

**JENNIFER HOLLEY**

Plaintiff

- and -

**THE NORTHERN TRUST COMPANY, CANADA  
and THE ROYAL TRUST COMPANY**

Defendants

Proceeding Under the *Class Proceedings Act, 1992*

Affidavit of DIANE A. URQUHART

**I, DIANE A. URQUHART**, an independent financial analyst, of the City of Mississauga, in the Province of Ontario, **SOLEMNLY AFFIRM AS FOLLOWS:**

**I. INTRODUCTION**

1. I submit this affidavit in support of the Plaintiff's motion for certification of a class action under the Class Proceedings Act, relating to the claim that Northern Trust Company, Canada ("Northern Trust") and The Royal Trust Company ("Royal Trust") committed breaches of trust and misrepresentations in respect to the Nortel Health and Welfare Trust ("HWT") that reached the threshold of civil fraud. This affidavit addresses matters relating to:
  - a) Assessment of Northern Trust and Royal Trust taking risk with HWT assets, knowing that Nortel experienced financial distress during 2003 to 2006 and Nortel executives were using the HWT to materially mitigate Nortel's operating cash flow losses and contribute to its survival as an ongoing concern. The Nortel executives: used \$32 million of HWT assets belonging to the Reserve Plans' beneficiaries to pay for the Paid as Incurred Plans' members during May 2005 to April 2006, which were Nortel's obligation to pay; and, borrowed money from the HWT through an account called, Due from Sponsoring Company, which reached a peak of \$43 million at December 31, 2006,

that was left unpaid at \$28 million and with \$27 million written off at December 31, 2009, post the CCAA filing date of January 14, 2009.

- b) The Due from Sponsoring Company account receivable not meeting multiple requirements in the statutes and common law applicable to trusts, and the requirements set out within Nortel's Internal Company Manual for HWT procedures.
- c) Assessment of whether Northern Trust and Royal Trust sought re-imbursement from Nortel of the \$32 million misappropriated HWT assets and the \$37 million HWT's Due from Sponsoring Company, before the Nortel CCAA filing date of January 14, 2009, and whether Nortel had the financial means to repay these amounts owed to the HWT.
- d) Review of the Northern Trust fiduciary duties post the Nortel CCAA filing date of January 14, 2009.
- e) Evidence demonstrating vulnerability of HWT beneficiaries.

## **II QUALIFICATIONS**

- 2. I hold a Masters of Arts in Econometrics and Monetary Economics from the University of Toronto, together with an undergraduate Bachelor of Economics and Mathematics from McMaster University.
- 3. I have extensive senior executive management and technical work experience in the Canadian banking and securities industry within the fields of financial analysis of banks, insurers and other financial institutions, investment strategy, and investment portfolio management.

4. My work experience includes my role as Managing Director of Research and Institutional Equities at Burns Fry, a predecessor company of BMO Nesbitt Burns. While there, I was also Chair of the Investment Strategy Committee, was a Top Rated Financial Services Analyst, and co-led the operations of 175 research, sales and trading personnel in Canada, the United States, Europe and Asia.
5. I subsequently held the position of Managing Director of Equity Research and Investment Strategy at Scotia Capital, the securities dealer subsidiary of the Bank of Nova Scotia. While at Scotia Capital, I lead a team of 62 people, including 27 strategic, fundamental and quantitative analysts. I was a member of Scotia Capital's Executive Committee, Chair of the Investment Strategy Committee and key spokesperson for Scotia Capital.
6. I act as a *pro bono* financial consultant for the National Pensioners and Seniors Citizens Federation and the United Senior Citizens of Ontario in relation to flawed investment products sold to seniors and pension plans, and to public policy on pensions.
7. I have been invited to provide expert witness testimony to the Federal House of Commons Standing Committee of Finance on income trusts and Non Bank Asset Backed Commercial Paper. I have also been invited to provide expert testimony to the Federal House of Commons Standing Committee on Industry, Science and Technology and the Senate Standing Committee of Banking Trade and Commerce on amendments to the Companies' Creditors Arrangement Act and Bankruptcy and Insolvency Act in respect to the priority of pension plan and long term disability income plan deficits amongst creditors at bankrupt corporations. My expert testimony to the Federal legislators on these Standing Committees has had positive outcomes: The Federal Minister of Finance James Flaherty made

amendments to the Income Tax Act in 2006 to curtail the \$200 billion income trust industry. The Federal Labour Code was amended in 2012 for mandatory purchase of long term disability insurance by federally registered private corporations offering LTD income benefits.

8. I have also been invited to provide expert witness testimony to the Ontario Standing Committee on Government Agencies and the House of Commons Standing Committee of Justice and Human Rights on securities regulation, the Criminal Code and securities crime policing issues involving the RCMP, the OSC and other provincial securities regulators, and investment industry Self-Regulatory Organizations.
9. I am an instructor for the annual Canadian Police College, Investment Fraud Course attended by fraud investigators from the provincial securities commissions and police services throughout Canada.
10. I was appointed in April 15, 2008 by the Honourable Justice Colin Campbell of the Ontario Superior Court of Justice as financial analyst expert under the Representative Counsel Order for the Ad Hoc Committee of Retail Asset Backed Commercial Paper (“ABCP”) Owners, in regards to the *ABCP Companies’ Creditors Arrangement Act* (“CCAA”) proceedings supervised by Justice Colin Campbell. This CCAA proceeding involved complex financial contracts valued at a total of CDN\$32 billion and a large numbers of small investors, pension funds, corporations and governments. My research on Non-Bank ABCP, contributed to the retail owners of less than \$1 million receiving the largest securities settlement in Canadian history at \$188 million and there were subsequent settlements and

finances of \$140 million paid by 8 investment banks in respect to OSC, AFM and IIROC allegations on the mis-selling of Non Bank ABCP. I attach Exhibit "XX,"

[CV Diane Urquhart](#)

**III TRUSTEES KNEW NORTEL HAD FINANCIAL DISTRESS DURING 2003 TO 2006**

11. Northern Trust and Royal Trust knew, or were reckless or willfully blind, to two sets of Nortel actions in respect to the HWT during 2005 and 2006. These trustees were taking risks with HWT assets and hence taking risks with the rights of the HWT beneficiaries to receive their disability and survivors' income insurance and pensioners' life insurance future premiums. The risks taken were very serious in the context of the financial distress Nortel was experiencing at the time.
  
12. The Nortel Health and Welfare Trust Time Line of Events prepared by Charlotte M. Urquhart shows that Nortel had several adverse events during the period 2003 to 2006, which imposed financial distress on Nortel and motivated the Nortel executives to improve the cash situation of Nortel in the following two ways:
  - a) by taking a \$32 million employer contribution holiday during May 2005 to April 2006 for the Paid as Incurred Plans for medical and dental claims and the life insurance premiums of the active and LTD employees, and withdrawing the HWT's irrevocable assets to pay for Nortel's own obligations to pay for these Paid as Incurred Plan benefits on an ongoing basis. This pitted the HWT Reserve Plans' beneficiaries against the Paid as Incurred Plans'

participants, with the ultimate reward falling to Nortel at the expense of the HWT Reserve Plans' beneficiaries.

- b) by imposing an \$11 million increase in the Due from Sponsoring Company on the HWT balance sheet during each of 2005 and 2006 in recognition of Nortel's requirement to make annual employer contributions for the incurred claims within the Reserved Plans and paying these contributions as an IOU instead of cash; I attach Exhibit "XX,"

**Nortel Health and Welfare Trust Time Line of Events 2002-2011**

- 13. As noted in the affidavit of Charlotte Urquhart, professional trustees, Northern Trust and Royal Trust, should have seen the red flags indicating trouble with the HWT assets and the financial welfare of its beneficiaries, when there was the complete absence of Nortel employer contributions into the HWT for both the Reserved Plans and the Paid as Incurred Plans during May 2005 to April 2006, and when the HWT had a significant deficit at December 31, 2004. Furthermore, the employer contributions for the Reserved Plans being booked as IOUs rather than cash during 2005 and 2006 was another warning sign to Northern Trust and Royal Trust that Nortel could be experiencing financial stress. Charlotte Urquhart's affidavit showed that the HWT assets, typically used in the calculation of trustees' fees, were falling precipitously from \$140 million at December 31, 2004 to \$109 million at December 31, 2005 and \$85 million at December 31, 2006, the latter as reported in the 2006 HWT financial statement and all of these numbers excluding the Due from Sponsoring Company receivable. The book value of HWT assets had declined by 40% in two years. I attach Exhibit "XX,"

**Nortel V. Nortel Health and Welfare Trust 2000-2009**

- 14. Charlotte Urquhart's affidavit also discusses the significance of the HWT deficit increasing from -\$56 million (-29%) at December 31, 2004, to -\$156 million (-59%) at

December 31, 2005 and then to \$-170 million (-66%) at December 31, 2006, excluding the Due from Sponsoring Company receivable on the premise it was of questionable value. There were no other arm's length suppliers of new credit to Nortel during 2003 to 2006. The HWT deficits were still very large, even if Nortel's Due from Sponsoring Company were to be fully paid at some future point and therefore considered to be a bona fide HWT asset: -\$36 million (-18%) at December 31, 2004, -\$125 million (-47%) at December 31, 2005 and -\$127 million (-50%) at December 31, 2006. I attach Exhibit "XX,"

#### [Nortel HWT Surplus-Deficit 2002-2009](#)

15. Subsequently, the December 31, 2006 HWT assets of \$85 million were retroactively restated to \$107 million in the 2007 HWT financial statement, an increase of \$22 million due to the 2007 change in accounting policy to value the securities at market rather than their book value (excluding the Due From Sponsoring Company receivable as a questionable account.) The marked to market write-up of HWT assets did reduce the 2006 HWT deficit, however, it remained seriously high at -\$149 million (-58%) with the Due from Sponsoring Company written-off and -\$106 million (-41%) if it were paid back in full.

16. The risks Northern Trust and Royal Trust took with the HWT assets were at a time when Nortel was experiencing four consecutive years of negative operating cash flow between 2002 and 2005: -\$768 million in 2002, -\$140 million in 2003, -\$185 million in 2004 and -\$179 million in 2005. The ultimate reward of the increase in Due from Sponsoring Company and the employer contribution holiday for the Paid as Incurred Plans during 2005

and 2006 went to Nortel itself. The amount of cash generated for Nortel from the misappropriated assets and borrowing from the HWT was material relative to Nortel's negative operating cash flows, for example, improving Nortel's 2005 negative operating cash flow loss by a material 15%. (\$11 million increase in Due from the Sponsoring Company, plus \$21 million out of the \$32 million total employer contribution holiday for the Paid as Incurred Plans applicable to 2005, divided by the negative \$212 million operating cash flow loss without these cash savings.) I attach Exhibit "XX,"

**[Nortel V. Nortel Health and Welfare Trust 2000-2009](#)**

17. Furthermore, the additional increase in Due from Sponsoring Company account receivable and the employer contribution holiday for the Paid as Incurred Plans during January to April 2006 raised Nortel's positive cash flow from operations in 2006 by a material 11% ((\$11 million increase in Due from the Sponsoring Company, plus \$11 million out of the \$32 million total employer contribution holiday for the Paid as Incurred Plans applicable to 2006, divided by the positive \$214 million operating cash flow loss without these cash savings.)
18. Nortel's cash balance was falling precipitously from the \$3.8 billion at December 31, 2002 to \$3.0 billion at December 31, 2005. This was due to the negative operating cash flow each year during 2003 to 2005 summing to negative \$504 million, and debt maturities each year during 2003 to 2005 summing to \$367 million. Nortel could not raise new debt or equity during the 2003 to 2005 period because of the first and second accounting restatements and late financial statement filings; the termination of the CEO, CFO and Controller on April 28, 2004 and the subsequent CEO leaving the company on



October 17, 2005; plus, multiple securities regulatory and criminal investigations were disclosed in 2004 that were ongoing until 2007 and 2008 charges and settlements were announced.

19. Nortel's cash was about to plummet another \$1,425 million in 2006, because \$1,275 million of 6.125% February 15, 2006 notes and \$150 million of 7.40% June 15, 2006 notes were coming due in 2006. I attach Exhibit "XX,"

**Nortel Long Term Debt, Credit Facilities and EDC Support Facility 2004-2006**

20. On April 24, 2004, a Nortel News Release says :

"Credit Facilities

**NNL has notified the lenders under its US\$750 million five-year credit facilities that it is terminating these credit facilities.** NNL will be unable to file its 2003 Form 10-K by April 29, 2004 which would permit the lenders under these credit facilities to terminate their commitments under such facilities. The five-year credit facilities, which would otherwise expire by their terms in April 2005, have remained undrawn since their effectiveness in April 2000."

Nortel had cancelled its \$750 million bank credit facilities on the same day it announced that the three top executives of Nortel were being terminated. There was no bank credit facility to turn to or any other source of new debt and equity right up until the day before the \$1,275 million of 6.125% February 15, 2006 notes was due. On February 14, 2006, Nortel was finally able to secure a new \$1,300 million new 1 year bank credit facility. I attach Exhibit "XX,"

**Nortel News Release President and CEO as well as CFO and Controller, Terminated April 28, 2004**

21. On October 23, 2003, a News Release for Nortel's 2003Q3 Results says: "The Company also announced that it intends to restate its financial results for 2000, 2001 and 2002 and the first and second quarters of 2003, as a result of its comprehensive asset and liability

review and other related reviews ... which are still ongoing.” I attach Exhibit “XX,”

[Nortel News Release 2003Q3 Results October 23, 2003](#)

22. On December 23, 2003, Nortel makes its first restatement of its financial results for the periods 2000, 2001, 2002 and 2003 Q1 and Q2 in its SEC 10K Report for 2002. I attach Exhibit “XX, “

[Nortel Networks Corporation 10-KA 2002 dated Dec. 23, 2003](#)

23. On April 24, 2004, a Nortel News Release says that the President and CEO, as well as the CFO and the Controller of Nortel, are terminated. This New Release also announces that the delays in the filing of the SEC 10K reports due to its accounting restatements were causing non-compliance with the performance obligations under its public debt indentures and Export Development Canada Support Facilities. The creditors had rights to call for early maturity of the debt and cancellation of the EDC Support Facilities during the period of late filings. Nortel disclosed that it may be unable to meet its payment obligations with respect to its indebtedness should the creditors exert these rights. The warning about its Debt Securities and the EDC Support Facilities were worded as follows:

“Debt Securities

As previously announced, as a result of the delay in the filing of the 2003 Form 10-K beyond March 30, 2004, the Company and NNL are not in compliance with their obligations to deliver to relevant parties their filings with the United States Securities and Exchange Commission (the “SEC”) under their public debt indentures. Approximately US\$1.8 billion of notes of NNL (or its subsidiaries) and US\$1.8 billion of convertible debt securities of the Company are outstanding under the indentures. The delay does not result in an automatic event of default and acceleration of the long-term debt of the Company or NNL.

**If the holders of at least 25 percent of the outstanding principal amount of any relevant series of debt securities provide notice of such non-compliance to the Company or NNL, as applicable, and the Company or NNL, as applicable, fails to file and deliver the relevant 2003 Form 10-K within 90 days after such notice is provided, then the trustee under the indenture**

**or such holders will have the right to accelerate the maturity of the relevant series of debt securities.** While such notice could have been given at any time after March 30, 2004, to date neither the Company nor NNL has received any such notice.

**In addition, if the required percentage of holders under one series of debt securities were to give such a notice and, after the 90 day cure period expired, were to accelerate the maturity of such debt securities, then the principal amount of each other series of debt securities could, upon 10 days' notice, be accelerated without the lapse of an additional 90 day cure period. Based on inquiries to date, the Company believes that approximately 34 percent of the outstanding principal amount of the US\$150 million 7.875% notes due June 2026 issued by a subsidiary of NNL and guaranteed by it are held by a group of related holders.** Other than with respect to that series of debt securities, based on such inquiries, neither the Company nor NNL is aware of any holder, or group of related holders or parties, that holds at least 25 percent of the outstanding principal amount of any relevant series of debt securities. The Company also believes based on such inquiries that approximately 23 percent of the outstanding principal amount of the US\$150 million 7.40% notes due June 2006 issued by NNL are held by a single holder.

**If an acceleration of the Company's and NNL's debt securities were to occur, the Company and NNL may be unable to meet their respective payment obligations with respect to the related indebtedness.** In such case, the Company and NNL would seek alternative financing sources to satisfy such obligations. At present, neither the Company nor NNL has any agreements or understandings in place with respect to any such financing.

#### EDC Support Facilities

As previously announced, NNL obtained a waiver from Export Development Canada ("EDC") to permit continued access by NNL to the EDC performance-related support facility in accordance with its terms while the Company and NNL complete their 2003 Form 10-K filing obligations. The waiver will expire on May 29, 2004. **Because the developments announced today will result in a delay in such filing beyond May 29, 2004, NNL intends to request a new waiver from EDC to cover the period beyond May 29, 2004. There can be no assurance that NNL will receive a new waiver or as to the terms of any such waiver. If such a waiver is not received, EDC would as of May 29, 2004 have the right to terminate its commitments under the facility, which provides for up to US\$300 million of committed support** (which support is conditioned upon, among other things, the maintenance of minimum credit ratings of B from Standard & Poor's Ratings Service and B3 from Moody's Investors Service, Inc. and the absence of a material adverse change) **and US\$450 million of uncommitted support.** EDC would further have the right to exercise certain rights against collateral under NNL's security documents if the underlying instruments or performance bonds become due, or require that NNL cash collateralize all existing support. As at March 31, 2004, there was approximately US\$326 million of outstanding support under this facility."

I attach Exhibit "XX,"

**[Nortel News Release President and CEO as well as CFO and Controller, Terminated April 28, 2004](#)**

24. On January 11, 2005, after a Deloitte Touche and Ernst & Young Special Audit, Nortel issued its second restatement of its financial results for 2001, 2002 and 2003 Q1, Q2 and

Q3 in its SEC 10K for 2003. I attach as Exhibit “XX,”

**[Nortel Networks Corporation 10 K 2003 dated Jan. 11, 2005](#)**

25. On May 2, 2005, Nortel filed its SEC 10K for 2004, one month late and not containing any accounting restatements. However, this 2004 10K discloses SEC and OSC regulatory investigations underway, US. Texas Attorney’s Office and RCMP IMET criminal investigations underway, and numerous civil class actions filed against the corporation. It says:

We are under investigation by the SEC and the Ontario Securities Commission, or OSC, Enforcement Staff and have received a U.S. federal grand jury subpoena for the production of certain documents sought in connection with an ongoing criminal investigation being conducted by the U.S. Attorney’s Office for the Northern District of Texas, Dallas Division.

Further, the Integrated Market Enforcement Team of the Royal Canadian Mounted Police, or RCMP, has advised us that it would be commencing a criminal investigation into Nortel’s financial accounting situation. In addition, numerous class action complaints have been filed against Nortel, including class action complaints under the Employee Retirement Income Security Act, or ERISA. In addition, a derivative action complaint has been filed against Nortel.

I attach as Exhibit “XX, “

**[Nortel Networks Corporation 10 K 2004 dated May 2, 2005](#)**

26. On October 17, 2005, Nortel announces CEO Bill Owens is leaving and will be replaced by CEO Mike Zafirovsky. New debt and equity financing is once again likely to be deferred until the new CEO determines his own turnaround business strategy. I attach Exhibit “XX,

**[CBC - Nortel picks new CEO to replace Bill Owens October 17, 2005](#)**

27. On March 10, 2006, a Nortel News Release announces Nortel will delay the filing of its 2005 Annual Report due on March 31, 2006, a month later as it needed more time to complete its third accounting restatements. I attach Exhibit “XX,”

**Nortel News Release Nortel to Delay Filing 2005 Annual Report Until End of April 2006**

**March 10, 2006**

28. On May 1, 2006, Nortel issued its third restatement of its financial results for 2003, 2004 and 2005 Q1, Q2 and Q3 in its SEC 10K for 2005. This would be the last accounting restatement and last financial statement filed on a late basis. I attach as Exhibit "XX,"

**Nortel Networks Corporation 10K 2005 dated May 1, 2006**

29. Northern Trust and Royal Trust knew or were reckless or willfully blind to the fact that Nortel was a below investment grade credit risk since 2001 as shown in Table 1. They should not have released the \$32 million of HWT assets to pay for the Paid as Incurred Benefit Plans on the premise that Nortel would reimburse the HWT beneficiaries at a later date. The trustees should not have allowed the \$22 million increase in Due from Sponsoring Company during 2005 and 2006, which created an all-time high cumulative \$42 million of Due from Sponsoring Company at December 31, 2006, on the premise that Nortel would fully pay this HWT receivable at a later date. Nortel was a below investment grade risk, meaning the HWT assets put into Nortel's possession for subsequent replenishment or repayment were placed at risk in the event of Nortel's bankruptcy, where the creditors would not honour Nortel's plans for replenishment and repayment of the HWT assets. Northern Trust and Royal Trust had no right to put the HWT assets at risk in the ways described in this class action, and the risks taken were significant at the time they were taken.

**Table 1**

**Credit Ratings on Nortel Long Term Bonds Issued or Guaranteed by NNC or NNL**

Period	Moody's		Standard & Poors		
	Credit Rating	Last Update	Credit Rating	Last Update	
2001	Baa2	Oct. 3, 2001	BBB-	Oct. 3, 2001	Investment Grade
2001	Ba3	April 4, 2002	BB	April 9, 2002	Speculative Grade
2002	B3	Nov. 1, 2002	B	Sept. 18, 2002	Speculative Grade
2003	B3	Nov. 1, 2002	B-	April 28, 2004	Speculative Grade
2004	B3	Nov. 1, 2002	B-	April 28, 2004	Speculative Grade
2005	B3	Feb. 8, 2006	B-	Feb. 8, 2006	Speculative Grade
2006	B3	Sept. 26, 2006	B-	June 16, 2006	Speculative Grade
2007	B3	March 22, 2007	B-	March 22, 2007	Speculative Grade
2008	Caa2	Dec. 15, 2008	D	Jan. 14, 2009	Speculative Grade
2009	Ca - NNC/D- Other	Jan. 15, 2009	D	Jan. 14, 2009	Speculative Grade

I attach Exhibit “XX, “

[\*\*Nortel Credit Ratings Description from Annual Reports & 10K's 2001 to 2008\*\*](#)

30. Northern Trust and Royal Trust knew or were reckless or willfully blind to the fact that Nortel had been conserving cash as evidenced by the elimination of its common dividend at June 29, 2001 and its preferred shares’ dividends at November 10, 2008. The Nortel Investor Relations shows that dividend history as follows:

“As a result, dividends have not been declared and paid on Nortel Networks Corporate common shares since June 29, 2001. On November 10, 2008, the Board of Directors of Nortel Networks Limited (NNL) suspended the declaration of further dividends on NNL’s Series 5 and Series 7 preferred shares.”

I attach Exhibit “XX,”

[\*\*Nortel Networks Corporation Dividend Information - Investor Relations Website April 1, 2013\*\*](#)

**IV DUE FROM SPONSORING ACCOUNT RECEIVABLE NOT IN COMPLIANCE WITH  
MULTIPLE REQUIREMENTS**

30. The Due From Sponsoring Company account receivable is not in compliance with:

- Common law on civil fraudulent breach of trust
- HWT Trustee Agreement
- Nortel Internal Company Manual
- Ontario Trustee Act
- Quebec Act Respecting Trust Companies And Savings Companies
- Quebec Civil Code

31. The Due from Sponsoring Company account receivable meets the test of civil fraudulent breach of trust because the trustees accepted the right of the HWT beneficiaries to the employer contributions to be put at risk by accepting these employer contributions in an IOU rather than cash,. Any IOU accepted constitutes risk, however, when the IOU became a % of total employer contributions at 43% in 2005 and 30% in 2006 as shown in the affidavit of Charlotte Urquhart, the proportionate risk accepted in these years was reckless, especially in the context where Nortel was unable to raise new debt arm-length credit suppliers during 2003 to 2005. The risk of the IOU was not compensated for by interest or security taken against Nortel assets.

32. Furthermore, when the trustees allowed the Due from Sponsoring Company account receivable to accumulate to a % of HWT total assets at 22% in 2005, 28% in 2006 and proceeding to 30% in each of 2007 and 2008 as shown in the affidavit of Charlotte Urquhart, they were reckless or wilfully blind to the inadequate diversification within the HWT total assets. The Due from

Sponsoring Company account receivable was more than the widely accepted diversification standard for an investment portfolio having no more than 10% invested in a single entity.

33. As discussed in point 39 below, the Due from Sponsoring Company account receivable breached S. 1340 of the Civil Code of Quebec because it was an evidence of indebtedness to the HWT by Nortel at a time when Nortel had failed to pay the prescribed dividends on its shares.

**1340.** The administrator decides on the investments to make according to the yield and the anticipated capital gain; so far as possible, he works toward a diversified portfolio producing fixed income and variable revenues in the proportion suggested by the prevailing economic conditions. He may not, however, acquire more than 5% of the shares of the same company nor acquire shares, bonds or other evidences of indebtedness of a legal person or limited partnership which has failed to pay the prescribed dividends on its shares or interest on its bonds or other securities, nor grant a loan to that legal person or partnership.

34. The trustees did not ensure that the HWT was being invested with the exercise, skill, diligence that a prudent investor would exercise in the circumstances, which is the non-quantitative standard set within S. 27(1) of the *Ontario Trustee Act Trustee Act R.S.O. 1990, CHAPTER T.23*. I discuss all the breaches of Investment Standards within the *Ontario Trustee* further at point 37 below.

35. The HWT Trustee Agreement has the following conditions relevant to the Due from Sponsoring Company are:

- the trustee shall make only such investments that comply with the applicable Federal and Provincial laws and regulations respecting the investment of trust funds (S. Article III (h)).

The Due from Sponsoring Company account receivable did not comply with the section noted below of the *Ontario Trustee Act Trustee Act R.S.O. 1990, CHAPTER T.23; Quebec Act*



*Respecting Trust Companies And Savings Companies. R.S.Q., chapter S-29.01 related Civil Code of Quebec.*

- the Trustee may be directed as to specific or general investment of the Trust in a request, direction, or authorization in writing signed by any person authorized by resolution of the Corporation's Board of Directors to sign such a writing (S. Article III (h))

No such authorized instructions for the HWT's acceptance of the "Due From Sponsoring Company" has been found in the evidence.

- the Trustee may hold part of the trust not invested, if it deems this to be advisable in the interest of the Trust (S. Article III (i)).

There are no circumstances where an uncollected, non-interest paying, and unsecured "Due From Sponsoring Company" account receivable is in the interest of the HWT beneficiaries, especially when Nortel is experiencing financial distress.

- there is no prescribed list of eligible investments for the HWT
- there is no explicit restriction on the HWT accepting short term or long term receivables owed to it by Nortel.

In any case, if there were to be an interpretation that required employer contributions could be paid in the form of a "Due From Sponsoring Company," it would surely be an extension of interpretation that requires this short or long term receivable to be capable of being converted into cash, to provide investment return, to be a safe asset in terms of preservation of capital, and to be a small % of total assets in order to mitigate the HWT's overall asset portfolio risk. Otherwise, the Trustee Agreement's requirement for employer contributions in an amount sufficient to pay claims on a sound actuarial basis is meaningless and offers virtually no protection to HWT beneficiaries.

36. The Due from Sponsoring Company account receivable is not compliant with the underlined HWT investment requirements set out in the Nortel Internal Company Manual. The Due from Sponsoring Company account receivable is in essence a credit security of Nortel.

- PDF Page 73  
9. No investment shall be made in the securities of Northern Telecom Limited, Bell Canada, or any of their subsidiary or associated companies.
- PDF Page 71  
10. No investment shall be made in the properties of Northern Telecom Limited, Bell Canada or any of their subsidiary or associate companies.

37. Trustees allowing the Due from Sponsoring Company account receivable to become a % of HWT total assets at 22% in 2005, 28% in 2006 and 30% in each of 2007 and 2008, were permitting unlawful investment as it was not in compliance with the underlined Investment Standards below from the Ontario Trustee Act Trustee Act R.S.O. 1990, CHAPTER T.23.

Investment standards

27. (1) In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments.

Authorized investments

(2) A trustee may invest trust property in any form of property in which a prudent investor might invest.

Criteria

(5) A trustee must consider the following criteria in planning the investment of trust property, in addition to any others that are relevant to the circumstances:

1. General economic conditions.
2. The possible effect of inflation or deflation.
3. The expected tax consequences of investment decisions or strategies.
4. The role that each investment or course of action plays within the overall trust portfolio.
5. The expected total return from income and the appreciation of capital.
6. Needs for liquidity, regularity of income and preservation or appreciation of capital.
7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Diversification

(6) A trustee must diversify the investment of trust property to an extent that is appropriate to,

- (a) the requirements of the trust; and
- (b) general economic and investment market conditions.

38. The trustees permitting a Due From Sponsoring Company account receivable, were permitting unlawful investment as it was not in compliance with the underlined sections of the *Quebec Act Respecting Trust Companies And Savings Companies. R.S.Q., chapter S-29.01*

DIVISION VI  
LOANS AND INVESTMENTS

200. Every company shall, in exercising its loan and investment powers, act as a prudent and reasonable person would act in similar circumstances, honestly and faithfully and in the best interests of the shareholders, the depositors and, as the case may be, the beneficiaries. It must also adhere to sound and prudent management practices.

201. Every trust company shall invest the funds it administers for other persons, other than deposits, in accordance with the Civil Code, except to the extent provided in the instrument creating the administration.

39. The trustees acceptance of the Due From Sponsoring Company account receivable is not in compliance with the underlined sections of the Civil Code of Quebec, **as** is required in S. 201 of the *Quebec Act Respecting Trust Companies And Savings Companies. R.S.Q., chapter S-29.01*

**DIVISION** **I**  
SIMPLE ADMINISTRATION OF THE PROPERTY OF OTHERS

**1301.** A person charged with simple administration shall perform all the acts necessary for the preservation of the property or useful for the maintenance of the use for which the property is ordinarily destined.

**1302.** An administrator charged with simple administration is bound to collect the fruits and revenues of the property under his administration and to exercise the rights pertaining to the property. He collects the debts under his administration and gives valid acquittance for them; he exercises the rights pertaining to the securities administered by him, such as voting, conversion or redemption rights.

**1303.** An administrator shall continue the use or operation of the property which produces fruits and revenues without changing its destination, unless he is authorized to make such a change by the beneficiary or, if that is prevented, by the court.

1304. An administrator is bound to invest the sums of money under his administration in accordance with the rules of this Title relating to presumed sound investments. He may likewise change any investment made before he took office or that he has made himself.

**DIVISION**

**II**

**FULL ADMINISTRATION OF THE PROPERTY OF OTHERS**

1306. A person charged with full administration shall preserve the property and make it productive, increase the patrimony or appropriate it to a purpose, where the interest of the beneficiary or the pursuit of the purpose of the trust requires it.

**CHAPTER**

**III**

**RULES OF ADMINISTRATION**

**DIVISION**

**I**

**OBLIGATIONS OF THE ADMINISTRATOR TOWARDS THE BENEFICIARY**

1308. The administrator of the property of others shall, in carrying out his duties, comply with the obligations imposed on him by law or by the constituting act. He shall act within the powers conferred on him. He is not liable for loss of the property resulting from a superior force or from its age, its perishable nature or its normal and authorized use.

1309. An administrator shall act with prudence and diligence. He shall also act honestly and faithfully in the best interest of the beneficiary or of the object pursued.

1310. No administrator may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator. If the administrator himself is a beneficiary, he shall exercise his powers in the common interest, giving the same consideration to his own interest as to that of the other beneficiaries.

1315. Unless it is of the very nature of his administration to do so, no administrator may dispose gratuitously of the property entrusted to him, except property of little value disposed of in the interest of the beneficiary or of the object pursued. No administrator may, except for valuable consideration, renounce any right belonging to the beneficiary or forming part of the patrimony administered.

1317. If there are several beneficiaries of the administration, concurrently or successively, the administrator is bound to act impartially in their regard, taking account of their respective rights.

**DIVISION**

**V**

**PRESUMED SOUND INVESTMENTS**

**1339.** Investments in the following are presumed sound:

(1) titles of ownership in an immovable;

(2) bonds or other evidences of indebtedness issued or guaranteed by Québec, Canada or a province of Canada, the United States of America or any of its member states, the International Bank for Reconstruction and Development, a municipality or a school board in Canada, or a fabrique in Québec;

(3) bonds or other evidences of indebtedness issued by a legal person which operates a public service in Canada and which is entitled to impose a tariff for such service;

(4) bonds or other evidences of indebtedness secured by an undertaking, towards a trustee, of Québec, Canada or a province of Canada, to pay sufficient subsidies to meet the interest and the capital on the maturity of each;

(5) bonds or other evidences of indebtedness of a company in the following cases:

(a) they are secured by a hypothec ranking first on an immovable, or by securities presumed to be sound investments;

(b) they are secured by a hypothec ranking first on equipment and the company has regularly serviced the interest on its borrowings during the last 10 financial years;

(c) they are issued by a company whose common or preferred shares are presumed sound investments;

(6) bonds or other evidences of indebtedness issued by a loan society incorporated by a statute of Québec or authorized to do business in Québec under the Loan and Investment Societies Act (chapter S-30), provided it has been specially approved by the Government and its ordinary operations in Québec consist in making loans to municipalities or school boards and to fabriques or loans secured by hypothec ranking first on immovables situated in Québec;

(7) debts secured by hypothec on immovables in Québec:

(a) if payment of the capital and interest is guaranteed or secured by Québec, Canada or a province of Canada;

(b) if the amount of the debt is not more than 80% of the value of the immovable property securing payment of the debt after deduction of the other debts secured by the same immovable and ranking equally with or before the debt;

(c) if the amount of the debt that exceeds 80% of the value of the immovable by which it is secured, after deduction of the other debts secured by the same immovable and ranking equally with or before the debt, is guaranteed or secured by Québec, Canada or a province of Canada, the Central Mortgage and Housing Corporation, the Société d'habitation du Québec

or a hypothec insurance policy issued by a company holding a permit under the Act respecting insurance (chapter A-32);

(8) fully paid preferred shares issued by a company whose common shares are presumed sound investments or which, during the last five financial years, has distributed the stipulated dividend on all its preferred shares;

(9) common shares issued by a company that for three years has been meeting the timely disclosure requirements defined in the Securities Act (chapter V-1.1) to such extent as they are listed by a stock exchange recognized for that purpose by the Government on the recommendation of the Autorité des marchés financiers, and when the market capitalization of the company, not considering preferred shares or blocks of shares of 10% or more, is higher than the amount so fixed by the Government;

(10) securities of an investment fund or of a private trust, provided that 60% of its portfolio consists of investments presumed sound and that the fund or trust has fulfilled in the last three years the continuous disclosure requirements specified in the Securities Act.

1340. The administrator decides on the investments to make according to the yield and the anticipated capital gain; so far as possible, he works toward a diversified portfolio producing fixed income and variable revenues in the proportion suggested by the prevailing economic conditions. He may not, however, acquire more than 5% of the shares of the same company nor acquire shares, bonds or other evidences of indebtedness of a legal person or limited partnership which has failed to pay the prescribed dividends on its shares or interest on its bonds or other securities, nor grant a loan to that legal person or partnership.

1343. An administrator who acts in accordance with this section is presumed to act prudently. An administrator who makes an investment he is not authorized to make is, by that very fact and without further proof of fault, liable for any loss resulting from it.

## **V TRUSTEES KEPT HWT ASSETS AT RISK DURING 2007 TO CCAA FILING ON JANUARY 14, 2009**

40. Northern Trust and Royal Trust have no evidence in the public domain that there was any attempt to send out or re-send out reimbursement invoices to collect money from Nortel to reimburse any of the \$32 million of HWT assets used to pay the Paid as Incurred Plans' members, up to December 5, 2005 in the case of Royal Trust, and at any time after that until Nortel's CCAA filing on January 14, 2009 in the case of Northern Trust.

41. Similarly, Northern Trust and Royal Trust have no evidence in the public domain that they attempted to collect the Due from Sponsoring Company of about \$31 million at December 5, 2005 in the case of Royal Trust, and the other amounts outstanding at any time after that until Nortel's CCAA filing on January 14, 2009 in the case of Northern Trust.
42. Royal Trust up to December 5, 2005, and Northern Trust thereafter until the CCAA filing, continued to put HWT assets at risk by not collecting on the required reimbursements and the Due from Sponsoring Company when Nortel had the means to pay these amounts owing. Nortel had the cash balances and amounts owing to the HWT shown in Exhibit "XX," [Nortel V. Nortel Health and Welfare Trust 2000-2009](#) and in the amounts specified in Table 2 for 2005 to 2008.

**Table 2**

<b>\$ Millions</b>	<b>Nortel Cash</b>	<b>HWT Assets Misappropriated + Due (Ignoring Accrued Interest)</b>	
<b>December 31, 2004</b>	<b>\$3,685</b>	<b>\$ 0 + \$20</b>	<b>0.5%</b>
<b>December 31, 2005</b>	<b>\$2,951</b>	<b>\$21 + \$31</b>	<b>1.8%</b>
<b>December 31, 2006</b>	<b>\$3,493</b>	<b>\$32 + \$43</b>	<b>2.1%</b>
<b>December 31, 2007</b>	<b>\$3,532</b>	<b>\$32 + \$41</b>	<b>2.1%</b>
<b>December 31, 2008</b>	<b>\$2,397</b>	<b>\$32 + \$37</b>	<b>2.9%</b>

43. As noted in point 20, while raising new debt and equity was impossible during 2003 to 2005, by February 14, 2006, Nortel was finally able to secure a new \$1,300 million new one year bank credit facility at February 14, 2006. In 2006, Nortel also experienced a turnaround in its operating cash flow to \$237 million (albeit inflated by the \$11 million of misappropriated HWT assets during January to April 2006 and the increase of \$11 million in Due form Sponsoring Company during 2006.) The positive events, combined with the third and last accounting restatement on May 1, 2006, led to several more new financings during 2006 to 2008, as shown in Exhibit "XX," [Nortel V. Nortel Health and Welfare](#)

[Trust 2000-2009](#) and in the deals and amounts specified in Table 3 for 2006 to 2008

**Table 3**

**Nortel New Credit Facility and Long Term Debt Offerings (\$ Millions)**

<b>Feb. 14, 2006 new bank credit facility</b>	<b>\$1,300 million</b>
<b>July 5, 2006 new debt offering</b>	<b>\$2,000 million</b>
<b>April 15, 2007 new debt offering</b>	<b>\$1,150 million</b>
<b>May 8, 2008 new debt offering</b>	<b>\$ 668 million</b>

**VI NORTHERN TRUST BREACHED FIDUCIARY DUTIES POST THE NORTEL CCAA FILING**

- 44.** The evidence and professional opinion provided in the April XX, 2013 affidavit from forensic accounting expert Charlotte Urquhart, is that the breach of trust and misrepresentations of Northern Trust, reached the level of fraud, because Northern Trust knew, or was reckless or willfully blind, to the risks it was taking with the rights of the HWT beneficiaries, when it had no right to take these risks. The court's definition of fraudulent breach of trust for trustees does not require Northern Trust to be unjustly enriched itself from its wrongdoings. However, Northern Trust did indeed become unjustly enriched also by its post CCAA omission of disclosures and actions against Nortel on behalf of the HWT beneficiaries, that benefitted itself in the March 30, 2010 Nortel Amended Settlement Agreement legal release of all lessor causes of action, but for fraud.
- 45.** Northern Trust was a party to the Nortel CCAA proceeding and Northern Trust took no steps to correct misleading HWT information in the Nortel Treasurer John Dolittle's Affidavit and in the Court Monitor's Pre-Filing Initial and First Reports. For example, the first time the HWT was mentioned to the CCAA court is in the Court Monitor's Pre-Filing



Report, dated January 14, 2009, within the Summary of Assumptions for the Forecast Cash Flow of Nortel for the first 13 weeks of the CCAA proceeding, which says:

“Funding payments to HWT account are suspended post-filing as it is forecast that the HWT trust has sufficient surplus assets to sustain itself during the Forecast Period.”

The HWT actually had a deficit at -52% at December 31, 2008 with the Due from Sponsoring Company not written off, and -67% with it written off. I attach Exhibit “XX,”

**Court Monitor's Pre-Filing Report January 14, 2009**

46. Another example of Northern Trust not correcting misleading HWT information was in

The Court Monitor’s 1st Report dated February 5, 2009, paragraph 48.

"The Nortel Networks Health and Welfare Trust (“H&WT”), as more fully described in the Doolittle Affidavit, is not subject to the CCAA proceedings and continues to operate in the ordinary course. The Sun Life Assurance Company of Canada administers various non-pension benefits through the H&WT. The H&WT provides funding for various non-pension benefits on behalf of current and former Canadian employees of the Applicants. The Applicants continue to fund this trust in accordance with past practice."

Operating in the ordinary course and continuing to fund the HWT in accordance with past practice, implies all is well within the HWT and that HWT beneficiaries need not be concerned about the HWT’s funding. I attach Exhibit “XX,”

**Court Monitor's 1st Report dated February 5, 2009**

47. John Dolittle’s affidavit, as Treasurer, at time dated January 14, 2009 says:

Point 41:

“The HWT is used to fund certain long term disability, life and other insurance and medical benefits for current and former employees.”

Point 90 (C) (iii):

“Benefit Trust – As discussed above, employee benefits are funded into accounts administered by a third party and are trust accounts. The Applicants do not have any

access to funds that are transferred into these accounts.”

John Doolittle was Assistant Treasurer at Nortel, when the Nortel plan to wind-up the HWT in 2005 was conceived, (then aborted 12 months later at April 2006.) It was misleading for John Doolittle to say in his affidavit that the HWT funded the life insurance and medical benefits of current and former employees, since he would have known that the HWT assets were for Reserved Plans, including only the Pensioners’ Life Insurance Fund for future premiums of the pensioners’ group life insurance policy. The Health and Welfare Plan legal documents and Nortel’s practice in respect to the use of the HWT assets was for these Reserved Plans’ purpose for every period, except May 2005 to April 2006 when Nortel made an aborted attempt to secretly wind-up the HWT. John Doolittle was replaced by Mike McCorkle, as the Assistant Treasury, when John Doolittle briefly left the company. The Nortel HWT funding policy was within the responsibilities of the Nortel Treasury Division. I attach Exhibit “XX,”

**Corporate Leader John Doolittle Affidavits January 14, 2009 and February 5, 2009**

48. Northern Trust’s legal counsel Pamela Huff of Blakes Cassels & Graydon LLP attending the March 3-5, 2010 CCAA to approve the first February 8, 2010 settlement agreement did correct the fundamentally flawed statement about the HWT not being a statutory trust made by Nortel’s Canadian legal counsel, Derrick Tay, now of Gowlings LLP at this hearing,” which was as follows:

“Now, whether it's called a trust, and the HWT was formed as a result of trust agreement that is almost 30 years old. HWT is a tax efficient deal and it's not a trust in the sense of a trust, as it's a statute or trust governed by statute or regulations or any of that.

So, although the applicants have funded the HWT over the years, because it was a tax efficient way of doing it, it's always been underfunded. There is no legal obligations on the applicants to insure that the HWT will also be fully funded.”

Northern Trust's legal counsel, who was also legal counsel for the largest Nortel bond owner, Matlin Patterson Global Advisers LLC and for one of the Nortel business acquirers, Telefonaktiebolaget LM Ericsson, clarified that Northern Trust was the trustee for the HWT, however, it did not have a role to take a position on the February 8, 2010 settlement agreement. Nonetheless, in this hearing, Northern Trust sought to have the legal release of the settlement agreement amended so as to expand its coverage of Northern Trust as trustee for the two Nortel Canadian pension plans.

Northern Trust's position was as follows:

"... I represent the Northern Trust Company Canada, that took over in December 2005. Northern Trust was also appointed trustee of the two pension plans in December 2005, as well, and in its capacity of the trustee of HWT and the pension plans, Northern Trust takes instruction and has as mentioned in earlier submissions from Nortel in all of those capacities, Northern Trust was not involved in the negotiations of settlement agreement. It received a copy of the agreement when it was publically disclosed and takes no position on the approval of it. It would not be its role to do so. The parties represented had beneficiaries by representative counsel, and Nortel was at the table, and the trustee would have no role in Nortel Hearing that, and takes no position on the approval of the settlement agreement."

"So to the extent it is not obvious, Your Honour, I will make the statement that Nortel Trust disputes any alleged breach of duty or any alleged liability for unfunded benefits, and if any such cause of action brought against it, I would rely on its indemnities from Nortel."

"But we also noted that the release in the draft order included the trustee of the HWT, but not the trustees of the pension plans; although, Northern Trust of the trustee of both HWT has indemnities for Nortel. So, we raised what we assumed were drafting glitches, and they agreed it was inadvertent of the trustee of the pension plans from the release and Nortel and the Monitor have agreed to the changes we have proposed to order. At the right stage, I understand they will take you through the draft order and the requested changes proposed by Northern Trust and agreed by Nortel and the Monitor."

I attach Exhibit "XX,"

### **[Interim Settlement Court Transcript March 3, 4, 5, 2010](#)**

49. Northern Trust did not seek a court order for disclosure to the HWT beneficiaries of key legal and financial HWT documents, after the Nortel CCAA filing on January 14, 2009 and before the March 30, 2010 Nortel Amended Settlement, which were necessary for disclosure of the HWT 65% deficit expected at the HWT wind-up date and what the factors

were causing this large deficit. The Nortel CCAA court monitor refused to release these HWT and related LTD documents in a letter dated November 5, 2009, despite a request from LTD representatives in a letter to J. Geoffrey Morawetz on November 2, 2009. Both Northern Trust and Royal Trust received legal protection from breach of trust and misrepresentation claims, except for fraud, within the legal release of the March 20, 2010 Nortel Amended Settlement Agreement. Consequently, the Nortel HWT beneficiaries did not have the opportunity to agree to, or oppose, this settlement on the basis of informed consent.

I attached Exhibit “XX,”

Exhibit XX [November 2, 2009 Letter to J. Morawetz requesting disclosure of information](#)

I attach Exhibit “XX,”

[Letter from Goodmans on Their Decision to Not Release Information Nov. 5, 2009](#)

50. Northern Trust filed no post CCAA motion in respect to Nortel’s breach of constructive trust and unjust enrichment for failing to reimburse the HWT for the misappropriated \$32 million of HWT assets during May 2005 to April 2006. Instead Northern Trust sought and received a court order for its own legal protection under the Nortel Amended Settlement Agreement dated March 30, 2010, without opposing this settlement agreement as trustee on behalf of the HWT beneficiaries.

51. Northern Trust did not advise HWT beneficiaries prior to the March 30, 2010 Nortel Amended Settlement Agreement that Nortel paid off just \$8.721 million of the \$37.064

million Due from Sponsoring Company during 2009 and wrote-off \$26.985 million of it at December 31, 2009. The HWT 2009 financial statement showing the Due from Sponsoring Company write-off was one of the documents not disclosed at the time of the March 30, 2010 Nortel Amended Settlement Agreement. Northern Trust had not only risked the HWT's assets in permitting Nortel to increase the HWT's Due from Sponsoring Company by \$22 million during 2005 and 2006 and not collecting the HWT's Due from Sponsoring Company during 2007 to the CCAA filing dated of January 14, 2009, it also failed to file any motion post CCAA filing and before the Nortel March 30, 2010 Amended Settlement Agreement in respect to Nortel's role and joint responsibility for breach of trust and its unjust enrichment from not paying all of the HWT's Due for Sponsoring Company.

**52.** As shown in Table 4, Nortel had the means to remedy the misappropriation of HWT assets and the breach of trust in the Due from Sponsoring Company, in the time period leading up to and during the CCAA proceeding. Northern Trust had the fiduciary duty to take steps to protect the interests of the HWT beneficiaries before and after the CCAA filing, and instead it took risks with the HWT beneficiaries' rights for the benefit of Nortel and ultimately for the benefit of itself through the March 30, 2010 Nortel Amended Settlement legal release of breach of trust, misrepresentations and any other causes of action, except fraud.

**Table 4**

**Due from Sponsoring Company (\$ Millions)**

	<b>Change</b>	<b>Outstanding</b>
<b>2007</b>	<b>-\$1.875</b>	<b>\$40.643 (1.0 % of Cash)</b>
<b>2008</b>	<b>-\$3.579</b>	<b>\$37.064 (1.5 % of Cash)</b>
<b>Post CCAA Filing 2009 Pay Down</b>	<b>-\$8.721</b>	<b>\$28.343</b>
<b>Post CCAA Filing 2009 Write-off</b>	<b>-\$26.985</b>	<b>\$ 1.358</b>

- 53.** Northern Trust received trustee fees before and after the CCAA filing up until the time of the HWT wind-up, while not performing its statutory fiduciary duties as trustee. Furthermore, it unjustly enriched its own financial situation after the CCAA filing date of January 14, 2009 by achieving legal protection from the damages of the HWT beneficiaries' within the March 30, 2010 Nortel Amended Settlement Agreement legal release through its role in the omission of key disclosures and its failure to take post CCAA filing legal actions against Nortel to exert the legal rights of the HWT beneficiaries in respect to the misappropriation of HWT assets during 2005 and 2006 and the breach of trust in the HWT's Due from Sponsoring Company.

**VII THE VULNERABILITY OF THE HWT BENEFICIARIES**

- 54.** The HWT beneficiaries comprise 11,568 vulnerable Canadians, who are long term disabled former employees, elderly survivors of deceased employees and pensioners. As of December 31, 2010, there are 357 LTD income beneficiaries, of which 85 have 160 dependent children. There are 81 survivors' income beneficiaries with an average age of 71, and 305 survivors' transition income beneficiaries with an average age of 77. The LTD and deceased employees were in insurance contracts with Nortel, where Nortel committed to pay future income in the contingent event of their disability or death. I attach Exhibit "XX,"

## HWT Beneficiaries' Characteristics

55. In addition, there are 10,461 pensioners life insurance fund beneficiaries, whose average age is 73. The pensioners' life insurance fund (PLIF) was created within the HWT in 1980. The purpose of the PLIF was reserves to pay for the pensioners' group life insurance policy premiums beyond the current year, for pensioners until their death. The average pensioners' life insurance coverage was \$24,638 per pensioner.
56. The LTD life insurance beneficiaries were in respect to both core life insurance and optional life insurance, both of which were funded by Nortel since the LTD benefits plan waived the employees' contributions for their optional life insurance selections prior to disability. The average LTD life insurance coverage was \$54,937.
57. The 2010 HWT wind-up settlement was at just 35% of the actuarial liabilities for the HWT beneficiaries. Nortel's LTD former employees' disability insurance income, until age 65, recovery or death, averaged \$30,829 per person, net of the CPP disability income received. Not everyone has qualified for CPP disability income, making the Nortel disability income their only source of income. Hypothetically, if the average LTD former employee was able to live on his 65% compromised Nortel disability income of \$10,790, plus his CPP disability income ranging from the average \$10,103 for 2012 to the \$14,555 maximum for 2013, the combined disability income from the two sources would be \$20,893 to \$25,345.
58. However, in practical terms, an LTD former employee, with annual expenses of \$35,000 for shelter, food and other basic living expenses, will use up his average HWT settlement

of \$78,333 within about three years, assuming the average CPP disability income. The \$35,000 benchmark used is substantially less than the average household expenditures in Canada of \$73,457 in 2011, according to Statistics Canada. The LTD former employees, not close to normal retirement age, face a long term future starting in 2014 of having to survive on just CPP disability income. The average medical and dental expenses for the LTD former employees are \$7,754 annually. I attach Exhibit “XX,”

**[Statistics Canada Average household expenditure, by province \(Canada\) 2011](#)**

59. The survivors’ income beneficiaries, whose average age is 70.5 years, are in similar dire straits with their average Nortel income of \$16,740 being cut by 65% to \$5,859 due to the compromised HWT wind-up settlement. The combined maximum CPP survivor pension and OAS is \$13,843. Survivors whose living expenses are \$35,000 face the same time of about three years for the use of their average HWT settlement of \$70,000. These survivors will need to live the rest of their lives on the \$13,843 social security net, unless they had other retirement savings.

60. Pensioners have lost 65% of the actuarial calculation for the present value of future premiums for their group life insurance policy coverage from age 65 until death. Given that 90% of the HWT beneficiaries were the pensioners, their share of the HWT wind-up settlement was 54%. Their average HWT settlement was \$4,246.

61. Pensioners’ income did not come from the HWT. It comes from one of the two Nortel Canadian pension plans, which are expected to wind-up in late 2013 to early 2014. In February 2010, The Ontario Government taxpayers provided an estimated \$350 million



grant into the Ontario Pension Benefit Guarantee Fund, which guarantees the first \$1000 per month of pensions by making a top-up payment for the pension plan deficit % applicable to the first \$1,000 of pension income. The Nortel Ontario pensioners that were members of the Union had average Nortel pension income of \$12,811 before the Nortel CCAA filing, and have an average decline of -3% and loss of inflation indexing due to the pension plan wind-up. The Nortel Ontario non-union pensioners had Nortel pension income of \$22,537 before the Nortel CCAA filing, and have an average expected decline of -19% and loss of inflation indexing. Nortel pensioners, who worked outside of Ontario, have an average expected decline of -40% due to the pension plans' wind-up.

62. If we assume the combined CPP and OAS pensions range from the \$12,517 average for 2012 to the \$18,703 maximum for 2013, the Nortel pensioners have average total combined Nortel, CPP and OAS pension in the range of \$23,009 to \$36,958 due to the pension plans' wind-up.

63. I swear this affidavit in support of a motion certifying the within action as a class proceeding and for leave under Part XXIII.1 of the *Securities Act*, and for no other purpose.

**AFFIRMED BEFORE ME** at the City )  
of Toronto, Province of Ontario )  
this ● day of April , 2013 )  
) )  
\_\_\_\_\_ )  
A COMMISSIONER, ETC.

\_\_\_\_\_  
**DIANE A. URQUHART**