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Superintendent of Financial Services

Ontario

Surintendant des services financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "**PBA**");

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services to approve, under section 70, the Second Addenda to the Wind Up Reports filed in respect of the Nortel Networks Negotiated Pension Plan, Registration Number 0587766 and the Nortel Networks Managerial and Non-Negotiated Pension Plan, Registration Number 0342048; and

AND IN THE MATTER OF a Notice of Intended Decision to Refuse to Make Orders under sections 87(1) and (4) of the PBA relating to the Nortel Networks Negotiated Pension Plan, Registration Number 0587766 and the Nortel Networks Managerial and Non-Negotiated Pension Plan, Registration Number 0342048.

NOTICE OF INTENDED DECISIONS

TO:

MORNEAU SHEPELL LTD. IN ITS CAPACITY AS THE APPOINTED ADMINISTRATOR OF THE NORTEL NETWORKS NEGOTIATED PENSION PLAN AND THE NORTEL NETWORKS MANAGERIAL AND NON-NEGOTIATED PENSION PLAN
895 Don Mills Road, Suite 700
One Morneau Sobeco Centre
Toronto, ON M3C 1W3

Administrator of the Plans

Attention:

Hamish Dunlop
Principal

AND TO:

COURT APPOINTED REPRESENTATIVES OF THE FORMER EMPLOYEES OF NORTEL NETWORKS CORPORATION AND SEVERAL OF ITS AFFILIATED COMPANIES

Care of

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Representative Counsel for the Former Employees of Nortel Networks Corporation and Several of its Affiliated Companies

Attention:

Mark Zigler

I INTEND TO APPROVE, under sections 70 and 89(4) of the PBA, the following documents (together referred to herein as the "**Indexation Addenda**"):

a. The Second Addendum to the Wind Up Report for the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan Wind Up as at October 1, 2010 Defined Benefit Provision Only, prepared and submitted November 9, 2017; and

b. The Second Addendum to the Wind Up Report for the Nortel Networks Negotiated Pension Plan Wind Up as at October 1, 2010 Defined Benefit Provision Only, prepared and submitted November 9, 2017.

I INTEND TO REFUSE TO MAKE the following orders in respect of the Nortel Networks Negotiated Pension Plan, Registration Number 0587766 (the "**Negotiated Plan**") and in respect of the Nortel Networks Managerial and Non-Negotiated Pension Plan, Registration Number 0342048 (the "**Managerial Plan**" and, together with the Negotiated Plan, the "**Plans**"):

a. An Order pursuant to section 87(4) of the PBA requiring the Administrator of the Plans to prepare new Indexation Addenda, using assumptions and methods that calculate member entitlements and Pension Benefits Guarantee Fund ("**PBGF**" or the "**Guarantee Fund**") refunds in a manner which does not take into account certain amounts paid into the pension funds for the Plans from the estate of Nortel Networks Corporation and several of its Affiliated Companies;

b. An Order pursuant to section 87(1) of the PBA requiring the Administrator to refrain from distributing funds to the PBGF, in accordance with the Indexation Addenda.

Si vous désirez recevoir cet avis en français, veuillez envoyer votre demande immédiatement à: Adjointe, audiences, Greffe, Commission des service financiers de l'Ontario, 5160 rue Yonge, boîte 85, Toronto ON M2N 6L9.

YOU ARE ENTITLED TO A HEARING before the Financial Services Tribunal (the "**Tribunal**") pursuant to subsection 89(6) of the PBA. **A hearing before the Tribunal about this Notice of Intended Decisions may be requested by completing the enclosed Request for Hearing (Form 1) and submitting it to the Tribunal within 30 days after this Notice of Intended Decisions is served on you.1 A copy of that form is included with this Notice of Intended Decisions.** Additional copies can be obtained by visiting the Tribunal's website at www.fstontario.ca.

If a Request for Hearing (Form 1) is submitted to the Tribunal within 30 days after this Notice of Intended Decisions is served on you, subsections 89(8) and 89(9) of the PBA provide that the Tribunal shall appoint a time for and hold a hearing, and by order may direct the Superintendent of Financial Services (the "**Superintendent**") to make or refrain from making the intended decisions indicated in this notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the PBA and its regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

IF NO WRITTEN REQUEST FOR A HEARING IS MADE within 30 days after this Notice is served on you, TAKE NOTICE THAT, pursuant to subsection 89(7) of the PBA, the

Superintendent will carry out the intended decisions set out herein.

A completed Request for Hearing form must be received by the Tribunal within 30 days after this Notice is served on you. Forms may be mailed, faxed, or delivered to:

Financial Services Tribunal
5160 Yonge Street, 14th Floor
Toronto ON M2N 6L9

Attention: The Registrar
Fax: 416-226-7750

The hearing before the Tribunal will proceed in accordance with the Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal made under the authority of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22. Those Rules are available at the website of the Tribunal: www.fstontario.ca. Alternatively, a copy can be obtained by telephoning the Registrar of the Tribunal at 416-590-7294, or toll free at 1-800-668-0128 ext. 7294.

REASONS FOR INTENDED DECISIONS:

1. These are the Reasons of the Superintendent in support of his Notice of Intended Decisions to approve, under section 70 of the PBA, the Indexation Addenda and to refuse to issue Orders under sections 87(1) and (4) of the PBA requiring the Administrator to revise the Indexation Addenda and to refrain from distributing amounts to the PBGF in accordance with the Indexation Addenda.

I. Background

2. Nortel Networks Corporation and several of its Affiliated Companies ("**Nortel**") was the sponsor of the Plans. On January 14, 2009, Nortel was granted creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") by the Superior Court of Justice (Commercial List) (the "**Court**").

3. On May 27, 2009 and July 30, 2009, the Court granted representation orders appointing Donald Sproule, Michael Campbell, David Archibald and Susan Kennedy (for employees who were in receipt of long-term disability benefits) as representatives of the former employees of Nortel (together the "**Representatives**"). Koskie Minsky LLP was also appointed as representative counsel for the former employees of Nortel.

4. Proofs of claim, each dated September 28, 2009, were filed by Nortel in respect of each of the Plans ("**Original Proofs of Claim**") for the purpose of Nortel's CCAA proceeding. The Original Proofs of Claim noted that the claim would need to be adjusted if the Plans were subsequently wound up.

5. Effective October 1, 2010, the Superintendent appointed Morneau Sobeco Limited Partnership (now Morneau Shepell Ltd.) as the administrator for each of the Plans (the "**Administrator**").

6. On March 8, 2011, the Superintendent issued orders winding up each of the Plans in full under section 69 of the PBA. The effective date of the wind ups, as specified in the orders, is October 1, 2010.

7. On April 5, 2011, the Administrator filed applications (the "**Applications**") under section 34(7) of Regulation 909, R.R.O. 1990 made under the PBA (the "**Regulation**") for an

"interim allocation" from the PBGF to each of the Plans. The amounts of the proposed interim allocations were estimated to be sufficient, together with the assets of the Plans, to provide the benefits determined under sections 34(5) and (6) of the Regulation and pay the reasonable costs of the Administrator.2 The Applications were prepared in accordance with FSCO's published Revised Guarantee Fund Allocation Process.

8. On May 26, 2011, the Superintendent issued orders, pursuant to section 83(1) of the PBA, declaring that the PBGF applies to the Plans.

9. The Administrator also filed Actuarial Opinions for each of the Plans as at December 1, 2010 (the "**Actuarial Opinions**") in support of the Applications for each of the Plans. The Actuarial Opinions state that the Ontario wind up funded ratios estimated in the Actuarial Opinions are used only to approximate the Plans' PBGF claim and that the Ontario wind up funded ratios for the purposes of section 34 of the Regulation will be established in the wind up reports, subject to regulatory approval. The Actuarial Opinions also state in several places that the amount of the interim allocation is a "best estimate" based on the information then available and that, if the interim allocation is insufficient to settle the Plans' liabilities, further applications for additional allocations from the PBGF will be made.

10. The Actuarial Opinions also state that that the Administrator has filed claims on behalf of the Plans in the Nortel CCAA proceeding for the "funding deficiency" in each of the Plans. The Actuarial Opinions indicate that "it is not possible to quantify potential recoveries" and that the Actuarial Opinions were prepared "without taking into account any potential recoveries" from the Nortel estate.

11. On May 27, 2011, the Superintendent approved the two Applications and allocated $287,197,000 to the Managerial Plan and $96,780,000 to the Negotiated Plan both from the PBGF (the "**Allocations**"). The approval letter for each of the Plans stated that any money allocated from the PBGF but not required to provide for the benefits determined in accordance with section 34 of the Regulation "shall be returned to the Guarantee Fund".

12. In December 2013, the Administrator prepared the Actuarial Report on the Wind Up of the Nortel Networks Negotiated Pension Plan Defined Benefit Provision Only Actuarial Wind Up Report as at October 1, 2010 (the "**Negotiated Wind Up Report**"). The Negotiated Wind Up Report was revised and resubmitted in August 2015**.**

13. On August 11, 2015, the Administrator filed Amended Proofs of Claim (the "**Claims**") which updated and adjusted the Original Proofs of Claim "to take into account, among other things, the court-approved wind ups of the Plans and the resulting obligation of Nortel to fund the wind up deficits in the Plan pursuant to section 75 of the PBA." The Amended Proofs of Claim identified claims of $520,835,000 in respect of the Negotiated Plan and $1,368,644,000 in respect of the Managerial Plan. These amounts were calculated based upon the total wind up deficit in each of the Plans. There were no separate claims filed in respect of lost indexation although indexation entitlements were included in the benefit liabilities used to calculate the total value of the Claims.

14. In November 2015, the Administrator submitted the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan Defined Benefit Provision Only Wind Up Actuarial Valuation as at October 1, 2010 prepared as at March 31, 2015 (the "**Managerial Wind Up Report**").

15. Both Wind Up Reports did not take into account any additional amounts payable to the Plans in respect of the Claims.

16. On or about July 6, 2017, the Administrator received interim distributions from the Nortel estate to the Plans (the "**Dividends**"). Specifically, the Negotiated Plan received $236,941,937 and the Managerial Plan received $622,633,000. The Administrator has indicated that there is a possibility that additional amounts may be paid from the Nortel estate once the CCAA Monitor has dealt with certain unresolved issues concerning claims against the Nortel estate.

17. In August 2017, the Administrator filed an addendum to each of the two Wind Up Reports (the "**August Addenda**") dealing with the Administrator's proposed treatment of the Dividends. In a letter dated September 13, 2017, the Representatives objected to the August Addenda.

18. On October 10, 2017, the Administrator filed revised addenda (the "**Revised Addenda**") dealing only with the portion of the Dividends allocated for non-Ontario employment and the portion of the Dividends allocated for Ontario employment other than amounts which could be attributed to indexation benefits. The Revised Addenda were filed to permit the processing of benefit increases to members in respect of the portion of Dividends allocated for non-Ontario employment and the portion of the Dividends allocated for Ontario employment that are not attributable to indexation benefits, and therefore, not in dispute. The Representatives have confirmed that their objection does not relate to the Revised Addenda. The Revised Addenda were approved by the Superintendent.

19. On November 9, 2017, the Administrator filed the Indexation Addenda which set out the proposed treatment of the remaining portion of the Dividends allocated for Ontario employment which the Representatives claim is attributable to indexation. The Representatives calculate, based on the methodology in the Indexation Addenda, that the resulting refunds payable to the PBGF are $67,344,000 from the Negotiated Plan and $153,876,000 from the Managerial Plan.

20. The Representatives object to the Indexation Addenda on the basis that the calculation of the amounts payable back to the PBGF as a refund should not take into account any portion of the Dividends which the Representatives assert is attributable to lost indexation. Based on the Representatives' position, the representatives calculate that the amounts to be refunded to the PBGF should be $30,251,000 from the Negotiated Plan and $91,367,000 from the Managerial Plan.

II. Position of the Representatives

21. The Representatives argue that the members of the Plans are contractually entitled to indexation under the terms of the Plans and that there are no provisions in the PBA or Regulation which limit such an entitlement. As a result, the Representatives argue, the Administrator is under a fiduciary duty to advance a claim against the Nortel estate in respect of lost indexation benefits and to ensure that amounts recovered in respect of such losses are distributed to members only.

22. Section 34 of the Regulation sets out the methodology for computing the quantum of a PBGF allocation to a pension plan. The Representatives argue that section 34 prescribes the "amount of funding the PBGF will provide to a plan, and how the administrator must calculate the amount of PBGF funding required to meet obligations to members on the date the Superintendent makes an order under section 83(1) of the PBA declaring that the PBGF applies to the plan." The Representatives argue that nothing in section 34 (or any other section of the Regulation or PBA) permits the reduction of benefits to members or

the use of amounts recovered in respect of lost future indexation to pay a refund to the PBGF for benefits the PBGF does not guarantee.

23. The Representatives argue that neither section 34 nor any other section of the Regulation addresses the treatment of amounts recovered from the estate of an insolvent employer after an order is made under section 83(1) or after the Superintendent authorizes a payment from the PBGF. The Representatives argue that the only provision which addresses the treatment of amounts recovered from the estate of an insolvent employer is section 86(4) of the PBA which sets out the entitlement of the Superintendent to subrogate to the rights of the administrator of a pension plan "in respect of which the Superintendent authorizes payment from the Guarantee Fund". The Representatives argue that the Superintendent's subrogation rights under section 86(4) are limited only to recoveries that are attributable to benefits guaranteed by the PBGF.

III. Position of the Administrator

24. The Administrator takes the position that the proposed treatment of the Dividends and the consequent refunds to the PBGF is consistent with the requirements of the PBA and Regulation and does not, therefore, constitute a breach of the fiduciary duties it owes to the members of the Plan.

25. The Administrator points out that the Claims are singular and undifferentiated claims in respect of the total wind up deficits in the Plans. There are no separate claims filed for indexed benefits versus non-indexed benefits or for guaranteed benefits versus non-guaranteed benefits. Accordingly, the Dividends are part of the assets of the Plans as a whole and are available to satisfy all liabilities of the Plans whether those liabilities are guaranteed by the PBGF or not.

26. The Administrator asserts that the treatment of the Dividends and consequent refunds to the PBGF are dictated by the terms of the PBA and Regulation (specifically, section 34 of the Regulation). The Administrator asserts that it cannot be a breach of its fiduciary obligations to comply with the PBA.

27. The Administrator notes that the Applications and Allocations were conditional in nature and were implemented in accordance with FSCO's Revised PBGF Allocation Process. The purpose of the revised allocation process was to avoid imposing unnecessary financial hardship on plan members that would necessarily arise if such allocations were delayed until all amounts were recovered from the estate of an insolvent employer and benefits settled. Accordingly, the Allocations were necessarily provisional until all such recoveries had been realized and the amount of the Allocations could finally be determined pursuant to section 34 of the Regulation.

IV. Analysis

28. The relevant provisions of the PBA and the Regulation should be interpreted in accordance with the scheme and objects of the PBA. While the PBA has at its core the protection of member rights and entitlements, the PBGF has as its focus the provision of partial compensation to pension plan members for losses of pension benefit entitlements arising out of employer insolvencies. The PBGF does not provide full indemnification for such losses. The compensation is partial and subject to maximums and exclusions, as prescribed in the PBA.

29. Further, the PBGF applies to protect members of all pension plans with respect to covered benefits, not just the members of the Plans. The assets in the PBGF are limited to prescribed assessments paid into the PBGF by sponsoring employers and discretionary grants and loans made by the government, as well as investment earnings thereon. Section 82(6) of the PBA makes it clear that all grants or loans from the government to address shortfalls in the PBGF are discretionary and that there is no assurance that such grants or loans will be made. Accordingly, with limited funding, the PBA and Regulation should be interpreted strictly to ensure that all members of the pension plans covered by the PBGF receive the protection set out in the PBA and that members of a single plan do not enjoy greater or lesser protection because of the timing of the PBGF declaration issued under section 83(1) or other arbitrary factors.

Section of the Regulation

30. 30. Section 34 of the Regulation governs the computation of member benefits and the amount of the PBGF allocation to a pension plan in circumstances where a declaration has been made under section 83(1) and the Ontario assets of the plan are less than the Ontario wind up liability. It applies only to benefits earned for employment in Ontario irrespective of where the plan is registered.

31. Section 34.1 of the Regulation states that if the wind up date of the pension plan is prior to December 8, 2010 then the version of section 34 as it read on December 31, 2011 applies to the plan. The effective date of the wind ups of the Plans is October 1, 2010 which is prior to December 8, 2010. Accordingly, the version of section 34 of the Regulation as it read on December 31, 2011 applies to the Plans:

34. (1) Where an order has been made under subsection 83 (1) of the Act in respect of a plan where the effective date of the wind up is before the Regulation date and when the order is made the Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall provide benefits under the plan in accordance with this section as it read immediately before the Regulation date.

(2) Where an order has been made under subsection 83 (1) of the Act in respect of a plan where the effective date of the wind up is on or after the Regulation date and when the order is made the Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall provide benefits under the plan in accordance with this section.

(3) For purposes of this section,

> “modified Ontario wind up liability” means the Ontario wind up liability excluding any liability for benefits described in subsection 47 (2). O. Reg. 712/92, s. 21.

(4) For purposes of this section,

> “Guaranteed Benefit liability” means the total liability of the plan for benefits guaranteed by the Guarantee Fund and other amounts guaranteed by the Guarantee Fund, excluding the amount by which the contributions made by any member, plus interest, for such guaranteed benefits and other amounts exceeds the liability for the member’s guaranteed benefits and other amounts.

(5) If, on the date an order is made under subsection 83 (1) of the Act in respect of a plan, the Ontario assets of the plan are less than its Ontario wind up liability, the administrator shall pay to each person entitled on wind up to payment of benefits guaranteed by the Guarantee Fund or other amounts guaranteed by the Guarantee Fund, the greater of,

(a) the sum of,

(i) 100 per cent of the benefits and other amounts for the person included in the calculation of the Guaranteed Benefit liability, and

(ii) the amount, determined under subsection (6), related to all other benefits for the person included in the calculation of the Ontario wind up liability; and

(b) the value of the person's contributions to the plan plus interest.

(6) The amount referred to in subclause (5) (a) (ii) shall be determined as follows:

1. If the Ontario assets of a plan are less than its modified Ontario wind up liability, the amount to be used for purposes of subclause (5) (a) (ii) for the person shall be determined by,

i. calculating the ratio of the Ontario assets of the plan to its modified Ontario wind up liability, and

ii. multiplying the ratio obtained under subparagraph i by the value of 100 per cent of the benefits in respect of the person, included in the calculation of the modified Ontario wind up liability but not included in the calculation of the Guaranteed Benefit liability in respect of the person.

2. If the Ontario assets of a plan are equal to or exceed its modified Ontario wind up liability, the amount to be used for purposes of subclause (5) (a) (ii) for the person shall be the sum of,

i. 100 per cent of the benefits included in the calculation of the modified Ontario wind up liability in respect of the person but not included in the calculation of the Guaranteed Benefit liability for such person, and

ii. the total of the benefits referred to in subsection 47 (2) for the person, multiplied by the ratio of,

A. the amount by which the Ontario assets exceed the modified Ontario wind up liability, to,

B. the amount by which the Ontario wind up liability exceeds the modified Ontario wind up liability.

(7) On application by the administrator, the Superintendent shall allocate from the Guarantee Fund and pay to the plan sufficient money to provide, together with the

Ontario assets, for the benefits determined under this section.

32. Section 34 prescribes the method for calculating the amount of the allocation to be paid from the PBGF to a pension plan which is the subject of a declaration under section 83(1) of the PBA. Section 34 also prescribes the specific benefit entitlements of members. It provides instructions to determine the benefits each member will receive. Essentially, section 34 requires that the prescribed benefit liabilities, as specified in the section, be calculated in respect of each Ontario member. The amount of the PBGF allocation is the residual amount required to settle such liabilities after the Ontario assets (defined in section 1(2) of the Regulation as “the portion of the market value of the plan assets allocated for employment in Ontario under clause 30(2)(e) or (e.1)”) have been taken into account.

33. The prescribed benefits liabilities are set out in sections 34(5) and (6). Not all liabilities are included. The liabilities include 100 per cent of guaranteed benefits (section 34(5)(a)(i)) and a provision for an additional amount which is determined by multiplying benefit liabilities not included in the calculation of the guaranteed benefit liability by the Ontario modified wind up funded ratio (i.e.: the funded ratio determined based on the Ontario assets and modified Ontario wind up liability) (sections 34(5)(a)(ii) and 34(6)1).

34. Section 34 expressly requires that certain benefits not be included in the calculation of plan liabilities for the purposes of determining the quantum of the PBGF liability. Indexation benefits, like all other benefits listed in section 47(2) of the Regulation, are excluded from the scope of guaranteed benefits. In addition, all benefits listed in section 47(2) are also excluded from the additional payment from the PBGF to be made based on the funded ratio under section 34(6)1(ii) through the definition of “modified Ontario wind up liability”. Benefits which are excluded under section 47 do not attract additional allocations from the PBGF and can only be paid if the Ontario assets exceed the Ontario wind up liabilities prior to consideration of liability in respect of benefits listed in section 47(2) (defined as the “modified Ontario wind up liability”).

35. The Representatives argue that section 34 prescribes the amount of the PBGF allocation “on the date the Superintendent makes an order under section 83(1) declaring that the PBGF applies to the plan” and that section 34 does not address the treatment of an amount recovered from an insolvent employer after a section 83(1) declaration is made.

36. However, section 34 requires that the calculation under section 34 be performed once all of the information required to do the calculation is available. This cannot occur until members return their option forms, all possible recoveries in respect of the assets of the plan have been made and all benefit obligations have been settled through lump sum commuted value transfers or annuity purchases. This is consistent with the terms of section 34, actuarial practice, established wind up administration practices and the reasonable expectation of pension plan members and other stakeholders.

37. Section 34(2) does direct the Administrator to determine the funded status of the plan as at the date of the section 83(1) declaration. However, the purpose of this determination is simply to assess whether or not section 34 applies to the determination of benefits under the plan. Sections 34(1) and (5) require that if the “Ontario assets of the Plan are less than its Ontario wind up liability” when the section 83(1) declaration is made then the method set out in section 34(1) determines benefit entitlement and the consequent quantum of the PBGF allocation.

38. There is no support in the wording of section 34 for the conclusion that the calculation under section 34 must be performed as at the date of the section 83(1) declaration. Indeed, such a conclusion would run counter to the general scheme of the statutory regime governing the PBGF.

39. If the Representatives' interpretation were correct, then not only would the calculation of the PBGF allocation have to occur as at the date of the section 83(1) declaration, so would the calculation of member benefit entitlements. Once that occurs, it is unclear, under the Representatives' argument, how plan recoveries or post-wind up fluctuations in the cost of providing the benefit for various factors (including annuity purchase rate fluctuations) are to be taken into account. The Representatives' position appears to be that the procedure in section 34 will have to be run once again but on the basis that only assets recovered in respect of guaranteed benefits can be considered in determining the assets of the plan. This is wholly inconsistent with the wording of section 34 and with the Representatives' position that section 34 has no application to post-declaration recoveries.

40. Further, the date of the section 83(1) declaration does not have any specific relevance in determining benefit entitlements and liabilities. The PBA does not dictate any particular timing for the issuance of the declaration and it is generally issued when sufficient information about the employer's solvency is obtained in order to make a determination concerning whether the criteria in section 83(1) are met. Unlike the determination of a wind up date, the PBA is silent as to the timing of a declaration. If the interpretation of the Representatives were correct, an undue degree of arbitrariness in the determination of the quantum of the allocation from the PBGF would necessarily result. Certain plans and members would benefit and others would suffer a loss depending on the largely administrative timing of a section 83(1) declaration. Interpretations which lead to such arbitrary results ought to be avoided.

41. The fact that the Superintendent approved a provisional allocation from the PBGF in accordance with FSCO's published procedure does not change the requirements of the PBA and Regulation. This procedure was developed, in large part, to avoid unnecessary hardship to members associated with interim benefit reductions pending efforts to recover outstanding contributions from the insolvent estate of an employer and settle benefits. On their face, both the Applications and Allocations were provisional and conditional on a number of future factors including future recoveries for the Plans out of the Nortel estate. It is clear on the face of these documents that the provisional amount of the PBGF allocation could be decreased or **increased** once the actual experience for these factors was known and once the required calculations under section 34 could actually be performed. This process is consistent with the reasonable expectations of all stakeholders including members of the Plans.

42. Finally, the Superintendent acknowledges that the members of the Plans have a contractual right to indexation under the terms of the Plans. If the assets in the Plans were sufficient to pay all benefit entitlements, the PBA would require that the full indexation be paid. Unfortunately, this is not the case and the PBA prescribes a different approach which requires adherence to section 34 of the Regulation. Compliance with these regulatory requirements does not constitute a breach of fiduciary duty by the Administrator.

Section 86(4) of the PBA

43. Section 86(4) states as follows:

    The Superintendent is subrogated to the rights of the administrator of a pension plan in

respect of which the Superintendent authorizes payment from the Guarantee Fund in satisfaction of a pension, deferred pension, pension benefit or contribution guaranteed under section 84 (guaranteed benefits).

44. The Representatives argue that "section 86(4) of PBA is the only provision of the PBA or Regulation that addresses these exact circumstances where a plan administrator has recovered amounts from an insolvent estate on behalf of plan members after the Superintendent has declared the PBGF applies and authorized a payment from the PBGF." Further, the Representatives argue that the subrogation right in section 86(4) is limited "only to a recovery that has been received in respect of benefits guaranteed by the PBGF" and "does not extend over other components of the claims made on behalf of members". The Representatives argue that the Administrator's interpretation of section 34 of the Regulation conflicts with section 86(4) and renders section 86(4) inoperative.

45. The Superintendent disagrees with the Representatives' interpretation of section 86(4).

46. On its face, section 86(4) does not limit the Superintendent's subrogation rights to recoveries in respect of guaranteed benefits. Section 86(4) states that the subrogation right is triggered in respect of a plan where "the Superintendent authorizes payment from the Guarantee Fund". The plain words of section 86(4) provide a wide right of subrogation to the Superintendent to all claims of the administrator once payment from the PBGF has been authorized. There is no language that limits subrogation to components of claims relating to guaranteed benefits. Quite simply, the Representatives' interpretation reads into section 86(4) words which do not appear in the section.

47. The notion that recoveries in respect of unpaid employer contributions can be segregated as between guaranteed benefits and non-guaranteed benefits is foreign to the PBA and regulations thereto. Required employer contributions are calculated on the basis of overall benefit liabilities in a plan. Neither the PBA nor the Regulation confers status on employer contributions as being in respect of guaranteed as opposed to non-guaranteed benefits. Once contributions have been made into a plan, there is no notion or requirement that the plan assets be segregated or accounted for separately based on their status as funding guaranteed as opposed to non-guaranteed benefits. The notion that such a classification scheme in respect of recoveries for unpaid employer contributions should be read into section 86(4) is inconsistent with this general scheme of the PBA and Regulation.

48. Further, neither the Claims nor the Dividends were segregated or differentiated as between guaranteed benefits as opposed to non-guaranteed benefits. Consequently, it is not appropriate to impose a *post-facto* partitioning of the Claims or Dividends as required by the Representatives' approach.

49. With respect to the alleged conflict as between the Administrator's interpretation of section 34 of the Regulation and section 86(4) of the PBA, no such conflict exists if the plain words of section 86(4) are properly construed. Further, while it is accurate to state that, in the event of a direct conflict as between the provisions of an act and a regulation, the act will prevail, the PBA and the Regulation are also required to be read together as a closely meshed integrated scheme. Accordingly, section 86(4) is properly interpreted as providing a wide subrogation right to support the full inclusion of all recoveries, once a payment from the PBGF has been authorized, in the plan assets used for the purposes of determining benefit entitlements and the quantum of PBGF allocations under section 34 of the Regulation. As such, section 86(4) has specific application in cases, such as this case, where interim allocations have been paid from the PBGF and there are subsequent

recoveries from the estate of the employer. Section 86(4) authorizes any refund back to the PBGF generated once the calculation required under section 34 is finally performed in light of such recoveries and other factors.

Conclusion

50. Section 70(4) of the PBA states that an administrator "shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent." Section 70(5) of the PBA states that "the Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members, retired members and other persons entitled to benefits under the plan."

51. For the reasons set out above, the Superintendent is of the opinion that the Indexation Addenda meet the requirements of the PBA and regulations and that the interests of the members, retired members and other beneficiaries are protected. Accordingly, the Superintendent intends to approve the Indexation Addenda under sections 70 and 89(4) of the PBA.

52. The Representatives have requested that the Superintendent issue an order under sections 87(4) and (5) requiring that the Administrator prepare a new Indexation Addenda using assumptions and methods consistent with the Representatives' interpretation of the PBA and the Regulation. However, the issuance of an order under sections 87(4) and (5) requires that the Superintendent be of the opinion, that the assumptions or methods used in the preparation of the report required are not consistent with accepted actuarial practice or are inappropriate in the circumstances for the pension plan, or that a report submitted in respect of a pension plan does not meet the requirements of the PBA or pension plan. For the reasons set out above none of these preconditions have been met in this case. Accordingly, the Superintendent proposes to refuse to issue an order under sections 87(4) and (5).

53. Finally, the Representatives have also requested that the Superintendent issue an order under section 87(1) requiring that the Administrator refrain from distributing funds to the PBGF as proposed in the Indexation Addenda. However, the issuance of a order under section 87(1) requires that the Superintendent be of the opinion, "upon reasonable and probable grounds" that a pension plan is not being administered in accordance with the PBA or the pension plan, that the pension plan does not comply with the PBA, or that the administrator of the pension plan, the employer or other person is contravening the PBA. For the reasons set out above none of these preconditions have been met in this case. Accordingly, the Superintendent proposes to refuse to issue the requested order under section 87(1).

54. Such further and other reasons as the Superintendent may advise.

DATED at Toronto, Ontario, March 12, 2018.

Original Signed By

Lester J. Wong
Deputy Superintendent, Pensions
By delegated authority from the
Superintendent of Financial Services

Copy:

TO:

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Toronto-Dominion Bank tower
Toronto, ON M5K 1E6

Attention:

Randy Bauslaugh

Lawyers for the Administrator

1 *NOTE - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.*

2 *NOTE - Pursuant to section 34.1 of the Regulation, benefits under the Plans should be provided in accordance with section 34 of the Regulation as it read on December 31, 2011. References in this paragraph to subsections 34(5), (6) and (7) of the Regulation refer to those subsections as they read on December 31, 2011.*