

**APPENDIX A**

**Review of Brian Mason Memorandum to Paul Beesley dated April 23, 2012**

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**All the paragraphs in blue within this Appendix A are quotes from the Brian Mason Memorandum to Paul Beesley dated April 23, 2012, and one noted quote from the Letter of Chris Nicholas, OPP Criminal Investigation Services dated Nov. 6, 2012.**

**The responses to the blue paragraphs within this Appendix A are quotes from the Charlotte Urquhart Forensic Accounting Report dated July 30, 2012, and one noted quote from the C. Urquhart e-mail to Brian Mason dated November 2, 2012.**

## **OPP Makes Error in Overall Conclusions**

Brian Mason's conclusions are:

"Upon review of the entire complaint, I have determined that there is no evidence to support charges of fraud, theft or any other criminal code offences. There are no grounds to believe that the Nortel pension committee or its senior executives used deceit or any other fraudulent means that resulted in the deprivation of the HWT or Nortel's long-term disabled employees. This is the criminal benchmark and it was not met."

"Dishonesty on behalf of the Nortel pension committee or that of the senior executives relating to the HWT has not been encountered" [Page 000103]

"It is clear from the interviews that have been conducted for this review that Nortel's pension committee and senior executives were acting in good faith and in the best interest of the company and that of the disabled employees. A decision was made by those that administered the HWT account that was thought to be in the best interest of Nortel and its disabled employees." [Page 000102]

Charlotte Urquhart's Forensic Accounting Report conclusions are:

"Upon conducting a review of additional information and materials received there is evidence to support that during the time Nortel's cash balances were declining between the period of May 2005 to and including April 2006, persons in authority having exclusive care and control of the Nortel Health and Welfare Trust Fund, did breach a fiduciary duty through knowingly misappropriating Trust funds for the unauthorized purpose and use by Nortel to offset declining corporate losses during the aforementioned period between May 2005 to April 2006.

This appears to be a methodical and calculated scheme running over a prolonged term resulting in the misappropriation of approximately \$32 million from the Nortel Health and Welfare Trust Fund for a use other than authorized by this Trust Fund.

The Nortel Health and Welfare Trust Fund was governed by both a Health and Welfare Trust Trustee Agreement, and common law for trusts, as the Nortel Health and Welfare Trust Fund was for the use and exclusive benefit of the beneficiaries.

The \$32 million in funds fraudulently removed from the Trust was applied to the suffering Nortel's cash strapped position to offset the losses identified between May 2005 and April 2006, which resulted in a profit gain in 2006 for Nortel. The removed Trust money created a financial risk to unsuspecting and vulnerable beneficiaries, who relied on the Trust and were unaware of the money taken from the Trust during this period."

## OPP Makes Error by Ignoring Existence of Irrevocable Trust

"This was not the standard policy used by private sector companies operated in Canada and the United States of America. Most companies operated what was called an ASO administered policy that was funded on a "pay as you go" basis." [Page 000102]

- 1) In 1980 Nortel created a Trust Fund to hold the assets in support of its Funded Wage Loss Replacement Plan and did establish the HWT Trustee Agreement to define this Trust's legal terms and conditions. Nortel by creating a Trust could not subsequently shut down the Trust without the consent of the Trust beneficiaries and without paying all the claims and obligations to them as outlined in the signed Trustee Agreement.

Exhibit "A"

[Nortel - Montreal Trust HWT Trustee Agreement Jan. 1, 1980](#)

- 31) Nortel's employer contributions were irrevocable.

- 32) [Nortel - Montreal Trust HWT Trustee Agreement Jan. 1, 1980](#)

Exhibit "A"

"ARTICLE II - TRUST FUND

1. The Trust fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the Employees.

2. All payments made to the Trustee from time to time by the Corporation and designated affiliated or subsidiary corporations and by the employees, together with all profits, increments and earning thereon, shall be irrevocable and constitute upon receipt by the Trustee, the Trust Fund to be administered by the Trustee in accordance with the terms of this Trust Agreement, the Health and Welfare Benefit Plan and the Eligibility Requirements."

- 33) The HWT could not be terminated without notice to the Trustee and without Nortel being responsible to pay to the Trustee sufficient funds to satisfy all claims and obligations, according to the HWT Trustee Agreement.

- 34) [Nortel - Montreal Trust HWT Trustee Agreement Jan. 1, 1980](#)

Exhibit "A"

"ARTICLE IV - AMENDMENT AND TERMINATION

Upon sixty (60) days prior written notice to the Trustee, the Corporation may terminate its obligation to make Employer's contributions in respect of benefits after the date of written notice to the Trustee (hereinafter called the "Notice of Termination.") 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 the Trustee sufficient funds to satisfy all the 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." Furthermore, Nortel did not have the legal right to unilaterally wind-up the HWT without the unanimous consent of the HWT beneficiaries, according to Ontario court precedents for variance of a trust and the Ontario Variance of Trust Act.

- 41) Nortel did not have the legal right to unilaterally wind-up the HWT without the unanimous consent of the HWT beneficiaries, according to the Ontario Variance of Trust Act and court precedents for variance of a Trust

Exhibit "T"

[Ontario Variance of Trust Act R.S.O. 1990, CHAPTER V.1](#)

Exhibit "U"

[Montreal Trust v. Superintendent of Financial Services Decision No. P0307-2008-1, Jan. 7, 2009](#)

"In the Dickson case [Dickson v. Richardson [1981] O.J. No. 2451], the Court of Appeal ultimately refused to approve the settlement varying the trust because it had not received the unanimous consent of all beneficiaries. The Court of Appeal held that since a compromise was a contract to which all parties must consent, and since the court did not have the power to bind known dissentients, the order of the court below amending the trusts could not be supported by the court's inherent jurisdiction in that case. In the case before us, the Applicants have addressed this concern by obtaining a Court order under the Class Proceedings Act, 1992 to bind all possible parties (but for the sole opt out)."

### **OPP Makes Error by Accepting No Dishonesty in Wind-up of U.S. Irrevocable Trust**

"Leading up to 2005, a similar HWT operated by Nortel in the United States of America was wound down and then operated as a standard ASO policy like the one mentioned above. In early 2005, Nortel's Canadian pension committee was looking to wind down their HWT fund as was done in the United States." [Page 000102]

Letter of Chris Nicholas, OPP Criminal Investigation Services dated Nov. 6, 2012 says:

"The OPP commenced a review of the allegations of possible criminal activity involving Nortel's Health and Welfare Trust funds ... It was determined that there was no evidence to support that criminal offences had occurred during the administration of the Health and Welfare Trust."

The C. Urquhart e-mail to Brian Mason dated November 2, 2012 says:

I have attached a PDF of the Nortel Telecom Inc. US HWT Trustee Agreement ("U.S. HWT") dated March 12, 1992. This legal document was found in the attached #8831 Objection to Debtors Motion by US LTD Employee Carmel Totman, filed in the US Chapter 11 court on October 16, 2012.

The relevance of this new evidence is that the terms of the U.S. HWT Trustee Agreement demonstrate that the Nortel executives had no legal right to terminate the U.S. HWT and to distribute this trust's assets to the corporation (See Point 10.2 Termination below.)

My report entitled "Nortel Misappropriation Trust Funds Complaint" explained there was no legal right to wind-up the Canada HWT under the Canada HWT Trustee Agreement and under Canada's trust common law and statutes. Now, we also see that there was no legal right to wind-up the U.S. HWT either, under the U.S. HWT Trustee Agreement and U.S. statutes governing contracts and trusts. So the Nortel executives did exhibit dishonesty when winding-up the Canada HWT after following the lead of the Nortel executives who exhibited dishonesty when they wound-up the U.S. HWT in prior years.

10.2 Termination. The Corporation may terminate the Trust by delivering to the Trustee, at least thirty (30) days prior to the effective date of termination, a resolution of its Board of Directors. If the Trust is terminated, all of the provisions of the Trust evidenced by this Trust Agreement, nevertheless, shall continue in effect until the Trust Fund has been distributed by the Trustee in accordance with the Plan as directed by the Corporation or its duly authorized agent. However, under no condition shall the termination of the Trust result in a distribution to the Corporation of any portion of the Trust Fund.

## OPP Makes Error on No Legal Funding Obligations

"In May of 2005, the pension committee and senior executives knowingly and openly took a moratorium on funding the HWT as it was determined that there was no legal obligation to continue funding the account in this manner. These decisions were made by Nortel lawyers and human resource managers as well as Mercer's financial consulting." [Page 000102]

29) Nortel had a legal obligation to make employer contributions on a sound actuarial basis each year to fund adequately its Health and Welfare Plan, according to the HWT Trustee Agreement.

30) [Nortel - Montreal Trust HWT Trustee Agreement Jan. 1, 1980](#)

Exhibit "A"

"ARTICLE IV - EMPLOYER'S CONTRIBUTIONS

1. The corporations and its designated affiliated or subsidiary corporations agree to make Employer's contributions to the Trust in amounts sufficient to pay any claims which may be asserted against the Trust Fund at a result of the administration of the Health and Welfare Plan, and as may otherwise be required from time to time by this Trust for the purposes of the Health and Welfare Plan, as determined by the Trustee on a sound actuarial basis.

2. The Trustee shall determine or cause to be determined, on a sound actuarial basis from time to time, and in any event, once every calendar year, the level of contributions to the Trust Fund necessary to fund adequately the Health and Welfare Plan.

3. Subject to paragraphs (1) and (2) hereof, the corporation and its designated affiliated or subsidiary corporations shall be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Health and Welfare Plan."

35) [Appendix KKK - Internal Company Manual 1981](#)

Exhibit "N"

The Nortel Internal Company Manual dated in or about 1981 further validates the funding policy of the Nortel disability income benefits within the HWT and therefore indicates the LTD income was not paid on an annual pay as you go basis. The Nortel Internal Company Manual dated in or about 1981 says Nortel's disability income insurance creates an actuarial liability beginning in the year in which the claims are incurred and that this actuarial liability is to be paid at 20 percent per year uniformly over a five year period.

36) This Nortel Internal Company Manual says that Mutual Life, a predecessor of Sun Life is responsible for advice on plan design trends, estimates of outstanding liabilities for future periods and of the level of funding required for expected claims.

"11.02 Long-Term Disability

Funding of actuarial liability at 20 percent per year uniformly over a five year period beginning in the year in which the claims are incurred is acceptable and consistent with the Advance Income Tax Ruling from the Department of National Revenue. Payments are made at fiscal year-end."

1.16 Mutual Life shall advise the Trustees and Northern Telecom of the level of funding required to pay for expected claims.. This advice is to be provided no later than year end for each year. Mutual Life's Group Policyholder Service officer is Mr.. Gerry Ward; their actuary is Mr. Kurt Von Schilling. The phone number is 456-0471/2/3/5."

- 39) The ASO Agreement between Nortel and Clarica Insurance January 1, 1999 validates the existence of annual estimates of disability and survivor reserves, which refutes the statement that the LTD income was paid on an annual pay as you go basis.

Exhibit "Q"

[ASO Agreement with Clarica Insurance Jan. 1, 1999](#)

"Base Fees include the following services:  
assistance with plan design and review  
annual estimate of incurred but not reported claims  
annual estimates of disability and survivor reserves  
maintenance of a plan document and ASO Agreement"

- 40) An internal Nortel report dated May 31, 1999 received by a Nortel disabled employee in a court discovery process showed that Nortel held a \$236,676.44 reserve for a disability incurred claim in her specific name and policy certificate number.

NORTEL NETWORKS  
OTTAWA - Skyline  
May 31, 1999

REVIEW

90002.B.000- [redacted]  
Reserve : \$236,676.44

Active rehab

NAME: [redacted]  
CERT: [redacted]  
OCCUPATION: [redacted]  
AGE: [redacted]  
DATE OF DISABILITY: June 2, 1998  
QUALIFYING DATE: December 1, 1998  
DEFINITION CHANGE: December 1, 1999

Exhibit "R"

[Nortel Internal Document Showing Reserve \\$ Amount for LTD Claimant May 31, 1999](#)

## OPP Makes Error by Ignoring Employer Contributions Taken from the LTD Reserve

42) Page 28 of the Mercer's Valuation of the Obligations of the Health and Welfare Trust as at September 30, 2005 clearly shows that Nortel management was informed that they removed \$18,098 thousands of dollars of contributions from the LTD asset reserve in the HWT. This figure is labelled as negative contributions, distinct from benefit payments made to the LTD. This removal of contributions is contrary to the requirements for irrevocability of employer contributions in the HWT Trustee Agreement and the CRA Interpretation Bulletins and Rules relating to the Income Tax Act for HWTs.

"The following table presents a reconciliation of Trust assets by benefit <sup>19</sup>

	Retiree			Optional		
	Life	LTD	SIB	Life	Total	
Balance at September 30, 2004		61,079	74,524	18,755	18,938	173,296
<hr/>						
Contributions	-	(18,098)	-	2,183	(15,915)	
<hr/>						
Benefit Payments	7,374	11,846	1,487	3,641	24,348	
<hr/>						
Investment income	3,133	3,822	972	977	8,904	
<hr/>						

<sup>19</sup> Figures are in thousands of Canadian dollars

Mercers Human Resource Consulting"

Exhibit "S"

[Appendix GGG - Valuation of the Obligations of the Health and Welfare Trust as at September 30, 2005](#)



## **OPP Makes Error on Nortel Law Department and Mercers Agreeing to HWT's Termination**

"In May of 2005, the pension committee and senior executives knowingly and openly took a moratorium on funding the HWT as it was determined that there was no legal obligation to continue funding the account in this manner. These decisions were made by Nortel lawyers and human resource managers as well as Mercer's financial consulting." [Page 000102]

- 43) The document evidence and the professional standards applicable to Mercer's actuaries indicate that Mercer's would have agreed that Nortel could wind-up the HWT only after meeting its legal obligations for funding the LTD and survivors' income insurance benefits.

Exhibit "D"

[Affidavit of Michael McCorkle, sworn September 27, 2010](#)

"Nortel considered winding up the trust in 2006, but Mercer's and the Law Department's advice was that such an act would trigger an obligation to top up the income plan deficits immediately. Although we did not have a formally approved timeline in place to eliminate the HWT deficit, we did recognize that it was a firm obligation and we planned to return the \$30 million plus taken out of the HWT during 2005 to 2006."

- 44) Mercer's Valuation of the Obligations of the Health and Welfare Trust as at September 30, 2005 has a date of February 6, 2006 and the scope of work in this document is described to be valuing the net obligations of the Trust in the event they were to be fully funded as of September 30, 2005. Mercer's could not have approved the plan to wind-up the HWT and stop making employer contributions into the HWT beginning May 2005 before it had prepared this report.

Exhibit "S"

[Appendix GGG - Valuation of the Obligations of the Health and Welfare Trust as at September 30, 2005](#)

### **"Scope of Work**

Mercer Human Resource Consulting ("Mercer") was engaged to value the net obligations of Nortel Networks Corporation's ("Nortel") Health & Welfare Trust ("the Trust"). A description of the work to be performed was provided in our November 7, 2005 letter to Norma Crowder.

The results of this valuation represent the net obligations of the Trust in the event they were to be fully funded as of September 30, 2005. They are intended for use by Nortel in reviewing the Trust and its ongoing operations and may not be suitable for other purposes. In particular, the results of this valuation are not appropriate for accounting purposes or determining contribution levels, without modification. Other purposes may require additional determinations."

- 45) Furthermore, Mercer's actuaries must follow accepted actuarial practice given their profession, and it is clearly not accepted actuarial practice to wind-up an HWT, while its corporate sponsor is ongoing, with the intent to remove assets from the HWT that were required to pre-fund the incurred claims of the Nortel disabled and survivors' income benefits. Professional actuaries must describe their valuations clearly, and make them in the context of the HWT Trustee Agreement and the benefit plan documents.
- 48) Mike McCorkle, the former Assistant Treasurer and Treasurer, swore an affidavit explicitly saying that Mercer's and the Law Department's advice was that such an act [winding-up the HWT] would trigger an obligation to top up the income plan deficits immediately.

Exhibit "D"

[Affidavit of Michael McCorkle, sworn September 27, 2010](#)

"8. Nortel considered winding up the trust in 2006, but Mercer's and the Law Department's advice was that such an act would trigger an obligation to top up the income plan deficits immediately. Although we did not have a formally approved timeline in place to eliminate the HWT deficit, we did recognize that it was a firm obligation and we planned to return the \$30 million plus taken out of the HWT during 2005 to 2006."

## **OPP Makes Error on LTD Income Being Pay-As-You-Go Rather Than Funded Plan**

"Nortel's long-term disabled employees were funded by Nortel on a "pay-as-you-go" basis using the HWT as a payment mechanism. Numerous non-pension employee benefits, including life insurance, medical, dental and survivor income benefits were funded through the HWT in the same manner as the long-term disabled employees and as a result there was a commingling of assets in the HWT. Nortel would use the HWT to pay all employee benefits on a "pay-as-you-go" basis and at the end of each month would replenish the account through payments from Nortel and insurance providers. These remittances would have approximately a two month lag for payment to the HWT to replenish the account."  
[Page 00096]

- 49) Chart 3 shows that the HWT had two purposes. One purpose was for the HWT to be a conduit for the administration of receiving required employer contributions to pay for annual pay as you go benefits. The second purpose of the HWT was for the accumulation of employer contributions, together with investment income, to fund disability income insurance and survivors' income insurance sponsored by Nortel, and not through third party insurers.
- 50) It has not been disputed in the court process that the HWT assets were intended to pay for the incurred claims of the income of the disabled and survivors of deceased Nortel employees. (J. Geoffrey Morawetz made a decision that there were also assets in the HWT to pay for the future life insurance premiums that Nortel promised to pay on behalf of the pensioners. This was not the position put forward with supporting expert evidence by the dissenting Nortel disabled. No appeal was permitted of J. Morawetz's decisions in respect to the Nortel HWT and the Nortel disabled.)

Exhibit "X"

[Endorsement HWT Distribution J. Morawetz Nov. 9, 2010](#)

[Endorsement Leave to Appeal HWT Distribution J. Weiler Jan. 7, 2011](#)

[Supreme Court of Canada Leave to Appeal J. LeBel, J. Fish, J. Cromwell June 9, 2011](#)

- 51) The sworn affidavit of Michael McCorkle confirms the differential treatment within the HWT of the pay as you go medical and life insurance benefits versus the funded LTD income benefit.

Exhibit "D"

[Affidavit of Michael McCorkle, sworn September 27, 2010](#)

3. The HWT was set up as a tax efficient vehicle by Nortel many years ago to promote the health and welfare of Nortel employees, and at the same time, to administer payments for Nortel pensioners' medical costs and life insurance coverage. The medical costs and life insurance premiums of the pensioners, and of the active and long term disabled employees were paid on the basis of what we called pay-as-you-go. Nortel made employer contributions into the HWT annually to reimburse the HWT for the employees' and pensioners' medical claims and the life insurance premiums paid to Sun Life.
4. At some point before my time at the Toronto office, the Pensioners' life insurance premiums stopped being paid for by employer contributions on a pay-as-you-go basis and began to be paid

out of the HWT assets. We regarded the reserve assets for the Pensioners' Life Insurance Plan to be in run-off mode, as Nortel had determined earlier in the decade that it was not obliged to pre-fund pensioners' future life insurance premiums.

5. The income benefits for the long term disabled were treated differently, as these specifically involved the need to make employer contributions into the HWT to accumulate assets and produce investment income to pay for the future income of the employees that had become long term disabled.

## **OPP Makes Error by Ignoring the Stated Purpose of Trust Assets**

The HWT Financial Statements categorize the employee benefits plans as either Reserved Plans (plans for which the Fund holds assets) or Paid as Incurred Plans (benefits which are reimbursed by Nortel on an ongoing basis).

### **1. DESCRIPTION OF THE FUND**

The Health and Welfare Trust Fund (the "Fund") was established by Nortel Networks Limited (the "Administrator") on January 1, 1980 in order to fund the employee benefits program for all eligible employees of Nortel Networks Limited and its Canadian subsidiaries (collectively, the "Company") under the following plans:

*Reserved plans (plans for which the Fund holds assets)*

- (a) Long-term Disability Plan
- (b) Survivor Income Benefit Plan
- (c) Pensioners' Insurance Plan
- (d) Employee – financed Group Life Plan (Group Life – Part II)

*Paid as Incurred Plans (to be reimbursed by Nortel Networks on an ongoing basis)*

- (e) Dental Plan
- (f) Extended Health Plan
- (g) Group Life Plan (Group Life – Part I)

Exhibit "Y"

[HWT Financial Statements - Appendices O-RR](#)

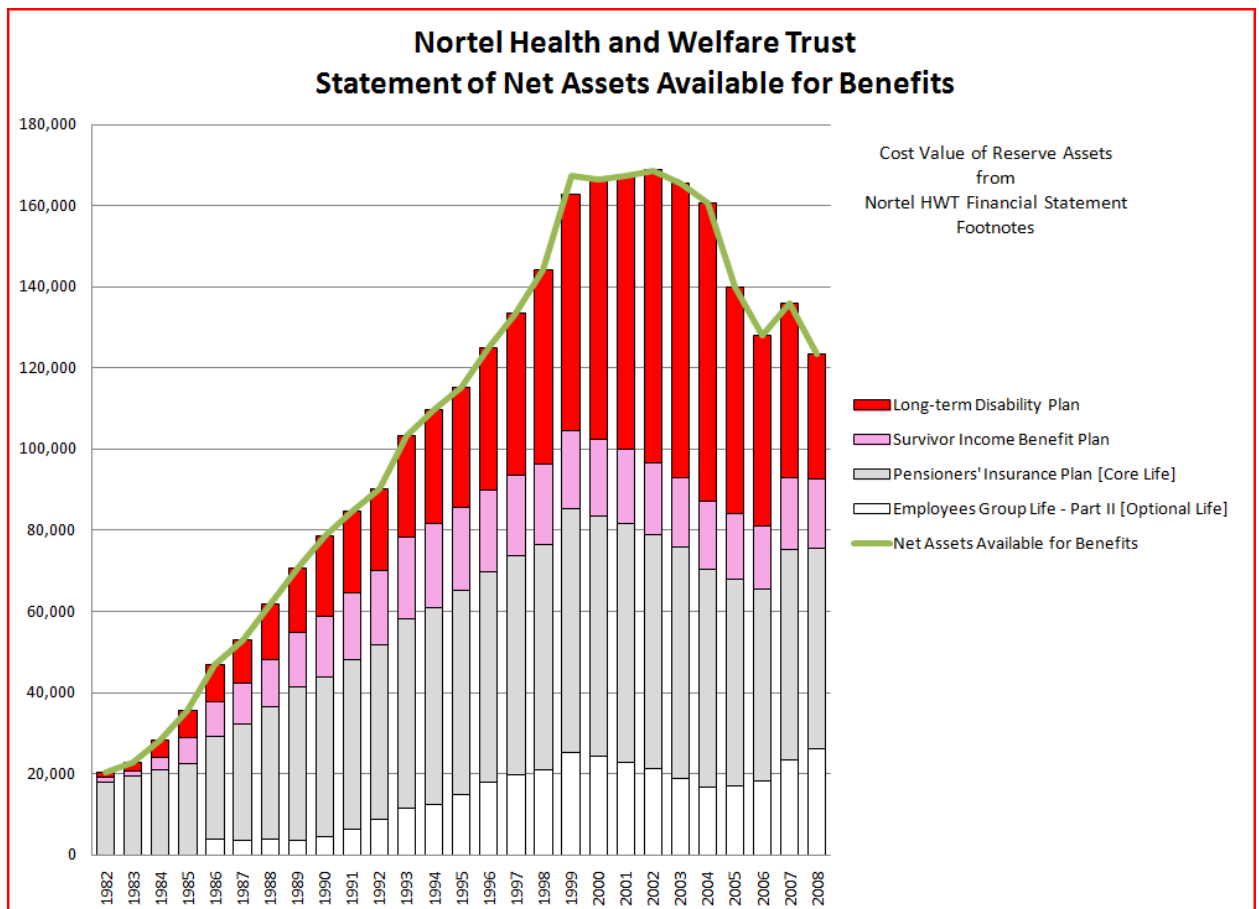
52) The sum of the asset reserves for the different Funded Plans in the Health and Welfare Trust equaled total net assets during the period 1982 to 2008 as shown in Chart 4A. No Medical and Dental Claims and the Core Employer Paid Life Insurance Premiums for the Active and LTD Employees are listed under the liabilities being funded in the HWT. There is no residual amount of assets in the HWT available to pay for these pay as you go benefits.

Exhibit "Y"

[HWT Financial Statements - Appendices O-RR](#)

53) In Chart 4B The Health and Welfare Trust Financial Statements Footnote 4 provides cost value of reserved assets for just five sub-accounts: Long Term Disability Plan, Survivor Income Benefits Plan, Survivor Transition Benefit Plan, Pensioners' Insurance Plan (Retiree Life), and Group Life - Part II (Optional Life).

**CHART 4A:**



**CHART 4B:**

**NORTEL NETWORKS  
HEALTH AND WELFARE TRUST FUND  
Statement of Net Assets Available for Benefits  
December 31, 2004  
(in thousands of dollars)**

	2004	2003
<b>INVESTMENTS (Note 3)</b>		
Bonds and debentures		
Federal	\$ 23,568	\$ 29,712
Provincial	85,297	88,720
Corporate	30,083	23,575
	<u>138,948</u>	<u>142,007</u>
Cash and short-term investments	6,563	8,639
	<u>145,510</u>	<u>150,646</u>
ACCRUED INTEREST	2,190	2,401
DUE FROM SPONSORING COMPANY	20,290	19,991
LONG-TERM RECEIVABLE (NOTE 3)	521	521
	<u>23,000</u>	<u>22,913</u>
<b>TOTAL ASSETS</b>	<b>168,510</b>	<b>173,559</b>
ACCRUED CLAIMS PAYABLE (Note 2)	(8,012)	(7,995)
<b>NET ASSETS AVAILABLE FOR BENEFITS (Note 4)</b>	<b>\$ 160,498</b>	<b>\$ 165,564</b>

ON BEHALF OF NORTEL NETWORKS LIMITED

**NORTEL NETWORKS  
HEALTH AND WELFARE TRUST FUND  
Notes to the Financial Statements  
December 31, 2004**

**2004 Cost Value of Reserves Assets**

Long-term Disability Plan	\$73,516
Survivor Income Benefit Plan	16,490
Survivor Transition Benefit Plan	-
Pensioners' Insurance Plan [Core Life]	53,918
Employees Group Life - Part II [Optional Life]	<u>16,576</u>
<b>NET ASSETS AVAILABLE FOR BENEFITS</b>	<b>\$160,500</b>

**4. FUTURE BENEFIT PAYMENTS AND RELATED RESERVES**

As at December 31, 2004, the estimated value of obligations under the various benefit plans exceeded the value of reserved assets in the Fund. The funding status of the Reserved Plans and Survivor Transition Benefit Plan at year end is as follows:

(a) Plans requiring a series of benefit payments

Certain plans entail a regular series of benefit payments to a claimant. The estimated present value of the future payments anticipated to be made after December 31, 2004 in respect of claims which commenced before that date and the related value of assets reserved in the Fund are as follows:

	2004		2003	
	Present Value of Future Payments (\$'000)	Cost Value of Reserved Assets	Present Value of Future Payments (\$'000)	Cost Value of Reserved Assets
Long-term Disability Plan	\$ 104,138	\$ 73,516	\$ 102,641	\$ 72,735
Survivor Income Benefit Plan	17,068	16,490	18,198	17,026
Survivor Transition Benefit Plan	359	-	1,055	-
	<u>\$ 121,565</u>	<u>\$ 90,006</u>	<u>\$ 121,894</u>	<u>\$ 89,761</u>

The actual benefit payments are charged against the Fund in the period in which they are paid.

(b) Plan requiring lump sum payments - Pensioners' Insurance Plan

An actuarial valuation of the Pensioners' Insurance Plan is performed by an independent actuary every three years.

The most recent actuarial valuation of this Plan, dated as at January 1, 2002, indicates that, at that date, the actuarial liabilities amounted to \$74,931,000 and the market value of the assets amount to \$63,551,000. Therefore, there exists a funding deficiency of \$11,380,000. The interest rate actuarial assumption is 7.0% per annum.

The Plan, as at December 31, 2004, has assets reserved with a book value of \$53,918,000 (2003 -- \$57,059,000).

(c) Plan requiring lump sum payments - Group Life - Part II

Employees have the option to purchase additional group life insurance coverage up to age 65. This is fully employee funded, and the value of the assets reserved at December 31, 2004 totaled \$16,576,000 (2003 - \$18,744,000).

**2004 Cost Value of Reserve Assets**

Pensioners, Active and LTD Employees Medical and Dental Benefits Plans	NONE
Active and LTD Employees Core Life Insurance Plans	NONE

- 54) The HWT Financial Statement for 2007 contains a change in accounting policy, which is to exclude from sponsor company contributions and from benefits paid the amount relating to medical, dental and company paid group life, as these are not benefits for which the Fund has assets.

"4. COMPARATIVE AMOUNTS

Due to the implementation of the basis of presentation as outlined in note 2(c) above, comparative amounts for 2006 have been materially changed to reflect current accounting methodology. 2006 investment in bonds were increased by \$21,814 to reflect the market value of these investments. 2006 "change in unrealized gains" were increased by \$2,735 to reflect the decrease, year-over-year in the unrealized gain and losses", and the balance of \$ 19,086 was added to "Opening Net Assets Available for Benefits".

In addition, the comparative figures in the statement of changes in net assets has been changed to exclude from sponsor company contributions and from benefits paid the amount relating to medical, dental and company paid group life, as these are not benefits for which the Fund has assets. In 2007, the Fund changed its policy to billing the sponsor company directly for the benefits paid on its behalf rather than recording benefits paid and a matching contribution. Accordingly 2006 contributions and benefits paid were reduced by \$38,128."

Exhibit "Y"

[HWT Financial Statements - Appendices O-RR](#)

## **OPP Makes Error on No Employee Paid Source Deductions for LTD Income Benefits**

"Insurance Companies and source deductions did not fund the long term disabled; they were solely funded by Nortel alone." [Page 000102]

- 55) Employees paid source deductions to buy optional LTD income benefits. Starting in 1995 and until 2006, the Core Long-Term Disability Benefit paid by Nortel covered 50% of FLEX Earnings and the employees could purchase Optional Long-Term Disability Benefit to "Raise 50% benefit to 70%." 2007 and later, the Core Long-Term Disability Benefit paid by Nortel covered 50% of FLEX Earnings and the employees could purchase Optional Long-Term Disability Benefit to "Raise 50% benefit to 66-2/3%." The cost of the Optional Long-Term Disability coverage was unchanged at 0.45% of FLEX Earnings during 1995 up to 2007, rising to 0.50% in 2008. Prior to 1995, the Core Long Term Disability Benefit paid by Nortel covered 70% of FLEX Earnings.
- 56) Nortel employees paid for their optional disability insurance coverage using a combination of FLEX credits paid for by the employer and payroll deductions from their salaries. A Nortel employee who later became disabled was paying \$9.61 per pay period or \$250 per year as shown in the Nortel FLEX benefits confirmation statement for 1997. The same Nortel employee was paying \$11.33 per pay period or \$295 per year for the optional coverage in 1999.

Exhibit "Z"

[Nortel FLEX benefits confirmation statement 1997](#)

Exhibit "AA"

[Nortel Your Default Benefit Statement 1999](#)

- 57) The format of the Nortel FLEX benefits confirmation statement was more informative in 2000, where we see that Nortel paid \$467 per year for the core 50% coverage and the employee paid \$339 per year for the optional increase in coverage from 50% to 70% of pre-disability income. Interesting to note is that the employee paid more than his fair share of the disability insurance coverage considering his cost was 42% of the combined employer and employee cost, whereas the incremental coverage bought was just 29% of the total coverage amount. The combined employer and employee cost of \$806 per year was just 1.07% of pre-disability income.

Exhibit "BB"

[Nortel FLEX benefits confirmation statement 2000](#)



## **OPP Makes Error on Tax Efficient Vehicle Not Having Legal Obligations**

"On January 1st, 1980 Nortel established a HWT as a tax efficient vehicle through which Nortel could continue to provide employee benefits by agreement between Northern Telecom Limited (a predecessor company to Nortel) and Montreal Trust Company (Trustee)." [Page 00096]

25) The HWT having a function as a tax efficient vehicle, adds to Nortel's legal obligations in respect to the appropriate use of the assets within the Trust, since access to the HWTs tax benefits are legitimate only when the HWT structure and activities comply with the Income Tax Act provisions and Canada Revenue Agency Interpretations and Rulings for HWTs and Wage Loss Replacement Plans.

### 26) [IT85R - Pre 1986 Health and Welfare Trusts for Employees Jan. 20, 1975](#)

Exhibit "K"

"2. Health and welfare benefits for employees are sometimes provided through a trust arrangement under which, the trustees (usually with equal representation from the employer (or employers' group)) and the employees (or their union) receive the contributions from the employer or employers (hereinafter referred to as the employer) and in some cases from employees to provide health and welfare benefits that have been agreed to between the employer and the employees (or their union) ). Under such an arrangement an employee is not considered to receive or enjoy a benefit at the time of the employer's contribution is made to the trustees."

### 27) [IT428 - Wage Loss Replacement Plans April 30, 1979](#)

Exhibit "L"

"7. A plan for purposes of paragraph 6(1)(f) of the Act and section 19 of the ITAR must be an "insurance" plan. Those provisions are not applicable, therefore, to uninsured employee benefits such as continuing wage or salary payments based on sick leave debits, which payments are included in income under paragraph 6(1)(a). It is to be noted that, while a plan must involve insurance, it is not necessary that there be a contract of insurance with an insurance company. If, however, insurance is not provided by an insurance company, the plan must be one that is based on insurance principles, i.e., funds must be accumulated, normally in the hands of trustees or in a trust account, that are calculated to be sufficient to meet anticipated claims. If the arrangement merely consists of an unfunded contingency reserve on the part of the employer, it would not be an insurance plan."

## **OPP Makes Error on HWT Containing Surpluses Without Legal Obligations**

“A substantial fund of approximately \$100-120M had been created to administer dental and medical benefits, life insurance, survivor and long term disabled employee benefits for Nortel. This fund was established during the high tech boom of the 1980's when financial surpluses were extensive and it was used as a tax benefit to Nortel.” [Page 000102]

37) The CRA Interpretation Bulletins and Rules for HWTs do not permit corporations to make tax deductions for new employer contributions when there is an other than temporary surplus in the Trust Fund relative to the incurred claims for benefit plans within the HWT. So the statement that the fund was somehow established in the 1980's when financial surpluses were extensive in order to achieve tax benefits does not make sense, since the HWT could not contain other than temporary surplus assets.

Exhibit "O"

[CRA Ruling Document # 9412155 - HWT Surplus - July 26, 1994](#)

Exhibit "P"

[Canadian Pacific Case on LTD Benefits Not a Contingency Reserve Sept. 10, 1998](#)

## **OPP Makes Error on Nortel's Continuation of the HWT Being Benevolent**

“When the PIC realized that the commingling of funds in the HWT made it difficult to transition from the HWT to a standard ASO policy, they decided to continue with the HWT, even though this was coming at an added cost because they were no longer receiving substantial tax benefits to utilize this type of investment vehicle.” [Page 000102-3]

13) There were no changes in the Canadian income tax law before, during or after May 2005 to April 2006 that lessened the tax benefits to Nortel associated with its HWT.

## **OPP Makes Error on Plan to Replenish the Fund is Not Subjective Awareness**

“Nortel's pension committee and executives were being as open and transparent as they could have been in the situation. The reduction to the HWT was realized by Nortel as a long-term financial obligation to the HWT and it was agreed to replenish the fund to the \$100M it was at before the moratorium on payments took place.” [Page 000103]

“If not for the subsequent collapse of Nortel and bankruptcy filing, it is believe the Nortel pension committee and senior executives would have ensured that the HWT had been replenished the entire \$30M.” [Page 000103]

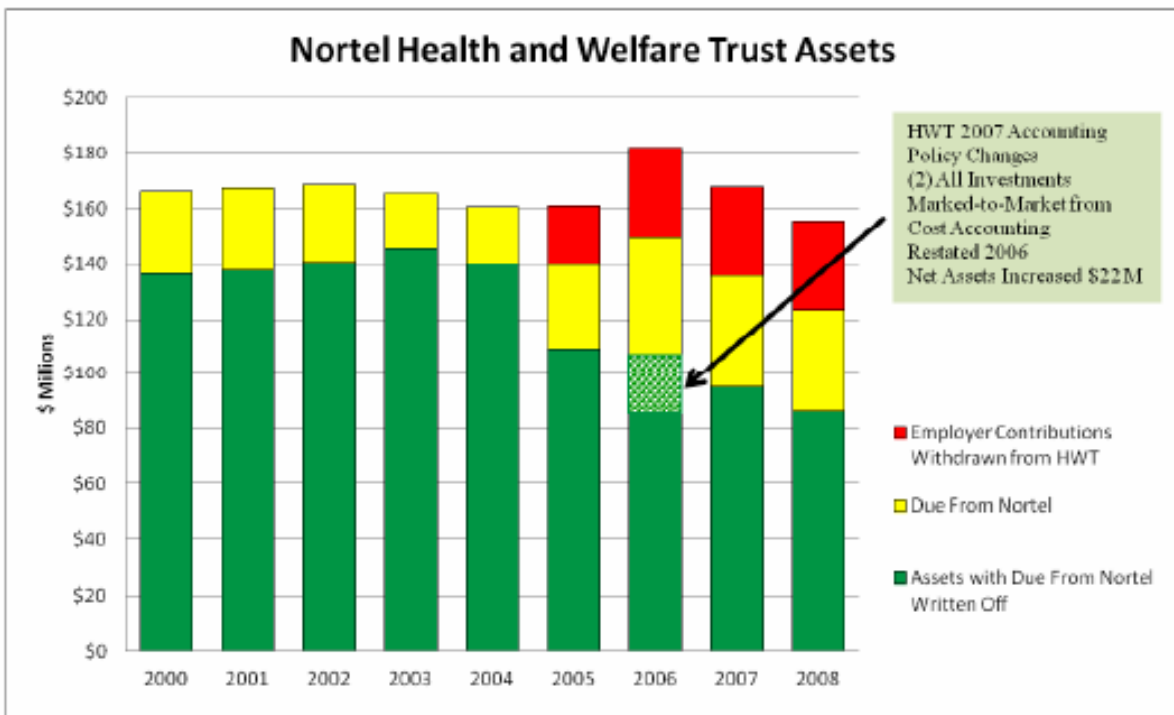
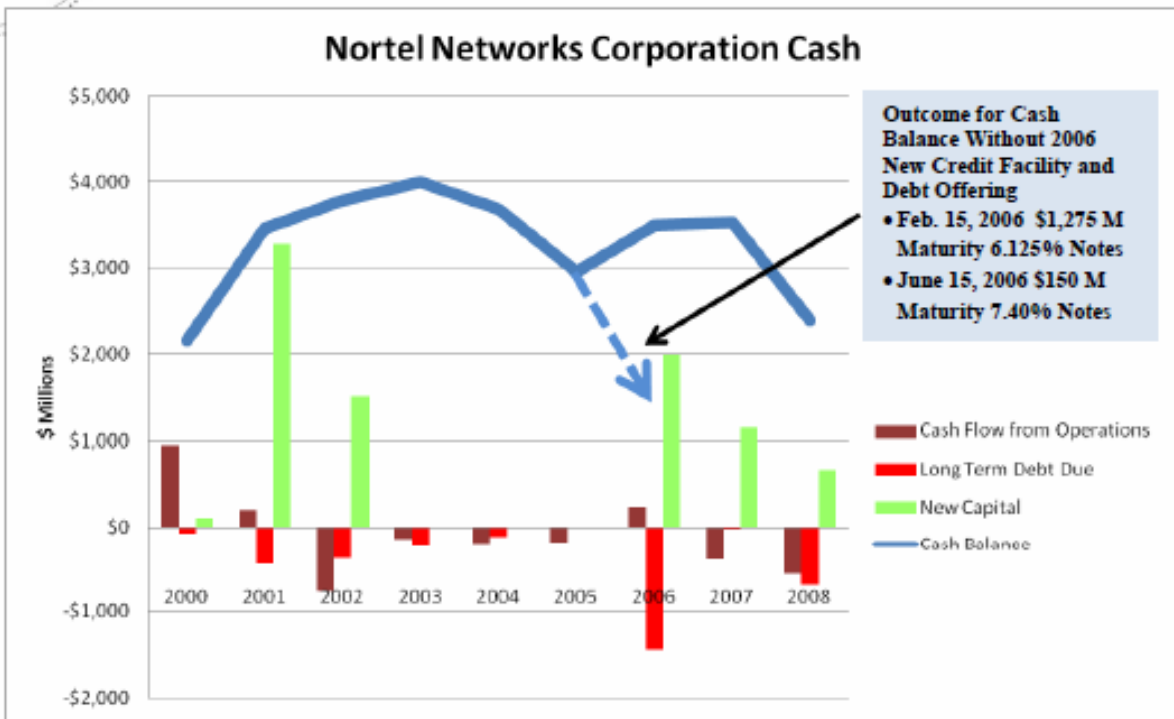
14) After April 2006 there was subjective awareness when Nortel devised a plan to repay the money they knowingly had misappropriated for unauthorized use from the HWT funds.

Exhibit "F"

[Fifty-First Report of the Monitor, dated August 27, 2010](#)

PDF Page 28, Point 81

CHART 1:



## **OPP Makes Error on Open and Transparent Decisions Affecting Trust Beneficiaries**

“Nortel's pension committee and executives were being as open and transparent as they could have been in the situation. The reduction to the HWT was realized by Nortel as a long-term financial obligation to the HWT and it was agreed to replenish the fund to the \$100M it was at before the moratorium on payments took place.” [Page 000103]

“The entire process of Nortel taking a moratorium of funding the HWT and looking into winding down the HWT was an open and transparent decision made by the pension committee and senior executives. There was nothing nefarious or deceitful encountered in this business decision.” [Page 000103]

- 58) There was no disclosure made to the Nortel LTD beneficiaries of the following facts that were severely detrimental to their interests and for which all of Nortel's Pension Policy Committee of Directors, Pension Investment Committee of Senior Executives and the HWT's external Trustees, Royal Trust and subsequently Northern Trust, had a fiduciary duty to act in the interests of the HWT's beneficiaries. Failure to disclose HWT activities that are contrary to the interests of the Nortel LTD cannot reasonably be considered to be not nefarious or not deceitful and to be open and transparent as they could be in the situation.
- Nortel's intent to wind-up the HWT, a Bona Fide Trust, containing the asset reserves specifically there to fund the Nortel disabled current and future income as prescribed in the HWT Trustee Agreement (in addition to the survivors' income insurance asset reserves);
  - Not making reimbursement payments into the HWT for pay as you go benefits paid by the HWT during May 2005 to April 2006;
  - Not making required employer contributions for the newly determined Nortel disabled beneficiaries contrary to the Trustee Agreement;
  - Using the asset reserves relating to the Trustee Agreement's requirement for Nortel to pay the current and future income of existing Nortel disabled (and survivors') beneficiaries for the unintended purpose of paying the pay as you go benefits during May 2005 to April 2006. The HWT did not contain any assets whose purpose was to pay for these latter expenses since these latter expenses are paid by Nortel's reimbursement payments going into the HWT each year on a pay as you go basis. Pre-funding of these expenses within the HWT is not permitted in the Income Tax Act and the CRA Interpretations and Rules governing HWTs.

## **OPP Makes Error on Employees Did Not Know About the HWT**

“Employees and former employees of Nortel were not informed of the existence of the HWT until at least 2007 nor were they promised that their benefits would be provided through a health and welfare trust. None of Nortel's collective bargaining agreements referenced the HWT or promised to provide benefits through a health and welfare trust.” [Page 000096]

- 59) Nortel LTD employees received T4s in 1996 from the Health and Welfare Trust and T4As in 2003 from the Nortel Health and \_\_\_\_\_, and so the employees were informed about the existence of the HWT.

Exhibit "CC"

[T4A 2003](#)

Exhibit "DD"

[T4 96 & T4A's 2003 & 2004](#)

- 60) On March 15, 1999, Nortel disabled employees received a Notice Long Term Disability (Ltd) - Deduction Changes, in which it was disclosed that CPP-QPP contributions would no longer be a payroll deductions from their wage loss replacement income. The reason given provides another disclosure that Nortel's "wage loss replacement plan" was funded under the Northern Health and Welfare Trust:

"Why the Change?

The change stems from our consultants' review of tax issues related to the LTD Program. That review determined that, since the LTD plan is a "wage loss replacement plan" funded under the Northern Telecom Health and Welfare Trust (HWT), CPP/QPP contributions should not apply to LTD benefit payments. The other required change is that LTD benefits will be reported on a T4A slip rather than a T4 slip."

Exhibit "EE"

[Notice Long Term Disability \(Ltd\) - Deduction Changes March 15, 1999](#)

61) Nortel acknowledged that its Health and Welfare Trust held a reserve from which reimbursement for current and future claims liability for approved LTD claims is paid in correspondence with one Nortel disabled employees' lawyer.

This Nortel disabled employee's lawyer asked 3 questions in a letter to a Nortel lawyer dated November 5, 2002:

- i. Is Nortel's LTD plan underwritten by an insurer?
- ii. Does Nortel's LTD plan have a segregated fund for financing benefit payments?
- iii. What measures has Nortel taken to provide funding for future LTD benefits in the event of an assignment in bankruptcy?

The Nortel lawyer responded to the 3 questions in a letter dated November 8, 2002:

No, our LTD plan is self-insured.

Contributions are paid into and claims are paid out of a Health & Welfare Trust.

Nortel's contributions are for core coverage. Employees contribute for optional coverage using company-provided FLEX credits.

I will not engage in this exercise in speculation. I would, however, point out that there is a Health & Welfare Trust that holds a reserve from which reimbursement for current and future claims liability for approved LTD claims is paid, as noted above.

Exhibit "FF"

[Correspondence between LTD's Lawyer and Nortel April 26, 2002 to Feb. 3, 2003](#)

- 62) Nortel first disclosed its long term disability plan was self-insured in its 2005 and subsequent benefit handbooks on or about p. 2:

"Did you know: Most of Nortel's Health & Group Benefits, including short-term disability, long-term disability, medical and dental/vision/hearing care, are self-insured. This means that Nortel plays a role similar to that of an insurance company for its employees. In other words, the Company assumes the risks and pays the claims directly from its net income or retained earnings. The insurance company only provides administrative services such as claims processing."

Exhibit "GG"

[http://ismymoneysafe.org/Nortel2/2005 FLEX Benefits Enrolment Guide.pdf](http://ismymoneysafe.org/Nortel2/2005_FLEX_Benefits_Enrolment_Guide.pdf)

[http://ismymoneysafe.org/Nortel2/2005 FLEX Benefits Handbook.pdf](http://ismymoneysafe.org/Nortel2/2005_FLEX_Benefits_Handbook.pdf)

[http://ismymoneysafe.org/Nortel2/2005 Guide D'Inscription Au Regime d'avantages sociaux a la carte.pdf](http://ismymoneysafe.org/Nortel2/2005_Guide_D'Inscription_Au_Regime_d'avantages_sociaux_a_la_carte.pdf)

[http://ismymoneysafe.org/Nortel2/2005 Brochure d'avantages sociaux a la carte.pdf](http://ismymoneysafe.org/Nortel2/2005_Brochure_d'avantages_sociaux_a_la_carte.pdf)

[http://ismymoneysafe.org/Nortel2/2006 FLEX Benefits Enrolment Guide.pdf](http://ismymoneysafe.org/Nortel2/2006_FLEX_Benefits_Enrolment_Guide.pdf)

[http://ismymoneysafe.org/Nortel2/2006 FLEX Benefits Handbook.pdf](http://ismymoneysafe.org/Nortel2/2006_FLEX_Benefits_Handbook.pdf)

[http://ismymoneysafe.org/Nortel2/2008 FLEX Benefits Explore Your Possibilities.pdf](http://ismymoneysafe.org/Nortel2/2008_FLEX_Benefits_Explore_Your_Possibilities.pdf)

[http://ismymoneysafe.org/Nortel2/2008 FLEX Benefits Handbook.pdf](http://ismymoneysafe.org/Nortel2/2008_FLEX_Benefits_Handbook.pdf)

[http://ismymoneysafe.org/Nortel2/2009 FLEX Benefits Enrollment Guide.pdf](http://ismymoneysafe.org/Nortel2/2009_FLEX_Benefits_Enrollment_Guide.pdf)

[http://ismymoneysafe.org/Nortel2/2009 FLEX Benefits Handbook.pdf](http://ismymoneysafe.org/Nortel2/2009_FLEX_Benefits_Handbook.pdf)

[http://ismymoneysafe.org/Nortel2/2009 New Hire Benefits Information.pdf](http://ismymoneysafe.org/Nortel2/2009_New_Hire_Benefits_Information.pdf)

- 63) The disability self-insured disclaimer provided in Nortel's 2005 and subsequent year employee benefit brochures is false, misleading and deceitful. Starting in 2005, Nortel did not maintain adequate financial reserves to fund its disability insurance as it should have done in playing its role similar to that of an insurance company. The Nortel Health and Welfare Trust wind-up distribution funds just 35% of the December 31, 2010 actuarial liabilities estimated by Mercer's for the current and future income within the incurred claims of the Nortel disabled former employees.