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Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE

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

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HEARING OF MOTION

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--Held before the Honourable Mr. Justice Morawetz, at 361 University Avenue, Toronto, Ontario, on the 29th and 30th days of September, and 1st day of October, 2010.

APPEARANCES/COUNSEL:

F. Myers, G. Rubenstein and M. Wagner, for Ernst & Young Inc., Monitor

D. Tay, A. Merskey and J. Stam for Nortel Networks Corporation, et. al.

W.E. Pepall, for the Former Employees

T. McRae, for Nortel Canadian Continuing Employees

G. Finlayson, for the Noteholders

K. Rosenberg, for the Superintendent of Financial Services

A. MacFarlane, for the Chapter 11 Unsecured Creditors' Committee

L. Barnes and G. Grove, for the Board of Directors

L. Rogers, for Northern Trust Company

K. Maher, for Flextronics (Canada) Inc.

B. Wadsworth, for the CAW

P. Engelmann and F. Campbell, for Susan Kennedy, Court Appointed LTD Beneficiaries' Representative

J. Rochon and S. Tambakos, for the Dissenting LTD Beneficiaries

September 29, 2010
--- Court opens
--- Brief scheduling discussion.

THE COURT: We can deal with this later, but trying with that plan, if it all holds together, I see no reason why this matter cannot be completed sometime tomorrow afternoon. All right. Okay, Mr. Myers.

MR. MYERS: Thank you, Your Honour.

As Your Honour knows, this is a motion by Ernst & Young, in its capacity as the Monitor of Nortel Canada, for approval of a proposed methodology for the allocation of the corpus of the Nortel Health and Welfare Trust and ancillary distribution of funds to the beneficiaries by the year end, as contemplated in the Settlement Agreement previously approved by the Court.

The motion is a product of a huge amount of effort on the part of representatives and officers of the Monitor, Nortel, actuaries, the employees and former employees' representatives and their counsel and creditor representatives.

The motion, as you know, commences as a

Monitor's proposal, but now has the consent of the court-appointed representatives for the beneficiaries of the trust.

There is representatives of the Employees LTD, as well as the former employees, pensioners, and their independent counsel. The motion also has the consent of the CAW for its members.

It's also supported by the court-appointed representative counsel for the current employees, even though they are not receiving anything, they are also not challenging any entitlement either. As I mentioned previously, creditor representatives are here and do not oppose. There may be an issue as to how payments out of the trust can be treated in a subsequent CCAA claims process, and how that will work, and that issue may come up at a later stage.

All of these parties who have consented and filed consent to various forms will tell you of their consent and have also reserved their rights so that supporting the Monitor's proposal, but if the Court were to determine that the proposal is not to be approved, they

all retain their right to assert different outcomes.

Now, yesterday my friend, Mr. Rochon, purported to deliver a motion returnable today seeking a different outcome, to which no one consents and which you have heard would require substantial additional argument on numerous grounds, because all parties and all estimates I have given you and all preparation is all based on the consent order, and in our submission Mr. Rochon's motion is not properly before you and ought not to be heard today or this week.

As Your Honour intimated, right now, it's not clear if the motion is actually brought on behalf of any party or anyone with an interest. Moreover, on the 17th of this month, we had a 9:30 scheduling appointment before Your Honour, and at that point Mr. Rochon knew of the consent, and it was clear on the 17th only the Monitor's motion was proceeding today, and there were many consents that were to be part of the basis of the motion.

It was clear on the 17th that only the

Monitor's motion was scheduled for today, so that the Monitor's allocation if approved would be approved, and if not, everyone would be reserving their rights, and then there would be a dispute with the relevant parties.

Under the Settlement Agreement, if litigation emerges as to entitlement to benefits, those inter beneficiary claims and the cost -- any cost resulting from those claims, are for the HWT of the trust.

Up to this point, the Monitor's proposal and certain capped fees of independent counsel have been born by the Nortel estate.

So, it's a very different thing if there is to be a motion for a different outcome that is not, in my submission, and I believe it's shared by the parties, there is no motion before you today for another outcome.

In fact, that would yield an inter beneficiary piece of litigation that would have to be scheduled and coordinated and have very different costs and entitlement consequences.

By way of preliminary comment, Mr. Rochon's motion if it's ever to be heard, it should be scheduled at another time, but it will be

unnecessary if the Monitor's motion is approved today, and that was well understood on the 17th of September at the 9:30 appointment.

THE COURT: Would it be fair to say, and I would invite Mr. Rochon to comment, that I did note in more than one factum that there was a submission made that the Court had the option of either approving what I will call "The Settlement Consent" as is, or not to approve? And it struck me that Mr. Rochon's motion is to direct another alternative.

MR. MYERS: It's our submission that another alternative is not for today. Nobody prepared for that. There is no material for it. In order to get this motion going to get money out hopefully by year end, as opposed litigation to keeping all beneficiaries at bay for however long that would take, and subjecting everyone against that, the Monitor's come forward with this, which you will hear me submit is the practical, sufficient way to proceed. That's for today, and the only thing for today as a result of the 9:30 appointment we had.

THE COURT: Is there anything you want to add preliminary?

MR. ROCHON: Briefly. At the case conference, as you will recall, we had a motion to seek representative order at that time, and it was based on the fact that Koskie Minsky had backed off and new counsel had been moved into the shoes of Koskie Minsky that we felt that it would not be productive to move forward for representation at that time.

The other thing that I recall from that case conference with Mr. Myers, in response to my insistence -- if you will -- that this hearing deal with the allocation issue and consider the various scenarios based on legal principles, and it was based on Mr. Myers' assurance at that time that, yes, the parties will have an opportunity and you will, Mr. Rochon, to make submissions dealing with the legal principles which are to apply to the scenarios.

It was quite obvious that we were championing Scenario 3, and Mr. Myers and the Monitor and other counsel were with Scenario 2.

So, at that time everyone was put on notice we

were not only challenging Scenario 2, but we were advancing Scenario 3, and at that time I was comforted by Mr. Myers' assurance that today's hearing would deal with legal principles applicable to the recommendation/or acceptance of one of these two scenarios.

So, it was on the basis of that assurance, that we did not believe it was necessary to bring a motion, and then we saw the factum arrive yesterday and the day before, and suddenly they were relying on consent and it's based on settlement or approve or don't approve, and my friend took us by surprise, and that is why we delivered the Notice of Motion this morning, and that we handed up to Your Honour through your clerk, and that is the basis upon which we approach this hearing.

There is the importance of the issue here, the division of approximately $80 million of two groups, and I represent a portion of one of those groups; that is, the Dissenting Disabled People.

So, because of the importance of the issue, we believe that we shouldn't be constrained to consider "yay" or "nay" on the single proposal

advanced by Mr. Myers and his team. It should be open for the Court to consider all scenarios; that is, two or three, based on legal standards for that analysis and considering the evidence in support of that position. This is not an issue that should be decided on a standard, short legal entitlement. Thank you.

THE COURT: Thank you. I think, as far as the disposition of the motion, I would expect that whatever arguments you will make would cover a lot on the points. If there has to be a formal disposition, we could revisit the motion and provide further argument on it.

MR. MYERS: I think you will hear it in argument here. This motion has not been brought forward at the settlement. You don't see Red Cross in our material, but it's not a binary outcome. My friend is incorrect to say Scenario 2 or 3.

If every creditor interest and beneficiary is unleashed, there is many potential outcomes. The piece of litigation could involve many potentialities. There are LTD Beneficiaries who have this option and pension beneficiaries

with this option, and there are Ltd. Beneficiaries who could be 64 years old, so they care more about the pension benefit, and they don't care as much as to what happens in the next little while. So the potentialities are far more than binary.

So, that piece of litigation is far more significant than this motion, but we do submit to you, we think we have the right answer and reasonable interpretation that Your Honour will adopt, and the significant and substantial and unanimous support of the representatives is a very significant indicator that we are correct in that regard. But if we are wrong or Your Honour is otherwise not able or inclined to make the order we seek, then we can deal with how to deal with potential for other litigation and deal with all other possibilities, and others reserved by other parties.

The outcome the Monitor seeks today, Your Honour, is in our submission a fair and reasonable balance of the various interests of Nortel the trust fund that is currently inadequate to meet all claims against it.

The proposed allocation is practical and can be implemented without undue cost and delay, because it's readily applicable on objectively verifiable standards, and I will come back to that.

The Monitor, of course, recognizes the hardship that has been felt by all the beneficiaries of the HWT, the Health and Welfare Trust, as a result of Nortel's insolvency and the deficit in the trust, and the Monitor recommends that the proposed allocation methodology reasonably addresses the hardship as far as available funds allow, and in the most practical manner available, consistent with the most reasonable interpretation of the trust agreement.

Those who are seeking to oppose bringing forward historic grievances and raise hardship issues that simply don't change the issues before the Court today.

I propose to make submissions in the following areas. First, a bit about the process of how we got here, and then on what is really the sole legal issue before you, the interpretation of the trust agreement. In our

submission, the terms of the trust agreement and the claims and benefits to be paid on the termination of the trust are those that are currently being paid or certain to be paid as of the date of termination.

Under that understanding of the clause, pensioner and LTD life insurance benefits qualify for inclusion, but the employee optional life benefit does not quality, and I will show you why for each.

I will then, after speaking to the legal issue, I will speak briefly to some of the material filed by my friend, Mr. Rochon, and for the most part, in our submission, it's inadmissible expert opinion on the question of law. It seeks to directly interpret the trust agreement or speak to legal priorities.

I will give an overview on examples just so Your Honour has a context in which to hear and weigh and consider Mr. Rochon's submissions.

The bottom line is the tax issues that the affidavit raise, his issue about historical actuarial funding standards and alleged hardship on a group comparative basis is simply not relevant to the issues before you

today.

The Monitor brings the motion then, Your Honour, as a result of a settlement agreement approved by the Court and following leave to appeal was denied, and that calls for the distribution of Health and Welfare Trust in 2010, and I quoted the relevant portion in paragraph 6 of our factum and the Monitor's report has it in full.

It is a daunting task to get the distribution done to something in the order of 18,000 or 20,000 beneficiaries, including survivors and LTDs by year end and individualizing, and so there is an importance to getting this matter on and heard. And the practicality to adopt on objective and readily verifiable outcome to get money distributed at the time when benefits are otherwise poised to end under the settlement agreement as ordered.

The company, Nortel, has no economic interest in the distribution, the amount to be distributed themselves, but it has an interest in claims that survive.

In addition, Nortel has to cause the trustee of the trust to take whatever steps are to be

taken to wind up the trust, and that is a very substantial act outside of the ordinary course of Nortel's business, and one, therefore, that the Court would be expected to supervise under the initial order.

The Monitor, as Your Honour knows, has as well expanded powers to seek power and direction on any matter, and in this case the Monitor is of the view more generally as an Officer of the Court, that it's important to assist the parties in bringing about an early resolution of the HWT issue if possible.

Now, in June of this year, after the settlement agreement was implemented in June, the LTD Beneficiaries' court-appointed represented retained the firm of Sack Goldblatt Mitchell to represent their interest in the HWT, distinct from the Koskie firm, who you will note is not here today. They act for everyone, and thought it advisable not to participate in this proceeding.

In July, the former employees' representative retained the Lerner firm to represent their interest with respect to pension benefits under the HWT. The CAW sent its pensioners

and survivors as well, and, of course, the Court appointed representatives chose their own counsel, and those counsel signed confidentiality agreements so to be enable to access detailed financial information about the trust and history, which given that some of it is 30 years old is not perfect, but it was provided to all.

In addition, the Monitor facilitated access to Mercer, the Nortel actuaries were made available to representatives of independent counsel and their actuaries. The Monitor facilitated conversations, investigation, and asked its counsel to look at the trust agreement and asked Mercer to do an evaluation of liability, and took the unusual step as you will see in Volume 1 of the Monitor's report, the Monitor published counsel's opinion on the appropriate outcome in order to allow counsel to form their own opinions. And that's an important point for you today, that there are legal principles at play, but it's not in a vacuum. It's an unusual circumstance where a legal opinion has been put out and everyone has had a chance to look and comment on it,

and then consent to it. Consent to its implementation.

The Monitor also assisted to fulfill the request of the LTD Beneficiaries' representatives. So that Mercer prepared allocation statements for all of the non-pension beneficiaries, and then a second set of numbers evolved.

Those numbers, of course, are not relevant to the actual legal determination, but help people to make informed decisions. So there is a substantial amount of work done to involve all interested parties, representatives, counsel, and experts as necessary.

The Monitor expressed the view in paragraph 109 of the report, that the interest of the beneficiaries had been represented by the four sets of counsel and the Court-appointed representatives appointed to date.

Now, in the last 48 hours, I forget if it was yesterday or the day before, Mr. Rochon advised that he will rely on an Affidavit of Ms. Plante that was filed in this motion back in August.

Your Honour may recall from the September 17, 9:30, we circulated a schedule and asked people to say what they were relying on, and Mr. Rochon was relying on the affidavits of Williams and Bell, but otherwise his motion would then not be scheduled, and said he needed until the 24th to file additional affidavits of Bell and Williams and Ms. Urquart, and then we hear yesterday, Plante's affidavit is in, and we see a factum challenging aspects of independent counsel. Once again, on the commercial list we go to 9:30 appointment because time is at premium, and we rely on counsel and statements and schedules put forward so we have a fair and appropriate hearing. We are before you with the adequacy and appropriateness and the breadth of effort made by independent counsel, and it's inappropriate and Ms. Plante's affidavit should not be considered by you today.

Among the relief to be sought by the Monitor, including approval by the Court for appointment of independent counsel for the purpose of this motion, these are people who

participated in good faith in the insolvency process, and in the Monitor's submission it's proper they receive the protection from those who might be inclined to make mischief for counsel or others in their professional capacities.

The legal issues. Turning to the merits of my point. The legal issues today were set out in paragraph 26 of our factum, page 14. Issue "E" is the principle issue, and the group that does not qualify, and then "D", I am not sure if that is in the factum. The basis for seeking the relief is not clear.

Nothing changes between "B" and "D". The case law -- Mr. Rochon then goes to the case law. It's clear that the issue is determined on the documents in any event. The distribution is driven by the intention of documents, so "B" and "D" will be effectively resolved in the same issue, and that issue, if Your Honour may turn the page and to paragraph 29 of the factum, turns on the termination clause in the trust agreement that governs this trust.

Interesting, my friend puts in an affidavit from Mr. McCorkle who says he was employed

from '97 to 2009, and then purports to give his subjective interpretation of what the agreements mean, even though they were drafted 17 years before he was employed, and Your Honour knows, and my friend, Mr. Rochon, has put the Ventas case before you, page 8 of that case before the Court of Appeal, recites the Eli Lily decision, Supreme Court of Canada decision.

> "The evidence of subjective belief of what a contract means. Contractual interpretation is a matter of conjecture interpretation based on the facts as existed."

As Your Honour knows.

And the interpretation before you, under this clause, you will see in the first sentences:

> "On termination, the trustee has to satisfy all expenses, claims, and obligations arising under the trust agreement up to the date of termination, but the trustee."

-- in the second sentence --

> "Also has to determine the amount of money necessary to pay and

satisfy."

-- and here is the next phrase:

"All future benefits and claims to be made under the plan in respect to benefit and claims up to the date of notice of termination."

So, two phrases, all claims and expenses and obligations, in the first sentence, and then up to date of termination, and then all future benefit and claims to be made under the plan up to the date of notice of termination, and then these are the two phrases that are dealt with and reconciled in Goodmans memo, which is at tab 2 B of Volume 1 of the motion record. Page 99 of the record. Page 12, paragraph 48, the bullet point:

"It is clear that any claims actually made and obligations actually incurred up to the day date of notice of termination, these would include for example the reimbursements of medical bills, life insurance payments to people who died, and income payments to the beneficiaries. What is not clear is which future benefits

and claims to be paid. The phrase future benefits and claims is not defined, and while some meaning may be given to the word future, meaning should also be given to up to the date of notice of termination."

And that is the tension.

Future could be everything. Every beneficiary could say, I am a future claimant, but it's only future claims up to the date of determination.

Paragraph 49 of the memo of Goodmans, they understood you cannot take away vested rights. That is the decision of the Supreme Court of Canada.

So, what is there on top of vested rights that could be future claims that exist up to the date of termination, and paragraph 51 and 52, provides what we submit is the answer.

"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 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 and claims' that can be considered to have been made or incurred prior to the *notice of termination*.
>
> 'Future benefits and claims' may be further interpreted to also include claims that have not been made at the date of The Notice of Termination, but that without termination would have been made in the future."

It's too narrow to say only the claims that arise before termination can be claimed, because that ignores the word "benefits", because it's not just paying claims. This pays benefits too, and it ignores the word "future."

So, future benefits, which may not be claimed but which can be seen to be accrued or incurred up to the date of notice of termination, and we interpreted and the Monitor submits means that the benefits that certainly would have been paid in future are included.

Now, if I could ask you to turn up Mr. Rochon's factum. Paragraph 66, page 24 of the factum. And one of the nubs, one of the two nubs of his arguments, is the second last sentence of 66:

> "As discussed, the benefit provided by Nortel is that of the payment of premiums only."

So, what he says and what Ms. Urquart says and then the actuaries rely on, is the only thing Nortel promised to give the pensioners is an insurance premium. One year of premiums. That is the promise. That is the benefit. And with respect, that's simply not correct. And if --if Your Honour could pull up volume 2 of the motion record? Page 616 of the record. You may want to start at 599, sorry. This is the "Retiree Benefit Handbook" for Nortel.

599.

THE COURT: Okay. I have that.

MR. MYERS: If you turn to 616. The page numbers don't come well through, but it starts, "Retiree Life Benefits".

THE COURT: I have it. The easiest way is to go from the bottom of the page, so I have January 2006?

MR. MYERS: Yes. There are several brochures for all types of benefits, and this is the general retiree program.

The COURT: As you are going through this, given the volume of material, I have not been through all of these particular brochures.

MR. MYERS: This is the only page I am taking you to. This brochure explains the benefits being offered and starts at the top, Nortel offers two company paid life options for individuals who retire under the program, and you are asked to select one option. Option one, a $10,000 death benefit, or, option two, a $10,000 death benefit, plus $25,000 life insurance. It talks about tax consequences, and then:

"The coverage option you select

will remain in effect throughout your retirement and the benefit will be paid to the designated beneficiary in the event of your death. Benefit proceed are non-taxable to the designated beneficiary, regardless of the option you select."

Nortel did not promise to give its employees an annual amount to fund a premium for insurance policy. It promised its employees a benefit that would remain in effect throughout their retirement to be paid to beneficiaries or its estate.

Mr. Rochon recites the Air Products case, Supreme Court of Canada. Which says:

"Employee booklets of this type are binding. That is the promise."

This coverage does not end at age 65 or 70. Many of us in our law firms of elsewhere may have insurance coverage that ends when we leave or when we turn 65, or our agents may have said get a term policy that goes for a five or ten-year term.

Now, much can get confused if we get into terms of art and state what policy is what.

We said in our report it's permanent insurance, and Ms. Urquart says no, it's one year term life.

The vehicle by which Nortel fulfills its promise, by which the HWT fulfills its promise. It could be an insurance policy. Nortel could have self insured, or could have bought a different policy every year. The promise, the benefit, was a fixed amount of money that will remain payable throughout the employees' retirement and be paid.

The promise does not end. It's not term insurance in the phrasing of something that ends at the age 65 or a five-year term.

As I said, the policy terms themselves do not particularly matter. The understanding is, what is the promise made? What is the benefit, because that is what the clause in the trust agreement speaks to? The benefit.

The future benefit that is incurred -- said to be incurred up to the date of termination.

Now, Mr. Rochon in his factum says we did not respond to all evidence as to whether it's a term or life or renewable policy, because the evidence was in the record that the promise

was a permanent benefit not contingent. All that has to happen to a pensioner to collect the benefit is that they have retire, and then they have to pass away. And that is a certainty, given that they have all retired up to the date of termination, there is a certainty that they will pass away.

The same with LTD beneficiaries. They have insurance too, and as long as they are on LTD, it's a certainty they will pass away on LTD, or they will pass over to become pensioners.

Let me contrast that with optional life. You are at your employment, and you have the option to take the life insurance while employed. You may take it, you may not, and if you take it, it only lasts while the employee is employed.

So the employee leaves, and the benefit ends. There is no future liability.

In the memo, at tab B, we say the promise has been fulfilled. The obligation. They received what were promised.

Now, in the HWT, in the accounting for the trust, there is $18 million that has been accounted for to be reserved for optional

life.

The difficulty is that there is no liability for that money to attach to, because if they die as of the date of termination, they will have been paid, but if they are alive at date of termination, there is no more benefit to receive. The benefit isn't permanent, and that surplus arose through claims experience changes over the years. Some years premiums go up and some down, and there have been adjustments back and forth between the insured and Nortel and the trust, but as employees have left over the years, they have not got refund contribution. Money has been left in the HWT and designated by accounting to the reserve fund, but it's no part of the terms of this trust that employees who don't die have claim to that money.

Now, I know the current employees, representatives for example, could reserve rights to change that right down the road, but right now nobody is claiming that money for optional life. We've said in our memo why there is no resulting or constructive trust and money cannot go back to Nortel anyway,

because Nortel owes money to the HWT, and so at best would be a set off.

So that all beneficiaries that participate will benefit from the $18 million being available, but that is not a windfall to them, because the trust is under water.

Now, Mr. Rochon argues in his factum: "Can't we say that some medical or dental benefits for LTD beneficiaries might be incurred with a certainty? We know right now that some people are sick and will incur future medical and dental."

In our submission, that is a very slippery slope. As a practical matter, Mercer tells us there is $250 million worth of claims that will swamp everyone down to significant reductions. So, I am not sure Mr. Rochon really wants to go down that slope.

In any event, as I said before, everyone can argue that there is some element of future benefit for themselves, but the Monitor's submission is that the words of the agreement are best interpreted that claims have to exist with certainty, and the way that is determined is objective. Objectively worded from the

wording of the benefit.

The wording of this benefit is, you have permanent right to receive $10 or $25,000 when you die. That is what the benefit that I took you to says. It's objectively verifiable from the benefit itself. It doesn't turn -- the existence of the entitlement does not turn on any individualized facts or conditions.

Might an LTD beneficiary get better? Maybe there will be a better outcome? Who, what, how and why is all up in the air whether they need drugs tomorrow. It requires an individual determination, and, in my submission, when you look at the wording of the trust agreement, and see that it's talking about future benefits and claims up to the date of notice of termination, it must be directing you to a decision that can be made. A practical decision that could be given effect to. A decision that flows from the wording and objective meaning of the benefits. Not -- it can't be required. There is nothing in this that says go have a trial where each individual instance has to be determined in order to participate in the winding up.

In our submission, to give the interpretation that these words can reasonably bear the benefits by the terms are certain on the date of termination. That is how to give this clause sense, practically, objectively.

And where that takes us then is to our Monitor's supplemental report tab B. Tab B of the Monitor's report. The thin one.

This is the revised appendix showing different outcomes, and the outcome we propose today is outcome two, which has the dotted line around it. So you see the pensioner's life?

THE COURT: So this supplements and supercedes 142 to 145 of the report?

MR. MYERS: Yes. What changed was Mercer was able to put a value on the optional life value for the LTD, and that has tweaking to the other numbers.

So you see the pensioners life will have a call on $35 million of it. The LTD future income will be $26.98 million. The optional life for LTD is to get them to retirement. Optional life, and then there is the survival benefit, but not the large optional life.

And you will see in column 3, the column

Mr. Rochon says his clients want, there is nothing for pension life. The LTD income goes up to 57, but there is nothing for LTD life. So to sacrifice LTD in order to avoid pensioner life.

In our submission, column two properly reflects those claims, which are vested as of the notice of termination for which are certain to be made, based on an analysis of the objectively verifiable terms of the benefits.

Now, I will turn as briefly as I can to a few words on Mr. Rochon's material. In our submission, the expert material before you is inadmissible. An affidavit telling you how to interpret the trustee or priorities of law. Mr. Bell tells you his opinion on priority. Those are questions of law. If you could turn up my book of authorities, not for the memorandum of law. It is the book of authorities re: HWT. Tab L, the decision of the Court of Appeal in the Webb case, page 7, paragraph 12.

In this case, the issues upon which it was proposed two witnesses would give opinion

evidence on matters of law which are within expertise of the trial judge in which he was required to determine, and it goes on to rule issues of law inadmissible.

More pointedly, the Royal Bank case at tab K, the decision of Justice Ground, Professor Geva put in an affidavit on "Bills of Exchange", may be the leading expert in the common wealth world.

In my view paragraphs 5, 6, paragraphs 27, 31, 33 are comprised of an analysis of Canadian and English law, which has been incorporated into Canadian domestic law by virtue of section 9 of "The Bills and Exchange Act", relevant to this case, an analysis of how the law is developed, and submissions on how the law should be developed and even as to how the summary judgment should be decided. I believe it to be so the courts in Ontario do not accept expert evidence as to domestic law, and I have no precedents to the contrary.

The content of these paragraphs clearly should be included in the facta. Submissions of counsel and submissions on domestic law, the application to the domestic law and issues in

this proceeding and to some extent public policy matters relating to the issues in this proceeding.

The evidence of Ms. Williams and Mr. Bell and Ms. Urquhart, to the extent they urge upon you an interpretation of law, of tax law, of the outcome of the legal interpretation of the termination provision of the trust agreement, were questions of priorities, questions of law and are inadmissible.

But then they go farther, and they purport to tell you that under actuarial principles HWTs were to be funded a certain way and be taxed in a certain way. Fine. That's irrelevant to how they are to be distributed. If it said distributed funds based on how funded and adjust for differences, fine, but this doesn't. This says based on a determination of liabilities.

So, whether actuaries required funding or the tax man allows or disallows accountability is not the issue of law before you. More than that, they take it further.

What Ms. Williams does is say, as a result of how I say you should have funded and what the

tax law is, Your Honour should accept a different set of facts.

In my submission, experts cannot give opinions on hypotheticals to change the facts, and the best example is paragraph 46 of Mr. Rochon's factum, page 15. The top of the page, last sentence:

> "The payment of premiums for future coverage period would not be an acceptable defence for an employer, and there would be no accumulation of assets in the nature of coverage into the future."

So, because the premiums are deductible in some way, you have to assume they would be deducted, and therefore there could be no accumulation within the trust relating to pensions -- pension insurance.

The problem is, tax law does not dictate the facts. It's the other way around. The facts determine how the trust is taxed. You cannot look at an interpretation bulletin and say because of that, the facts didn't happen, when in fact they did. Despite Ms. Williams' belief of there being no accumulation of

assets for coverage, there was.

If you turn to Volume 1 of the record, tab J. That is the ruling of Revenue Canada from 1979, page 269, page 3 of the ruling.

Paragraph E, Group Life Insurance Plan. If you start in the middle of the paragraph, seven lines down:

> "Contributions, both the active employees and companies, not immediately applied against claims and expenses carrier will be deposited and transferred to a sub account called the pension insurance fund."

So, in order to be deductible only pay this year's premium. The tax ruling anticipates that some contributions will not be immediately applied and will be deposited in a sub account called the pensioner's insurance fund.

The next paragraph at present:

> "The pensioner's insurance fund, totalling approximately $11 million with Mutual Life Insurance Canada has agreed to transfer these funds to the trust fund."

So not only is she wrong about the tax. I don't know how this fund -- this trust fund was set up on the basis that there wouldn't be accumulation of monies referable to insurance, and the Monitor tells you at paragraph 47 of this report as of December 31, '09, there is $30.7 million there.

So, all of these arguments, that because of tax law they had to do it a certain way, and had they done it that way, there will be no money available if we don't give any money, they try to change the facts with expert evidence, rather than looking at the facts. And the same thing is done, the flip side. They say for the LTD income benefits, the ongoing income while disabled. Both Williams and Bell say that actuarial principles would require HWT or Nortel to prefund them in full. So, nothing for the life insurance, even though there is, and their life disclosure payments should be prefunded in full. They run into the exact same problem. The facts are different.

The same, page 269, at the top of the page. Dealing with long-term disability plan at the

top of 269, second full sentence:

> "The company's contribution of the trust will be sufficient to satisfy all claims; however, the company may from time to time wish to make additional increased contributions based on an actuarial evaluation or some other reasonable basis."

So, they are only putting in amounts to cover claims. They might want to fund actuarial for other things and put in additional contributions, and what we know today is that what is in the LTD income reserve, paragraph 58 of the Monitor's report is $15.7 million as of December 31, '09. The total liabilities as of December 31, 2010, will be $77.3.

So, again, Williams says they must have prefunded everything. They didn't. Facts are what the facts are. You cannot take tax law or actuarial principles and assume the facts away.

Moreover, when asked a question of opinion, when in the very ruling that was the basis for this trust's formation, the contrary appears.

But in addition to all of that, you cannot

change the facts with your opinion. These opinions have nothing to do with the issues under the trust agreement.

The one single fundamental issue before you, what is the meaning of the phrase "future benefit"? Historic facts and historic actuarial principles and debates over what tax policy may or may not have applied are not relevant.

The test is: What do the words of the trust agreement analyzed in the scope of the actual facts, the proven facts, mean?

Finally, you have an affidavit from Ms. Urquart which advocates a position rather than setting out a position of independence, but it's principally based on funding, because of what they see as historic funding, which derives an outcome, and that I submit is irrelevant, and then there are various emotive phrases used to characterize Nortel's underfunding. What they call a loan in some places, and then shown as a due to shareholder, but it also talks about money removed from the trust, and then paragraph 4.

There is no question Nortel did not fund all

amounts to meet all liabilities of the trust. Both the Monitor's report and Exhibit RR, and Ms. Urquart's chart show the amounts went up and down over time, but there was a general trend of up. Some years they paid them off and some it grew.

It's also clear that there was a significant increase in the amount of underfunding in 2005-2005 when Nortel did not make contributions because it was thinking about winding the trust down, but there is no evidence before you to support any allegation of misappropriation, distinct from ongoing funding that was used and there was without doubt underfunding. But a failure to pay is not the same as a misappropriation.

Mr. McCorkle in his affidavit says it is obvious. If Nortel had known that it was going to end up insolvent and leave employers underfunded, they may have made different decisions. But nothing turns on -- I mean, Mr. McCorkle's evidence sounds very innocent. They were looking at winding down the trust in 2005, but that has no effect on what is going on today. In fact, maybe another day if ever,

but it's certainly not before you today. So, Ms. Urquart's affidavit and her characterizations of underfunding that occurred is again of no consequence. There is an outright error in her material that I should point you to. If you have her affidavit?

THE COURT: Where will I find it?

MR. MYERS: It should be in this week's motion record. I don't know if there is another name. Responding? It's the thinnest, and has four short affidavits and was delivered this week. This affidavit of Ms. Urquart, Your Honour, page 19. In looking, 2005, 2006, Nortel did not pay contributions. So money was used to fund benefits and was not reimbursed. And Ms. Urquart did an analysis and you see there was $32 million of HWT assets removed. Another way of saying underfunding.

THE COURT: Just a moment. Okay. Paragraph 30. All right.

MR. MYERS: There were $32 million in assets removed over the two calendar years of 2005, 2006, which funds were used to pay pensioners'

medical benefits and active and employed LTD benefits, life insurance premiums, and employer contribution.

Sorry, money was used and not supported by contributions that should have been, to pay pensioners medical benefit and active LTD medical and life, not pensioner and life.

And if you look at the chart on the next page, if you would. And then in the red square at the bottom of the page, estimated $16 million spent on medical claims of pensioners.

So, what was said in the material is $16 million went to pension and medical claims but then if you go to paragraph 31, in table five the red note describes the breakdown of the group that would benefit and life insurance paid from the assets during the 12 months of contribution.

It's my opinion that the distribution paid from the HWT would be as follows: One, pensioner life insurance premium, 16 million. And then Mr. Rochon argues, look, the 16 million went to the pensioner life insurance premium. Wrong. It went to the pensioner medical benefits that were active LTD and

life. The chart shows medical claims, but 31 (i), it morphs into insured life insurance premium, and Mr. Rochon repeats that in the factum, that pensioner life received a disproportion of benefit somehow.

My last point on this, Your Honour, is the generalizations that come out in Ms. Urquart's affidavit, that LTD beneficiaries "face a life of poverty", and similar statements, when there are over 300 LTD beneficiaries represented before you today that are consenting, and only a few voice a concern. And as I said earlier, people could be extremists, but some could be 64 and want the pension benefits, and some could get well. Some could have working spouses and not be impoverished. Even within Mr. Rochon's group, there could be individual circumstances. The generalization and macro approach does not advance the inquiry of all. The inquiry being what is the meaning of the trust agreement, which is not an individualized approach. It's an objective approach. There was a benefit promise to pay on $10,000 or $25,000 on the death of a retiree with no conditions.

Actually, it's less contingent, but we know from the case law, being ill, being retired that is the objective criteria. We say they are both vests. The LTD is vested and the pension life is and the LTD life is, or sufficiently certain to fulfill the wording of the clause.

We are engaged in a balance. Looking at a fair and reasonable balance, and, in our submission, the approach taken not only fits the words best, but it's a practical methodology, because it can be implemented and it cannot be that the drafters intended for this to have an individual assessment. The consents that are before you are powerful support for the Monitor's position and correctness of the Monitor's position. Subject to Your Honour, if I could just have a second.

There is no suggestion by anyone in this room, on behalf of the Monitor, that there is any denial of the hardship being suffered by people in the insolvency. We see it in working in insolvency, and sometimes you become jaded. There is nothing jaded about

this case. There is hardship. There will be different degrees and effects of the hardship. In my submission, Your Honour, in the Monitor's submission, it's simply a fact that should be acknowledged. It's not a relevant issue in the case before you. Thank you.

THE COURT: Thank you. We will take the morning break. 15 minutes.

--- Brief recess.

--- Upon resuming.

THE COURT REGISTRAR: Phones off, please.

THE COURT: My understanding is that the interpreter providing sign language may not be required? This was a request for special needs, but can we have confirmation that the sign language is not required? I don't know whether, Mr. Rochon, if that is your group?

MR. ROCHON: We are content that the interpreter take the rest of the day off.

THE COURT: I am sure that the interpreter has lots to do. Thank you, very much, you can be dismissed.

THE ASL INTERPRETER: Thank you. I am available on request to return, if needed.

MR. ROCHON: If I may clarify one matter that

Mr. Myers brought to my attention with respect to Ms. Urquart's affidavit at page 19.

Mr. Myers seemed to indicate that there was an issue with the affidavit in terms of pension claims or premiums. I wanted to bring to the court's attention that there was an error in 31 (i). It reads, pensioners life? It should read, pensioners' medical benefits, $16 million. And then the chart on the next page is an accurate description of the amounts that were taken from the trust through '05 and '06, and it talks about pensioners' medical claims. So, it's on the right footing now. I wanted to raise that error.

THE COURT: Any required change on the second line of 31?

MR. ROCHON: No. I don't believe so, because the life insurance premiums referenced there are for the actives, and that is picked up at paragraph 31 (ii), and also for the LTD medical.

THE COURT: The total is the 32?

MR. ROCHON: Yes.

THE COURT: Thank you. Mr. McRae?

MR. McRAE: Thank you. I will be brief.

I am for the Nortel Canadian Continuing Employees, and we support the proposed allocation by the Monitor. We do this even though there are only about 150 of our people who will get any distribution under the proposed allocation, and they would be people eligible by December 31st of this year.

We do so, in a nutshell, in the spirit of trying to achieve peace in our time. We have reserved all of our rights, and we have communicated with the Monitor certain positions we might take concerning the optional life, which Mr. Myers alluded to. We are supporting the Monitor's position, but that is also why we oppose the motion of Mr. Rochon to proceed today.

As was said, this is not a binary outcome. There are many arguments that could be advanced, and we are not advancing them at this time, but we have reserved our rights to do so.

We would not have acquiesced in the delivery of his affidavit material at these very late dates, for example, if we understood that it was going to be either column two or three.

There are many issues that might be on the table if Your Honour does not see fit to permit the proposed allocation.

Subject to your questions, those are my submissions.

THE COURT: Thank you. Mr. Pepall?

MR. PEPALL: Thank you. Let me say, Your Honour, at the outset, that on behalf of the Former Employees Representatives, we do adopt and support the submissions made by Mr. Myers; however, we do have some supplemental submissions to make to the Court on behalf of the Former Employees representatives.

Together with Mr. Wadsworth today, I will be the only voice speaking today on behalf of that beneficiary class.

The Health and Welfare Trust beneficiaries represented are Pensioners Life, according to the Mercer's report, page 116. The average age of the pensioners is 74. Pensioners medical, dental, survivor income beneficiaries, and that pays lifetime income benefits for survivors of certain nonunion employees that died in service.

There are approximately 80 in receipt of those

benefits.

Survivor transition beneficiaries, which also is an income benefit payable for 60 months for survivors of certain union employees, and there are approximately 305 in benefit. The former beneficiary classes I represent, together with Mr. Wadsworth, make up approximately 79 percent or $428.5 million of the $543 million total Health and Welfare Trust liabilities, as calculated by Mercer. Numerically, this class would be in excess of 90 percent of the HWT beneficiary population. This group has a very significant financial interest in the disposition of this trust. After due consideration and consultation, this group has resolved to support the Monitor's recommendation and allocation.

While it may not be the optimum of all of the various scenarios, we regard it as well researched, principled and fair, in the sense that it attempts to achieve relative parody among the various beneficiary groups.

For that reason, the Former Employees representatives have signed a consent that is filed with the Court. That consent is subject

to conditions.

One of the conditions is that the other Court authorized representative of the beneficiary classes also support the Monitor's recommendation.

In as much as they do, in the case of the other ones that have signed consent, and Mr. McRae's clients who do not oppose it, all other Court authorized representatives support the recommendation.

So, the first condition is met. The second condition was that it be approved by the Court.

With respect to that condition, we of course submit that it should be approved by the court, and we have submissions in three general areas to that make in that respect.

Firstly, we will make some contextual or background comments, which favours the supporting or approval of the recommendation.

Those could be broken into the three subcategories.

One is facts and circumstances that bear upon the recommendation, and, two, is the investigation and process in formulating the

recommendation. And three will be a submission on how in light of what has transpired, the issue before the court should be framed.

The second general area of submissions that we will make is limited to the Pensioner Life Benefit. No other benefit seems to be currently in dispute. So, we will make submissions as to why the Pensioner Life Benefit should be a participating beneficiary in the wind-up of the trust.

In the course of making that submission, we will offer some comments on the evidence that the opposing LTD beneficiaries have made or presented.

The third area of submission will be what our position is or what the court should do in the event that the Monitor's recommendation is not approved, which engages the Notice of Motion served by Mr. Rochon's office and received by us at 4:22 yesterday.

With respect to that, the Former Employees representatives organized and briefed this matter in response to the Monitor's recommendation. My instructions, my mandate,

is to support that recommendation, not to make arguments against it.

It is the only distribution methodology that is currently properly before the Court.

The Monitor did not rank the various scenarios in order of preference. We do not see this proceeding as a choice between option two and option three.

If it were, we would be opposed to option three, and if option two were removed because the Court won't approve it, we would develop support to other options more favourable to the Former Employees. Option three is the least inclusive of any of the options in the Monitor's report. We don't support it. We will not support it, and if option two is not approved by the Court, we would seek an opportunity to come back to the Court and present evidence, if required, and further submissions on different alternatives.

Moving then to the first area of submission, which is the contextual or background, and I will try not to repeat what Mr. Myers has advised the court on, but it's clear we are talking about the wind-up or termination of

the trust agreement, which includes the termination provision.

Under that trust agreement, all beneficiary classes have equal status. The trust agreement does not establish priorities among beneficiaries on termination. It does not make any specific allocation to any particular class of claimant. It does not require on termination that accounts be taken to determine what has been paid to one class of beneficiaries over the history of the trust, as opposed to what has been paid to others. It gives no instruction to the trustee to examine and inquire into hardship at the moment of termination. It does not ask the trustee to allocate on termination, according to the tax deductibility of prior contributions. All of these latter concepts are extraneous methods that have been added, and they have no place in the trust agreement. In that we are dealing with a trust, there is a duty on the trustee, and I would submit a duty that the Court would recognize to be even handed and impartial in administrating to terminating the trust. That principle alone

would mandate a generous and inclusive construction of the termination provision. The trust termination provision has been noted as drafted over 30 years ago and survives without amendment. It is not easily understood and applied to the current circumstances, which is in the nature of the liquidation of the trust, rather than merely a transfer or reversion back to Nortel or under some other.

However, as Mr. Myers pointed out, some important guidance is given by the use of the terms, "future benefits and claims." Benefits and claims when used together are not defined in the trust instrument, but in our submission they are not redundant duplicative terms. Each is entitled to a meaning and interpretation and effect.

In our submission, the language used demonstrates to protect on termination, beneficiaries in circumstances where the benefits have not yet been reduced to claims in pay.

The second contextual background area that I would like to discuss is the process that has

culminated in the recommendation before the Court today.

Everyone is indebted to the Monitor and its counsel for the thorough investigation that has been conducted and the thoughtful presentation of the issue.

Mr. Rochon says in paragraph two of his factum that he accepts the structure and analysis of the Monitor, in the Monitor's report. He disagrees with only one item.

I submit, therefore, that in the work of the Monitor, no relevant fact or principle has been overlooked.

The court-appointed representatives of the beneficiary classes have had independent legal representation. There is no process deficit there. Based upon the case conference of September 17, at 9:30, at which Your Honour presided for today's hearing, there is no overhanging issue of conflict on the part of Koskie Minsky.

The court-appointed representatives and their counsel have had unrestricted access to data, and they have had an opportunity to understand the implications of the recommendation, and

consult with their members.

In consequence, it would be my submission that there is no procedural deficiency in the work performed or the material provided and presented on behalf of the Monitor. That is an issue that is off the table.

Having regard to the consent that has been filed on behalf of all of the court representative parties and nonopposition of the current employees, what therefore is the issue before the court? How should it be framed?

In my submission, it's not whether it is open to just interpret the trust agreement in a manner different than the way in which it has been interpreted and agreed to by the parties I have mentioned.

We submit that the question reduces itself as to whether there is some manifest overriding error in the Monitor's recommendation. If there is no error of that magnitude and description, and the outcome reflects a reasonable interpretation of the trust agreement, a construction that the language the trust agreement can reasonably bear, it

should, in our submission, attract court approval.

Against that background, I move to the second general submission, which explores why the Monitor's recommendation is fair, reasonable, and consistent with the terms of the trust agreement, and in that regard we will focus on the Pensioner Life Benefit.

I begin by saying that it is essential that there be a clear understanding of the nature of the Pensioner Life Benefit. It is of critical importance that it be correctly understood.

In our submission, it has been fundamentally misunderstood and incorrectly characterized by the opposing LTD group.

The nature of the benefit is this, Your Honour: The obligation assumed by Nortel to its retired employees is to pay a predetermined death benefit. That obligation vests on retirement. It does not laps or expire prior to death.

Although that benefit has involved the payment of experienced rated premiums to an insurer, that is a matter of implementation. It is not

a matter of obligation. The obligation survives and is independent from any arrangements between Nortel and Sun Life or any other insurer.

The Mercer calculation of the pensioner benefit liability is not some one-year term premium calculation.

Now, it is the present value of future death benefits, Nortel will be obliged to pay its retiree beneficiaries.

Let me demonstrate that with reference to the Mercer report, Volume 1, beginning at page 104, tab c, of The Motion record.

Just some background. At page 107, you will see in paragraph 2 of the middle of the page that post retirement life insurance is a benefit program that Mercer was asked to value.

Page 110 is a summary of the evaluation result and that liability is approximately $125 million.

If you look at page 121, you will see that part of the tools that were used by Mercer --

THE COURT: Let me pick up that reference of 125? Is this back at 110?

MR. PEPALL: 110. Yes, evaluation results.
Second in, PRB Life, Pensioners, 125.
THE COURT: Yes.
MR. PEPALL: And you can see that at 121,
Mercer was using a mortality table.
And then at page 133, item 6 of the Mercer report is the non-pension benefit plan provisions, and you can see that there is not just one plan here that effects retirees.
There is nonunion pensioners that retire after 2008, and nonunion that retired before, and union pensioners. These were the plans that Mercer was examining.
Now, if you look at page 137, which is the description of those plans, you will see that each plan involves the payment of a death benefit. It doesn't say, this is the present value of premiums we should pay Sun Life for one year. It reflects, the calculation reflects, the present value of death benefits payable to all eligible retirees under each of these three plans.
How Nortel carries out or implements that promise is not relevant.
The core promise is the payment of a death

benefit, whether it's outsourced to an insurer, whether it is funded internally or some combination, does not colour the nature of the underlying obligation, and that is the obligation being valued by Mercer, and that is the obligation at issue in the determination of the trust.

Even the history of the operation of this trust demonstrates that Pensioner Life was not some transitory benefit. Even prior to the settlement of the trust, Nortel assumed an obligation to maintain a group life insurance program for retired employees.

As the CRA documents that Mr. Myers took you to show, is the trust was initially capitalized with an $11 million surplus held by Mutual Life in a prior retiree insurance program. That was the seed capital for this trust.

All subsequent Health and Welfare Trust financial statements record a reserve called "The Pensioner Life Fund". The financial statements are in the record.

That reserve continued and continues right through to today.

The Health and Welfare Trust was merely a tax efficient medium through which benefits could be paid.

It's not where you go to find the source of the benefit. Pensioner life, if you look at the trust document, at tab G, has been a constituent benefit under that trust from day one.

Now, I pause here to make a comment on Ms. Urquart's affidavit. I don't have it in a motion record, but if you have Mr. Rochon's motion record? The Urquart affidavit at paragraph 15.

Ms. Urquart testifies:

> "While Nortel, the corporation, promised to pay life insurance premiums during retirement until death --"

Wrong, as I will explain in more detail later.

> "It is my opinion, that the HWT made no similar promise and has no obligation to pay for future life insurance premiums of pensioners from HWT assets."

You cannot, Your Honour, decouple the trust

from the underlying obligation of Nortel to pay a death benefit. The trust is no more than a funding mechanism. It does not alter the underlying obligation.

Paragraph 15 also errs in the classification of a benefit of future life insurance premiums.

Also, in her affidavit, Ms. Myers points out that the trust agreement, the trust instrument says it does not create the benefits, it will provide the benefit. It doesn't create. It provides the benefits.

Also in her affidavit, Ms. Urquart makes extensive reference from paragraphs five through to 12 of the Sun Life policy, or a Sun Life policy, and she bases her reference to the Sun Life policy to support her statement that Pensioner Life is nothing more than a one-year term insurance policy. But if you look at those policies at tab L, and I will not take you to them. They are quoted here. They do not say that. They don't describe this as one-year term insurance. It's irrelevant anyway.

Of course Sun Life is going to terminate the

policy for nonpayment of premiums at the end of December. Makes no difference. Doesn't change these vested obligations of Nortel to pay death benefits.

You can see from --if you had the time to look at the motion record tab L, page 779, you will see that the benefit is not term insurance. Term insurance has a fixed term, and then will laps and expire. This doesn't.

She quotes the termination arrangements between Sun Life and Nortel, in my submission, they are not relevant.

Paragraph 13 of the Urquart affidavit, the deponent states:

> "While Nortel made a promise to its employees that it would provide life insurance coverage after they retired, the disclosures made to pensioners as recently as January 2006 indicate that Nortel had the right to terminate the pensioner's life insurance coverage at any time without notice to the participants."

I submit that is an incorrect statement. Even the part that is quoted doesn't say that. It

simply says that Nortel reserves the right to amend the plans.

It is important on this point, because it is the benefit booklet, for me to take you to that, and that is Motion Record, Volume 2, tab K. And at page 557 is the benefit plan handbook six, which is the --if you turn the page, is the traditional program grandfathered employees. And that is page 558. The cover page.

Your Honour, without doing it, if you relate that back to the Mercer schedule, you would see that traditional program grandfathered employees is one of the life or death benefits described in the Mercer report.

So this is one of the retiree programs.

And the quote that Ms. Urquart refers to is on the next page, and it doesn't say right to terminate. Doesn't say right to terminate vested rights. Just the right to change, and you can see from what we have looked at that Nortel from time to time changed its programs prospectively. If you retire after 2008, this will be the death benefit, but they never took away a right that vested previously.

Much of the brochure or book deals with the health care benefits, but at page 13, at the bottom, is life insurance. This is retiree life insurance.

Now, Ms. Urquart says it can be cancelled and says it's one-year temporary term. This is what it says:

> "Upon your retirement, Nortel Networks will provide life insurance coverage equal to your basic life insurance immediately prior to retirement. The coverage will decrease by 5 percent on each anniversary of your retirement until it equals 25 percent of your preretirement basic life insurance. This reduced coverage will continue in effect for the remainder of your lifetime."

And without necessarily taking you to it, but at page 590, same tab, Exhibit K, is the balanced program. Another heading in the Mercer columns. Column number three in the Mercer columns, and page 616 is the life benefit, and that is the paragraph that

Mr. Myers read to you. No temporary benefit there.

And then at page 645 is the non-grandfathered traditional program. That would be column two in the Mercer calculation, and then at page 663, unfortunately no page number at the bottom, is again the description of the retiree life program. It's not how Ms. Urquart describes it. It is a death benefit that survives and is payable until the date of death.

In my submission, this incorrect characterization of the death benefit seriously undermines the position being urged by the opposing LTD beneficiaries. They do it to form an argument that it is a contingent benefit that Sun Life could cancel it, that Nortel could cancel it. But the contract, the obligation proves otherwise.

The future nature of the benefit is also demonstrated to some extent by the fact that the Nortel financial statements reveal that assets were held in a sub account and reserved against this liability. That is why in the supplementary report of the Monitor, Pensioner

Life is listed among the reserved liabilities. The reserve or reserving, the provisioning, indicates in our submission an intention on the part of Nortel and the trustee, to recognize this as a future benefit obligation in which provisions have and should be made. The existence of sub account provisioning was a factor that the Monitor took into account in formulating the recommendation.

I would now like to address the concepts of vesting and non contingency.

I submit the inclusion of Pensioner Life as a participating benefit is informed by the fact that it is a vesting and noncontingent future benefit. These were also factors considered by the Monitor in support of this recommendation.

With respect to vesting, as we have seen, the underlying benefit obligation, the payment of a death benefit, does not laps, does not expire, prior to December 31st, 2010 -- trust termination date -- or at any time after during a retiree's lifetime.

It's our submission that the retiree's entitlement to this benefit vests on

retirement.

At that point in time, the former employee is absolutely and unconditionally entitled to the un contracted death benefit. The retiree is under no obligation to make a further application, subscription, or submit to a medical examination. The benefit vests. That obligation, as I have said before, is not linked to the maintenance of any life insurance policy or policy administration.

In our factum, we make reference to the case of Dayco v. The Canadian Auto Workers. It's in the Monitor's brief of authorities on its memorandum at tab j.

At issue in this case were group insurance benefits granted to former or retired employees under expired collective agreements, and when Dayco went into insolvency, they wanted to cancel the benefits to retirees, and the retirees' union, CAW, wanted to grieve that cancellation under the collective agreement, and the company said, "You cannot grieve it. An arbitrator has no jurisdiction, because it's an expired collective agreement."

And at issue before the arbitrator and then

the courts, all the way up to The Supreme Court of Canada, was whether or not the arbitrator had jurisdiction to consider this grievance, and that issue was informed or coloured by the fact by the question of whether or not the insurance benefits payable to retirees was vested. And the court came to the conclusion after an exhaustive review of U.S. and Canadian authority that the promise to pay benefits to retirees did survive the expiration of the collective agreement, because the obligation to pay these benefits vests on retirement.

Without taking you to it, I refer you to the headnote at page 3, paragraph 88 of the judgment. It's a Supreme Court of Canada case.

So, we would submit, based on all of that, based on logic, authority, based on the practice and operation of this trust and creation of reserves, all drive in assuming that retiree life is a vested benefit.

As I said before, while Nortel might change it, prospectively it never did or could change it retrospectively.

Another feature picked up by the Monitor in his recommendation is that it's a noncontingent benefit. The ultimate future benefit, the promise to pay on death, is not a contingent or speculative event.

If Benjamin Franklin could be accepted by the Court as authoritative, it was he who said, "In this world nothing is certain but death and taxes." It was John Maynard Keynes who said, "In the long run, we are all dead." The death benefit is not a contingent or speculative event. It is a certain event. And so that was also obviously an important consideration for the Monitor in formulating its recommendation.

So on summary, in this area, we would urge the Court to accept the recommendation, and not exclude Pensioner Life from the payment of the death benefit, because, one, it's a contractual obligation to pay a death benefit, not an obligation to pay a one-year premium. Two, the obligation and entitlement vested on retirement cannot be cancelled after retirement. And, three, the payment of the benefit is not contingent the event will

occur. Four, the reserves have maintained and earmarked in relation to that benefit.

If you apply these features to the trust termination provisions, a vested noncontingent certain future benefit, it is in our submission, reasonable to interpret that to include Pensioner Life as a participating beneficiary. And if I am correct that the proper framing of the question is that the Monitor's recommendation and the interpretation of the trust that it can reasonably bear, then I would submit on these documents it is clearly. And I say at the risk of being repetitive, that the true characterization and nature of the benefit severely undermines the position that the opposing LTD beneficiaries are taking.

Everything that Diane Urquart says in her affidavit about this being a temporary term insurance policy is factually wrong. She should be acknowledging that it is a vested death benefit, that there is an unconditional promise on the part of Nortel to pay and has nothing to do with Sun Life policies.

With respect to the position I would take on

behalf of my clients in relation to the expert evidence that has been proffered to the Court, by the opposing LTD beneficiaries, I support Mr. Myers's submissions.

My submissions on this evidence of Bell, Williams, and Bornestein for that matter, is set out in our factum of paragraphs 27 to 44. There we address the issues of admissibility and weight.

The bottom line here, I suppose, with respect to weight is, these witnesses have endeavored to introduce extraneous terminology and concepts into an area and question in which they don't apply.

Using expressions like "incurred event" or "incurred expense" or "tax deductibility of funding contributions" is not helpful. It's not grounded in the trust document. It's not grounded in any authoritative principle that has been cited to the Court.

It is an attempt to opine on the ultimate issue where the Court needs no assistance. All the Court needs is the trust document and the surrounding circumstances in evidence and apparently not contested by the opposing LTD

beneficiaries.

So, rather than going through my factum, I will adopt the position of Mr. Myers and refer you to those paragraphs in my factum on the issue of admissibility and weight.

That takes me to my third and final point, which is no distribution of the Health and Welfare Trust should be approved in this hearing, other than the one recommended by the Monitor.

As I said before, this is not a contest today between two options. The only motion properly before the Court is the Monitor's.

If it is not approved, however, if that option is not approved, the beneficiary classes that I represent would have to reassess their position.

The issue of representation of the various beneficiary classes would have to be addressed, and perhaps not just the LTD. Whether there are scenarios that are not listed, whether there are hybrid scenarios that are justified might have to be considered. Whether there is additional evidence that has to be marshaled would have

to be considered.

I think all of those who are participating today on the basis that they consent to the Monitor's recommendation, recognize that going into the abyss of a contested proceeding where every beneficiary class tries to maximize its return is with risk.

And to illustrate that point, if you would look at the Appendix B to the supplementary report of the Monitor with the various scenarios, and we can properly call it the abyss, because as has been indicated the costs would not be assumed by Nortel. This estate would dissipate in contested litigation that would involved experts, which it already has to some extent. Perhaps even more counsel than appearing today, and as I said earlier in opening, my clients will not support option three. It is, as I said, the least inclusive, the least even handed of any of the options.

If this is a free for all, why would the pensioners not support option one?

In a liquidation of the trust, pro rata among all the beneficiaries has some attraction.

Others might say, not enough attention has

been paid to the reserved asset.

Once you open that, you bring Optional Life. That 18 million is now being distributed among other beneficiaries back in play. Mr. McRae's clients and my clients would say, "Why should we share the reserve of a surplus of premiums with other classes?"

But we are not here today to argue another scenario preferable to the one that has been recommended. We are here to support the recommendation, but if that recommendation falls away, then there is more work to be done.

And that is why, Your Honour, in our factum, when you get to the order requested portion, and this factum was prepared before yesterday and filed before yesterday's Notice of Motion came in.

On behalf of the Former Employees, we request that an order issued in the form of a draft appended as Schedule B to the Monitor's Notice of Motion, there may be further comments on the form of that, but the concept we have already consented to. But, b, in the event that the Monitor's recommendation is not

approved, that a date be set for Court directions regarding representation and process leading to a hearing to determine the appropriate distribution to the Health and Welfare Trust.

That would, in our submission, be the appropriate alternative order, having regard to the way in which this proceeding has been framed and advanced by the parties.

Subject to any questions, Your Honour may have, those are the submissions on behalf of my clients.

THE COURT: Thank you, Mr. Pepall.

Mr. Wadsworth, you are next.

MR. WADSWORTH: I would prefer to have it all heard at once.

THE COURT: We will take lunch now, and reconvene at 2:00. Hopefully that will leave enough time for the rest of the submissions, all of which will be quite brief I gather in their remarks, but we will start at two p.m. Thank you.

--- Lunch recess.

--- Upon Resuming.

MS. STAM: Good afternoon. Before we get

started tomorrow, I understand from my friends that there are some objections that have been filed in the U.S. motion for tomorrow.

At the moment, it's unclear as to how many will be resolved by tomorrow, but the very rough time estimate is a bit longer than what I indicated this morning, so it may be a few hours tomorrow before the joint hearing is over.

THE COURT: Well, hopefully we will be able to finish this matter tomorrow. How should I put this? I will put you in charge of making certain that counsel involved in this hearing are kept up to date with the motion for tomorrow.

MS. STAM: Thank you.

Mr. Wadsworth, good afternoon.

MR. WADSWORTH: Good afternoon, Your Honour.

I think by this point in the proceeding, I don't have to identify who it is we represent. The Actives, the LTDS and those retired that retained us, and specifically with respect to the LTD with whom we have exclusive bargaining right, and I think I have said that once or twice.

As a legal representative for all those who we represent, the CAW supports the Monitor's proposal on the motion. Union has been in constant communication with those we represent, including holding meetings, three of which took place during the past week, and which was attended by about 1100 or so retired LTD recipients.

Based on the union's review of the trust agreements and the supporting documentation, our meetings and communication, as well as the feedback we have received, we made the determination that the Monitor's proposal is legally supportable, and one which is in all the circumstances in the best interest of all of our clients. Therein lies the reason that the union on behalf of all those who we represent consented to the order as presented.

The CAW received and reviewed all of the documentation available to the company and the Monitor with respect to the relationship or the history of the Health and Welfare Trust. The union then developed an opinion regarding the interpretation of the trust documents and established a position with regard to the

distribution of the remaining funds in the Health and Welfare Trust that from our reading was supportable on the basis of trust documents and basic trust law.

The Monitor's interpretation and it's proposed method of determining those beneficiary programs, and, therefore, the beneficiaries themselves that were entitled aligns with the union's determination made previously.

During the course of the discussions that took place between those stakeholders, particularly interested in the Health and Welfare Trust distribution, there were, as you will see in the Monitor's proposal at tab D, a number of different proposals, costings and outcomes.

In order to ensure fairness for the pension recipients that we represent by way of retainer, the union was involved and engaged in the independent legal counsel process as it relates the Former Employees as described in paragraphs 103 to 108 of the Monitor's 51st report.

It was the position of the union that we would use the advice provided by independent legal counsel to inform our own position on behalf

of the pension recipients that we represent. Having considered that advice, and in light of our own conclusion, and having our own conclusions, the union has advised the pension recipient clients it supports the Monitor's proposal as it relates to the disposition of the funds of the Health and Welfare Trust. But there were other things, other than just the interpretation of the trust document itself that informed our position, not to oppose the Monitor's proposal, and those included the likelihood that the Court would reject the Monitor's proposal in favour of what we might see as a legally unsupportable one.

The other LTD and retiree groups had determined to accept the Monitor's proposal, and those groups included 11,000 retirees and 280 or so LTD recipients, whereas the union represents 632 pension recipients, and 98 LTD members. And then, of course, the hang over from the settlement agreement, that the legal cost arising out of a dispute, regarding the corpus of the Health and Welfare Trust, would come out of the trust fund itself.

And as importantly, given the groups that we represent, any dispute that resulted in litigation over the funds in the Health and Welfare Trust would delay the distribution to our members and our clients.

Now, the termination provision of the trust itself, and I am sure that you have seen it once or twice here today, but in terms of the wording of the termination provision of the trust, which is at Volume 1, tab G, page 215 of the Monitor's record, I think in terms of emphasizing some of the wording in paragraph two on page 14 under article six:

> "Upon receipt of the notice of termination, the trustee shall within 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."

As with future benefits, the word "obligation" is not defined within the trust agreement itself, but I think an interpretation, particularly with respect to the arguments

that have been made on the vesting of the retiree life insurance, whether it becomes a future benefit or claim, which has been argued before you it does, it could also be seen as one of the obligations, the vested interests that have a right to the distribution of the funds within the remaining, or the remaining funds within the Health and Welfare Trust.

Now, clearly, following my two friends, a lot of my thunder has been taken with respect to the arguments I was going to make before you today, and I will attempt not to repeat a vast majority of those.

But I think, once again, it is worth reiterating that -- and this is something the unions are quite familiar with, which is the obligation of an employer under a benefit plan to provide the benefit. In order for the employer to be, and certainly in this case the Health and Welfare Trust to be on the hook solely for the payment of premiums, one would assume that it would be very clear in the trust document itself, and certainly with respect to the termination provision, very clear what the distribution should be.

In our respectful submission, it is clear that the benefit that was sought by anyone who was a beneficiary with respect to the life insurance and retirees was the insurance itself and not the payment premiums, and there is no documentation that demonstrates that the only benefit would be the payment of premiums. My friends have taken you to the retiree documentation showing the benefit plan, and I believe that is at tab K, and they are all very clearly that the benefit is life insurance for life.

Much has been made with respect to the expert's and other affidavits, and that in the vernacular of our American friends has been proffered by the Dissenting LTD representatives.

I would ask that you turn up the factum of those Dissenting LTD representatives, and particular page 2, at paragraph 4.

In the third line of that paragraph it says:

> "Given the seriousness of the issues before the Court, this is not the time to invoke technical arguments or make unfounded attacks on well

regarded and suitably qualified experts, so as to avoid a debate on the issue on the merit."

Your Honour, this is exactly the time to be making such arguments. And we would ask, as I am sure that you will, to take a good, hard look at the information that has been provided in those affidavits. It's very important to look at the relevance.

The factual foundations of any opinion, and whether the affiant is really assisting with the understanding or attempting to persuade by argument or making legal determinations with respect to what are in reality alleged facts.

It has been noted there are no responding affidavits from the CAW with respect to the actuarial reports that have been provided on behalf of the Dissenting LTDs.

In reality, all that needs to be before the Court is contained in the Monitor's record, disputing the opinions that are offered would simply be like playing "Wack a Mole". An exercise in futility, because they are not germane, and they contain allegations of fact without foundation, inferences without being

reviewed by those who have not in fact reviewed the trust agreement, or making comparisons with respect to another trust, without disclosing the terms of that trust agreement to use for comparison.

And, of course, allegations of conflict of interest, which are far beyond the expertise of those who are proffering the evidence.

With respect to the conflict of interest, the Dissenting LTDs had put forward a motion seeking to represent all of the LTD beneficiaries, and one of the basis for that motion was an allegation that the firm Koskie Minsky was in conflict of interest with respect to the representation of both retiring and LTD recipients. That motion, as you are aware, was withdrawn sine die.

As I understand it this morning, the submissions of Mr. Rochon said his clients determined not to go forward with their representation motion because Koskie Minsky had backed off, and independent legal counsel had been appointed. I therefore understand that those sections of the materials, including affidavits and the factum, which

address the issues of alleged conflict of interest, and the independence of the independent counsel who have been appointed might not now be relied upon.

The issue before the Court is solely with respect to whether or not the motions Monitor seeking approval of its proposed distribution of the remaining funds in the Health and Welfare Trust should be approved or not approved.

As others before me have said, and you will see in our request for relief in our factum, if the Court determines not to approve the Monitor's proposal, then there needs to be revision of our position.

As I said, there were a number of factors that went into our determination with respect to supporting the Monitor's proposal. I think enough has been said with respect to the Notice of Motion, which was served on us, or received by us at about 5:00 p.m. yesterday. There will be a lot of work that would need to be done if we were going to deal with that motion in the future. Certainly, as you have heard, with respect to the affidavits that

would be as I understand offered in that motion, I think that goes without question, having heard what you have today, a lot of cross-examination would be taking place.

Finally, as you will have seen, the union's record contains a request, that in addition to the order requested by the Monitor, we seek additional relief.

Essentially, the request arises out of the fact that the union is tired of playing cat and mouse with Dissenting LTDs. I will not go through it now, but at tab E of our motion record, there is a series of correspondence where the union seeks clarification with respect to the position of the Dissenting LTDs as to whether or not they are seeking to represent members of the CAW.

Frankly, we have had to throught out our Statutory Rights on so many occasions in this proceeding and with the Court of Appeal, and we are getting a little tired of it.

So, if we could have a declaration with respect to this proceeding regarding those long-term disability recipients members of the CAW, and for all purposes of this proceeding

represent those individuals, perhaps we could save certain amounts of paper that are going into the factum and constant relying on Dayco. As I said, Your Honour, given the fact that the a vast majority of the submissions that were prepared have been covered by others, we urge upon you to find that the Monitor's proposal is legally supportable, and certainly in the face of its consent by all of the interested parties, but for a few, and in order to close up this chapter of what has been a very trying time for our members. We would urge you to do so. Thank you, very much.

THE COURT: Thank you. One moment.

MR. ENGELMAN: Thank you. Good afternoon, Your Honour. I will be referring to a green book in our factum. Possibly Volume 1, a motion record, and possibly the brief supplemental, both of which have the breakdowns on the scenarios. I will not be referring to any authorities, other than in passing my friends have already done so. By way of introduction, sir, I am here today and have been assisting the court-appointed

LTD Beneficiaries' Representatives with my colleague Fiona Campbell. Ms. Kennedy is present in the courtroom today as is Joanne Bailey (ph), who is a member of the steering committee for the LTD Beneficiaries.

Our submissions today will be fairly brief, not because it's not of great importance to our clients, but much of what we wanted to put before the Court has already been put before you. In addition, and of utmost importance is the fact that Ms. Kennedy has conditional and consented to the Monitor's proposed allocation. I wanted to take you to that briefly if I might. That is tab A of the factum.

You have the consent document, and you will find that in the facta of other parties as well.

THE COURT: There are two tab A's.

MR. ENGELMAN: It would be the second one I hope, unless it appears twice. So, what you will see is a number of whereas clauses, and this preamble sets out the factual context, and the final two at the bottom of page 2:

"Subject to paragraph 2 herein,

hereby consent to the Court making an order with the terms of the draft order attached as Schedule B to the Monitor's Notice of Motion, returnable September 29, 2010."

And that is the draft order that Mr. Myers has put before you. And, secondly, and importantly:

"The consent of each party is conditional upon all other parties hereto also consenting, and this consent shall lapse and be of no further force and effect if the Court does not approve the Monitor's recommendation of the terms set out in the draft order."

So, that is the reservation of rights and you heard that from Mr. Pepall and Mr. Wadsworth. Sir, much of the background surrounding has been set out before you this morning by the Monitor, both in their factum and oral, and you are, of course, well versed in the facts. Principle among the unfortunate facts, that the liability of the Health and Welfare Trust is almost seven times the value of its assets.

We are told it's $542 million approximately in liabilities, with only $80 million in assets, and this means financial hardship for many individuals as they do not get what they anticipated they would when they started working at Nortel.

I want to very briefly describe our clients role, since she has been appointed here. You are familiar with some. She was appointed on July 30th, 2009, as the representative of Nortel employees, excluding those represented by the CAW; thus, approximately 260 of the 360 group members.

Of those 260 employees, it's important to note that not one of them has elected not to be bound by the representation order. In other words, they have had the option to opt out now for approximately one year and nobody has.

Ms. Kennedy thus has the authority to represent these 260 employees for the purpose of settling, or otherwise dealing with these claims in this proceeding, or for that matter in any other proceedings which have been or may brought before this Court relating to this matter.

This is not an easy task, sir. Her group is diverse in many ways. The suggestion that this is somehow a homogeneous group of people could not be further from the truth. This is a group of people of all ages. They have different backgrounds, different family circumstance, and obviously have a range of disabilities that they are dealing with in their lives.

As part of her role, Ms. Kennedy, on behalf of the group, entered into the Settlement Agreement with the other parties back at the end of March. That has been spoken to briefly, sir, and I just wanted to highlight a couple of important points from that Settlement Agreement.

Firstly, the Settlement Agreement called for Nortel, not the Health and Welfare Trust, to pay for the long-term disability income benefits, health and dental benefits, and life insurance in full until the end of December of this year.

It noted that the employment of the members of the LTD Beneficiaries group will terminate December 31, of this year, and then Health and

Welfare Trust is wound up and distributed to the beneficiaries.

It's also importantly noted, and Mr. Wadsworth made this comment to you, any fees or expenses relating to dispute or litigation among the beneficiaries of the trust concerning entitlement will not be paid by the company, but will be paid from the assets of the trust.

Sir, as you are well aware, this trust has been in existence for approximately 30 years, and many benefits paid or provided through it over the course of its time. Those included the LTD income benefits, post-retirement medical/dental benefits, pension or life insurance benefits, survivor income benefits and transition benefits to name a few.

The real issue is, how the assets of the trust will be dealt with upon the termination, and as many of my friends have taken you to the wording of the termination clause, the clause is somewhat unclear. Particularly, as it relates to future benefits and claims following the date of the termination.

Some of the history and the surrounding work of Ms. Kennedy and the steering committee is

set out in the Monitor's report and its record. You will find that at Volumes 1 tab 2, pages 76 through 78. This includes the retention of independent counsel, and this was to deal with the issue of the Health and Welfare Trust allocation, due to a concern about a potential conflict of interest for the firm Koskie Minsky.

There is a letter from Mr. Zigler of that firm. It's also in the record for your reference at volume 6 of the Monitor's Motion Record, pages 2358 and 2359.

After Ms. Kennedy retained our firm, numerous documents were provided to counsel by the Monitor and Monitor's counsel. Ms. Kennedy met with members of the steering committee and had several meetings and discussions with counsel. Some of this worked to fully inform herself as a court-appointed representative is set out in paragraphs 15-20 of our factum. Suffice it to say, Ms. Kennedy and members of the steering committee have been working countless hours fulfilling the mandate this Court has given.

Aside from obtaining independent legal advice

and through counsel's answers from the Monitor and its counsel, Ms. Kennedy and counsel have consulted three sets of actuaries. Their own independent actuary, actuaries from Mercer, and also from the Seagull Company, who had been reviewing the work of Mercer.

In addition, Ms. Kennedy requested and the Monitor agreed to provide statements setting out the estimated actuarial value of the individual benefits under the Monitor's proposed allocation methodology, under Scenario 2. In our respectful submission, this was highly important when one looks at the scenarios one sees the number of $30 million for approximately 34 percent of the benefits, but these individual statements have allowed members of the group to see exactly what this means for them on a micro or individual basis.

These statements, known as "beneficiary estimated allocation statements" were sent out to all members of the LTD beneficiary group in early September of this year. And because of the slight adjustments to the numbers in Scenario 2, with the inclusion of the optional

life benefits for members of the LTD group, supplement or revised statements were sent out to them more recently.

Ms. Kennedy made a tremendous effort to keep members of the LTD group informed of the work she has been doing on their behalf. After obtaining independent legal and actuarial advice, she decided to support the Monitor's proposal, and to make sure that members of the group understood why she was supporting the proposal and also explain some of the other possible outcomes -- we had 16 listed in the Monitor's report -- and, of course, there are others that may exist as well, Ms. Kennedy asked counsel and actuaries to put on a webinar, at which time group members could listen to a webcast discussion and submit questions before, during, and after the webcast for answers, and that was done on September 8 of this year.

As noted, she and the steering committee have continued to remain available to their constituent members through phone and email exchanges and website postings.

Now, as I have said, she has entered into a

consent agreement with other court-appointed representatives, whereby they have all after carefully reviewing the Monitor's motion materials, and the proposed allocation plan and by reviewing this with counsel, sign consent to this Court. I have spoken about the conditions attached to that consent.

The two issues that we say are before you today are: Does the Court have jurisdiction to approve the proposed methodology? And, if so, should the Court approve the proposed methodology and other relief requested by the Monitor?

In our respectful submission, that is all that is that is before you today.

On the jurisdictional issue and your jurisdiction to approve this methodology, Mr. Myers spoke to you about that this morning, we have brief comments of that in the factum, and it's our submission this Court does have that authority.

With respect to the second question: Should this court approve the proposed methodology? The Monitor's proposed methodology is based, in our submission, on four assumptions, and

you have been taken to these earlier today, but they are set out in paragraph 25 of our factum, which is on page 9. That is that the trust is -- the Health and Welfare Trust is made up of one trust, rather than a number of sub trusts. Secondly, that the beneficiaries that entitled to the distribution on termination of the trust are those that have benefits in pay, and those whose benefits that are certain to be payable in the future. Thirdly, that the assets in the reserve account for optional life should be distributed among the beneficiaries who entitled to a distribution on planned termination, and, forth, that the trust assets be shared on a pro rata basis between beneficiaries.

There is no dispute on the first assumption. There is a dispute on the second one, and there are several scenarios set out in either Appendix D-1 of the Monitor's Motion Record, Volume 1, or the supplemental, that deals with the possibility of different beneficiaries being entitled to shares.

The proposed allocation by the Monitor,

Scenario 2, is in our submission within the reasonable range.

We are not here to argue the relative likelihood of one of these scenarios being adopted by the Court after a long, arduous litigation process. There are always risks associated with litigation. What we are here to do is comment on the reasonableness in light of several factors.

Firstly, is it based on a reasonable interpretation of the trust agreement and other relevant documents? And we submit that it is, and that an interpretation that all beneficiaries with benefits be paid and benefits which are certain to be payable in the future is reasonable in these circumstances.

Secondly, one issue that is still of some contention, I believe, is how it should be divided, and it is our respectful submission that they should be done on a prorated basis. In our submission, where trusts are silent on this issue, courts have typically ordered equal or pro rata shares.

I will comment very briefly on the affidavit

evidence. Some of it which we received very recently from the Dissenting LTD.

A number of counsel have commented on improprieties on questions of admissibility and weight, and essentially we agree with the appendix to the Monitor's factum on this issue, which sets out some of the concerns about these affidavits, and also the oral submissions that were made today by Mr. Myers.

In the main, these affidavits are replete with legal submissions, irrelevant considerations, clear misunderstandings of the benefits provided with the trust, and clear in the fact they fly in the face of the documents and information provided.

Mr. Pepall in his factum went through in detail the law on this issue. I would simply submit the four-part test from the Supreme Court in Canada in R v. Mohan, and, in particular, the test of relevancy and necessity have not been met.

As I stated earlier, the court-appointed rep and sought and obtained independent legal advice to consider whether or not the Monitor's proposal was reasonable from an

actuary perspective.

My friend, Mr. Rochon, was critical of Ms. Kennedy for not filing affidavit evidence from the independent actuary. He is right. We did not do that. We did not file an affidavit from Mr. Christie after receiving his advice. If he had said the Monitor's proposal was not reasonable, I can assure the Court that an affidavit would have been prepared.

Needless to say, after receiving independent legal advice and independent actuarial advice, Ms. Kennedy decided to support the Monitor's proposal and entered into the consent agreement I referred to. An affidavit was not necessary.

Ms. Kennedy's decision was not made lightly and was, as I stated, based on several factors. One, of course, is whether or not the proposed methodology was reasonable in all of the circumstances. Other issues were also considered. These are issues which are typically considered before one embarks on a litigation or possible litigation process. What are the chances of actually doing better?

Obviously Scenario 3 provides her group with more financial, but there are the core responding risks of doing worse, including Scenario 1, and others listed, and possibly some not listed. Risk analysis is part of any and all advice counsel should give clients when considering the possible lengthy litigation.

If it wasn't obvious that there would be or will be contested litigation, one need no go further than the submissions of my friend Mr. Pepall made this morning. He spoke of his clients never agreeing to Scenario 3. He spoke about the abyss should we embark on that process.

Mr. McRae, on behalf of the affiant, also mentioned that they may pursue scenarios more favourable to them, and I think the list goes on.

In addition, aside from the risks of doing worse or possibly no better, there are two other important considerations that Ms. Kennedy took into consideration. Firstly, cost. We are not just dealing with legal fees. Should this matter not be resolved in

accordance with the Monitor's proposal, all litigation costs, legal, actuarial, and others will be significant.

As we all know, these costs will not be borne by Nortel. They will flow through the trust.

Lastly, and perhaps more important, the concern of delay.

The settlement agreement spoke about the winding-up of the trust by the end of the year, and the fact that the LTD income benefits will end as of December 31st, 2010.

By not agreeing to this proposal and engaging in litigation, there could be litigation for many months -- if not years -- if we factor in appeals. This is something that has caused anxiety, stress and is obviously a concern in looking at factors and in determining whether or not to support the Monitor's proposal.

We know that many of the members of this group have little or no other sources of income. Litigation will inevitably delay continuing income and cause hardship to many members of the group.

Ms. Kennedy has had to weigh all of these factors: Risk, costs, and delay when deciding

how to resolve the Health and Welfare Trust allocation. She has done this, and in the decision-making process that we have now culminated in her decision to support the Monitor's proposal and consent she entered into.

In closing, we support the Monitor's proposed allocation and the draft order found in the Monitor's record at Volume 1, tab B, pages 30 to 35. Should the Monitor's proposal not be accepted, as noted in our factum, and in the consent agreement attached thereto, Ms. Kennedy reserves her right to advance other positions and lead other evidence in further court proceedings.

Sir, before I sit down, i would be remised if I did not acknowledge the efforts made by the Monitor's representative and counsel in being accessible to members of our firm and in answering question and providing documentation. Ms. Kennedy has been receiving email requests, phone messages, and the Monitor has been extremely helpful in enabling us to do that and providing us with the information we need to do that.

Sir, those are my submissions, unless you have questions of me.

THE COURT: Just one, to clarify one point, and then to the other representatives of the beneficiaries, because I think you are the final counsel to speak on behalf of those groups. I think you indicated that not one of your group has elected to opt out?

MR. ENGELMAN: That's my understanding, sir.

THE COURT: And if previous counsel could give me, I think the general number was three or four, and I want to make sure that that has not changed?

MS. RUBENSTEIN: There are four in total, and I believe three are former employees. On page 7 of the Monitor's report, there are three former employees who have opted out and one continuing employee who has opted out.

THE COURT: Thank you, Ms. Rubenstein.

MR. ENGELMAN: Thank you, sir.

THE COURT: That takes us, I believe, to Mr. Macfarlane?

MR. MACFARLANE: Your Honour, we have actually similar submissions, and our recommendation is that counsel for the Monitor and other

counsel. Our issue is not directly before Your Honour today, and it would be better left to the end. In the end that you are persuaded to make this order or inclined to make an order, it relates to the distribution and not the trust itself, and that way we don't clutter the record for today, and if that suits Your Honour, that would be our recommendation.

THE COURT: How will that -- well, at some point, if there is no determination today or tomorrow?

MR. MACFARLANE: Well, then if Your Honour is inclined to grant this order on variation, we could give our submissions at that time, and then perhaps discussion and narrow the issues.

THE COURT: Make sure you get back to the floor.

MR. FINLAYSON: I didn't want to take up more time than necessary. We are looking to put in some language to whatever order is issued, and also in my case looking for clarification in the nature of reservation of rights, and we think that be held down to the end.

THE COURT: Fine. So, Mr. Rogers?

MR. ROGERS: Your Honour, we act for Northern Trust Company, which is the trustee of the Health and Welfare Trust. We are here because they request the form of order, and essentially at the direction of the Monitor or Nortel. We are content with the form of order. We take no position with respect to the appropriate allocation methodology, and the comments now are a place holder that if any party has concerns with respect to our role, or the obligations of Northern Trust, we would appreciate an opportunity to respond to any. Those are my submissions, subject to any questions you may have.

THE COURT: Thank you. Mr. Merskey?

MR. MERSKEY: Your Honour, I think it's me now, Your Honour. I only have three short points on behalf of the company, and those deal with the nature of this motion and the process leading up to it. What the question before you is, and what the question before you is not, and I doubt that that will even take 10 minutes.

With respect to the nature of this motion, the company makes limited submissions today,

because the motion is entirely about the HWT, an asset -- as pointed out -- Nortel does not have an economic interest in.

Now, the absence of submissions should not be taken as an absence of interest in general. Nortel and the people who continue to work there have a real interest in seeing the HWT distribution addressed fully and fairly and avoiding the uncertainty of what to do in the event of further litigation after this hearing.

With respect to the process, it's for that reason that the company worked closely with the Monitor and the interested parties in the time of the settlement agreement onward to make sure there was an open process to bring the question forward. I will not recite the steps for you. They are in the Monitor's report at paragraph 29, and the affidavit of Ms. King filed by the company just to describe the process is paragraph 14 to 19.

We simply ask the Court to take note of what has been done by many stakeholders to get here, and that that is the basis by which agreement has been obtained from so many of

the people here before you.

The company supports the process and the result outlined by the Monitor and has no submissions to add to the Monitor's helpful and detailed analysis.

I have two short points about the nature of the question before you. As I said, what it is and what it is not. The question before you is specifically an interpretive one. How to interpret the phrase: "All future benefit and claims made under the plan." And the language you have been taken to, as Mr. Wadsworth pointed out obligations as well. There is no doubt much turns on that phrase and that language for the different beneficiaries, but in the end it is a defined question of interpretation arising from the paragraph of the trust agreement, which you can look at in the context, and the kind that comes before this court on a regular basis, which does not make it easier to determine, but puts the focus on what the question is about.

I make that point, because as my friends who have gone before me have indicated, there is

much irrelevant material before the Court, or as I put it, what this motion is not about.

The Monitor, Mr. Wadsworth, Mr. Pepall, Mr. Engelman have noted for you the frailty as what is self described as expert evidence. I commend those points to you, and I specifically echo Mr. Wadsworth's point on the relevance of it all.

I have to make one specific point on behalf of the company though, because it's been unfairly impugned in this irrelevant material. In the affidavit of Ms. Urquart and the factum, both of which were served after the materials of all other parties. There is a broad-brush attack on the actions of the company in funding the HWT, including unfounded allegations of misappropriation.

I make note of these allegations, not to refute them here, although they are of course denied, but to point out how deeply prejudicial it would be to give them any consideration in this forum.

The evidence submitted by all other parties to this motion properly makes no mention of this issue. Neither the company or anybody else

who would need to do so is in any position to respond to those allegations, nor should they be, because in the end that is not the issue before this Court.

I simply ask you to disregard the affidavit of Ms. Urquart and all similar allegations. By all means, give due consideration to all the proper argument put before you, but be mindful of which ones are relevant and be weary of unfair and unfounded attacks. Those are my comments, Your Honour.

THE COURT: Thank you. Mr. Barnes?

MR. BARNES: I actually, Your Honour, I just want to let the Court know that the directors support the submissions made by the company.

THE COURT: Thank you.

We are running ahead of schedule, Mr. Rochon. I will take the break, and then call on you.

--- Brief recess.

--- Upon resuming.

THE COURT: Good afternoon.

MR. ROCHON: I wanted to hand up the affidavit of Joanne Williams.

Now, by way of housekeeping, Your Honour, I wanted to make sure you have the materials we

plan to rely on close at hand. The Opposing LTD Beneficiary Motion for Representation. That is a two volume motion record, and contains the affidavits of Joanne Williams, Arlene Plante, and then there is the supplementary motion record, also blue back, the volume which has the affidavit of Jeremy Bell. And then you should have a thin volume, being the responding motion record of the Dissenting LTD Beneficiaries motions.

Now, as part of our case involves having a couple of beneficiaries, the LTDs, making short submissions, I know Peter Burns is here, and I wonder in terms of using up the runway toward the end of the day, if it might be for Mr. Burns to make brief comments?

I was contemplating honing my submissions to accommodate the many, some important, points made by my friends, and I am wondering from my perspective, my submissions could be a little more focussed if I had the evening break to prepare them. And I know we have the international hearing at 11:00, but we could make progress in the morning as opposed to drifting through the preliminary comments this

afternoon, but we could make use of the time by hearing from Mr. Burns, and that would perhaps set the stage in terms of important aspects of our case.

THE COURT: I think that would be fine, Mr. Rochon. It would be stretching it to think you would complete today and the same type of issue for Mr. Wadsworth. I would rather you go through. If we could hear from the individuals this afternoon, that would be fine.

MR. ROCHON: Mr. Burns is here, and I know a couple of other individuals from Ottawa and Calgary wanted to appear by video or tape. They were not able to get a courtroom that accommodate the live feed and looking at the fallback, we were not able to get tapes delivered by courier in time to have those individuals available to make presentations. So, I am not sure if there is some way to use the more high-tech room? I think last time I described it as high-tech, but it wasn't quite there. Maybe it's capable of doing a live video feed similar to what you are doing with the court in Delaware?

If someone has, for instance, a Bell centre and we dial in and hear from the individuals in the smaller environment tomorrow, depending on when the joint hearing wraps up?

THE COURT: I heard about this earlier in the week, and I thought there may have been some discussions as to how to technically deal with that. I will look into that at the conclusion of this, this afternoon.

MR. ROCHON: That would be appreciated. So if Peter Burns would approach. Thank you.

MR. BURNS: Good afternoon, Your Honour.

THE COURT: Good afternoon, Mr. Burns.

MR. BURNS: I am Peter Burns, and today I carry the personal aspirations of disabled employees overcome by Project Copperhead or its kind in any future.

We search for Nortel disabled on our own, and only a few days ago found a new uninformed membership. Here is what we all want to tell you.

Imagine that you are bedridden and disabled and considered unable to speak or manage your own affairs. Your trustee works in your best interest, and you would expect the trustee to

advocate for you, and then intervene for you when you cannot. If someone wanted to borrow money from your trust, for instance, your trustee should say something like, "No. You may not borrow any money from this disabled person's trust. He cannot speak his wishes for himself, but you can be assured that I have his best interests in mind when I say his money is required to look after his needs until he dies. There is an annuity for you staying in your nursing home, but your trustee is taking it away from you to pay his own bills."

Imagine being cheated as you watch on helplessly, because everything you say is unheard or irrelevant. You lay in bed and ask yourself, what will happen on the day you are broke? And one day, as you are wheeled from that nursing home, someone may say to you with pity, "They ought to enforce the laws against the pillage of the disabled by the trustees."

What if one day you find out their scheme is called "Project Copperhead", a venomous snake that lives near the Nortel United States head office, but, pardon me, what does that code

name conjure in your mind? Fear, violence, poison?

I'd say the name is about right. What does that say about the professionals? Nortel? What does it say about the people that misappropriate trust funds for disabled people? Every disabled person I know, when they left their career, experienced a sudden loss of personal voice. Perhaps, because I am physically disadvantaged and fighting pain with drugs, I have become easy to take advantage of when things with are done with intent to confuse.

To this light, I want to welcome all of you to Project Copperhead the last and most significant days. This project has been venomous and especially deadly to the sick and disabled. The movie was code named "Copperhead" in the movie "Kill Bill." She took part in a massacre in two parts. Perhaps "Kill Bill", like the movie would have been a better code name.

In this proceeding, Project Copperhead continues to treat the disabled like pray. How else could I explain that there is Health

and Welfare Trust distribution to pay only 29 million out of 80 million for the Health and Welfare Trust for the disabled. We have gone to 100 million dollars in actuarial liabilities for disability income alone. The disabled have another $80 million in actual liability for future medical costs and other benefits that Nortel promised.

I beg this Court to respect and enforce the current laws protecting the trust accounts for the disabled. Trust rules are designed to prevent distance relatives of the deceased from making claims on money placed in trust for the living expenses of disabled children. It is no different here, except this is a commercial case.

I urge you, sir, as one of the highest officers of this Court, to make sure that persons who are not deserving become beneficiaries of our trust. They come so at the behest of the group of professionals in this courtroom who have not taken the effort and care to understand the historical facts and legalities regarding the Nortel Health and Welfare Trust.

The Court Monitor is advocating for the $44 million of the $80 million of the Health and Welfare Trust. The Monitor wants the money allocated for the settlement of life insurance premiums to be given to the pensioners. If replacement life insurance is bought, in fact adult children of pensioners become the ultimate beneficiaries of the trust.

My survival and that of my disabled peers are clearly only a secondary consideration to this Monitor.

I would like to ask a question of this Project Copperhead in our garden of Canada. Why does the court Monitor work so aggressively against my lawyer, Mr. Rochon, and his team of senior lawyers, actuaries, and financial experts. These are dedicated professionals who have worked for many months on my behalf and my disabled peers to prepare for these days in court. They have thoroughly researched the law, actuarial taxation and the financial consideration for this case in order to secure what belongs to the disabled out of the billions of dollars in Nortel's global bankruptcy estate. It's through their

expertise that I am standing here today.
Did the Court Monitor ask whether the 400 can survive on what is left after all the executive bonuses and leaving us with 34 percent of our income going forward? Did they ask why the actors in Project Copperhead needed to use misinformation, nondisclosure, and interference to try to prevent even the disabled who are cognizant in putting forward the best possible case on their own behalf and a lawyer of their own choice.
The Court should know that my financial slide has already begun. I have become a high-risk creditor. When I tried to get a minor student loan for my university aged daughter for $5,000, it required six weeks to approve.
When I look for accommodations, my income is in question. The disabled are here today to collect the full disability income from our company, Nortel, who told us it played the role of insurer.
I plead that Project Copperhead use the legal tools that Canada has to help us. Please, do not use the same tools under another interpretation to crush us. Even the rough

and tumble CCAA rules contemplate protection of trust beneficiaries, a creditor claim arising due to misappropriation by a debtor acting in a judiciary manner cannot be compromised. Especially it can not without a vote from the affective persons.

I am with Nortel and used to work, but now I am sick and cannot. I lack functional or placed to ditch and rot. I face the world with damaged brain, and I have half a leg, I guess that just says it all when Nortel makes me beg.

Nortel directors, and all that pack doing this to me and us, you can scoff as you watch the disabled die and beg. But remember, it is your disgrace alone. I am proud to say that the disabled employees have walked the high road and looked to the law for help. We are not alone. We thank the many professionals and government leaders working on our behalf, and that believe in this great country, because it's Canada. Thank you, Your Honour.

THE COURT: Thank you. Mr. Rochon, any other individuals that wish to make statements?

MR. ROCHON: I am not sure whether Mr. Clooney

is making presentation today? I know he is available, but I don't know if you prefer to do that tomorrow?

THE COURT: Is it possible to have it today? I am --I am trying to establish a schedule so we can conclude tomorrow.

MR. ROCHON: I believe he is ready.

LAWRENCE CLOONEY: My name is Lawrence Clooney. I have 20 years of service with Nortel Networks, of which 16 were as an active employees. I worked many facets with the company. I started off in design transfer in the Brampton facility and moved to manufacturing systems. From there, with my commercial tool background I was moved to B & R in Ottawa. They required my skill set. I had the background with commercial tools and all their software base systems.

So I have done everything from design transfer to manufacturing systems, designed and helped design a database that if it went down, the shop floor would lose $150,000 an hour. That was a high pressure job with Nortel. I moved to Ottawa and worked on a high-speed telecommunication database, and does 1-800

calls, and I moved into component engineering and ended up in spectrum, which is a gateway product which made money for Nortel.

So, I have done project management, software development. I've done a lot of different jobs at Nortel, up until I got sick. When I went on disability I thought I was protected and had insurance, and I went along and tried to work my personal health issues with the medical facilities here in Canada, only having to be ended up treated by doctors in U.S.

I have a lot of out-of-pocket health care expenses. In 2008, I declared $12,000 in medical expenses with Canada Revenue, and that does not include the medical expenses I got paid through the Nortel Health Care Plan. So, I would have to add another 4 to $5,000 to that. This health care, the health care I receive in the U.S. is necessary for me to sustain my life, support my family, and possibly recover down the road. There may be a possibility of recovering, I don't know. But if I don't get the health care, I will not recover, and the doctors in the U.S. have saved me a couple of times. The health care

system in Canada has failed me.

I have a son that is 10 years old, who is in grade 5, and just in June, he --in June, he competed in the Ontario Eastern Regional Swim Meet, and he took two bronze and one gold home. For a ten-year-old, that is a major achievement. I never asked him to do that. I don't ask him to get A's. I don't ask him for metals, but just to do his personal best and beat his goals every time. So, he is an overachiever of his own desire.

So, to me, I worked very hard for Nortel, as I just explained, and I have moved from Brampton to Ottawa. I have gone all over for Nortel, and I worked hard for them, and worked one year 300 hours of overtime, and I have the stubs to prove that. I was dedicated to Nortel. I protected Nortel.

The way I protected Nortel, I delivered products that were above average quality with no more than a two-year slip. I was very reliable, very dependable. I was a self-managing project manager. I had VP call me up to find out what went wrong with their switch on the weekend. I had customers demand

I go in, because I operated with a high level of integrity.

At the end of this bankruptcy, that is what I will walk away with, and I will instill upon my son.

The thing that bothers me the most with the professional pack that sits around me, is that my grandfather and my father fought for this country. My grandfather won the MM (phonetic) in World War 1 for grenade a machine gum. My father was in the second medium regiment in World War 2, and he was in Italy, France, Belgium, and I have his medal. I can prove that to anyone in this courtroom. And he fought for the Jews and the Holocaust, and I am sure judging by the surnames in some of these people in this courtroom they are of Jewish decent, and he fought hard. There were horrible living conditions, and it gulls me to stand here and stand amongst some of these people, because they are not fighting for me. They are fighting for something else, and I suspect it's the Employee Health and Welfare Trust, but I don't have a lot of proof for that.

So what I ask is that the court consider the hard work that Joel Rochon and his partners have done on behalf of the disabled. They have not been paid to date. They are working for free, and, for me, that puts them in the same classification as my grandfather and my father, who fought for the vulnerable in conditions more deplorable than where we sit today.

I also ask the Court that you pay Joel Rochon for services rendered. If these people are getting paid, I believe he should be paid for one reason over and all lawyers should agree, in a justice system, everyone's opinion should be valued, and obviously we have seen the ducks line up here. Everyone has their story all set up and were prepared, and in walks Mr. Rochon with a difference of opinion, and when I deliver products, I value differences of opinion, because then the product goes out squeaky clean.

That is all I have to say, and I thank you for your time.

THE COURT: Thank you. So, I believe Mr. Rochon, that concludes the individual

presentations, subject to what can be made.

MR. ROCHON: So, do we start at 10:00?

THE COURT: I have another matter at 10:00, and then I have the hearing at 11:00. Any updates on the developments?

MS. STAM: Not since I last heard.

THE COURT: Ms. Stam will coordinate. I would think, assuming that the technical side of things works tomorrow, which we are hopeful it will, I guess they will go from 11 until concluded, and then it's just a case of getting people and court staff and things from 393 to 361. 2:30 is more realistic. Do you have any idea how long you expect?

MR. ROCHON: In the vicinity of an hour and a half?

THE COURT: Those that intend to reply, be prepared to reply, and you can get me the list for tomorrow morning.

-- Adjourned to September 30, 2010.

-- Upon resuming on September 30, 2010.

September 30, 2010.

THE COURT REGISTRAR: Court is in session, please, be seated.

THE COURT: Good afternoon, Ms. Stam.

MS. STAM: Good afternoon, Your Honour. Before we start, I have a few housekeeping matters. I don't know if you want to deal with those now or on the break, but I wanted to let you know.

THE COURT: How much time do you think you'll need?

MS. STAM: 30 seconds.

THE COURT: Go ahead.

MS. STAM: The first is that we do have the final information signed, and I spoke with counsel. So, that Your Honour knows, I did not circulate the final order to all on the service list, but most counsel are in the courtroom. They are filing that in the U.S. this afternoon. We also inadvertently left out the ceiling paragraph from the passport order this morning, so we revised the order.

THE COURT: What was in there? I thought it was in there?

MS. STAM: I don't believe so.

THE COURT: I thought it was in paragraph five, but I may be mistaken. So, there is a motion record on this that I have overed at 330 University.

MS. STAM: Okay. If it's easier for you, I can leave the order with you and come get them tomorrow morning.

THE COURT: That would be best. These will be available at the office tomorrow.

MS. STAM: So, I have this order, as well as the revised order.

So, I am handing up the original you signed, and the two copies of the clean, revised order.

THE COURT: I thought I saw the reference to Appendix 6. So, 16 is the new one?

MS. STAM: Yes, I believe so.

THE COURT: I take it you did not have a chance to get the previous issued and uttered.

MS. STAM: No. We actually noticed it right after the hearing ended, and it was pointed out to us.

THE COURT: Okay. So the second copy is out there somewhere?

MS. STAM: I believe it's in the file.

THE COURT: So, those are the two. All right. Those will be for -- we do not need those, and those are the two. Those are the signed ones there, and these are the ones. This is the

one that is no longer. I am voiding that.

Okay. Thank you, Ms. Stam.

MS. STAM: Thank you.

THE COURT: Mr. Rochon.

Thank you, I did receive your list of retainers for the LTD Beneficiaries, and I also have the response from Mr. Wadsworth.

MR. ROCHON: I am not sure when you had time to review the emails.

THE COURT: That is what Blackberries are for. So I have your factum, responding motion records, and then the three volumes.

MR. ROCHON: With respect to the Plante affidavit, there was a comment, I believe yesterday, about one counsel saying they were concerned that that affidavit touched on conflict issues.

Well, we are not planning to use that affidavit for purposes of conflict, but there are some exhibits in particular that we want to reference that are in the public domain, so to speak, and those exhibits are found at tabs or Exhibit tabs G, W, X and Y, of the second of Ms. Plante's affidavit, and those I will reference shortly in my submissions. And then

you have the supplementary motion record from Ms. Bell, and the further from I guess Joanne Williams, and then the responding motion record. The thin volume. You should have that as well.

I will begin by saying the Monitor seeks an order approving a methodology for the allocation of the corpus of the HWT based on Scenario 2 of Appendix D-1 of their materials. Although it was our understanding that the motion would turn on legal entitlement based on the wording of the trust agreement, the Monitor and those making submissions yesterday, have advanced the argument that this Court should only consider whether or not to approve or not to approve scenario 2, as if this were a settlement approval hearing.

You heard yesterday far-ranging submissions as to what the legal test should be. Mr. Pepall, for the Pensioners, stated effectively -- or what he tried to do was convert the test into a judicial review or appellant hearing standard by suggesting that the Court should rule against approval of Scenario 2, only if there was a matter of manifest or overriding

error.

Mr. Wadsworth took a different approach, and he spoke about Scenario 2 in terms of being legally supportable. The language from others talked of the Scenario 2 being in a reasonable range, as being the guiding legal test.

We respectfully submit that the distribution of the HWT assets should be governed by actual legal entitlement based on a judicial determination of the correct meaning of the termination provision and not by a lower legal standard.

In fact, it was based on this understanding informed by the September 17th attendance with Your Honour in Chambers across the street, and the statements made by Mr. Myers, as I mentioned earlier, as well as the prior communication from Koskie Minsky and the disabled, and that I will turn up briefly, and these are the exhibits to Ms. Plante's affidavit, and if I could trouble Your Honour to turn up Tab V of Volume 2 of the original motion record for the representation order. It's toward the end. "V" as in Victor.

If we go to page 3 of 8, midway down the page,

under the heading "Update on Health and Welfare Trust." This is dated June 24th, of this year. So, well before any report from the Monitor came in.

Looking under paragraph number two, four lines down, and across the middle of the page:

> "Direction will be sought from the Court on the allocation of HWT assets."

Which were approximately 80 million, and so forth. And then if you stay with the same volume, and move forward in the volume to Exhibit G, as in George, you will see subsequent communication from Koskie Minsky, dated August 6th, 2010. And if you go to the first page of that exhibit, dated August 6th, 2010, toward the bottom of the page: "Allocations and Distributions of HWT assets." You see second line down:

> "We expect that the Monitor will make the proposal for the allocation of these assets."

So, they are speaking professionally at this point:

> "And that interested beneficiaries

> will have an opportunity to make submissions to the Court on that proposal and on the distribution of the assets."

Implying, in my submission, that there would be a legal determination with respect to the distribution of the assets, and then the final point on this was the case conference on September 17th, where I thought we had confirmed that we were heading toward a legal determination on the distribution of the HWT assets.

However, to ensure that the Court is satisfied that it has jurisdiction and should proceed in a manner that would allow for an allocation based on legally determined entitlement, we have filed a cross motion, which was filed yesterday.

Perhaps the timing of the cross motion is regrettable, but it must be recalled that the Monitor, and all of the parties, have known for weeks of the distribution -- as a preferred distribution option preferred and advocating by the Dissenting LTDs through the delivery of the Williams actuarial affidavit,

which is sworn on August 9, of this year, prior to the allocation proposal set out by the Monitor.

Our position was reenforced through the delivery of the Bell affidavit, which was sworn September 3rd and delivered subsequent to the Monitor's material.

And that affidavit confirms the distribution in accordance with Scenario 3 as opposed to Scenario 2 and provides actuarial evidence in support of that.

So, the actual filing of the cross motion was merely a way of formalizing or crystallizing the substantive argument that was already before my friends. That said --

THE COURT: There was considerable comment from a number of parties to the effect that if the motion proposed did not result in the approval of Scenario 2, that they had argument and would go through the materials to submit in response to your motion.

MR. ROCHON: Yes. We are aware of the position taken from my friends with respect to that, that had they known it was a legal entitlement process as opposed to an approval

of a single scenario, then they would have filed material, I believe I heard them say, possibly actuarial evidence.

THE COURT: I heard them say, if it's not number two, it does not necessarily result in the Court having the ability, based on the late delivery of the motion filed and the scenario, and there may be multiple other scenarios they may wish to propose.

MR. ROCHON: Right. Well, what I would submit to that is that in terms of filing further evidence, I certainly wouldn't stand in the way of that. I was, quite frankly, both surprised and disappointed that, you know, the proposed independent counsel, for instance, both for the Pensioners and Disabled, had not taken this opportunity to actually file affidavit evidence from their actuaries, because that would have helped to explain their rationale in terms of supporting Scenario 2.

But that aside, and recognizing and living with our disappointment, they have not done that, because it would help to shed light on these important issues. I would not be

opposed to providing them with some more time, without suggesting an adjournment formally, but time to file whatever material they want to file so that light can be shed on this, and their procedural rights are protected even though they have known our position since August that Scenario 3 was our preferred position over Scenario 2.

THE COURT: You started these submissions with comments on jurisdiction. Do I take it that you are of the view that the Court does have the jurisdiction to make a ruling on the allocation?

MR. ROCHON: I am of the view that the Court has jurisdiction to make the ruling on the allocation, but the standard should not be the standard urged upon you by my friends; that is, the lower threshold standard of simply this is within the zone when considering all scenarios. But, rather, the interpretation I would urge upon the Court, if Your Honour is disposed to make a determination now, without allowing my friends a further opportunity to file supplementary or affidavit material, because nobody has filed any actuarial

reports, thus far that I am aware of, other than our clients. My submission is that the analysis should be limited to that of legal entitlement to whatever scenario is presented. It may be under that -- under that standard, you reject Scenario 2 without prejudice to another scenario being put forward by the Monitor or some other party, and you can adjudicate on that.

THE COURT: I have your submission that based on the termination provisions?

MR. ROCHON: Yes.

THE COURT: Okay.

MR. ROCHON: Now, others making submissions suggested that, well, if Scenario 2 is not the only scenario considered, then other outlying scenarios could be put forward. But I would remind my friend and make this point to the Court: That the Monitor's analysis in the Memorandum of Law, which we in many aspects support, and I will go through the areas where we specifically support that. That memorandum essentially puts forward two scenarios, that is the in pay and certain to be paid scenarios, but then we -- well, we part

company on the certain to be paid scenario. But the Monitor does not endorse or suggest that the other scenarios are even plausible. So, the other parties would be entitled to make their pitch. It's my submission, there are really only two plausible scenarios that we are dealing with: Scenarios 2 and 3. Now, Mr. Merskey made the observation that, you know, there would be protracted litigation if the legal entitlement based on the termination provision approach was taken, as recognized by Mr. Merskey this effectively boils down to an interpretation of the few words of a trust agreement.

All of the background evidence requiring -- sorry, regarding the HWT is already before the Court in the Monitor's report. It would just be a matter of producing further actuarial evidence to assist the Court. Finding a fair and just solution will not be overly time consuming, and there's no reason this cannot be resolved within a few week's time. If the Court is concerned about any prejudice to the other parties that have suggested that they would have filed materials.

The suggestion that this matter be thrown into the abyss, as one counsel stated, is purely over the top, in my submission, and such fear should not be created for the disabled. Decisions should not be based on exaggerated concerns.

Similarly, the concern about costs of a dispute being born out of the HWT, in my submission, are also misplaced. Clause C-2 of the settlement agreement should not be interpreted as to apply to a focussed application or motion to the Court to determine legal entitlement. And in the context of an $80 million trust fund, and given the significance of the issues to so many, the fact that some additional work may need to be done is preferable to making a decision based on a lower standard.

THE COURT: Where will I find C-2.

MR. ROCHON: That is one of the clauses in the settlement agreement.

MR. FINLAYSON: I don't know offhand the wording, but reference was made to this yesterday. And it's the provision that any disputes relating to the allocation would not

be born by Nortel, pursuant to the trust agreement, but would in fact be born by the trust itself.

MR. ROCHON: Volume 1 of the record, and if you turn to page 49 and 50 of the brief, you will find reference to that. Midway down the page, page 50 of that record.

> "Any fees or expenses incurred in connection with any dispute or litigation to beneficiaries of the HWT concerning entitlement shall not be paid by Nortel, but shall be paid by the HWT corpus".

THE COURT: And your submission is that if this goes to further litigation?

MR. ROCHON: If it moves on to a focused application, you know, to move the pendulum along the continuum so that we are not dealing with approval but with determination, a legal determination to the entitlement based on the termination provision, that that questioning should not invoke the terms of C-2. In fact, even if it did, and there was some amount of money taken from the HWT to get it right, in order to get it right or to use the more

rigorous standard, then, in my respectful submission, that would be well worth the money taken from the HWT, when so much money is at stake.

THE COURT: I hear you. I also see strong mandatory language in C-2.

MR. ROCHON: About who pays?

THE COURT: Yes.

MR. ROCHON: Well, if the cost of a single motion needed to come from the HWT, that would be a fair and just result, when the alternative is to have the matter decided on a much lower threshold. I appreciate some of the language now that I reflect back on it. It appears to be mandatory language. Given that the allocation and trust interpretation questions, in my respectful submission, should turn on the question of legal entitlement, no significance should be attributed to the fact that the employee representatives have consented to the allocation in the order proposed by the Monitor.

Further, Mr. Engelmann spoke about the risk of delay and cost and different possible outcomes

as specifically informing Ms. Kennedy's consent. However, in terms of risk of a different outcome, Scenario 2 represents by far the least favourable scenario, and the least desirable of the scenarios as between the two scenarios that are being contemplated by the Monitor.

Why -- I ask the rhetorical question -- is there reluctance amongst our friends here in this court to actually proceed with an approach based on a legal determination. That is how rights are determined in our justice system.

Your Honour was asked about opt out information yesterday. This issue also came up at the approval hearing. In terms of the approval hearing, the groups were given an opportunity to object pursuant to the notice procedure order.

So, I am not following why the failure to opt out was relevant to the merits of their objection. That was the early spring hearing. Similarly, here, as the issue should turn on legal entitlement, I don't understand the significance of whether or not our 40 or so

clients have opted out or not. Particularly in the unusual circumstances, which I assume were recognized by Your Honour at the case conference, resulting from the withdrawal of Koskie Minsky due to an apparent conflict concern and the fact the disabled would not have the benefit of court-appointed counsel representing them throughout this process. A retroactive appointment in the circumstances, because I believe that is part of the order before Your Honour.

THE COURT: Following your last comment, the disabled have not had the benefit of representation?

MR. ROCHON: Since Koskie's has withdrawn from this aspect of the case, there is no -- at the moment, there is no court-appointed representative for the disabled, outside of the representation that we provide for a number of the Dissenting LTD Beneficiaries.

MR. WADSWORTH: Your Honour, I hate to jump in. Clearly they do have legal representation. Koskie pulled out for a particular issue, and they do have legal representation. That's clearly unfair.

MR. ROCHON: My point is, there is no court-appointed legal representative before you right now on the HWT issue. Right now. But leaving that reality aside for a moment, what significance should be attached to the fact that our 40 or so clients have not opted out, because if the determination of this question of allocation is based on legal determination and interpretation of the determination provisions, then we have standing to make submissions on that basis, then I am not sure that opting in or out or opting out or objecting or any of that really matters, because the focus remains on the standard, and we were able to make submissions, because Your Honour is allowing us to make those submissions on that question. So, I am not sure it has the same significance as it would in other circumstances. That was the only point I was making.

The other ancillary issue that I understood the deadline for opting out had expired in any event, and if anything turns on the opting out, we could arrange to have our people opted out if this is something the Court or anyone

suggests is meaningful to the persuasiveness of our submissions.

THE COURT: You have been provided with the opportunity to make submissions. I am mindful of the point that Mr. Wadsworth made with respect to CAW and your ability, or you have an ability to represent that which falls within his group, so.

MR. ROCHON: Thank you. As noted yesterday when I made brief submissions, the Dissenting Disabled largely agree with the structure of the analysis of provided by counsel for the Monitor in its Memorandum of Law.

In fact, there is an agreement on the following points of principle, and I plan to list a few.

There is an agreement that Nortel originally paid $11 million by way of a contribution to the HWT on account of Pensioners' life insurance premiums. Second, that all amounts put into the HWT over the course of time, have become commingled, such that there is now only one trust. Three, that the termination provision extends to cover LTD income benefits, STBs in pay, and SIBs in pay.

And, four, to the point that I believe Mr. Myers made yesterday, that Nortel has made a promise to Pensioners, as well as other employers, to provide insurance coverage to pensioners until death, and further agreed that a death claim would be paid in various amounts to the survivors of those pensioners. And, fifth, that the Pensioners have a vested interest or right to receive insurance benefits from Nortel.

However, the critical issue of whether there is a sufficient nexus between the promise of Nortel and the HWT to require that the HWT pay these benefits promised to be paid by Nortel, that is the question.

During the submissions of the Monitor and others yesterday, no one touched on this critical issue. Similarly, none of the case law cited by my friends address whether any vested benefits become an obligation of the HWT or any other trust, only statements. Bold statements were made to the effect that there is no reason to decouple the HWT from Nortel. Well, we certainly agree that the life insurance benefits promised by Nortel have

vested as against Nortel. Such obligations cannot be downloaded on the HWT, if not provided for in the termination or plain language of the termination provision as informed by what is permissible under tax rules governing HWTs in Canada.

The Dissenting Disabled, therefore, respectfully disagree with the conclusion that future Pensioner life benefits are entitled to participate in the distribution of the HWT.

The Dissenting Disabled have the support of two very capable actuaries who were retained to address actuarial practice and tax implications relative to the HWT.

We have also filed an affidavit from a senior financial analyst to assist the Court in understanding the significance of the complex financial productions provided and to calculate the relative impact of Scenarios 2 and 3 to the Pensioners and Disabled.

THE COURT: And you will, of course, address some of the concerns raised by your friends?

MR. ROCHON: With respect to admissibility issues, yes, I will. Sorry, these are my preliminary comments.

Finally, we have produced an affidavit from a Nortel insider, a past treasurer of Nortel, a member of the pension investment committee. I should say a one-time member of the investment committee, who provided firsthand information with respect to the benefit contributions in 2005 and 2006, and the decision by Nortel to pay pensioners' medical benefits and other expenses for the HWT, resulting in at least a $30 million shortfall in the HWT assets to the determent of the Nortel Disabled Employees.

Now, I reflected on my friend's comments about the current participant in the pension investment committee opined on the specific intention of the HWT wording, and I have decided together with consultation not to press that point.

Collectively, our experts and the treasure have provided detailed reasoning to support a distribution based on Scenario 3. On the other hand, neither the Monitor nor proposed independent counsel have provided any evidence from an actuary or insider to assist the Court in understanding their position, especially on the actuary issues we have raised.

The position of the Dissenting Disabled boils down to three main arguments. First, the plain reading of the termination provisions favours an interpretation that only incurred claims or claims in pay are payable on termination. This interpretation would support a distribution pursuant to Scenario 3. Second, tax and actuarial considerations support an interpretation of the termination provision that would result in a distribution pursuant to Scenario 3.

And, third, equitable considerations overwhelmingly support a distribution consistent with Scenario 3.

Going to the first point about the plain reading. The plain reading of the termination provision of the HWT is found at page (sic) 61 of our factum. If you have that? Sorry, paragraph 61.

Demonstrates that only the claims of the HWT actually incurred prior to the notice of termination can participate in the wind-up distribution.

The applicable words read:

"The amount of money necessary to

pay and satisfy all future benefits and claims to be made under the plan, in respect for benefits and claims up to the date under the notice of termination."

In order to give meaning to the words "up to the date of the notice of termination", it flows from a plain reading interpretation that no benefits or claims, other than those which we all agree are in pay or incurred, should be paid beyond the date of the notice of termination.

As such, it would be a violation of the terms of the trust to attempt to download future benefits which have not yet been incurred, regardless of the promises made by the company to make payments to pensioners into the future.

While such promises of insurance coverage are not at all disputed, the terms of this trust do not impose an obligation on the HWT to include such benefits in a wind-up distribution.

THE COURT: Just so I am clear, a 60 year old, in looking at expectation to the death benefit

that has not been covered?

MR. ROCHON: The 60 year old person, who is on disability or someone that is a current employee?

If the individual is 60 now, and the eligibility for pension benefit is 65 and the termination happens this year, that is right, that individual under the wind-up or termination of this plan will not be entitled to the payment of insurance premiums on his one-year term policies beyond, let's say, the end of December 2010. However, he can look to the estate to satisfy that claim.

Now, another way to go to the reading, Your Honour, if you could just stick with paragraph 61 for a moment, is beginning with the line midway down:

> "Money necessary to pay and satisfy all future benefits and claims."

I would add parenthetically here in square brackets, as may be permitted by tax and actuarial rules and practice.

THE COURT: Well, you have to do considerable explanation on that. I start with the

obvious. If I find that there is a clear way to interpret 61, does that not put an end to the inquiry?

MR. ROCHON: If you --

THE COURT: This is a 1980 document.

MR. ROCHON: Well, it's a 1980 document that is subject to the laws of Canada.

THE COURT: It's very clear what 61 means?

MR. ROCHON: Well, what 61 meant in 1979, when the founders of this trust got together and wrote it is one thing, but what this document meant in 1986 is -- or what this document, this trust, was capable of doing in 1986 and beyond, due to a change in the tax rulings -- as is in the evidence -- is something else. Because originally insurance premiums could be funded, and you probably remember submissions and reading materials about an $11 million fund that was established originally in order to pay insurance premiums for pensioners right from the beginning of this trust in the late '70's and early '80's.

That is true. That money was there originally, and it was funded, but in 1986 the rules changed, such that HWTs could only hold

a group term life policy, such that deductions could only be taken from the expenses incurred in the year that they were actually incurred. So -- and then we have heard about how the trust funds became commingled and now it's a single trust for all intents and purposes. So, looking at that line that I took you to, money necessary to pay and satisfy all future benefit and claims, which -- and then adding parenthetically, which the trust is legally allowed to pay, or as permitted by sound actuarial and legal practices. Those words could be inserted as well, and then you carry on with the wording.

So, in other words, this trust acts separate and apart from the rest of Nortel's operations. It's not just another division of optical communications for Nortel. This is a trust that is apart from the corporation. It's not owned by the corporation. The beneficiaries are those entitled to benefit from the trust. So, it's a separate being if you will, and care has to be taken when you are adding money to it or taking money away. Especially taking money away, because when you

take money away from a trust like this, it's improper.

THE COURT: Who are the beneficiaries of the trust? Setting aside the termination provision, who are the beneficiaries?

MR. ROCHON: Well ...

THE COURT: Are the pensioners not beneficiaries of this trust?

MR. ROCHON: Well, to answer the question, the pensioners -- sorry. Under the trust, the trust is really administering premium payments on a pay-as-you-go basis. So, Nortel makes a payment to the trust one year of $100, and then that is used to buy life insurance coverage for a period of time for a number of individuals for that year, but what Nortel was not able to do was create a fund from which premiums would be paid into the future. It was always expense, and revenue, expense, and pay-as-you-go structure on a year by year basis.

What my friends are attempting to do by way of interpretation is allow for future payments of premiums to be downloaded, if you will, into the last year of the trust. When during the

normal course and functioning of this trust, save and except the situation in situation one, when they put $11 million into it, was to do the pay-as-you-go payment. So, now they suggest, let's just -- let's prefund this, these insurance premiums for "X" number of years into the future on behalf of the ten plus thousand pensioners, and download those costs into the trust, and then we will do an allocation to the pensioners. It just doesn't work like that.

THE COURT: I don't think you answered my question really.

MR. ROCHON: Sorry, would you mind repeating it?

THE COURT: Are the pensioners beneficiaries of the trust, leaving aside the termination provisions?

MR. ROCHON: Just a moment. The pensioner life benefit plan was -- the premiums associated with that plan were administered through the HWT. To the extent there was a benefit, it was a finite benefit for a one year period of time -- up to a one year period of time, providing monthly premiums were paid

on a pay-as-you-go basis through the trust. So, coming back to your question, were they beneficiaries? You could stretch the meaning to say that there were, but the benefits were limited to group term life payments that would buy coverage, insurance coverage, term life coverage for the pensioners.

THE COURT: What about the death benefit? There were two components. There was the 25,000 life and then the death?

MR. ROCHON: My friends have described as permanent insurance in their materials and in their submissions.

Our submission is, when you look at those brochures that were put before the Court yesterday, they talk about insurance coverage being promised by Nortel. They don't say who will be paying the $25,000 or $10,000. In actual fact, it's my submission and understanding that the death benefit would be paid by a third party insurer; namely, Sun Life.

But regardless of whether or not that death benefit was paid by Nortel or promised to be paid by Nortel, or it was the coverage -- that

is, the premium coverage that would be paid by Nortel, it's my submission that the only aspect of that, that could properly flow through the HWT would be the value of the premiums for one year, because as Ms. Williams has stated in her original August 9th affidavit, and that is at Volume 1 of the original motion record. If I could ask you to turn up Exhibit B to her affidavit.

Her affidavit is at tab 2 of that volume. It probably makes sense to start at paragraph 10 of her affidavit, at page 4 of her affidavit. And it begins at paragraph 10:

> "In accordance with interpretation, the types of benefits that may be administered by an employer under an HWT arrangement are restricted to ..."

And then you go down to the third one:

> C: Group term life insurance policies."

So, those are the only types of policies that can be administered through an HWT, and then if you go to Exhibit B, this is the July 31, 1986 tax ruling.

THE COURT: I think it's actually an IT bulletin.

MR. ROCHON: An interpretation bulletin. Health and Welfare Trust, July 31, 1986. And then if you skip to paragraph one, toward the bottom of the page, and at the bottom of the first full paragraph:

> "The purpose of this bulletin is to describe the tax of the employee health and benefit program as administered through your employer, and that is administered by an employer through a trust arrangement and is restricted to A, B, C."

And C is the restriction that is picked up by Ms. Williams in her affidavit, and that is a group term life insurance policy.

And I will take you to Ms. Williams' affidavit and complementary affidavit of Bell, and both say HWT essentially across Canada are with the rules, and the only insurance policy product that can be held within an HWT is a group term insurance policy.

And as you note from Ms. Urquart's affidavit, in accordance with this interpretation

bulletin from Revenue Canada, the insurance policies held by Nortel are one-year term policies. They are not whole life. They are not the so-called permanent life, which I am not even sure what that is, but it's not contemplated by that interpretation bulletin, and it's not described by the actuaries and not in evidence outside a statement or factum by my friends.

That is not to say, I don't want to take anything away from Nortel in trying to put together a good benefits package for people paying a 25,000 or 10,000 death benefit. That is hardly anything. It would have been the minimal insurance benefit provided, and it's my understanding that the amount of those insurance benefits would increase based on seniority, but the only responsibility for the HWT is the one-year term; that is, the premium associated with that one-year term. It would be an affront to the rules of trust and tax, to download the next 30 years of premiums into the last year of this trust, and it's really an unfair transfer from what is properly an obligation from the Nortel estate as to the

HWT, and the effect of that is severe prejudice to the disabled.

In my submission, in recommending the inclusion of extraneous future claims or the payment of future premiums for pensioners, the Monitor ventures upon the plain wording and termination provision and advocates for an expansive interpretation in order to capture future benefits, i.e., life insurance premiums that are not even due and certain, and certainly will not become due prior to the notice of termination.

And then the evidence of Ms. Urquart explains these are paid on a monthly basis, and become due monthly, and a premium in 2015 is not due now.

Second, this interpretation -- that is our interpretation -- is consistent with tax, actuarial and insurance rules, principles and practices that apply to HWTs. Such principles should strongly inform the interpretation of the provision and any wind-up allocation. In this regard, it must be recalled that the HWT is the tax-motivated vehicle.

In fact, the Government of Canada provided

incentive for corporations to set up HWTs and take deductions for expenses incurred in any given year as a way to promote the health and welfare of Canadian employees.

This is especially the case when such a result reflects the plain meaning of the termination provisions and the evidence before the Court regarding actuarial practice.

Third, even if pensioner life benefits are held to qualify for participation -- and this is an alternative submission -- equitable consideration justifies a distribution of asset generally in accordance with amounts set out in Scenario 3.

The essence of that statement and submission is that the impact on an average disabled will be approximately -- in dollar terms -- approximately 72,000 if Scenario 2 is chosen over 3.

In other words, that is how much of a disadvantage would be downloaded to a disabled, 72,000, and that is in the evidence, versus a corresponding detriment, if you will, to an average pensioner of just under $3,500.

Because there is over 10,000 pensioners and

probably under 400 disabled members that the numbers shake out like that. But in terms of individual harm or prejudice detriment, the disabled would be much more prejudiced on a per capita basis than having the pensioners spread out. That 3,500 is over the course of a lifetime of an average pensioners.

This motion is of the highest importance to the LTD Beneficiaries. It represents the LTD Beneficiaries the last meaningful opportunity to cushion the fall resulting from the massive shortfall of the HWT.

It's the LTD Beneficiaries' rights to bring action against the trustees and others responsible for the funding shortfall having been extinguished in the settlement agreement. There are not other remedies available to the LTD beneficiaries. As I mentioned, they are also the most affected by the underfunding in the HWT and have the greatest comparative need among all potential beneficiaries. This is not to take away from the pensioners that have needs that go beyond the needs of an average working person who is not yet retired; however, many have serious chronic life

threatening conditions with no prospect of ever being gainfully employed again. Most require pricey medications to live with dignity.

A drastic cut in disability income, which would be the effect of Scenario 2, would force them to rely -- well, many of them, it would force many of them to rely on social assistance and will push many of them below the poverty line.

It must not be forgotten that at least $30 million was removed from the HWT when Nortel engaged in the moratorium in 2005-2006. That was the moratorium of making contributions and paid medical and life insurance benefits directly from the assets of the HWT, as confirmed by Nortel's past treasurer and with the analysis of the independent financial analyst.

This has already had a massive impact on the Nortel disabled population and much of this money adhered to the benefit of the pensioners.

The bottom line from an equitable perspective is, as I stated, the average disabled will

lose approximately 72,000 if Scenario 2 is chosen, and the selection of Scenario 3 over 2 would result in the average pensioner foregoing just under 3,500.

Here, in these unique circumstance, and after considering all of the facts submitted, that it would lead to an injustice to evoke the inequity that is suggested by the Monitor. It must be recalled that this is a principle of last resort.

The allocation methodology ultimately approved by the Court should address the equitable considerations in play in these proceedings. It's respectfully submitted that the appropriate allocation of the assets is the third scenario. Scenario 3.

Now, in terms of the expert evidence, while the ultimate issue before the Court involves a question of law surrounding interpretation of the termination provision, expert evidence -- such as the evidence we proffered -- is helpful insofar as it supports the plain meaning of the interpretation provision. Here the actuarial and tax evidence is fully supportive of the plain meaning of the

termination provision. A review of the credentials of the Dissenting Disabled experts, shows that they are well positioned and qualified to speak to the matters in issue. Their opinions cannot be lightly ignored, and I will take you to some case law that suggests that Your Honour is able to consider the evidence and opinions of these experts, even though the final decision as to interpretation rests with Your Honour.

If I could ask you to turn up the first affidavit filed; that is, the affidavit of Joanne Williams, and that is down at tab 2 of the original motion record, Your Honour.

Her background and credentials begin at paragraph four. She's a fellow of the Society of Actuaries and the Canadian Institute of Actuaries. Ms. Williams also the acting superintendent for pensioners in the Province of Ontario. Sorry, the Province of Nova Scotia from 1996-1997, where she acted as the provincial regulator responsible for the administration of pension benefits act and the regulator of all private pension plans in the province of Nova Scotia. Since 1997, she has

provided actuary consulting services for an Ottawa firm and is frequently engaged in providing evaluations and advice for self insured Health and Welfare Trust established to comply with the requirements of the Canada Revenue Agency.

Ms. Williams has provided two affidavits in this proceeding, and the first one I believe you have in front of you.

Now, in terms of the credentials, if I could ask you to turn to the affidavit of -- I will come back to this affidavit in a moment, but while doing credentials, the affidavit of Jeremy Bell, which is in the supplementary motion record in tab 1. His education and experience begins at the top of page 2.

Mr. Bell is a Fellow of the Society of Actuaries and Fellow of the Canadian Institute of Actuaries. Both of these designations are the highest standing as an actuary.

Initially, Mr. Bell worked as an actuary as a consultant for Mercer's, and I note that Mercer's is the actuary consulting firm that is used in this proceeding. At Mercer, Mr. Bell determined reserves and funding

requirements for pension plans and provided advice on related matters to clients. Subsequently, Mr. Bell has become the chief actuary and chief investment officer of the health care benefit trust in British Columbia. One of the largest Health and Welfare trusts in Canada, representing over 80,000 active members and 6,000 disabled members with current assets of approximately three quarters of a billion dollars.

Finally, we have affidavit in the thin responding record of Diane Urquart. That is, tab 3 of that brief. That thin brief. Her qualifications begin at paragraph 3. Her qualifications as an expert include being on the executive committee of Scotia McLeod, Scotia Bank, and director of investment strategy and managing director at Burns Fry, predecessor BMO, Nesbitt Burns, and also served as court-appointment financial analyst expert under the order of Justice Campbell in the ABCP matter. She thus been accepted by one of your fellow judges.

Ms. Urquart's review analysis of voluminous disclosure by the Monitor for the purpose of

assisting this Court in making a fair determination as to the appropriate allocation of the HWT assets.

THE COURT: You covered qualification. The question of qualification, I don't think that is the issue?

MR. ROCHON: Well, one issue that my friends brought up was their opinions.

THE COURT: They are qualified. Their credentials are substantial. It's a question of whether in the context of these proceedings whether the affidavits are admissible as expert evidence, as you know.

MR. ROCHON: On that point, I further take the objection to essentially be that you cannot have an expert that is going to make the final determination.

THE COURT: At some point, there may be some that need a break.

MR. ROCHON: This may be the appropriate time.

--- Brief recess.

--- Upon resuming.

THE COURT: Mr. Rochon, what is the timing of the individual from Calgary?

MR. ROCHON: We were going for 4:30. I didn't

ask if we could stay for a few minutes after that?

THE COURT: Yes. There are some restrictions of some staff, so it's not open ended.

MR. ROCHON: Mr. Myers has opened up Goodmans technical IT department, and he has a phone that will help to get the people speak to us. A phone number. So the plan was call them at about 4:30, and then, or as soon as I am done submissions, and hopefully I will be able to wrap up before that.

Your Honour, in support of my submission that opinion evidence from actuaries and financial analysts can be used and accepted by the Court in order to assist in the interpretation of certain aspects of a complex financial actuarial based case, I have a case from the Alberta Queen's Bench, that has a detailed analysis including the, and Mr. Tambakos wanted to circulate that. There were a couple of paragraphs that I wanted to go to.

MR. MYERS: This could have been circulated during the break, Your Honour.

MR. ROCHON: Good point.

THE COURT: If there are any other cases,

deliver them now.

MR. ROCHON: That is all.

THE COURT: Mr. Myers, do you need a few minutes to review this?

MR. MYERS: It should be fine.

MR. ROCHON: Thank you. I wanted to take Your Honour to 33 and 34. Those are the ultimate paragraphs, but if you want to just make a side bar note. Beginning at paragraph 38 going to 48. Those 10 paragraphs, but 43 and 44. Paragraph 43:

> "Opinion evidence of industry practice as pleaded here is admissible to explain a written contract where there is ambiguity or where there is silence."

And reliance for that principle is CP Hotels, the Bank of Montreal, Supreme Court of Canada, and gives the cite.

> "But not to assist in interpreting an ordinary English word."

And it goes back to the Harrison case.

Paragraph 44 states:

> "Opinion evidence is admissible to assist the Court in finding the

meaning of technical terms in a contract."

And carries on:

"Opinion evidence is also admissible to assist the Court when dealing with the unique context of the oil and gas industry."

And then 45 states:

"Where there is a standard or common practice in an industry in relation to the performance of contracts, that evidence is in some cases admissible. An expert can also opine that a parties' conduct was inconsistent with that standard of practice. What he cannot do is offer an opinion that a party was therefore, at law, in breach of its contract."

So, to sum up, helpful opinions and evidence can be offered, but they cannot go so far as to provide a final adjudication or interpret ordinary English words.

Now, I want to -- I realize the affidavits are quite voluminous, and I wanted to go to the Ms. Williams affidavit at tab one, Volume 1.

If I could ask Your Honour to turn up paragraph two, at the top of page 2. Where Ms. Williams begins, second line down:

> "This is because upon wind-up of the Nortel HWT, the liabilities should be calculated with respect to all claims of insured events occurring up to the date of the wind-up."

I should remind Your Honour that this affidavit was sworn at the beginning of August, prior to the Monitor's report coming out and August 9th.

So, what Ms. Williams is stating here is consistent with what has become known as Scenario 2.

In the case of LTD income benefits, and she is providing her actuarial opinion here.

> "...the insurable events, namely the events of disability have already occurred. On the other hand, future premiums payable to third party insurers for group's term life insurance after the wind-up date are not incurred expenses, nor liabilities of the HWT on wind-up."

THE COURT: That is not the question that I am called upon to determine. Tell me how that is not just suggesting the legal conclusion?

MR. ROCHON: Because this deals with what is permitted under the Health and Welfare Trust generally. It's an opinion from an experienced actuary and is providing the Court with information the Court would not normally have access to, and this information will help the Court to interpret the plain language of the termination provision.

She is not saying this is what the plain language states. She is rather saying that -- she is talking about incurred expenses for disabled individuals will be paid typically under a wind-up, and future liabilities for insurance premiums will not be paid.

So, backing up a couple of lines, where she states:

> In the case of LTD income benefits, the insurable events; namely, the events of disability have already occurred."

And then she contrasts that with future premiums payable to third party for group term

life after the wind-up are not incurred expenses.

I, personally, was not aware of that incurred expenses and not incurred expenses. I was not familiar with these terms, and Ms. Williams has helped to shed some light on these otherwise foreign insurance concepts and has applied them to the case of Health and Welfare Trust and HWT of Nortel.

She is not saying the words of the termination agreement, therefore, means "X". That is for Your Honour to decide.

If I might turn Your Honour to page 4, where we looked briefly a moment ago, but going to paragraph 11. She begins by stating:

> "Employers may deduct contributions to HWT in the year the legal obligation to make the payment to the trust arises."

And then she goes on to explain why that is the case and references interpretation of Bulletin 85-R2, which we reviewed earlier.

Now, at paragraph 12, there is a point of law which technically wouldn't be the within the purview of an actuary to advise the Court of,

but with respect to paragraph 12, this is really a legal point that we essentially adopt as part of our legal argument.

But there is a discussion relating to a case of the Court of Appeal, 1998, which informs the question of deductibility from Mr. Justice Borne, the Court of Appeal for Ontario.

THE COURT: For the purpose of the affidavit, what are you telling me?

MR. ROCHON: Well, being mindful of the Court's concern that legal matters and questions of plain language interpretation are for the Court to decide, what I am saying is that this expert has pointed us to a very helpful case dealing with deductibility.

THE COURT: I am having a problem here, and the problem is this: I assume that you had some involvement in the drafting of the affidavit, or your firm did?

MR. ROCHON: I can not say with respect to this affidavit, but maybe Mr. Tambakos can assist. I think we have had limited input. This is her work product.

THE COURT: Let me try it this way, did you

have an opportunity to review the evidence and reflect on what would be some fairly basic concerns?

MR. ROCHON: Normally, we would see the draft or next to final draft, Your Honour. I can not say what was happening at the beginning of August.

THE COURT: Not only is she an actuary, but she has some other talents.

MR. ROCHON: I think she has a mathematics background.

THE COURT: I take it paragraph 12 would normally be seen in a factum?

MR. ROCHON: That is right. That is why I drew your attention to that, Your Honour. The other couple of paragraphs I wanted to draw your attention to, Your Honour, are paragraphs 28 and 29, dealing with the wind-up of the HWT. At 28, she states:

> "Upon wind-up, the HWT liabilities would likewise be calculated with respect of all claims of insured events up to the date of the wind-up. There is no basis from deviating from the existing term from the Nortel HWT,

where the applicable insurance principles on or before the wind-up of the plan, unless there are surplus assets remaining after existing claims have been settled."

And then her opinion at paragraph 29:

"In my opinion, therefore, the LTD Beneficiaries have a strong argument that the future income replacement benefits should be settled in priority within Nortel HWT. In other words, assets within the Nortel HWT should not be allocated to the cancelled insurance coverage that would have applied to future events before and unless LTD income benefits, where the insurable have already occurred have been fully satisfied."

Then without going to it, I would recommend for your reading paragraph 33 of Ms. Williams' affidavit.

Next is the affidavit of Jeremy Bell. That is in the supplementary motion record, Your Honour, tab 1. Mr. Bell has provided a comprehensive affidavit, and a lot of

background information is contained in paragraphs one through -- well, in addition to his credentials, up to paragraph 44, and then he comes to the section, "Summary Regarding Funding Obligations."

But the point I wanted to draw the Court's attention to begins at paragraph 48 and beyond, under the heading of Treatment of Obligations on Wind Up.

Mr. Bell, as you know, is the head of this large BC-based Health and Welfare Trust that is -- that basically is used as a centralized place where corporations can benefit from this larger trust fund, Health and Welfare Trust, in order to pay out benefits to their employees. And at 49, he relates the experience he has had as the chief actuary of this fund, and states that:

> "We do, however, experience terminations from the Health Care Benefit Trust."

That is the place he works. And:

> "In these terminations employers exit the trust they cease contributing pending settlement of any outstanding

obligation. Coverage for any future claims ceases. In these in instances we continue to pay for the following with respect to employers covered by the employer. A, income for existing disabled members of the date of termination. This income is paid until the point that the member is no longer eligible to receive it due to recovery, accident, or death."

And then at, B, at top of page 14:

"Reimbursements for life, accidental death and dismemberment extended health and dental claims that happen prior to the date of termination."

Those are also covered.

THE COURT: When he says at 50, we continue to pay. Who is "we"?

MR. ROCHON: We would be the Health Care Benefit Trust. That is, the trust continues to pay.

THE COURT: This is in the context of an employer exiting the trust as in 49?

MR. ROCHON: Yes.

THE COURT: So, Mr. Bell's comments in the settlement of outstanding obligations, whether the employer is called upon to contribute or settle or provide additional consideration into the trust to cover the items outside of B in Section 50?

MR. ROCHON: I think the answer to the question is at the end of 52, which is the last sentence, second line from the bottom:

> "Once the employer terminates from the Health Care Benefit Trust, non-insured claims and future coverage of the benefits revert to employer."

In other words, they become the responsibility of the employer to pay directly.

THE COURT: Is that part of the settlement, outstanding obligation, is he called upon for the employer to fund this trust in some way?

MR. ROCHON: What I take from 52, Your Honour, is the actual payment for those non incurred claims for future coverage become the direct responsibility of the employer, and the analogous situation here would be it would become the obligation of the estate.

And then in terms of the relative priority,

talking about self funded Health and Welfare Trust, generally, paragraph 53 states:

> "Paramount importance should be placed on long-term disability claims, as well as other claims occurring prior to date of termination."

And then 54:

> "I believe funds not incurred from the bankruptcy of a company should be funded from the Health and Welfare Trust after incurred claims are provided."

And that is the affidavit of Mr. Bell. I should also point out that there were two subsequent affidavits from Ms. Williams and Mr. Bell that were obtained following the disclosure of the opinion -- sorry, the Monitor's report and opinion from Goodmans, and they are also in the material in the thin volume, and they confirm the approach that we are advocating for, and that is Scenario 3. I will not take you to those in detail now. Finally, the affidavit of Ms. Urquart. We have reviewed her credentials. We also made reference briefly to this affidavit in

response to comments from other counsel that made submissions yesterday.

I alerted the Court to a correction in one of the descriptors at page 19, paragraph 31(i). That should have read, "pensioners' medical benefits, $16 million."

At paragraph 30, I draw your attention to that $32 million of HWT assets were removed during the moratorium. This is consistent with the evidence of Mr. McCorkle, the Nortel insider.

Also at paragraph 32, there is an update provided with respect to the Health and Welfare loan to Nortel of $37 million, and only to confirm the review of that loan documentation, and further documentation and financial statements were reviewed, and it would appear that was in fact a loan taken from the HWT for $37 million.

And then moving forward to table 8, found at paragraph 36. You will see that there is a limited review of life insurance premiums paid to pensioners, totalling $16 million for the years 2005 to 2009. This is -- I should emphasize that this is fresh money taken from the HWT over and above the money described at

paragraph 31.

So, there is money taken from the HWT in order to pay for the pensioners life insurance premiums for those years 2005 to 2009.

During the course of my friends' submissions, there were some objections voiced as to the characterization of Ms. Urquart's affidavit of the removal of monies from the HWT as being misappropriation.

I would only say with respect to that, the following: How ever Nortel's actions in removing money from this Health and Welfare Trust are characterized, we should not lose sight of the undisputed fact that significant monies were removed from the trust, and that was not a good thing. The concerns we expressed --

THE COURT: I don't think that is what your friends were concerned about. They were concerned about the characterization of the funds being transferred and misappropriation.

MR. ROCHON: The point that I was making, when you take money from a trust account that is not being used to pay the beneficiaries of the trust account, then it is an appropriate use

of the term "misappropriation", in my respectful submission.

MR. MYERS: Sorry, I didn't understand any evidence that the money was not paid to beneficiaries. I thought that it was to pay medical and dental benefits, and there were no contributions put in. There was no evidence that money went to a third party, for example.

MR. ROCHON: We didn't describe it as fraud.

THE COURT: Well, there are two different things here. Mr. Myers is pointing out his understanding, which is that the monies were used and paid to beneficiaries of the trust with no corresponding contribution to keep the amounts in the trust.

If that is in fact the situation, then you have to square for me the words misappropriation which in plain meaning of the word means funds taken from a trust improperly used and distributed to parties not entitled to it, and I think there is a point to be made by --

MR. ROCHON: Let me see if I could try to calm the waters on this by saying the following, money was taken from the HWT during 2005 and

2006, and other years, to fund what were normally pay-as-you-go obligations, and the money taken from the trust was money that was sacrosanct or trust funds that was there to pay for funded programs or funded plans, i.e., the long-term disabled plans, to make sure there was sufficient money to pay for disability claims into the future.

So, yes, the money was not spent in Vegas or any highly inappropriate purpose, but was used to pay what were pay-as-you-go benefits, and the money came from the Health and Welfare Trust that was supposed to be the funded trust used to pay things; such as, long-term disability income benefits, and the other benefits that we don't have any dispute about, and I mentioned those at the beginning of my submissions.

THE COURT: Is the problem caused by, you know, the one trust with multi beneficiaries? I think from your standpoint some have greater entitlement to programs, but is this not where the program starts? You have one trust and many beneficiaries.

MR. ROCHON: I see your point, but I am

beginning to appreciate the difference between pay-as-you-go obligations administered through the trust in and out --

THE COURT: I understand there are differences. The factual issues and the difficulty that a number of the disabled have. That is not lost. The struggle I have is that you are still left with one trust and having to pick and chose among beneficiaries.

MR. ROCHON: That is true, and we urge this Court to not chose the route whereby future premium payments never contemplated by this trust would be paid on the backs of disabled. I had made an earlier comment I just wanted to clarify Your Honour, which is an important distinction. We are talking about the intention of the trust back in 1979-1980. And I had indicated that because of the change of the law in 1986 that the intention had changed, but I would like to partially retract that statement.

The intention cannot be discerned from the evidence that we have before us.

It's the Court's duty to look to the plain meaning of the words of the termination

provision, or if in doubt look to the tax and actuarial practice in order to inform the Court's understanding of what the intention is.

The HWT may have been tax compliant through the $11 million funding in 1980 and compliant with Scenario 2 at that time. But given the change in the law, my friend's Scenario 2 is subsequent to 1986 no longer tax compliant, and the only tax compliant scenario would be that is upon termination. The only tax compliant scenario would be Scenario 3, in my submission.

I think I have covered a number of legal points in my submissions, Your Honour. There is one point though that I wanted to bring forward in relation to the reserves set -- the bookkeeping reserves set by Nortel as being informative of the Monitor's decision to chose Scenario 2 over Scenario 3.

It might be helpful at this point to turn up the Monitor's report and the memo from Goodmans and that is tab B, Volume 1 of the Goodmans material, tab 2-B. There is just one point of -- I want to say intellectual

inconsistency see, but that may be harsh.
Inconsistency in the document.
It's beginning at paragraph 41, and it's touching on the Optional Life account.
THE COURT: I don't know if I have the right one here. Okay. Got it. All right.
Paragraph?
MR. ROCHON: 41, and touching on the optional life account.
THE COURT: Yes.
MR. ROCHON: I just make the submission that the tax rules make it impermissible to hold permanent insurance policies in the HWT. Only group life insurance policies are permissible, as such an interpretation that pensioners' life benefits should participate on termination would thus offend the tax rules regarding Health and Welfare Trust and would potentially throw into question the tax question of the HWT.
Now, in the memorandum, interpretations of the trust agreement that conflict with tax rules of the HWT and are described as untenable, and you will see in paragraph 41, just four or so lines down, beginning with the "i.e.", and

there can be no reversion.

> "This result is not tenable and would potentially throw into question the tax equation of the HWT since inception."

Now, this relates to the treatment of the optional life account.

So, they're concerned about being off side of tax considerations as it applies to the optional life account. However, in the summary of conclusion section at page 15 of the memorandum, I guess, beginning at paragraph 61 of the memo.

We largely agree, as I said before, with a lot of what is in this memorandum. 61 states: "The HWT is a single trust fund." And 62:

> "The optional life participants are not entitled to the optional life account, and these assets do not revert to Nortel, and the HWT is a single trust fund and should be distributed to the HWT beneficiaries, who are eligible to participate at the time of determination."

And then 63:

"All claims and obligations described up to the date of termination of the HWT."

And then 64. The first part of 64 is fine.

"With regard to future claims, it may be argued, first, all claims for future benefits vested under the plans should be present value and participate, or, two, 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."

And we're good with that as well, because that would cover the long-term disabled, but then things become a little tenuous in the next language:

"Given the language of the trust agreement as supported by Nortel's funding practices, the better view is that claims that have been made but would certainly have been made --"

Sorry.

"...claims that have not been made

but certainly would have made in the future should participate in those two above."

But this interpretation is not borne by the plain language reading of the termination provision.

The language that would certainly have been made in the future, those are words that appear nowhere in the text of the termination provisions. They're words that are extraneous to any plain reading of the trust agreement anywhere.

And, in my submission, this is where there is a bend in the logic of the Goodmans' memorandum, which is not supported by actuarial practice, and it's not consistent with tax considerations that we have touched upon through our experts.

All right. Now, also picking up that language, "certain to occur", there is one important point in the evidence that I wanted to take you to, and that is in the affidavit of Diane Urquart in the thin motion record, Tab 3.

And if we could turn to page 8, paragraph 12,

and I am not sure which of the famous authors said that there are only two certainties in life: Death and taxes.

UNIDENTIFIED LAWYER: Benjamin Franklin.

MR. ROCHON: There you go.

Well, in this case, as true as that statement is, at paragraph 12 in Ms. Urquart's affidavit, she points out that the term life policy of insurance terminates automatically upon your being the company's receivership or bankruptcy, and upon this receivership or bankruptcy or the participating affiliate, the insurance of all members of that participating affiliate terminates automatically.

So, well, in 2000, before the hit the fan at Nortel, and you will recall there were problems with revenue recognition and then the cookie jar reserve allegations later under Mr. Dunn, and then the market price crash, and then finally the company is in CCAA process, and deep in that process now, and in litigation. Suddenly, there's not so much certainty. All of these term life policies will terminate automatically upon bankruptcy.

Now, this company is, for all intents and

purposes, bankrupt now. Is it formal bankruptcy yet? It's factual bankruptcy from a cursory review of the financial situation. So, these policies right now are probably dead in the water, in my respectful submission. So there is no certainty.

In fact, there's not even a policy at all that is in effect. They have all been cancelled. Sorry, I shouldn't say "all" been cancelled, but to the extent that Nortel is bankrupt, they have automatically terminated.

THE COURT: It seems to be somewhat at odds with your position last March?

MR. ROCHON: Well, I don't think we had access to the term life policies in March.

THE COURT: Well, as far as I understand, the policies have not been cancelled. Could we have some clarification on that point?

MR. MYERS: As far as we know, they are in force.

MR. ROCHON: The point is that these policies are no longer certain, and there is an element of uncertainty as to whether or not they have been or will be automatically cancelled.

Those are my submissions, Your Honour.

If we could have our two individuals call in or whoever is available to call in at this time. Maybe we could take a short break to set up?

THE COURT: I will just be outside here, and as soon as you get it, we will convene again.

--- Brief recess.

--- Upon resuming.

MR. TAMBAKOS: Good afternoon, Your Honour. We have Greg McAvoy and Arlene Bornstein on the line. I will turn it over.

--- (*Calls transcribed to the best of my skill and ability.*)

MR. MCAVOY: I will begin.

THE COURT: Good afternoon, sir.

MR. MCAVOY: Thank you, Your Honour. My name is Greg McAvoy. I am a former Nortel employee, now on long-term disability. Please, refer to my February affidavit for further details.

Dealing with these CCAA proceedings is worse than dealing my disease, which believe me is no picnic.

Unless the Health and Welfare funding is restored and allocated to the disabled, my

family and I will be financially ruined. How can I live on the CPP disability income of $13,000 per year? Can anyone in this courtroom? This barely covers basics like food, let alone housing and my high medical and drug expenses. Our lives have been put on hold for well over a year, and I am sick of it.

Lawyers and bondholders are getting rich, and we are suffering. One of my colleagues even tried to commit suicide.

We are in this situation because Nortel did not operate as an honest company. Our trust account was drained in many ways, including employer contributions withdrawn, loans as employer contributions, and employer cash contributions stopped, and employer contribution to fund to pay employer benefits. Nortel said they were acting like an insurance company, but this is not true. They put the disabled at risk and failed to inform us that we were at risk.

Now, what about our pensions? Unlike the current Nortel pensioners, who have had a lifetime to accumulate wealth and receive

pensions from Nortel, CPP, most of us on LTD were in our early 40's who went on LTD. We have had dramatically reduced pensions. Most of us have many years before retirement, and our own source of income is the Health and Welfare Trust.

On a fairness basis alone, the money in the Health and Welfare Trust should go to the disabled and survivors, not to insurance premiums for the pensioners.

The court-appointed pensioners have been lobbying the Ontario government not to wind up the pension plan. With the support of Koskie Minsky, they are pushing to have the funds managed by a private company.

Further, the downside risk, and even the fact that the Ontario pensioners may lose government back up were never stated.

Ms. Kennedy publically endorsed this plan and also was prepared to put all LTDs employees at risk. I did not give any of these individuals the right to touch my pension.

Also, I believe Ms. Kennedy has no right to represent the LTD beneficiaries of the Health and Welfare Trust, as she was not elected for

this role and all these negotiations have been done without our knowledge or consent.

Remember, many of us are managers, engineers, and highly trained technical people who can understand actuarial documents and can read financial statements. We are not mentally incompetent.

On the other hand, I have no faith in the (inaudible)competency of the trust agreement of our existing court-appointed representative. Note, the same group also wanted to launch another scheme this time using money from the Health and Welfare Trust to find a new medical plan, based on Koskie Minsky to fund the trust.

The scheme was opposed by many of the LTD Employees, those that saw the risk but were never disclosed. The common denominator here is Koskie Minsky pushing for more business at the disregard the risk of disabled.

I am appalled by the way many of the court lawyers have behaved. Many times we have been treated rudely and in a condescending manner. A request for information often ignored.

I would like to remind everyone, on March 11,

2010, Canada signed a UN Conventional Right for Persons with Disabilities, income protection and legal access and the elimination of poverty are key principles. We are not objects of charity.

The government has, therefore, given us the answer to this trust issue. It must be restored for the disabled.

Thank you, Your Honour.

THE COURT: Thank you, Mr. McAvoy.

MR. ENGELMANN: Your Honour, if I make a comment, before the next person speaks. I think it's grossly unfair to use this forum to attack the integrity of the court-appointed representative, and I hope this will not continue.

THE COURT: The Court has that marked and established the basis that certain parties who wish to make their views known on difficult issues are not -- we are giving them the latitude to do so.

I hear you, sir, but at the same time, I think everyone in the courtroom has to recognize there are difficult issues.

Ms. Bornstein, are you there?

MS. BORNSTEIN: Yes, I am.

THE COURT: Okay. Go ahead.

MS. BORNSTEIN: Thank you. Thank you for this opportunity, Justice Morawetz. My name is Arlene Bornstein.

Before the creation of the Northern Telecom Health and Welfare Trust, the company who made is (inaudible) submitted a trust which included all planned documents in the funding policy. They wanted to ensure that the trust they were created for their employees would be compliant with the rules under CRA, but the mere fact that Northern Telecom got special permission from Revenue Canada to put some part of monies (inaudible) arrangement called a pensioner life insurance fund -- and it was a fund, not a plan -- over 30 years ago, into the Health and Welfare Trust upon its creation, does not in any way translate into an obligation on the part of the Nortel Health and Welfare Trust.

To use assets of my LTD income plan or the survivors' income plan to pay the life insurance premiums for retirees, or anyone else at Nortel. Particularly, this original

money has long been gone, especially when Nortel's management started to pay for pensioner life insurance premiums out of the Health and Welfare Trust assets in 2000 and continued to do so throughout this decade. The rule in place since 1986 does not allow for any prefunding of life insurance at all. So, we have to comply with the rules as they are today in order to wind-up the trust, not the rules that existed 25 years ago.

If Nortel made a promise that the trust cannot execute, then this is a promise of Nortel that its estate will have to deal with. You cannot ask us to accept a life of poverty and expect us not to object while we watch our disability insurance money taken from us, because it's seen as a convenient source of money to pay what Nortel owes its pensioners in terms of life insurance coverage.

What Nortel promised us was it was a disability income until age 65, death, or recovery from illness. They said they were playing a role like an insurance company when they created the trust, and they got tax advantages from it.

In fact, until 2003, my T-4 slip said, the Northern Telecom Health and Welfare Trust was paying my LTD income, and then after that Sun Life was listed as the payer.

If there was enough money to provide for the plans clearly outlined everywhere, the funded and income plan, we would not be here, Your Honour, because none of us has a desire to take more than what is legally ours, and what we are legally entitled to according to experts and under the actuarial law.

The fact that Nortel used our money to pay for life insurance premiums, not only as the pensioners but other Nortel employees at times in history, does not in any way create (inaudible) use the money put aside for our children and our future and allow the assets to be drained to our detriment.

It's a sign of company that went down the wrong path. Nortel was not supposed to be using the trust like an operating bank account.

How they kept their books for the reserve assets of the trust cannot possibly include the distrubution of our assets on the wind-up

when there is just one trust, and given Nortel's accounting regularities, how can anyone rely on Nortel's bookkeeping practice in the reserve asset in the trust?

Even the trust accounting had to be restated, and I am certain we are all familiar with the settlement reached between the NDP and Nortel officers, and the three faced criminal prosecutions related to these accounting irregularities.

Is it these bookkeeping practices we are being asked to rely on here?

Now, the Health and Welfare Trust cannot have any other type of life insurance (inaudbile), whether you call it permanent, life insurance, death, whatever, none of those are actually allowed inside a Health and Welfare Trust.

If it's not on the list, it's not allowed in the trust. If it's not group term, it's not allowed in the trust.

If you can not have it inside a trust, how can anyone construe that Health and Welfare Trust somehow acquires an obligation for a type of plan that it's not allowed to have?

Regarding the matter of counsel order, I have

not opted out, because I personally, and the rest of the Dissenting LTD, believe this Court when it said we had a right to object to the Settlement Agreement, and we could have a lawyer of our choice to present legal reasons for objection.

He did, but it didn't matter, and what we understand is that our lawyer is lawfully legally entitled to be in this court now to present to Your Honour legal arguments on my behalf against Scenario 2 and provide argument in support of Scenario 3.

Your Honour, that the court Monitor, former employees, and LTD Representatives, and their legal counsel had several meetings to make some deal on how the assets will be doled out, and I am certain Your Honour is aware it's irrelevant to Your Honour's decision on this matter. Particularly, when we received a few emails in mid January of this year from the representing stating that the allocation had already been agreed upon a full eight months ago, Your Honour.

I understand that this Health and Welfare Trust distribution will be determined on legal

principle only. Since I have the right to be represented in this way, in this court, I don't see how I would be improving my position by opting out of the counsel order for the CCAA process today.

I supported the transfer of the red counsel motion to RG for many reasons, but I also supported that we differ this matter so the Health and Welfare Trust distrubution could be examined on legal arguments.

I know for a fact that Rochon Genova and the actuarial and financial experts have worked for weeks and weeks and weeks diligently, without any pay, to assist this Court to get the legally sound and what we are entitled to, Health and Welfare Trust distribution. We are certain -- sorry.

THE COURT: Take your time.

MS. BORNSTEIN: I am about to finish. We are certain that Your Honour has the power to instruct this Court appropriately, and that a plan that would see all of Nortel's disabled employees deprived of what is rightfully their's under the law so that our assets will be taken from us, and instead used to create a

Health Welfare Trust for the union and NRTC, is yet (inaudible) legislation under the Income Tax Act, that that will not happen.

Thank you, Your Honour.

THE COURT: Thank you, Ms. Bornstein. I believe that concludes the calls.

Mr. Rochon, I think you have indicated you have completed your submissions.

Is there anything you wish to add after hearing from the two individuals?

MR. ROCHON: No. Thank you.

THE COURT: That leaves reply.

Mr. Myers, how long would you expect to be in reply? And then the others as well?

MR. MYERS: 15-20 minutes.

THE COURT: Others?

MR. WADSWORTH: Five to 10 minutes, Your Honour.

THE COURT: Regrettably, some of the court admin staff have obligations and will not be able to complete this today. We will start and wrap up tomorrow morning with a ten o'clock start, and we still have to hear from Mr. Finlayson.

You may want to sit together tomorrow, Mr.

MacFarlane. All right. Thank you.

I think that you know, as I said earlier, I hear you, and the function of all of the court-appointed representatives is very challenging in this difficult case. It feels better to give individuals a bit of latitude, so they can insure that their voices are heard. Okay. See you at 10:00.

-- Court adjourned to October 1, 2010.

-- Upon resuming on October 1, 2010.

October 1, 2010.

THE COURT REGISTRAR: Please, be seated.

THE COURT: Okay. Good morning. Mr. Myers, I think you are first up.

MR. MYERS: I think we will go in around the same batting order, in terms of what people have to say.

THE COURT: Okay.

MR. MYERS: Your Honour, yesterday, Mr. Rochon argued that Nortel's benefit promise to its employees was not an obligation of the Health and Welfare Trust, and that is not correct.

If I could ask you to turn up Volume 1 of the record, tab G?

Your Honour will see the trust agreement, and

just starting right on page 202 at the commencement of the trust agreement:

> "Whereas the corporation has established for the benefit of certain employees and employees such as the corporation may designate, certain Health and Welfare Plan and other plan or plans as the corporation from time to time may offer as follows: A, B, C, D, E, F, group life insurance plan, all which hereafter referred to as "The Health and Welfare Plan."

So, Health and Welfare Plan that includes the group life insurance plan offered to employees. And then under Article 2, the trust fund.

> "The trust fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the employees."

Sorry, back at page 203 there is a definition of benefits.

> "The term 'benefits' as used herein shall mean payment benefits, as determined under the Health and

Welfare Plan."

So, the Health and Welfare Plan that it includes the insurance plan, and the payment is the payment benefit under the insurance plan, and the purpose of the trust is to provide the plan benefits for the benefit of the employees.

The plan, Mr. Pepall and I took you to various iterations of it already, which are behind Exhibit K, which define the insurance benefit. In accordance with the employer's promise. So it is the promise under the plan, is very much the subject of the trust. In fact, the word "benefits" which is used in the termination agreement provision, as Your Honour may recall, is defined as the benefit under those plans; being, the employer's promise to make the payment of the plan benefits.

So when Your Honour asked yesterday, who are the beneficiaries? The answer to that is the employees who are entitled to receive benefits under the various plans, and that, by the way, is set out in paragraph 8 of the Goodmans Memorandum as well.

Now, which beneficiaries share in the liquidation is determined by the termination clause, which tells you which benefits are included, which claims, which obligations, which future benefits are included. And that is -- in my submission, you cannot decouple the benefit promise made by Nortel from the trust. In fact, it's the opposite. The trust incorporates expressly the promise to provide the benefits under the plan.

THE COURT: What's the impact of the 86 amendment to the Tax Act that Mr. Rochon focussed on?

MR. MYERS: Well, Your Honour, he said a couple of things about them. He said that after 86, the Income Tax Act made it illegal for Nortel to accumulate money in the pension -- money in the trust for the pensions. Income Tax Interpretation Bulletins are not law, and we set out that provision from the interpretation in our material.

But even if the Income Tax Act itself had changed, even if the act changed, and assuming that the ruling does not grandfather, a change in the tax law would just change the taxation

of Nortel on how its future contributions or future distributions from the trust are taxed. It doesn't change the meaning of the trust document, which was set out eight years or so earlier.

Of course, Your Honour knows that we interpret the meaning of agreement as at the time written, wherein surrounding circumstances where they are ambiguous, and my friend's book of authority talks about that. Lister v. Dunlap. There are many a number of interpreting contracts as the date written. So, if in '86 there was a consequence, it may have changed the trust agreement if it needed to take into account the changes, but there is no evidence of any changes.

In fact, in the records are years worth of audited and unaudited financial statements of the trust and actuarial reports of the pension fund, the pension reserve within the trust, from right up to this year for the last 20 years. The facts are what they are.

There is no issues of auditors raising issues with financial statements or actuaries raising issues in the actuarial reports.

Nortel made its contribution and paid it's taxes.

So, the fact that the tax laws may have changed, may or may not have changed the tax issues then. There is no issue of it, and it's of no consequence today.

Going forward, there is not going to be anymore contributions. There is going to be a capital distribution. It will be taxed as it's taxed.

The laws on interpretations of what might be tax attributes for pension insurance plans is of no consequence for today, and we deal with that in Schedule C.

The bottom line is, the changes in '86 are irrelevant to the issue before you, which is the interpretation of the meaning of the termination provision in 1980, which my friend rightly conceded did not change. It cannot change because of an interpretation of the bulletin some years later.

Now, the Monitor submits that the interpretation put forward in the Memorandum is in fact the correct interpretation of the trust agreement, and the Court should so find.

It's the most reasonable interpretation, in our submission, that is consistent with all of the words used, with the objective verifiable intention of the parties, and it's the most -- it's the most practical to implement.

As we heard Mr. Rochon respond to Your Honour's questioning, he seems to want you to accept the position that should Your Honour not be prepared to accept that the Monitor's interpretation is correct, then your holding should be without prejudice for others to come back to engage in future inter litigation as may so be advised.

The Monitor does not submit that there are two options. In fact, the Monitor put before you, and Mercer identified 14 options in Exhibit D, and they all flow in one way or another from Goodmans memorandum.

The memorandum goes through an analysis of all kinds of different possibilities, including optional life being in or out, the benefits, some in, some out. Whether it's constructive or resulting. The memo covered all different options, but one needs to read the agreement as a whole, in my submission.

I understand all the different combinations that are being put forward, but if Your Honour wouldn't mind turning up the memorandum, and I am looking at paragraph 97 of the record.

It's behind tab 2-B, paragraph 41 of the memorandum.

This is dealing with one provision, the Optional Life account. There is a reserve, there's a sub account that's been dedicated to the Optional Life, and we said, and I mentioned to you in-chief, there is no ongoing liability for Optional Life.

So, there is money sitting there that does not have ongoing liabilities to pay, and the first sentence at 41:

> "If the Optional Life account is a separate trust fund..."

And we assert today, and everyone agrees it's not. But in the memo:

> "If it is a separate trust fund, and there is no constructive or resulted trust, under the terms of the trust agreement, Nortel is entitled to surplus funds under the HWT."

There is no interpretation being done, but if

there is money sitting there with no liabilities associated with it, the termination clause says it goes back to Nortel. The next sentence is what Mr. Rochon focused on:

> "However, given the tax rules related to the Health and Welfare Trust, i.e, there be no reversion, this result is not tenable ..."

So, there is a big tax problem if that happens. And then they go on:

> "In addition, the financial statements with respect to the HWT disclose a debt to the HWT due from the response involving the company Nortel."

And we say there is set off.

What that paragraph is doing, and sometimes parties forget and become so focussed on your own interest, and forget who else is out there.

That is talking about Nortel's interest, and the creditors who might see $18 million sitting in a potential trust account with no trust liability. They may be saying --

creditors and Nortel may be saying, we have $18 million we can go after here. And Goodmans say, "Wait a minute. If you do that, you may be opening a tax hornet nest for yourself, and there is set off."

So creditors and Nortel don't get excited about this Optional Life. There is no money there for you, and if you thought you wanted it, watch out for the taxes.

That sentence that Mr. Rochon talked about is not using the Income Tax Rules to interpret the term of the trust agreement. It's explaining the consequence of a position to Nortel and the creditors.

We have never used the tax attributes to change the facts or ask Your Honour to find different facts or to change the interpretation of the trust. That is exactly what my friend's experts did do.

The expert issue, my friend gave you the Marathon case, and what that says the issue after Mohan is no longer commenting on the ultimate issue, but rather is the expert testimony helpful to the Court and necessary to provide the Court with assistance in

understanding the facts, but what an expert testimony cannot do is interpret law. That was the decision of Justice Ground, and the Court of Appeal decision that I gave you in our book of authorities.

If Your Honour looked, for example, at paragraph 51 in the Marathon decision that my friend handed up. It's a loose decision. My friend read what experts can do, but not the six paragraphs that the same Court said it can't do, which is interpret law. Paragraph 51, page 15. The bottom paragraph of the page, right in the middle of the paragraph talking about a Mr. Alan.

> "In summary, Mr. Alan offered the opinion that based upon a review of the financial statements those failed to comply with covenants in the agreement ... the latter conclusion is on the Court's task and carries no weight."

Paragraph 52, at the bottom of page 16. Top of page 16, the bottom:

> "... reported to interpret several articles in the agreement, which is of

course not his function."

Paragraph 57, which is on page 18. The last paragraph dealing with Dr. Sic's (ph) testimony. Page 18 at the bottom.

"...purported to interpret 9.2 of the report, but that again is the Court's role."

And above paragraph 58 (e), and then the same about Mr. Vetch:

"Mr. Vetch also offered interpretation, which is not for him to do."

And, yet, Mr. Rochon took you to paragraphs 2, 28, and 29 of the Williams' affidavit in which she does exactly that: "Here is what the termination clause means."

So, whether Your Honour says it's inadmissible because it's a matter of law, or it gets no weight, because it's not opining on facts for which the Court needs expert assistance, the evidence is of no value.

Mr. Bell is similar, but suffers the additional that he is talking about a different plan. A multi-employer sector plan, with no indication that it even has post

retirement or pension benefits. No evidence at all before you whether employers that leave that plan are providing pensions to employees elsewhere. No evidence before you of the terms of the trust.

Mr. Bell says that when people leave our trust, here is what we pay them. Without giving the terms of the trust to see what the terms of trust require them to be paid.

There is evidence of what is done in British Columbia, and a different plan is of no relevance or assistance.

Your Honour, all the issues, in our submission, come back to how you interpret the termination clause and the phrase, "future benefits and claims to be made under the plan up to the date of termination."

In his argument, Mr. Rochon took you to the paragraph and did not deal with the word "future." Just ignored it.

In my submission, interpreting a contract, we do not ignore a word, and then he redefined the word "benefits". He said benefits are one year premiums. He didn't take you to the definition of benefits in Article 1 that says:

"Benefits are the benefits provided in the plan."

Mr. Pepall and I took you to the plans that show that it's the money being paid forever to the retirees when they die. Excuse me, for one moment.

Now, Mr. Rochon went on to say, even if we were correct, that Your Honour could use equity and give something to non pari passu distribution.

The first part 45 minutes of Mr. Rochon's evidence tells Your Honour this is about the correct legal result and cannot turn on what others say is fair and reasonable. It's legal entitlement, as the Monitor submits.

But then he changes course and says, well, if legal entitlement is unfair, you can help out. But you will see in the book of authorities, I will give you the reference.

The Buckley case is tab 3 of Mr. Rochon's authorities, paragraph 72.

"One only deviates from pari passu where the words of the agreement provides, otherwise the presumption isn't pari passu sharing."

Lastly, Your Honour, Mr. Rochon speaks on the equitable argument about the hardship that his clients suffer. No doubt, this is a difficult and painful matter.

The HWT is underfunded. There's only about $80 million available for over $500 million in identified liabilities. Everyone has heard the expressions of hurt and anger that have been before the Court.

The Monitor has not taken the responsibilities lightly in coming before the Court or carrying out the process that brought us here.

The Monitor listened to the Disabled Beneficiaries and Pensioners. Nortel made promises of benefits to all of them that it's not fulfilling. Nortel also has obligations to others.

The Monitor submits that its proposal reflects the legal entitlement to the beneficiaries that is fair and reasonable and financially possible. It's recommendation and support of all court-appointed and CAW who collectively have the authority to represent the interests of all beneficiaries of the HWT.

The representatives of counsel underwent their

own difficult and serious processes. We submit Your Honour should take considerable comfort in the representatives' consent that what the Monitor submits is the proper outcome is also viewed by the beneficiaries as a whole as fair and equitable and is desired by the beneficiaries to have balanced their own interest.

Your Honour, this concludes my reply, and I think we can deal with the order very briefly at the end if it suits Your Honour.

THE COURT: Thank you. I believe Mr. Pepall?

MR. PEPALL: Thank you, Your Honour. Once again, I support the reply submissions of my friend, Mr. Myers. I have a few of my own, however.

The first one follows conveniently after Mr. Myers' concluding remarks, and I begin by saying that my friend, Mr. Rochon submits propositions to the Court that on scrutiny should be difficult if not impossible to accept.

The first one, Mr. Rochon says that the fact that the court-appointed representatives for former employees, CAW, LTD Beneficiaries have

consented to the recommendation, and the continuing employees representative does not oppose it is not significant.

Your Honour heard argument from counsel representing all of those representatives regarding the investigative, advisory, and consultative process that has gone on. It starts with the court-appointed Monitor's recommendation. The Monitor has no economic interest in the outcome, other than the fair and timely resolution of the issue.

Representatives who have in their orders the authority to compromise and settle have taken counsel and have made a judgment. An informed judgment.

The Monitor's recommendation and the judgments of the representatives has been made in the presence of the affidavit material that Mr. Rochon's clients have served.

How can this be meaningless? No one has argued that the consent is dispositive, but it is not, in our submission, insignificant. It is a persuasive indication that what is before the Court for approval is fair and reasonable.

I, therefore, do not depart from the

submission that I made two days ago that the onus should be on the Dissenting Beneficiaries to demonstrate to Your Honour some material error.

The error, in my submission, is not, does not rest with the Monitor's proposal. The error rests with the submission and evidence of the opposing LTDs in their mischaracterization of the pensioner life benefit.

Secondly, difficult proposition, Mr. Rochon and his clients admit that the trust originates with $11 million infusion from the pensioners.

Mr. Rochon admits or accepts the structure and analysis in the Goodmans memo, but then it takes a considerable period of time for Mr. Rochon to acknowledge that the pensioners are beneficiaries. And even then he says, only if you stretch the meaning of beneficiaries.

When there is nothing in the trust document that Mr. Myers has just taken you to. There is nothing in the Goodmans memo that designates pensioners as anything other than equal status beneficiaries.

Mr. Rochon would have you accept that they are a subordinate or lower class of beneficiary, whereas Mr. Myers just demonstrated it's not the case.

It's worthwhile for a moment to focus on the $11 million, which goes from a pensioner life reserve and goes into the trust.

What is the present value of $11 million in 1980? Well, if the benefit to pensioners was pay-as-you-go, as has been submitted, that money should be in tact, and if money well invested doubles every 10 years, that $11 million is now $88 million. However, the current reserve, according to Column 4, Option 4, in the revised appendix, shows that the pensioner's reserve 33.5 million.

Who is subsidizing who? How can anyone say on those that pension life is being funded on the backs of LTD?

Thirdly, Mr. Rochon makes what I would submit to Your Honour are meaningful concessions, but then ignores those concessions in the argument directed to the plain meaning of the termination provision.

Mr. Rochon concedes that Nortel has made a

promise to pay a death benefit to retired employees. I agree.

Mr. Rochon admits that the benefit as vested, which means it is permanent, continuing, irrevocable. I agree.

Mr. Rochon does not explain however, why a conceded promise to pay a death benefit that has vested does not qualify as a future benefit within the termination provision.

In his plain meaning argument, he asks you to read in words like "actually incurred" or parenthetically add, "which the trust was legally allowed to pay", when the words don't exist. So he writes out future benefit and writes in extraneous words and calls it plain.

On the issue of the interpretation bulletin, I have a couple of more supplementary submissions.

In effect, Mr. Rochon is asking the Court to find the Nortel Health and Welfare Trust is not tax compliant, that it's somehow some outlaw Health and Welfare Trust, and that somehow affects the distribution on wind-up.

As Mr. Myers pointed out, that is not supported by tax assessment or regulatory of

any kind. It's based entirely on a 1986 interpretation bulletin, that I submit does not apply to this trust.

And if Your Honour would have reference to it, it's in the Rochon motion record, tab B to the Williams affidavit.

Quite apart from the fact, Your Honour, this is an Interpretation Bulletin that comes into effect six years after the trust was established, it's my submission that this interpretation applies to active employees. It's all about Health and Welfare Trusts that are established for employees in service. It's nothing to do with Health and Welfare Trusts that include retirees or pensioners. The term that my friend focuses on, "Group Term Life Insurance Policy", would only apply to an active employee. We all know that employer's group term policies end at age 65. That's not our trust.

Our trust includes survivor income benefits. Benefits paid to the survivors of people who die in service. Income benefits.

They are not referred to in the interpretation bulletin.

Our trust includes survivor transition benefits that have been paid by survivors of the union. That is not covered by the interpretation bulletin.

A careful reading of this bulletin will indicate that the Health and Welfare Trust regime under review there is established for active employees. It doesn't rule anything in respect of trusts that are established or include benefits for retired employees. Even if it did, in my submission, this bulletin could not take away any rights or legitimacy that preexisted it.

My friend says these tax considerations based on this bulletin and actuarial considerations dictate an outcome, and I query why Ms. Williams -- the expert who proffered this interpretation bulletin -- did not provide us with the analysis on whether it governs retired or permanent employees or both? What kind of Health and Welfare Trust? A generic term is referred to here.

This is a partisan advocacy piece from an expert that has not signed a rule 53 acknowledgment. It's not a balanced rendering

of this document.

My friend says he is disappointed that those who support the recommendation have not tendered actuarial evidence. I don't know what the actuarial evidence would be, other than to check the Mercer assumptions and calculations.

How some other trust would have reserved or provided for long-term disability benefits has nothing to do with this case.

There was nothing that obliged Nortel to reserve at 100 percent for LTD benefits, and it's clear on the evidence that they didn't.

My friend, Mr. Rochon, also bolsters his argument by an appeal to equitable considerations. I want to spend a moment on the equity argument.

Even though all of these beneficiaries are of equal standing under the trust, and there is nothing in the trust agreement that obliges the trustee to enter into a hardship analysis, this submission is being submitted to you.

I rely on and stand by the statement that we made in our factum at paragraph 44, which I will read:

"Relative hardship among HWT beneficiary classes, having regard to the asset liability shortfall, plays no part in the adjudication of the issue. Relative hardship is not referred to in the trust agreement and is impossible to measure. The hardship experienced by retirees is self evident. Retirees are elderly, unemployable, uninsurable, and they are or will experience medical problems. No group has a monopoly or even a priority on hardship."

Your Honour, the notion that the capital payment, and if retirees participate in the distribution, what they will get is an accelerated payment of the present value of a fraction of the death benefit -- about 33 odd percent of the present value of the death benefit.

The notion that this will go to their children who are not in need is unfounded. This will go to the retirees, and, if they pass, it will go to their widows or widowers.

My friend, Mr. Rochon, also makes a per capita

recovery submission. You will recall he talks about the $72,000 sacrifice being balanced against the $3,500 sacrifice.

Again, my submission is that it's not germane to the issue of entitlement on termination, and it's really quite a one-dimensional argument.

Mr. Rochon admits that that is simply long division. It's a function of the fact that there is 11,000 retirees and 360 LTD Beneficiaries. It's also, Your Honour, based on a comparison of Options 2 and 3. If you factor in Scenario 1, and maybe it's worthwhile if I may, just to look at the supplemental report. As Mr. Myers said, we tend to focus on the first four of really only the two proposals on the first page, but there are actually 14 of them. I only need to make reference to the first two.

If you look at Option 1, the pensioner recovery goes from the 35 million in Option 2, to 47.3 million.

So, the per capita distribution, if you compare Option 2 to Option 1, is better. We never look at the SIBs -- the survivor income

beneficiaries. You can see the liability is 16.2 million. If you look at the reserved asset method, once Optional Life is redistributed, they are fully funded.

So, there is quite a sacrifice for them to go from Option 4 to Option 2, and this is what happens, Your Honour, when everybody seeks to maximize his or her recovery under these different scenarios.

It's very much in the interest of the pensioners to opt for one, and in the interest of SIBs to opt for number four. That judgement has been made for the reasons given to you to support the recommendation.

My friend, Mr. Rochon, and I -- I may not have recorded his submissions accurately, but he talks in terms of a $30 million unearned benefit to pensioner's life somehow between 2005 and 2009.

In paragraph 31 of the Urquart affidavit, which must be the support for that submission, got corrected. When it said $16 million of the 32 there went to pensioner life, it was corrected. It was pensioner, medical, dental.

So, I don't know where that submission comes

from. It's not born out by the financial statements.

Now, nobody has directed Your Honour to the financial statements, but let me just do that briefly at Volume 4 of the motion record. And just look at how this pensioner life issue gets reported and how it develops. We will pick three years during the period Mr. Rochon referred to, and if you look at Volume 4, tab (ii), page 1563, "Future Benefit Payment and Related Reserves." Paragraph 4 (b), plan requiring lump sum payments, Pensioners' Life Insurance. Acknowledgment there that there is a lump sum payment due.

> "The most recent actuarial evaluation of this plan, dated as of January 1, 2002, indicates that the liabilities amounted to 75 million and the market value of the assets amounted to 63.5 million; therefore, there exists a funding deficiency of 11.3 million deficiency."

Well, move forward to 2005, which is tab (LL), which is the commencement date when this unearned benefit was being paid.

If you look at page 1586, page 4(b), or paragraph 4(b), the actuarial liabilities have gone from 75 million to 138.5, and the reserve has actually gone down to 61.5, and the funding deficiency has gone from 11 million to 77 million. It doesn't look like there is any unearned benefit being earned there.

If we look to 2008, the last financial statement before the CCAA proceeding, at page 1609, paragraph 4(b), the liability has gone down a little bit, 134.5 million, but the assets have gone down to 49.6 with a funding deficiency of almost 85 million.

MR. ROCHON: Your Honour, Mr. Pepall is getting into waters that are with respect too deep and he's giving a financial analysis opinion without support, and I -- that is my submission.

THE COURT: If I understood correctly, I thought he was referencing facts that are contained in the financial statement. Tell me where is the analysis? He is just quoting numbers out of the financial statement.

MR. ROCHON: He is quoting numbers and then suggesting that this is in direct refute of

Ms. Urquart's numbers and making submissions and drawing conclusions that just are not there.

THE COURT: I will let him finish for a specific reason. The proposition put forth in paragraph 31 turns out to be in error. It was corrected. Mr. Pepall is following on from that and pointing out something in the financial's that I will accept as being the audited financial's.

MR. ROCHON: I think they are the unaudited.

THE COURT: Sorry, it's an internal. Okay. The difficulty starts from paragraph 31, where the submissions started.

MR. ROCHON: The corrected paragraph 31.

THE COURT: Correct. Carry on.

MR. PEPALL: Fortunately, Your Honour, that is the last of the financial statement review that I will make. But those financial statements do not indicate some unearned benefit leaking out to the pensioners. Finally, on this equitable issue, I would like to refer to one of the cases that Mr. Rochon refers to in his brief of authorities at tab 5.

Do you have that, Your Honour?

THE COURT: Yes.

MR. PEPALL: At issue in this case was the interpretation of a pension plan created by a trust, and the paragraph that I would draw Your Honour's attention to is at page 4, paragraph 19, which simply sets out a principle under the heading "General Principle", and it supports the submission that we made in opening two days ago. Trustees, and I say by extensions on court's own determination, are obliged to interpret trust instruments in a way that is even handed as between beneficiaries, interpretive results that favour a beneficiary group or group of beneficiaries over others are to be avoided, unless the trust document language mandates its results.

The principle of evenhandedness would incline towards an inclusive interpretation, and if I may move to the interpretation issue.

What we see here is, historically Nortel established and corporately administered several benefit plans for the benefit of active and retired employees.

One plan, the LTD Plan, was a promise to pay income replacement benefits if the employee became disabled.

The group life plan, it was Nortel that promised to pay a death benefit, the beneficiaries of active and retired employees. What was important is the obligation with respect to both belonged to Nortel, and the benefit belonged to the employee, retired, or active, or disabled. It was a straightforward two-party contract.

In 1980, Nortel decided to have those plans assigned, for administrative purposes, to the trust. As Mr. Myers has pointed out, it did not change in any respect, the underlying obligations, and there are other provisions in the trust document which show or which require Nortel to fund the trust to pay the benefits. The trust is an intermediary. It's a vehicle. It doesn't assume the obligations. The obligations continue to rest with Nortel.

Mr. Rochon says that the critical issue is the nexus between Nortel and the trust, and you cannot download pensioner life on to the trust.

As we said, once again, you cannot decouple the trust from the underlying obligation. The underlying obligation as expressed in the employee benefit books always rests with Nortel. The obligation to pay disability, employees that are disabled, and the obligation to pay death benefits to employees were both assigned to the trust for an administrative purpose. That obligation always remained with Nortel, and there is no difference in structure between Pensioner Life and LTD.

It's not possible to say, as Mr. Rochon I believe submitted, that the death benefit obligation stays with the cooperation and, therefore, pensioners can not share on termination, but somehow the LTD obligation migrated into the trust and LTD beneficiaries can. It's the same structure.

During our submissions two days ago, we said and I think Mr. Myers emphasized it again today, that it is critical to understand the nature of the Pensioner Life Benefit, and there is confusing rhetoric in Ms. Urquart's affidavit and the factum, suggesting this is a

one-year term policy that only requires the premiums be paid, and once it's terminated by Sun Life, it's over.

I have submitted before, and I repeat the submission that that -- the position of the opposing LTDs proceeds and is premised on that fundamental mischaracterization of the benefit.

We took you, two days ago, to the Mercer report, Volume 1, page 37 which showed that Mercer's were valuing the present value of the death benefit for each of the life programs that were in effect for retirees. Mr. Rochon made no comments in response. He did not reply to that.

We then looked at the Nortel pension booklets, and aligned each one of them with the columns in the Mercer report and demonstrated that this was not some premium payment. This was an obligation to pay a benefit on death and it did not terminate until death. All of those were at tab K. No comment by Mr. Rochon.

Mr. Rochon goes back to the concedes that Nortel has made a promise to pay a death benefit, and he concedes that that benefit was

vested, and he grudgingly admits that pensioners were trust beneficiaries, and if all of that is true, and Benjamin Franklin is correct that death is a certainty, how does this benefit not fall under the termination provision?

Mr. Rochon attempts to create uncertainty in the benefit by somehow linking it to the Sun Life policy, that the Sun Life policy may terminate in the future is an irrelevant consideration.

The vested obligation on Nortel is what is important, and it -- going back to tab K -- documents, does not terminate when the Sun Life policy terminates, and as Dayco, the Supreme Court of Canada said, when obligations vest, they can't be taken away. Dayco says there is even a remedy to enforce. So it doesn't matter if the Sun Life policy expires, the right and the remedy persists.

It would be exactly the same if the administration of the LTD obligation was outsourced to a private insurer, and those arrangements had to stop, because Nortel could no longer pay the fee. It would not change

the fact that Nortel owes income benefits to the LTD recipients.

So, if you take everything that has been acknowledged collectively and examine the true character of the benefit, and apply the wording of the trust provision, particularly the words "future benefit" and recognize future benefit is distinguished from future claims, it must yield the outcome that pensioner life participates.

I am going to conclude, Your Honour, with a few comments on the expert witnesses. I am not going to repeat Mr. Myers' submissions. I adopt them, but I do find it remarkable that in the initial Bell and Williams' affidavits, in which beliefs and opinions are expressed on what should happen, on this disposition of the termination of this trust, neither expert engages in an analysis of or really even makes reference to the trust provision. They introduce extraneous concepts and language that simply do not exist or apply.

I won't take you to it, but if you look at the Bell affidavit, at paragraphs 53 and 54, he talks all about claims.

If he had looked at the termination provision, he would have seen that what is protected on termination is not just claims, but benefits. Future benefits.

So, in my submission, those expert witness affidavits do not meet the Mohan test, because they do go to the relevant question, and relevance and necessity simply has not been established.

So, in summary, the former employee representatives urge the Court to approve the Monitor's recommendation. If the Court declines to do so, we are now, in light of Mr. Rochon's comments, as having been accepted that no other or alternative scenario will be ordered and interested parties will have the opportunity to regroup and make submissions as they may be advised.

Those are my reply submissions, Your Honour.

MR. MCRAE: Subject to the qualifications set out in our factum, we are reserving our rights, but we do support the proposed allocation methodology.

THE COURT: All right.

MR. WADSWORTH: Following up on the final

submission of my friend, Mr. Pepall, Mr. Rochon took the position that in order to prepare for a review of his proposal, that the parties would require only a couple of weeks, because I inferred earlier it would take significantly longer than that, as there would be significant cross-examination on the affidavits that are proffered in support of his client's position.

With respect to those affiant's, there are a few things to point out.

One of them is with respect to the affidavit of Mr. McCorkle, the Nortel insider, and that is in the responding motion record, on the Dissenting LTD Beneficiaries, and I believe it is tab 4. At page 5 of that affidavit, paragraph 12, I think it essentially says all that needs to be said.

Starting at the second line:

> "It is my opinion that the bondholders and other unsecured creditors that I deal with regularly in my profession --"

THE COURT: Slow down. Okay.

MR. WADSWORTH: Thank you.

"... imposed on the disabled by past Nortel decision ... would agree with me that ... and does not rightfully belong to the other creditors. I am as such an unsecured creditor and fully support such a settlement".

Your Honour, it clearly indicates that Mr. McCorkle has no idea what this motion is about. Clearly doesn't understand that it relates to the distribution of the Health and Welfare Trust from which the other creditors have no interest, and therein lies just the beginning.

Do you want the rest of it?

MR. ROCHON: Your Honour, I am just wondering about this being a reply point. I never raised the aspect of Mr. McCorkle in my responding submissions. So, as interesting as the comments are, perhaps that could have been made in Mr. Wadsworth's original submissions.

THE COURT: Understood.

MR. WADSWORTH: Understood.

THE COURT: Mr. Rochon, if you think you have to make any further comments on that, you will

be provided the opportunity.

MR. WADSWORTH: Mr. McCorkle was called as the Nortel insider and that gave him specialized knowledge, and it was our submission that he doesn't clearly understand the issue that is before the Court.

With respect to Mr. Bell's affidavit, that is in the supplementary motion record, it's at tab 1. At page 4 of that affidavit, paragraph 15, he references certain standards of practice and says:

> "While section 1210.02 provides useful ideas for identifying accepted actuarial practice, I have not identified any useful public written account providing direction on the accepted actuary practices as it pertains to funding self-insured, long-term disability benefits."

MR. ROCHON: Your Honour, it's the exact same point I made earlier.

THE COURT: Reply only, Mr. Wadsworth.

MR. WADSWORTH: I understand.

Mr. Rochon's position before Your Honour was that the obligation was simply the payment of

premiums.

It's been shown that, in fact, the obligation is with respect to the actual benefit itself. I would again simply point out to Your Honour that in the termination provision, it says specifically that the trustee is to determine and satisfy all expenses, claims, and obligations arising out of the terms of the trust agreement and Health and Welfare Plan up to the date of the notice of termination.

We go back to the supplementary motion record, and Exhibit B to the affidavit of Mr. Bell, which is the Deloitte & Touche Health Care Benefit Trust Independent Review.

THE COURT: Where are you now?

MR. WADSWORTH: Supplementary record, tab B. Specifically at tab B, page 62. Do you have that?

THE COURT: Yes.

MR. ROCHON: Your Honour, I did not refer to this in my responding submissions at all.

THE COURT: Well, you may not have referred to a specific document, but I think the concept is something I want to hear about, and the position being that it's the payment of the

premium as opposed to the payment of the benefit.

So, again, if you want to make further comments after Mr. Wadsworth, you will be provided the opportunity. Carry on.

MR. WADSWORTH: In the paragraph that starts, "The Health Care Benefit Trust Agreement"? Partway down the page, on the right-hand side it begins with, "Furthermore"?

THE COURT: Yes.

MR. WADSWORTH: So:

> Furthermore, the trustees may in their discretion calculate based on the actuarial advice, the amount of liability attributable to each participating employee, such as any liability where the trust represents the liability of the participating employees under the following definition in the 'Canadian Institution of Charter Accountants' Handbook', section 1000.32. Liability are obligations of an entity enterprising from a past transaction or event, the settlement of which may

result in the transfer of use of assets, revision of services, or other yielding of economic benefits in the future. The past transactions or events that give rise to liability are primarily those that entitle the employees to the benefits, through the trust implementation of the D.R.B., it's anticipated that the obligation will be settled through future contributions by participating employers. The CICA 1033 identifies the following three essential characteristics of liability: They embody a duty or responsibility to others that entails settlement by future transfer or use of assets, provisions of service or other yielding economic benefit at a specific or determinable date on a specified occurrence or on demand."

Specified occurrence, Your Honour, I would suggest a death would be that.

"The duty or responsibility obligates the entity leaving as little

> or no discretion to avoid it, and the transaction or event obligated entity has already occurred, i.e., the retirement."

These are documents and information upon which Mr. Bell makes certain opinions, and I think it's important to understand what their effect is in this particular instance, despite the fact that a lot of his reliance is on the Health and Welfare Trust, over which there is sway, and we have no information about.

With respect to the point made by Mr. Pepall regarding Ms. Urquart's affidavit, the point was made that the benefit could end upon the bankruptcy or receivership of Nortel.

That's the same paragraph in the document that is referenced in her affidavit, and I will not take you to it, but it's page 8 of her affidavit, paragraph 12, and the document that is referenced directly under it also states that the policy may be terminated by Sun Life.

Now, clearly, the death benefit entitlement that is promised by Nortel, the obligation of which is fulfilled by the trust, cannot be stopped by the external Sun Life insurer.

Finally, Mr. Rochon said there are no court-appointed counsel representing the LTD recipients before you.

Well, what you do have is counsel representing the court-appointed representatives with respect to those non-CAW LTD recipients. The court-appointed representatives who have chosen the independent counsel, and the fact that their legal counsel has not been court appointed is of no significance, as evidenced by the fact that the CAWs are not court appointed and Mr. Rochon is not court appointed. It makes no difference to the argument.

The only matter is the interpretation of the trust agreement, and we urge upon you to support the Monitor's proposal.

Subject to any questions, those are my submissions.

THE COURT: Mr. Engelmann, I think you are next.

MR. ENGELMANN: Good morning, Your Honour. I have three brief submission, and they all relate to submissions Mr. Rochon made with respect to our submissions, and they deal with

the issues or considerations of risk by the court-appointed representatives for the LTD group for consideration of delay and the point that Mr. Wadsworth made on status.

The first point is my friend Mr. Rochon's criticism of Ms. Kennedy considering the issue of risk, and this starts with his submissions that essentially that the Monitor's proposal before the Court is the worst the LTD group could do.

He suggests that or did suggest to you, there are really only two options that flow from the Monitor's Memorandum of Law and the scenarios set out in Appendix D, to the Monitor's Report.

In his words, the Monitor does not suggest any other scenarios are plausible, with the exception of 2 and 3. This submission is simply wrong.

When one reads the Memorandum of Law that the Monitor prepared when counsel for the Monitor prepared, when one looks at those scenarios, it's apparent there are 14 different scenarios. And the Monitor does not rank them and say one is more plausible than the other.

The Monitor comes up with what it believes is the correct interpretation, and we made comments on the facts of what is reasonable and that is Scenario 2.

It is clearly a legitimate consideration for Ms. Kennedy with the assistance of counsel and an actuary to consider the other scenarios, and consider that many of the other scenarios bring a worse result for her group than the proposal being put forward as the correct proposal by the Monitor. That is, of course, not only reasonable and prudent, but I would submit it's necessary in her important role in due diligence as the court-appointed representative.

On the status issue, and Mr. Wadsworth spoke to it briefly, my friend, Mr. Rochon, submitted that independent counsel were not yet court-appointed. I am not sure where he intended to go with that. Suffice it to say, as the court-appointed representative, Ms. Kennedy has a great deal of power and responsibility. One of those powers is to retain and instruct counsel.

In addition, on this point, on September 17th,

as I understand it, Mr. Rochon decided at that point that it was no longer necessary to proceed with his representation order, and it was withdrawn or adjourned indefinitely, and it was done so because of the retention of independent counsel by Ms. Kennedy and other court-appointed representatives. Somewhat inconsistent, in my respectful submission, on those points.

She sought the advice of independent counsel and actuary and acknowledged the recognition and importance of doing so.

Lastly, the submission on delay. Mr. Rochon, my friend, has suggested that the consideration of delay and cost has been exaggerated. All I will say, although this litigation likely will not take years, of course, if it's not resolved through the proposal of the Monitor today, it can no doubt be managed by the Court. But to suggest that the fight over multiple options and multiple scenarios, and scenarios that provide other better financial provisions -- and my friends went through that today, Scenario 4, providing better benefits to SIB, and the Optional Life

Benefit providing more financial benefits to the pensioners. To suggest that this will not take some time, and there will not be many parties involved and multiple experts in cross-examination, and that can be resolved in a motion in a couple of weeks is naive to the extreme, and is a gross underrepresentation of what may be involved if this proposal is not accepted by the Court.

Your Honour, those are my brief submissions, unless you have any questions.

THE COURT: Thank you.

MR. ROGERS: No submissions, Your Honour.

THE COURT: So, we have Mr. Macfarlane, and Mr. Finlayson, and I will give Mr. Rochon an opportunity to respond.

To make use of the time, we will hear from Mr. MacFarlane and Mr. Finlayson, the morning break, and then Mr. Rochon will have an opportunity to provide what ever comments.

MR. MYERS: Otherwise, we are available on any comments of the rest of the order to reflect what we say will be the outcome.

The top is the clause that Mr. MacFarlane for the creditors seek, and then the bottom there

are a few extras on the end, and I think Mr. Wadsworth will speak to that clause.

MR. MACFARLANE: Good morning, Your Honour. I appear on behalf of the creditors.

I am making submissions with respect to an additional paragraph to be included in the order, and Mr. Finlayson on behalf of the note holder group will be making similar arguments. I will lead off.

If I may just give you the genesis of how this came to be. There were discussions with respect to how distributions of the trust would affect distributions from the Nortel in respect of the claims.

THE COURT: Tell me, what these paragraphs add to the order, given the concept of double claims?

MR. MACFARLANE: All it does --

THE COURT: If this is just for greater certainty and clarification language, you have a long way to go.

MR. MACFARLANE: It is, Your Honour, for that purpose, greater certainty, and what it does, Your Honour, is basically links up adjudication in this process, and I may just

take you to it. A starting point, in the receiver's report, and I will refer to one document, which I say the receiver's report, paragraph 24 (b), 44 of the report, the Monitor states -- so page 44, tab 2, paragraph 124 (b).

THE COURT: Page numbers again?

MR. MACFARLANE: Page 44 of the report.

THE COURT: 44 of the report.

MR. MACFARLANE: 124 (b) and (e).

The Monitor states:

> "The resolution ... and distribution matter is a necessary step ... that development of the CCAA plan and administration of the -- "

Accordingly, it's our view that it's a germane time and move to the claims adjudication process to maintain the certainty that was negotiated as part of the settlement agreement before Your Honour many months ago, and also included in the record of the Monitor, and, as you may recall, the issue of certainty and confusion was a very hot and negotiated topic as part of the settlement agreement, and if I could ask Your Honour to turn up the

settlement agreement at tab (e) of the Monitor's record, and it's behind the order of Your Honour made on March 31. I will take you to specific clause C-2. And as Your Honour noted yesterday, C-1 provides strong mandatory --

THE COURT: Which page in the record?

MR. MYERS: Mine is 160.

MR. MACFARLANE: I am taking you to C-2. Yesterday Your Honour noted with respect to C-1 that dealt with funding, there was strong mandatory language giving direction with respect to funding, and, in my respectful submission, the same strong language is contained in respect of language of the HWT claims, and if I take Your Honour quickly to the provision. That provision has the underlying reason to have this particular paragraph in the order, and in the order going forward with respect to the claims of the adjudication process.

C-2 provides, starting on the third line, that with respect to any funding deficit in the HWT, or any HWT-related claims, in these proceedings or any such receivership or other

bankruptcy proceeding, or in any other forum whatsoever concerning Nortel -- and it defines the worldwide entities -- and/or the HWT, the employee representatives shall not advance, assert or make any claim that any HWT claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including but not limited to a priority claim against Nortel or any Nortel worldwide entity, or any other subject of a constructive trust, or trust of any nature or kind.

And then drop to the end of the paragraph:

And such claims to the extent allowed against Nortel ... established in these proceedings on a pari passu basis with the claims of the ordinary unsecured creditors of Nortel.

In our respectful submission, that provides clear language with respect to how claims will be dealt with in the claims procedure going forward.

Those provisions were then adopted and affirmed in Your Honour's order in paragraph 10 and 12 of the order behind tab (e), in paragraphs 10 and 11.

The specific language reaffirming the language

and the claims adjudication are verbatim in those two paragraphs.

In our submission, it follows that since C-2 makes it clear, and as we affirmed in Your Honour's order, these rank as ordinary unsecured claims on a pari passu basis, that only priority or preferred ranking, that logically, when moneys are paid from the HWT corpus to the HWT beneficiaries, those moneys on the basis that they were unordinary claims on a pari passu basis, as our language picks up, shall reduce their aggregate claim against Nortel on a dollar-per-dollar basis with respect to the approving claim.

THE COURT: What am I missing? I mean, regardless of what the outcome of Scenario 2 or 3 is. I think the point is the same for both. If you have a beneficiary under the trust, and they receive some benefit from the trust, does it not automatically fall that the claim against Nortel falls on a dollar-for-dollar basis.

MR. MACFARLANE: That's right.

THE COURT: Isn't that the law anyway; what does this add?

MR. MACFARLANE: It adds further certainty.

THE COURT: Does the Monitor have any position on this? I don't think it requires any further clarification. That is my initial reaction, having heard what you said.

MR. MACFARLANE: The Monitor was satisfied and looked at the language and was fine with it. The language that came back was added on by Mr. Zigler and Mr. Wadsworth.

So, I mean, the Monitor was satisfied, we were satisfied with it. It was Mr. Wadsworth and Mr. Zigler.

THE COURT: We will take the break now. I find this entire -- there are two many angels on the head of this pin.

These are the basic principles. If the Monitor comes forth with some language, they will administer the claims process. If you can work it out, fine. My only view is that it adds nothing to what is going on.

MR. FINLAYSON: You are right, this is the way that the law operates. If you have a dollar here, you cannot claim here, and it's as simple as that, but what has happened is we got something back that is attempting to hedge

against something.

THE COURT: Over the break, if the parties can work something out that the Monitor concurs in, and this makes no difference, the same principles there. If the parties are in agreement, fine, it will be considered. No agreement, there will be no language either one. I personally don't think it adds anything. Take 15 minutes.

--- Brief recess.

--- Upon resuming.

THE COURT REGISTRAR: Court is now resumed.

THE COURT: Mr. Finlayson?

MR. MACFARLANE: We were unable to resolve the issue. We have heard you that the issue is clear, so we will not take further steps in that regard, and I don't know if Your Honour wants to note it or not, but we will not ask that that paragraph in this order, but there would be a reservation of rights later on.

THE COURT: I have made a note here for endorsement. I do appreciate that your clients sometimes in other jurisdictions insist to obtain very specific language to cover off everything, but it's not generally

the practice we follow.

MR. MACFARLANE: Thank you.

THE COURT: Mr. Rochon?

MR. ROCHON: Thank you, Your Honour. I will try to be brief. There have been a few things mentioned in my friends' submissions today that I would like to reply to, and there have been repeated mischaracterizations of other things that have been said, so I would like to address that.

First, with respect to 1986 Interpretation Bulletin that the provision meant one thing, and that is subsequently meant one thing prior to and another subsequent.

That is not our position, our point is that the intention of the parties cannot be discerned, and, therefore, you have to look at the tax implication and actuary practices in assessing the two possible scenarios.

The Court should consider that the scenario which yields a tax-compliant result and consistent with actuarial practices, that is the one that should be relied upon, and we have a case that I wanted to take you to as well.

I will give you the cite in the factum. It's page 25 of our factum, paragraph 69:

> "Indeed, it's an accepted principle of contractual interpretation that when faced with two plausible interpretations, two and three, one leads to construction of contract that is unlawful, courts will prefer the interpretation which is consistent with the law. Thus, the proper interpretation of the termination provision is the one that is compliant with tax law and applicable actuarial and insurance standards and practices."

Secondly, in response to something Mr. Wadsworth said. He took Your Honour to an exhibit contained in Mr. Bell's affidavit. Exhibit B? If I could ask you to turn that up, I would appreciate it, and page 62 of Exhibit B.

This exhibit clearly indicates that the liability attaches to the event or occurrence taking place, and Mr. Wadsworth mentioned death was something certain to occur; however,

it must be kept in mind that the death has not occurred in these circumstances.

In particular, I go to the three essential characteristics of liability. The third one, letter "C" being the transaction or event obligating the entity that has already occurred.

So, that is clearly more in line with Scenario 3 than Scenario 2.

As a follow-up to that point, several people talked about reading in certain language into the termination provision, and I just wanted to point out that we are not the ones reading in, they are. And the words they are reading in are, "But would certainly have been made in the future."

And if we go to contrasting that with the emphatic language in Exhibit B that I took you to, one of the three tenets of the trust, and if we go to the Goodmans memo at Exhibit B, and flip to page 102. If Your Honour could turn that up. Page 102 of the record, and going to the bottom paragraph 64. Just toward the middle of that paragraph.

"Given the language that the trust

agreement as supported by Nortel's funding practices, the better view is that claims that have not been made ... "

And then it carries on here:

"... but would certainly have been made in the future."

Focusing on those words, those words constitute the read in that from the disabled perspective means the difference between Scenario 2 and 3. Living for very many of our group, a life of poverty or not.

So, it's only if this read in is allowed, that Scenario 2 can work, in my respectful submission.

When I was making my earlier submissions, the point I was making is that this has to be consistent with law. That is, the interpretation that one gives to this trust agreement. Because there are -- there is no other indication as to what this language means, other than what is legal. What is compliant with the law and actuarial practices.

Finally, we have never conceded that the

pensioners were beneficiaries entitled to participate in a wind-up scenario, beyond receiving one year's worth of premiums toward the coverage. This is why we focus on and go through the term of nature of the policy and so forth.

The only connection with the HWT, in my submission, is the payment of premiums during the set timeframe; namely, one year, or in this case up to December 31, 2010.

Those are my submissions in reply. I appreciate that. Thank you.

THE COURT: Thank you.

MR. MYERS: Your Honour, the hearing of this motion has had some unusual elements to it. It's taken effort from court staff to accommodate us for several days, and we want to express our appreciation for all the efforts for the staff and your time.

THE COURT: I would echo that the court administration has distinguished themselves over the last few days, and I do thank all counsel for all your efforts and the high quality of all presentations. There are obviously some very serious issues involved

here. There will be no decision today.
I am mindful this is a very stressful time for all of the parties and pensioners alike, and I will do my utmost to provide a decision as soon as possible, but it will be taken under reserve, and I am not going to give time estimates, but I am aware of the December 31st time, and I am aware that all parties will want to consider what this decision is.
MR. MYERS: I will hand up this draft. It's in the form of the motion record.
THE COURT: The other thing I would ask, Mr. Myers, perhaps would be if I could be provided with a document in Word from the supplementary report, the revised appendix with all 14 scenarios. I have a PDF, but it may be easier to come to me in Word.
MR. MYERS: Or Excel?
THE COURT: Something that could be changed and moved into a Word document.
Thank you.
--- Hearing concluded.

REPORTER'S CERTIFICATE

I, Marlene Finnegan, Court Reporter, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth;

That the above said was taken down by me stenographically and thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

Dated this 17th day of December, 2010.

_____

Marlene Finnegan, Court Reporter