespread support. Consents to the proposed allocation have been provided by counsel to the Nortel Canadian Continuing Employees ("NCCE"), to the court-appointed employee representative, counsel to the Former Employees ("Former Employees") and the LTD Beneficiaries representative, and the CAW.

[26] Counsel to the Bondholders and to the Unsecured Creditors' Committee in the Chapter 11 proceedings do not oppose the allocation proposed in Scenario 2. However, to the extent that Scenario 2 is not approved, both the Bondholders and the Unsecured Creditors' Committee reserve their rights.

[27] The Scenario 2 allocation is opposed by the Dissenting LTD Beneficiaries (defined below). While the Dissenting LTD Beneficiaries largely agree with the structure of the analysis provided by counsel to the Monitor as set out in the Memorandum, they disagree with the conclusion that future Pensioner Life benefits, which they characterize as the payment of annual premiums on one year term life insurance policies, are entitled to participate in an distribution of the HWT.

[28] The Dissenting LTD Beneficiaries brought a cross-motion seeking approval of the distribution of the HWT in accordance with Scenario 3 of Schedule B, or other alternative relief as set out in their Notice of Motion.

[29] The differences between Scenario 2 and Scenario 3 are significant. The total of all benefit liabilities under the HWT is \$548.2 million. The HWT has assets of \$80 million. Scenarios 2 and 3 provide for a charge of \$7.8 million for Pensioner Life Premiums for 2010 leaving \$72.2 million for distribution. Under Scenario 2, the proposed amount payable to Pensioner Life claims is \$35.05 million and \$26.98 million to LTD Insurance, with smaller amounts paid for other benefits as indicated. Under Scenario 3, there would be no distribution on account of Pensioner Life claims and there would be an increase of \$30.59 million for LTD claims to \$57.57 million.

[30] The motion of the Dissenting LTD Beneficiaries was served the day before the hearing. A number of parties expressed concern over late service and reserved their rights, in the event

Scenario 2 was not approved, to submit further evidence and to present further argument. This concern was acknowledged by counsel to the Dissenting LTD Beneficiaries.

[31] As stated above, the Monitor's recommendation is based on its conclusions regarding legal issues as set out at [20].

[32] The Dissenting LTD Beneficiaries take no issue with [20] (a) and (c).

[33] For the reasons set forth in the Memorandum, I accept the conclusions set out at [20] (a) and (c): the HWT constitutes one trust, and Group Life – Part II reserved assets should be included in HWT distribution.

### **Legal Counsel**

[34] All but a very few individuals are represented by court-appointed representatives and Representative Counsel for the Former Employees, LTD Beneficiaries and the NCCE, or by CAW counsel.

[35] The court orders appointing the employee representatives provide that they may represent their constituents for the purpose of settling or compromising their claims in insolvency proceedings or in any other proceeding that has been or may be brought before this court.

[36] The Former Employees' representatives and the LTD Beneficiaries' representative each retained independent counsel (collectively, "Independent Counsel") to advise them with respect to the Proposed Allocation Methodology and to take all steps necessary or desirable with respect to thereto (the "Retainer"). Independent Counsel appear on their behalf on this motion. Nortel has agreed to provide funding for the retention of Independent Counsel for these purposes, subject to a fee cap.

[37] Although only three individuals formally opted out of being represented by Representative Counsel, approximately 40 individuals (the "Dissenting LTD Beneficiaries") have retained Mr. Rochon.

[38] The Dissenting LTD Beneficiaries raised an issue of conflict of interest of Representative Counsel. A motion was brought to address the issue, but subsequent to the retention of Independent Counsel, the Dissenting LTD Beneficiaries decided not to proceed with their motion.

[39] I am satisfied that any issues relating to conflict in this area have been addressed in a satisfactory manner.

### **Position of Parties Supporting Scenario 2**

[40] The Monitor recommends the Proposed Allocation Methodology, submitting that it represents a fair and reasonable balancing of various interests in a trust fund that is clearly inadequate to fully meet all claims and that it is a practical methodology that can be implemented without undue cost and delay. The parties supporting the Monitor adopted the submissions of the Monitor.



[41] The Monitor submits that distribution of the HWT should extend not only to beneficiaries with income claims presently being paid (*i.e.*, LTD Income) but also to those whose claims are certain to be paid in the future (*i.e.*, Pensioner Life).

[42] The Monitor submits that this interpretation best gives meaning to the Termination Provision and would distribute the HWT to holders of benefits that have been vested so that an employee or former employee receives what is promised to him or her. It submits that the Proposed Allocation Methodology provides that those beneficiaries whose claims are in pay (that is, those with income claims presently being paid) and those beneficiaries whose claims are certain to be payable at some future date will share in the distribution. The Monitor emphasizes that this interpretation is consistent with the Termination Provision in terms of both the requirement to pay all claims and future claims, as well as the limiting words "up to the date of the Notice of Termination".

[43] It is uncontroversial that any claims actually made and obligations actually incurred up to the date of the Notice of Termination should participate. On the issue of what future benefits and claims should be paid (given that the phrase "future benefits and claims" is not defined and given that the Termination Provision sets a cut-off date of "up to the date of the Notice of Termination"), the Monitor submits that not all potential contingent future unvested beneficiaries of the HWT are entitled to participate. In this respect, the Monitor argues that the effect of the phrase, "up to the date of the Notice of Termination," is to restrict distribution to "future benefits and claims" that can be considered to have been made or incurred prior to the date of termination.

[44] The Monitor further submits that "future benefits and claims" should be interpreted to also include claims that have not been made at the date of termination but that, without termination, would *certainly* be made in the future. The Monitor contends that such benefits can be said to have vested and, therefore, belong among the Proposed Participating Benefits.

[45] The NCCE supports the Scenario 2 allocation but does not necessarily agree with any or all of the submissions of the Monitor.

[46] The Former Employees representative submits that the outcome proposed by the Monitor is reasonable and warrants court approval. Their support is conditional upon the continued support and agreement of other beneficiary classes and, ultimately, the approval of the court.

[47] In this connection, the Former Employees submit that all represented interests have equal status as beneficiaries of the HWT. The Termination Provision does not establish priorities as between beneficiaries, nor does it make specific allocation of trust assets to any particular beneficiary class on trust termination. In absence of any express terms in this regard, a trustee is under a duty of "even-handedness" to administer the trust impartially as between beneficiaries and classes of beneficiaries.

[48] On the issue of what future benefits and claims should be paid, the Former Employees submit that the specific use by the Termination Provision of the term "benefits" in the phrase "benefits and claims" is significant and that the term has, and must, be given a meaning that is

distinct from "claims". The Former Employees submit that the settlor intended to provide for future benefits, as well as future claims at the point of termination.

[49] The Former Employees reject the argument that vested retiree life benefits are subordinate to LTD Beneficiaries on trust termination. They submit that very clear language would be required to exclude a beneficiary class having a vested, non-contingent benefit from sharing on termination and that no such language exists in the Trust Agreement.

[50] The Former Employees submit that the Monitor's recommendation that Pensioner Life share or participate *pro rata* with the other beneficiary classes represents a reasonable interpretation of the Trust Agreement in light of surrounding circumstances. These include the fact that, *at its creation*, the HWT was funded by \$11 million transferred from a Mutual Life Assurance Account representing the surplus in a prior retirement life insurance plan; that each annual HWT financial statement after its formation reported a "Pension Insurance Fund Reserve"; and that Pensioner Life premium were historically paid from HWT assets up to and throughout the CCAA proceedings.

[51] The Former Employees disagree with the Dissenting LTD Beneficiaries' characterization of the Pensioner Life benefit as contingent. They submit that it is a permanent life insurance benefit such that - provided premiums were paid - insurance would continue throughout the retiree's life time without subsequent application or examination. *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at p. 305. They submit that Pensioner Life benefits vested when a Nortel employee retired, and, as such, Nortel or the HWT assumed an unconditional, binding obligation to make Pensioner Life insurance premium payments for the balance of the retiree's life.

[52] The Former Employees submit that, in respect of Pensioner Life, the vesting event is retirement, not death. The ultimate Pensioner Life benefit - payment on death - is not a contingent or speculative event. Consequently, they submit that Pensioner Life is a vested future benefit and certain future claim and plainly within the scope of the Termination Provision.

[53] CAW supports the submission of the Monitor and emphasizes that, in accordance with accepted labour law principles, all of the benefits that have accrued to unionized retirees at the time of their retirement under a collective agreement must be seen as having "vested." As such, a retiree who has been subject to a collective agreement has the right to seek through their union the enforcement of those rights that had vested at the time of their retirement, even though the collective agreement in effect at the time of such retirement has, in fact, expired.

[54] In a submission unique to its interests, the CAW argues that the Dissenting LTD Beneficiaries who are members of the CAW, and the counsel that purports to represent them, have no standing to oppose that which the union has determined to support. As a result, the submissions of the Dissenting LTD Beneficiaries is incompatible with the union's role as exclusive bargaining agent, which provides it with the authority to resolve disputes arising out of the interpretation, application, or administration of the collective agreement and is subject only to the duty of fair representation.

### **Dissenting LTD Beneficiaries**

[55] The Dissenting LTD Beneficiaries submit that a plain reading of the Termination Provision demonstrates that only claims of the HWT actually incurred prior to the Notice of Termination can participate in the wind-up distribution. Such claims would include the ongoing future income payments that flow from claims incurred up to the date of the Notice of Termination.

[56] They submit that the foregoing interpretation is consistent with tax, actuarial, and insurance rules, principles and practices that apply to health and welfare trusts, in general, as well as the publicly available documentation related to the HWT.

[57] The Dissenting LTD Beneficiaries reject as unreasonable an interpretation of the Termination Agreement such that future premium payments owing to a third party insurer in respect of coverage beyond the date of termination should be paid from the HWT. They submit that, in recommending the inclusion of future claims, the Monitor ventures beyond the plain wording of the Termination Provision and advocates for an overly expansive interpretation of these provisions in order to capture future claims, which are contingent, and is contrary to the taxation rules that govern HWTs.

[58] They contend that this interpretation fails to give any meaning to the "up to the Notice of Termination" cut-off date set out in the Termination Provision and runs afoul of the basic tenet of contractual interpretation that meaning should be given to provisions in their entirety. They argue that giving meaning to the expression "future benefits" and to the stipulated cut-off date necessarily leads to the conclusion that only "future benefits and claims" incurred prior to the Notice of Termination are payable on wind-up of the HWT.

[59] The Dissenting LTD Beneficiaries also challenge the Monitor's characterization of Pensioner Life benefits as relating to permanent insurance. Rather, they submit that these benefits relate to one year renewable term life insurance policies paid monthly by Nortel to Sun Life.

[60] The Dissenting LTD Beneficiaries also reject the notion that Pensioner Life benefits are certain to be paid in the future. They submit that their position is supported by the termination provisions of the Sun Life Group Term Life Insurance Policies. These indicate that coverage is automatically terminated upon the receivership or bankruptcy of the policyholder, NNL, and that "the insurance of all members stops on the termination date of this policy and claims incurred after that date are not eligible for payment." They add that it is clear that Nortel is effectively bankrupt and that, therefore, Pensioner Life and other life insurance coverage will terminate. Benefits pursuant to this coverage will not, then, "certainly be made in the future".

[61] They further cite as problematic the reading in of an obligation to pay "claims that have not been made but would certainly have been made in the future" because the certainty of the claim being relied upon by the Monitor relates to the certainty of death. They submit that the payment of the death claim is the obligation of Sun Life, a third party insurer, and not of Nortel or the HWT. The benefit provided by Nortel is restricted to the payment of premiums only,

which cannot give rise to a claim in the future that would be captured by the Termination Provision.

[62] The Dissenting LTD Beneficiaries suggest that the wind-up liabilities should be interpreted in accordance with a funding basis consistent with the tax considerations that apply to the HWT, particularly when such a result best reflects the plain meaning of the Termination Provision and the evidence before the Court regarding actuarial practice.

[63] In this respect, they submit that tax rules permit only group term life insurance policies, and not permanent policies, to be held in an HWT. To accede to an interpretation in which Pensioner Life benefits participate on termination would offend the tax rules governing health and welfare trusts and potentially throw into question the tax treatment of the HWT.

[64] They submit that tax rules are relevant, in this respect, because the proper interpretation of the Termination Provision should be one that is compliant with tax law and applicable actuarial and insurance standards and principles. This follows from the accepted principle of contractual interpretation that, when faced with two plausible interpretations, one of which will lead to a construction of a contract that is unlawful, courts will prefer the interpretation that is consistent with the law.

[65] The Dissenting LTD Beneficiaries submit that, given that Nortel established the HWT in order to secure tax benefits of such trust arrangements, the tax purpose and motivation of the HWT, as well as Nortel's subsequent actions in relation to the HWT, should strongly inform the interpretation of the Termination Provision and any prospective allocation methodology. The fact that Nortel was taking tax deductions equal to its contributions encourages the inference that its contributions were in respect of claims that had occurred or were currently occurring, such as disability income payment.

[66] They contend that an interpretation allowing Pensioner Life benefits to share in the distribution of HWT assets would imply that Nortel HWT was not tax compliant and would suggest that Nortel had been claiming deductions to which it was not entitled because of the *Income Tax Act's* prohibition of deducting prepaid insurance considerations.

[67] The Dissenting LTD Beneficiaries also reject the Monitor's emphasis on the fact that Pensioner Life benefits were part of a reserved plan. They submit that but for an \$11 million initial contribution at the HWT's inception from a Mutual Life Assurance Account, the nature of the Pensioner Life benefit suggests that benefits pursuant to it would be treated as pay-as-you-go claims for which no pre-funding was permitted and which would not have required a book-keeping reserve.

[68] They argue that the \$11 million transfer does not constitute evidence that the pensioners are beneficiaries of the HWT today on its wind-up and should have no bearing on the interpretation of the Termination Provision.

[69] The Dissenting LTD Beneficiaries urge the conclusion that the notional reserve for the Pensioners' Life Insurance Plan is distinguishable from the reserve for the LTD and Survivor Income Plans for which Nortel recognized an obligation to accumulate funds. This reserve ought not to have any significance on the interpretation of the Termination Provision.

[70] Moreover, the Dissenting LTD Beneficiaries urge that *pro rata* distribution of funds is not appropriate in this case. In this respect, they submit that the Termination Provision does not specify how the Trust Fund is to be shared on the dissolution of the Nortel HWT. They reject the Monitor's proposal that the Court apply the maxim "equality is equity" on the grounds that it is a principle of last resort and not a *prima facie* presumption. The Dissenting LTD Beneficiaries submit that "equality is equity" can apply only if there is not some good reason in law and equity why it ought not to apply.

[71] They submit that a determination of the appropriate allocation should reflect the intention of the parties at the time the transactions were entered into and the necessity for fairness in the ultimate result.

[72] The Dissenting LTD Beneficiaries suggest that equal treatment of incurred claims of the LTD Beneficiaries and survivors and the contingent claims of pensioners in respect of future Pensioner Life benefits is inconsistent with the purpose for which Nortel established the Nortel HWT. They submit that such equal treatment would be patently unfair to the LTD Beneficiaries, who have a profound interest in the HWT and who were the ones most harshly impacted by the Settlement Agreement, which, among other things, prevents them from seeking legal redress the funding shortfall.

[73] They submit that an equitable distribution of the Nortel HWT is one that will take into account the compelling reasons why this court should not apply the "equality is equity" principle in this case, such as the disproportionate impact of the distribution on LTD Beneficiaries.

## **Analysis**

### **Preliminary Issue – Expert Evidence**

[74] Scenario 3 provides for an enhanced recovery for the Dissenting LTD Beneficiaries – at the expense of the of the Pensioner Life claimants. The situation facing the Dissenting LTD Beneficiaries and the Pensioner Life claimants is that of a "zero sum game". Increased allocation for one group corresponds with a diminished allocation and recovery for another group.

[75] There is no doubt that the position of the Dissenting LTD Beneficiaries has been severely compromised by Nortel's insolvency. However, the Dissenting LTD Beneficiaries are not alone in this respect. All of the parties claiming entitlement to the HWT have been adversely impacted by Nortel's insolvency.

[76] Counsel to the Dissenting LTD Beneficiaries submits that the proper distribution of the assets of the HWT upon wind-up depends on the Termination Provision, read in the context of the Trust Agreement as a whole, and with a view to the intention of Nortel as the settlor *at the time it entered into the Trust Agreement*.

[77] Counsel further submits that evidence of such intention may be gleaned from various sources, *including the factual matrix at the time* and other documents relating to the HWT, employee benefits and employee communications (see *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at p. 670).

[78] Counsel further submits that a trust document should be construed using rules of contractual interpretation and rules of statutory interpretation. The goal of contractual interpretation is to discover, objectively, the parties' intentions *at the time the contract was made* (see *Gilchrist v. Western Star Trucks Inc.*, [2000] B.C.J. No. 164 at para. 17 (C.A.)). Second, the agreement must be construed as a whole with meaning given to all its provisions (see *Pass Creek Enterprises Limited v. Kootenay Custom Log Sort Ltd.*, [2003] B.C.J. No. 2508 at para. 17 (C.A.)). Third, the court should interpret the agreement having regard to *the business context in which the agreement was concluded* (see *Ventas Inc. v. Sun Rise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083 at para. 24 (C.A.)).

[79] However, the submissions at [77-79] have to be contrasted with the position put forth by the Dissenting LTD Beneficiaries, who contend that, as a result of the changes to the *Income Tax Act* from 1986 onward, no deductible contributions could have been made for life insurance unless they were in the form of premiums actually paid to an insurer during the year. Counsel to the Dissenting LTD Beneficiaries then concludes that wind-up liabilities should be interpreted in accordance with a funding basis consistent with the tax considerations that apply to HWTs of this type – particularly when the result best reflects the plain meaning of the Termination Provision – rather than the evidence before the court regarding actual practice.

[80] If the submissions at [77-79] are accepted, it brings into question the Dissenting LTD Beneficiaries' reliance upon the 1986 amendments to the *Income Tax Act*, concerning the deduction of prepaid insurance consideration, and upon Interpretation Bulletin IT-428 on this subject. It also puts into issue the admissibility of the affidavits of Joann Williams, sworn August 9, 2010 (the "Williams Affidavit") and September 24, 2010 (the "Supplementary Williams Affidavit"); of Jeremy Bell, sworn September 3, 2010 (the "Bell Affidavit") and September 23, 2010 (the "Supplementary Bell Affidavit"); and of Diane A. Urquhart, sworn September 26, 2010 (the "Urquhart Affidavit").

[81] In my view, the position put forth by the Dissenting LTD Beneficiaries that the 1980 Trust Agreement should be interpreted in light of post-1986 tax regime is flawed.

[82] First, it ignores that Nortel has certain obligations as set out in the Plans, as there is clear language that establishes its obligations.

[83] Second, it ignores the fact that Pensioner Life obligations vest on retirement.

[84] Third, there is an absence of any contractual provision that could be interpreted as disentitling certain claimants, such as Pensioner Life claimants, from receiving their vested entitlement to a share of the trust.

[85] Fourth, although the Dissenting LTD Beneficiaries submit that the distribution of the HWT is to be governed by legal interpretation of the Trust Agreement, the evidence put forth by the Dissenting LTD Beneficiaries by and large ignores the obligation of Nortel in the Trust Agreement and focuses on funding issues affected by subsequent events.

[86] In my view, the position at [80] is inconsistent with the argument put forth at [77-79].

[87] The Trust Agreement dates from 1980. According to the submissions of the Dissenting LTD Beneficiaries, it follows that questions of interpretation of the Trust Agreement must be based on the situation as it existed at the time the Trust Agreement was executed. I agree with this submission.

[88] The contractual obligations of Nortel are set out in the various benefit plans that form part of the Record (the "Plans"). It is clear that retirement is the point at which certain obligations result in benefits for the claimants. The HWT, therefore, should be seen as the funding vehicle that delivers the benefit provided by Nortel to the claimants.

[89] The Trust Agreement establishes the basis upon which the HWT was established and is to be funded, as well as the basis upon which benefits are to be paid to claimants. Nortel has contractual obligations to the claimants. It may be that certain obligations may be amended from time to time; nevertheless, once certain promises and obligations of Nortel give rise to vested benefits in favour of certain beneficiaries, they cannot be unilaterally withdrawn or eliminated.

[90] Counsel to the Monitor and parties supporting the Monitor identified numerous concerns with the evidence submitted by the Dissenting LTD Beneficiaries.

[91] With respect to the Williams and Bell Affidavits, the Monitor submits that neither should be given any consideration, as both affidavits fail to meet the required criteria to overcome their presumptive inadmissibility, being based on arguments and theories irrelevant to the HWT, and neither affidavit deals with the Termination Provision. Counsel also submits that issues of both admissibility and weight arise with respect to the Williams and Bell Affidavits. They argue that the evidence is not relevant because both expert witnesses purport to express opinions and opine on the ultimate issue before the Court, insofar as they express views on the terminal distribution of the HWT.

[92] Specifically, counsel submits that the affidavits speak to matters of tax and insurance law that are beyond the expertise of Williams and are, in any event, irrelevant; that their opinions in respect of other trusts or benefit administrators reserved for LTD claims are irrelevant; that how the HWT could have been funded is irrelevant; that Williams uses undefined terms that are not referred to in the Termination Provision; and that the tax deductibility of contributions by Nortel is unreferenced in the trust document as a factor in allocation or termination.

[93] It is further submitted that the affidavits do not pass the test for necessity, either, because Williams and Bell have no qualifications or experience in the construction of trust documents and their evidence does not inform or assist in any meaningful way how the trust instrument is to be interpreted on termination.

[94] There is no evidence that Canada Revenue Agency has challenged or disallowed any tax deductions relating to the HWT taken by Nortel post-1986. There is no evidence that the 1986 changes to the *Income Tax Act* resulted in any alteration of the obligations of Nortel in the Plans and, specifically, to the Pensioner Life claimants. There is no evidence that the changes to the *Income Tax Act* somehow invalidate the HWT, in whole or in part.

[95] In this context, I have concluded that evidence relating to the 1986 tax changes and evidence relating to current actuarial practice that reflects the 1986 tax changes is not relevant to

the issue to be determined, namely an interpretation of the Trust Agreement. Simply put, legal developments in 1986 do not affect or alter the factual matrix as it was in 1980, and the Trust Agreement has to be interpreted on the basis of facts existing in 1980.

[96] The Williams Affidavit expresses a "belief" that the LTD Beneficiaries' Income Replacement Benefits is required to be paid in priority to Pensioner Life benefits on the distribution of assets from the HWT on its wind-up. In my view, in the Williams Affidavit and the Supplementary Williams Affidavit, Ms. Williams attempts to introduce current standards based on contemporary tax practice to change the facts as they were in 1980. It seems to me that her conclusions are derived from evidence that is not relevant to the interpretation of the 1980 Trust Agreement. Further, her conclusions are tantamount to her opining on questions of law.

[97] The Bell Affidavit is submitted to provide Mr. Bell's opinion on the generally accepted actuarial principles and practices used to determine sufficient contributions to fund long-term disability wage replacement benefits. Mr. Bell also asserts, as a "belief", that "claims not incurred at the time of the bankruptcy of a company should be funded from health and welfare trust *after* incurred claims are provided for" (emphasis in original). It seems to me that, in the Bell Affidavit and the Supplementary Bell Affidavit, Mr. Bell, like Ms. Williams, has drawn conclusions from evidence that is not relevant to the interpretation of the 1980 Trust Agreement. His conclusion also results in Mr. Bell opining on questions of law.

[98] The criteria for admissibility of expert opinion evidence has been, in my view, accurately summarized at Schedule C of the factum submitted by counsel to the Monitor, in particular, at paragraphs 3 - 6. Schedule C is attached.

[99] Schedule C was composed before the filing of the Williams Supplementary Affidavit and Bell Supplementary Affidavit, the Urquhart Affidavit, and the affidavit of Michael McCorkle (the "McCorkle Affidavit"). In my view, these affidavits add no relevant evidence to the issue to be determined: the interpretation of the Trust Agreement. In fact, the second Bell affidavit comments on a different and unrelated healthcare benefit trust and the McCorkle Affidavit relates to events in 2005 and 2006.

[100] The Williams Supplementary Affidavit again relies on facts from 1986 to buttress her opinion on the question of law that is before the court.

[101] In substance, I am in agreement with the content of Schedule C insofar as it relates to the law and, particularly, to both affidavits of Ms. Williams and Mr. Bell, as well as those of Ms. Urquhart and Mr. McCorkle.

[102] With respect to the Urquhart Affidavit, it is included in the responding Motion Record of the Dissenting LTD Beneficiaries, a document dated September 27, 2010 and filed in court September 28, 2010, the day before the hearing commenced.

[103] The Urquhart Affidavit proffers an opinion that there cannot be claims or benefits prior to the HWT wind-up that enable the pensioners to qualify for participation in the HWT distribution, other than to receive the Pensioner Life insurance premiums for 2010 provided for the Settlement Agreement. There are two difficulties with this affidavit. It attempts to recast the facts at the time the Trust Agreement was executed to a post-1986 era. Secondly, the opinion goes to the



legal issue to be determined in this motion. The affidavit does not meet the required criteria to overcome the presumptive inadmissibility as a matter of law. In addition, I seriously question whether this affidavit can be considered "fair, objective, and non-partisan" as required by rule 4 of the *Rules of Civil Procedure*.

[104] The Urquhart Affidavit, to the extent that it is intended to support the conclusions of Ms. Williams and Mr. Bell, is inadmissible for the same reasons provided relating to the affidavits of Williams and Bell.

[105] Furthermore, I question the appropriateness of Ms. Urquhart providing her opinion that new evidence in the 51<sup>st</sup> Report of the Monitor establishes a misappropriation of assets on the part of Nortel. There is evidence that trust monies were used to pay benefits. There may have been inadequate contributions by Nortel and a shortfall, but this does not necessarily result in the conclusion that there has been a misappropriation of assets. To suggest misappropriation of assets, without referencing an evidentiary foundation is, at best, a questionable use of the word "misappropriation" and, at worst, reckless.

[106] Additional concerns were also raised as a result of comments in [13] of the Urquhart Affidavit. Ms. Urquhart states that Nortel had a right to *terminate* Pensioner Life insurance coverage. This statement is not accurate: the information booklet excerpt that forms the basis of this conclusion – and which is reproduced in her affidavit at [13] – clearly states that Nortel had only a right to *amend* the coverage.

[107] While I can appreciate there may have been a degree of haste in preparing this affidavit, concerns are raised when such inaccurate statements are made.

[108] The Urquhart Affidavit is for the most part irrelevant to the determination of the issues at hand. It does not provide any assistance to the court, and it is not, in my view, necessary or appropriate to consider it.

[109] Counsel to the Dissenting LTD Beneficiaries submits that, given the seriousness of the issues, this is not the time to invoke technical arguments or make unfounded attacks on well-regarded and suitably qualified experts so as to avoid an honest debate of the issues on their merits. The issues on this motion are clearly serious, but it centres on the interpretation of the 1980 Trust Agreement. The deponents may very well be regarded as experts in their field, but that does not necessarily result in their evidence having to be considered when it is not, in my view, relevant. Accordingly, I decline to give any consideration to their affidavits.

### **Disposition**

[110] As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need.

[111] All parties are in agreement that the HWT corpus must be distributed having regard to those benefits and claims that can be considered to have been made or incurred before the date of termination. The parties disagree as to whether that distribution of the HWT corpus should also include claims that, without termination, would certainly have been made in the future, including Pensioner Life benefits. The Monitor and supporting parties submit that the latter category should share in the distribution while the Dissenting LTD Beneficiaries argue that it should not.

[112] It seems to me that the phrase "all future benefits and claims" in the Termination Provision allows for the possibility that claims otherwise certain to be made in the future are to be satisfied upon termination. The use of "all future benefits and claims" reveals that the HWT is not absolved of its responsibility to settle valid expenses, claims or obligations for reason only that they are future claims. It is permissive of Pensioner Life benefits but not determinative of the issue.

[113] Ultimately, what is needed is a determination of what constitutes a valid claim against the HWT at the date of termination of the trust. In this respect, I agree with the Applicants that any claim that can be said to have vested at the date of termination can share on the wind-up distribution; therefore, it must be considered whether Pensioner Life benefits can be said to have vested at the relevant point in time.

[114] It is settled that a permanent pensioner life benefit becomes vested on the date of an employee's retirement notwithstanding any uncertainty as to date on which the life insurance claim will be realized, *i.e.*, death: *Dayco (Canada) Ltd. v. CAW-Canada, supra*. The Dissenting LTD Beneficiaries urge me to make the finding that Pensioner Life benefits under the HWT are not permanent life benefits but rather term life benefits, conceptualized as the payment of annual premiums on one year term life insurance policies.

[115] I decline to do so. Any such interpretation of the agreement requires the assistance of tax, actuarial and insurance principles and practices developed in a time period subsequent to 1980. The proper interpretation of the Trust Agreement must have regard to the intentions and reasonable expectations of the parties that signed it, which cannot be ascertained from practices and regulations introduced years after the Agreement was concluded. There is no indication or evidence, either in the Agreement itself or elsewhere, that the Trust Agreement should incorporate subsequent developments in tax, actuarial, or insurance principles and practices. It would be inappropriate to interpret the Termination Agreement with reference to considerations that could not possibly have been contemplated by the parties when the Agreement was drafted in 1980.

[116] I find that the parties to the Trust Agreement had both the intention and reasonable expectation that Pensioner Life benefits would manifest as permanent life benefits. Permanent pensioner life benefits vest on retirement. These Pensioner Life benefits must, therefore, be considered vested future benefits and, thus, certain future claims that are within the scope of the Termination Provision and subject to distribution upon wind-up.

[117] It is necessary to focus on the obligations of Nortel, as opposed to the funding challenges faced by it. The obligation of Nortel to provide Pensioner Life benefits remains constant: claimants have a contractual right to certain entitlements and Nortel has a corresponding

contractual liability. The argument of the Dissenting LTD Beneficiaries at [61-62] is misguided because it takes Nortel's contemporary funding shortfall to alter a contractual relationship that was determined and fixed by the Trust Agreement in 1980. In the words of counsel to the Former Employees, the obligations of Nortel cannot be decoupled from the Trust Agreement.

[118] There is no basis to disentitle Pensioner Life claimants from sharing in the distribution of the HWT. In particular, the language of the Trust Agreement in no way provides for the ousting of their rights. I have concluded that their vested ownership rights cannot be abrogated in the manner suggested by the Dissenting LTD Beneficiaries. It is one thing for changing circumstances to result in a diminished recovery for all entitled parties; it is something entirely different to conclude that Pensioner Life claimants should receive no distribution from the HWT Trust. I see no grounds in law, equity, contract, or otherwise to conclude that one unfortunate party – Pensioner Life claimants – should be required to subsidize the misfortunes of another – the LTD Beneficiaries. I view *pro rata* distribution to be the only principled and fair manner of resolving this unfortunate scenario.

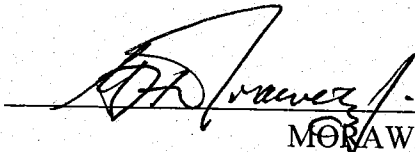
[119] In the result, the Monitor's motion is granted, approving Scenario 2, being the proposed methodology for the allocation of the corpus of the HWT. The consequential relief requested in the Notice of Motion as set out at [2] is also granted.

[120] In light of this disposition, in my view, it is not necessary to address standing issues in respect to certain dissenting LTD Beneficiaries.

[121] It follows that the cross-motion of the Dissenting LTD Beneficiaries is dismissed.

[122] An order shall issue to give effect to the foregoing.

[123] I wish to express my appreciation to all court-appointed representatives who have worked diligently in fulfilling their mandate in what is clearly a very difficult situation.

  
MORAWETZ J.

**Date:** November 9, 2010

## SCHEDULE "A"

Memorandum

August 27, 2010

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### **INTRODUCTION**

This memorandum is filed in conjunction with the Fifty-First Report of Ernst & Young Inc., the monitor of Nortel Networks Limited ("Nortel") (the "Monitor's Report") and refers to documents appended thereto. For the purposes of this memorandum we rely upon the facts set out in the Monitor's Report and the documents referred to in such report. In addition, capitalized terms that are not defined in this memorandum have the meanings set out in the Monitor's Report.

### **ISSUES**

The issue to be determined in this motion is how the funds remaining in Nortel's Health and Welfare Trust (the "HWT") are to be distributed upon termination of the HWT. This determination requires consideration of the following questions:

Does the HWT constitute one trust or several trusts?

Who is entitled to the assets in the reserve account on the financial statements referred to as Group Life- Part II (related to optional life insurance)?

Which claims participate on a termination of the HWT?

How should the Trust Fund be shared among participating beneficiaries?

### **DISCUSSION**

Before addressing the appropriate distribution of the Trust Fund, it is important to appreciate that Nortel has contractual obligations to its employees and pensioners to provide certain health and welfare benefits. Employees and pensioners have claims for those benefits against Nortel on the basis of their contracts of employment. Claims that do not participate on a termination of the HWT can nevertheless be made against the estate of Nortel.

The creation of such contractual relations does not in itself create trust relationships between the parties, nor is a trust required to fund or deliver health and welfare benefits. Nortel elected to create the HWT as a funding medium through which to fund at least some of the Plans.

The HWT was established as a health and welfare trust for tax purposes. Health and welfare trusts are subject to classic trust law principles.

Determining the proper distribution of the Trust Fund on termination of the HWT depends on the interpretation of the termination provisions of the Trust Agreement, read in the context of the Trust Agreement as a whole, and with a view to the intention of Nortel as the settlor at the time the Trust Agreement was entered into. Evidence of such intention may be gleaned from various sources, including the factual matrix at the time and other documents relating to the HWT, employee benefits and employee communications.

***Does the HWT constitute one trust or several trusts?***

The first issue that must be addressed in order to determine the appropriate distribution of the Trust Fund is whether the HWT constitutes one trust or several trusts. The issue arises because the language of the Trust Agreement indicates a single trust but administrative and accounting practices may suggest an intention to create a number of separate trusts, as explained below.

The HWT was administered historically as having separate accounting and "reserves" for certain of the benefit plans covered under the trust (the "Reserved Plans"). Amounts were notionally reserved on the HWT financial statements for the Reserved Plans, but the benefits were not fully pre-funded. There was no actual segregation of trust assets; rather, all assets were commingled. Benefits under benefit plans other than the Reserved Plans were paid by Nortel through the HWT on a pay-as-you-go basis.

**Trust Law Principles**

As stated above, classic trust law principles apply to health and welfare trusts. Under trust law, a trust is established if the so-called three certainties are present: certainty of objects, certainty of subject matter and certainty of intention.

*Certainty of objects* requires that the beneficiaries be clear and ascertainable. If the HWT is one trust, the objects are all the beneficiaries of all the Plans. If the HWT consists of separate trusts for the Reserved Plans, the beneficiaries for each Reserved Plan (other than optional life, as discussed in Part B below) would be the objects of each respective trust. Therefore, there is certainty of objects (other than with respect to optional life) whether there is one trust or several trusts.

*Certainty of subject matter* requires clarity as to which property forms part of the trust fund. If the HWT is one trust, the subject matter would be the Trust Fund. If the HWT consists of several trusts, the trust fund for each Reserved Plan would be the reserved amount of the fund in respect of such Plan. Therefore, there is certainty of subject matter whether there is one trust or several trusts. However, if there are several trusts, as there is a deficiency in the HWT and the funds have been commingled, there would be a tracing issue to address.

*Certainty of intention* requires a consideration of the intention of the settlor. That is, was the intention of Nortel, as the settlor of the HWT, to establish one trust in respect of all the Plans or separate trusts for each of the Reserved Plans?

In considering Nortel's intention, we have reviewed (i) the Trust Agreement; (ii) Nortel's representations to Revenue Canada (as it then was) in respect of the tax ruling; (iii) and, to a

lesser extent, the subsequent administrative and accounting practices of the Trustee and of Nortel acting as settlor and administrator of the HWT.

The Trust Agreement

The Trust Agreement refers to the establishment of a single Trust Fund. There is no indication in the Trust Agreement of an intent to create a separate trust in respect of each Plan. No provision in the Trust Agreement authorizes or directs the Trustee to segregate assets generated by contributions made on account of different Plans or different classes of beneficiary, and in fact the Trust Fund assets have always been commingled without allocation to separate Plans.

The recitals in the Trust Agreement state that a trust fund "to be known as the Health and Welfare Trust" is established to give effect to the Health and Welfare Plan. The purpose of the Trust Fund is "to provide the Health and Welfare Plan benefits for the benefit of the Employees".

**"Trust Fund" is defined as:**

The term "Trust Fund" as used herein shall mean all of the assets of the "Health and Welfare Trust" including all funds received by way of *contributions from the Corporation* and those of its designated affiliated or subsidiary corporations in accordance with the provisions of the Health and Welfare Plan and of this Trust Agreement, *and all employees' contributions* together with all profits, increments, and earnings thereon. (Emphasis ours.)

**The recitals in the Trust Agreement provide that additional plans may be added to the HWT from time to time:**

The Corporation has established for the benefit of certain of its employees and the employees of such affiliated or subsidiary Corporations as the Corporation may designate, certain Health and Welfare plans, and such other similar plan or plans as the Corporation may from time to time place in effect, as follows:

- (a) a Health Care Plan;
- (b) a Management Long Term Disability Plan;
- (c) a Union Long Term Disability Plan;
- (d) a Management Survivor Income Benefit Plan;
- (e) a Management Short Term Disability Plan;
- (f) a Group Life Insurance Plan;

*all of which are hereinafter collectively referred to as the "Health and Welfare Plan."* (Emphasis ours.)

The Trust Agreement does not specify that any additional plans constitute separate trusts.

The Trust Agreement does, however, require the Trustee to keep separate records in respect of each of the separate Plans. Article 3, paragraph (2)(p) of the Trust Agreement provides:

The Trustee shall keep accurate and detailed accounts of all investments and transactions made by it pursuant to this Agreement and shall keep separate records for each of the separate Plans.

a. Representations to Revenue Canada

Evidence of Nortel's intention may also be gathered from its representations to Revenue Canada for the tax ruling. These representations refer to *a single trust fund* with "sub-accounts" created expressly for the purpose of record-keeping. In the overall description of the arrangement, in its letter to Revenue Canada dated December 16, 1979 (the "Ruling Request Letter"), Nortel states that Nortel (with related companies) proposes "*to establish a Health and Welfare Trust Fund.*"

**In describing the Long Term Disability Plan, the Ruling Request Letter states:**

Under this plan eligible claims by employees will be submitted to the administrator for settlement. The administrator will then issue a draft to the claimant(s) drawn on the trust's account.

**In the description of the Group Life Insurance Plan (Part I – Basic & Part II – Optional), the Ruling Request Letter states:**

Contributions (both the active employees' and the Company's) not immediately applied against claims & expenses of the Carrier will be deposited/transferred to a sub-account of the Trust called the "Pensioners Insurance Fund". [With respect to Part I – Basic.]

\* \* \*

Group Life Insurance (Part II) is paid totally by the employees and is optional. These employees' contributions will form part of the trust fund but will be kept in a separate sub-account.

Under this plan (both Part I and Part II) the Carrier will receive and settle all claims and receive settlement of its premium at that time from the Trust. As a matter of record keeping claims together with the Carrier's claim expense charges will be charged to the respective sub-accounts.

b. Administrative and Accounting Practices

The manner in which Nortel administered the HWT and performed financial reporting may also be relevant.

During the administration of the HWT in the normal course, the Trustee accounted for the assets in the HWT in part by distinguishing between pay-as-you-go benefit plans and funded benefit plans with notional reserve accounts.

The reports prepared by actuaries and accountants for the purposes of determining Nortel's funding policy with respect to the Health and Welfare Plan and preparing financial statements of Nortel and the HWT refer to "reserves" or "sub-accounts" in respect of certain of the Plans.

On the other hand, Nortel files only one federal tax return in respect of the HWT. In addition, it appears that Nortel did not instruct the Trustee to establish separate bank accounts and no separate bank accounts were maintained in respect of each Reserved Plan.

### Analysis

It may be possible to argue that, because separate records were maintained in respect of each of the Plans, Nortel intended to " earmark" the funds for specific purposes. The notes to the financial statements set out the funded status of each Reserved Plan separately (i.e., long-term disability plan, survivor income benefit plan, pensioners' insurance plan and employee-financed group life plan (Part II)). In addition, both the ruling and the Ruling Request Letter refer to sub-accounts of the Trust Fund, which could suggest an intention on the part of Nortel to create separate trusts.

However, as stated above, there is no express term of the Trust Agreement creating separate trusts and thus no clear statement of intent to create separate trusts. Instead, there are clear provisions stating that the sub-accounts were for record-keeping purposes only, and separate bank accounts were not established or maintained.

We have been unable to find any case where a court has held that there was an intention to create separate trusts on the basis of record-keeping alone. The fact that the accounting and actuarial valuations were performed on a "plan-by-plan" basis indicates nothing more than compliance with Article 3, paragraph (2)(p) of the Trust Agreement.

In conclusion, given the provisions of the Trust Agreement, other relevant documents and Nortel's administrative practices, the HWT constitutes one trust providing a number of different benefits for the beneficiaries.

*Who is entitled to the assets in the reserve account on the financial statements referred to as Group Life- Part II (related to optional life insurance)?*

The 2009 financial statements refer to an amount of \$17,906,000 in the reserve account in respect of the group life-part II (optional life) benefit (the "Optional Life Account") and there is no corresponding liability. There are three possibilities for the allocation and distribution of the Optional Life Account:

- Payment to optional life participants;
- Reversion to Nortel; or



- Inclusion of these funds as part of the Trust Fund to be distributed to those beneficiaries eligible to participate in the corpus of the HWT at the time of termination and distribution of the HWT.

#### Payment to optional life participants

All of the contributions to the optional life insurance plan (i.e., the premiums) were made by the participants (except for those persons on long-term disability whose premiums were contributed by Nortel). Term life insurance was provided by Sun Life, and Nortel was the policyholder.

If the HWT establishes separate trusts, the employees participating in optional life may argue that they are entitled to the Optional Life Account, as they are its only beneficiaries. However:

On the plain language of the Trust Agreement, Nortel would be entitled to these funds because Article VI of the Trust Agreement provides that, on termination, any surplus remaining reverts to Nortel.

The employees received what they bargained for. Based on the employee communications provided to us, the employees participating in optional life had no expectation that they would receive anything other than term life insurance protection and a conversion privilege in the event of termination.<sup>1</sup> It is unlikely that these reserved funds were contemplated by anyone other than Nortel and Sun Life, and there is no evidence of an intention on the part of the participants not to part outright with the premiums when they paid them. Indeed, the participants in the optional life plans changed from year to year, and any participant who elected not to participate in a following year received no refund.

Even if there are separate trusts for the Reserved Plans, there is an issue with respect to certainty of objects for the Optional Life Account. The Optional Life Account historically was used to pay optional life claims when there was a year of negative experience and used to reduce premiums in the next year if premiums in respect of a year were set too high. In other words, it was used to benefit not past participants but current and future optional life participants, who are unknown. As a result, there does not appear

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<sup>1</sup> In *Canadian Dental Association v. Association des Chirurgiens-Dentistes du Quebec*, 1994 CLB 4402, 17 O.R. (3d) 817, the Ontario Court of Appeal considered a similar fact scenario. The national association of dentists ("CDA") developed an insurance program for dentists. Coverage was provided on an experience-rated basis. Surpluses were declared in several consecutive years with respect to the life and disability plans, and such surpluses were paid to CDA. The trial court determined that surplus funds belonged to the participants who had paid the premiums. The Court of Appeal allowed the appeal. It relied on the fact that, when a participant pays a premium in respect of an insurance policy, the expectation is that he or she will have protection against the insured risk under the policy and nothing further.

to be certainty of objects. Therefore, it is arguable that there cannot be a separate trust in respect of the Optional Life Account.

Nevertheless, whether there is a single trust or several trusts, optional life participants may argue they should be the beneficiaries of the Optional Life Account on the basis of resulting or constructive trust.

### Resulting Trust

#### **The authors of *Oosterhoff on Trusts* divide resulting trusts into two broad categories:**

The first occurs when a settlor transfers assets to trustees and thereby creates or intends to create an express trust. If the express trust fails to arise or fails to dispose of the entire beneficial ownership of the trust assets, the remainder normally results to the settlor or to his or her estate.

Resulting trusts in the second category arise when one person (A) voluntarily transfers an asset to another person (B) or when A purchases an asset and directs the vendor to transfer the asset to B. In these situations, equity usually presumes that A did not intend that B should take the asset beneficially, and therefore, B will hold the asset on resulting trust for A unless the presumption is rebutted.<sup>2</sup>

Because the employees participating in the optional life insurance plan paid all of the premiums for the life insurance benefits, they could argue that, in effect, they overpaid the original premiums, and should be reimbursed under a resulting trust. However, since the optional life policy is only between Nortel and Sun Life, the participants would have to establish that Nortel acted as their agent in procuring the life insurance from Sun Life and wrongfully kept any surpluses, for which there is no evidence. Among other things, there is no evidence of:

- any understanding or intention that Nortel would act as an agent of the employees in purchasing the insurance;
- separate policies, certificates or accounts in the names of specific employees;
- liability on the part of employees for any shortfall (which would be expected if they were the principals);

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<sup>2</sup> A.H. Oosterhoff *et al.*, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7<sup>th</sup> ed. (Toronto: Carswell, 2009) at 590.

- an expectation of receiving a refund of premium based on favourable claims experience; or
- any right of employees to require a return or transfer of the funds or the delivery of policies.

To the contrary, the evidence is that Nortel and Sun Life treated Nortel as the principal, including the cross-rating of claims between basic and optional life. Accordingly, we do not think a Court would impose a resulting trust.

c. Constructive Trust

A constructive trust is a remedy that a court may impose where necessary to prevent the unjust enrichment of the defendant at the expense of the plaintiff, or to compensate the plaintiff for a wrong.<sup>3</sup> The participants in the optional life insurance plan may claim that a constructive trust should be imposed on the Optional Life Account.

Each of the following elements must exist to warrant the imposition of a constructive trust:

- enrichment,
- corresponding deprivation, and
- the absence of any juristic reason for the enrichment.<sup>4</sup>

The courts have also recognized that a constructive trust may be appropriate more generally to prevent persons from retaining property which, in "good conscience," they should not be permitted to retain.<sup>5</sup>

In *I.U.O.E., Local 894 v. Smurfit-Stone Container (Canada) Inc.*,<sup>6</sup> the employer had received demutualization proceeds in respect of life insurance plans. The employer was the policyholder and paid the premiums. The New Brunswick Court of Appeal held that there was no unjust enrichment or fiduciary obligation and therefore it was not appropriate to impose a constructive trust. Although the demutualization benefit had enriched Smurfit-Stone, the Union had not suffered a corresponding deprivation. The employees had not been deprived of any of the defined benefits they bargained for. In addition, since the policy carried with it an ownership interest in Sun Life and Smurfit-Stone was the policyholder, there was a juristic reason for it to retain the demutualization benefit.

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<sup>3</sup> Roy Goode, "Property and Unjust Enrichment" in Andrew Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 215 at 217; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 43.

<sup>4</sup> *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at para. 9.

<sup>5</sup> *Soulos v. Korkontzilas*, *Supra* Note 3 at paras. 17, 29-34.

<sup>6</sup> *I.U.O.E., Local 894 v. Smurfit-Stone Container (Canada) Inc.*, 2005 CarswellNB 209 (C.A.).

Similarly, the optional life participants may be unable to establish a deprivation because they obtained exactly what they had bargained for (i.e., term life insurance coverage). As all of the elements required to make out a case for unjust enrichment are not present, a constructive trust should not be imposed.

The situation of the optional life participants is distinguishable from the situation of the annuitants in *Re Nortel Networks Corporation*,<sup>7</sup> where a constructive trust was imposed on individual annuity contracts held by Sun Life. In that case:

- separate accounts were kept by Sun Life relating to each individual annuitant;
- upon retirement, the annuitants had a right to the amounts in their accounts through one of four available methods;
- although Nortel was named as owner and beneficiary, each annuity also recorded the name of a particular individual as “annuitant”;
- the annuitants did not receive the payments from Nortel to which they were entitled; and
- but for the constructive trust, the assets would have gone to Nortel’s general creditors, which the Court considered would be a windfall.

The optional life participants, by contrast, received the coverage they bargained for. Separate accounts were not kept by Sun Life for named individuals; the participants had no right to receive refunds of premium or direct a delivery or transfer of surplus funds; and there is no concern about a windfall, since under the Proposed Allocation Methodology the funds will be used for payments to other beneficiaries who are suffering a shortfall on their claims.

Where all the elements described in paragraph 35 above are not present, a court may nevertheless impose a constructive trust on the basis that it would not be in good conscience to allow the legal owner of specific assets to retain them. In *N.A.I.T. Academic Staff Association v. N.A.I.T.*,<sup>8</sup> a significant portion of the premiums had been paid by the participants. N.A.I.T. was the owner of the policy and received the demutualization proceeds. The union took the position that a fiduciary relationship existed between the employer and the employees because N.A.I.T. acted as the employees’ agent in obtaining the policy and remitting the premiums.

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<sup>7</sup> *Nortel Networks Corp. (Re)*, 2010 ONSC 3061.

<sup>8</sup> *Northern Alberta Institute of Technology Academic Staff Assn. v. Northern Alberta Institute of Technology*, 2002 ABQB 750; the Alberta Court of Appeal affirmed the decision, but sent the matter back to the Court of Queen’s Bench to recalculate the amount of money for which NASA should have its constructive trust, 2004 ABCA 42 (leave to appeal to the SCC refused, 2004 SCCA 154)

The Court found that an agency existed sufficient to be the foundation for the fiduciary duty claimed, and that N.A.I.T. had profited as a result of that relationship. N.A.I.T.'s breach of its fiduciary duties by keeping the money (even in the absence of misconduct) was remedied by imposing a constructive trust.

While it might not be in good conscience for Nortel to retain the Optional Life Account, the same cannot be said if the Optional Life Account remains in the Trust Fund for distribution to the other HWT beneficiaries who are suffering a shortfall on their claims. Further, as discussed in paragraph 33 above, there are no indicia of agency in this case.

#### Reversion to Nortel

If the Optional Life Account is a separate trust fund and there is no constructive or resulting trust, under the terms of the Trust Agreement, Nortel is entitled to surplus funds on the termination of the HWT. However, given the tax rules related to health and welfare trusts (i.e., there can be no reversion), this result is not tenable and would potentially throw into question the tax treatment of the HWT since inception. In addition, the financial statements in respect of the HWT disclose a debt to the HWT due from the sponsoring company (Nortel). The financial statements do not indicate to which of the reserved funds the debt due from the sponsoring company relates. Accordingly, it could be allocated a number of different ways, including a set off in respect of any entitlement of Nortel to excess optional life funds. Finally, the Trust Agreement does not provide for any reversion to Nortel unless "all expenses, claims and obligations and future benefits and claims arising under the terms of the Trust Agreement and the Health and Welfare Plan" have been satisfied. Given the large deficit in the Trust Fund, and with respect to the Plan, there can be no reversion to Nortel regardless of whether there is one trust or several trusts.

#### Inclusion in the Trust Fund

Whether the HWT is one trust or several trusts, the result would be the inclusion of the Optional Life Account in the corpus of the HWT to be distributed to those beneficiaries eligible to participate at the time of termination.

*Which claims participate on a termination of the HWT?*

#### **In order to determine which claims participate on termination, we will consider:**

*the beneficiaries of the HWT;*

*the termination provision in Article VI of the Trust Agreement (the "Termination Provision"); and*

*application of the Termination Provision to claims of the beneficiaries.*

#### The beneficiaries of the HWT

"Beneficiaries" is not expressly defined in the Trust Agreement. Instead, Article II of the Trust Agreement states that the Trust Fund is "created for the purpose of providing the Health and

Welfare Plan benefits for the benefit of Employees". "Employees" are "those active and retired employees of the Corporation and designated affiliated or subsidiary corporations which have adopted the Health and Welfare Plan, including dependents as defined in Schedule A, on whose behalf contributions are or have been made to the Trust Fund and who are eligible for benefits under the Health and Welfare Plan".

The first recital to the Trust Agreement refers to components of the "Health and Welfare Plan". These include a health care plan, management long-term disability plan, union long term disability plan, management survivor income benefit plan, management short-term disability plan and group life insurance plan. In the Trust Agreement, all of these separate arrangements are defined collectively to be the "Health and Welfare Plan". The definition of Health and Welfare Plan also includes "such other similar plan or plans as the Corporation may from time to time place in effect."

Therefore, under the Trust Agreement, the beneficiaries of the HWT are defined widely as those employees and former employees of Nortel and their dependants who are eligible for benefits under a health or welfare benefit arrangement that is funded by or through the Trust Fund, and, where there is a surplus on wind-up of the HWT, Nortel itself.

d. The Termination Provision

The Trust Agreement provides that Nortel may terminate the HWT on sixty days' notice to the Trustee. Upon receipt of notice of termination, the Trustee must take certain steps:

Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and *satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice of Termination.* The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to *pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination.* The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the Trust Agreement and the Health and Welfare Plan shall revert to the Corporation. (Emphasis ours.)

Whether the HWT is one trust or consists of several separate trusts, lack of clarity in the Termination Provision raises an issue of precisely which benefits and claims participate on termination. Specifically:

- It is clear that any claims actually made and obligations actually incurred up to the date of the Notice of Termination should participate. These would include, for example, reimbursement of medical bills actually incurred, life insurance payments to the estates of people who died and income payments due to LTD beneficiaries.
- What is not clear is which *future* benefits and claims should be paid from the HWT. The phrase “future benefits and claims” is not defined in the Trust Agreement and occurs only in the Termination Provision. While some meaning must be given to the word “future”, meaning must also be given to the expression “up to the date of the Notice of Termination”.

The next section offers an interpretation of the Termination Provision that gives meaning to the language as a whole, and explains how this interpretation would be applied to different types of benefits.

e. Application of the Termination Provision to claims of the beneficiaries

It is first necessary to consider generally whether future benefits would be available to ALL beneficiaries of the HWT, which in turn requires a consideration of the concept of vested rights. Some beneficiaries have vested rights and benefits under the Plans. Benefits vest when an employee or former employee becomes absolutely entitled to receive what is promised; that is, the promise to provide the benefits is not subject to any contingency. Vested benefits cannot be reduced or eliminated.<sup>9</sup> The beneficiaries with vested benefits are pensioners and people in receipt of LTD benefits, survivors' income benefits and survivor transition benefits.

By contrast, the benefits of active employees may be amended or terminated at any time, as may the employment itself. Claims in respect of these types of benefits (health, dental and life (basic and optional, subject to the discussion above) for active employees other than those on LTD) are not vested and therefore should not participate unless they have been incurred by the date of the Notice of Termination. Claims in respect of future benefits for active employees are uncertain and contingent and cannot be said to have arisen before the date of the Notice of Termination.

If the Trust Agreement is interpreted to provide that, on termination, all beneficiaries with vested rights under all Plans participate for future benefits, then all such claims would be included. However, this interpretation gives no meaning to the cut-off date stipulated in the Trust Agreement: “up to the date of the Notice of Termination.”

If, by contrast, the Trust Agreement is interpreted to give meaning to both the expression “future benefits” and to the stipulated cut-off date, the Trustee should pay only “future benefits

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<sup>9</sup> In *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at para. 87, the Supreme Court expressed the view, in *obiter*, that retirement rights that survive expiration of the underlying agreement vest at the time of retirement and cannot be taken away.

and claims" that can be considered to have been made or incurred *prior to the notice of termination*. "Future benefits and claims" may further be interpreted to also include claims that have not been made at the date of the Notice of Termination but that, without termination, would certainly have been made in the future. Applying this interpretation to each category of benefit:

*Pensioner Medical/Dental: Only claims that were actually incurred prior to the Notice of Termination would be included, since future benefits (being contingent and uncertain) cannot be said to have existed prior to the cut-off date.*

*Pensioner Life Insurance: As pensioner life is permanent (and not term) insurance, it may be argued that the present value of this future benefit for all pensioners should be included, as there is no contingency with respect to the ultimate payment of this benefit. This benefit may therefore be considered to have existed before the cut-off date.*

*LTD Income: The present value of the future benefit for LTD income already in pay prior to the Notice of Termination should be included on the basis that a claim was made before the Notice of Termination and the ongoing stream of income constitutes future benefits in respect to that claim.*

*LTD Medical/Dental: Only claims that were actually incurred prior to the Notice of Termination would be included, on the same basis as (i), above.*

*LTD Life Insurance: It may be argued that the present value of this future benefit for all LTDs should be included, as those individuals who are on permanent disability will either die while on LTD or after retirement, so that they are covered in any event, and the claims are not contingent.*

*SIBs: The present value of the future benefit for SIB income already in pay prior to the Notice of Termination should arguably be included, on the same basis as (iii) above.*

*STBs: The present value of the future benefit of STBs in pay prior to the Notice of Termination should arguably be included, on the same basis as (iii) above.*

As noted previously, claims that do not participate on a termination of the HWT may nevertheless remain valid claims in the Nortel estate.

Although we do not believe that the existence of the Reserved Plans demonstrates an intention to establish separate trust funds, regard may be had to Nortel's practice to assist in interpreting the Termination Provision. Other than with respect to optional life, our analysis leads to the



conclusion that the claims entitled to participate on termination are in fact claims for benefits with respect to the Reserved Plans.<sup>10</sup> This strongly suggests that there was a perceived difference between these types of claims and claims that Nortel paid on a pay-as-you-go basis. In other words, these were treated as claims that were certain to occur and therefore required the keeping of reserves. This supports our conclusions with respect to which claims participate on termination and which do not.

In conclusion, as discussed above, there are difficulties in interpreting the Termination Provision. However, based on the Trust Agreement, other relevant documents and Nortel's administrative practices, the following categories of claims should participate:

*claims of all beneficiaries of the HWT actually incurred before the Notice of Termination; and*

*claims in respect of future benefits where those benefits have vested and meet the test of the cut-off date as described above, being pensioner life insurance, LTD income, SIBs and STBs. In addition, on balance, LTD life insurance should be included.*

*How should the Trust Fund be shared among participating beneficiaries?*

Under any interpretation of the Trust Agreement, an actuary would determine the present value of the participating claims. Nortel would be required to pay the Trustee sufficient funds to satisfy this obligation.

As set out above, the Termination Provision does not specify how the Trust Fund is to be shared on the dissolution of the HWT. Since there are insufficient funds to satisfy all claims against the HWT, an issue arises as to how to allocate the Trust Fund among the competing claims.

It is a well-established maxim that "equality is equity". This means that, in the absence of sufficient reason for dividing property on any other basis, the courts will order equal division.<sup>11</sup> This principle has been applied by Canadian courts in many different circumstances, including distributions of funds to investors in an insolvency and to beneficiaries of a pension plan being wound up.

If the Reserved Plans were treated as involving separate trusts, the beneficiaries under each Reserved Plan (other than optional life) would share *pro rata* in the funds reserved for that Plan. Beneficiaries of plans without reserves would not receive anything from the HWT.

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<sup>10</sup> Other than the special case of STBs in pay.

<sup>11</sup> John McGhee Q.C., *Snell's Equity*, 31<sup>st</sup> ed. (London: Sweet and Maxwell, 2005) at paras. 5-20 to 5-23.

If there is a single trust, the Trust Fund should be distributed *pro rata* among the claims entitled to participate on termination.

## **SUMMARY OF CONCLUSIONS**

The HWT is a single trust fund.

The optional life participants are not entitled to the Optional Life Account and these assets do not revert to Nortel. As the HWT is a single trust fund, these assets should be distributed among the HWT beneficiaries who are eligible to participate at the time of termination.

All claims and obligations arising up to the Date of Termination participate on a termination of the HWT.

With regard to future claims, it may be argued that (i) all claims for all future benefits vested under the Plans should be present valued and participate; or that (ii) only claims made prior to the date of the Notice of Termination, including the present value of future income payments for benefits already in pay, should participate. Given the language of the Trust Agreement as supported by Nortel's funding practices, the better view is that claims that have not been made but would certainly have been made in the future should participate in addition to those in (ii) above. Therefore, the following would participate for the actuarial value of future benefits: pensioner life insurance, LTD income, SIBs and STBs in pay and, on balance, LTD life insurance.

The Trust Fund should be distributed *pro rata* among those entitled to benefit (under either interpretation set out above) under the HWT on termination.

# Nortel Health and Welfare Trust

## REVISED Illustrative Allocation Scenarios

Scenario: Optional Life does not participate

Cdn Millions

## REVISED Appendix D-1

Scenarios 1 to 4

Type of Benefit	1		2		3		4	
	Benefit Liabilities <sub>6</sub>	All Benefits Share Pro Rata [Distribution %: 14.6%]	Proposed Participating Benefits Share Pro Rata [Distribution %: 33.8%]		Benefits in Pay Share Pro Rata [Distribution %: 72.1%]		Reserved Asset Method <sub>3,5</sub> [Distribution %: N/A]	
Pensioner Life (including ADB) <sup>1</sup>	\$ 126.9	\$ 10.72	\$ 35.05		\$ -	\$	33.53	
Pensioner M&D	251.3	36.67	-		-	-	-	
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>47.39</b>	<b>35.05</b>		-	-	<b>33.53</b>	
LTD Income (including IBNR)	79.9	11.66	26.98		57.57		21.47	
LTD M&D <sup>2</sup>	29.7	4.33	-		-		-	
LTD - STB accrued	0.3	0.04	-		-		-	
LTD Life <sup>2</sup>	4.5	0.66	1.52		-		0.65	
LTD Optional Life Benefit (including IBNR)	5.3	0.78	1.80		-		-	
<b>LTD Benefit Total</b>	<b>119.7</b>	<b>17.47</b>	<b>30.30</b>		<b>57.57</b>		<b>22.12</b>	
SIB <sup>4</sup>	16.2	2.36	5.47		11.67		16.55	
STB - in pay	4.1	0.60	1.38		2.95		-	
STB - accrued	30.0	4.38	-		-		-	
Optional Life	-	-	-		-		-	
<b>Total Benefits</b>	<b>\$ 548.2</b>	<b>\$ 72.2</b>	<b>\$ 72.2</b>		<b>\$ 72.2</b>		<b>\$ 72.2</b>	

Pensioner Life 2010 Premiums <sup>1</sup>	NA	<u>7.80</u>	<u>7.80</u>	<u>7.80</u>
Total	\$ <u>548.2</u>	\$ <u>80.0</u>	\$ <u>80.0</u>	\$ <u>80.0</u>

**NOTES**

1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)
2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners.
3. Optional life reserved asset of \$18.7 million has been allocated pro rata amongst the other reserved assets based on asset value
4. The pro-rata allocation of the optional life reserved asset amongst the other remaining reserved asset categories results in the SIB reserved asset allocation exceeding the total benefit claim attributable to this category. No adjustments have been made to limit the SIB distribution under the reserved asset method
5. The Reserved Asset Method allocates HWT Assets using the reserved asset mix as at December 31, 2009 (as disclosed in the 2009 Health Welfare Trust Financial Statements)
6. Source: Mercer 2010 HWT Preliminary Valuation

**Nortel Health and Welfare Trust**  
**REVISED Illustrative Allocation Scenarios**  
Scenario: Optional Life is a participating benefit  
Cdn Millions

**REVISED Appendix D-2**  
Scenarios 5 to 8

Type of Benefit	5				6		7		8	
	Benefit Liabilities <sup>4</sup>	All Benefits Share Pro Rata	Proposed Participating Benefits Share Pro Rata		Benefits in Pay Share Pro Rata		Reserved Asset Method <sup>3</sup>		[Distribution %: N/A]	
		[Distribution %: 11.2%]	[Distribution %: 25.9%]		[Distribution %: 53.3%]					
Pensioner Life (including ADB) <sup>1</sup>	\$ 126.9	6.38	\$	25.01	\$	-	\$	23.85		
Pensioner M&D	251.3	28.08		-		-		-		
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>34.46</b>		<b>25.01</b>		-		<b>23.85</b>		
LTD Income (including IBNR)	79.9	8.93		20.66		42.63		16.44		
LTD M&D <sup>2</sup>	29.7	3.32		-		-		-		
LTD - STB accrued	0.3	0.03		-		-		-		
LTD Life <sup>2</sup>	4.5	0.50		1.16		-		0.50		
LTD Optional Life Benefit (including IBNR)	5.3	0.60		1.38		-		-		
<b>LTD Benefit Total</b>	<b>119.7</b>	<b>13.38</b>		<b>23.20</b>		<b>42.63</b>		<b>16.94</b>		
SIB	16.2	1.81		4.19		8.64		12.67		
STB - in pay	4.1	0.46		1.06		2.19		-		
STB - accrued	30.0	3.35		-		-		-		
Optional Life	-	18.74		18.74		18.74		18.74		
<b>Total Benefits</b>	<b>\$ 548.2</b>	<b>\$ 72.2</b>		<b>\$ 72.2</b>		<b>\$ 72.2</b>		<b>\$ 72.2</b>		
Pensioner Life 2010 Premiums <sup>1</sup>	NA	7.80		7.80		7.80		7.80		
<b>Total</b>	<b>\$ 548.2</b>	<b>\$ 80.0</b>		<b>\$ 80.0</b>		<b>\$ 80.0</b>		<b>\$ 80.0</b>		

# NOTES

1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)
2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners.
3. The Reserved Asset Method allocates HWT Assets using the reserved asset mix as at December 31, 2009 (as disclosed in the 2009 Health Welfare Trust Financial Statements)
4. Source: Mercer 2010 HWT Preliminary Valuation

## Nortel Health and Welfare Trust

### REVISED Appendix D-3

#### REVISED Illustrative Allocation Scenarios

Scenarios 9 to 11

Scenario: STB Liability is excluded and Optional Life does not participate

Cdn Millions

Type of Benefit	Benefit Liabilities <sup>3</sup>	9		10		11	
		All Benefits Share Pro Rate	[Distribution %: 15.6%]	Proposed Participating Benefits	[Distribution %: 34.4%]	Benefits in Pay Share Pro Rate	[Distribution %: 75.1%]
Pensioner Life (including ADB) <sup>1</sup>	\$ 126.9						
Pensioner M&D	251.3	\$ 11.96		\$ 35.80		\$ -	
<b>Pensioner Total</b>	<b>378.2</b>	<b>39.13</b>					
LTD Income (including IBNR)	79.9			<b>35.80</b>			
LTD M&D <sup>2</sup>	29.7	12.44		27.45		60.03	
LTD - STB accrued	EXCLUDED	4.62		-		-	
LTD Life <sup>2</sup>	4.5	-		-		-	
LTD Optional Life Benefit (including IBNR)	5.3	0.70		1.55		-	
<b>LTD Benefit Total</b>	<b>119.4</b>	<b>0.83</b>		<b>1.83</b>			
SIB	16.2	<b>18.60</b>		<b>30.83</b>		<b>60.03</b>	
STB - in pay	EXCLUDED	2.52		5.57		12.17	
STB - accrued	EXCLUDED	-		-		-	
Optional Life	EXCLUDED	-		-		-	
<b>Total Benefits</b>	<b>\$ 513.8</b>	<b>\$ 72.2</b>		<b>\$ 72.2</b>		<b>\$ 72.2</b>	

Pensioner Life 2010 Premiums <sup>1</sup>	<u>NA</u>	<u>7.80</u>	<u>7.80</u>	<u>7.80</u>
<b>Total</b>	<b>\$ <u>513.8</u></b>	<b>\$ <u>80.0</u></b>	<b>\$ <u>80.0</u></b>	<b>\$ <u>80.0</u></b>

**NOTES**

1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)
2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to retirement and become eligible as pensioners.
3. Source: Mercer 2010 HWT Preliminary Valuation (excludes STB Liability)

# **Nortel Health and Welfare Trust**

## **REVISED Illustrative Allocation Scenarios**

Scenario: STB Liability is excluded and Optional Life is a participating benefit  
Cdn. Millions

## **REVISED Appendix D-4**

Scenarios 12 to 14

Type of Benefit	Benefit Liabilities <sup>3</sup>	12		13		14	
		All Benefits Share Pro Rata [Distribution %: 11.9%]		Proposed Participating Benefits [Distribution %: 26.3%]		Benefits in Pay Share Pro Rata [Distribution %: 55.6%]	
Pensioner Life (including ADB) <sup>1</sup>	\$ 126.9	\$ 7.33		\$ 25.59		\$ -	
Pensioner M&D	251.3	29.96		-		-	
<b>Pensioner Benefit Total</b>	<b>378.2</b>	<b>37.29</b>		<b>25.59</b>		-	
LTD Income (including IBNR)	79.9	9.53		21.02		44.45	
LTD M&D <sup>2</sup>	29.7	3.54		-		-	
LTD - STB accrued LTD Life <sup>2</sup>	EXCLUDED 4.5	- 0.54		- 1.18		- -	
LTD Optional Life Benefit (including IBNR)	5.3	0.64		1.40		-	
<b>LTD Benefit Total</b>	<b>119.4</b>	<b>14.24</b>		<b>23.61</b>		<b>44.45</b>	
SIB	16.2	1.93		4.26		9.01	
STB - in pay	EXCLUDED	-		-		-	
STB - accrued Optional Life	EXCLUDED	-		-		-	
<b>Total Benefits</b>	<b>\$ 513.8</b>	<b>18.74</b>		<b>18.74</b>		<b>18.74</b>	
		<b>\$ 72.2</b>		<b>\$ 72.2</b>		<b>\$ 72.2</b>	



Pensioner Life 2010 Premiums <sup>1</sup>	<u>NA</u>	<u>7.80</u>	<u>7.80</u>
Total	<u>\$ 508.5</u>	<u>\$ 80.0</u>	<u>\$ 80.0</u>

**NOTES**

1. Pensioner Life Premiums for 2010 have been treated as charge against the distribution in respect of the Pensioner Life Benefit (if any)
2. LTD Life and LTD M&D includes \$2.0 million and \$5.2 million, respectively, related to LTD individuals who are assumed to proceed to retirement and become eligible as pensioners.
3. Source: Mercer 2010 HWT Preliminary Valuation (excludes STB Liability)

## **SCHEDULE “C” – THE WILLIAMS AND BELL AFFIDAVITS**

### **PART I – THE OPINIONS AND BELIEFS EXPRESSED IN THE AFFIDAVITS**

1. The Williams Affidavit expresses a “belief” that the LTD Beneficiaries’ income replacement benefits are required to be paid in priority to Pensioner Life benefits on the distribution of assets from the HWT on its wind-up.<sup>2</sup>

Affidavit of Joann Williams, affirmed August 9, 2010, para. 2 (the “**Williams Affidavit**”); Opposing LTD Beneficiaries’ Motion Record (“**Opposing Record**”), Tab 2

2. The Bell Affidavit states that it is submitted to provide Mr. Bell’s “opinion on the generally accepted actuarial principles and practices used to determine sufficient contributions to fund long term disability wage replacement benefits.” Mr. Bell also asserts, as a “belief,” that “claims not incurred at the time of the bankruptcy of a company should be funded from a Health and Welfare Trust **after** incurred claims are provided for.”

Affidavit of Jeremy Bell, sworn September 3, 2010 paras. 1 and 54 (emphasis in original) (the “**Bell Affidavit**”); Opposing LTD Beneficiaries’ Supplementary Motion Record (“**Opposing Supp. Record**”), Tab 1

### **PART II – THE AFFIDAVITS SHOULD NOT BE CONSIDERED IN THIS MOTION**

#### **A. Criteria for Admissibility**

3. Expert opinion evidence is presumptively inadmissible and the Opposing LTD Beneficiaries have the burden of establishing its admissibility.

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<sup>2</sup> The Williams Affidavit uses the term “Retiree Life Benefits” instead of “Pensioner Life benefits”.

*R. v. Abbey*, 2009 ONCA 624 at para. 71 (C.A.); leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.) ("*R. v. Abbey*"); BOA, Tab G.

4. The preconditions to overcoming the inadmissibility of expert opinion evidence are:
- the witness must be a properly qualified expert;
  - the proposed opinion must be necessary in assisting the trier of fact and must relate to a subject matter that is properly the subject of expert opinion evidence;
  - the proposed opinion must be logically relevant to a material issue; and
  - the absence of any exclusionary rule.

*R. v. Abbey, supra*, at paras. 75 and 80; BOA, Tab G

5. To be admissible, the expert opinion evidence must provide technical information that is outside the experience and knowledge of the trier of fact. Expert opinion evidence that brings no added benefit to the process inevitably will be excluded. As stated by the Supreme Court of Canada:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "[...] If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary".

*R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 25 (S.C.C.) (emphasis added, citing *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42 (S.C.C.) that in turn cites *Turner* (1974), 60 Crim. App. R. 80 at 83); BOA, Tab H

*R. v. Abbey, supra*, at para. 94; BOA, Tab G

*Tavernese v. Economical Mutual Insurance*, 2009 CarswellOnt 3204 at paras. 13 and 15 (S.C.J.); BOA, Tab I

6. The *Rules* further codify that experts have a duty to provide opinion evidence "that is related only to matters that are within the expert's area of expertise," and that it must be "fair,

objective and non-partisan”. The Court of Appeal has stated that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal.

Rules 4.1.01(1)(a) and (b), *Rules of Civil Procedure*

*R. v. Abbey, supra*, para. 62; BOA, Tab G

**B. The Affiants are Not Qualified Experts**

7. It is apparent from the Affidavits that:

- neither Ms Williams nor Mr. Bell have any legal qualifications or legal expertise, including qualifications or expertise to interpret the Trust Agreement or to reach legal conclusions on the terms of the Trust Agreement or priorities with respect to the HWT;
- they have no published or academic works, peer-reviewed or otherwise, including in respect of health and welfare trusts or plans or legal, actuarial or insurance principles in relation to them;
- they have had no experience with the termination, wind-up or distribution of assets on wind-up in respect of any health and welfare trust;
- they have had no experience or involvement with the HWT itself; and
- Mr. Bell’s experience with health and welfare trusts is extremely limited, being in respect of a singular multi-employer trust in British Columbia, whose liabilities are backed by public-institutions.

8. Accordingly, the affiants of the Affidavits do not demonstrate the requisite expert qualifications for the expressed beliefs or opinions.

**C. Legal Opinion is Not the Proper Subject of Expert Evidence**

9. It is firmly established that purported expert opinion evidence on the issues of domestic law before the Court is not of assistance to the Court, does not meet the criterion of necessity, and as a matter of law is outside the scope of proper expert evidence.

*Pente Investment Management Ltd. v. Schneider Corp.*, [1998] CarswellOnt 5952 at paras. 4-5 and 10 (Gen. Div.), aff'd (1998), 42 O.R. (3d) 177 at paras. 40-43 (C.A.); BOA, Tab J

*Royal Bank of Canada v. Société Générale (Canada)*, 2005 CarswellOnt 2201 at para. 1 (S.C.J.); BOA, Tab K

*Webb v. Waterloo Regional Police Services Board* (2002), 95 C.R.R. (2d) 297 at paras. 7-14 (C.A.); BOA, Tab L

10. Expert witnesses take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a *factual inference* that should be drawn from the material.

*R. v. Abbey*, *supra* at para. 71; BOA, Tab G

11. Here, the opinions or “beliefs” expressed by Ms Williams and Mr. Bell purport to be expert opinion (or “belief”) precisely as to how the Court should answer the very legal question of law before it: namely, how the HWT assets are distributable upon wind-up and whether any “priorities” are applicable.

**D. Lack of Relevance to the Subject Matter – Williams Affidavit**

12. As well as being inadmissible as expert opinion evidence on a matter of law, the Williams Affidavit on its own terms does not logically bear on the Proposed Allocation Methodology for the HWT wind-up.

13. The issue on the motion is the appropriate allocation of the assets in the HWT upon termination of the HWT.

14. Ms Williams posits that actuarial principles (and, in some cases, insurance principles) mandate that the liabilities of the HWT are to be calculated “in respect of all claims for insured events occurring up to the date of the wind-up”, and that, by contrast, they require that premiums payable after wind-up for “group term life insurance” not be considered “incurred expenses” or liabilities of the HWT on wind-up. Ms Williams also suggests that Nortel was required by actuarial practice to maintain a present value reserve for the LTD Beneficiaries’ income benefit, and so on wind-up a reserve amount must be given priority in the distribution of HWT assets.

Williams Affidavit, paras. 2, 21 and 29; Opposing Record, Tab 2

15. However, it is the Trust Agreement that provides for the determination (upon termination) of all expenses, claims and obligations arising under the terms of the Trust Agreement and the HWT, and for the inclusion or exclusion of future benefits and claims. The Trust Agreement makes no reference to a priority for “insured” claims over non-insured claims, or a priority for liability for “insured events” having occurred over liability for “future premiums” for group life premiums not yet incurred. Ms Williams’ thesis fails to take this into account, and is premised on alleged actuarial or insurance principles that the Trust Agreement’s termination provision does not reference or invoke.<sup>3</sup>

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<sup>3</sup> Indeed, even if they were relevant, none of the alleged actuarial or insurance principles asserted by Ms Williams prescribe any priorities upon termination of a health and welfare trust. There are no actuarial principles cited that mandate that a reserve be set up to fully fund expected LTD Beneficiaries’ income benefits.

16. Further, this motion is not an inquiry into what “could” have or “should” have been done by way of funding the HWT. How it was in fact funded, and whether particular reserves were in fact set up, is a simple historical, factual question on which Ms Williams offers no evidence.

17. Ms Williams’ thesis in other parts of her affidavit turns on various CRA published statements (Interpretation Bulletins and other publications) about the taxation of health and welfare trusts and other benefit programs. However, CRA statements are not law and do not prescribe any legal requirements for any transactions or arrangements.

*Caballero v. R.*, 2009 TCC 390 at para. 8 (T.C.C.); BOA, Tab M

18. As the CRA itself emphasizes in one of the very documents cited in the Williams Affidavit:

**Notice to the reader:**

- Bulletins do not have the force of law.

Interpretation Bulletin IT 85R2, dated July 31, 1986, attached as Exhibit “B” to the Williams Affidavit at pg. 1 (emphasis in the original); Opposing Record, Tab 2(B)

19. CRA’s publications bear no logical relevance, in any event. These are non-binding statements from CRA as to the tax treatment that it *may* afford to certain arrangements or transactions *if* specified factual conditions exist and/or certain arrangements are in place. The characteristics of a benefit plan such as the HWT are whatever they are in fact, and their reality is not changed by virtue of CRA’s income tax treatment. Rather, it is the characteristics of a benefit plan that determine the tax treatment.

20. The current and historical reality of any funding for the HWT does not change as a result of any CRA criteria, and any speculation about what the funding would or might have been if certain approaches had been taken is irrelevant.

21. In any event, the conclusion that “as a result [of various CRA statements], there would be no accumulation of assets in an HWT to fund life insurance coverage into the future” is contradicted by Ms Williams’ own statement that “[t]he nature of the employer’s legal obligation to make contributions is governed by the terms of the trust agreement.”

Williams Affidavit, paras. 11 and 15; Opposing Record, Tab 2

22. This primacy of the trust agreement is in fact also recognized by Deloitte & Touche LLP in its report on another trust that Mr. Bell cites:

A trust is created by a formal written document known as a Trust Agreement. The Trust Agreement outlines all matters relating to governance such as the number of trustees, the manner in which they are appointed, trustee responsibilities and powers, requirements for meetings, provisions for amending and terminating the trust, for example.

Deloitte & Touche LLP Report, dated January 29, 2004, attached as “B” to the Bell Affidavit, p. 14 (“**Deloitte Report**”); Opposing Supp. Record, Tab 1(B).

23. Moreover, the HWT was established in the context of a (very specific) “Ruling Request Letter” and a ruling from CRA (the “**Ruling**”), as opposed to any other CRA statements. If any inferences are to be drawn from CRA’s treatment of the HWT, it is the Ruling (and the Ruling Request Letter), and CRA’s treatment of the HWT since then, that constitute the relevant context. As set out in the Monitor’s 51st Report, pursuant to the Ruling (and consistent with the express provisions of the Trust Agreement) there was no requirement for funding of all expected



future LTD Beneficiaries' income benefits and no prohibition on the funding of future premiums for Pensioner Life benefits.

Monitor's 51st Report, paras. 36-38; Monitor's Record, Tab 2, pp. 52-54

24. The Williams Affidavit further expresses a thesis based on a misconception of the Pensioner Life benefit and the nature of Nortel's liability for this benefit, and an ensuing flawed contrast of the Pensioner Life benefit to the LTD Beneficiaries' income benefit (and the nature of Nortel's liability for it). The Williams Affidavit asserts that "future premiums paid to third party insurers for group term life insurance are not incurred expenses" (i.e., they are "contingent" only) and accordingly are not deductible under the CRA's criteria for health and welfare trusts, leading to a conclusion that "there would be no accumulation of assets in [a health and welfare trust] to fund life insurance coverage into the future."

Williams Affidavit, para. 15; Opposing Record, Tab 2

25. Ms Williams conflates funding theories with Nortel's obligation to provide the Pensioner Life benefit, which is a non-contingent liability. Once a Pensioner retires, he or she has met all the eligibility requirements for the life insurance and the coverage continues for life, unless he or she ceases to be a Canadian resident. The life insurance policies themselves expressly provide that there is no termination of their benefits.

Sun Life Policies, attached as Appendix "L" to the Monitor's 51st Report; Motion Record, Vol. III, Tab 2(L), pp. 792-93, 795, 797-98 and 861-65

26. Ms Williams' thesis is further premised on lump-sum, reserve-type funding in respect of future years' life insurance premiums being characterized as funding in respect of "contingent" benefits, within the meaning as set out in a 1998 Ontario Court of Appeal decision.

*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 114 O.A.C. 217 at para. 11 (C.A.) ("*Canadian Pacific*"); BOA, Tab N

27. However, the Pensioner Life benefits in the HWT fall squarely within the criteria for a non-contingent liability as set out in the holding in *Canadian Pacific*. Nortel's pensioners are entitled to Pensioner Life benefits for their lifetime with the insurance proceeds payable on death (at any age). That entitlement is not contingent, but rather is certain since the triggering events (namely, retirement and death) are certain (one having occurred and the other certain to occur). The precise total amount of future annual group life premiums to be paid may not be certain, but, as stated in *Canadian Pacific*, that uncertainty does not make the liability a contingent one.

*Canadian Pacific, supra*, at para. 43; BOA, Tab N

28. Further, Ms Williams' statements to the effect that CRA recognizes a distinction between (i) lump-sum funding of future expected LTD income benefits (as being fully deductible when the funding is made); and (ii) future expenses for life insurance premiums (as not being fully deductible when made as a lump sum) is incorrect. In fact, CRA's stated position (whether correct or not, as a matter of income tax law) is that lump-sum funding of future expected LTD income benefits is not deductible in the year of contribution.

CRA Technical News – Health and Welfare Trusts 10302002, p.6, attached as Exhibit "C" to the Williams Affidavit; Opposing Record, Tab 2(C)

**E. Lack of Relevance to the Subject Matter – Bell Affidavit**

29. As submitted above, the Bell Affidavit, as purported expert evidence on a legal principle, is *ipso facto* not admissible as a matter of law. In any event, it is respectfully submitted, the

evidence proffered by the Bell Affidavit on its own terms does not bear on the issue before the Court, being the Proposed Allocation Methodology for the HWT wind-up.

30. In the case of the Bell Affidavit, the entire discussion concerns Mr. Bell's experience with the funding of disability benefits under an ongoing, publicly sponsored, multi-employer trust in British Columbia. His evidence does not address, concern or take into consideration the HWT or the Trust Agreement. Further, the B.C. trust is not only entirely unrelated to the HWT, but it is not distributing its assets or being wound-up.

31. This motion is not about the B.C. trust. The terms and practices of the B.C. trust are not in issue before this Court. Mr. Bell's evidence is not logically relevant to the matters in issue in the motion.

32. The Bell Affidavit further appears to suggest that principles for a wind-up of all health and welfare trusts can be drawn from certain specific employers' "exits" from the ongoing B.C. trust, whereby coverage stops and no payments are made "related to any event occurring after the date of termination". While this may be an accurate description of the one health and welfare plan that Mr. Bell is familiar with, it bears no logical connection to the HWT or the terms of the Trust Agreement that address the parameters of claims upon termination of the HWT.

Bell Affidavit, paras. 48-52; Opposing Supp. Record, Tab 1

33. In addition, the Bell Affidavit, in suggesting that general actuarial principles and practices can be drawn from certain specific practices relating to the B.C. trust, is inherently flawed as there are no actuarial standards or practice requirements in respect of the funding of

self-insured long-term disability income benefits. The Actuarial Standards Board's own criteria for what constitutes accepted actuarial practice states that the *only* explicit articulation of accepted actuarial practice are the Board's "rules and standards." Mr. Bell himself admits that he has identified no "useful public written account providing direction on accepted actuarial practice as it pertains to funding self-insured long-term disability income benefits." Nortel's actuaries, Mercer, confirm that they too are not aware of any actuarial standards or practice requirements specifically designed for settlement of non-pension benefits.

Bell Affidavit, para. 15; Opposing Supp. Record, Tab 1

Mercer Valuation, pg. 4; Monitor's Record, Vol. I, Tab 2(C), p. 109

Standards of Practice – General Standards for the Canadian Institute of Actuaries, pg. 1013, section 1210, attached as Exhibit "A" to the Bell Affidavit; Opposing Supp. Record, Tab 1(A)

**APPENDIX “A” – LIST OF AUTHORITIES IN SCHEDULE “C”**

1. *Caballero v. R.*, 2009 TCC 390 (T.C.C.)
2. *Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 114 O.A.C. 217 (C.A.)
3. *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] CarswellOnt 5952 (Gen. Div.), aff’d (1998), 42 O.R. (3d) 177 (C.A.)
4. *R. v. Abbey*, 2009 ONCA 624 (C.A.); leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.)
5. *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.)
6. *Royal Bank of Canada v. Société Générale (Canada)*, 2005 CarswellOnt 2201 (S.C.J.)
7. *Tavernese v. Economical Mutual Insurance*, 2009 CarswellOnt 3204 (S.C.J.)
8. *Webb v. Waterloo Regional Police Services Board* (2002), 95 C.R.R. (2d) 297 (C.A.)

**APPENDIX "B" – STATUTORY REFERENCES IN SCHEDULE "C"**

***Rules of Civil Procedure, R.R.O. 1990, reg. 194***

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.