Docket: 2014-3260(IT)G

BETWEEN:

JAMES SCOTT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2014-3263(IT)G

BETWEEN:

SUSAN KENNEDY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2014-3265(IT)G

BETWEEN:

MARY ELLIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2014-3266(IT)G

BETWEEN:

ANN MCCANN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on August 25, 2016 and October 5, 2016,
at Ottawa, Ontario. Written Submissions filed by the Appellants and the Respondent on August 24, 2016; Supplementary Written Submissions filed by the Appellants on October 5, 2016; Supplementary Written Submissions filed by the Respondent on November 4, 2016; and Appellants' Reply to Respondent's Supplementary Written Submissions filed on November 24, 2016

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Mark Zigler, Roberto Tomassini, Brianna Sims
Counsel for the Respondent:	Bobby Sood, Rita Araujo

JUDGMENT

1. The Appeals of Mary Ellis (2014-3265(IT)G) and Susan Kennedy (2014-3263(IT)G) are allowed and the Assessments that are the subject of those Appeals are referred back to the Minister of National Revenue (the "Minister") for reconsideration and reassessment in accordance with the attached Reasons, and, in particular, on the basis that the distributions in the amounts of $1,371 and $9,011.88 paid in 2011 by the Nortel Health and Welfare Trust (the "HWT") to Ms. Ellis and Ms. Kennedy respectively in respect of the Nortel Group Term Life Insurance Plan are not to be included in computing their income for 2011.

2. The Appeal of Ann McCann (2014-3266(IT)G) is allowed and the Assessment that is the subject of that Appeal is referred back to the Minister for reconsideration and reassessment in accordance with the attached Reasons, and, in particular, on the basis that the amount of the distribution paid in 2011 by the HWT to her that pertained to her survivor transition benefits and that is to be included in computing her income for 2011 is $6,152.42 (and not $6,438.39).

3. The Appeal of James Scott (2014-3260(IT)G) is dismissed.

The Parties are invited to file written submissions on costs, or to request a hearing in respect of costs, within 90 days of this Judgment.

Signed at Ottawa, Canada, this 9th day of November, 2017.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2017 TCC 224
Date: 20171109
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REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] The fallout and litigation arising from the financial difficulties experienced by Nortel Networks Corporation ("NNC") and its subsidiaries (collectively, "Nortel") in 2009 continues.[1] In these Appeals, although Nortel is not a litigant, some of its former employees, or the surviving spouses of former employees, are the Appellants.

[2] These Reasons apply to Appeals instituted by James Scott, Susan Kennedy, Mary Ellis and Ann McCann respectively, and relate to the taxability of distributions that were made in 2011 from a health and welfare trust established by Nortel in 1980. The Appellants filed their income tax returns for 2011 on the basis that those distributions formed part of their income. However, after the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), issued notices of assessment (the "Assessments") in accordance with the income tax returns as filed, the Appellants filed Notices of Objection, taking the position that the distributions were not taxable. After the CRA confirmed the Assessments, the Appellants instituted these Appeals.

II. FACTS

[3] At the commencement of the hearing, the Appellants and the Respondent (collectively, the "Parties") presented to the Court a Statement of Agreed Facts (the "SAF").[2] The SAF is reproduced as Appendix A to these Reasons. Certain of the relevant facts are summarized in the ensuing paragraphs.[3]

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1 For greater certainty, in these Reasons (excluding Appendix A), the term "Nortel" means NNC and its subsidiaries. Grammatically, I will use the term "Nortel" as a singular noun, notwithstanding that it refers to multiple corporations. I will use the term "Nortel Entity" to refer to any of NNC and its subsidiaries.

2 Exhibit AR-1. I am not certain that the SAF uses the term "Nortel" consistently throughout its contents. For instance, in paragraph 1 of the SAF, the term "Nortel" is defined as meaning Nortel Networks Corporation (i.e., NNC in these Reasons), "which was a publicly-traded Canadian company and the direct or indirect parent of more than 130 subsidiaries." However, paragraph 9 of the SAF implies that Nortel (as defined in the

A. Background

[4] Until January 14, 2009, NNC was a publicly traded Canadian corporation and the direct or indirect parent of numerous subsidiaries. On January 14, 2009, most of the Nortel Entities filed for bankruptcy protection. In Canada, the Canadian corporations filed under the *Companies' Creditors Arrangement Act* (the "*CCAA*").[4] Ernst & Young Inc. was appointed as the monitor (the "Monitor") of the Nortel estate.

[5] During the *CCAA* proceeding, Nortel divested itself of substantially all of its assets and business units and terminated the employment of most of its employees in Canada.

B. Health and Welfare Plans

[6] As of January 1, 1980, Nortel established health and welfare plans (the "HW Plans") for the benefit of certain active and former employees. The HW Plans provided for various benefits, including health care (medical and dental) benefits, sickness and accident benefits, long term disability benefits, survivor income benefits and group life insurance.[5]

[7] Most of Nortel's health and welfare benefits, including life insurance and survivor income/transition benefits, were delivered through the Nortel Health and Welfare Trust (the "HWT") established pursuant to a trust agreement (the "Trust Agreement"), made effective as of January 1, 1980, between Montreal Trust Company and Northern Telecom Limited (which was then the name of NNC).[6] The HWT was a single trust fund created for the purpose of delivering health and

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SAF) was the only Nortel Entity that was a party to the Amended and Restated Settlement Agreement made as of March 30, 2010 (the "ARSA"), whereas a review of the ARSA shows that five Nortel Entities (i.e., NNC, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation) were parties to the ARSA.

3 If there is an inconsistency between the SAF and the summary of the facts set out in these Reasons, the SAF prevails, unless otherwise indicated. In deciding these Appeals, I have relied on (among other things) the SAF, which I have endeavoured to summarize in paragraphs 4 through 34 of these Reasons. Those paragraphs also contain a few facts, as well as comments, that are not stated in the SAF.

4 *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

5 *Fifty-First Report of the Monitor*, August 27, 2010, Exhibit AR-2, Joint Book of Documents ("JBOD"), vol. 1, tab 12, pages 11-12, ¶34 & 37(b).

6 Exhibit AR-2, JBOD, vol. 2, tab 30.

welfare benefits to active and retired employees of Nortel and their eligible dependents in accordance with the HW Plans.

[8] Most of Nortel's non-pension employee benefits, including group life insurance, long term disability, health care (medical and dental) and survivor income benefits, were funded by Nortel on a pay-as-you-go basis; however, as an administrative matter, they were paid using the HWT as a payment mechanism. Certain other benefits were funded, in part, by the HWT using its trust assets. Although the assets for the funded benefits were notionally allocated in the financial statements of the HWT, those assets were not segregated by benefit plan, and no separate bank accounts were established, with the result that all of the HWT assets were commingled.[7]

[9] By agreement dated December 1, 2005, Nortel appointed the Northern Trust Company, Canada (the "Trustee") as the successor trustee under the HWT, and the Trust Agreement was amended to reflect this change. As of the same date, Nortel entered into a letter agreement with the Trustee, wherein Nortel agreed:

a) to be solely responsible for administering the HW Plans and for determining the contributions required to adequately fund the HW Plans, and

b) to indemnify the Trustee from all claims and liabilities incurred by the Trustee and arising out of the administration of the HW Plans or out of the contributions made (or not made) by Nortel to the HWT.

The letter agreement also stated that "to the extent necessary, this letter shall constitute an amendment to the Health and Welfare Trust."

[10] As Nortel's financial situation deteriorated and it ultimately became insolvent, it nevertheless continued to fund certain benefits for more than a year after the CCAA filing, but it became apparent that Nortel could not continue to do so indefinitely, which lead to the negotiation of an agreement concerning some of the issues related to the HW Plans and other plans.[8]

[11] Certain employment-related issues of former Nortel employees were addressed in an Amended and Restated Settlement Agreement made as of March 30, 2010 (defined above as the "ARSA") among NNC, four other Nortel

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7 Exhibit AR-2, JBOD, vol. 1, tab 12, p. 11, ¶34.

8 *Fifty-First Report*, *supra* note 5, p. 7-8, ¶23-24.

Entities, the Monitor, the court-appointed representatives of the former Nortel employees (the "Former Employee Representatives"), Susan Kennedy on behalf of the Represented LTD Beneficiaries,[9] and Representative Counsel[10] (collectively, the "Settlement Parties").

[12] The ARSA was approved by the Ontario Superior Court of Justice (the "Superior Court") by Order dated March 31, 2010 (the "Settlement Approval Order"). The Settlement Approval Order was affirmed by the Ontario Court of Appeal on June 3, 2010.

[13] The ARSA provided that, up to December 31, 2010, Nortel was to continue to pay life insurance benefits and survivor income/transition benefits. The ARSA also provided that no such benefits were to be paid by Nortel for any benefit coverage period after December 31, 2010.

[14] Pursuant to the ARSA, the affected employees and survivors, including the Appellants, were entitled to file an unsecured claim as ordinary creditors against the Nortel estate in the CCAA proceeding for any funding deficit in the HWT or for any HWT-related claims (the "HWT Claims").

[15] Certain of the representative parties to the ARSA, on their own behalf and on behalf of the parties represented by them, released the Trustee of the HWT, the Monitor and others from any claims related to the HWT. Nothing in the ARSA released Nortel from any claim for any funding deficit in the HWT or for any

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9 The term "Represented LTD Beneficiaries" is defined in the recitals to the ARSA as, in essence, being (subject to certain exceptions) certain employees of Nortel who were not then working due to an injury, illness or medical condition in respect of which they were receiving or were entitled to receive disability income benefits by or through Nortel, and who could assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with Nortel or termination thereof, or a pension or benefit plan sponsored by Nortel. See Exhibit AR-2, JBOD, vol. 1, tab 9, p. 2.

10 The ARSA defines the term "Representative Counsel" as meaning Koskie Minsky LLP, court-appointed counsel to:

(a) the Former Employees of Nortel (referred to elsewhere as the "Nortel Former Employees" (being, subject to certain exceptions, all former employees, including pensioners, of Nortel or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension)), and

(b) the Represented LTD Beneficiaries.

See Exhibit AR-2, JBOD, vol. 1, tab 9, p. 1-3.

HWT Claims, to the extent that such claims were allowed as ordinary unsecured claims against Nortel.[11]

[16] In the ARSA, the Settlement Parties agreed to "work towards developing a Court approved distribution of the HWT corpus in 2010 to its beneficiaries entitled thereto and the resolution of any issues necessarily incident thereto." The ARSA did not affect "the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT."

[17] The HWT allocation agreed to by the Settlement Parties was submitted to the Superior Court for approval. The HWT allocation and the distribution of the HWT's corpus were approved by the Superior Court by Order dated November 9, 2010 (the "HWT Allocation Order"). The methodology for allocation of the corpus of the HWT approved by the Superior Court provided that the amount of the allocation was to be calculated based on each approved participating benefit's respective share of the present value of all the approved participating benefits.[12] The Order also provided that certain beneficiaries,[13] including the Appellants, were to receive distributions from the approved participating benefits' *pro rata* share of the HWT corpus. The distribution of the corpus of the HWT was to be made by the Trustee (or an agent of the Trustee or Nortel) to the entitled individuals in accordance with the HWT Allocation Order.

[18] The date of the Notice of Termination for all purposes under and pursuant to the Trust Agreement was deemed by the HWT Allocation Order to be December 31, 2010. The HWT Allocation Order also provided that the requirement for and delivery of a Notice of Termination to the Trustee pursuant to section 2 of Article VI of the Trust Agreement was dispensed with for all purposes.[14] By way of background, the first two sentences of section 2 of Article VI of the Trust Agreement read as follows:

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11 The ARSA, Part G, ¶1-2; see Exhibit AR-2, JBOD, vol. 1, tab 9, p. 8-9.

12 The approved participating benefits were: (i) Pensioner Life, (ii) LTD Income, (iii) LTD Life, (iv) LTD Optional Life Benefit, (v) STBs in pay, and (vi) SIBs in pay. Some of these terms are defined below.

13 The beneficiaries were: (i) Pensioners for Pensioner Life (e.g., Ms. Ellis), (ii) LTD Beneficiaries for LTD Income and LTD Life (e.g., Ms. Kennedy), (iii) LTD Beneficiaries under Optional Life, (iv) STB beneficiaries (e.g., Ms. McCann), and SIB beneficiaries (e.g., Mr. Scott).

14 Exhibit AR-2, vol. 1, tab 17, p. 4, ¶4.

> 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.[15]

Thus, the term "Notice of Termination" refers to the termination of NNC's obligation to make contributions in respect of benefits under the HW Plans, and not to the termination of the Trust. The date of the Notice of Termination marked the end of NNC's obligation to make contributions to the HWT and the effective date for the determination and satisfaction of the expenses, claims and obligations of the HWT.[16]

[19] As at December 31, 2010, the HWT had insufficient assets to deliver the vested employee benefits. Nortel was then insolvent and could not fund the benefits.

[20] Distributions from the HWT, in accordance with the HWT Allocation Order, commenced in 2011, pursuant to various interim distribution orders issued by the Superior Court in 2011. The Appellants all received distributions, some of which are described below.[17]

[21] By Order dated November 19, 2013, the Superior Court further ordered and declared that "upon the posting of the Notice of Declared Distribution on the Monitor's website and completion of the distributions from the HWT as provided

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15 Exhibit AR-2, vol. 2, tab 30, p. 14, sec. 2.

16 Notwithstanding that the date of the Notice of Termination was deemed to be December 31, 2010, which apparently marked the end of NNC's obligation to make contributions to the HWT, it is my understanding that the final contribution by NNC to the HWT was "made probably in 2012, or thereabouts." See the *Transcript* of the Third Party Examination for Discovery of Lee Close, for Ernst & Young Inc. (i.e., the Monitor), on May 5, 2016, Exhibit AR-4, p. 7, lines 9-13.

17 It is my understanding that distributions were paid by the HWT in 2011, 2012, 2013 and 2014, but only certain of the distributions paid in 2011 are the subject of these Appeals; see the *Transcript* of the Third Party Examination for Discovery of Ellen Whelan, for Mercer (Canada) Limited, on April 25, 2016, Exhibit AR-3, p. 32, lines 15-16.

for in this Order, the HWT will automatically terminate."[18] As of August 2016, the distributions from the HWT had apparently not been completed.[19]

C. The HWT's 2011 Income Tax Return

[22] The hearing of these Appeals commenced on Thursday, August 25, 2016. On Monday, August 22, 2016, a trial management conference was held by telephone conference call. At that time, counsel for the Appellants advised that there would be no witnesses called at the hearing and that there would be a statement of agreed facts, as well as agreed-upon exhibits. Counsel for the Respondent concurred with the foregoing statements. Three days later, shortly after the beginning of the hearing, the SAF was entered as Exhibit AR-1 and a three-volume Joint Book of Documents (defined above as the "JBOD") was entered as Exhibit AR-2.

[23] At the commencement of the hearing and before the above-mentioned documents were entered as exhibits, counsel for the Respondent requested leave to file, as contemplated by subsection 244(9) of the *Income Tax Act*[20] (the "*ITA*"), an affidavit (the "Affidavit") sworn by a CRA auditor and containing, as exhibits, copies of the 2011 T3 Trust Income Tax and Information Return filed by the HWT and the 2011 Trust Notice of Assessment issued by the CRA to the HWT. Counsel for the Appellants objected to the admission of the Affidavit. I directed that the Affidavit be marked as Exhibit R-1 for Identification, and indicated that I would consider, and ultimately make a determination concerning, the admissibility of the Affidavit.

D. Mary Ellis (Pensioner Life Insurance Benefit)

[24] In 2010, Ms. Ellis, who was a retired employee of Nortel, had a vested right, by virtue of her employment with Nortel, to receive life insurance benefits under the Nortel Group Term Life Insurance Plan (the "Group Life Plan").[21] Ms. Ellis'

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18 HWT – Declared Distribution Order, Exhibit AR-2, vol. 2, tab 28, p. 5, ¶14.

19 Statement by counsel for the Respondent, *Transcript*, August 25, 2016, p. 17, lines 23-24; and p. 18, lines 8-10 (in these Reasons, the term "*Transcript*," without a further descriptor, refers to the transcript of the hearing, and not to the transcript of an examination for discovery). See also Exhibit AR-4, *Transcript* (Close), p. 49, lines 9-11; and p. 59, lines 18-21.

20 *Income Tax Act*, RSC 1985, 5th Supplement, c. 1, as amended.

21 It is my understanding that the Group Life Plan was a group term life insurance policy, as defined in subsection 248(1) of the *ITA*.

benefit consisted of group life insurance coverage and the payment by the HWT of the requisite insurance premiums during her lifetime. The amount of the insurance proceeds that would have been paid, on the death of Ms. Ellis, to her beneficiary, and which was based on her earnings while she was an active employee of Nortel, was $17,000. For taxation years ending before 2011, Ms. Ellis included, in computing her income, the amount of the group life insurance premiums paid on her behalf by the HWT.

[25] Pursuant to the ARSA, the HWT continued to pay the life insurance premiums in respect of Ms. Ellis until December 31, 2010, but no premiums were paid thereafter. The Monitor estimated that, as at December 31, 2010, the present value of Ms. Ellis' claim was $6,855.

[26] As Ms. Ellis was a beneficiary of the HWT, when distributions from the corpus of the HWT were made in 2011, Ms. Ellis received $1,371. The Monitor subsequently issued to Ms. Ellis a T4A slip in respect of the $1,371 distribution. When Ms. Ellis prepared and filed her income tax return for 2011, she included the distributed amount of $1,371 in computing her income. Ms. Ellis' 2011 tax return was assessed as filed, and she subsequently objected and later appealed.

E. Susan Kennedy (Long Term Disability Life Insurance Benefit)

[27] In 2010, Ms. Kennedy was a former employee of Nortel who was receiving long term disability benefits ("LTD Benefits") under the Nortel Long Term Disability Plan for full-time employees (the "LTD Plan"). As such, she had a vested right to receive life insurance coverage under the Group Life Plan (while she was in receipt of LTD Benefits), until attaining age 65, whereupon she would have been eligible for pensioner life insurance coverage under the Group Life Plan for her lifetime. The amount of the insurance proceeds that would have been paid, on the death of Ms. Kennedy, to her beneficiary was $62,000 for basic life insurance and $186,000 for optional life insurance. For taxation years ending before 2011, Ms. Kennedy included, in computing her income, the amount of the group life insurance premiums paid on her behalf by the HWT.

[28] The HWT paid the life insurance premiums in respect of Ms. Kennedy until December 31, 2010. No premiums were paid thereafter. The Monitor estimated the present value of Ms. Kennedy's claim, as at December 31, 2010, to be $29,394.

[29] As Ms. Kennedy was a beneficiary of the HWT, she was entitled to receive a share of the distribution of the corpus of the HWT. She received lump-sum

payments in the amounts of $7,281.88 and $1,730 in September 2011 and December 2011 respectively. The Monitor subsequently issued one or more T4A slips (presumably in the aggregate amount of $9,011.88, i.e., $7,281.88 + $1,730) to Ms. Kennedy, who, in preparing her income tax return for 2011, included the distributed amounts in computing her income.[22] The CRA assessed Ms. Kennedy's 2011 income tax return as filed, after which Ms. Kennedy objected and later appealed.

F. James Scott (Management Survivor Income Benefit)

[30] While she was alive, the spouse of Mr. Scott was an active non-unionized full-time employee of Nortel. After the death of his spouse, Mr. Scott, pursuant to the Management Survivor Income Benefit Plan (the "SIB Plan"), became entitled to receive monthly survivor income benefits (the "SIBs"), each in the amount of $871.46, by reason of his spouse's employment with Nortel. In preparing his income tax returns, Mr. Scott reported the SIBs as death benefits, which he included in computing his income. Mr. Scott received SIBs until December 31, 2010, but not thereafter.

[31] Mercer (Canada) Limited ("Mercer"), which was Nortel's actuary, estimated the present value of Mr. Scott's SIBs, as at December 31, 2010, as being $124,345. When the corpus of the HWT was distributed in 2011, Mr. Scott received lump-sum payments of $724.18 in January 2011, $482.79 in May 2011 and $7,319.20 in July 2011 (resulting in aggregate distributions of $8,526.17 to him in 2011).[23] The Monitor subsequently issued one or more T4A slips to Mr. Scott in respect of the distributions, and Mr. Scott included the distributed amounts in computing his income for 2011. After his 2011 income tax return was assessed as filed, Mr. Scott objected and later appealed.

G. Ann McCann (Union Survivor Transition Benefit)

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[22] Ms. Kennedy's Notice of Appeal refers to the lump-sum payment of $7,281.88 (which was received in September 2011) but not to the lump-sum payment of $1,730 (which was received in December 2011). As indicated in paragraph 8 of the Crown's Amended Reply, in assessing Ms. Kennedy for 2011, the Minister assumed that she received a lump-sum payment in the amount of $7,281.88 from the NWT. The Amended Reply does not specifically refer to the amount of $1,730 received by Ms. Kennedy in December 2011.

[23] The SAF does not expressly state that Mr. Scott was a beneficiary of the HWT.

[32] Before his death, the spouse of Ms. McCann was a unionized employee of Nortel. Upon the death of her spouse, Ms. McCann became entitled to receive monthly survivor transition benefits ("STBs") under the Union Survivor Transition Benefit Plan (the "STB Plan"), by virtue of her spouse's employment with Nortel. Specifically, under the STB Plan, Ms. McCann was entitled to receive a monthly payment in the amount of $725 for a fixed five-year term that would have expired on December 31, 2013. Pursuant to the ARSA, Ms. McCann continued receiving the monthly STBs until December 31, 2010, after which no further benefits were paid. The Monitor estimated the present value of Ms. McCann's STBs, as at December 31, 2010, to be $24,644.

[33] As Ms. McCann was a beneficiary of the HWT, when distributions from the corpus of the HWT were made in 2011, she received $2,175 in January 2011, $285.97 in May 2011 and $3,691.45 in July 2011 (resulting in aggregate distributions of $6,152.42 to her in 2011).[24] The Monitor subsequently issued one or more T4A slips to Ms. McCann in respect of the distributions to her.

[34] When Ms. McCann filed her income tax return for 2011, she included the distribution of $6,152.42 in computing her income. The CRA subsequently assessed her return, apparently to include, in computing her income, STBs in the amount of $6,438.39, after which Ms. McCann objected and later appealed.[25]

III. ISSUES

[35] The issues to be resolved in respect of these Appeals are the following:

A. Is the Affidavit, together with the HWT's 2011 T3 Trust Income Tax and Information Return and 2011 Trust Notice of Assessment, admissible?

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[24] In subparagraph 8(b) of the Amended Reply in Appeal No. 2014-3266(IT)G, counsel for the Crown stated that, in assessing Ms. McCann, the Minister had assumed that the amount of the distribution in 2011 by the HWT to Ms. McCann was $6,438.39. Given that paragraph 70 of the SAF indicates that the total distributions in 2011 by the HWT to Ms. McCann were $6,152.42, the assumption by the Minister has been partially demolished, to the extent of $285.97 (i.e., $6,438.39 − $6,152.42). See also footnote 76 below.

[25] It is my understanding that some or all of the Appellants were entitled to benefits under the HW Plans in addition to those described above, and that some or all of the Appellants received distributions from the HWT, not only in 2011 but in subsequent years, in respect of some or all of the benefits to which they were entitled. However, only the distributions described above are the subject of these Appeals.

B. Are sections 104 through 108 of the *ITA* applicable to the disposition of these Appeals, and, if so, how?

C. Should the distribution in the amount of $1,371 by the HWT to Ms. Ellis in 2011 be included in computing her income for 2011?

D. Should the distributions in the aggregate amount of $9,011.88 by the HWT to Ms. Kennedy in 2011 be included in computing her income for 2011?

E. Should the distributions in the aggregate amount of $8,526.17 by the HWT to Mr. Scott in 2011 be included in computing his income for 2011?

F. Should the distributions in the aggregate amount of $6,152.42 by the HWT to Ms. McCann in 2011 be included in computing her income for 2011?

IV. ANALYSIS

A. Admissibility of the Affidavit

(1) Background

[36] When drafting an agreement concerning the use of a statement of agreed facts or a joint book of documents, it is not uncommon for one or more of the parties to reserve the right to call one or more witnesses or to introduce additional documentary evidence at the hearing. There was no such reservation by either Party here, although the introductory paragraph of the SAF concludes by saying, "Nothing in this document precludes any parties from relying on the facts otherwise in the record before the court." As mentioned above, counsel for the Respondent applied to have the Affidavit admitted as evidence so that it and its exhibits would be part of the record before the Court.

[37] It is my understanding that the primary reason for which the Respondent wanted to introduce the Affidavit (including the HWT's 2011 tax return and notice of assessment) as evidence was to prove that the HWT existed in 2011 and that, in computing its income for 2011, the HWT deducted the amounts distributed by it to the Appellants in 2011. Counsel for the Respondent submitted that the matching principle was applicable, such that, assuming that the HWT deducted the distributed amounts, it would follow that those amounts should be included in computing the income of the recipients.

[38] Counsel for the Appellants objected to the admission of the Affidavit on the basis that the delivery of the Affidavit to him on the morning of the first day of the hearing constituted prejudicial "last-minute trial-by-ambush type tactics."[26] Furthermore, counsel for the Appellants pointed out that the HWT is not a party to these Appeals and that its tax return and notice of assessment are confidential. In addition, counsel for the Appellants submitted that the matching principle does not exist and that the manner in which the HWT was taxed is not relevant to the taxability of the Appellants.

[39] While making his submissions concerning the admissibility of the Affidavit, counsel for the Appellants stated that, although the HWT Allocation Order provided that the date of the Notice of Termination (which, in my view, marked the end of NNC's obligation to make contributions to the HWT and set the effective date for the determination and satisfaction of the expenses, claims and obligations of the HWT[27]) was deemed to be December 31, 2010, he was willing to concede that the winding-up of the affairs of the HWT continued into 2011, 2012 and subsequent years and that the HWT has filed tax returns for each year during which the winding-up has continued.[28]

(2) Rule 89(1)

[40] Each of the Appellants filed a List of Documents (Partial Disclosure) on January 30, 2015. Each List referred to the 2011 Income Tax and Benefit Return of the particular Appellant, but did not refer to the 2011 T3 Trust Income Tax and Information Return of the HWT.

[41] On January 30, 2015 the Respondent filed a List of Documents (Partial Disclosure) in each of these Appeals. The Lists filed in respect of Mr. Scott's and Ms. McCann's Appeals referred to copies of the 2011 income tax returns of those

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[26] *Transcript*, August 25, 2016, p. 9, lines 20-21. See also p. 6, lines 26-28; and p. 22, lines 22-25. Although counsel for the Respondent did not provide counsel for the Appellants with a copy of the Affidavit until the morning of the commencement of the hearing, it is my understanding that, two days before the hearing, counsel for the Respondent advised counsel for the Appellants of the former's intention to put the HWT's 2011 tax return and notice of assessment before the Court.

[27] See paragraph 18 above.

[28] *Transcript*, August 25, 2016, p. 9, line 22 to p. 10, line 11; p. 13, lines 13-19; p. 14, lines 3-6; p. 18, lines 25-28; and p. 29, lines 8-12.

two Appellants respectively.[29] The Lists filed by the Respondent in respect of Ms. Kennedy's and Ms. Ellis' Appeals referred to the 2011 Option C Printouts for those two Appellants,[30] rather than to their actual tax returns. The Lists filed by the Respondent did not refer to the HWT's 2011 income tax return or notice of assessment.

[42] Subsection 89(1) of the *Tax Court of Canada Rules (General Procedure)*[31] (the "*Rules*") states:

> 89(1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless
>
> (*a*) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,
>
> (*b*) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or
>
> (*c*) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.

[43] The HWT's 2011 tax return and notice of assessment do not come within paragraph 89(1)(*b*) or (*c*) of the *Rules*, nor are they referred to in the pleadings or in the Respondent's List of Documents. They are, however, included as exhibits in the Affidavit, which was not filed with the Court before the commencement of the hearing and was only served on the Appellants on the morning of August 25, 2016 (the day when the hearing commenced). Paragraph 89(1)(*a*) of the *Rules* does not specify a deadline for filing and serving a list of documents or an affidavit containing a document. Subsection 81(1) of the *Rules* provides that a list of documents (partial disclosure) is to be filed and served within 30 days following

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29 Curiously, the List filed by the Respondent in respect of Ms. McCann's Appeal indicates that her 2011 tax return was undated, whereas the List filed by Ms. McCann indicates that her 2011 tax return was dated April 11, 2012.

30 It is my understanding that the CRA does not retain the originals of all tax returns that are filed by the numerous taxpayers in Canada. Rather, the CRA enters the data from each taxpayer's income tax return into its computerized database. In order to obtain a summary of the data in respect of a particular taxpayer's income tax return, an Option C Printout is requested.

31 *Tax Court of Canada Rules (General Procedure)*, SOR/90-688, as amended.

the closing of the pleadings. This suggests that a list of documents should be filed sooner, rather than later.

[44] The context of sections 78 through 91 of the *Rules* suggests that, in paragraph 89(1)(*a*), the word "affidavit" means an affidavit of documents as contemplated by subsections 82(4) through (6) and section 88 of the *Rules*, rather than an affidavit of the type contemplated by subsection 244(9) of the *ITA*.

[45] If the Affidavit is not an affidavit of the type contemplated by paragraph 89(1)(*a*) of the *Rules*, unless the Court otherwise directs, the HWT's 2011 tax return and notice of assessment may not be used in evidence by the Respondent. If the Affidavit is an affidavit of the type contemplated by paragraph 89(1)(*a*), and if I determine that the Affidavit is admissible, the service of the Affidavit on the Appellants on the morning of the commencement of the hearing placed the Appellants at a significant disadvantage.

(3) Jurisprudence concerning Rule 89(1)

[46] Subsection 89(1) of the *Rules* has a salutary objective, which is to reduce the possibility of taking the other party by surprise (colloquially referred to as trial by ambush).[32] Hence, the general rule is to exclude from evidence a document that is not referred to in the pleadings or the list of documents of the party who seeks to introduce the document.[33] Absent some agreement between the parties, subsection 89(1) of the *Rules* and other evidentiary requirements relating to the production of documents should not readily be ignored.[34] A departure from the general rule requires some justification[35] or some reason.[36]

[47] The opening words of subsection 89(1) of the *Rules* provide the Court with a discretion to allow a document into evidence even if the requirements of

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[32] In *Scavuzzo v The Queen*, 2004 TCC 806, ¶5, Bowman CJ noted that to confront a party with numerous documents that were not disclosed in the other party's list of documents could take the first party by surprise and put him at a significant and possibly unfair disadvantage.

[33] *Walsh v The Queen*, 2009 TCC 557, ¶25. See also *Canadian Economic Consultants Ltd. v The Queen*, [2001] 1 CTC 123 (FCA); and *568864 B.C. Ltd. v The Queen*, 2014 TCC 373, ¶107.

[34] *Savoy v The Queen*, 2011 TCC 35, ¶23 and footnote 6 therein.

[35] *Walsh*, *supra* note 33, ¶25.

[36] *Myrdan Investments Inc. v The Queen*, 2013 TCC 35, ¶26.

subsection 89(1) have not been met.[37] As a foundation for the exercise of this discretion, there should be some reason provided to the Court in support of the proposition that a previously undisclosed document should be allowed into evidence.[38] The Court must exercise its discretion judicially, according to the rules of reason and justice, and not arbitrarily.[39] In determining whether to admit a previously undisclosed document, there must be a balancing of the competing interests of both parties, so as to avoid a miscarriage of justice.[40] The Court must also be mindful of the interests of justice and the overriding importance of having all of the relevant information before the Court to enable it to arrive at a proper and just disposition of the particular appeal.[41] Finally, the Court should not lose sight of subsection 4(1) of the *Rules*, which provides that the *Rules* are to "be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[42]

[48] During the discussion of the admissibility of the Affidavit, neither counsel specifically addressed the question of whether the Respondent's failure to include the HWT's 2011 tax return and notice of assessment in its List of Documents precludes, by reason of subsection 89(1) of the *Rules*, the Respondent from using that tax return and notice of assessment in evidence.[43] Given that subsection 89(1) of the *Rules* was not discussed expressly by either counsel, counsel for the Appellants did not urge me to exclude the Affidavit on the basis of subsection 89(1) of the *Rules*,[44] and counsel for the Respondent made no submission as to why the Court should exercise its discretion so as to allow the

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37 *Ibid.*, ¶27. See also *Sydney Mines Firemen's Club v The Queen*, 2011 TCC 403, ¶17.

38 *Myrdan Investments*, *supra* note 36, ¶26.

39 *Sydney Mines*, *supra* note 37, ¶18. See also *Doiron v Haché*, 2005 NBCA 75, ¶57; and *New Brunswick v Stephen Moffett Ltd.*, 2008 NBCA 9, ¶10.

40 *Sydney Mines*, *supra* note 37, ¶17.

41 *Ibid.*, ¶21.

42 *Myrdan Investments*, *supra* note 36, ¶27; and *Sydney Mines*, *supra* note 37, ¶22.

43 There was discussion by counsel for the respective Parties of the Lists of Documents, but that discussion was in the context of the HWT Allocation Order, and not in the context of the HWT's 2011 tax return and notice of assessment.

44 Although counsel for the Appellants did not base his opposition to the admission of the Affidavit on the exclusionary rule in subsection 89(1) of the *Rules*, he did, as noted above, submit that the late introduction of the Affidavit was prejudicial and constituted trial by ambush; *Transcript*, August 25, 2016, p. 6, lines 26-28; p. 9, lines 20-21; and p.22, lines 22-25. While discussing his concerns, counsel for the Appellants stated, "they didn't put it in" (*Transcript*, August 25, 2016, p. 22, line 22), which might (although it is not clear) have been intended to submit that the Respondent did not put the Affidavit (or its exhibits) in the Respondent's List of Documents.

Affidavit to be admitted, nor did counsel for the Respondent provide a justification or reason for departing from the general rule in subsection 89(1) of the *Rules*. Counsel for the Respondent explained why they would like the HWT's 2011 tax return and notice of assessment to be entered into evidence and why the desire to enter those documents into evidence arose only a day or two before the hearing, but they did not explain why I should ignore the general rule of exclusion in subsection 89(1) of the *Rules*.

[49] As the impact of subsection 89(1) of the *Rules* was not argued before me, I am reluctant to base my decision concerning the admissibility of the Affidavit solely on that particular rule.

(4) Subsections 241(1) and (3) of the *ITA*

[50] Another ground for the objection by counsel for the Appellants to the admission of the Affidavit was that the exhibits to the Affidavit constitute taxpayer information (as defined in subsection 241(10) of the *ITA*), and, as such, are confidential and are, by reason of paragraph 241(1)(*a*) of the *ITA*, precluded from public disclosure. Paragraph 241(1)(*a*) of the *ITA* reads as follows:

> 241(1) Except as authorized by this section, no official or other representative of a government entity shall
>
> (*a*) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information….

[51] The opening phrase of subsection 241(1) of the *ITA* makes it clear that the remainder of section 241 may contain exceptions to the general prohibition contained in subsection 241(1) of the *ITA*. One such exception is found in paragraph 241(3)(*b*) of the *ITA*, which reads as follows:

> 241(3) Subsections (1) and (2) do not apply in respect of …
>
> (*b*) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

(5) Jurisprudence Concerning Section 241

[52] In the *Slattery* case, Iacobucci J of the Supreme Court of Canada enunciated some of the principles that apply to the interpretation and application of section 241 of the *ITA*, as follows:

> In my view, s. 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4).
>
> Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state….
>
> By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information….
>
> Parliament has also recognized, however, that if personal information obtained cannot be used to assist in tax collection when required, including tax collection by way of judicial enforcement, the possession of such information will be useless. *Disclosure of information obtained through tax returns or collected in the course of tax investigations may be necessary during litigation in order to ensure that all relevant information is before the court, and thereby to assist in the correct disposition of litigation*. But this necessity is sanctioned by Parliament in a very limited number of situations. Disclosure is authorized in criminal proceedings and other proceedings as set out in s. 241(3). Certain other situations are specified in s. 241(4), which have been described … as being "largely of an administrative nature" ….[45] [*Emphasis added.*]

[53] Iacobbuci J went on to discuss the two connecting phrases that appear in the statutory provision quoted above. In particular, he considered the phrase "in respect of," which appears in the first line of subsection 241(3) of the *ITA* and the phrase "relating to" which appears in the first line of paragraph 241(3)(*b*) of the *ITA*. Quoting from the *Nowegijick* case, he noted that "[t]he phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters."[46] He also stated that, in his view, the

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45 *Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt*, [1993] 3 SCR 430, at 443-445.

46 *Nowegijick v The Queen*, [1983] 1 SCR 29, [1983] CTC 20, 83 DTC 5041, ¶30.

comments quoted from *Nowegijick* are equally applicable to the phrase "relating to". He then observed:

> So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.[47]

Later in his reasons, Iacobucci J reiterated his comments concerning the breadth of subsection 241(3) of the *ITA*, as follows:

> As mentioned earlier, in my opinion the exception authorizing Revenue Canada to disclose tax related information in proceedings is very broad; that is, it operates in respect of proceedings relating to the enforcement of the *Income Tax Act*.[48] [*Emphasis in original.*]

[54] In my view, particularly in light of the broad interpretation given to subsection 241(3) of the *ITA* in *Slattery*, the Appeals instituted by Mr. Scott, Ms. Kennedy, Ms. Ellis and Ms. McCann constitute legal proceedings relating to the administration or enforcement of the *ITA*. I am not aware of any requirement that the legal proceedings in which the disclosure of otherwise confidential taxpayer information is sought must pertain to the taxpayer who is the subject of that information. In fact, the Federal Court of Appeal has previously ordered that the income tax returns of a third party, which were relied on by the Minister in assessing another taxpayer, were to be disclosed to the assessed taxpayer who had commenced legal proceedings to challenge its assessments.[49]

[55] Counsel for the Appellants referred me to the *Tor Can Waste Management* case, which dealt with a motion brought by a reassessed taxpayer for disclosure by the Crown of information and documentation obtained by the CRA from a third party from whom the reassessed taxpayer had purchased certain waste containers or bins. In the course of deciding the motion, Lyons J stated:

> 23. Subsections 241(1) and (2) of the *Act* embody the basic principles that restrict the release of confidential taxpayer information. Paragraph 241(3)(*b*) of the *Act* contains an exception to the prohibition in

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47 *Slattery*, *supra* note 45, p. 446.

48 *Ibid*., p. 451.

49 *MNR v Huron Steel Fabricators (London) Ltd.*, (1973) 41 DLR (3d) 407, 73 DTC 5347 (FCA). See also *Heinig v The Queen*, 2009 TCC 47, ¶9; and *The Queen et al. v Harris*, 2001 FCA 74.

> respect of legal proceedings relating to the administration or enforcement of the *Act*….
>
> 24. The prohibition against disclosure by the Minister of protected third-party taxpayer information and documentation applies if it is not relevant to nor was relied on by the Minister in reassessing a tax return.
>
> 25. Courts will not order the disclosure of third-party information where the Minister did not use the information nor if there was virtually no reason to use the information to make an assessment.
>
> 26. Courts have ordered disclosure of third-party information (income tax returns and information exchanged with the Minister) if the information was relied on by the Minister in making the assessment.
>
> 27. In the decision of *Oro Del Norte S.A. v R.*, [1990] 2 CTC 67 (Fed. T.D.), the Court held that third-party information relevant to the issues between the parties or relied on by the Minister in assessing is disclosable. Recently, in *Heinig* …, Webb J. confirmed those principles (relevance and reliance).[50] [*Footnote numbers omitted.*]

There was no suggestion by counsel for the Respondent that the CRA relied on the HWT's 2011 tax return in assessing Mr. Scott, Ms. Kennedy, Ms. Ellis or Ms. McCann. However, counsel for the Respondent asserted that, by reason of the matching principle, the HWT's 2011 tax return is relevant to these Appeals. Counsel for the Appellants took the position that the manner in which the HWT was taxed is not relevant to the taxability of the Appellants. I will discuss the question of relevance below.

[56] In *Tor Can Waste Management*, Lyons J noted (in footnote 16) that in *9005-6342 Québec Inc.*,[51] Hogan J had canvassed the principles relating to section 241 of the *ITA*. The *9005-6342* case, like many of the cases dealing with section 241 (including some of those referred to above), dealt with an application by a taxpayer to require the CRA to produce third-party tax information that was used by the CRA in assessing the taxpayer or that was relevant to the taxpayer's appeal. Given that *9055-6342* did not deal with a situation where the CRA or the Crown was endeavouring to enter confidential third-party tax information as evidence in an appeal relating to another taxpayer, that case is not directly on point with the current situation. Nevertheless, some of the principles pertaining to section 241 of

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50 *Tor Can Waste Management Inc. v The Queen*, 2015 TCC 157, ¶23-27.

51 *9005-6342 Québec Inc. v The Queen*, 2010 TCC 463.

the *ITA*, as enunciated by Hogan J and paraphrased below, might have some application here:

a) Reasons of public policy and relevance might preclude the use of third-party tax information that would otherwise qualify for disclosure under paragraph 241(3)(*b*) of the *ITA*.[52]

b) Third-party tax information should not be disclosed to another taxpayer if the CRA had virtually no reason to use the information when assessing the other taxpayer.[53]

c) Even though subsection 241(3) of the *ITA* (which refers to any legal proceedings relating to the administration or enforcement of the *ITA*) is broader than paragraph 241(4)(*a*) of the *ITA* (which requires that the information contemplated by that provision be regarded as necessary for the purposes of the administration or enforcement of the *ITA*), and even though subsection 241(3) of the *ITA* does not specify that third-party tax information must be relevant to a particular case, the information may be disclosed only if it is relevant.[54]

d) The notion of relevance must be interpreted broadly.[55]

With respect to the principle summarized in subparagraph b) above, counsel for the Respondent did not make any submission to suggest that, in assessing the Appellants, the CRA used, or even considered, the information contained in the HWT's 2011 tax return or notice of assessment.

[57] In *Gordon v The Queen*, after noting that the Supreme Court of Canada had indicated in *Slattery* that a wide view should be taken when determining whether a proposed disclosure is in respect of a proceeding relating to the enforcement or administration of the *ITA*, O'Keefe J concluded that certain third-party taxpayer information could be released by the CRA and other government officials to counsel for the Crown to enable counsel to defend an action that had been brought against the Crown. However, O'Keefe J expressed the view that notice of the proposed release of taxpayer information should be given to the third parties:

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52 *Ibid.*, ¶21.
53 *Ibid.*, ¶37.
54 *Ibid.*, ¶38.
55 *Ibid.*, ¶41.

> There is no requirement under the *Income Tax Act* that third parties be given notice that their tax information will be released. However, this does not mean that some type of advance notice should not be given to the taxpayer [presumably meaning the third party whose tax information is to be released]. I am of the opinion that some type of advance notice should be given to the taxpayer. Based on the information available to me on this hearing, I am not prepared to dictate the form of notice. I would, however, direct the parties to the statements of Justice Phelan in *Scott Slipp Nissan Ltd. v Canada (Attorney General)*, [2005] G.S.T.C. 70, 2005 FC 1479 at paragraphs 15 and 16 where he stated:
>
> > 15. It was appropriate for the Minister to give notice to third parties and to provide them respectively with their confidential information that was to be released. The principles of fairness generally would require this procedure as these third parties may have rights or interests affected by the Minister's decision to disclose….[56]

[58] In *Tor Can Waste Management*, Lyons J referenced the *Oro Del Norte* case, which was a motion by a taxpayer for an order compelling the Crown to produce certain documents containing third-party taxpayer information. It is noteworthy that, in the context of that motion, counsel for the Crown advised the third parties that the applicant in that motion was seeking production of their confidential documents.[57]

[59] There was no indication given to me by counsel for the Respondent that the HWT had been given notice that the Respondent proposed to enter the HWT's 2011 tax return and notice of assessment as evidence in respect of these Appeals. I am reluctant to disregard the view expressed by O'Keefe J that some type of advance notice should be given to a third party before its taxpayer information is used in legal proceedings pertaining to some other taxpayer.

(6) Relevance

[60] As noted above, both Lyons J and Hogan J indicated that, notwithstanding that subsection 241(3) of the *ITA* might authorize the disclosure of confidential taxpayer information in the context of legal proceedings relating to the administration or enforcement of the *ITA*, such disclosure should not be made unless the information is relevant to those proceedings. The classic explanation of relevance was reiterated by the Supreme Court of Canada in 2011, as follows:

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[56] *Gordon v The Queen*, 2007 FC 253, ¶19. Paragraph 16 in the *Scott Slipp* case (which is referenced, but not quoted, above) is not relevant to these Appeals.

[57] *Oro Del Norte, S.A. v The Queen*, 90 DTC 6373 (FCTD), at 6374.

> In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence"….[58]

[61] In *Oro Del Norte*, Jerome ACJ made the following comments concerning relevance:

> A taxpayer must therefore be permitted access to all documents which are relevant to or relied upon by the Minister of National Revenue in reassessing a return. Counsel for the defendant concedes that the broad test of relevancy expounded by McEachern C.J. in *Boxer and Boxer Holdings Ltd. v. Reesor, et al.* and adopted by Urie J. in *Everest & Jennings Canadian Ltd. v. Invacare Corporation* [1984] 1 F.C. 856 (F.C.A.) applies:
>
> > It seems to me that the clear right of the plaintiffs to have access to documents which *may* fairly lead them to a train of inquiry which *may* directly or indirectly advance their case or damage the defendant's case particularly on the crucial question of one party's version of the agreement being more probably correct than the other, entitles the plaintiffs to succeed on some parts of this application…. [*Emphasis in original.*]
>
> … I fail to see how documents pertaining to the activities of other mining companies, whether similar to the plaintiffs or not, can in any way "lead the plaintiffs to a train of inquiry which may directly or indirectly advance their case or damage the defendant's case…" The Minister has an obligation to treat all similarly situated taxpayers in the same manner, but it does not follow that documents pertaining to a similarly situated taxpayer are relevant to any other taxpayer's reassessment.[59]

Of course, the Respondent is not suggesting that the HWT is a taxpayer who is similarly situated to any of the Appellants. Rather, I assume that the Respondent's objective is to show that the HWT, in computing its income for 2011, presumably deducted the distributions made to the Appellants, from which, according to the Respondent, it would follow that the distributions should be included in computing the Appellants' income for 2011. In other words, this would be an application of

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58 *White v The Queen*, [2011] 1 SCR 433, 2011 SCC 13, ¶36.

59 *Oro Del Norte*, *supra* note 57, at p. 6375.

the so-called matching principle, as described by counsel for the Respondent (or, as I prefer to call it, reciprocity of tax treatment).[60]

[62] In their submissions concerning the relevance of the HWT's 2011 tax return and notice of assessment, counsel for the Respondent explained that one of the issues in these Appeals is whether the distributions from the HWT to the Appellants were income or capital. Counsel submitted that, in a general situation, one of the factors to be considered when resolving an income-versus-capital issue is a comparison of the manner in which the payor and the payee of a particular payment report the payment on their respective income tax returns.[61] While counsel did not refer me to any specific authority for that proposition, I acknowledge that certain comments made by the Federal Court of Appeal and the Supreme Court of Canada in *Redeemer Foundation* are supportive. In the Federal Court of Appeal, Pelletier JA stated:

> There is reciprocity in the tax treatment of most commercial transactions. Simply put, one person's business deduction is another person's revenue. The Minister has every interest in confirming that the amount claimed as a business expense by the buyer is the amount recorded as revenue by the seller. In the case of registered charities, the same reciprocity applies. If the Minister determines that donations received are not eligible for deduction, then he has an interest in reviewing the

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60 Counsel for the Respondent used the term "matching principle" to refer to the concept of comparing the manner in which a payor and a payee declare a particular payment on their respective tax returns, as a factor to be considered when determining whether the payment is on income account or capital account; see *Transcript*, August 25, 2016, p. 14, lines 20-26. I am not certain that the term "matching principle" is the best term to use when referring to the concept put forward by counsel for the Respondent, as it is my understanding that the term "matching principle" generally refers to a principle of accounting that seeks to match expenses to revenues and that is used in determining the timing of the deduction of current expenses for income tax purposes; see Canderel Limited v The Queen, [1998] 1 SCR 147, 98 DTC 6100 (SCC), rev'g 95 DTC 5101 (FCA); Toronto College Park Limited v The Queen, [1998] 1 SCR 183, 98 DTC 6088 (SCC), rev'g 96 DTC 6407 (FCA); Oxford Shopping Centres Ltd. v The Queen, [1980] CTC 7, 79 DTC 5458 (FCTD), aff'd [1981] CTC 128, 81 DTC 5065 (FCA); Joseph Frankovich, "The Matching of 'Current' Expense Under Canada's Income Tax Laws," (1998) Canadian Tax Journal, vol. 46, no. 1, p. 1-28; and David G. Duff et al., Canadian Income Tax Law, 4th ed. (Markham; LexisNexis Canada Inc., 2012), p. 883-891. I believe that the concept referred to by counsel for the Respondent might be better described as "reciprocity of tax treatment," as discussed in Redeemer Foundation v MNR, [2008] 2 SCR 643, 2008 SCC 46, aff'g 2006 FCA 325, or as "symmetry," as discussed in Daishowa-Marubeni International Ltd. v The Queen, [2013] 2 SCR 336, 2013 SCC 29, ¶41-43.

61 *Transcript*, August 25, 2016, p. 14, lines 20-26.

> returns of those to whom a receipt has been issued in respect of those donations. This ability to subject both parties to a transaction to equivalent tax treatment is a fundamental aspect of the verification process.[62]

In the Supreme Court of Canada, Rothstein J (dissenting in part) quoted a portion of the above statement by Pelletier JA, and then stated:

> I agree that there is reciprocity of tax treatment of many commercial and charitable transactions and that the CRA may have an interest in seeing how both the taxpayer and the other party to a transaction have recognized it for tax purposes.[63]

[63] Given that the concept of relevance must be interpreted broadly,[64] and given the Supreme Court's recognition of the reciprocity of tax treatment and the desirability of avoiding asymmetrical tax treatment, I am of the view that the manner in which the HWT reported the distributions to the Appellants is relevant to these Appeals, although it is not necessarily determinative.[65]

(7) Decision

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62 *Redeemer Foundation* (FCA), *supra* note 60, ¶41.

63 *Redeemer Foundation* (SCC), *supra* note 60, ¶54. See also *Woodland v The Queen*, 2009 TCC 434, ¶43; and *McAllister v The Queen*, 2007 TCC 708, ¶19.

64 *9005-6342 Québec*, *supra* note 51, ¶41.

65 In paragraph 43 of *Daishowa–Marubeni*, *supra* note 60, the Supreme Court stated, "*Although not dispositive*, … an interpretation of the Act that promotes symmetry and fairness through a harmonious taxation scheme is to be preferred over an interpretation which promotes neither value." (*Emphasis added*.) In discussing the taxation of benefits under paragraph 6(1)(*a*) of the *ITA*, David M. Sherman states "that taxable benefits remain taxable even if the employer does not deduct the cost as an expense"; see *Practitioner's Income Tax Act*, 52nd ed. (Toronto: Thomson Reuters Canada Limited, 2017), p. 7. Similarly, Chris Falk and the other editors of the *Canada Tax Service* (Toronto: Thomson Reuters), vol. 2, p. 6-26 (looseleaf dated 2016-12-16), state that, "As a general rule, taxable benefits are taxable to an employee regardless of whether the employer claims a deduction…." I acknowledge that some employer deductions are optional and that the two quoted statements in this footnote about taxable benefits are, in a sense, the reverse of the argument that the Crown would like to advance, but they do show that reciprocity of tax treatment is not always the rule. Other situations where there is not reciprocity of tax treatment are:

(a) shareholder benefits, where subsection 15(1) of the *ITA* includes the benefit in computing the income of the shareholder, notwithstanding that the corporation which conferred the benefit does not get a deduction or other recognition in respect of the benefit; and

(b) the adjustments under paragraph 69(1)(*a*) and subparagraph 69(1)(*b*)(i) of the *ITA*, where only one side of a particular non-arm's-length transaction is adjusted.

[64] Although the HWT's 2011 tax return and notice of assessment are relevant to these Appeals and there is a presumption of admissibility,[66] I have concluded that, in the circumstances of these Appeals, the Affidavit should not be admitted into evidence for the following reasons:

a) I have not been provided with adequate justification for departing from the general rule of exclusion set out in subsection 89(1) of the *Rules*;

b) there has been no indication that the CRA, in assessing the Appellants, used or considered any information in the HWT's 2011 tax return or notice of assessment; and

c) notice has not been given to the HWT of the Respondent's request to introduce the HWT's confidential taxpayer information as evidence in these Appeals.

B. Applicability of Trust Provisions

[65] During oral argument, I raised the question of whether the trust provisions contained in sections 104 through 108 of the *ITA* are applicable to the disposition of these Appeals. I asked counsel to provide written submissions in respect of this issue.

(1) Appellants' Submissions

[66] In "Supplementary Written Submissions of the Appellants," filed on October 5, 2016, counsel for the Appellants submitted that the provisions contained in sections 104 through 108 of the *ITA* are not relevant to the determination of the issues in these Appeals. Counsel for the Appellants acknowledged that the rollover provisions in section 107.1 of the *ITA* do apply to the HWT, as it is a trust described in paragraph (a.1) of the definition "trust" in subsection 108(1) of the *ITA*. The effect of paragraphs 107.1(*a*) and (*c*) of the *ITA*, which are the applicable provisions, is that neither the HWT nor the Appellants realized a gain or a loss on, respectively, the disposition of property by the HWT when making the distributions or the disposition by the Appellants of parts of their respective interests in the HWT in exchange for the distributions. However, the CRA did not

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[66] *Globe and Mail v Canada (AG)*, [2010] 2 SCR 592, 2010 SCC 41, ¶56. See also *Tang v The Queen*, 2017 TCC 168, ¶22.

assess the Appellants in respect of any alleged gain, such that section 107.1 is not relevant to these Appeals.

(2) Respondent's Submissions

[67] Counsel for the Respondent, in "Respondent's Supplementary Written Submissions re: Sections 104 to 108," filed on November 4, 2016, submitted that sections 104 to 108 of the *ITA* do not assist in the determination of the issues in these Appeals. Thus, counsel for the Respondent concurs with the main thrust of the submissions by counsel for the Appellants concerning the non-applicability of sections 104 through 108. However, counsel for the Respondent then went on to suggest that paragraphs 104(13)(*a*) and 108(5)(*a*) of the *ITA* could constitute an alternative basis for the taxation of the distributions made in 2011 by the HWT to the Appellants.

(3) Concurrence

[68] I concur with the general positions taken by counsel for the Appellants and counsel for the Respondent to the effect that sections 104 through 108 of the *ITA* are not determinative of the issues in these Appeals. I accept the submissions made by counsel for the Appellants in the "Appellants' Reply to Respondent's Supplementary Written Submissions," filed on November 24, 2016, that the Assessments were issued on the basis that section 6 of the *ITA* (in the case of Ms. Ellis and Ms. Kennedy) or section 56 of the *ITA* (in the case of Mr. Scott and Ms. McCann) brought the respective distributions into income, and that it is too late for the Respondent now to suggest, in the alternative, that the applicable charging provisions are paragraphs 104(13)(*a*) and 108(5)(*a*) of the *ITA*.

[69] Having concluded that I need not consider sections 104 through 108 of the *ITA* further, I will now turn my attention to sections 6 and 56 of the *ITA*.

C. Taxability of Distributions

(1) Life Insurance

(a) Mary Ellis (Distribution of $1,371)

[70] Before December 31, 2010, the HWT paid the premiums in respect of the group life insurance coverage for Ms. Ellis. In computing her income from employment for 2010 and preceding taxation years, Ms. Ellis, as required by

subsection 6(4) of the *ITA*, included the amount prescribed by Part XXVII of the *Income Tax Regulations*[67] (the "*ITR*").

[71] The amount distributed to Ms. Ellis by the HWT in 2011 represented a portion of the present value of her beneficiary's loss of life insurance coverage as at December 31, 2010. The calculation of the amount to be distributed to Ms. Ellis was based on the present value of the amount of the life insurance proceeds that would have been paid to her beneficiary on the death of Ms. Ellis; it was not calculated by reference to the premiums that would have been paid if the Group Life Plan had not been terminated.[68] Specifically, if the Group Life Plan had remained in effect, the amount of the life insurance proceeds that would have been payable on the death of Ms. Ellis was $17,000. Mercer calculated the present value of her claim amount as at December 31, 2010 to be $6,855.[69] The amount actually distributed by the HWT to Ms. Ellis in 2011 in respect of the life insurance claim was $1,371.[70]

(b) Susan Kennedy (Distribution of $9,011.88)

[72] Before December 31, 2010, the HWT paid the premiums in respect of the group life insurance coverage for Ms. Kennedy. In computing her income from employment for 2010 and preceding taxation years, Ms. Kennedy, as required by subsection 6(4) of the *ITA*, included the amount prescribed by Part XXVII of the *ITR*.

[73] The amount distributed to Ms. Kennedy by the HWT in 2011 represented the present value of the amount of the life insurance proceeds that would have been paid to her beneficiary on the death of Ms. Kennedy. If the Group Life Plan had remained in effect, the amount of the life insurance proceeds that would have been payable on the death of Ms. Kennedy was $62,000 for basic life insurance and $186,000 for optional life insurance. Mercer calculated the present value of her

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67 *Income Tax Regulations*, CRC, c.945, as amended.

68 Written Submissions of the Appellants, p. 16-17, ¶48-49; Exhibit AR-3, *Transcript* (Whelan), page 16, lines 19-22, question 71; and p. 56, line 13 to p. 57, line 4, questions 247-248. See also Exhibit AR-2, JBOD, vol. 1, tab 14; and vol. 2, tab 35, Forms A & B.

69 Exhibit AR-2, JBOD, vol. 2, tab 35, Ellis Information Statement Package, Form A and Form B, p. 2, lines 51-52.

70 Exhibit AR-2, JBOD, vol. 2, tab 38, Form T4A – Statement of Pension, Retirement, Annuity, and Other Income.

claim amount as at December 31, 2010 to be $29,394.[71] The amount actually distributed by the HWT to Ms. Kennedy in 2011 in respect of the life insurance claim was $9,011.88.[72]

(2) Survivor Benefits

(a) James Scott (Distribution of $8,526.17)

[74] Before December 31, 2010, the HWT paid to Mr. Scott monthly survivor income benefits (defined above as "SIBs"), each in the amount of $871.46. Mr. Scott, as required by subparagraph 56(1)(*a*)(iii) of the *ITA*, included the SIBs in computing his income for 2010 and preceding taxation years.

[75] The amount distributed to Mr. Scott by the HWT in 2011 in respect of the SIBs represented a portion of the present value of the actuarial equivalent of the aggregate SIBs that would have been paid to him during his lifetime if Nortel had not become insolvent. Specifically, Mr. Scott's SIB claim amount was calculated by Mercer as being $124,345.[73] The amount actually distributed by the HWT to Mr. Scott in 2011 in respect of his SIB claim was $8,526.17.[74]

(b) Ann McCann (Distribution of $6,152.42)

[76] Before December 31, 2010, the HWT paid to Ms. McCann monthly survivor transition benefits (defined above as "STBs"), each in the amount of $725. Ms. McCann, as required by subparagraph 56(1)(*a*)(iii) of the *ITA*, included the STBs in computing her income for 2010 and preceding taxation years.

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71 Exhibit AR-3, *Transcript* (Whelan), p. 75, lines 15-20, question 319; and Exhibit AR-2, JBOD, vol. 2, tab 41, Forms A & B.

72 Exhibit AR-2, JBOD, vol. 2, tab 44, Form T4A – Statements of Pension, Retirement, Annuity, and Other Income ($7,281.88 + $1,730.00 = $9,011.88).

73 Exhibit AR-3, *Transcript* (Whelan), p. 28, lines 7-10; and p. 31, line 12 to p. 32, line 25; and Exhibit AR-2, JBOD, vol. 2, tab 47, Form A.

74 Exhibit AR-2, JBOD, vol. 2, tab 50. The documents behind this tab are two T4A slips in the respective amounts of $8,043.38 and $5,145.78, of which, according to paragraph 19 of Mr. Scott's Notice of Appeal, $7,801.99 and $724.18 respectively related to his SIB claim ($7,801.99 + $724.18 = $8,526.17).

[77] Mercer calculated Ms. McCann's STB claim amount to be $24,644.[75] The amount actually distributed by the HWT to Ms. McCann in 2011 in respect of the STB claim was $6,152.42.[76]

(3) Position of the Appellants

[78] The Appellants submit that the distributions to them from the HWT represented settlement payments in consideration for the surrender of their right to receive the benefits that they, or their beneficiaries, would otherwise have received.[77] The Appellants take the position that the distributed amounts constituted consideration for the disposition of a right to receive future amounts, such that the distribution was a capital transaction. According to the Appellants, the distribution was consideration for the surrender or release of a right, rather than a replacement of an underlying benefit.[78]

[79] Ms. Ellis and Ms. Kennedy also submitted that the amounts distributed to them represented a present valuation of the tax-free life insurance proceeds that would have been paid on their deaths to their beneficiaries, such that, if the *surrogatum* principle were to apply, the result would be non-taxability.[79]

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[75] Exhibit AR-3, *Transcript* (Whelan), p. 28, lines 7-10; p. 35, lines 1-5; and p. 40, line 24 to p. 41, line 3; and Exhibit AR-2, JBOD, vol. 2, tab 53, Form A. In one of the responses by Ms. Whelan, as referenced in the previous sentence, she indicated that the claim amount was "an estimate of the future [*sic*] value of lost employment benefits due to the insolvency of Nortel" (p. 35, lines 4-5). In other responses referenced in this footnote (i.e., p. 28, lines 7-10 and p. 41, lines 1-3), Ms. Whelan used the term "present value," which I take to be the correct term.

[76] Paragraph 70 of the SAF. According to paragraph 19 of Ms. McCann's Notice of Appeal, she received two T4A slips, one in the amount of $2,175 and the other in the amount of $4,263.39 ($3,977.42 of which represented the other portion of the STB distribution). In paragraph 8 of the Amended Reply in respect of Ms. McCann's Appeal, the Crown assumed that Ms. McCann received STB distributions in 2011 in the amount of $6,438.39. Exhibit AR-2, JBOD, vol. 2, tab 56, contains a copy of a T4 slip, a copy of a T4A slip issued by TNTC as paying agent for a pension plan and portions of two additional T4A slips issued by NNC; the amount shown in box 028 of one of the partial T4A slips is $2,175.00; the other partial T4A slip does not show any income amount. I accept the amount set out in paragraph 70 of the SAF, i.e., $6,152.42. See also footnote 24 above.

[77] Written Submission of the Appellants, p. 29, ¶76-77.

[78] *Ibid.*, p. 27, ¶70.

[79] *Ibid.*, p. 33, ¶85.

[80] In addition, Mr. Scott and Ms. McCann submitted that, as the amounts distributed to them were paid in settlement of their rights to future benefits, a right which they submitted existed independently of the former Nortel employees (i.e., their respective deceased spouses), it is unreasonable to infer that the distributions were received in recognition of their spouses' employment with Nortel, such that the distributions did not constitute death benefits, as defined in subsection 248(1) of the *ITA*.[80]

(4) Position of the Respondent

The Crown takes the position that the comments by Charron J in *Tsiaprailis* in respect of the non-taxability of a compensatory payment in respect of future benefits were *obiter dicta*, and that the *ratio decidendi* of the majority decision in *Tsiaprailis* was to the effect that the lump-sum settlement payment in respect of arrears was properly taxable.[81] The Crown also takes the position that the *obiter dicta* should be confined to situations involving paragraph 6(1)(*f*) of the *ITA*, a provision that includes in income certain amounts that are received "on a periodic basis … pursuant to" certain specified types of plans. Paragraph 6(1)(*f*) of the *ITA* is not applicable in these Appeals, such that the *Tsiaprailis obiter dicta* is not applicable here. The Crown also takes the position that the distributions by the HWT in 2011 were not promised under a settlement agreement and did not extinguish the Appellants' respective claims against Nortel.[82] In addition, the Crown takes the position that sections 5, 6 and 56 of the *ITA* provide that, subject to certain exceptions which are not applicable here, any payment or benefit received in respect of employment is taxable.[83] As well, the Crown submits that the *surrogatum* principle does apply and that the distributions in 2011 replaced vested employment benefits.[84]

(5) Analysis of *Tsiaprailis*

[81] As the *Tsiaprailis* case was a prominent feature of the submissions presented by counsel for the Appellants and counsel for the Respondent, I will briefly review a few aspects of that case. As the case is well known, I will not provide a detailed summary of its facts. Suffice it to say that Ms. Tsiaprailis had been in receipt of

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80 *Ibid.*, p. 44, ¶117.
81 See *Tsiaprailis v The Queen*, [2005] 1 SCR 113, 2005 SCC 8.
82 Respondent's Written Submissions, p. 2, ¶4-5.
83 *Ibid.*, p. 17, ¶37.
84 *Ibid.*, p. 20, ¶42-43.

monthly disability payments pursuant to a group insurance policy arranged by her employer, which had also paid the premiums in respect of the policy. When the insurer discontinued the payments, Ms. Tsiaprailis sued, and ultimately negotiated a settlement, pursuant to which the insurer paid to Ms. Tsiaprailis a lump-sum payment, portions of which were allocated respectively to the arrears that should have been paid periodically up to the date of the settlement, to the loss of future benefits, and to costs.[85] In analyzing the reasons of the three levels of judges in *Tsiaprailis*, I have focused on the portions of their reasons pertaining to the amount paid in satisfaction of the claim for future benefits, which is the aspect of that case that is most germane to these Appeals. In particular, I have endeavoured to extract the general principles enunciated by the various judges in respect of the scope of paragraph 6(1)(*a*) of the *ITA*, the applicability of the *surrogatum* principle, and the capitalization of a future income stream.

[82] In considering *Tsiaprailis* in the context of these Appeals, it is important to note that the monthly disability payments that Ms. Tsiaprailis received (before the insurer discontinued those payments) were included in computing her income pursuant to paragraph 6(1)(*f*) of the *ITA*. Accordingly, *Tsiaprailis* is not directly on point with these Appeals, as, before 2011, in computing their income, Ms. Ellis and Ms. Kennedy included their life insurance benefits pursuant to subsection 6(4) of the *ITA*, and Mr. Scott and Ms. McCann included their survivor benefits pursuant to subparagraph 56(1)(*a*)(iii) of the *ITA*.[86]

(a) Tax Court of Canada

(i) Limitation on Scope of Paragraph 6(1)(*a*)

[83] The trial judge in *Tsiaprailis*, Bowman ACJ (as he then was), revisited a principle that he had enunciated earlier in *Landry*, in which he had stated:

> Paragraph 6(1)(*a*) is a general provision and it is not intended to fill in all the gaps left by paragraph 6(1)(*f*) – *expressio unius est exclusio alterius*.[87]

In his argument in *Tsiaprailis*, counsel for the Crown suggested that the above statement should be given limited application. Bowman ACJ disagreed:

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85 *Tsiaprailis* (SCC), *supra* note 81, ¶15, 32 and 54.

86 Written Submissions of the Appellants, p. 23, ¶61-62.

87 *Landry v The Queen*, [1998] 2 CTC 2712, 98 DTC 1416 (TCC), ¶10. See also *Johnson Estate v The Queen*, [2002] 2 CTC 2725, 2002 DTC 1535, ¶32; and *Whitehouse v The Queen*, [2000] 1 CTC 2714, 2000 DTC 1616, ¶6-8.

> Counsel for the respondent suggested that the proposition should be given limited application. I agree that all principles of statutory interpretation – including Latin maxims of ancient vintage – should be treated with some caution. Nonetheless we have a specific section containing detailed conditions for the inclusion of an amount in income that would not otherwise be income. Since a crucial condition is not met – in this case that the amount be payable on a periodic basis – the Crown tries to bring it into income under a general provision. This is contrary to the most fundamental rules of statutory interpretation….[88]

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88 *Tsiaprailis v The Queen*, [2002] 1 CTC 2858, 2002 DTC 1563 (TCC), ¶20.

(ii) *Surrogatum* Principle

[84] Another significant aspect of the trial decision in *Tsiaprailis* was the statement by Bowman ACJ that the *surrogatum* principle should be limited to the computation of income from a business:

> I can see no reason for extending that rule [i.e., the *surrogatum* principle], which has been quoted with approval in Canadian courts (*e.g.*, *The Queen v. Manley*, 85 DTC 5150) beyond the computation of income from a business. I have no difficulty with the idea that where a person receives damages or insurance proceeds for the failure to receive business income those damages are themselves income from that business. That is a far cry from the notion that the same principle can justify that a lump sum payment made as the result of a compromise of a law suit brought to recover disability payments that are taxable only if the strict conditions of paragraph 6(1)(*f*) are met can be swept into income under the broad provisions of paragraph 6(1)(*a*). That is a distortion of the logic and common sense of the point that Lord Diplock was making.[89]

[85] In allowing Ms. Tsiaprailis' appeal, Bowman ACJ held the settlement payment was not to be included in computing her income. The Crown appealed.

(b) Federal Court of Appeal

[86] In the Federal Court of Appeal, the majority (Pelletier JA and Strayer JA) determined that the lump-sum payment received by Ms. Tsiaprailis should be allocated between the past and future components of the settlement amount. The majority went on to hold that the portion of the settlement amount relating to accumulated arrears was taxable pursuant to paragraph 6(1)(*f*) of the *ITA* because it related to amounts payable on a periodic basis, notwithstanding that it had been paid as a lump sum as a result of the settlement. The majority acknowledged that the portion of the lump-sum settlement amount pertaining to Ms. Tsiaprailis' future entitlement did not come within paragraph 6(1)(*a*) or paragraph 6(1)(*f*) of the *ITA*.[90]

(i) Limitation on Scope of Paragraph 6(1)(*a*)

[87] Concerning the scope of paragraph 6(1)(*a*) of the *ITA*, Pelletier JA stated:

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89 *Ibid.*, ¶24.

90 *The Queen v Tsiaprailis*, 2003 FCA 136, ¶18 & 25-26.

> Associate Chief Justice Bowman held that a section of general application such as paragraph 6(1)(*a*) could not be used to sweep into income an amount which did not fit within a provision aimed at amounts of that type, such as paragraph 6(1)(*f*). I adopt the learned Trial Judge's position on this issue.[91]

Evans JA, who dissented and who would have dismissed the Crown's appeal and upheld the decision of Bowman ACJ in its entirety, stated the following in respect of this point:

> I have had the benefit of reading the reasons of my colleague Pelletier J.A. I agree that the Crown's argument on paragraph 6(1)(*a*) of the *Income Tax Act* … must fail.[92]

Thus, all three members of the panel who heard the *Tsiaprailis* appeal concurred that paragraph 6(1)(*a*) of the *ITA* cannot be used to sweep into income an amount of a particular type that does not come within a specific provision aimed at amounts of that type.

(ii) *Surrogatum* Principle

[88] The Federal Court of Appeal did not refer to the *surrogatum* principle by name. However, Pelletier JA cited *London and Thames Haven Oil Wharves*, as applied in *Manley*, as authority for the proposition that, "Where a person has a right to receive a payment, the fact that collection activity must be undertaken to compel payment does not change the nature of that payment in the hands of the payee."[93] Evans JA (in dissent) noted that:

> … in *London and Thames Haven Oil Wharves* … it was held that the underlying source of an award of damages was relevant to determining whether the sum awarded should be treated as profits for tax purposes…. Similarly, this Court has also looked behind awards of damages or settlements to determine whether to characterize a payment as a capital gain or business income….[94]

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91 *Ibid.*, ¶5.

92 *Ibid.*, ¶27.

93 *Ibid.*, ¶20. The citation of *London and Thames Oil Wharves* is set out in footnote 117 below, and the citation of *The Queen v Manley* is [1985] 2 FC 208, [1985] 1 CTC 186, 85 DTC 5150 (CA).

94 *Tsiaprailis* (FCA), *supra* note 90, ¶35.

As authority for the above statement, Evans JA cited *Manley*,[95] *Mohawk Oil*,[96] and *T. Eaton*,[97] all of which dealt with taxpayers who participated in an adventure in the nature of trade or carried on a business.

(iii) Surrender of Right to Receive Future Benefits

[89] Although he did not rely on the concept in his decision, Pelletier JA made the following observation concerning the surrender or other disposition of a right to receive future benefit payments:

> This right to receive disability benefits so long as the state of total disability persists is a valuable right, just as the obligation to make the payments so long as the insured is eligible to receive them is a significant liability. The right and the corresponding obligation have a monetary value. An insured can agree to surrender his or her rights, thereby extinguishing the insurer's liability, in return for a payment. The fact that the parties choose to negotiate the value of that right/obligation by reference to the amounts which could become payable under the policy if the insured remained [eligible to receive them] does not mean that the settlement is a pre-payment of the insurer's obligations under the policy. We are not called upon to decide the nature of that right in this appeal but, in other circumstances, the disposition of a right to receive future amounts has been held to be a capital transaction.[98]

(c) Supreme Court of Canada

[90] Ms. Tsiaprailis appealed from the decision by the Federal Court of Appeal that the arrears component of the lump-sum settlement payment was taxable. The Crown did not appeal from the decision that the future component of the settlement payment was not taxable. It appears that the Crown did not argue before the Supreme Court of Canada that the arrears component of the settlement payment came within paragraph 6(1)(*a*) of the ITA. Thus, the only issue before the Supreme Court of Canada was whether the arrears component of the settlement payment came within paragraph 6(1)(*f*) of the *ITA*.

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95 *Manley*, *supra* note 93.

96 *Mohawk Oil Co. v The Queen*, [1992] 2 FC 485 (CA).

97 *T. Eaton Co. v The Queen*, [1999] 3 FC 123 (CA).

98 *Ibid.*, ¶17. As authority for the proposition set out in the above quotation, Pelletier JA cited *Short v The Queen*, [1999] 4 CTC 2085, 99 DTC 1146 (TCC).

(i) *Surrogatum* Principle

[91] Both Charron J and Abella J discussed the applicability of the *surrogatum* principle. In her dissent, Abella J questioned the application of the *surrogatum* principle both on the facts of the case and the statutory provisions under consideration. However, she went to say that, if the *surrogatum* principle were to be applied, she would not find the arrears to be taxable, as the general nature of the settlement amount paid to Ms. Tsiaprailis was to release the insurer from a claim that it was liable and to extinguish her claim for entitlement under the disability insurance policy.[99]

[92] After explaining the *surrogatum* principle in a statement that will be set out below, Charron J observed that the principle has been adopted in a number of Canadian cases, as noted by Peter W. Hogg *et al.* and Vern Krishna in their respective textbooks.[100] Charron J goes on to discuss the *surrogatum* principle in such a manner as to indicate that it was applicable to the portion of the settlement amount received by Ms. Tsiaprailis in respect of accumulated arrears, implying that it was not to be limited to situations where a taxpayer is engaged in an adventure in the nature of trade or a business.[101] Charron J did not suggest that the *surrogatum* principle would result in the portion of the settlement amount for future benefits being taxable.[102]

(ii) Capitalization

[93] Dealing with the concept of capitalization, Charron J referred to the decision of Kellock J in the Supreme Court's decision in 1956 in *Armstrong*, which dealt with the deductibility of a $4,000 payment made by Mr. Armstrong to his wife (or perhaps former wife) to be released from his obligation pursuant to a *decree nisi* of

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99 *Tsiaprailis* (SCC), *supra* note 81, ¶48 & 54.

100 *Ibid.*, ¶7. The referenced excerpts from the textbooks are cited as Peter W. Hogg, Joanne E. Magee and Jinyan Li, *Principles of Canadian Income Tax Law*, 4th ed. (Toronto: Carswell, 2002), p. 91-93; and Vern Krishna, *The Fundamentals of Canadian Income Tax*, 8th ed. (Toronto: Thomson Carswell, 2004), p. 413-415. One of the cases cited by Krishna is *Schwartz v The Queen*, [1996] 1 SCR 254, [1996] 1 CTC 303, 96 DTC 6103 (SCC), in respect of which he states in footnote 4 on p. 413 "surrogatum principle also applies to employment contracts, whether anticipatory or otherwise".

101 *Tsiaprailis* (SCC), *supra* note 81, ¶9-11 & 15-16.

102 The taxability of the portion of the settlement amount allocated to future benefits was not before the Supreme Court of Canada; therefore, one should not read too much into the silence of Charron J on this point.

divorce ordering him to pay $100 a month for the maintenance of the child of the marriage until the child attained age 16 or until the particular court otherwise ordered. Mr. Armstrong deducted the $4,000 payment pursuant to a statutory provision which permitted the deduction of certain amounts payable on a periodic basis for the maintenance of children of a marriage. Charron J quoted the following statement made by Kellock J, in determining that the $4,000 payment was not deductible:

> Such an outlay made in commutation of the periodic sums payable under the decree is in the nature of a capital payment to which the statute does not extend.[103]

Charron J. then went on to state:

> In Kellock J's view, the payment of a lump sum for future benefits would … be characterized as a capital payment.
>
> When the reasoning in *Armstrong* is applied to the present case, it is clear that monies paid in settlement of any future liability under the disability insurance plan were not paid "pursuant to" the plan because there is no obligation to make such a lump sum payment under the terms of the plan. The part of the settlement for future benefits is in the nature of a capital payment and is not taxable under s. 6(1)(*f*) of the Act.[104]

I read the above comments by Charron J as indicating that the amount received by Ms. Tsiaprailis in respect of future benefits was not taxable under paragraph 6(1)(*f*) of the *ITA* because it was a capital payment that was not paid pursuant to the disability insurance plan, such that the payment did not come within the wording of paragraph 6(1)(*f*). In other words, non-taxability arose because the statutory language of paragraph 6(1)(*f*) was not satisfied, and not merely because the settlement amount was a capital payment.

(iii) *Obiter Dicta*

[94] In their written submissions, counsel for the Respondent pointed out that the above statement and other statements in the reasons of Charron J that dealt with the tax treatment of the portion of the lump sum paid to Ms. Tsiaprailis in respect of future benefits were *obiter dicta*.[105] In considering the Respondent's submission, I

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103 *MNR v Armstrong*, [1956] SCR 446, at 448; see *Tsiaprailis* (SCC), *supra* note 81, ¶10.

104 *Tsiaprailis* (SCC), *supra* note 81, ¶10-11.

105 Respondent's Written Submissions, p. 2, ¶4; p. 15, ¶31; and p. 16, ¶34.

have reviewed the guidance by the Supreme Court in respect of its *obiter* statements:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it.[106]

Counsel for the Respondent did not make any submission as to whether the *obiter dicta* by Charron J in *Tsiaprailis* constituted a wider circle of analysis intended for guidance (which should be accepted as authoritative) or commentary, examples or exposition intended to be helpful (which may be persuasive, but are not binding).

[95] In *Prokofiew*, Doherty JA of the Ontario Court of Appeal made the following comments about *obiter dicta* from the Supreme Court of Canada, after quoting paragraph 57 of the *Henry* case:

> 19. The question then becomes the following: how does one distinguish between binding *obiter* in a Supreme Court of Canada judgment and non-binding *obiter*? In *Henry* at para. 53, Binnie J. explains that one must ask, "What does the case actually decide?" Some cases decide only a narrow point in a specific factual context. Other cases – including the vast majority of Supreme Court of Canada decisions – decide broader legal propositions and, in the course of doing so, set out analyses that have application beyond the facts of the particular case.
>
> 20. *Obiter dicta* will move along a continuum. A legal pronouncement that is integral to the result or the analysis that underlies the determination of the matter in any particular case will be binding. *Obiter* that is incidental or collateral to that analysis should not be regarded as binding, although it will obviously remain persuasive.

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106 *R. v Henry*, [2005] 3 SCR 609, 2005 SCC 76, ¶57. In paragraph 55 of his decision in *Henry*, Binnie J explained that "the '*Sellars* principle', as it had come to be known, was thought by some observers to stand for the proposition that whatever was said in a majority judgment of the Supreme Court of Canada was binding, no matter how incidental to the main point of the case or how far it was removed from the dispositive facts and principles of law…." See also *Windsor (City) v Canadian Transit Company*, [2016] 2 SCR 617, 2016 SCC 54, ¶61.

> 21. Lower courts should be slow to characterize *obiter dicta* from the Supreme Court of Canada as non-binding. It is best to begin from the premise that all *obiter* from the Supreme Court of Canada should be followed, and to move away from that premise only where a reading of the relevant judgment provides a cogent reason for not applying that *obiter*. The orderly and rational development of the jurisprudence is not served if lower courts are too quick to strike out in legal directions different than those signalled in *obiter* from the Supreme Court of Canada.[107]

The comments made by Charron J in *Tsiaprailis* about the non-taxability of the future component of Ms. Tsiaprailis' settlement payment were not integral to the result or the analysis that underlay the determination of the matter before the Supreme Court of Canada in that case, given that the appeal dealt only with the taxability of the arrears component of the settlement payment. Therefore, the *obiter dicta* was only incidental or collateral to the analysis before the Supreme Court. In determining the impact of that *obiter dicta* on these Appeals, it is important to note that *Tsiaprailis* dealt with paragraph 6(1)(*f*) of the *ITA*, whereas these Appeals deal with subsection 6(4) or subparagraph 56(1)(*a*)(iii) of the *ITA*, as the case may be. Therefore, *Tsiaprailis* is not on all fours with these Appeals. Thus, even if the *obiter dicta* is binding, it is not determinative of these Appeals. Accordingly, I do not think that it is necessary for me to determine whether, in the context of these Appeals, that *obiter dicta* is binding or merely persuasive.

[96] It should be emphasized that the fact that some of the comments by Charron J in *Tsiaprailis* were *obiter* does not minimize or detract from the holding by the Federal Court of Appeal in *Tsiaprailis* that the portion of the lump-sum settlement amount pertaining to Ms. Tsiaprailis' future entitlement did not come within paragraph 6(1)(*a*) or paragraph 6(1)(*f*) of the *ITA*.

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107 *R. v Prokofiew*, 2010 ONCA 423, ¶19-21.

(6) *Surrogatum* Principle

(a) Statement of Principle

[97] All Parties acknowledged that the tax treatment of damages and settlement payments is generally determined by reference to the *surrogatum* principle,[108] which provides that the taxability of an award of damages or a settlement payment is determined by reference to the nature and purpose of the payment that the damages or settlement amount replaces, as explained in *Tsiaprailis* by Charron J as follows:

> … [A]wards of damages and settlement payments are inherently neutral for tax purposes…. [I]n assessing whether the monies will be taxable, we must look to the nature and purpose of the payment to determine what it is intended to replace. The inquiry is a factual one. The tax consequences of the damage or settlement payment is then determined according to this characterization. In other words, the tax treatment of the item will depend on what the amount is intended to replace. This approach is known as the *surrogatum* principle.[109]

In dissent, Abella J explained the principle this way:

> Damage and settlement payments are inherently neutral for tax purposes and must therefore be classified to determine whether they are taxable. This is the *surrogatum* principle, as defined by Lord Diplock in *London & Thames Haven Oil Wharves Ltd. v. Attwooll (Inspector of Taxes)* (1966), [1967] 2 All E.R. 124 (Eng. C.A.) as follows:
>
> > Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits … the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received instead of the compensation.[110]

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108 Written Submission of the Appellants, p. 26, ¶69; and Respondent's Written Submissions, p. 20, ¶42-43.

109 *Tsiaprailis* (SCC), *supra* note 81, ¶7, per Charron J.

110 *Ibid.*, ¶48, per Abella J (dissent).

(b) Applicability of Principle

[98] Counsel for the Appellants have submitted that the *surrogatum* principle does not apply to render the distributions by the HWT to Ms. Ellis and Ms. Kennedy as taxable income because those payments did not replace the insurance benefits that they had a vested right to receive.[111] Counsel for the Appellants also submitted that the distributions did not replace the premiums payable in respect of the Group Life Plan or the eventual life insurance proceeds.[112] However, as an alternative argument, counsel for the Appellants suggested that, if the distributions were in replacement of anything, it was the tax-free life insurance proceeds that would have been paid to the beneficiaries, such that the *surrogatum* principle should be applied so as to treat the distributions as similarly being tax free.[113]

[99] The primary argument put forward by counsel for the Respondent was that sections 5, 6 and 56 of the *ITA* brought the distributions from the HWT trust into the income of the respective recipients.[114] However, as an alternative argument, counsel for the Respondent submitted that the *surrogatum* principle does apply and that the distributions by the HWT replaced vested employment benefits.[115] In rebutting the Appellants' alternative argument that the distributions replaced tax-free life insurance proceeds, counsel for the Respondent submitted that those proceeds would only have become payable on the death of the insureds and that the proceeds would have been payable to the beneficiaries, not to the insureds.[116] Counsel for the Respondent did not provide detailed submissions as to what it was specifically that the distributions replaced, other than to say that the things replaced were vested employment benefits.

[100] I concur with the submissions of counsel for the Appellants and counsel for the Respondent that the distributions by the HWT to Ms. Ellis and Ms. Kennedy did not replace life insurance proceeds, as such proceeds would have been payable

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111 Written Submissions of the Appellants, p. 41, ¶109. Counsel for the Appellants did not expressly specify what they meant by the phrase "the insurance benefits that the Appellants had a vested right to receive," as used in paragraph 109, but it appears that they were referring to the benefits derived from Nortel's contribution to a group life insurance policy, as referred to in paragraph 108 of their submissions.

112 *Ibid.*, p. 39, ¶101.

113 *Ibid.*, p. 33, ¶85.

114 Respondent's Written Submissions, p. 17, ¶37.

115 *Ibid.*, p. 20, ¶42-43.

116 *Ibid.*, p. 21, ¶45.

to the beneficiaries and not to the insureds, and would have been paid on the deaths of the insureds. As well, I am of the view that the distributions did not replace the premiums payable in respect of the Group Life Plan, because:

a) there was no life insurance coverage in place in 2011;

b) no premiums were payable after 2010;

c) if premiums had been payable in 2011, they would have been paid to the insurer and not to the insureds;

d) the distributions were not calculated by reference to the amounts of the premiums payable before 2011; and

e) the distributions did not result in any life insurance being put in place.

[101] An analysis of the *surrogatum* principle, as enunciated by Diplock LJ, shows that the classical statement of the principle is not ideally suited for the distributions paid in 2011 by the HWT to Ms. Ellis and Ms. Kennedy. The critical passage from *London and Thames Haven Oil Wharves* reads as follows:

> Where … a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received instead of the compensation.[117]

I have difficulty in applying the above formulation of the *surrogatum* principle to the distributions to Ms. Ellis and Ms. Kennedy, as they were not traders in 2011, i.e., they were not carrying on a business in 2011. Furthermore, the *surrogatum* principle applies where a person receives compensation for that person's failure to receive a sum of money. However, as has been noted above, Ms. Ellis and Ms. Kennedy were not entitled to receive either the life insurance proceeds or the life insurance premiums.

[102] Accordingly, in view of the inherent difficulties in endeavouring to apply Lord Diplock's statement of the *surrogatum* principle to Ms. Ellis and

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[117] *London and Thames Haven Oil Wharves, Ltd. v Attwooll (Inspector of Taxes)*, [1967] 2 All ER 124 (Eng. CA), at 134.

Ms. Kennedy, I have considered an alternative expression of the principle, as given by Mogan J in *Dumas*, where he made the following comment:

> In income tax law, there is nothing magic about an amount recovered by a plaintiff in civil litigation whether it be the result of a favourable judgment or a negotiated settlement. The amount recovered is compensatory in nature. That alone will not determine its character for tax purposes as being income or capital or something else. The real question is to determine why the compensatory amount was paid.[118]

In determining why the distributions were paid in 2011 by the HWT to the Appellants, I have concluded that the distributions were paid to Ms. Ellis and Ms. Kennedy as partial compensation for the termination of the Group Life Plan, and the distributions were paid to Mr. Scott and Ms. McCann as partial compensation for the termination of the monthly payment of their respective death benefits.[119]

[103] There is value in having one's life insured, particularly if the insurance is maintained and paid for by someone else. It seems to me that the distributions to Ms. Ellis and Ms. Kennedy were intended to compensate them, in small part, for no longer having their lives insured. This view is supported by the fact that the amounts of the respective distributions were calculated by reference to the present values of the amounts of the life insurance proceeds that would have been paid to the beneficiaries on the deaths of the insureds, and not by reference to the premiums that would have been paid if the Group Life Plan had not been terminated.[120] In other words, I view the distributions as not replacing the life insurance proceeds or, strictly speaking, the premiums *per se*, but as, in a sense, providing partial compensation for the loss of the status of being a member of the

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118 *Dumas v The Queen*, [2001] 1 CTC 2490, 2000 DTC 2603 (TCC), ¶19. As an example of the point made in the above statement, Mogan J referred to the *London and Thames Haven Oil Wharves* case.

119 Given that the premiums in respect of the Group Life Plan and the monthly SIB and STB payments were funded by Nortel on a pay-as-you-go basis, rather than being paid out of the accumulated trust assets, as was the case with certain other benefits, it is not clear that the distributions paid in 2011 by the HWT to the Appellants were paid out of trust property that was specifically set aside to fund the Appellants' benefits *per se*. See paragraph 8 above and Exhibit AR-2, JBOD, vol. 1, tab 12, p. 11, ¶34.

120 Written Submissions of the Appellants, p. 16-17, ¶48-49; Exhibit AR-3, *Transcript* (Whelan), page 16, lines 19-22, question 71; p. 75, line 15 to p. 77, line 11, questions 319-320; and Exhibit AR-2, JBOD, vol. 1, tab 14, p. 1.

Group Life Plan, whose premiums would have been paid by the HWT.[121] In my view, the distributions paid by the HWT to Ms. Ellis and Ms. Kennedy to compensate in part for the loss of that status constituted a benefit, which will be discussed below.

(7) Income or Capital

[104] There is no evidence as to whether the distributions in 2011 by the HWT to the Appellants were paid out of the income or the capital of the HWT. If the distributions were paid out of both income and capital, there is no evidence as to the allocation of the distributions between the income and the capital. However, that is not a concern, as I do not think that such evidence would be determinative of these Appeals.

[105] The income/capital dichotomy might be relevant in a slightly different context. As noted above, several cases have indicated that a lump-sum payment paid to commute a stream of periodic payments otherwise includable in income is a capital payment. For instance, in *Armstrong*, Kellock J stated that an outlay made in commutation of the periodic sums payable under a divorce decree was in the nature of a capital payment.[122] Similarly, in the decision of the Federal Court of Appeal in *Tsiaprailis*, Pelletier JA noted that in some circumstances the disposition of a right to receive future amounts is a capital transaction.[123] As well, in *obiter dicta* (as has already been noted), in the decision of the Supreme Court of Canada in *Tsiaprailis*, Charron J referred to the characterization by Kellock J in *Armstrong* of the lump-sum payment paid to commute the monthly support payments, and then stated that the part of the settlement amount received by Ms. Tsiaprailis for future benefits was in the nature of a capital payment.[124]

[106] The concept of capitalization was discussed by Archambault J in *Beninger*, which dealt with a situation where a court order reduced accumulated arrears of spousal support from $69,416 to $20,000 and cancelled the balance of $49,416. The Crown argued that this changed the nature of the amount owing by the taxpayer, such that it no longer represented support payable on a periodic basis, but

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121 The statement in the sentence to which this footnote is attached may, insofar as the premiums are concerned, represent a distinction without a difference.

122 *Armstrong*, *supra* note 103, p. 448.

123 *Tsiaprailis* (FCA), *supra* note 90, ¶17.

124 *Tsiaprailis* (SCC), *supra* note 81, ¶10-11. See also *Frizzle v The Queen*, 2008 TCC 651, ¶5.

represented an amount paid for a release with respect to the payment of the arrears. Archambault J stated:

> … I do not believe that whenever a taxpayer pays an amount less than the amount of arrears of spousal support (or of any other deductible or taxable amount for that matter) one must automatically conclude that the amount so paid is not deductible or taxable because the nature of the payment has changed. For example, if an employee sues his employer for unpaid salary, the fact that he later accepts a lesser amount in satisfaction of the original claim does not mean that what he received from, or what is paid by, his employer is not salary. The same logic would apply equally with respect to a creditor who sues his debtor for unpaid interest and who, for whatever reason, accepts in full satisfaction of the interest arrears a lesser amount.
>
> In my view, the situation is different where a person agrees to pay for being released from future obligations, such as the payment of a pension, an annuity or any other kind of future income. In such a case, a "capitalization" occurs. In the words of J.P. Hannan and A. Farnsworth, the authors of *The Principles of Income Taxation Deduced from the Cases*, (London: Stevens & Sons Limited, 1952) at page 287, "[c]apitalisation is simply the act of converting what would be income into what is capital". It is also enlightening to cite their observations on how the capitalization process works. At page 288, they state:
>
> > Capitalisation looks to the future−that is, it operates on a right to *future income*. It cannot operate on arrears of what would have been income if it had been received….[125] [*Emphasis in the original.*]

[107] As the distributions by the HWT to Ms. Ellis and Ms. Kennedy were not paid to commute the HWT's obligation to pay future insurance premiums, I am of the view that those distributions did not represent a capitalization. However, as Mr. Scott and Ms. McCann were entitled to receive monthly survivor benefits, the distributions made by the HWT to them represented a capitalization.

[108] The fact that a future income stream is capitalized does not always mean that the capitalized payment is not to be included in computing income. For instance, in *Monart*, where a landlord received a payment whose amount appeared to have been calculated by reference to the landlord's loss of future rent arising from a tenant's premature termination of its lease, the payment was held to be income of the landlord, notwithstanding that the landlord had argued that the tenant's termination of the lease had resulted in a substantial diminution in the value of the

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125 *Beninger v The Queen*, 2010 TCC 301, ¶22-23.

landlord's building, such that (according to the landlord) the payment should be capital.[126] Similarly, in *Canadian National Railway*, it was held that a shipper's payment to CNR of liquidated damages, calculated at the rate of $15 per ton, to compensate the railway for the shipper's failure to meet its contractual shipping commitment, was held to be income, as it was compensation for a loss of income, rather than a loss of capital.[127] In addition, in *Reusse Construction*, a lump-sum settlement payment compensating a landlord for a tenant's failure to pay future rent was treated as income of the landlord.[128]

(8) Surrender or Release of Right to Receive Future Benefits

[109] As noted above, the Appellants took the position that the distributions by the HWT to them constituted consideration for the disposition of a right to receive future amounts, and as such, constituted a capital transaction.[129] In the context of the distributions to Ms. Ellis and Ms. Kennedy, the Appellants base their argument on the fact that the respective amounts of the distributions were calculated by reference to the present value of the life insurance proceeds to be paid on death, and not the present value of the insurance premiums.[130]

[110] Some guidance in respect of this issue might be provided by the *Dumas* case, which had an element of similarity to *Tsiaprailis* and *Landry*, in that, after an insurer had discontinued the payment of monthly disability payments to Mrs. Dumas, she sued the insurer and recovered a lump-sum settlement amount of $105,000, in exchange for the signing of a full and final release, without the insurer admitting liability. In concluding that the settlement amount constituted income, Mogan J stated:

> 25. … The Appellant's problem in this appeal is to demonstrate that the character of the settlement amount is different from the character of the periodic payments (i.e., income) which would otherwise have been received. I will repeat here a statement of Mahoney J.A. in *Manley* ...:
>
> > … *Atkins* is not, and does not purport to be, authority for the proposition that damages, or an amount paid to settle a claim for damages, cannot be income for tax purposes.

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126 *Monart Corp. v MNR*, [1967] CTC 263, 67 DTC 5181 (Exch.).
127 *Canadian National Railway v The Queen*, [1988] 2 CTC 111, 88 DTC 6340 (FCTD).
128 *R. Reusse Construction Co. v The Queen*, [1999] 2 CTC 2928, 99 DTC 823 (TCC).
129 Written Submissions of the Appellants, p. 27, ¶70; and p. 29, ¶76-77.
130 Exhibit AR-3, *Transcript* (Whelan), p. 75, line 15 to p. 77, line 11, questions 319-320.

> The decisions of the Federal Court of Appeal in *Manley* and *Mohawk Oil* prove that all or a portion of an amount recovered as damages (as in *Manley*) or by way of settlement (as in *Mohawk Oil*) may be characterized as income for tax purposes. The character of an amount received as damages or to settle a claim will be influenced, if not wholly determined, by the nature of the claim made by the person receiving the amount….
>
> 27. Appellant's counsel raised the question as to whether Mrs. Dumas received the amount of $105,000 *qua* insured or *qua* employee. In my view, this question is not helpful because the Appellant would not have had any LTD insurance unless she had been employed by NGDA. Her LTD insurance was part of the benefits package which she received as an employee of NGDA. Rather than regarding her receipt of the amount "*qua* insured or *qua* employee" as if they were mutually exclusive alternatives, I would say that she received the amount in respect of or by virtue of her employment with NGDA having LTD insurance coverage.[131]

The above comments suggest to me that, even though Mrs. Dumas released the insurer from its obligation to pay future disability payments, she nevertheless received the settlement amount in respect of or by virtue of her employment.

(9) Scope of Paragraph 6(1)(*a*) of the *ITA*

[111] Paragraph 6(1)(*a*) of the *ITA* has a broad scope. In 1963, a provision similar to the current paragraph 6(1)(*a*) was found in paragraph 5(1)(*a*) of the *Income Tax Act* as it then read. The former provision read as follows:

> 5(1) Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus
>
> (a) the value of board, lodging and other benefits of any kind whatsoever (except the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group life, sickness or accident insurance plan, medical services plan, supplementary unemployment benefit or deferred profit sharing

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131 *Dumas*, *supra* note 118, ¶25 & 27. In paragraph 10 of the decision of the Federal Court of Appeal in *Tsiaprailis*, *supra* note 90, Pelletier JA quoted a portion of paragraph 25 of the *Dumas* decision. Incidentally, in taking a different view of the relationship between paragraphs 6(1)(*a*) and 6(1)(*f*) of the *ITA* than did the respective judges in *Landry*, *Johnson Estate* and *Whitehouse*, Mogan J held in *Dumas* that, although the settlement amount was not taxable under paragraph 6(1)(*f*), it was taxable under paragraph 6(1)(*a*).

> plan) received or enjoyed by him in the year in respect of, in the course of, or by virtue of the office or employment….[132]

[112] In *Ransom*, Noël J noted that the above paragraph 5(1)(*a*), together with paragraph 5(1)(*b*), as they then read, used "such embracing words that at first glance it appears extremely difficult to see how anything can slip through this wide and closely interlaced legislative net."[133]

[113] The above statement (and more) by Noël J was quoted by Dickson J in the *Savage* case.[134] Dickson J went on to consider the phrase "benefits of any kind whatever …" and noted that "[t]he meaning of 'benefits of whatever kind' is clearly quite broad…."[135]

[114] In *Blanchard*, Linden JA explained the purpose and scope of section 6 of the *ITA* in an elucidating passage:

> 3. Section 6 of the *Income Tax Act* was designed to supplement and broaden the notion of taxable employment income as set out in section 5, which provides that all forms of remuneration are to be included as employment income…. The notion of "remuneration", however, encompasses only those payments flowing from an employer to an employee for services rendered or work performed. It does not encompass other gains or advantages not directly classifiable as remuneration but arising, nonetheless, out of the taxpayer's employment. To capture these items, various inclusion provisions were added. Two of those provisions concern us directly here, paragraph 6(1)(a) and subsection 6(3).
>
> 4. Paragraph 6(1)(a) is an all-embracing provision. It provides that all "benefits of any kind whatever" are to be included as employment income if they were received "in respect of, in the course of, or by virtue of an office or employment". The section casts a wide net, incorporating two broadly worded phrases. The first is "benefits of any kind whatever". The scope contemplated by this phrase is plain and unambiguous: all types of benefits imaginable are to be included. Speaking for the majority in *The*

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132 *Income Tax Act*, RSC 1952, c. 148, as amended. It will be noted that the provisions of the former paragraph 5(1)(*a*) have been split between the current subsection 5(1) and the current paragraph 6(1)(*a*).

133 *Ransom v MNR*, [1967] CTC 346, 67 DTC 5235 (Exch.), ¶41.

134 *The Queen v Savage*, [1983] 2 SCR 428, [1983] CTC 393, 83 DTC 5409 (SCC), ¶21.

135 *Ibid.*, ¶23. It is interesting that, although the particular words in the statutory phrase quoted by Dickson J are "benefits of any kind whatever," he used a different phrase (i.e., "benefits of whatever kind") when indicating that the phrase's meaning was clearly quite broad.

> *Queen v. Savage*, … Dickson J. (as he then was) stated that paragraph 6(1)(a) was "quite broad" and covered any "material acquisition which confers an economic benefit".
>
> 5. The second phrase is a group of three phrases: "in respect of", "in the course of", and "by virtue of". In *Nowegijick v. The Queen*, … the Supreme Court of Canada explained the words "in respect of"…:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
>
> 6. The above comments are relevant in interpreting paragraph 6(1)(a). Parliament, [*sic*] has added the phrases "in the course of" and "by virtue of", to the phrase "in respect of" in order to emphasize that only the smallest connection to employment is required to trigger the operation of the section.
>
> 7. Paragraph 6(1)(a) leaves little room for exceptions, but a few have surfaced in the jurisprudence.[136] [*Footnotes omitted.*]

[115] The broad scope of paragraph 6(1)(*a*) of the *ITA* was reaffirmed by the Federal Court of Appeal in *McGoldrick*, as follows:

> As a general rule, any material acquisition in respect of employment which confers an economic benefit on a taxpayer and does not constitute an exemption falls within paragraph 6(1)(a)….[137]

[116] The distributions to Ms. Ellis and Ms. Kennedy were material acquisitions which conferred an economic benefit on each of them. Given that "[t]he phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters,"[138] and given that the addition to paragraph 6(1)(*a*) of the phrases "in the course of" and "by virtue of" emphasizes "that only the smallest connection to employment is required to trigger the operation of"[139] paragraph 6(1)(*a*), I am of the view that, even if the distributions

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136 *The Queen v Blanchard*, [1995] 2 CTC 262, 95 DTC 5479 (FCA), ¶3-7.

137 *McGoldrick v The Queen*, 2004 FCA 189, [2004] 3 CTC 264, 2004 DTC 6407, ¶9. The Federal Court of Appeal cited *Savage* in support of this proposition.

138 *Nowegijick*, *supra* note 46, ¶30.

139 *Blanchard*, *supra* note 136, ¶6.

paid to Ms. Ellis and Ms. Kennedy represented a capitalization (which, in my view, they did not) or if they were consideration for the surrender or release of a right, they would nevertheless have a small connection to the employment of Ms. Ellis and Ms. Kennedy so as to come within paragraph 6(1)(*a*) (subject to any applicable exception). I am not aware of any authority that expressly indicates that a payment representing a capitalization or a payment in consideration of a surrender or release of a right cannot also be a material acquisition which confers an economic benefit on the recipient in respect of, in the course of, or by virtue of the recipient's employment.

[117] Thus, *Ransom*, *Savage*, *Blanchard* and *McGoldrick* clearly establish that paragraph 6(1)(*a*) of the *ITA* casts a wide net and that the provision leaves little room for exceptions – but there are exceptions.

(10) Limitations on the Scope of Paragraph 6(1)(*a*)

[118] Without endeavouring to list all of the exceptions to paragraph 6(1)(*a*) of the *ITA*, I will note a few. The statutory provision itself contains six exceptions, as set out in subparagraphs 6(1)(*a*)(i) through (vi). Subparagraph 6(1)(*a*)(i) excepts any benefit derived from the contributions of a taxpayer's employer to or under (among other things) a group term life insurance policy. The purpose of this exception is to prevent the employer's contributions in respect of the policy itself from being included in income at this point by reason of the words "value of benefits of any whatever".[140] However, where an employee's life is insured under a group term life insurance policy, there may be an income inclusion under subsection 6(4) of the *ITA*.

[119] In *Blanchard*, Linden JA noted that reimbursements for costs actually incurred by an employee are not caught by paragraph 6(1)(*a*) and that benefits wholly extraneous or collateral to one's employment (i.e., a benefit received in one's personal capacity) may fall outside paragraph 6(1)(*a*).[141]

[120] When one considers the reasoning of Dickson J in *Savage*, it appears that the $500 exemption for scholarships, fellowships, bursaries and prizes in paragraph

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140 *Canada Tax Service*, *supra* note 65, vol. 2, p. 6-26 (looseleaf dated 2016-12-16).

141 *Blanchard*, *supra* note 136, ¶8-9.

56(1)(*n*) of the *ITA*, as it read in 1976, constituted, in a sense, an exception to paragraph 6(1)(*a*).[142]

[121] As explained by Bowman J in the trial decision in *Tsiaprailis* (which was adopted on this point by the Federal Court of Appeal), another exception arises where, in addition to the general provision in paragraph 6(1)(*a*), there is "a specific [statutory provision] containing detailed conditions for the inclusion of an amount in income that would not otherwise be income."[143] If a crucial condition for the application of the specific provision is not met, the general provision cannot be used "to fill in all the gaps left by" the specific provision,[144] or "to sweep into income an amount which [does] not fit within [the specific] provision aimed at amounts of that type…."[145] In *Tsiaprailis*, the specific provision was paragraph 6(1)(*f*) of the *ITA*. In the Appeals of Ms. Ellis and Ms. Kennedy, there is a different specific provision, subsection 6(4) of the *ITA*, which required them to include a prescribed amount in computing their income for the taxation years during which their lives were insured under the Group Life Plan.

[122] Subsection 6(4) of the *ITA* reads as follows:

> Where at any time in a taxation year a taxpayer's life is insured under a group term life insurance policy, there shall be included in computing the taxpayer's income for the year from an office or employment the amount, if any, prescribed for the year in respect of the insurance.

Part XXVII of the *ITR* contains detailed rules for calculating the prescribed amount, if any, to be included in a taxpayer's income under subsection 6(4) of the *ITA* in respect of insurance under a group term life insurance policy. In essence, the prescribed amount for a taxpayer is the total the taxpayer's term insurance benefit under the policy, the taxpayer's prepaid insurance benefit under the policy, and certain sales and excise taxes payable in respect of premiums paid under the policy.[146] Part XXVII of the *ITR* does not make any reference to distributions of the type that are the subject of these Appeals.

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142 *Savage*, *supra* note 134, ¶26-28 & 42.

143 *Tsiaprailis* (TCC), *supra* note 88, ¶20.

144 *Ibid.*, ¶19. See also *Landry*, *Johnson Estate* and *Whitehouse*, all of which are cited in footnote 87 above.

145 *Tsiaprailis* (FCA), *supra* note 90, ¶5 & 27. See also *Schwartz v The Queen*, [1996] 1 SCR 254, [1996] 1 CTC 303, 96 DTC 6103 (SCC), ¶52-54.

146 See subsection 2701(1) of the *ITR*.

[123] Some indication of the relationship between subsection 6(4) and paragraph 6(1)(*a*) of the *ITA* was provided by the *Technical Notes* issued by the Department of Finance in November 1994, when subsection 6(4) was amended:

> Subsection 6(4) includes in the income of an employee or former employee an amount in respect of life insurance provided as an employment benefit under a group term life insurance policy. *This subsection applies in place of the general benefit rule in paragraph 6(1)(a).*[147] [*Italicized and underlined emphasis added.*]

Also of note is the following statement in the *Canada Tax Service*:

> Although subparagraph 6(1)(a)(i) excludes benefits derived from an employer's contributions to a group term life insurance policy from the benefits taxable to the employee under the *general* provisions of paragraph 6(1)(a), subsection 6(4) provides for a *specific* income inclusion in respect of life insurance under a group term life insurance policy provided as an employment benefit.[148] [*Emphasis added.*]

[124] I have concluded that subsection 6(4) of the *ITA* and Part XXVII of the *ITR* are specific provisions designed to include in income certain amounts in respect of insurance coverage under a group term life insurance policy. Those specific provisions applied to Ms. Ellis and Ms. Kennedy so as to require them, in computing their income from employment, for each applicable taxation year before 2011, to include the prescribed amount in respect of their participation in the Group Life Plan. As those specific provisions have not captured the distributions paid in 2011 by the HWT to Ms. Ellis and Ms. Kennedy, paragraph 6(1)(*a*) of the *ITA* cannot be used to fill in the gaps left by subsection 6(4) and Part XXVII or to sweep those distributions into income.

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147 Department of Finance, *Technical Notes* (November 1994), s. 6(4).

148 *Canada Tax Service*, *supra* note 65, vol. 2, p. 6-403 (looseleaf dated 2016-04-29).

(11) Death Benefits

(a) Statutory Provisions

[125] In 2010 and previous taxation years (as applicable), Mr. Scott and Ms. McCann included their respective survivor benefits in their income pursuant to subparagraph 56(1)(*a*)(iii) of the *ITA*, which reads as follows:

> 56(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,
>
> (a) any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of, …
>
> (iii) a death benefit….

[126] The relevant portion of the definition of the term "death benefit," as found in subsection 248(1) of the *ITA*, reads as follows (and is subject to certain exclusions, which are not listed below):

> "death benefit" means the total of all amounts received by a taxpayer in a taxation year on or after the death of an employee in recognition of the employee's service in an office or employment….

It is my understanding that all the Parties acknowledge that the monthly payments received before 2011 by Mr. Scott and Ms. McCann ($871.46 in the case of Mr. Scott and $725 in the case of Ms. McCann) constituted death benefits.

(b) Jurisprudence

[127] The phrase "as, on account or in lieu of payment of, or in satisfaction of," which appears in paragraph 56(1)(*a*) of the *ITA*, also appears in subsection 212(1) of the *ITA*. In the *Transocean* case, which dealt with a payment made to a non-resident as consideration for the voluntary termination of a bareboat charter (which had obligated the payor to pay rent for the use of an offshore drilling rig, which rent would have been taxable under paragraph 212(1)(*d*) of the *ITA*), the Federal Court of Appeal stated the following:

> 46. By virtue of the additional words in paragraph 212(1)(d), that provision also applies to any payment made *on account of* such compensation, or *in satisfaction of* such compensation. That would appear to cover virtually all situations in which a payment is made to discharge, in full or in part, an

> obligation to pay compensation to a non-resident for the past or current use, in Canada, of property.
>
> 47. However, paragraph 212(1)(d) of the *Income Tax Act* also includes a payment made *in lieu of* compensation for the use, in Canada, of property. The ordinary meaning of the phrase "in lieu of", according to a number of dictionaries, is "instead of" or "in place of": *Black's Law Dictionary* (7th ed., 1999), *The Canadian Oxford Dictionary* (2001, Oxford University Press), *Gage Canadian Dictionary* (1983, Gage Publishing Limited), *The Canadian Dictionary of English Law* (2nd ed[.], Thomson Canada Limited). It seems axiomatic that an amount that is paid instead of a payment of a particular legal character, or in the place of such a payment, does not have that same legal character. Parliament, in using the words "in lieu of" in paragraph 212(1)(d), must have intended to expand the scope of paragraph 212(1)(d) to include payments other than payments that have the legal character of rent.
>
> 48. If the phrase "in lieu of rent" is interpreted to include only payments made as compensation for the past or current use of property, which is essentially the position of counsel for Transocean, it would add nothing to paragraph 212(1)(d), and thus would have no meaning. However, it would have meaning if it is interpreted, as the Crown contends, to include an amount paid as compensation for the anticipatory breach of a rental agreement. In my view, that is a consideration that would favour adopting the Crown's interpretation in preference to the interpretation proposed by counsel for Transocean.[149] [*Italics in original*.]

In my view, the above comments by Sharlow JA also apply to the interpretation of the same phrase in paragraph 56(1)(*a*) of the *ITA*.

[128] In *Pechet*, Campbell J noted that, in *Transocean*, Sharlow JA gave an expansive scope to the phrase "in lieu of."[150]

(c) Applicability of the Surrogatum Principle to the Death Benefits

[129] In *Transocean*, Sharlow JA indicated that the "judge-made rule, sometimes called the '*surrogatum* principle'," did not need to be considered in that case because the statutory words "in lieu of" expressed a similar idea.[151] Likewise, I am of the view that the words "in lieu of" in subsection 56(1) of the *ITA* express an

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149 *Transocean Offshore Ltd. v The Queen*, 2005 FCA 104, [2005] 2 CTC 183, 2005 DTC 5201, ¶46-48.

150 *Pechet v The Queen*, 2008 TCC 208, ¶12 & 14.

151 *Ibid.*, ¶50-51.

idea similar to the *surrogatum* principle, such that I do not need to consider that principle separately in the context of the death benefits.

(d) Nature of the Distributions to Mr. Scott and Ms. McCann

[130] During the Third Party Examination for Discovery on May 5, 2016 of Lee Close, as a representative of the Monitor, the following exchanges took place:

> 115. Q. And why was Mr. Scott entitled to receive survivor income benefits, to the monitor's knowledge?
>
> A. His spouse had been an employee of Nortel. He would have the benefit and when Mr. Scott's spouse died, he became entitled to payments under the plan.
>
> 116. Q. So is it fair to say that had Mr. Scott's spouse not been employed with Nortel, he would not have been entitled to the survivor income benefit?
>
> A. Yes….[152]
>
> 239. Q. Can you explain why Ms. McCann was receiving the monthly benefits prior to December 31, 2010?
>
> A. Because of an entitlement that she had relevant to her spouse's employment with Nortel at the time of the spouse's death….
>
> 242. Q. So is it correct that if Ms. McCann's spouse was not employed with Nortel, she would not have been eligible for those survivor transition benefits?
>
> A. Yes.[153]

It is my understanding that all the Parties acknowledge that the monthly benefits paid to Mr. Scott and Ms. McCann before 2011 were in recognition of the service of their respective spouses while they were employed by Nortel.

[131] During her examination, Ms. Close made the following comment about the connection between the distributions paid to Mr. Scott and Ms. McCann and his SIBs or her STBs, as the case may be:

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[152] Exhibit AR-4, *Transcript* (Close), p. 28, lines 6-16.

[153] *Ibid.*, p. 55, lines 3-7 & 20-23.

173. Q. So turning to the James Scott narrative, why is it that he received three distributions?

A. So pursuant to the second paragraph of Mr. Scott's document, it indicates that a series of court orders dated December 15, 2010, May 3, 2011, and June 21, 2011, provided for interim distributions from the HWT *on account of* the survivor income benefit.

174. Q. And the next line says that there would be cumulative distributions from the Health and Welfare Trust on account of the SIB benefits calculated using the HWT methodology be brought to 25 percent.

A. Yes.

175. Q. What is your understanding of that?

A. Is that cumulatively, the effect of these three distributions would be that Mr. Scott would have received 25 percent of his SIB benefit calculated using the HWT methodology….[154]

274. Q. If we turn to the narratives that were prepared by Ernst & Young and specifically that of Ann McCann, … we see that the HWT methodology brought her claim to 25 percent. Can you explain why that is?

A. A series of court orders dated December 15, 2010, May 3, 2011, and June 21, 2011, provided that Ms. McCann would cumulatively – sorry provided for distributions, interim distributions *on account of* her survivor transition benefit calculated using the HWT methodology.[155] [*Emphasis added.*]

The above statements by Ms. Close refer to three court orders. The first of those orders, which was issued by the Ontario Superior Court of Justice on December 25, 2010, contained the following provision:

> THIS COURT ORDERS that the Trustee shall make an interim distribution all on the direction of the Monitor or the Applicants *on account of* the Income Benefits to the Income Beneficiaries on before January 31, 2011, or as soon thereafter as is practicable.[156] [*Emphasis added.*]

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154 *Ibid.*, p. 42, lines 5-22.

155 *Ibid.*, p. 60, line 19 to p.61, line 4.

156 Exhibit AR-2, JBOD, vol. 1, tab 19, HWT Interim Distribution Order, p. 2, ¶3. Paragraph 2 of this Order states that all capitalized terms used but not otherwise defined therein

[132] The second Order referred to by Ms. Close was dated May 3, 2011, and contained the following provision:

> THIS COURT ORDERS that the Trustee shall make an interim distribution all on the direction of the Monitor or the Applicants *on account of* the Income Benefits to the Income Beneficiaries on or before May 31, 2011, or as soon thereafter as is practicable (the "May/June Interim Distribution").[157] [*Emphasis added.*]

[133] Ms. Close also referred to a court order dated June 21, 2011, which stated (among other things) the following:

> THIS COURT ORDERS that the Trustee shall make an interim distribution all on the direction of the Monitor or the Applicants *on account of* the Income Benefits to the Income Beneficiaries on or before July 31, 2011, or as soon thereafter as is practicable (the "Third Interim Distribution").
>
> THIS COURT ORDERS that the amount of the Third Interim Distribution of the HWT corpus to each Income Beneficiary, for which the Monitor or the Applicants shall direct payment, will be, when taken with the January Interim Distribution and the May/June Interim Distribution, 25 percent of Income Benefits calculated in accordance with the Approved HWT Allocation Methodology, using data available as of December 31, 2010 according to the Applicants' books and records, as updated from time to time.[158] [*Emphasis added.*]

[134] Paragraph 3 of each of the Orders of the Superior Court referenced above provided for interim distributions to be made on account of the Income Benefits to the Income Beneficiaries. I have not been provided with the respective meanings of the terms "Income Benefits" or "Income Beneficiaries." A glimpse into the meaning (at least in part) of those terms may be obtained from the narratives prepared on or about February 10, 2016 by the Monitor in respect of Mr. Scott and Ms. McCann. The narrative in respect of Mr. Scott contains the following statements:

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shall have the meaning given to them in the Fifty-Seventh Report of the Monitor. That report was not included in the JBOD.

157 Exhibit AR-2, JBOD, vol. 1, tab 20, May/June HWT Interim Distribution Order, p. 2, ¶3. Paragraph 2 of this Order states that all capitalized terms used but not otherwise defined therein shall have the meaning given to them in the Sixty-Fourth Report of the Monitor. That report was not included in the JBOD.

158 Exhibit AR-2, JBOD, vol. 1, tab 21, Third HWT Interim Distribution Order, p. 2, ¶3. Paragraph 2 of this Order states that all capitalized terms used but not otherwise defined therein shall have the meaning given to them in the Sixty-Ninth Report of the Monitor. That report was not included in the JBOD.

> Mr. Scott has a Survivor Income Benefit ('SIB') benefit liability amount of $123,121.61 calculated using the HWT Methodology.
>
> A series of court orders dated December 15, 2010, May 3, 2011 and June 21, 2011 provided for interim distributions from the HWT on account of SIB. The cumulative effect of these orders was contained in the June 21, 2011 order, paragraph 4, which ordered that the cumulative distributions from the HWT on account of SIB calculated using the HWT Methodology be brought to 25%. Accordingly, Mr. Scott received a distribution of 25% on $123,121.61 resulting in an interim HWT distribution to him in 2011 of $30,780.40.[159]

The narrative in respect of Ms. McCann states:

> Ms McCann has a Survivor Transition Benefit ('STB') benefit liability amount of $24,609.69 calculated using the HWT Methodology.
>
> A series of court orders dated December 15, 2010, May 3, 2011 and June 21, 2011 provided for interim distributions from the HWT on account of STB. The cumulative effect of these orders was contained in the June 21, 2011 order, paragraph 4, which ordered that the cumulative distributions from the HWT on account of STB calculated using the HWT Methodology be brought to 25%. Accordingly, Ms. McCann received a distribution of 25% on $24,609.69 resulting in an interim HWT distribution to her in 2011 of $6,152.42.[160]

Based on the testimony given by Ms. Close (as quoted above) and the above statements from the narratives in respect of Mr. Scott and Ms. McCann, I am of the view that the term "Income Benefits," as used in the Orders dated December 15, 2010, May 3, 2011 and June 21, 2011, included the SIBs and the STBs, and the term "Income Beneficiaries," as used in those same Orders, included Mr. Scott and Ms. McCann.

[135] Paragraph 46 of *Transocean*, as quoted above, seems to indicate that the phrases "on account of" and "in satisfaction of," which appear not only in subsection 212(1) but also in paragraph 56(1)(*a*) of the *ITA*, suggest that those statutory provisions may apply to any payment made on account of or in satisfaction of compensation of the applicable type, such that "virtually all situations in which a payment is made to discharge, in full or in part, an obligation

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159 Exhibit AR-2, JBOD, vol. 2, tab 49. I was not provided with an explanation as to why the amount of the distribution that is the subject of Mr. Scott's Appeal is $8,526.17, notwithstanding that the above narrative indicates that the amount of the distribution in 2011 was $30,780.40.

160 Exhibit AR-2, JBOD, vol. 2, tab 55.

to pay [such] compensation"[161] would be covered. Having read the three Orders of the Superior Court referred to above, the testimony given by Ms. Close and the narratives prepared by the Monitor, it is my understanding that the distributions paid in 2011 by the HWT to Mr. Scott and Ms. McCann discharged 25% of the SIB benefit liability or the STB benefit liability, as the case may be, owed by the HWT to Mr. Scott and Ms. McCann respectively. Furthermore, given that those Orders provided that the interim distributions that were the subject of the Orders were to be made "on account of" the Income Benefits (which, in my view, included the SIBs and the STBs), I am of the view that those distributions came within subparagraph 56(1)(*a*)(iii) of the *ITA*, as that statutory provision contains the phrase "any amount received … on account … of … a death benefit".

[136] If the above view is incorrect, I will now consider whether the distributions were amounts received in lieu of a death benefit.

[137] On April 25, 2016 counsel for the Parties, as well as counsel for Mercer, conducted the Third Party Examination for Discovery of Ellen Whelan, who was an actuary consulting in employment benefits at Mercer when the amounts of the distributions to the Appellants were quantified. During the course of her examination, Ms. Whelan made the following comments about the distributions to Mr. Scott:

> 28. Q. So beginning on the very first page of Exhibit 2, I will ask you to refer to the second full paragraph on that first page, and midway through that paragraph it reads: "This process, including the basis for calculating your employment-related claim ('Compensation Claim') has been approved by the Ontario Superior Court of Justice…." Do you see that?
>
> A. Yes
>
> 29. Q. What is meant there by "employment-related claim"?
>
> A. My understanding is this was to be an amount determined for all benefits that employees were going to lose due to the insolvency of the company….
>
> 31. Q. Further, was the reference here to "employment-related claim" a reference to an amount claimed by James Scott in recognition of his former spouse's service in an office or an employment with Nortel Canada?...

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[161] *Transocean, supra* note 149, ¶46.

32. …

A. Yes, it was a claim because of his former spouse's employment with Nortel.

33. Q. Returning again to the first page of Exhibit 2, in the next paragraph it concludes with, "your aggregate Compensation Claim against Nortel Canada is: $218,254." Do you see that?

A. Yes….[162]

39. Q. To the best of your knowledge, what was the $218,254 Compensation Claim intended to replace?

A. The table shows the various benefits that the $218,254….

MR. DAVIS: Just so we're clear for the record, we're looking at Form A, the document entitled Your Compensation Claim Amount and the table on that page, the first page of that document….

THE DEPONENT: So this table summarizes the various different employment-related benefits that Mr. Scott would have been entitled to receive had the company survived due to his former spouse's employment, and the amounts calculated for each benefit represent the foregone future ability to claim against those benefits because the company is insolvent….[163]

90. Q. To the best of your knowledge, do you know what the payments that he would have received were intended to replace?

A. The payments he would have received from the Health and Welfare trust were intended to replace a portion of some of the benefits we walked through on Form B [*sic*].

91. Q. On Form B there were several benefits that were listed. Do you know which one of those benefits the payments were intended to replace or compensate for?

A. In particular, the survivor income benefit and the pensioner life insurance benefits were compensated from the Health and Welfare Trust.

MR. DAVIS: You're looking at Form A.

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[162] Exhibit AR-3, *Transcript* (Whelan), p. 7, line 21 to p. 9, line 4.

[163] *Ibid.*, p. 9, line 24 to p. 10, line 15.

> THE DEPONENT: Sorry, Form A.[164]

[138] During her examination, Ms. Whelan made the following comments in respect of the distributions to Ms. McCann:

> 151. Q. … Is it correct that the compensation claim identified relates to an amount claimed by Ann McCann in recognition of her spouse's service in an office or employment with Nortel?
>
> A. Yes.
>
> 152. Q. In the third full paragraph on the first page, it indicates, "your aggregate Compensation Claim against Nortel Canada: $55,067."
>
> A. Yes….[165]
>
> 158. Q. And to the best of your knowledge, what was the compensation claim in amount of $55,067 intended to replace?
>
> A. If you turn over two pages to Form A, the table on that page gives a breakdown of the calculation of the $55,067. So primarily the payment was in lieu of lost survivor transition benefits, $24,644, and lost post-retirement medical and dental benefits, is the main claim.[166]

[139] It is my understanding that Ms. Whelan was examined as a representative of a third party, presumably pursuant to section 99 of the *Rules*. The transcript of her examination was entered as Exhibit AR-3, upon the request of counsel for the Appellants and counsel for the Respondent. Ms. Whelan did not testify as an expert. It is my understanding that the purpose of her examination was to explain the manner in which Mercer analyzed the respective claims of the Appellants (and numerous other employees, former employees or survivors of former employees) against Nortel. I read the comments quoted above as indicating Mercer's understanding of the context in which it performed its calculations, and not as a conclusive determination of the nature and purpose of the distributions. Thus, the amounts of the distributions to Mr. Scott and Ms. McCann were calculated by Mercer on the understanding that those amounts would partially replace, or be in lieu of, the death benefits that would have been paid to them if NNC had not become insolvent.

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164 *Ibid.*, p. 21, lines 3-16.

165 *Ibid.*, p. 35, line 18 to p. 36, line 1.

166 *Ibid.*, p. 36, line 23 to p. 37, line 5.

[140] As indicated above, I am of the view that the principles enunciated by the Federal Court of Appeal in interpreting the phrase "in lieu of" in paragraph 212(1)(*d*) of the *ITA* may also be applied to the interpretation of subparagraph 56(1)(*a*)(iii) of the *ITA*. I have found the following statement (which I have modified) from the reasons in *Transocean* to be particularly helpful:

> Parliament, in using the words "in lieu of" in paragraph 212(1)(d) [or subparagraph 56(1)(*a*)(iii)], must have intended to expand the scope of paragraph 212(1)(d) [or subparagraph 56(1)(*a*)(iii)] to include payments other than payments that have the legal character of rent [or a death benefit].[167]

Thus, the distributions paid in 2011 by the HWT to Mr. Scott and Ms. McCann did not need to have the legal character of death benefits in order to come within subparagraph 56(1)(*a*)(iii) of the *ITA*. Rather, it was sufficient for those distributions to have been paid instead of, in place of, or in lieu of, the death benefits that would have been paid but for the Nortel insolvency.

[141] To conclude on this point, if the distributions paid in 2011 by the HWT to Mr. Scott and Ms. McCann were not received by them on account of the death benefits that they were entitled to receive, I am of the view that those distributions were received by them instead of, in place of, or in lieu of, those death benefits, so as to come within the statutory phrase "any amount received … in lieu of payment of, … a death benefit."

[142] I am not aware of any authority that expressly indicates that a payment representing a capitalization of monthly death benefits or a payment in consideration of a surrender or release of a right to receive monthly death benefits cannot also constitute an amount received by the recipient instead of, in place of, or in lieu of payment of, those monthly death benefits.

V. CONCLUSION

[143] Based on the above reasons:

a) the Appeals of Ms. Ellis and Ms. Kennedy are allowed and the Assessments that are the subject of those Appeals are referred back to the Minister for reconsideration and reassessment on the basis that the distributions in the amounts of $1,371 and $9,011.88 paid in 2011 by the HWT to Ms. Ellis and

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[167] *Transocean*, *supra* note 149, ¶47. My modifications are set out in square brackets.

Ms. Kennedy respectively in respect of the Group Life Plan are not to be included in computing their income for 2011;

b) the Appeal of Ms. McCann is allowed and the Assessment that is the subject of that Appeal is referred back to the Minister for reconsideration and reassessment on the basis that the amount of the distribution paid in 2011 by the HWT to her that pertained to her STBs and that is to be included in computing her income for 2011 is $6,152.42 (and not $6,438.39);[168] and

c) the Appeal of Mr. Scott is dismissed.

Counsel for the Appellants and counsel for the Respondent may make submissions, in writing or orally (as they desire), concerning costs.

Signed at Ottawa, Canada, this 9th day of November, 2017.

"Don R. Sommerfeldt"

Sommerfeldt J.

[168] See footnotes 24 and 76 above.

APPENDIX A

2014-3260(IT)G, 2014-3263(IT)G,
2014-3265(IT)G, and 2014-3266(IT)G

TAX COURT OF CANADA

BETWEEN:

**JAMES SCOTT, SUSAN KENNEDY, MARY ELLIS,
AND ANN MCCANN**

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

The parties to these appeals admit, for the purposes of these proceedings only, the truth of the facts set out in this Statement of Agreed Facts and the authenticity, as defined in section 129 of the *Tax Court of Canada Rules (General Procedure)*, of the documents cited herein or included in the Joint Book of Documents, and consent to the admissibility of these documents. Nothing in this document precludes any parties from relying on the facts otherwise in the record before the court.

I. BACKGROUND

1. Until January 14, 2009, Nortel Networks Corporation ("Nortel") was a publicly-traded Canadian company and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries. It operated a global networking solutions and telecommunications business. On January 14, 2009 most of the Nortel entities filed for bankruptcy protection. In Canada, the Canadian incorporated entities filed under the *Companies' Creditors Arrangement Act* (the "*CCAA*").[169]

2. The Superior Court appointed Ernst & Young Inc. as the monitor of the Nortel estate (the "Monitor").[170]

3. During the *CCAA* proceeding, Nortel divested itself of substantially all of its assets and business units and terminated the vast majority of its employees in Canada.[171]

4. The Appellants consists of former employees of Nortel and surviving spouses of former Nortel employees who had a vested right to various benefits by virtue of their employment or their spouse's employment with Nortel, including the life insurance benefits or survivor income benefits at issue in these appeals.[172]

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[169] *Nortel Networks Corporation (Re)*, 2015 ONSC 2987 [**CCAA Allocation Decision**], Joint Book of Documents [**JBOD**], Tab 29, paras. 1 and 2; *Nortel Networks Corp (Re)*, [2009] OJ No 154, January 14, 2009, JBOD, Tab 1, paras. 1 and 2. Ontario Superior Court of Justice Fifth Amended and Restated Initial Order Re: Nortel Networks Corp, January 14, 2009, as amended and restated on February 25, 2011 [**Stay Order**], JBOD, Tab 3, para. 1 to 5.

[170] Stay Order, JBOD, Tab 1, paras. 27-28. See also Ontario Superior Court of Justice Fifth Amended and Restated Initial Order Re: Nortel Networks Corp, January 14, 2009, JBOD, Tab3, pp. 14-15, para. 24.

[171] CCAA Allocation Decision, JBOD, Tab 29, paras. 2 and 3.

[172] Health and Welfare Trust Agreement and Amendments, effective as of January 1, 1980 (Amendments September 24, 1984 and June 1, 1994) [**Trust Agreement**], JBOD, Tab 30. See also *Nortel Networks Corp (Re)*, 2010 ONSC 5584, November 9, 2010 [**HWT Distribution Endorsement**], JBOD, Tab 16, paras. 8 and 9(b); Fifty-First Report of the Monitor, dated August 27, 2010 [**Fifty-First Monitor's Report**], JBOD, Tab 12, paras. 32-34.

5. As of January 1, 1980, Nortel established Health and Welfare Plans ("HW Plans") for the benefit of certain active and former employees.[173]

6. Most of Nortel's health and welfare benefits, including the life insurance and survivor income/transition benefits were delivered through the Nortel Health and Welfare Trust (the "HWT") established pursuant to the trust agreement between the Montreal Trust Company and Northern Telecom Limited, a predecessor of Nortel, made effective as of January 1, 1980, as amended from time to time (the "Trust Agreement").[174] The HWT is a single trust fund created for the purpose of delivering health and welfare benefits to active and retired employees of Nortel and their eligible dependents in accordance with the HW Plans.[175]

7. By agreement dated December 1, 2005, Nortel appointed the Northern Trust Company, Canada (the "Trustee") as the successor Trustee under the HWT and the Trust Agreement was amended to reflect this change. As of the same date, Nortel entered into a letter agreement with the Trustee, wherein Nortel agreed to be solely responsible for determining the contributions required to adequately fund the HW Plans and for administering the HW Plans and indemnified the Trustee from all claims and liabilities incurred by the Trustee arising out of the contributions made (or not made) by Nortel to the HWT or out of the administration of the HW Plans. The letter provides that "to the extent necessary, this letter shall constitute an amendment to the Health and Welfare Trust".[176]

8. As at December 31, 2010, the HWT had insufficient assets to deliver the vested employee benefits. Nortel is insolvent and cannot fund the benefits.[177]

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[173] Trust Agreement, JBOD, Tab 30, p. 1, para. 1.

[174] Trust Agreement, JBOD Tab 30.

[175] Trust Agreement, JBOD Tab 30, Article II, paras. 1 and 2.

[176] Letter Agreement dated December 1, 2005 between Nortel Networks Limited and The Northern Trust Company, Canada, Successor Trustee of the Nortel Health and Welfare Trust, JBOD, Tab 33.

[177] Fifty-First Monitor's Report, JBOD, Tab 12, para. 23.

9. Certain employment-related issues of former Nortel employees are addressed in the Amended and Restated Settlement Agreement made as of March 30, 2010 (the "ARSA") between Nortel, the Monitor and the court-appointed representatives of the former Nortel employees (the "Former Employee Representatives"), the Appellant Sue Kennedy on behalf of the Represented LTD Beneficiaries, and Representative Counsel (collectively the "Settlement Parties").[178]

10. The ARSA was approved by the Superior Court by Order dated March 31, 2010 (the "Settlement Approval Order"). The Settlement Approval Order was affirmed by the Ontario Court of Appeal on June 3, 2010.[179]

11. The ARSA provided that up to December 31, 2010, Nortel continued to pay life insurance benefits and survivor income/transition benefits. The ARSA provides that no such benefits shall be paid by Nortel for any benefit coverage period following December 31, 2010.[180]

12. Pursuant to the ARSA, the affected employees and survivors, including the Appellants, are entitled to file an unsecured claim as ordinary creditors against the Nortel estate in the CCAA proceeding for any funding deficit in the HWT or any HWT related claims.[181]

13. The Appellants provided a release, as set out in section G of the ARSA, of any other claims against the Trustee of the HWT, the Monitor, among others. Nothing in the ARSA released Nortel from any claim for any funding deficit in the HWT or any HWT related claims (the "HWT Claims") to the extent such claims are allowed as ordinary unsecured claims against Nortel.[182]

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[178] Amended and Restated Settlement Agreement made as of March 30, 2010 [**ARSA**], JBOD, Tab 9.

[179] *Nortel Networks Corporation (Re)*, 2010 ONSC 1977, Endorsement of Morawetz J. made as of March 31, 2010 [**Settlement Approval Order**], JBOD, Tab 10; *Networks Limited (Re)*, 2010 ONCA 402, Endorsement of Morawetz J. made as of June 3, 2010 [**Denial of Leave to Appeal**], JBOD, Tab 11, para. 1.

[180] Fifty-First Monitor's Report , JBOD, Tab 12, para. 45; Ninety-Ninth Report of the Monitor, dated November 13, 2013, [**Ninety-Ninth Monitor's Report**], JBOD, Tab 27.

[181] ARSA, JBOD, Tab 9, Article II, para. 2.

14. In the ARSA, the Settlement Parties agreed to "work towards developing a Court approved distribution of the HWT corpus in 2010 to its beneficiaries entitled thereto and the resolution of any issues necessarily incident thereto."[183] The ARSA did not affect "the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT."[184]

15. The HWT allocation agreed to by the Settlement Parties was submitted to the Superior Court for approval as set out in the Fifty-first Report of the Monitor dated August 27, 2010.

16. The allocation was based on the methodology agreed to by the Settlement Parties for the purpose of the HWT distribution (the "HWT Methodology") as set out in the valuation report prepared by Nortel's actuarial firm, the Mercer Company ("Mercer") dated August 27, 2010, as amended (the "Mercer Report").[185]

17. The HWT allocation as proposed by the Monitor in its Fifty-first Report was approved by the Superior Court. The reasons for judgement are set out in Superior Court's endorsement of November 9, 2010 and the allocation and distribution of the HWT's corpus was approved by the Superior Court by Order dated November 9, 2010 (the "HWT Allocation Order").[186]

18. The methodology for allocation of the corpus of the HWT endorsed by the Ontario Superior Court of Justice provided that the amount of the allocation was to be calculated

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[182] ARSA, JBOD, Tab 9, Article II, para. 2.

[183] ARSA, JBOD, Tab 9, Article II, para. 1.

[184] ARSA, JBOD, Tab 9, Article II, para. 1.

[185] Mercer Valuation of the Obligations of the Non-Pension Benefits as at December 31, 2010, Appendix C to the Fifty-First Monitor's Report, dated August 27, 1010 [**Mercer Valuation Report**], JBOD, Tab 14.

[186] Settlement Approval Order, JBOD, Tab10; Ontario Superior Court of Justice HWT Allocation Order dated November 9, 2010 [**HWT Allocation Order**], JBOD, Tab 17, p. 3, para. 3(b); *Networks Limited (Re)*, 2010 ONCA 402 (denial of leave to appeal), JBOD, Tab 11.

based on each approved participating benefit's[187] respective share of the present value of all the approved participating benefits.[188] The Order also provided that certain beneficiaries,[189] including the Appellants, will receive distributions from the approved participating benefits' *pro rata* share of the HWT corpus.[190]

19. The distribution of the corpus of the HWT was to be made by the Trustee (or an agent of the Trustee or Nortel) to the entitled individuals in accordance with the HWT Allocation Order.[191]

20. Distributions from the HWT in accordance with the HWT Allocation Order commenced in 2011 pursuant to various interim distribution orders issued by the Superior Court in 2011.[192] The Appellants all received distributions as set out below.

21. The date of Notice of Termination of the HWT for all purposes under and pursuant to the Trust Agreement was deemed to be December 31, 2010 in the HWT Allocation Order.[193]

22. By Order dated November 19, 2013, the Superior Court further ordered that "upon the posting of the Notice of Declared Distribution on the Monitor's website and completion of the distributions from the HWT as provided for in this Order, the HWT will

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[187] The approved participating benefits are: (i) Pensioner Life; (ii) LTD Income; (iii) LTD Life; (iv) LTD Optional Life Benefit; (v) STBs in pay; and (vi) SIBs in pay; see HWT Allocation Order, JBOD, Tab 17, p. 3, para. 3(b).

[188] HWT Allocation Order, JBOD, Tab 17, p. 3, para. 3(b); Mercer Valuation Report, JBOD, Tab 14.

[189] The beneficiaries are: (i) Pensioners for Pensioner Life (Ellis); (ii) LTD Beneficiaries for LTD Income and LTD Life (Kennedy); (iii) LTD Beneficiaries under Optional Life; (iv) STB beneficiaries (McCann); and SIB beneficiaries (Scott): see HWT Allocation Order, JBOD, Tab 17, p. 3, para. 3(c).

[190] HWT Allocation Order, JBOD, Tab 17, p. 3, para. 3(c).

[191] HWT Allocation Order, JBOD, Tab 17, p. 4, para. 5.

[192] The Ontario Superior Court of Justice, HWT Interim Distribution Order, made as of December 15, 2010, JBOD, Tab 19; The Ontario Superior Court of Justice, May/June HWT Interim Distribution Order, made as of May 3, 2011, JBOD, Tab 20; The Ontario Superior Court of Justice, Third HWT Interim Distribution Order, made as of June 21, 2011, JBOD, Tab 21; The Ontario Superior Court of Justice, Fourth HWT Interim Distribution Order, made as of August 23, 2011, JBOD, Tab 22; The Ontario Superior court of Justice, Fifth HWT Interim Distribution Order, made as of November 8, 2011, JBOD, Tab 23; Ninety-Ninth Monitor's Report, JBOD, Tab 27, para. 17.

[193] HWT Allocation Order, JBOD, Tab 17, para. 4.

automatically terminate." [194] As of August 2016, the distributions from the HWT have not been completed.

II. COMPENSATION CLAIMS AGAINST THE NORTEL ESTATE

23. Pursuant to the ARSA, the Appellants agreed that with respect to any HWT Claims, the Appellants shall not advance, assert or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, and such claims, to the extent allowed against Nortel, shall rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel.[195] The amount of the payments from the Nortel estate that will be received by the Appellants based on their claims have yet to be determined.[196]

24. The amount of the total claim determined for each Appellant for the present value of all benefit claims as at December 31, 2010 was determined by Mercer in accordance with the Court-approved compensation claim methodology by Order dated October 6, 2011 and the procedure for submitting the claims was set out in the Order dated October 6, 2011.[197] Particulars of such amounts are:

Appellant	**Benefit claim amount as of December 31, 2010**	**2011 *pro rata* payment from HWT**
Mary Ellis	$6,855[198]	$1,371

[194] Ontario Superior Court of Justice HWT – Declared Distribution Order, November 19, 2013, JBOD, Tab 28, p. 5, para. 14.

[195] ARSA, JBOD, Tab 9, Article II, para. 2.

[196] The Ontario Superior Court of Justice, Compensation Claims Methodology Order, October 6, 2011 [**Compensation Claims Methodology Order**], JBOD, Tab 25; The Ontario Superior Court of Justice, Compensation Claims Procedure Order, October 6, 2011 [**Compensation Claims Procedure Order**], JBOD, Tab 26; Mary Ellis Beneficiary Estimated Allocation Statement, JBOD, Tab 37; Susan Kennedy Beneficiary Estimated Allocation Statement, JBOD, Tab 42; James Scott Beneficiary Estimated Allocation Statement, JBOD, Tab 48; Ann McCann Beneficiary Estimated Allocation Statement, JBOD, Tab 55.

[197] Compensation Claims Methodology Order, JBOD, Tab 25; Compensation Claims Procedure Order, JBOD, Tab 26.

[198] Mary Ellis Information Statement Package in the Matter of Nortel Canada CCAA Proceedings [**Ellis Information Package**], JBOD, Tab 35, Form A – Your Compensation Claim Amount, p 1 of 2.

Appellant	Benefit claim amount as of December 31, 2010	2011 *pro rata* payment from HWT
Susan Kennedy	$29,394[199]	$9,011
James Scott	$124,345[200]	$8,526
Ann McCann	$24,644[201]	$6,152

25. The Appellants received T4A slips in respect of their *pro rata* payments in 2011, and included those amounts in computing their taxable income for the year. The Minister assessed the Appellants' T4A income amounts as filed. The Appellants subsequently objected to the tax assessments, and ultimately appealed to this Court.

III. THE APPEALS

26. There are four type of benefits at issue in these appeals as follows:

Appellant	Benefit
Mary Ellis	Pensioner Life Insurance
Susan Kennedy	Long Term Disability Life Insurance
James Scott	Survivor Income Benefit
Ann McCann	Survivor Transition Benefit

[199] Susan Kennedy Information Statement Package in the Matter of Nortel Canada CCAA Proceedings [**Kennedy Information Package**], JBOD, Tab 41, Form A – Your Compensation Claim Amount, p 1 of 2.

[200] James Scott Information Statement Package in the Matter of Nortel Canada CCAA Proceedings [**Scott Information Package**], JBOD, Tab 47, Form A – Your Compensation Claim Amount, p 1 of 2.

[201] Ann McCann Information Statement Package in the Matter of Nortel Canada CCAA Proceedings [**McCann Information Package**], JBOD, Tab 53 Form A – Your Compensation Claim Amount, p 1 of 2.

A. Mary Ellis – Pensioner Life Insurance Benefit

27. Mary Ellis ("Ellis") is a retired employee of Nortel who had a vested right to receive life insurance benefits for her lifetime under the Nortel Group Term Life Insurance Plan (the "Group Life Plan") by virtue of her employment with Nortel.

28. Ellis was a beneficiary of the HWT and was entitled to receive a share of the HWT distribution in accordance with the HWT Allocation Order.[202]

29. The terms of the Group Life Plan are set out in various insurance policies (collectively referred to as the "Insurance Policies")[203] and various employee and pensioner benefit booklets provided to Nortel employees and pensioners (collectively referred to as the "Benefits Booklet").[204]

30. Life insurance proceeds were payable on the death of the pensioner to their designated beneficiary.[205] The amount of proceeds payable under the Insurance Policies to the

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[202] HWT Distribution Endorsement, JBOD, Tab 16, paras. 89 and 114-116.

[203] Policy #13900, Insurance Agreement between Mutual Life Assurance Company of Canada and Northern Telecom Limited Re: Group Policy # 13900, effective as of January 1, 1999 [**Policy # 13900**], JBOD, Tab 67; Overview – Policy #14900, Insurance Agreement between Clarica Life Insurance Company and Northern Telecom Limited Re: Group Policy # 14900, effective as of January 1, 1998 [**Policy # 14900**], JBOD, Tab 68; Reissue Highlights, Insurance Agreement between Clarica Life Insurance Company and Nortel Networks Limited Re: Group Policy # 14901, effective as of January 1, 2002 [**Policy #14901**], JBOD, Tab 69; Amendment Agreement No. 11, Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 20531, effective as of December 1, 2004 [**Policy # 20531**], JBOD, Tab 70; Amendment Agreement No. 7, Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 20532, effective as of May 1, 2005 [**Policy # 20532**], JBOD, Tab 71; Reissue – Agreement No. 9, Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 20533, effective as of December 1, 2004 [**Policy # 20533**], JBOD, Tab 72; Reissue – Agreement No. 4, Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 20534, effective as of December 1, 2004 [**Policy # 20534**], JBOD, Tab 73.

[204] 2009 Enrollment Overview Guide, dated 2008, JBOD, Tab 59, pp. 16; 2009 Nortel Health & Group Benefits Handbook, updated to January 1, 2009 [**2009 Benefits Handbook**], JBOD, Tab 60, pp. 53-60 and 64-65; Pensioner Health Care Plan, Traditional Program – Grandfathered Employees, updated to January 1, 2006, JBOD, Tab 61, pp. 13-14; Pensioner Health Care Plan, Traditional Program – Grandfathered Employees, Quebec, updated to January 1, 2006, JBOD, Tab 62, pp. 14; Retiree Healthcare and Life Benefits, Balanced Program, updated to January 1, 2006, JBOD, Tab 63, pp. 3-4 and 15; Retiree Healthcare and Life Benefits, Balanced Program, Quebec, updated to January 1, 2006, JBOD, Tab 64, pp. 3-4 and 16; Retiree Healthcare and Life Benefits, Traditional Program, updated to January 1, 2006, JBOD, Tab 65, pp. 3-4 and 18; Retiree Healthcare and Life Benefits, Traditional Program, Quebec, updated to January 1, 2006, JBOD, Tab 66, pp. 3-4 and 19.

[205] Policy #20532, JBOD, Tab 71, section G-1.

beneficiary on the death of the Pensioner varied based on the earnings of the pensioner while they were an active employee of Nortel.[206] For Ellis, the insurance proceeds that would have been paid to her beneficiary on her death was $17,000.[207]

31. Pursuant to the ARSA, Ellis continued receiving life insurance benefits with premiums paid until December 31, 2010. No life insurance benefits were paid by Nortel for any benefit coverage period following December 31, 2010.[208]

32. The present value of Ellis' claim as at December 31, 2010 was estimated by the Monitor to be $6,855 based on the methodology adopted by the Monitor and agreed to by the Settlement Parties to value compensation claims made against the Nortel estate in the *CCAA* Proceedings (the "Compensation Claims Methodology").[209]

33. In accordance with the HWT Allocation Order, Ellis received a lump sum payment of $1,371 in 2011 from the HWT. This amount was calculated in accordance with the HWT Methodology.[210]

34. The Group Life Plan was silent with respect to any payments to be made to the insured pensioner and any lump sum payments to either the pensioner or their designated beneficiary, other than the insurance proceeds payable to the beneficiary on the death of the pensioner.[211]

35. Prior to December 31, 2010, Ellis included the group term life insurance benefits as a taxable benefit when computing her taxable income.

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[206] Policy #20532, JBOD, Tab 71, Appendix A-1.

[207] Monitor's Description of Distribution Methodology for Ellis, JBOD, Tab 36, p 1.

[208] ARSA, JBOD, Tab 9, Section B, para 1.

[209] Monitor's Description of Distribution Methodology for Ellis, JBOD, Tab 36, p. 1; Ellis Information Package, JBOD, Tab 35, Form A – Compensation Claim Amount, p. 1.

[210] ARSA, JBOD, Tab 9, Section C, para. 2.

[211] Policy #20532, JBOD, Tab 71; and see for example 2009 Benefits Handbook, JBOD, Tab 60, p. 53.

36. With respect to the lump sum payments from the corpus of the HWT received by Ellis**,** the Monitor issued T4As and Ellis filed her tax return to include in taxable income the lump sum payments received from the HWT.[212] Ellis was assessed as filed.[213]

37. Ellis served a Notice of Objection for 2011 to object to the inclusion of the lump sum payments in her taxable income.[214]

B. Susan Kennedy – LTD Life Insurance Benefit

38. Susan Kennedy ("Kennedy") is a former employee of Nortel who was receiving long term disability benefits ("LTD Benefits") under the Nortel Long Term Disability Plan for full-time employees (the "LTD Plan").

39. As an LTD Benefits recipient, Kennedy had a vested right to receive life insurance benefits until the age of 65 under the Group Life Plan by virtue of her employment with Nortel while she was in receipt of LTD Benefits (the "LTD Life Benefits"), and after age 65 would have been eligible for Pensioner Life insurance benefits under the Group Life Plan for her lifetime.[215]

40. Kennedy is a beneficiary of the HWT under the Trust Agreement and was entitled to receive a share of the HWT distribution in accordance with the HWT Allocation Order.

41. The terms of the LTD Life Benefits are set out in the same Insurance Policies and Employee Booklets as the Pensioner Life Benefit at issue in the Ellis Pensioner Life Benefit Appeal.

42. The life insurance proceeds were payable on the death of the LTD Employee to their designated beneficiary and varied based on the earnings of the LTD Employee while an

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[212] Mary Ellis T4A Statement, JBOD, Tab 38, Box 28.

[213] 2011 Notice of Assessment of Mary Ellis, dated April 5, 2012, JBOD, Tab 39.

[214] T400A Income Tax Act Objection for Mary Ellis, Canada Revenue Agency, dated October 10, 2012, JBOD, Tab 40.

[215] Trust Agreement, JBOD, Tab 30, Appendix A, Section II – Long Term Disability Benefit, pp. 7, para. 3; Fifty-First Monitor's Report, para. 53, JBOD, tab 12; Kennedy Information Package, JBOD, Tab 41, Form B – Your Personal Information Change Form, p. 1, l. 5.

active employee of Nortel.[216] For Kennedy, the insurance proceeds that would have been paid to her beneficiary on her death consisted of $62,000 for basic life insurance and $186,000 for optional life insurance benefits.[217]

43. Pursuant to the ARSA, Kennedy continued receiving a life insurance benefit with premiums paid until December 31, 2010. No life insurance benefits were paid by Nortel for any benefit coverage period following December 31, 2010.[218]

44. The present value of Kennedy's claim as at December 31, 2010 was estimated by the Monitor to be $29,394 based on the Compensation Claims Methodology.[219]

45. In accordance with the HWT Allocation Order, Kennedy received lump sum payments of $7,281.88 in September 2011 and $1,730.00 in December 2011 from the HWT. This amount was calculated in accordance with the HWT Methodology.[220]

46. The Group Life Plan was silent on any payments to be made to the LTD Employees and any lump sum payments to either the LTD Employee or their designated beneficiary, other than the insurance proceeds payable to the beneficiary on the death of the LTD Employee.[221]

47. Prior to December 31, 2010, Kennedy included the group term life insurance benefits as a taxable benefit when computing her taxable income.

48. With respect to the lump sum payments from the corpus of the HWT received by Kennedy**,** the Monitor issued T4As and Kennedy filed her tax return to include in taxable

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[216] Policy #20531, JBOD, Tab 70, Section G-1 and Appendix B.

[217] Mercer Valuation Report, JBOD, Tab 14, p. 1.

[218] ARSA, JBOD, Tab 9, Section B, para 1.

[219] Kennedy Information Package, JBOD, Tab 41, Section Form A, p. 1.

[220] See HWT Allocation Order, JBOD, Tab 17, para. 4; Kennedy Information Package, JBOD, Tab 41, Section Form A, p. 1; Mercer Valuation of the Obligations of the Non-Pension Benefits as at December 31, 2010 for the Purpose of Termination of the Health and Welfare Trust, prepared February 2, 2016 [**Mercer Overview**], JBOD, Tab 34; Monitor's Description of Distribution Methodology for Kennedy, JBOD, Tab 43, p. 1; Susan Kennedy T4A Statements, JBOD, Tab 44, Box 28.

[221] See for example 2009 Benefits Handbook, JBOD, Tab 60, pp. 53; Settlement Approval Order, JBOD, Tab 10, paras. 10 and 11.

income the lump sum payments received from the HWT.[222] Kennedy was assessed as filed.

49. Kennedy served a Notice of Objection for 2011 to object to the inclusion of the lump sum payments in her taxable income.[223]

C. James Scott – Management Survivor Income Benefit

50. James Scott ("Scott") is the spouse of a deceased former employee of Nortel who had a vested right to receive monthly survivor income benefits (the "SIB") under the Management Survivor Income Benefit Plan (the "SIB Plan") by virtue of his spouse's employment with Nortel.

51. The SIB Plan covered all active non-unionized full-time employees of Nortel designated as management or management support staff, including Scott's deceased spouse.[224]

52. The terms of the SIB Plan are set out in the plans attached as appendix A to the Trust Agreement.[225]

53. The SIB Plan provided eligible SIB Survivors with a monthly income benefit based on a percentage of the deceased employee's basic annual salary, to be paid on a monthly basis for the life of the surviving spouse.[226]

54. Scott was entitled to receive a monthly SIB payment of $871.46 on or after the death of his spouse in recognition of his spouse's employment with Nortel.[227]

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[222] 2011 Notice of Assessment of Susan Kennedy, dated May 29, 2012, JBOD, Tab 45.

[223] T400A Income Tax Act Objection for Susan Kennedy, Canada Revenue Agency, dated November 5, 2012, JBOD, Tab 46.

[224] Trust Agreement, JBOD, Tab 30, Appendix A, p 1, Section Scope of Appendix, para. 1, and Section Definitions, para. 2(e).

[225] Trust Agreement, JBOD, Tab 30, Appendix A, p 1, Section Scope of Appendix, para. 1, and Section Definitions, para. 2(e).

[226] Trust Agreement, JBOD, Tab 30, Appendix A, p 3, Section Survivor Income Benefit, para. 2 and pp. 4-5, paras. 2-3.

[227] Mercer Valuation Report, JBOD, Tab 14, pp. 2; Scott Information Package, JBOD, Tab 47, Form B – Personal Information Change Form, p. 1.

55. Pursuant to the ARSA, Scott continued receiving a monthly SIB benefit until December 31, 2010. No SIB benefits were paid by Nortel for any benefit coverage period following December 31, 2010.[228]

56. In accordance with the HWT Allocation Order, Scott received lump sum payments of $724.18 in January 2011, $482.79 in May 2011, and $7,319.20 in July 2011. These amounts were calculated in accordance with the HWT Methodology.[229]

57. The present value of Scott's SIB benefits as at December 31, 2010 was estimated by Mercer to be $124,345 based on the Compensation Claims Methodology.[230]

58. The SIB Plan was silent with respect to any lump sum payment to be made to an eligible Survivor, other than a lump sum payment where a Nortel employee died as a result of an occupational accident, which is not applicable in these Appeals.[231]

59. Prior to December 31, 2010, Scott included the monthly SIB payments he received as a taxable death benefit when computing his taxable income.

60. With respect to the lump sum payments to Scott, the Monitor issued T4As and Scott filed his tax return to include in taxable income the lump sum payments received from the HWT.[232] Scott was assessed as filed.[233]

61. Scott served a Notice of Objection for 2011 to object to the inclusion of the lump sum payments in his taxable income.[234]

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[228] ARSA, JBOD, Tab 9, Section B, para 1.

[229] See HWT Allocation Order, JBOD, Tab 16, para. 4; Monitor's Description of Distribution Methodology for Scott, JBOD, Tab 49, p. 1; Mercer Overview, JBOD, Tab 34; James Scott T4A Statement, JBOD, Tab51, Box 28.

[230] Scott Information Package, JBOD, Tab 47, Form A – Compensation Claim Amount, p. 1.

[231] Trust Agreement, JBOD, Tab 30, Appendix A, Section Survivor Income Benefit (SIB), pp. 3-4, paras. 1(c) and 2.

[232] James Scott T4A Statements, 2011, JBOD, Tab 50, Box 28.

[233] Notice of Assessment of James Scott, dated May 22, 2012, JBOD, Tab 51.

[234] T400A Income Tax Act Objection for James Scott, Canada Revenue Agency, dated October 15, 2012, JBOD, Tab 52.

D. Ann McCann – Union Survivor Transition Benefit

62. Ann McCann ("McCann") is the spouse of a deceased unionized employee of Nortel. She had a vested right to receive monthly survivor transition benefits (the "STB") under the Union Survivor Transition Benefit Plan (the "STB Plan") by virtue of her spouse's employment with Nortel.

63. McCann was a beneficiary of the HWT and was entitled to receive a share of the HWT distribution in accordance with the HWT Allocation Order.

64. The STB Plan covered all active unionized employees of Nortel under various collective bargaining agreements with various unions that provided for STB benefits (collectively referred to as the "Collective Agreements") for employees covered by the applicable Collective Agreements, including McCann's deceased spouse.[235]

65. The terms of the STB Plan are set out in the various insurance policies (collectively referred to as the "STB Insurance Policies") and the Benefits Booklets.[236]

66. The STB Plan provided similar benefits to the SIB Plan at issue in the Scott SIB Survivor Appeal outlined above; upon the former employee's death, monthly income payments were made to eligible STB Survivors.[237]

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[235] See for example Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 25654, Appendix C-2, effective as of July 1, 1979 [**Policy # 25654 – Appendix C-2]**, JBOD, Tab 75, pp. E-1 ("This Plan is effective…to those hourly and salaried employees of Nortel Networks Limited who are members of the bargaining unit represented by C.E.EP. Local 4 and Local 9.").

[236] See Insurance Agreement between Clarica Heritage and Northern Telecom Canada Limited Re: Group Policy # 90002, Appendix C-7, effective as of November 22, 1979 **[Policy # 90002**], JBOD, Tab 74, Section Survivor Transition Benefit Plan, pp E-1 to E-5; Policy # 25654 – Appendix C-2, JBOD, Tab 75, Section Survivor Transition Benefit Plan, pp E-1 to E-8; Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 25654, Appendix C-7, effective as of July 1, 1979 [**Policy # 25654 – Appendix C-7**], JBOD, Tab 76, Section Survivor Transition Benefit Plan, pp E-1 to E-5; Insurance Agreement between Sun Life Assurance Company of Canada and Nortel Networks Limited Re: Group Policy # 25654, Appendix C-3, effective as of July 1, 1979 [**Policy # 25654 – Appendix C-3**], JBOD, Tab 77, Section Survivor Transition Benefit Plan, pp F-1 to F-5; 2009 Benefits Handbook, JBOD, Tab 61, pp. 68.

[237] See for example Policy # 25654 – Appendix C-2, JBOD, Tab 75, p. E-7.

67. McCann was entitled to receive a monthly STB benefit of $725.00 on or after the death of her spouse in recognition of her spouse's employment with Nortel for a fixed five year period, which would have ended on December 31, 2013.[238]

68. Pursuant to the ARSA, McCann continued receiving a monthly STB benefit until December 31, 2010. No STB benefits were paid by Nortel for any benefit coverage period following December 31, 2010.[239]

69. The present value of McCann's STB benefits as at December 31, 2010 was estimated by the Monitor to be $24,644 based on the Compensation Claims Methodology.[240]

70. In accordance with the HWT Allocation Order, McCann received lump sum payments of $2,175 in January 2011, $285.97 in May 2011, and $3,691.45 in July 2011 from the HWT, calculated in accordance with the HWT Methodology.[241]

71. The STB Plan was silent with respect to any lump sum payment to be made to an eligible STB Survivor, other than a lump sum payment where the Nortel employee died as a result of an occupational accident, which is not applicable in these Appeals.[242]

72. Prior to the December 31, 2010, McCann included the monthly STB payments received as a taxable death benefit in computing her taxable income.

73. With respect to the lump sum payments received by McCann, the Monitor issued T4As and McCann filed her tax return to include in her taxable income the lump sum payments received from the HWT. McCann was assessed as filed.[243]

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[238] Mercer Valuation Report JBOD, Tab 14, p. 2.

[239] ARSA, JBOD, Tab 9, Section B, para. 1.

[240] McCann Information Package, JBOD, Tab 53, Form A – Compensation Claim Amount, p. 1.

[58] See HWT Allocation Order, JBOD, Tab 17, para. 4.; Monitor's Description of Distribution Methodology for McCann, JBOD, Tab 55, p. 1; Mercer Overview, JBOD, Tab 34; Ann McCann T4A Statement, JBOD, Tab 56, Box 28.

[242] See for example Policy #25654 – Appendix C-2, JBOD, Tab 75, p. E-1 (definition of "Lump Sum Benefit").

[243] Notice of Assessment of Ann McCann, dated June 7, 2012, JBOD, Tab 57.

74. McCann served a Notice of Objection for 2011 to object to the inclusion of the lump sum payments in her taxable income.[244]

DATED at the City of Toronto, Ontario, on this 23rd day of August, 2016.

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[244] T400A Income Tax Act Objection for Ann McCann, Canada Revenue Agency, dated October 22, 2012, JBOD, Tab 58.

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COURT FILE NO.:	2014-3260(IT)G, 2014-3263(IT)G, 2014-3265(IT)G and 2014-3266(IT)G
STYLE OF CAUSE:	JAMES SCOTT AND HER MAJESTY THE QUEEN, SUSAN KENNEDY AND HER MAJESTY THE QUEEN, MARY ELLIS AND HER MAJESTY THE QUEEN, ANN MCCANN AND HER MAJESTY THE QUEEN,
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	August 25, 2016 and October 5, 2016
FILING DATES OF SUBMISSIONS:	August 24, 2016 (Appellants and Respondent) October 5, 2016 (Appellants) November 4, 2016 (Respondent) November 24, 2016 (Reply by Appellants)
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF JUDGMENT:	November 9, 2017

APPEARANCES:

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