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Subject:	Benefits Canada Article Sept. 30, 2016 and the Serious Errors of Mark Zigler, Court Appointed Legal Counsel for the Nortel Disabled
Attachments:	Benefits Canada - Ex-Nortel workers seeking regulatory change to boost priority of disability benefits Sept. 30, 2016.pdf

Navdeep Bains
Minister of Innovation Science and Economic Development

Mark Schaan and Paul Morrison, Ministry of Innovation, Science and Economic Development

Mark Zigler of Koskie Minsky LLP ("KM") made the following statements in the attached Benefits Canada article entitled, "Ex-Nortel workers seeking regulatory change to boost priority of disability benefits," September 30, 2016.

(1) Zigler, however, sees the issue differently. "What Nortel did wasn't unlawful," he says. "Nortel self-insured its disability benefits and it didn't have enough money in this trust to fund it all. That was a problem, largely, with the insurance laws in a lot of provinces that allow employers to self-insure these benefits."

(2) For Zigler, the best solution would be to prevent the self-insurance of long-term disability benefits because no company can guarantee it will be in business long into the future. "I think all the groups agree that would be a good thing, but if you speak to the actuarial firms and the large employers, they'll say: 'No, we need to be able to self-insure this stuff, because if we don't, we might never provide it.

(3) "Yes, you could change the law to do that," he says of the proposal."

Response to Point (1):
Mark Zigler of KM, who is the court-appointed legal representative of both the Nortel disabled and pensioners, is making the same error of "what Nortel did wasn't unlawful" at September 30, 2016 that he made at the time of the Interim Settlement Agreement in 2010.

We presented this error in the **Email to Mark Schaan, Ministry of Innovation, Science and Economic Development August 12, 2016** :

B. Interim Settlement Agreement, Court Approved On March 31, 2010, Had Multiple Errors In Law

2. Court Monitor and Legal Counsel Made Errors on Law Applicable to HWT
Court Monitor, Ernst & Young, and its legal counsel, Goodmans LLP, made errors on applicable law to the HWT within the Monitor's Statement in paragraph 48 of the 39th Monitor's Report dated Feb. 18, 2010:
"The Monitor has been advised by its counsel that Nortel was under no statutory or other legal obligation to establish or to fund a health and welfare trust and there is no regulation applicable to the HWT."
If there was no legal obligation, then constructive fraud could not have been determined by J. Paul Perell.

3. Court Appointed Legal Counsel to the LTD Made Errors in Law Applicable to HWT
   In the March 3-5, 2010 hearing transcript, Mr. Zigler says we certainly agree with the above Monitor's Statement. Plus, KM made the error of not demanding discovery on the HWT financial statements and actuarial reports and looking carefully for wrongdoings before recommending to the court representative the interim settlement agreement with only 9 months of benefits paid.

February 18, 2010 Email from KM issued prior to approval of the settlement agreement contains the same error on nothing unlawful.

> "Nothing in the trust documentation requires Nortel to pre-fund them either, … While we share your view on the immorality of self funding LTD benefits, unfortunately such activity is legal. Mark Zigler."

There are many reasons why Mark Zigler made an error in respect to his opinion that "What Nortel did wasn't unlawful."

1. J. Paul Perell decided there was a tenable constructive fraud claim in his **Justice Perell Decision on Holley v. Northern Trust and Royal Trust Feb. 11, 2014**. If there was no unlawful conduct, there would be no tenable constructive fraud claim.

   > [143] The problem for Ms. Holley, however, is that although she has pleaded a tenable constructive fraud claim, the claim is caught by the CCAA release.
   >
   > [148] … There may be a breach of contract or a breach of trust, or a constructive fraud, but there is no dishonesty or moral turpitude of the degree necessary to constitute common law fraud, which is a very serious tort precisely because it responds to genuine and not constructive dishonesty and moral turpitude.

   J. Perell denied a trial on the fraud claim, without having any evidence before him. The following affidavits containing the evidence of fraud were not to be submitted to a Summary Dismissal hearing. The fraud claim is due to Nortel withdrawing $32 million of money from the trust to pay for active and pensioners' medical benefits that were its obligation to pay. Also, there was $28 million of employer contributions made into the trust by way of a loan and not paid in cash. These actions materially improved Nortel's own cash flow in 2005-2006. There is a distinct difference between not making employer contributions into the trust on the premise that Nortel had no legal obligation to do so, and recklessly placing a large portion of reserves at risk due to the potential default of the loan to Nortel, and fraudulently taking money out of the trust reserves for the disabled beneficiaries to pay Nortel expenses.
   Charlotte Urquhart Affidavit
   Diane Urquhart Affidavit

2. Mark Zigler ignored the common law on breach of trust and breach of fiduciary duties in respect to all three aspects of: the employer contributions not being made despite the legal obligation to do so; putting the trust reserves at risk by investing them in a loan to Nortel; and, removing money from the trust to pay for Nortel expenses. Not meeting the standards of common law is characterized as unlawful conduct, since both statutes and common law define the rule of law. 9 months of benefits in exchange for the interim settlement agreement's broad legal release is grossly inadequate for the long term disabled's income replacement and medical benefits that were otherwise payable until recovery, death or age 65. This settlement served no CCAA purpose as without it, there would be no delay or frustration of the CCAA process for the restructuring of Nortel (9 months of benefits could have been deducted from the final CCAA settlement without a premature legal release before evidence was supplied to the long term disabled by Court Monitor Ernst & Young.)
   Air Canada (Re), [2004] CanLII 11700 (ON SC)
   Froese v. Montreal Trust Co. of Canada, [1996] B.C.J. No. 1091 (B.C.C.A.)

Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787
Cowan v. Scargill, [1984] 2 All E.R. 750 (ch.D.)
Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611

3. Mark Zigler saying there are no legal obligations is contrary to the **Multi-Employer Benefits Council of Canada (MEBCO) Submission to Alberta Finance 2002**, which argues that mandatory insurance or regulation of the funding of employer sponsored disability insurance is unnecessary due to the existence of trusts and trustees who must meet the common law requirements for fiduciary duties. KM endorsed the MEBCO legal position on employer sponsored disability insurance, as Raymond Koskie is one of MEBCO's founders and KM lawyer, Michael Mazzuca, and Segal actuary retained by KM, Tom Levy, are on **the MEBCO Board of Directors at 2010.** KM was the legal counsel for the Eatons self-insured long term disability plan that was underfunded at the time of the Eatons bankruptcy. KM should have known that it should not be supporting the MEBCO opposition to mandatory disability insurance in Alberta. Greg McAvoy would not be in his deprived position today had KM supported mandatory insurance in Alberta in 2002.

   The MEBCO paper refers to the case - *Cowan v. Scargill*, [1984] 2 All E.R. 750 (ch.D.) that says:

   "Under common law fiduciary duties, the duty of care encompasses four distinct duties, which apply, inclusively, to employee benefit plans:

   - To act scrupulously for the benefit of the trust or the beneficiaries and never for himself or herself while carrying out his or her duties. (conflict of interest rule)
   - To be active in carrying out those duties and perform them with complete integrity. (the standard of care rule)
   - To carry out those duties personally as a result of the trust and confidence reposed in him or her. (the no delegation rule)
   - To act impartially between the beneficiaries unless the trust instrument authorizes favoritism. (the even-handed rule)"

4. Mark Zigler would have known about the common law on constructive trust and unjust enrichment of the Nortel creditors. Other lawyers at KM represented nine Nortel senior executives who were granted a constructive trust and an uncompromised settlement equivalent to monthly payments (ranging from $991 to $31,950) for a Supplementary Pension and Retirement Allowance.

   Nortel Networks Corporation (Re), [2010] ONSC 3061 June 25, 2010

   75. In all the circumstances, it is unjust to require the Retirees as involuntary creditors to accept the risk of Nortel's insolvency. The total value of the Annuities is approximately $7 million. This represents a tiny portion of the total estimated claims against Nortel. The impact of the loss of the Annuities on the Retirees is significant. The general rights of creditors in the Nortel estate do not provide a juristic reason to permit an unjust enrichment in the context of these specific Annuities.

   76. Accordingly, this is an appropriate case for the Court to construct a trust for the benefit of the Retirees, and ensure that Nortel is not unjustly enriched.

   Sun Indalex Finance, LLC v. United Steelworkers, [2013] 1 SCR 271, 2013 SCC 6
   Indalex (Re), [2011] ONCA 265 April 7, 2011
   Indalex (Re), [2010] ONSC 1114 Feb. 18, 2010
   KPMG (Trustee in Bankruptcy of Ellingesen) v. Halmark Ford Sales Ltd., [2000] BCCA 458
   Ascent Ltd. (Re), [2006] O.J. No. 89 (O.C.J.)
   Pettkus v. Becker, [1980] 2 S.C.R. 834
   Sorochan v. Sorochan, [1986] 2 S.C.R. 38
   Soulos v. Korkontzilas, [1997] 2 S.C.R. 217

5. Mark Zigler did not exert the rights in the **Ontario Trustee Act S. 27(1)** with respect to the HWT loan to Nortel. This legislation says:

> "In investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments."

Nortel HWT trustees investing 30% of the HWT assets in a loan to Nortel, without interest or security, does not meet the standard of a prudent investor. There is no evidence that the HWT trustees took any steps to request the repayment of the HWT loan to Nortel at any time before or after the Nortel CCAA filing. The loan to Nortel is an asset of a trust account, and trust account assets are not accessible to creditors under S. 67 (1) (a) of the BIA.

6. Mark Zigler ignored Nortel's breach of the Ontario Consumer Protection Act on misrepresentation of an insurance contract that is not regulated under the Ontario Insurance Act.

Appendix B - Report on Misrepresentation Evidence
Letter to Assistant Deputy Minister Denton from Rochon Genova LLP Aug. 16, 2011

7. Mark Zigler had a conflict of interest between the majority of pensioners and minority of long term disabled employees he represented. This conflict resulted in the same treatment of the pensioners and disabled employees despite obvious legal differences:

- There were no wrongdoings in the pension plan, all employer contributions were made, employer contributions were paid in cash and not in loans to Nortel and there was no money removed from the pension trust to pay Nortel expenses. So there was no quid pro quo giving up of rights for the pensioners who also got nine months of benefits in 2010.

- KM made no effort to preserve the legal right of the disabled to make a plea for a non pari passu settlement on equitable considerations in the Sanction or Fairness Hearing after the CCAA Final Plan vote. The disabled HWT funding ratio of 38% compared to the pension plan funding ratio of 80% in Ontario, 69% in Nova Scotia and 57% in other Provinces. CPP disability income of $15,490 compared to combined CPP and OAS pension income of $19,956. Disabled medical expenses of $7,588 per person per annum, with pensioners at $1,756 .

- KM did not make a legal argument for the disabled to get a full return of their employee contributions to the HWT, before equal sharing of the remaining assets in the HWT amongst the disabled, survivors and pensioners group life insurance benefits plan members. Nortel had no legal obligations to fully fund the pensioners group life insurance benefits plan within the HWT, which was also a non-contributory plan. The pension plans were non-contributory.

8. Court Monitor Ernst & Young as the delegated officer of the court, J. Morawetz, Mark Zigler, and court representative Sue Kennedy breached Rule 7.08(4) in Rules of Civil Procedure under the Ontario Courts of Justice Act which requires all settlements with a person under disability to be in the best interests of the disabled person, to be with full disclosure of evidence regarding the material issues, and with reasonable legal fees. See Rule 7.08(4) and **Rivera v. LeBlond, 2007 CanLII 7396 (ON SC)** points below showing the detailed requirements of this Rule.

The **Letter from Court Monitor's Legal Counsel on Non-Disclosure Nov. 5, 2009** denies full disclosure of the requested evidence on the HWT Financial Statements, the group long term disability benefit plan legal document, actuarial and other relevant reports.

> "…the Monitor exercises its discretion on issues of disclosure in light of a number of competing considerations, including some that are not always readily apparent. Considering all of the relevant factors, the Monitor then determines to whom, how and when disclosure of documents should be made, taking into account the interests of all stakeholders and other facets of the restructuring.
>
> For the time being, the Monitor remains of the view that the disclosure of certain of the requested information should remain subject to the non-disclosure agreement, given a number of matters currently in progress in the restructuring"

Interim Settlement Court Transcripts March 3, 4, 5, 2010 indicate that J. Morawetz denied the requested two month delay of the settlement agreement hearing for discovery of evidence on the HWT and the group long term disability benefit plan. He did this knowing that the Court Monitor had refused disclosure of requested information.

The Nortel debtors in Canada filed a motion on March 3, 2010 seeking approval of the settlement agreement with the Nortel long term disabled employees, who are persons under disability, including undisclosed persons who are mentally incapacitated by their disability. This motion did not submit sufficient evidence to make a meaningful assessment of the reasonability of the proposed settlement of the claims of a person under a disability. It did not contain full disclosure of evidence regarding the material issues. The single 2008 HWT financial statement and the HWT Trustee Agreement disclosed at the time of the settlement agreement showed there was a massive deficit in the HWT relative to Nortel's legal obligations to fund certain HWT listed benefits on an actuarial sound basis, and that a large loan to Nortel was on its balance sheet. But, discerning the cause of deficit being a fraudulent breach of trust and fraud done to materially improve the cash flow of Nortel required context from the whole body of evidence: the full historical set of historical HWT financial statements, HWT tax filings, the Long Term Disability Benefits Plan legal document, Mercers' actuarial reports, the Internal Company Manual, Sun Life Administration Services Agreement, and Benefits Brochures. This whole body of evidence was needed to make a meaningful assessment of the proposed settlement and it was not disclosed until six months after the settlement agreement with the disabled was approved by the court.

Mark Zigler of KM acting for the Nortel disabled did not file an affidavit setting out his position in respect of the proposed settlement even though he is required to do so in Rule 7.08(4). Mark Zigler did not support the two month delay for discovery of evidence. KM did not disclose its fees and disbursements and there is no discussion in any affidavit or court hearing on whether these are reasonable in all the circumstances

Sue Kennedy did file an affidavit on March 2, 2010 agreeing to the settlement agreement. She gave therein KM's legal opinion that "there was no statutory obligation under the terms of the Trust Agreement which required Nortel to fund in full the HWT benefits." There was no indication that this settlement was in the best interests of the disabled, rather she states "it was the best outcome in the circumstances." The stated circumstances were the limited cash flow in the Canada estate, the disabled need for the certainty and security of income and medical benefits for the next nine months and giving up rights to future, risky and uncertain litigation which will take years to resolve.

9. The argument of a quid pro quo legal release being of nominal value due to future risky and uncertain litigation which will take years to resolve has multiple deficiencies relative to the

material issues to be assessed by the disabled legal counsel, disabled court representative, disabled settlement participants, the Court Monitor and the CCAA judge:

- The settlement did not contain full disclosure of evidence regarding the material issues surrounding the legal release, which was in breach of Rule 7.08(4)
- The disableds' lawyer and court appointed representative implied there were no available causes of action as the legal opinion was that Nortel had no legal obligation to fund the long term disability benefits in the HWT.
- There were no affidavits or other communications specifying the plausible causes of action and damage remedies above the pari passu settlement with unsecured creditors that were being given up, such as
  i. the $14 million underpayment from not returning employee contributions first before the pari passu calculations are done
  ii. the $32 million of assets taken from the HWT during 2005-2006
  iii. the $28 million loan to Nortel that is neither an actuarial sound employer contribution required in the HWT trustee agreement, nor a prudent investment of the HWT assets under trust legislation
  iv. the constructive trust over employer contributions that were not recognized to be made into the HWT at all, ie. not in the accounting of a loan made to Nortel for the employer contributions it knew it had to pay but planned to pay in the future when the loan was being repaid.
- Mark Zigler appears to have accepted the false premise that the CCAA court judge must, or would nonetheless, always use his discretion to apply federal paramountcy to override all common law and provincial statutes so as not to defeat the purpose of the CCAA by causing delay or frustrating the process under the CCAA to restructure the corporation. Mark Zigler made no effort to argue that just and fair treatment of the disabled with a remedy of under 1% of expected global and Canada estate assets could not cause delay or frustrate the process under the CCAA to restructure the corporation. Nortel was being liquidated by sale of its business units.
- The damages from the causes of action to be litigated could have been earmarked in a contingent escrow account for the disabled payable at the time of estate distribution or even beyond that. Litigation of the causes of action would have taken no less number of years than the almost eight years it has already taken to mediate and litigate the allocation of the Nortel bankruptcy estate assets. The Eatons bankruptcy proceeding was known to be a nine year process, extended seven years beyond the bankruptcy plan of arrangement approved in 1999 due to this plan containing an escrow account for future payments from Sears relating to its successful use of Eatons' tax loss carryforwards that were to be paid to former shareholders of Eatons.

Response to Point 2:

Mark Zigler appears to be unware that the Federal Government adopted mandatory disability insurance in the Federal Labour Code in 2012 and that the Ontario Government adopted mandatory disability insurance in the Ontario Insurance Act in 2014. This is surprising from a lawyer who has high acclaim for his benefits expertise.

The Nortel disabled were responsible for persuading these two governments that they needed to adopt mandatory disability insurance. KM was opposed to this policy change.

Response to Point 3:

We do agree with Mark Zigler that you could change the law to get the Nortel disabled paid in full. Our proposal is that you can achieve this goal by prescribing the Nortel group long term disability plan as an Eligible Financial Contract with deemed collateral in the CCAA Regulations on a retroactive basis.

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RULE 7.08 ON APPROVAL OF A SETTLEMENT WITH A PERSON UNDER DISABILITY

R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE **under** ***Courts of Justice Act, R.S.O. 1990, c. C.43***

APPROVAL OF SETTLEMENT

Settlement Requires Judge's Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O.

Where no Proceeding Commenced

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application.

Material Required for Approval

(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement.

(4.1) If there is no litigation guardian and the settlement that is the subject of the motion or application is in respect of a matter under the *Substitute Decisions Act, 1992* to which this rule applies, the affidavit referred to in clause (4) (a) shall be provided by the moving party or applicant (as the case may be), and the affidavit referred to in clause (4) (b) shall be provided by his or her lawyer.

Rivera v. LeBlond, 2007 CanLII 7396 (ON SC)

[22] In *Marcoccia v. Gill* [2007] O.J. No. 12, Wilkins J. addressed the issue of payment of solicitor's fees. At paragraphs 20, 38 and 39 he held that:

It may well be that the litigation guardian and even, possibly, the guardian of property might be prepared to make agreements with respect to contingency fees or other payments of fees to the solicitor, but, in my view, the scope of rule 7.08 is such that none of those agreements has any force and effect in the absence of approval by a judge and there is no obligation on the judge to award the solicitor fees and disbursements in accordance with any such agreement, unless that judge might be satisfied, having regard to the total circumstance of the settlement, that such additional fees and disbursements are correct and justified.

[23] Rule 7.08(4) and the obligations of the court pursuant to its *parens patriae* jurisdiction require a party seeking approval to submit sufficient evidence to make a meaningful assessment of the reasonability of the proposed settlement of the claims of a person under a disability.

[24] This is a serious and substantial requirement which cannot be satisfied by the provision of conclusory statements. It requires full disclosure of evidence regarding the material issues. Where there is a conflict in the evidence the conflicting evidence must be disclosed to the court.

[25] Rule 7.08(4) does not however, require a full trial of the material issues. The court should be sensitive to the costs of additional proceedings or imposing onerous obligations on the parties, provided sufficient evidence has been submitted to enable the court to make the required assessment.

[26] The evidence required will in part turn on the facts of the case. It may be that more evidence will be required where a person's claim is compromised in a settlement. Where the settlement contemplates amounts being invested or paid to third persons, it is necessary to provide sufficient evidence to demonstrate that the proposal is secure, provides a real benefit to the disabled person and adequately addresses the long term needs and interest of the disabled person.

[27] Typically the applicants will have to provide sufficient evidence to demonstrate that:

a) an appropriate investigation with respect to both liability and damages has been completed;
b) an appropriate assessment of liability issues has been made;
c) an appropriate assessment of damages issues has been made; and
d) the fees and disbursements which the plaintiff's lawyers propose to charge are reasonable in all the circumstances.

[29] The person under a disability has no ability to look after his or her own interest and other family members and litigation guardians may have little means of properly assessing such accounts. The court must be careful to ensure that funds are being appropriately apportioned both among the plaintiffs and with respect to costs paid.