

December 2, 2011

The Honourable Minister of Finance Dwight Duncan,  
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Dear Honourable Minister Dwight Duncan:

Thank you for continuing your dialogue with us. We wish to respond to your apparent misunderstandings in the letter dated November 16, 2011 about the Nortel settlement having had informed consent by the Nortel long term disabled employees ("LTD") and about the Ontario government making discretionary choices to assist the high end Nortel pensioners through the Ontario Pension Benefit Guarantee Fund ("PBGF") while not assisting, and in fact harming, the worst impacted Nortel LTD.

This is a long letter due to the complexity of "the dilemma" you say we are in. We ask you to consider two next steps: that you recommend that FSCO support a CCAA court motion for reconsideration of the Nortel settlement's legal release to restore certain legal rights for the LTD; and, you recommend that Cabinet support Minister of Consumer Services Margaret Best in ordering an investigation of our Complaint about misrepresentations by Nortel and Sun Life of the disability insurance Nortel sold us. Given the strength of our evidence and legal arguments for jurisdiction of the Consumer Protection Act, the latter step produces a government regulatory remedy of our damages of poverty, and for many, premature deaths.

We recognize that the Ontario Government has duties to protect LTD, pensioners and taxpayers, inside and outside of the bankruptcy court, and that the government makes choices on policy alternatives and the use of its resources. The government's choices, however, should not be executed solely on political considerations to benefit the majority of pensioners as a voting block. The Ontario Government also has an obligation under S. 7 of the Charter of Rights and Freedoms to not make discretionary choices that harm the health and security of the LTD. The LTD are in the extreme minority of less than 1% of workers (0.3% in the Nortel case). 1.1 million Canadians are covered by employer sponsored disability insurance plans that are now certain to fail when employers file for bankruptcy. Media has recently highlighted this problem: [Toronto Star - Roseman, Are your disability benefits at risk? Nov. 16, 2011](#)  
[CALU INFOExchange - Systemic Failure of Disability Insurance in HWTs Sept. 2011 Vol 3](#)

We attach [Appendix A - Nortel LTD Timeline](#), with links to documents and audio recordings referred to in this letter. We also attach [Appendix B - Contributions removed from HWT disability insurance reserve - all & individual LTD employees](#) to convince you that severe wrongdoing occurred when Nortel management withdrew \$18 million of contributions from the LTD asset reserve in the Health and Welfare Trust ("HWT") in 2005. The LTD asset reserve was a roll-up of the disability insurance reserves in place for specific LTD employees, like the \$236,676 set aside for a specific LTD employee at May 31, 1999. In addition to misrepresentations of our disability insurance, HWT money has been wrongfully taken from each of us.

## **FSCO piggybacks settlement that did not have informed consent of the LTD**

Your letter says:

"the Superintendent was not alone in supporting the agreement. The agreement was also supported by a large majority Nortel Disabled (90 per cent) through their court-appointed representative. Further, the agreement was also supported by the Former Employees, the Canadian Auto Workers (CAW) and the Nortel Canada Continuing Employees, as well as the Nortel Board of Directors, the Noteholders, the Unsecured Creditors' Committee and the Monitor."

The Superintendent of FSCO, through its bankruptcy lawyer Ken Rosenberg of Paliare, Rosenberg, Rothstein LLP, agreed to a settlement that jeopardizes the health and security of LTD, without the fundamental justice of informed consent by the LTD.

### **There is no evidence that 90% of the Nortel LTD supported the settlements**

- (1) There was no vote on either the Feb. 8, 2010 first settlement, or the March 30, 2010 amended settlement ("the settlements");
- (2) 10% of the Nortel LTD hiring Rochon Genova LLP (RG) to oppose the settlements is not evidence that "a large majority Nortel Disabled (90 per cent)" support the settlements;
  - (i) The about 40 opposing LTD in court on March 3-5, 2010 and March 31, 2010 are 31% of the 130 non-union LTD that Sue Kennedy communicated with, who are members of CNELTD, the acronym for Canadian Nortel Employees on Long Term Disability. The Feb. 23, 2010 KM webinar slides say "**CNELTD Membership 130 members (and increasing).**"
  - (ii) 100 CAW-Canada LTD members are excluded from the representation order appointing Koskie Minsky LLP (KM) and Sue Kennedy. CAW legal counsel opposed RG representing any opposing CAW LTD members in court and so the CAW LTD's stated right to oppose had no practical means by which they could do so in court other than to be there to oppose in person. It is extremely difficult for sick people to travel and make presentations in public court, and most cannot afford the travel and accommodation costs in Toronto.
  - (iii) Silence is not approval, especially from LTD preoccupied with the symptoms of their long term disabilities and the stress of their medical benefits being cut off within 20 days of the Feb. 8, 2010 settlement and 24 hours of the March 30, 2010 amended settlement.
- (3) Sue Kennedy's polling of support for the March 30, 2010 settlement was done in her March 29, 2010 email to the 130 non-union LTD. There was no evidence submitted that she received more than 40 responses supporting the March 30, 2010 amended settlement.
- (4) The opposing LTD had critical comments screened from the CNELTD Yahoo! Group website by Sue Kennedy starting on Feb. 3, 2010. On Friday, March 26, 2010, after the release of J. Morawetz's decision to reject the Feb. 8, 2010 settlement, there was a note on the CNELTD Yahoo! Group website saying "Due to multiple commitments by the various members of the Legal Steering Committee this weekend, the messages submitted to this site as of now will only be reviewed sometime Sunday afternoon. If we need to send the CNELTD group any important information during this time, it will be sent using an e-mail distribution list...Sue Kennedy will be checking her e-mails occasionally on the weekend, but since she is using her Blackberry, she will not be sending detailed replies."

- (5) The names and contact information for the Nortel LTD creditors are not disclosed. Opposing LTD have been unable to contact other LTD to educate them about the settlement and invite them to join their opposing ranks.
- (6) Majority support by the LTD cannot reasonably be construed to have happened given that reasonable persons would not agree to accept just 9 months of income and medical benefits in exchange for a lifetime of poverty. Only LTD persons very close to early retirement would consider waiving significant LTD legal rights, as their remaining LTD period is small compared to their pension period until death.
- (7) Sue Kennedy informed the Nortel LTD in a teleconference on August 27, 2009 that she would not be making any important decisions on their behalf unless the group had provided informed consent, with disclosure to them of the same information she had as the court representative, and with a vote. She did the opposite throughout the CCAA proceedings.

### **The Nortel LTD had inadequate time to consider and oppose the settlements**

The time frame for filing notice of appearance to oppose the settlement was initially 16 days after the Feb. 8, 2010 settlement announcement, 8 days after the Feb. 18, 2010 Monitor posting the settlement itself and 1 day after the Feb. 23, 2010 KM LTD webinar explaining the settlement. The deadline for submitting the notice of appearance to oppose was extended over the weekend from Feb. 24, 2010 to March 1, 2010, but even this was just 10 days after the Feb. 18, 2010 Monitor's posting of the settlement.

Unilingual francophone LTD were sent the Feb. 16, 2010 English notification letter in the mail first and then the French notification letter was sent later. It arrived just a few days before the March 1, 2010 opposition deadline. It was next to impossible for the unilingual francophone LTD to oppose the settlement, since there was no notice of appearance to oppose form provided with the notification letter. There was not enough time to get an opposition form from the Monitor by mail and to be able to send it back on time.

The English and French notification letters, notice of appearance to oppose forms and the settlement itself were posted on the Monitor's website. Most of the LTD do not have a computer and internet access. The French notification letter and French notice of appearance to oppose form were not capable of being opened on the Monitor's French website, only on the Monitor's English website. The French Settlement Agreement was not on Monitor's English website until about Feb. 27, 2010.

Our independent financial expert, Diane Urquhart, helping us on an unpaid basis informed us on Sunday, Feb. 22, 2010 that the 2008 HWT financial statement released on Feb. 18, 2010 indicated there was likely to be over a \$100 million shortfall in the HWT relative to the LTD income and medical actuarial liabilities. \$79 million of this amount was the expected shortfall for the LTD income actuarial liability alone. After hearing this bad news, we scrambled to find a lawyer to represent the dissenting LTD in court on March 3-5, 2010 and were fortunate to have our case accepted by RG. We had been searching for a lawyer to work pro bono or on contingency for many months and had been unsuccessful.

The March 30, 2010 amended settlement was submitted to court without notice to the LTD and without a process for opposing the amended settlement. The amended settlement was materially different for the LTD because it dropped the H2 clause and Bill S-216 benefitting the LTD, had already been tabled in the Senate the week before. The March 30, 2010 settlement proved to be the main stumbling block causing the Federal Conservative Party to reject Bill S-216 in the Senate on December 16, 2010 and to defeat Bill C-624 in the House of Commons on March 11, 2011.

### **The settlement communications featured the benefits without quantifying the give-up**

The Feb. 8, 2010 Nortel Media Release, CNELTD Media Release and CAW Update about the settlements provided to the Nortel LTD did not present the likely, but still unknown, severe dollar consequences of giving up their legal rights in the settlements' legal release.

The Feb. 8, 2010 CAW Update erred in its description of the settlement's legal release when it said, "This agreement releases Nortel from liability regarding the Pension Plan or the Health and Welfare Trust EXCEPT for claims based on fraud, gross negligence [error not corrected], contractual rights [error not corrected] and/or misrepresentation by the directors or wrongful or oppressive conduct by the directors."

### **Nortel LTD were denied requested material information until 5 months after settlements**

The Monitor refused to disclose material information sought by dissenting Nortel LTD representatives beginning at August 18, 2009. The [Letter from Goodmans on their decision to not release information Nov. 5, 2009](#) is abundantly clear about the Monitor controlling who, what, where and why information is released during a CCAA proceeding (all said with the apparent blessing of J. Morawetz who received a Nov. 2, 2009 letter from Nortel disabled persons seeking disclosure of material information.) The Monitor did not release material information until the August 27, 2010 Monitor's Report, containing thousands of pages of actuarial reports, insurance and legal documents governing Nortel's LTD disability insurance and Sun Life's pensioners life insurance, the HWT financial statements, HWT tax filings, CRA rulings and employee and pensioner benefit brochures. These material disclosures came 5 months after the settlements had been approved by Sue Kennedy and the court.

Sue Kennedy was not elected by her disabled group. Group members were not confident that she possessed the knowledge of finance and law needed to assess the advice she was being given by KM and its actuarial and financial advisors, Segal and RSM Richter.

Anne Clark Stewart, a former Nortel human resources executive, former LTD and a pensioner during the whole CCAA proceedings, had a predominant influence on the decisions of Sue Kennedy, who did not have her own expertise to formulate judgements about what was the best course of action for the LTD. Anne Clarke Stewart was a member of the LTD Legal Steering Committee despite her conflict of interest. She was a strong advocate for the LTD and pensioners to jointly negotiate with Nortel and to jointly lobby for government actions, despite the real conflict of interest between the pensioners and LTD.

## **Extinguished LTD legal rights have significant value and prospects for success**

The settlements' legal release forced an unnecessary and premature sacrifice of valuable and viable legal rights of the LTD without the informed consent of the LTD. We say unnecessary and premature sacrifice because:

- (1) Nortel was liquidating and not restructuring, and so preservation of jobs was never at stake;
- (2) Nortel's global estate is now \$10 billion, at least 67% higher than the \$6 billion already expected at the time of the settlements;
- (3) the Canada estate cash has been controlled by the U.S. Unsecured Creditors Committee and The Informal Nortel Noteholder Group to serve their own interests. The Canada estate will in the end nonetheless likely exceed \$2 billion, albeit with up to \$13.2 billion of inter-country creditor claims against the Canada estate in favour of the U.S. and U.K. estates;
- (4) the estimated \$75 million needed to fully settle the Canada disability insurance claims was then and certainly is now a minor 0.8% of the Nortel global estate and is a reasonable 3.5% or less of the ultimate expected Canada estate. Both a priority remedial or an equitable settlement of the LTD is affordable;
- (5) a priority remedial settlement of the disability insurance claim is warranted to avoid unjust enrichment of the other creditors under the common law or various Provincial statutes providing for remedy of breach of contract, misrepresentations, constructive trust and breach of trust in failing to protect the disability asset reserves in the Health and Welfare Trust (a bona fide trust.);
- (6) the LTD deserve the same treatment as the constructive trust argued by KM for the 9 Nortel executives and granted by the court on June 25, 2010, 7 months after the motion was heard Nov. 20, 2009; none of Goodmans, KM, or the CAW legal counsel, presented the legal rights and remedies to the court representative for the non-union LTD, nor to the LTD employees or the court; and,
- (7) Goodmans, KM and the CAW lawyer ignored all the CCAA provisions available to protect vulnerable creditors in the circumstances applicable to the Nortel LTD, which the Insolvency Institute of Canada and other bankruptcy lawyers use to argue that bankruptcy law amendments for the LTD are not required. For example, Goodmans, KM and the CAW lawyer did not argue for the use of CCAA S. 32(4)(c) to continue LTD income benefits due to financial hardship, or the use of CCAA S. 6(1) to seek an unequal compromise under equitable considerations for the minority at the CCAA Fairness Hearing. See PDF pages 22 to 24 in [Systemic Failure of Employer Sponsored Disability Insurance Updated November 2011](#). The ignored common law and Provincial statutes relevant to employer sponsored disability insurance and trusts are also in this report.

## **J. Morawetz approval founded on parties agreeing and the evidence and legal arguments before him**

Your letter defends the Superintendent of FSCO's support for the settlements on J. Morawetz's subsequent orders as noted in the following paragraph.

"Justice Marowetz [sic] of the Superior Court of Justice approved the agreement because, in his view, while the agreement was not perfect, under the circumstances, it balanced the competing interests of all stakeholders and represented a fair and reasonable compromise."

J. Morawetz appears to have relied heavily on KM, the CAW lawyer and FSCO's lawyer recommending the settlements and upon Sue Kennedy consenting to the settlements. He was not, to our knowledge, presented material evidence and legal arguments for the protection of LTD legal rights at the time of the settlements by KM or the CAW lawyer, who both have duties to argue for the interests of the LTD. The current outcome of poverty, and for many premature death, is very far from the test of perfect or a fair and reasonable compromise, especially in the context of what became known about the HWT wrongdoings 5 months later and the 67% higher global estate than expected at the time of the settlements.

The Court of Appeal of Ontario refused to hear appeals on J. Morawetz's settlement order and the HWT settlement order. So there has been no mechanism for the dissenting Nortel LTD to have the errors in J. Morawetz's decisions relating to Nortel's LTD disability insurance re-examined by other judges.

### **Ontario Government made discretionary choices to provide grants and make PBA amendments for the Nortel pensioners**

You say that

"the actions taken by the Superintendent in the Nortel proceedings must reflect the requirements of law, which include the Superintendent's duty to pursue the PBGF claims paid out for the purpose of discharging his obligations to the PBGF,"

This implies that the government was forced to make guarantee payments from the PBGF to the Nortel pensioners in the first place.

The reasonable conclusion is that the Ontario Government has made a discretionary decision to make a taxpayers' grant into the PBGF to fund an estimated \$410 per month for Nortel pensioners, including high end pensioners who got a PBA amendment for a new choice to stay in the capital markets. This grant unlike a loan does not need to be repaid from increased premiums charged to employers insured by the PBGF.

#### **[Ontario Pension Benefit Guarantee Fund Grant \\$500 M Grant March 2010](#)**

The Ontario Government was under no legal obligation to put new money into the PBGF once this fund was depleted by claims from wound-up pension plans. This is clearly stated in the PBA.

#### **[Ontario Pension Benefits Act - Pension Benefits Guarantee Fund](#)**

Stating that "the government understands the dilemma facing the Nortel Disabled in these unfortunate circumstances" belies the fact that it made a choice to spend an estimated \$380 million taxpayers' money to assist the Nortel pensioners, while it has done nothing to mitigate the Nortel LTD former employees' 70% cut in Nortel disability income. Many of these Nortel disabled are in their thirties and forties, with 160 dependent children. How can the government think that a PBGF Payment on their miniscule pension entitlement helps them live from now until age 65?

The argument that FSCO is obliged to recover its PBGF payments from the Nortel estate in order to preserve PBGF capital to pay the future pensioners of future bankrupt employers is of legal merit, only because the taxpayers' grant was put into the PBGF to make guarantee payments in the first place. But, the taxpayers' grant and the PBGF guarantee payments for Nortel pensioners would have been less, if the high end pensioners with the new choice to remain in the capital markets were not eligible to get the PBGF guarantee payments.

The PBGF could have restricted its guarantee payments to the low end pensioners of wound-up pension plans that remained in the default choice of annuities when it amended the PBA. The taxpayers' money not granted for the benefit of the high end pensioners would have been better spent on the more vulnerable and more damaged Nortel LTD, whether or not there was a pre-established Ontario government program for such catastrophic events as they were exposed to. New legislation to make a grant of taxpayers' money to the disabled under a new or one time emergency disability income protection program would have been no more onerous to do than the PBA amendment to enable high end pensioners a new settlement choice to remain in the capital markets, while still qualifying for a PBGF guarantee payment.

### **Conclusions and next steps?**

The Ontario Government should not have spent taxpayers' money to help high end pensioners, while it is unwilling to help the more vulnerable low income LTD, whose health and security are deeply compromised. The discretionary grant into the PBGF for the high end pensioners results in the PBGF having an obligation to make a correspondent Nortel estate claim for the benefit of future pensioners, which is to the detriment of the Nortel LTD now. The PBGF chose to support the settlements, which contributed to the Nortel LTD losing valuable and viable legal rights to seek their own civil remedies for wrongdoings, or an equitable settlement within the CCAA proceeding itself. Now to add insult to injury, the Ontario Government is choosing not to enforce the Consumer Protection Act, which has the legal jurisdiction to assist the Nortel LTD by correcting an injustice, without requiring a legislative amendment or taxpayers' funding. **(Attorney General lawyers Jim Girling and Marilyn Marshall and Assistant Deputy Minister of Consumer Services Frank Denton are stopping this enforcement for reasons that are without legal merit.)**

The Nortel CCAA proceedings are continuing. There are precedents for reconsideration of interim court decisions before the closing of CCAA proceedings on reasons of fundamental justice and plain common decency. We urge the Ontario Government to join us in supporting a motion to J. Morawetz that he reconsider the LTD being entitled to litigate for remedy of the wrongdoings against them, or to seek an equitable solution within the CCAA proceedings at the Fairness Hearing after the vote on the CCAA Final Plan.

In addition, the CCAA has specific provisions for priority payment of court orders obtained by government regulatory agencies to compensate harmed parties for the damages caused by offences committed. Justice for the alleged wrongdoings of misrepresentations on Nortel's disability insurance can be successfully achieved through enforcement of the Ontario Consumer Protection Act. Please go beyond understanding our dilemma, to fulfilling your government obligation to not make discretionary choices that harm our health and safety.

Sincerely

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[Appendix A - Nortel LTD Timeline](#)

[Appendix B - Contributions removed from HWT disability insurance reserve - total & individual LTD employees](#)

### **Related Documents**

[Ending Lives of Canadian Disabled June 2011](#)

[Systemic Failure of Employer Sponsored Disability Insurance Updated November 2011](#)

[Letter from Dwight Duncan to Nortel Disabled November 16, 2011](#)

[Letter to McGuinty from Nortel Disabled Complainants Nov. 14, 2011](#)

[Email from Dalton McGuinty to Nortel Disabled Complainants Nov 7, 2011](#)

[Email to Margaret Best from Urquhart October 20, 2011](#)

[Letter to McGuinty from Nortel Disabled Complainants Oct. 17, 2011](#)

[Letter to Assistant Deputy Minister Denton from Rochon Genova LLP Aug. 16, 2011](#)

[Appendix A - Consumer Protection Act - Ontario Legislature and Committee Debates](#)

[Appendix B - Report on Misrepresentation Evidence](#)