**From:** Urquhart [mailto:urquhart@rogers.com]
**Sent:** October-20-11 12:21 PM
**To:** 'Correspondence@ic.gc.ca'; 'a - Celeste Hicks'; Colette Downie (Colette.Downie@ic.gc.ca); Christian Paradis (christian.paradis@parl.gc.ca)
**Cc:** Roger Charland (charland.roger@ic.gc.ca); Richard Dicerni (richard.dicerni@ic.gc.ca); Marc Vallières (mark.vallieres@ic.gc.ca); 'Diane & Hugh Urquhart'; 'Greg McAvoy'; Jackie Bodie (jbodie@blinc.ca); 'Carol Sampson'; 'Josée Marin'; 'Denise Gelineau'; 'Maurice Brosseau'; 'Micheline Brosseau'; 'Joel Rochon'; Sakie Tambakos (stambakos@rochongenova.com); Joann Williams (jwilliams@wpi.ca); Jeremy Bell (Jeremy.Bell@hbt.ca); Marta Morgan (Marta.Morgan@ic.gc.ca)
**Subject:** RE: Letter from Colette Downie to Diane Urquhart regarding Employer Sponosred Disability Insurance October 19, 2011

Industry Minister Christian Paradis

-and-

Colette Downie
Director-General, Marketplace Framework Policy Branch
Industry Canada

Thank you for your letter to me on October 19, 2011 expressing the view that Industry Canada staff have reviewed my report "Systemic Failure of Employer Sponsored Disability Insurance," and have determined it is inappropriate for you to talk to me as the matter is still before the courts.

Firstly, the report, "Systemic Failure of Employer Sponsored Disability Insurance," is not limited to discussion of solutions for the Nortel disabled former employees injustice, poverty and premature deaths. **This report contains recommendations for Federal and Provincial Governments' legislative amendments to improve the safety of employer sponsored disability insurance plans that are now certain to fail due to Ontario Superior Court of Justice bankruptcy court decisions on the Nortel sponsored disability insurance plan.** The relevant bankruptcy court decisions affecting the Nortel disabled former employees, and which set the precedent for failure of all employer sponsored disability insurance plans funded within Health and Welfare Trusts, are already made and all court appeals are exhausted.

The required Federal Government legislative amendments to improve the safety of employer sponsored disability insurance are within the jurisdiction of the Department of Finance and the Department of Industry as noted in my report. The Department of Industry's responsibility for legislative amendments are in respect to the Companies Creditors Arrangement Act and Bankruptcy and Insolvency Act to provide for the priority payment of employer sponsored disability insurance claims. This will provide for equal treatment of employer sponsored disability insurance and disability insurance provided by insurers, whether it is the sponsoring employer or insurer that files for bankruptcy or bankruptcy protection. As discussed below this also meets the new Supreme Court of Canada test for Federal legislation needing to be compliant with S. 7 of the Charter of Rights and Freedoms: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Read again the following section from: **Systemic Failure of Employer Sponsored Disability Insurance Updated September 2011**
Disability Insurance at Insolvent Employers Should Have Same Priority as Disability Insurance at Insolvent Insurers
P. 11

"Disability insurance provided by insurers, has three elements of protection in Canadian law:
(1) requirement for disability income reserves;
(2) policyholders are ahead of the creditors at insolvent insurers under the **Federal Winding-up and Restructuring Act** , and,
(3) there is the insurance industry protection program, **Assuris ,** to provide further protection of disability insurance after the insurer has failed.

If employers are permitted to play the role of insurer, at least the first two protections need to be in place within Canadian laws:
(1) there needs to be mandatory disability insurance reserves in a trust account, which requires legislative amendment governing both Federally and Provincially registered corporations providing disability insurance; and,
**(2) there needs to be clear priority of disability insurance claims over creditors within the Companies' Creditors Arrangement Act (CCAA) and Bankruptcy and Insolvency Act (BIA), both of which are Federal jurisdiction.**

The Federal Government should not be condoning lower business costs achieved through under-funded employer sponsored disability insurance, which is not known to be unsafe until the employer files for bankruptcy protection. The Federal Government has a responsibility to provide security for its most vulnerable disabled citizens and to prevent the downloading of disabled employees onto the taxpayers. "

I am sharing below an Oct. 6, 2011 email sent to the Members of the Canadian Council of Insurance Regulators (including the representative of OSFI) calling for them to get moving on legislative reform of insurance regulation to better ensure the funding of employer sponsored disability insurance plans. The Department of Industry needs to act too.

**Secondly, the Nortel disabled former employees' poverty and premature deaths remain an open unresolved public interest issue, for which the Department of Industry should not be washing its hands of until the Nortel CCAA proceedings are complete. These proceedings are apt to still be underway 10 years from now and by then many of the Nortel disabled will have died in completely untenable and unjust circumstances.** Also waiting up to 10 years before considering Federal bankruptcy law amendments needed to fix now certain to be unsafe employer sponsored disability insurance plans is clearly irresponsible in respect to the 1.1 million Canadians covered by employer sponsored disability insurance plans.

As discussed in my report, the Federal Conservative Senators and Conservative MPs rejected the various bills to amend the CCAA and BIA for priority of disability insurance claims for reasons that are not of legal merit in terms of: (a) the March 30, 2010 settlement was a CCAA final plan; (b) the Federal Government did not have the power to make retroactive changes to the

CCAA and BIA; and, (c) there would be litigation if the Federal Government made retroactive amendments on the premise that the new law could not apply retrospectively to the March 30, 2010 agreement. The lawyers in your Department should know that these arguments from the Conservative Senators and MPs are incorrect and they should be providing the proper legal advice to the politicians. At least, then, the politicians are forced to give honest answers for why they are not supporting legislative reform for the Nortel disabled and for all the 1.1 million Canadians in certain to fail employer sponsored disability insurance plans within Health and Welfare Trusts_ that is they choose as a matter of public policy not to! They wish to permit the employers to continue to misrepresent their disability insurance and to make minimal cost savings at the risk of catastrophic loss for individual Canadians. This from a government who espouses a Law and Order agenda and yet employers are free to deceive their employees about an essential insurance, take their disability insurance reserves from Health and Welfare Trusts, and even take the money employees contributed for what they thought was to buy insurance from an insurance company.

**Finally, I would urge the Department of Industry to examine the implications of the recent Supreme Court of Canada decision, Canada (Attorney General) v. PHS Community Services Society 2011 SCC 44.**

This Supreme Court of Canada Insite Decision says Canadian governments cannot enforce a law if it harms the health and safety of Canadians under S. 7 of the Charter of Rights and Freedoms. The SCC description of the Insite Case is:

*"Safe injection site — Sections 4(1) and 5(1) of Controlled Drugs and Substances Act ("CDSA") prohibiting possession and trafficking of illegal drugs subject to exemption from federal Minister of Health — Clinic operating safe injection site pursuant to ministerial exemption granted under s. 56 of Act — Minister subsequently revoking exemption — Whether division of powers exempts clinic as health facility from application of CDSA as exercise of federal jurisdiction over criminal law. Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1), 5(1), 56 — Constitution Act, 1867, ss. 91(27), 92(7), 92(13), 92(16)."*

In the Nortel case, Justice Geoffrey Morawetz used his discretion to order the March 30, 2010 settlement that contained a legal release of Nortel, Sun Life and Northern Trust for damages caused by them on any grounds, on the premise that the CCAA bankruptcy law is for the purpose of facilitating a successful restructuring. Quite apart from the inaccuracy of Nortel restructuring and there being no vote or evidence of majority support from the Nortel disabled for the March 30, 2010 settlement, the Federal bankruptcy law should not in any situation be permitted to be implemented in a discretionary manner that harms the health and safety of disabled citizens. The CCAA and BIA words enabling such discretion as occurred in the Nortel case, is in violation of S. 7 of the Charter and Rights and Freedoms.

Industry Canada lawyers should not rest on their laurels and think that the Nortel disabled or other disabled Canadians should pursue a legal challenge of the CCAA and BIA in respect to S. 7 of the Charter. These people are very sick and have limited resources. It is your duty as an Industry Canada policy expert to protect Canada's most vulnerable citizens by recommending to the Minister of Industry that there be CCAA and BIA amendments to meet the Charter's S. 7 requirement to protect the right to life and security of disabled Canadians.

Sincerely

Diane A. Urquhart
Independent Financial Analyst
Mississauga, Ontario
Tel:  (905) 822-7618
Cell:  (647) 980-7618
E-mail: urquhart@rogers.com