

August 27, 2010

I. 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.

II. 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:

- (A) Does the HWT constitute one trust or several trusts?
- (B) 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)?
- (C) Which claims participate on a termination of the HWT?
- (D) How should the Trust Fund be shared among participating beneficiaries?

III. DISCUSSION

1. 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.
2. 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.
3. The HWT was established as a health and welfare trust for tax purposes. Health and welfare trusts are subject to classic trust law principles.

4. 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.

A. Does the HWT constitute one trust or several trusts?

5. 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.
6. 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

7. 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.
8. *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.
9. *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.
10. *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?

11. 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.

(i) *The Trust Agreement*

12. 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.
13. 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".
14. "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.)

15. 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.

16. 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.

(ii) *Representations to Revenue Canada*

17. 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.*”

18. 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.

19. 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.

(iii) *Administrative and Accounting Practices*

20. The manner in which Nortel administered the HWT and performed financial reporting may also be relevant.
21. 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.
22. 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.
23. 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

24. 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.
25. 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.
26. 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.
27. 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.

B. 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)?

28. 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

29. 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.
30. 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:
- (A) 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.
- (B) 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.¹ It is unlikely that these

¹ 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.

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.

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

31. 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.

(i) *Resulting Trust*

32. 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.²

33. 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

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

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);
- 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.

(ii) *Constructive Trust*

34. 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.³ The participants in the optional life insurance plan may claim that a constructive trust should be imposed on the Optional Life Account.
35. 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.⁴

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.⁵

³ 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.

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

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

36. In *I.U.O.E., Local 894 v. Smurfit-Stone Container (Canada) Inc.*,⁶ 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.
37. 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.
38. The situation of the optional life participants is distinguishable from the situation of the annuitants in *Re Nortel Networks Corporation*,⁷ 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.

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

⁷ *Nortel Networks Corp. (Re)*, 2010 ONSC 3061.

39. 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.*,⁸ 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. 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.
40. 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

41. 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

42. 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.

⁸ *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)

C. Which claims participate on a termination of the HWT?

43. In order to determine which claims participate on termination, we will consider:
- (i) the beneficiaries of the HWT;
 - (ii) the termination provision in Article VI of the Trust Agreement (the “Termination Provision”); and
 - (iii) application of the Termination Provision to claims of the beneficiaries.
- (i) *The beneficiaries of the HWT*
44. “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”.
45. 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.”
46. 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.
- (ii) *The Termination Provision*
47. 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.)

48. 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.

(iii) Application of the Termination Provision to claims of the beneficiaries

49. 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.⁹ The beneficiaries with vested benefits are

⁹ 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.

pensioners and people in receipt of LTD benefits, survivors' income benefits and survivor transition benefits.

50. 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.
51. 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."
52. 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 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:
 - (i) *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.
 - (ii) *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.
 - (iii) *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.
 - (iv) *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.

- (v) *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.
 - (vi) *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.
 - (vii) *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.
53. As noted previously, claims that do not participate on a termination of the HWT may nevertheless remain valid claims in the Nortel estate.
54. 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.¹⁰ 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.
55. 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:
- (i) claims of all beneficiaries of the HWT actually incurred before the Notice of Termination; and
 - (ii) 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.

¹⁰ Other than the special case of STBs in pay.

D. How should the Trust Fund be shared among participating beneficiaries?

56. 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.
57. 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.
58. 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.¹¹ 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.
59. 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.
60. If there is a single trust, the Trust Fund should be distributed *pro rata* among the claims entitled to participate on termination.

IV. SUMMARY OF CONCLUSIONS

61. The HWT is a single trust fund.
62. 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.
63. All claims and obligations arising up to the Date of Termination participate on a termination of the HWT.
64. 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

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

value of future benefits: pensioner life insurance, LTD income, SIBs and STBs in pay and, on balance, LTD life insurance.

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

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