CITATION: Holley v. The Northern Trust Company, Canada, 2014 ONSC 889
COURT FILE NO.: 12-CV-462273CP
DATE: 20140211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JENNIFER HOLLEY	)	*Joel P. Rochon, Peter Jervis*, and *Remissa Hirji*, for the Plaintiff
Plaintiff	)	
– and –	)	
THE NORTHERN TRUST COMPANY, CANADA and THE ROYAL TRUST COMPANY	)	*Jeff Galway* and *Nicole Henderson*, for the Defendant The Northern Trust Company, Canada
Defendants	)	*R. Paul Steep, Christine L. Lonsdale,* and *Daniel Dawalibi*, for the Royal Trust Company
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: January 23 and 24, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Jennifer Holley is the Plaintiff in this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992. She sues The Royal Trust Company and The Northern Trust Company, Canada.

[2] As I will describe below, because of a release granted in proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA"), Ms. Holley can only sue the Defendants for fraud.

[3] Royal Trust and Northern Trust each move for an order striking out Ms. Holley's Amended Statement of Claim on the basis that her pleading discloses no reasonable cause of action for fraud or, in the alternative, they each seek a judgment dismissing her action as statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

[4] Royal Trust also asserts that Ms. Holley's action should be dismissed as an abuse of process.

[5] For the reasons expressed below, I do not regard Ms. Holley's action as an abuse of process. However, in my opinion, it is plain and obvious that her Amended Statement of Claim does not plead a tenable cause of action for fraud. She does plead a tenable cause of action for constructive fraud, but, in my opinion, constructive fraud is encompassed by the CCAA release. Further, it is my opinion that it is plain and obvious that her claims for constructive fraud or for common law fraud are statute-barred.

[6] Accordingly, for the reasons expressed below, I dismiss her action against Royal Trust and Northern Trust.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. Introduction

[7] In this part of my Reasons for Decision, I shall describe the factual and procedural background. In this introduction, I identify several contested issues of mixed fact and law that will be important to the legal analysis that will come later, and I explain why attention to these matters is important.

[8] I have already noted above that because of a release in CCAA proceedings, Ms. Holley can sue Royal Trust and Northern Trust only for fraud. The practical consequence of this restriction is that the Defendants advance a two-pronged argument. First, they say that their actions were compliant with the Trust Agreement, and second, they say that if there was non-compliance, it did not amount to fraud. This two-pronged argument makes for contested issues about: (a) the interpretation of the Trust Agreement; (b) whether Ms. Holley has a tenable argument that the conduct of Royal Trust and Northern Trust breached their respective obligations under the Trust; and (c) assuming that it is arguable that Royal Trust and Northern Trust acted unlawfully, was the alleged misconduct fraudulent?

[9] Further, the matter of the fraud exception in the CCAA release raises an interpretation issue about the scope of the release, and, in particular, there is the contested issue of whether as a matter of interpretation, constructive fraud was released by the CCAA release. Thus, it is necessary to pay attention to the circumstances in which the CCAA release came into existence in the CCAA proceedings.

[10] Moreover, it is necessary to pay attention to the circumstances in which the release was granted because those circumstances are important to Royal Trust's and Northern Trust's argument that the limitation period began to run at the time of the CCAA Monitor's 31st Report to the court, which Report discussed the delivery of a release.

[11] Ms. Holley denies that her claim is statute-barred, and she submits that the earliest date for discovery of her claims came with the Monitor's 51st Report, which Report, she submits, reveals the factual information necessary to discover a fraud action against the Defendants.

[12] Thus, there is a contested issue about discoverability that turns on the nature of the disclosures in these two Reports from the Monitor. It shall, therefore, be important to pay attention to the information disclosed by the Monitor and also to pay attention to what the circumstances reveal about what Ms. Holley and her lawyers knew or ought to have known about seeking a remedy against Royal Trust and Northern Trust at the time of the Monitor's 39th Report.

2. The Parties

[13] The Plaintiff, Jennifer Holley, was an employee of Nortel Networks Corporation ("Nortel"). Nortel is the applicant in ongoing proceedings under the CCAA. As an employee, Ms. Holley was on long-term disability ("LTD") for over 12 years. Given her current health, it is unlikely that she will ever be able to return to work. Because of the CCAA, she and other employees or former employees of Nortel will no longer receive LTD benefits, although they will receive something modest from the winding up of the Trust.

[14] Ms. Holley brings this proposed class action on her own behalf and on the behalf of the following class of persons:

> All Beneficiaries of the Nortel Health and Welfare Trust ("HWT"). Beneficiaries include:
>
> (a) LTD Beneficiaries for LTD Income and LTD Life;
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> (b) LTD Beneficiaries participating under Optional Life for the LTD Optional Life Benefit;
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> (c) STB Beneficiaries in pay on or before December 31,2010 for STBs;
>
> (d) SIB Beneficiaries in pay on or before December 31,2010 for SIBs; and
>
> (e) Pensioners (including LTD Beneficiaries) for Pensioner Life.
>
> (the "Class" or "Class Members").

[15] Nortel provided LTD and other benefits through the Nortel Health and Welfare Trust, which is also known as the HWT, which I will refer to as the Trust.

[16] Replacing the original trustee, which, from 1980 to 1997, was the Montreal Trust Company, Royal Trust was the trustee of the Trust from April 1997 to November 30, 2005.

[17] Then, Northern Trust was appointed as trustee of the Trust effective December 1, 2005, and it continues to act as trustee of the Trust, which is in the process of being wound-up. Northern Trust is also the trustee of Nortel's pension plans.

3. The Nortel Health and Welfare Trust

[18] Nortel (and its predecessors) provided LTD, health, and welfare benefits to its employees. The benefits were funded and administered through the Nortel Health and Welfare Trust ("the Trust").

[19] The Trust is governed by the Trust Agreement, which began with an agreement dated January 1, 1980 between Northern Telecom Limited (a predecessor to Nortel) and Montreal Trust Company, as trustee. The Trust Agreement was amended by agreements dated September 24, 1984, June 1, 1994, December 1, 2005, and by a letter agreement dated December 1, 2005.

[20] It may be noted that in the CCAA Proceedings, discussed below, Justice Morawetz held that the Trust constitutes one trust created for the purpose of providing health and welfare plan benefits for Nortel's employees. See *Nortel Networks Corporations (Re)*, 2010 ONSC 5584 at paras. 9, 10, and 33.

[21] For present purposes, the following provisions in the Trust Agreement are relevant:

RECITALS

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

(a) a Health Care Plan;

(b) a Management Long Term Disability Plan;

(c) a Union Long Term Disability Plan;

(d) a Management Survivor Income Benefit Plan;

(e) a Management Short Term Disability Plan;

(f) a Group Life Insurance Plan

All of which are hereinafter collectively referred to as the "Health and Welfare Plan".

2. To give effect to the Health and Welfare Plan it is necessary to establish a trust fund to be known as the "Health and Welfare Trust".

Now therefore in consideration of the premises and the mutual covenants herein contained the Corporation and the Trustee, here covenant and agree as follows:

ARTICLE II – DEFINITIONS ...

1. The term "Trustee" shall mean the Trustee herein named its successors and assigns and shall include the person, legal entity or corporation to whom the Trustee may delegate such 'powers as are necessary for the sound and efficient administration of the Trust fund.

2. The term "Benefits" as used herein shall mean payments benefits as determined under the Health and Welfare Plan.

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

5. The term "Employer's Contribution" as used herein shall mean payments required to be made by the Corporation and by designated affiliated or subsidiary corporations to the Trust Fund to enable the Trustee to discharge; the obligations arising under the Health and Welfare Plan.

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

ARTICLE II – TRUST FUND

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

2. All payments made to the trustee from time to time by the Corporation and designated, affiliated or subsidiary corporations and by the employees, together with all profits, increments

and earning thereupon, shall be irrevocable and constitute upon receipt by the trustee, the trust funds to be administered by the trustee in accordance with the terms of this trust agreement, the Health and Welfare Benefit Plan and the Eligibility Requirements.

3. The Trustee shall from time to time on the written directions of an officer of the Corporation so designated by its Board of Directors, or failing such designation, by the Secretary, of the Employees' Benefit Committee of the Corporation, or a Plan Administrator appointed by the Corporation, make payments out of the Fund to such persons, in such manner and in such amounts as may be specified in such directions to the Trustee. In each instance, the written directions shall be deemed to include a certification to the Trustee that such directions and the payments to be made pursuant thereto are in accordance with the terms of the Health and Welfare Plan, which certification shall constitute full and complete protection to the Trustee in complying with such directions.

ARTICLE III - TRUSTEE

1. The Trustee, who shall also be known as the "Trustee of the Health and Welfare Trust", hereby accepts the trust created by the Trust Agreement and agrees to hold, invest, distribute and administer the Trust Fund in accordance with the terms and conditions of the Health and Welfare Plan and this Trust Agreement.

ARTICLE IV – EMPLOYER'S CONTRIBUTIONS

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

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

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

ARTICLE VI – AMENDMENT AND TERMINATION

2. Upon sixty (60) days prior written notice to the Trustee, the Corporation may terminate its obligation to make Employer's contributions in respect of benefits after the date of written notice to the Trustee (hereinafter called the Notice of Termination)..Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice of Termination. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the trust Agreement and the Health and Welfare Plan shall revert to the Corporation.

[22] Effective December 1, 2005, Northern Trust replaced Royal Trust to become the trustee of the Trust.

[23] When Northern Trust became the trustee, the Trust Agreement was amended to provide that Nortel would assume sole responsibility for determining the amount of required contributions. The letter agreement stated:

> Notwithstanding anything to the contrary in the Health and Welfare Trust and for the avoidance of any doubt, we [Nortel] agree that you [Northern Trust] shall have no responsibility for determining, reviewing or monitoring the amounts of Nortel Networks Limited's contributions required in order to adequately fund the Health and Welfare Plan ("Contribution Amounts") nor to advise and carry out administrative procedures in accordance with the Health and Welfare Plan and the eligibility Requirements.
>
> Nortel Networks Limited agrees that it shall be solely responsible for determining said Contribution Amounts on a sound actuarial basis...and agrees to indemnify and hold you harmless from any and all costs, losses, damages, claims, actions, suits, liabilities, expenses or other charges (including attorneys' fees) that you incur directly or indirectly arising out of the contributions made (or not made) by Nortel to the Health and Welfare Trust or out of the administration of the Health and Welfare Plan.

4. The Operation of the Trust and the Allegations of Breach

[24] I will return several times below to the parties' arguments about whether Royal Trust or Northern Trust breached their obligations under the Trust or whether they were authorized to do what they did or what they allowed to be done. Answering that issue depends upon interpreting the Trust Agreement. However, there actually is little dispute about how the trust operated and how the various constituent benefit plans were administered. The disputed legal issue is whether the Trustees' administration of the Trust was compliant with the Trust Agreement.

[25] The Trust operated in the following way. Over the history of the Trust, Nortel made contributions of three sorts. First, Nortel made cash contributions for some plans for which the trustee had established a reserve account. The trustee would invest the contributions in accordance with the investment powers set out in the Trust Agreement. The trustee would pay the benefits for the Reserved Plans from the reserve account. A payment to an employee's survivor spouse is an example. LDT benefits are another example of benefits paid from the reserve account. It will be a matter of debate between actuaries about the extent to which and when, if ever, the reserve account had a surplus or was underfunded and had a deficit.

[26] Second, Nortel made cash contributions to put the trustee in funds or to reimburse the trustee for the payment of benefits by the trustee to employees under plans administered through the Trust for which there was no reserve account and for which the benefits were being paid on a pay-as-you-go basis. Medical or dental plan benefits are an example. This benefit was administered through the Trust but no reserve account was established for the benefit.

[27] Third, Nortel would, in effect, promise to pay the trustee for contributions to the reserve account or to reimburse the trustee for its payment of the pay-as-you-go benefits for the plans that did not have a reserve account.

[28] Before it became the subject matter of litigation, this third way of Nortel making a contribution was described by the parties as the "Due," which nickname derives from the Trust's financial report asset item "Due from Sponsoring Company." Now that the matter is in litigation,

the parties characterize the Due in different ways. Royal Trust and Northern Trust characterize it as a non-cash payment made by Nortel, much the way that a promissory note, IOU, or post-dated cheque is a payment or an account receivable.

[29] In contrast, Ms. Holley characterizes the Due as an unauthorized loan, a fraud, and a breach of the terms of the trust and the obligations owed by the trustee to the beneficiaries of the Trust. Ms. Holley submits that allowing the Due to persist uncollected and without security meant that reserve funds had to be used to pay non-reserve benefits and this practice imperilled the reserves earmarked for LTD beneficiaries and others, especially during the time when financial funnel clouds were in the financial weather forecast for Nortel.

[30] Royal Trust and Northern Trust submit that they did nothing wrong in accepting the Due. They submit that the Trust Agreement never imposed upon the trustee a duty to compel Nortel to make contributions and the Trust Agreement never imposed an obligation on the trustee to otherwise monitor Nortel's compliance with its contribution obligations.

[31] There was an issue between the parties during the hearing of the motion about whether the December 1, 2005 letter agreement acknowledged that but for the letter agreement, the trustee did indeed have a responsibility to determine the amount of Nortel's contribution or whether the December 1, 2005 letter agreement was introduced when Northern Trust became trustee out of its abundance of caution to make it clear that it did not have such an obligation.

[32] There was an issue between the parties about whether the trustee had a responsibility to ensure that the benefit plans were actuarially sound. In her Statement of Claim, Ms. Holley pleads that for Nortel to secure favourable tax treatment for its contributions, the LTD benefits under the Trust must respect the principles of insurance, even if the benefits are not insured with a licensed insurer. In this regard, paragraph 7 of CRA [Canada Revenue Agency] Interpretation Bulletin IT-428 provides:

> If, however, insurance is not provided by an insurance company, the plan must be one that is based on insurance principles, i.e., funds must be accumulated, normally in the hands of trustees or in a trust account, that are calculated to be sufficient to meet anticipated claims. If the arrangement merely consists of an unfunded contingency reserve on the part of the employer, it would not be an insurance plan.

[33] In her Amended Statement of Claim, Ms. Holley pleads that Nortel and the trustee played a role similar to that of an insurance company and thus the trustees had an obligation to ensure that the Trust reserve account reflected the funded liability for future long term benefit payments. She submits that the Trust Agreement imposed on Royal Trust and then Northern Trust the obligation to ensure that the Trust was adequately funded for future liabilities, especially the LTD benefits.

[34] It is thus a matter of significant controversy between the parties as to the nature of the funding to make payments of the benefits conferred by the Trust. As already noted above, in actual operation, some of the benefits under the Trust, described as the "Reserved Plans" and which included long term disability and survivor income benefits, were paid by the trustee from invested Trust assets. As noted above, other benefits under the Trust, which were described as "paid as incurred plans" or "pay-as-you-go plans" and which included medical and dental costs and life insurance premiums, were paid in a two-step process in which Nortel paid the beneficiaries' claims by funding the Trust on an as-needed basis. This was described as administering the payments through the Trust.

[35] As a factual matter, only the Reserved Plans had assets notionally allocated in the Trust as reflected by the Trust's financial statements; however, assets were not segregated in the Trust for each Reserved Plan and no separate bank accounts were established.

[36] All of the Trust assets were commingled in one common trust bank account. Royal Trust and Northern Trust submit that the Trust Agreement permits any trust asset to be used to pay benefits, which is in fact what occurred during the lifetime of the Trust.

[37] In the Statement of Claim, Ms. Holley pleads that when Northern Trust became trustee it was aware that Nortel and Royal Trust had been breaching the Trust Agreement by using the trust fund as an unfunded contingency reserve to pay as incurred short term employee benefits without compensating the Trust as required. She pleads that Northern Trust knew that Nortel had failed to maintain the Trust as required by sound actuarial analysis and by Article IV paragraph 1 and 2 of the Trust Agreement.

[38] Ms. Holley pleads that Northern Trust agreed to facilitate this breach of trust and continued the breach of the fiduciary duty owed to the beneficiaries of the Trust but demanded that Nortel provide an indemnification. She submits that by the December Letter Agreement, Nortel agreed to indemnify Northern Trust for any liability associated with employer contributions not being made on a sound actuarial basis. She pleads that the Letter Agreement does not derogate from Northern Trust's obligations to the beneficiaries of the Trust.

[39] Whether or not it was a breach of the trust, it is a fact that as at December 31, 2008, just before the CCAA proceedings, Nortel owed the Trust contributions of $37 million. There was a Due of $37 million.

5. The CCAA Proceedings

(a) The Monitor's 39th Report and the CCAA Releases

[40] On January 14, 2009, Nortel and its subsidiaries sought and were granted protection from their creditors under the CCAA. The CCAA Proceedings are ongoing. Pursuant to the Initial CCAA Order, Ernst & Young Inc. was appointed as the Monitor in the CCAA proceedings.

[41] Under the initial CCAA Order, Nortel continued to provide health and welfare benefits to its active employees, pensioners, and LTD employees. However, given Nortel's insolvency, it advised its employees that payment of benefits would cease after March 31, 2010.

[42] As might be expected all sorts of claims were made by creditors and stakeholders in the CCAA proceedings, and subject to court approval, by agreement dated February 8, 2010, various CCAA stakeholders, including representatives of the active, former, and LTD employees of Nortel, entered into a Settlement Agreement. There, however, was a dissenting group of LTD beneficiaries, including Ms. Holley, who opposed the proposed settlement or their claims.

[43] Under the Settlement Agreement, certain health and welfare benefits would continue to be paid past March 2010 until December 31, 2010. Under the proposed Settlement Agreement, Royal Trust and Northern Trust were released from claims regarding the Trust and the parties agreed to work towards developing a court-approved distribution of the corpus of the Trust in 2010.

[44] The Monitor provided information to the court about the proposed settlement. On February 18, 2010, the Monitor released its 39th Report in the CCAA Proceedings. The expressed purpose of the report was to provide the court with information about the settlement including an analysis of the impact of the settlement on the stakeholders.

[45] The 39th Report attached the Trust Agreements. The Report attached the unaudited financial statements for the Trust for the period ending December 31, 2008. The Monitor's report indicated that net assets of the Trust available for benefit payments at December 31, 2008 were approximately $123 million of which approximately $37 million was an unsecured promise from Nortel, which, as noted above, the parties call "the Due."

[46] In its 39th Report, the Monitor stated that in order to understand the Settlement Agreement, it was necessary to have basic information about the benefits and the role of the Trust. The Monitor noted that: "The HWT has been operated such that certain employee benefits have been paid by the HWT with trust assets, whereas other employee benefits have been funded by the Applicants on a pay-as-you-go basis, but paid through the HWT as an administrative matter."

[47] The Monitor noted that: "Based on the Monitor's review to date, the HWT has never had sufficient assets in the trust to pay the present value of all the benefits for all the plans that are designated under it nor was it legally required to do so."

[48] In paragraph 49 of the 39th Report, the Monitor noted the "Due". The report stated:

> 49. The net assets of the HWT available for benefit payments at December 31, 2008 were approximately $123 million, of which approximately $37 million was represented by an amount "Due from Sponsoring Company". The Monitor has been advised by the Applicants that this balance represents amounts due by the Applicants primarily related to benefit payments made to beneficiaries of the HWT prior to the Filing Date.

[49] The 39th Report described the releases that were part of the Settlement Agreement, and the Report expressed the Monitor's opinion that the releases were an important step in "resolving issues related to claims and potential claims against [Nortel], which will assist in the development of a [Restructuring] Plan." At paragraphs 101 to 103 of the Report, the Monitor described the importance of the releases under the heading "Avoiding Litigation Costs" as follows:

> *Avoiding Litigation Costs*
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> 101. Provisions of the Settlement Agreement and the Settlement Approval Order result in the release of certain rights and claims primarily concerning pension plan administration, HWT administration and priorities (see paragraphs 94 and 95 above). The Monitor understands that the releases were part of the settlement process necessary in order for the Representatives, on their own behalf and on behalf of those they represent, to achieve certainty of payment of employee benefits and pension benefits, an achievement that Settlement Representative Counsel expressed as important to their constituents in the process leading up to the Settlement.
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> 102. The release of certain claims and rights is an important step in the development of a Plan. The releases assist in claim determination and reduce the risk of litigation against the Applicants and their directors (who benefit from a priority charge pursuant to the Initial Order); thereby reducing the risk that assets would be depleted in order to fund potentially significant litigation costs.
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> 103. The Monitor will not comment on the relative risks or potential success of any claims released as part of the Settlement; however, the Monitor is of the view that the releases represent a

> fair balancing of interests given the certainty achieved regarding employee benefits and the avoidance of potential litigation risks and costs and disruption to the development of a Plan.

[50] I pause here to note that Ms. Holley says that the Monitor's 39th Report did not disclose the facts that support her proposed class action for fraud. In particular, she says that the report did not disclose how the shortfall accrued or that the trustee had over a one-year period in 2005-2006 assisted Nortel to trust funds for unauthorized purposes. However, to foreshadow my conclusion below and as will become readily apparent from reading the affidavits and factums filed in opposition to the recommendations of the 39th Report and comparing them to the allegations in the Amended Statement of Claim, Ms. Holley did know the fundamental allegations that underpin her fraud action; namely, that there was a breach of trust by underfunding the Trust by $37 million and that there was a breach of trust by the trustee using trust assets reserved for the LTD and survivor beneficiaries to pay the pay-as-you-go plan beneficiaries.

[51] On March 26, 2010, Justice Morawetz declined to approve the February Settlement Agreement, but the agreement was amended and restated, and Justice Morawetz approved it on March 31, 2010, with written reasons released on April 8, 2010. See *Nortel Networks Corporation (Re)*, 2010 ONSC 1708.

[52] As mentioned above, at the time of the settlement approval motion, a group of LTD beneficiaries under the Trust opposed the Settlement Approval Order. This group was represented by the law firm of Rochon Genova LLP, who are Ms. Holley's lawyers of record and the proposed Class Counsel for Ms. Holley's proposed class action. In the CCAA proceedings, the objectors delivered affidavits from Diane Urquhart and from Ms. Holley.

[53] Ms. Urquhart, an economist, financial analyst, and mathematician, who was put forward as an expert, took the position that the Settlement Agreement ought not to be approved. In her affidavit she said that the settlement was grossly unfair and prejudicial. She referred to the information obtained from the Monitor's report, and she noted an underlying "breach of trust," and she referred to the negative impact of the Due. She deposed that she was extremely concerned because it appeared that there was a breach of trust and that the Trust had been seriously depleted by as much as $100 million. She noted that there appeared to be a $37 million loan made from the Trust to fund Nortel's pay-as-you-go plans. She said that there was evidence of a breach of trust.

[54] In her affidavit, Ms. Urquhart noted that she had reviewed the 39th Report and she understood it to reveal that there had been a breach of trust. She was concerned that the release would take away her rights of legal action as against the Releasees. Under the heading "The HWT is massively underfunded in breach of Nortel's trust obligations" she stated that the $37 million loan to record amounts owed to the Trust was likely cash taken out of the Trust to pay for the Pay-As-You-Go Employee Benefit Plans for which Nortel did make an annual contribution to fund annual claims. She said that this loan was effectively made from the assets belonging to the LTD beneficiaries and survivors of deceased Nortel employees. She stated that it was evident that there was a massive shortfall in the Trust of an amount likely in excess of $100 million and that the shortfall was only recently disclosed to the LTD beneficiaries. She said that Nortel's contributions in 2007 and 2008 were grossly inadequate at a time when the Trust was seriously underfunded. Her belief was that Nortel breached its obligations to make contributions from time

to time for the purpose of the Health and Welfare Plan, as determined by the Trustee on a sound actuarial basis.

[55] The Dissenting LTD Beneficiaries filed a factum opposing the Settlement Agreement. The factum alleges a breach of trust by one or more trustees with respect to the shortfall in the Trust, referred to the Due, and noted the withdrawal of reserve assets to fund benefits under the pay-as-you-go plans. The factum stated at paragraphs 58-60 as follows:

> 58. Although counsel have not had the opportunity to fully analyze the HWT Claims being released, the disclosure to date evidences a clear breach of the HWT trust agreement which required Nortel to make: "Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund as a result of the administration of the Health and Welfare Plan, and as may otherwise be required from time to time for the purpose of the Health and Welfare Plan, and determined by the Trustee on a sound actuarial basis."
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> 59. This breach occurred under one or more of the trustee(s)' watch. Even where the trustee's stated role is more of a custodian, courts have still recognized the fiduciary obligations owed by the trustee to the beneficiaries of the trust. As stated by the British Columbia Court of Appeal in *Froesse v. Montreal Trust Co. of Canada* [1999] B.C.J. No. 1091 at para. 39 (B.C.C.A.) "there is what academics call an "overarching" obligation upon a custodial or administrative trustee to pay attention to the interest of the beneficiaries additional to its contractual duties provided in the trust indenture."
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> 60. In *Froesse*, *supra*, the Court held that "within the scope of its duties as administrator ... the defendant breached its duty of care to the beneficiaries when it failed to respond to the discontinuance of Company contributions. ....

[56] Pausing here, it is worth noting for a variety of reasons that in paragraph 59 of this factum presented to oppose the CCAA release, Ms. Holley states that a breach of trust occurred while Royal Trust and Northern Trust were administering the Trust and that they breached their duties as defined by the British Columbia Court of Appeal in *Froesse v. Montreal Trust Co. of Canada,* [1999] B.C.J. No. 1091. Paragraph 59 of the factum for the CCAA proceedings is replicated as paragraph 58 in Ms. Holley's factum for these motions now before the court. In her current factum, she adds in the next paragraph a quote from *Froesse* at para. 26 that: "it is difficult to imagine a more significant indication of trouble than the virtual termination of contributions from the principal contributor to the plan."

[57] One reason why all this is notable, is that it belies Ms. Holley's argument that all the information released until August 2010 when the Monitor's 51st Report was released focused on Nortel's behaviour. A second reason that paragraph 59 of the CCAA factum is notable is that it indicates that as of the 39th Report, Ms. Holley was aware of alleged misconduct by Royal Trust and Northern Trust.

[58] Returning to the narrative of the CCAA proceedings, in his reasons for decision at paras. 45-47, Justice Morawetz summarized the objections to the Settlement Agreement, including the breach of trust allegations, of the dissenting group, as follows:

> 45. The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD employees are giving up legal rights in relation to a $100 million shortfall of benefits...

> 46. The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT [the Due] that they should be able to pursue.
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> 47. Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, [visualize to avoid Nortel being sued by the trustee for an indemnity] rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue. [...]

[59] In his decision approving the Settlement Approval Order, after referring to the LTD group's argument that the Court should not release the trustee for breaches of trust including responsibility for the $37 million shortfall in contributions, Justice Morawetz stated at paras. 80-82:

> 80. In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.
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> 81. The releases benefit creditors generally as they reduce the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.
>
> 82. Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

[60] Notwithstanding the objections, Justice Morawetz authorized a CCAA release. The Settlement Approval Order released Royal Trust and Northern Trust from all claims regarding the Trust except with respect to claims of fraud. The Order stated:

> THIS COURT ORDERS AND DECLARES that the Releasees, the trustee [Northern Trust] and the custodian of the Pension Plans ... are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to... (ii) the HWT, including without limitation the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in the subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

[61] It should be noted that the Settlement Agreement provided for a release in favour of various third-party releasees, which would include Royal Trust and Northern Trust. The Releasees are released from all claims relating to the Trust including without limitation, the administration of the Trust, funding of the Trust, and any obligation to contribute to the Trust, except claims with respect to fraud on the part of a Releasee.

[62] The Settlement Agreement also provides for a "claim-over release," which prohibits former and current Nortel employees and Trust beneficiaries from bringing any claim against

any third-party, if that third-party may reasonably be expected to have a claim against a Releasee.

[63] The objectors sought leave to appeal Justice Morawetz's approval of the Settlement Agreement. In a factum filed on May 18, 2010 in the Court of Appeal, they argued at paras. 29, 54, and 59 as follows:

> 29. The Objecting LTD Beneficiaries again emphasized that the Amended Settlement Agreement was patently unfair because the benefits it provided were far outweighed by the confiscation of their legal rights regarding the over $100 million breach of trust and ensuing shortfall in the HWT. [...]
>
> 54. It is equally offensive to public policy for solvent third parties such as the HWT trustee to escape liability for breaches of fiduciary duties without providing any "tangible and realistic" consideration to the releasing parties. In this regard, the limited disclosure to date evidences a clear breach of the HWT trust agreement which required Nortel to make 'Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund [...]
>
> 59. Beyond the third party releases, the LTD Beneficiaries' potential claims for priority are also meritorious. Here, given the nature of the alleged breaches of trust, the LTD Beneficiaries have, at a minimum, a very tenable basis for asserting priority in respect of the $37 million removed from the HWT.

[64] The Court of Appeal refused leave to appeal on June 3, 2010.

(b) The Monitor's 51st Report

[65] On August 27, 2010, the Monitor released its 51st Report. The purpose of this Report was to seek approval of a methodology for the termination of the Trust and for the allocation of the corpus of the Trust. The distribution was problematic because the Trust Agreement did not provide guidance and competing claimants had different interpretations and positions as to how the Trust's remaining assets should be distributed. With greater particularly about the various funds within the Trust, the Monitor's 51st Report described the history and operation of the Trust, in the same way that it had been described in the 39th Report.

[66] For the purposes of the motions now before the Court, it is particularly important to note what the Monitor had to say about the Trust's Financial Statements from 1982 to 2009, copies of which were attached as appendices to the Report. The Monitor attached a summary and a chart to assist in the review of the financial statements. The summary and the charts were described in paragraph 77 of the Report as follows:

> 77. To assist in a review of the financial statements:
>
> (a) A summary including certain notes that have evolved over the years from the years in which the notes first appeared is attached as Appendix "QQ"; and
>
> (b) A chart summarizing amounts from the financial statements called accounts receivable or "due from sponsoring corporations or company" is attached as Appendix "RR". As indicated therein, almost from the inception of the HWT, there have been amounts receivable from the sponsoring companies. As set out in the Thirty-Ninth Report, the Monitor has been advised by the Applicants that these amounts are primarily related to benefit payments made to beneficiaries of the HWT prior to the filing date. The Monitor

has found nothing to indicate that these amounts represent anything other than accumulated contributions owing.

[67] Appendix RR was a chart setting out the "Due" from the inception of the Trust. Ms. Holley states that knowing the information contained in this chart, most particularly, a footnote with respect to the Due for 2006 was necessary before her fraud claim could be discovered. For present purposes, the following excerpt will suffice:

APPENDIX "RR"

Health & Welfare Trust Fund

Debt Due from Sponsoring Company(ies) as shown on the HWT financial statements

Year	Amount $
1981	3,615,003
1982	2,488,577
1983	3,530,315
1984	7,575,941
1985	15,390,909

....

2000	29,697,000
2001	29,825,000
2002	27,759,000
2003	19,991,000
2004	20,290,00
2005	31,121,000
2006	42,518,000[1]
2007	40,643,000
2008	37,064,000
2009	1,358,000

1. As reported in the notes to the 2009 HWT financial statements, in 2005 Nortel undertook a valuation of the fund to determine the funded status of the plans. Nortel suspended contributions to the HWT for a 12 month period over 2005 and 2006, resulting in an increase in the Due from the Sponsoring Company amount.

[68] Once again, Ms. Holley with the aid of Ms. Urquhart represented a dissenting group that opposed the methodology for distributing the Trust's corpus. Ms. Urquhart again delivered an

affidavit setting out the alleged misappropriation of the Trust's assets. The objectors made written submissions to Justice Morawetz. In opposing the allocation methodology, the objectors noted the breaches of trust and the mishandling of the Trust's assets.

[69] Since, as noted above, Ms. Holley submits that she did not discover that there was an action in fraud against Royal Trust and Northern Trust until the delivery of the Monitor's 51st Report, it is necessary to examine what Ms. Urquhart said in her affidavit for the objectors.

[70] In her affidavit, under the heading "New Evidence Confirms $32 Million Withdrawal of Assets from HWT for 'Pay as You Go Items'," Ms. Urquhart stated that she had analyzed the contributions of Nortel by cash and by the Due and that she had identified a one-year moratorium in Nortel contributions between 2005 and 2006. She said the information in the Monitor's 51st Report confirmed that in 2005, $21 million, and in 2006, $11 million, was wrongly taken out of the Trust's assets and used to pay pay-as-you-go medical claims and life insurance premiums that Nortel was required to fund from its operations. She said this $32 million was removed when the Trust was under-funded for the incurred claims of the LTD and Survivors income beneficiaries.

[71] Referring to her March 2010 affidavit filed to oppose the Settlement Agreement, Ms. Urquhart said that new information in the 51st Report confirmed that the loan recorded as "Due from Sponsoring Company" in the Trust's financial statements meant that Nortel recognized it had an obligation to make contributions for the incurred claims of the LTD and Survivors income beneficiaries. She said the loan had existed for many years and had grown larger since 2005. It was her opinion that Nortel's ability to repay this loan was impaired by 2005 and that the reserve portion of the Trust was in a deficit position thereafter so that payments for pay-as-you-go insurance premiums of $17 million should not have been made from reserve assets.

[72] In November 2010, notwithstanding the objections of the objectors, by order dated November 9, 2010, Justice Morawetz approved an allocation methodology for the corpus of the Trust. See *Nortel Networks Corporation (Re)*, 2010 ONSC 5584, leave to appeal to Ontario Court of Appeal refused, 2011 ONCA 10, leave to appeal to SCC refused [2011] SCCA No. 124.

6. The Proposed Class Action

[73] On August 27, 2012, precisely on the second anniversary of the Monitor's 51st Report, Ms. Holley commenced this action by notice of action. The definition of the Class Members claimants is set out earlier in these Reasons for Decision.

[74] On September 26, 2013, there was a case conference at which the Defendants advised Ms. Holley that her Statement of Claim was defective.

[75] On October 29, 2013, Ms. Holley delivered an Amended Statement of Claim. She advances claims for fraudulent breach of trust, constructive fraud, and fraud. Given that she knew that a pleadings attack was inevitable, it is safe to assume that Ms. Holley held nothing back in pleading her case of fraud.

[76] Ms. Holley pleads that Royal Trust and Northern Trust knowingly and intentionally breached their trust and fiduciary duties because they knew that the trust fund was significantly underfunded. She submits that in concert with the soon to be insolvent Nortel they facilitated the breaches of trust and concealed the truth from the CCAA Monitor.

[77] She says Royal Trust and Northern Trust schemed with Nortel to unlawfully use trust funds for unauthorized purposes to protect Nortel's business interests. She alleges that the Defendants assisted Nortel to withdraw $32 million from the Trust between May 2005 and September 2006 without any actuarial basis or justification for the withdrawal of trust funds and any belief that the funds could be repaid and rather knowing that there was a high risk that the funds would not be paid. She says that Royal Trust and Northern Trust allowed Nortel to post an IOU (the Due) instead of actually making the necessary contributions to the Trust. She says that breached their duties by failing to collect on the Due before Nortel became insolvent.

[78] Ms. Holley pleads that the $32 million withdrawn was money for the Reserved Plans but was unlawfully used by Nortel to pay for benefits in the Paid as Incurred Plans, including active, LTD and pensioner medical and dental benefits, and active and LTD life insurance premiums that Nortel was obligated to pay directly from its own operations and funds. She submits that Nortel had no right to withdraw funds from the Trust to pay for benefits in the Pay as Incurred Plan.

[79] Ms. Holley submits that Royal Trust and Northern Trust knew, or were reckless and wilfully blind to the fact that the beneficiaries of the Trust would be at risk if the Trust was not funded on a sound actuarial basis. Ms. Holley pleads that Royal Trust and Northern Trust took unconscionable risks that would prejudice the rights of the beneficiaries, without having any right to take those risks by allowing trust funds to be removed from the Trust and not informing the beneficiaries. She pleads that the Defendants knew or ought to have known that their conduct would prejudice the beneficiaries who would not receive the benefits to which they were entitled.

[80] Ms. Holley pleads that the acceptance of the unsecured Due (the IOU) as Nortel's contribution to the Trust was a breach of fiduciary duty. She says the Due was effectively a varying loan from the Trust in favour of Nortel. She pleads that Royal Trust and Northern Trust granted increases to the Due despite their knowledge that Nortel's financial distress created a significant risk for the beneficiaries of the Trust who would not receive the benefits to which they were entitled.

[81] Ms. Holley pleads that Royal Trust and Northern Trust concealed their breaches of trust from the beneficiaries and the Monitor during Nortel's CCAA proceedings and secured the benefit of a third party release contained in a Settlement Agreement addressing employee-related claims.

[82] On November 22, 2013, Royal Trust filed a Statement of Defence. Royal Trust denies all allegations of wrongdoing.

[83] On November 25, 2013, Northern Trust filed a Statement of Defence. Royal Trust denies all allegations of wrongdoing.

[84] Both Royal Trust and Northern Trust deny any misconduct amounting to fraud and they rely on the CCAA release as barring Ms. Holley's action.

[85] The Defendants both plead that Ms. Holley's action is statute-barred under the *Limitations Act, 2002*. Northern Trust's pleading is illustrative. It states in paragraphs 20, 21, and 29, and 30 as follows:

> 20. Contrary to the allegations in paragraph 40 of the Amended Statement of Claim considerable information regarding the funding and operation of the HWT was disclosed in the CCAA

> Proceedings prior to the Settlement Approval Order being granted information contained in the 39th Report, including the 21st.
>
> 21. On the motion before Morawetz J. to approve the Settlement Agreement, the plaintiff made submissions to the Court in the CCAA Proceedings objecting to the Settlement Approval Order, and in particular to the Release in favour of Northern Trust contained therein. The plaintiff relied on substantially the same allegations contained in the Amended Statement of Claim, including but not limited to the existence of the Due, the use of HWT assets to fund "paid as incurred plan" benefits (which was permissible under the Trust Agreement), and the alleged non-disclosure of financial information regarding the HWT, to oppose the granting of the Release. The plaintiff's objections were not accepted by the Court, which ultimately granted the Settlement Approval Order.
>
> *Plaintiff's Claim is Statute-Barred*
>
> 29.. The plaintiff's claim is statute-barred, as the matters complained of in the Amended Statement of Claim were known to the plaintiff at the latest when the 39th Report was released on 29. February 18, 2010. Northern Trust pleads and relies on the provisions of the *Limitations Act*, S.O. 2002, c. 24, sch. B, as amended.
>
> 30. As to paragraph 46 of the Amended Statement of Claim, Northern Trust admits that the 51st Report of the Monitor in the CCAA Proceedings was delivered on or about August 27, 2010, but repeats that financial status of the HWT, including the existence and amount of the Due, the value of the HWT assets, and the estimated actuarial liabilities for the so-called "reserved plans," were all disclosed in the 39th Report.

C. DISCUSSION AND ANALYSIS

1. Introduction

[86] Three different attacks are made against Ms. Holley's proposed class action.

[87] The Defendants' first attack is the two-pronged attack that because of the release granted in the CCAA proceedings Ms. Holley can sue only for fraud and she has failed to do so for two mutually exclusive reasons. For the first prong, the Defendants argue that it is plain and obvious that there was no wrongdoing. For the second prong, they argue that if there was wrongdoing, it is plain and obvious that the wrongdoing does not equate to fraud and is rather the wrongdoing that was released by the release in the CCAA proceedings. As I will explain below, the Defendants' first argument fails at this juncture of the proceedings but their second argument succeeds.

[88] The Defendants' second attack is that in any event Ms. Holley's claim is statute-barred. As I will explain below, I agree that the action is statute-barred.

[89] The third attack is made just by Royal Trust. It argues that Ms. Holley's action is an abuse of process. As I will explain below, I disagree with this argument.

[90] Thus, as explained more fully below, because it is plain and obvious that Ms. Holley has no fraud claim to plead and also because her claim is statute-barred, I dismiss her action.

2. The Test on a Rule 21 Motion

[91] The Defendants' motions are brought pursuant to Rule 21.01, which states:

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that, ...

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

[92] Insofar as the motions were brought pursuant to rule 21.01 (1)(a), I grant leave to admit evidence. Ms. Holley did not consent to leave being granted, but she did not oppose the granting of leave.

[93] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[94] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17-25, the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[95] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof: *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.).

[96] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.

[97] Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[98] Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

[99] A motion under rule 21.01(1)(a) for a determination before trial of a question of law may permit the court to strike out an action when it has been brought beyond a limitation period; *Beardsley v. Ontario*, [2000] O.J. No. 4057 (S.C.J.) at para. 11; aff'd [2001] O.J. No. 4574 (C.A.) at paras. 21 and 24. Under rule 21.01(1)(a), the court may consider whether the determination of the applicable limitation period is a question of law that would dispose of all or part of the action, if the material facts upon which such a determination depends are not in dispute: *Gowling Lafleur Henderson v. Springer*, 2013 ONSC 923 at para. 19; *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 (S.C.J.); *Whittaker v. Great-West Life Assurance Company*, [2008] O.J. No. 1194 (S.C.J.) at paras. 32-37 (S.C.J.).

[100] In the case at bar, I granted leave for evidence to be admitted, and the facts upon which I shall decide the limitation issue are indisputable or assume that the facts set out in the Amended Statement of Claim are taken as proven.

3. Was There Wrongdoing by Royal Trust and Northern Trust?

[101] Royal Trust and Northern Trust have decent arguments that they did nothing wrong in how they administered the Trust. They rely on Justice Morawetz's finding there was a single trust, and they say that if the reserve funds were depleted, they were depleted to make payments to the beneficiaries of the one trust. They point out that under the Trust Agreement there is no express obligation on the trustee to compel contributions from Nortel and there is the undisputable fact that the approach of accepting a "Due" from Nortel as a form of making contributions seems to have been an operative and transparent fact from the outset of the Trust. They point out that there was nothing hidden about how benefits were paid throughout the history of the Trust.

[102] In my opinion, although Royal Trust's and Northern Trust's arguments are decent arguments, the arguments are not so strong as to make it plain and obvious that Ms. Holley's claim is untenable and that she has no reasonable prospect of success.

[103] I do not see Justice Morawetz's finding of a single trust precluding Ms. Holley's possible success. As I suggested during oral argument, a last will and testament is often also a single trust and depending on the terms of the will, it might be wrong to use one beneficiary's trust fund assets to pay the legacies of another beneficiary under the same will. It is not plain and obvious that a similar type of wrongdoing did not occur in the case at bar.

[104] I do not see the circumstance that the trustees accepted a "Due" from Nortel as a form of making contributions from 1980 until the end of the Trust makes Ms. Holley's allegation of

wrongdoing untenable. Although a trial judge may agree with the trustees that there never was a breach, it is not plain and obvious that a trial judge could not conclude that the approach of the trustees was wrong. It is also not plain and obvious that a trial judge would not conclude that taking a Due or permitting a contribution holiday was only acceptable provided that the reserves of the Trust were actuarially sound to deliver the benefits for the designated beneficiaries.

[105] If a trial judge were to come to the conclusion that some Dues were unlawful, then it seems to me that it is not plain and obvious that the trustees taking a Due from Nortel, when it was attempting to put on some financial makeup to cover its business's blemishes, would not be wrongdoing.

[106] I appreciate that Northern Trust has the additional protection of the letter agreement dated December 1, 2005, but recalling that the plain and obvious standard sets a pole-vault high bar to jump over, it is not plain and obvious to me that this letter exculpates Northern Trust for what it did or what it allowed Nortel to do.

[107] Therefore, I conclude that it remains to be determined if Royal Trust's and Northern Trust's acts and omissions were compliant or non-compliant, authorized or unauthorized, under the Trust Agreement.

4. Fraud and Constructive Fraud and the Scope of the Release

(a) The Nature of Fraud and Constructive Fraud

[108] The second prong of Royal Trust's and Northern Trust's argument about their conduct not exposing them to liability is that assuming there was wrongdoing in the administration of the Trust, the wrongdoing did not amount to fraud and, therefore, the wrongdoing was released by the release ordered by Justice Morawetz in the CCAA proceedings.

[109] In order to evaluate the merits of the Defendants' argument that there was no constructive fraud or common law fraud, which I will consider in the next section of these Reasons, it is necessary to consider first the law about the nature of fraud and of constructive fraud.

[110] It is also necessary to consider the nature of fraud because Ms. Holley argued that the CCAA release did not release constructive fraud and conversely the Defendants argued that the exemption in the release for fraud was only for common law fraud.

[111] As a matter of the common law, fraud is associated with the tort of deceit, which is also called the tort of fraudulent misrepresentation.

[112] The constituent elements of a common law fraud, deceit, or fraudulent misrepresentation claim, as they are variously called, are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages: *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at p. 344; *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Hryniak v. Mauldin*, 2014 SCC 7 at para. 87; *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1990), 78 Alta. L.R. (2d) 62 (Q.B.), aff'd (1992), 3 Alta. L.R. (3d) 124 (C.A.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

[113] At the fundamental core of fraud, deceit, or fraudulent misrepresentation is the moral turpitude or the defendant. As Professor Emeritus G.H.L. Fridman states in *The Law of Torts in Canada* (3rd ed.) (Toronto: Carswell, 2010) at p. 707: "Liability for fraud or deceit is based upon the idea that to lie or to deceive are morally wrong acts which merit legal sanction when they result in suffered by the victim."

[114] While the notion of fraud may elude precise definition, it necessary involves some aspect of impropriety, deceit, or dishonesty: *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2001] O.J. No. 2344 at para. 8 (C.A.); *Cineplex Odeon Corp. v. 100 Bloor West Partner Inc.*, [1993] O.J. No. 112 at para. 30 (Gen. Div.).

[115] In *Washburn v. Wright* (1913), 31 O.L.R. 138 (App. Div.), Justice Riddell said, at p. 147:

> Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is ... done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" *Ex p. Watson* (1888), 21 Q.B.D. 301, per Wills, J., at p. 309.

[116] The moral turpitude of fraud, deceit, or fraudulent misrepresentation are found in the constituent elements that: (1) the defendant knows that his or her statement is false or the defendant is indifferent to the statements truth or falsity; and (2) the defendant having an intent to deceive the plaintiff. The common law punishes the immorality of lying for an evil purpose with an award of damages. In the contractual setting, equity also provided the remedy of rescission for fraudulent misrepresentation with the same constituent elements, save that it is not necessary for the plaintiff to show damages in order to obtain rescission.

[117] That the moral turpitude elements of fraud are fundamental to liability was very recently demonstrated by the Supreme Court of Canada's judgment in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, which was the companion case to *Hryniak v. Mauldin*, *supra*, now the leading judgment about the test for a summary judgment.

[118] In *Hryniak v. Mauldin*, the Supreme Court upheld a summary judgment for fraud, and in *Bruno Appliance and Furniture Inc. v. Hryniak*, the Supreme Court upheld the dismissal of a summary judgment for fraud precisely because there was a genuine issue for trial about the moral turpitude elements of fraud, which were confirmed by Justice Karakatsanis for the Court. At paragraphs 18 to 21 of her judgment, she stated:

> 18. The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:
>
> > First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false... . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
>
> 19. This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 319-20, that tort law

> requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".
>
> 20. Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330 "fraud without damage gives ... no cause of action" (p. 340).
>
> 21. From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss..

[119] Constructive fraud is not a common law tort, but a doctrine of equity in its supervision of trustees, trustees *de son tort*, fiduciaries, and contracting parties, but constructive fraud also involves an element of immorality. However, the moral turpitude of constructive fraud is of a different sort than the lying with an intent to deceive which is the insignia of common law fraud. Thus, in *Guerin v. R.*, [1984] 2 S.C.R. 335 at p. 389, Justice Dickson focused on unconscionability and adopted the definition of equitable fraud from the English case of *Kitchen v. Royal Air Force Association*, [1958] 2 All E.R. 241 at p. 249 as: "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

[120] In *Nocton v. Lord Ashburton*, [1914] A.C. 932 at p. 953, the famous case about a lawyer's breach of fiduciary duty, Lord Haldane stated that in equity, constructive fraud means "not moral fraud in the ordinary sense, but a breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

[121] Justice Blair recently discussed the utility of equitable or constructive fraud to supervise a variety of relationships in *Outaouais Synergest Inc. v. Keenan*, 2013 ONCA 526 at para. 93, where he stated:

> 93. Although not necessarily an exclusive list, there appear to be certain recognized circumstances where the concept of equitable fraud is engaged. First, conduct amounting to equitable fraud or fraudulent concealment may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 356 (*per* Wilson J.) and at p. 390 (*per* Estey J.); *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278, 81 B.C.L.R. (4th) 199, leave to appeal refused, [2008] S.C.C.A. No. 416. Secondly, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake: see *Sylvan Lake*, at paras. 38-39. Finally, equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 571.

[122] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club*, 2002 SCC 19, Justice Binnie for the majority of the Supreme Court of Canada considered whether equitable fraud could provide the basis for a claim for rectification, and at para. 39 of his judgment, Justice Binnie described the nature of equitable or constructive fraud as follows:

> 39. What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (BCSC), McLachlin C.J.S.C. (as she then was) observed that "in this context fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable

> fraud or constructive fraud ... Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": [citations omitted].

[123] As appears from this passage in Justice Binnie's judgment, equitable fraud refers to conduct falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained by his or her conduct. The idea of unconscientiousness connotes the idea of conduct not guided by principles of what is the right thing to do but falling short of the evil or wickedness of deceitful conduct. Justice Binnie described constructive fraud as wider than strict fraud and including all kinds of unfair dealing and unconscionable conduct.

[124] Returning to *Guerin v. R.*, *supra*, where Justice Dickson referred to constructive fraud as unconscionable conduct, in this case, there was no trust relationship between the Federal Government and the Musqueam Indian Band, but the Federal Government was found liable for breach of fiduciary duty. The Band had surrendered lands from its reserve, and the Crown entered into a lease of the lands to a golf club. The breach of fiduciary duty was that the government agreed to terms of the lease that were contrary to the terms approved by the Band at the surrender meeting.

[125] For present purposes the important point to note is that the judges of the Supreme Court agreed that the trial judge had been correct in dismissing the alternative claim in deceit because there was no finding or dishonesty or moral turpitude. Justice Wilson (Justices Ritchie and McIntyre concurring) stated at paras. 39-40:

> 39. The appellants base their claim against the Crown in deceit as well as in trust. They were unsuccessful on this aspect of their claim at trial but have raised it again on appeal to this Court. While the learned trial judge found that the conduct of the Indian Affairs personnel amounted to equitable fraud, it was not such as to give rise to an action for deceit at common law. He found no dishonesty or moral turpitude on the part of Mr. Anfield, Mr. Arneil and the others. Their failure to go back to the Band and indicate that the terms it had approved were unobtainable, their entry into the lease on less favourable terms and their failure to report to the Band what those terms were all flowed, he found, from their paternalistic attitude to the Band rather than from any intent to deceive them or cause them harm.
>
> 40. Nevertheless, there was a concealment amounting to equitable fraud. It was "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (*Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, per Lord Evershed M.R., at p. 573). The effect of the finding of equitable fraud was to disentitle the Crown to relief for breach of trust under s. 98 of the *Trustee Act*, R.S.B.C. 1960, c. 390, now R.S.B.C. 1979, c. 414. A trustee cannot be exonerated from liability for breach of trust under that section unless he has acted "honestly and reasonably".

[126] It was in the context of the Supreme Court's conclusion that equitable fraud was sufficient to prevent the running of a limitation period that Justice Dickson (Justices Beetz, Chouinard, and Lamer concurring) made the comment noted above alluding to equitable fraud as defined by Lord Evershed *Kitchen v. Royal Air Force*. The complete text of his comment at para. 115 of his judgment about the distinction between fraud and equitable fraud is as follows:

> 115. It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or

> until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. The limitations period did not therefore start to run until March 1970. The action was thus timely when filed on December 22, 1975.

[127] That equitable or constructive fraud does not necessarily connote dishonesty and is therefore less odious than common law fraud is a point that also emerges from Justice Sharpe's judgment in *Edwards v. Law Society of Upper Canada* (1998), 39 O.R. (3d) 10 (S.C.J.), revd. (2000), 48 O.R. (3d) 321 (C.A.), leave to appeal to the S.C.C. refused, [2000] S.C.C.A. No. 533.

[128] In this case, Edwards sued the executors of the estate of a deceased lawyer who was alleged to have committed fraud. Justice Sharpe dismissed the action based on the executor's plea of *plene administravit*. This decision was reversed by the Court of Appeal. However, the Court of Appeal agreed with Justice Sharpe's conclusion that that claim against the executors was not statute-barred by the two-year limitation period under the *Trustee Act* because under the former *Limitations Act,* R.S.O. 1990, common law actions for fraud were exempted from all limitation periods, including the one found in the *Trustee Act*. For present purposes, the point to note is that Justice Sharpe drew a distinction between common law civil fraud for which there was no limitation period and equitable fraud for which there was a limitation period under the *Trustee Act* and he explained the reason for the distinction at paragraphs 28-32 of his judgment.

[129] Justice Sharpe explained that the limitation period in the *Trustee Act* was designed to apply only to "innocent breaches of trust" and not applying to "fraudulent acts." He pointed to English cases that drew a distinction between "constructive or equitable fraud" and "actual fraud." As a matter of statutory interpretation, he concluded that the former *Limitations Act* exempted only common law fraud from the running of limitation periods but the statutory language did not apply to cover acts which are not dishonest. These claims could be statute-barred. At paragraph 32 of his judgment, Justice Sharpe stated:

> 32. .... The suggestion that an innocent breach of trust gains the protection accorded by s. 44 from otherwise applicable limitation provisions cannot, in my opinion, be reconciled with the language of s. 44 which only applies to "fraud or fraudulent breach of trust." That statutory language is simply not apt to cover acts which are not dishonest. Giving full allowance for the concept of constructive or equitable fraud, it is difficult to see how an innocent breach of trust could be included within the phrase "fraudulent breach of trust." ....

[130] To summarize, at its core, common law fraud involves dishonest and moral turpitude. The fraud elements of common law fraud are that the defendant has an intent to deceive and makes a false statement that he or she knows is false or the defendant makes a false statement that he or she is indifferent to its truth value. Constructive fraud does not necessarily involve dishonesty or moral fraud in the ordinary sense, but a breach of sort that would be enforced by a court of conscience.

(b) The Scope of the CCAA Release

[131] Justice Sharpe's interpretative reasoning commends itself to me in interpreting the scope of the release ordered in the CCAA proceedings in the immediate case. Given the factual circumstances of those proceedings and the arguments that the parties made in supporting or opposing the release, I would interpret the CCAA release as discharging liability for all forms of misconduct including equitable or constructive fraud and the exemption part of the release as excluding only common law fraud from the discharge of liability.

[132] Justice Morawetz was aware that Ms. Holley was objecting to the conduct of the Trustees and at paragraph 81 of his Reasons for Decision, set out above, he said that the CCAA release benefitted creditors generally because, amongst other things, it reduced the risk that Nortel would be sued by the trustees for contribution and indemnity if they were sued. The release he ordered covered the administration of the trust and the investment of the Trust's assets; i.e. it covered the activities of Royal Trust and Northern Trust. If Ms. Holley's interpretation of the release as not covering constructive fraud were correct, then the release would become sterile. In my opinion, Justice Morawetz intended the release to have the utility of barring constructive fraud and other breaches of trust or fiduciary duty by the trustees.

[133] Contrary to what I was told during the argument of these motions, Justice Morawetz could have also released Ms. Holley's claims for fraud against the trustees. Justice Morawetz, a scholar in bankruptcy and insolvency law, would have been aware of the Court of Appeal's 2008 decision in *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, where at para. 111, the Court held that the parties to a CCAA proceeding are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. Justice Morawetz recently invoked this authority in *Labourers' Pension Fund of Central and Eastern Canada (Trustees) v. Sino-Forest Corp.*, 2013 ONSC 1078.

[134] In the *Metcalfe & Mansfield* case, Justice Blair stated at para. 111:

> 111. The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotini's Restaurant Corp. v. White Spot Ltd.*, [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[135] The *Metcalfe & Mansfield* case at para. 115 is also authority that a CCAA release can release claims against third parties including claims for fraud, tort, breach of fiduciary duty, etc.

[136] For present purposes, the point to keep in mind is that Justice Morawetz had argument before him that the conduct of the trustees in their administration of the trust was being impugned as an egregious breach of trust; i.e., the trustees were being impeached for a constructive fraud, and yet while carving out fraud, Justice Morawetz approved a release that covers misconduct with respect to contributions to the Trust and with respect to the administration of the Trust. It appears that he was surgical in approving a release that encompassed constructive fraud (fraud in equity) but that did not cover common law civil law fraud.

[137] This interpretation that the CCAA release in the case at bar encompasses constructive fraud but not common law fraud is supported by the express language of the release, set out above. The discharge of liability part of the release expressly includes equitable claims; visualize:

> ... are hereby released, discharged ... from all ... claims ... whether arising by contract, agreement ... under statute, civil law, common law, or in equity ... related to... the HWT , including without limitation the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, ...

The exemption from the release does not refer to equity and refers only to fraud; visualize:

> ... provided that nothing herein shall release a director of Nortel from any matter referred to in the subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

[138] I conclude that the release bars constructive fraud claims but the common law torts of fraud, deceit, or fraudulent misrepresentation are not barred. It appears from the circumstances that Justice Morawetz intended that the CCAA release be as encompassing as possible while excluding civil law fraud.

[139] I will return to this conclusion below, but for the purposes of this Rule 21 motion, its significance is that if I am correct, then it is plain and obvious as a matter of interpretation of the release that Ms. Holley's constructive fraud or equitable fraud causes of action are barred by the release. If I am wrong, then the questions become: (a) whether or not Ms. Holley has pleaded a tenable cause of action of constructive fraud, with its taint of unconscionability or unconscientiousness; or (b) whether or not Ms. Holley has pleaded a tenable cause of action for common law fraud with its taint of dishonesty.

5. Does Ms. Holley Have a Cause of Action for Constructive Fraud?

[140] Assuming that constructive fraud is not released by the CCAA and assuming that the claim for constructive fraud is not statute-barred under the *Limitations Act, 2002*, the next question is whether or not Ms. Holley's Amended Statement of Claim pleads a tenable claim for constructive fraud.

[141] With the above assumptions, if her Amended Statement of Claim adequately pleads constructive fraud with its taint of unconscionability or unconscientiousness, then it would survive the attack being made by the Defendants' Rule 21 motions.

[142] I can be brief in answering this issue. With the above assumptions about the scope of the CCAA release and about the operation of the *Limitations Act*, in my opinion, Ms. Holley has adequately pleaded a claim for constructive fraud. In other words, to use the double-negative legal jargon of a Rule 21 motion, it is not plain and obvious that she has not pled a tenable constructive fraud claim.

[143] The problem for Ms. Holley, however, is that although she has pleaded a tenable constructive fraud claim, the claim is caught by the CCAA release.

6. Does Ms. Holley Have a Cause of Action in Fraud?

[144] Before considering the Defendants' arguments about the *Limitations Act, 2002* and Royal Trust's abuse of process argument, the last cause of action issue to consider is whether Ms. Holley has pleaded a tenable claim of common law fraud against Royal Trust and National Trust.

[145] Having regard to my conclusion that the CCAA release covers constructive fraud, for Ms. Holley's Amended Statement of Claim to survive the Defendants' Rule 21 motion, this issue is crucial.

[146] When one removes the rhetorical salt, pepper, and hot spices of conclusory adjectives of wrongdoing and moral turpitude, Ms. Holley's cause of action for fraud can be distilled to the following constituent elements of material fact:

- Royal Trust and Northern Trust knew that the Trust was underfunded and permitted Nortel or schemed with Nortel to allow it to withdraw $32 million from the Trust so that Nortel could pay its pay-as-you-go obligations rather than paying for them as required from its own assets.
- Royal Trust and Northern Trust knew or were willfully blind to the fact that the withdrawal of funds was unlawful, unjustified, and imperilled the viability of the Trust to pay the benefits under the Trust. They breached their trust and fiduciary duties by accepting the unsecured Due rather than requiring cash from Nortel and the acceptance of the Due imperilled the viability of the Trust to pay the benefits under the Trust.
- Royal Trust and Northern Trust breached their trust and fiduciary duties by not enforcing the unsecured Due and this failure imperilled the viability of the Trust to pay the benefits under the Trust.
- Royal Trust and Northern Trust concealed their breaches of trust from the beneficiaries and the Monitor during Nortel's CCAA proceedings and secured the benefit of a third party release contained in a Settlement Agreement addressing employee-related claims.

[147] In paragraphs 54 of her factum for this motion, Ms. Holley describes her claim for fraudulent breach of trust as follows:

> 54. The facts as pleaded demonstrate that Northern Trust and Royal Trust committed breach of trust in respect to the HWT that has reached the level of fraudulent breach of trust, as defined in numerous common law cases, which is: "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take." Northern Trust and Royal Trust knowingly took risks with the HWT assets, when they had no right to do so. Alternatively, the trustees were reckless or wilfully blind to the risks taken and to the rights of the HWT beneficiaries.

[148] In my opinion, accepting these material facts as true, there is no dishonesty or moral turpitude of the degree necessary to establish common law fraud, and it is plain and obvious that the Amended Statement of Claim does not plead the fraud elements of the common law torts of fraud, deceit, or fraudulent misrepresentation. There may be a breach of contract or a breach of trust, or a constructive fraud, but there is no dishonesty or moral turpitude of the degree necessary to constitute common law fraud, which is a very serious tort precisely because it responds to genuine and not constructive dishonesty and moral turpitude.

[149] If their interpretation of the Trust Agreement is wrong, then it may be that Royal Trust and Northern Trust were negligent, careless, and in breach of their contractual or fiduciary duties under the Trust Agreement, but there was no lying or trickery or intent to deceive in making payments to beneficiaries of the Trust or in accepting the Due from Nortel.

[150] There may be constructive fraud pleaded in the Amended Statement of Claim, but there is no common law fraud because there is no false statement by commission or omission. Rather, the Trustees transparently disclose that Nortel was not making its contributions and that there was a "Due from Plan Sponsor" and it is disclosed that the Trust is using its reserve account to pay not only for the Reserve Plans but also for the pay-as-you-go plans. Ms. Holley cannot plead that she was misled or deceived by any disclosures, non-disclosures, or false statements because she was not misled.

[151] Ms. Holley knew the truth that $37 million was being allocated in a way that she says was contrary to the terms of the Trust Agreement. While the Trust may arguably have been recklessly administered by the Defendants to the extent of their conduct constituting constructive fraud, they made no statements knowing the statements to be untrue and they made no statements with reckless indifference to their truth value. There is no malice or intent to deceive the beneficiaries of the Trust or any trick perpetrated by the trustees on Ms. Holley and the other LTD beneficiaries.

[152] In my opinion, it is plain and obvious that the material facts pleaded by Ms. Holley do not constitute a tenable plea of common law fraud and the Amended Statement of Claim should be struck out without leave to amend because Ms. Holley has had the opportunity to put her best case forward, and she has failed to show a reasonable cause of action for fraud.

7. Is Ms. Holley's Claim Statute-Barred?

[153] Royal Trust and Northern Trust argue that Ms. Holley's claim is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24. Sch. B. It should be appreciated that this defence applies to both the fraud claim and also the constructive fraud claim. In other words, this defence is mutually exclusive from the defence based on the effect of the CCAA release, which I have interpreted to discharge constructive fraud but not fraud claims.

[154] For this argument, the pertinent sections of the *Act* are a sections 1, 4, and 5, which state:

> *Definitions*
>
> 1. In this Act, ...
>
> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Discovery*
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. ...

[155] The discoverability principle governs the commencement of a limitation period and stipulates that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief: *Kamloops v. Nielson* (1984), 10 DLR (4th) 641 (S.C.C.); *Central Trust Co. v. Rafuse* (1986), 31 DLR (4th) 481 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 at para. 26 (S.C.J.) affd. 2009 ONCA 692. Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.

[156] The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period, if he or she knows or ought to know the existence of the material facts, which is to say the constitute elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 at para. 27 (S.C.J.) affd. 2009 ONCA 692; *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (C.A.).

[157] I can be relatively brief in discussing whether or not Ms. Holley's claims are statute barred. Quite simply, I agree with the Defendants' argument, and I conclude that it is plain and obvious that Ms. Holley discovered her claim around the time of the Monitor's 39th Report.

[158] The case at bar may be somewhat unique in that the mental state of discovery, usually in the metaphysical realm of what a person knows or ought to know, has manifested itself through affidavits and factums and reported judgments with written expressions of knowledge, akin to admissions of what Ms. Holley discovered at the time of the 39th Report. Those written expressions reveal that with the 39th Report, she knew the factual basis for her constructive fraud and fraud claim against the Defendants.

[159] Although it is not necessary for the running of the limitation period for the plaintiff to know the legal significance of the facts, in the case at bar, Ms. Holley had legal representation and the record of the affidavits and factums and, in particular, the reference to *Froesse v.*

Montreal Trust Co. of Canada, *supra* shows that that she was aware of the legal basis of the claim against Royal Trust and National Trust.

[160] The case at bar is not the type of case in which the court should postpone deciding the application of the *Limitations Act, 2002* to a summary judgment motion or a trial. Apart from the presumption in s. 5 (2) of the *Act* that a person with a claim shall be presumed to have discovered the claim on the day the act or omission on which the claim is based took place, which would commence the running of the limitation period in 2006, the court's own record from the CCAA proceedings shows that Ms. Holley discovered the factual basis for her claim around the time of the 39th Report of the Monitor in February 2008. She did not commence her claim until August 2010 and, in my opinion, it is plain and obvious that both her claim for constructive fraud and also her claim for common law fraud, if any, are statute-barred.

8. Is Ms. Holley's Action Barred as an Abuse of Process?

[161] Having regard to my conclusions above that Ms. Holley's constructive fraud claim is barred by the release in the CCAA proceedings and that her claims for constructive fraud and common law fraud are statute-barred under the *Limitations Act, 2002*, it is not necessary to rule on Royal Trust's argument that Ms. Holley's action should be dismissed as an abuse of process.

[162] However, because the point was fully argued and because there may be an appeal, I will briefly explain why I would not dismiss her action on this basis. There are two reasons.

[163] First, it is not plain and obvious that her present action re-litigates any cause of action that was already decided by Justice Morawetz. He certainly did not decide whether any frauds had been committed and the CCAA release excludes fraud claims. He also did not decide whether constructive fraud had been committed but, in my opinion, he decided only that constructive fraud, if any, should be released by the CCAA release.

[164] There may be an *issue estoppel* about whether the Trust is a single trust, but as I explained above, the unanswered question is whether there was fraudulent conduct with respect to that singular trust and in my opinion that issue was not litigated on its merits.

[165] Second, the application of the abuse of process doctrine is discretionary. The court has a discretion in regards to estopping a litigant from re-litigating an issue, and the court will not preclude a litigant from proceeding with its claim, if a bar would lead to an injustice: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraph 19 (S.C.C.). See also: *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.); *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.); *Monteiro v. Toronto Dominion Bank* (2008), 89 O.R. (3d) 565 at paragraphs 53-54 (C.A.).

[166] In my opinion, in the circumstances of the case at bar, excepting the limitation period defence, and assuming that there was a tenable claim for fraud, it would be unjust to bar Ms. Holley from having that tenable fraud claim determined on the merits. Further, in my opinion, in the circumstances of the case at bar, excepting the limitation period defence, it would be unjust to bar Ms. Holley from having her tenable constructive fraud claim determined on the merits.

D. CONCLUSION

[167] For the above reasons, I grant Royal Trust's and Northern Trust's Rule 21 motions.

[168] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Royal Trust's and Northern Trust's submissions within 20 days of the release of these Reasons for Decision followed by Ms. Holley's submissions within a further 20 days.

Perell, J.

Released: February 11, 2014

CITATION: *Holley v. The Northern Trust Company*, Canada, 2014 ONSC 889
COURT FILE NO.: 12-CV-462273CP
DATE: 20140211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JENNIFER HOLLEY

Plaintiff

- and -

THE NORTHERN TRUST COMPANY, CANADA and THE ROYAL TRUST COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

Perell, J.

Released: February 11, 2014