

Mitch Davies
Assistant Deputy Minister, Strategic Policy Sector
Ministry of Innovation, Science and Economic Development Canada

November 23, 2016 EMAIL

Assistant Deputy Minister Mitch Davies:

In your Nov. 10, 2016 letter, you thanked us on behalf of Minister Navdeep Bains for our meetings with ISED staff on Aug. 25, 2016 and in a teleconference on Oct. 28, 2016. We appreciate the opportunity for a continuing dialogue on how the CCAA legislation and regulations need to be amended in respect to long term disabled former employees, since the CCAA judges are using their discretion in a grossly improper manner by:

- Denying disclosure of evidence, trials and justice for wrongdoings against the self-insured group long term disabled benefit plan beneficiaries, who are supposed to be well-protected by common law and provincial statutes governing trusts, such as breach of trust, constructive trust, misrepresentations and fraud. No CCAA purpose was served by these injustices for the disabled.
- Ignoring Rule 7.08(4) of the Rules of Civil Procedure for the Ontario Courts on settlements with disabled persons. Denial of evidence, improper assessment and unreasonableness of legal counsel fees for settlements with disabled persons (In the November 16, 2016 132nd Monitor's Report, Ernst & Young has disclosed its CCAA Monitor's fees and disbursements at Cdn\$169 million to date, bringing its total global amount to Cdn\$582 million. This report also disclosed for the first time that the former employees' court appointed legal counsel and their benefit advisory firms have fees of Cdn\$51 million to date.)
- Violating the long term disabled Charter rights to substantive equality and not to be denied of life, liberty and security. SCC tests for justifiable limitation of Charter rights are not met, plus the deleterious impact of the CCAA court forcing poverty on the disabled who had bought disability insurance from their employer is an overriding SCC Charter consideration that judges are responsible to administer.

Your letter says our proposals “have significant insolvency policy implications and potentially significant economic consequences. Accordingly, legislative or regulatory action to implement your proposals must be considered in this context...Any changes to insolvency and restructuring law must be evidence-based and consistent with domestic policy objectives and Canada's international commitments.”

Mark Schaan has told Greg McAvoy about these and other concerns and that Greg is not accepting the Ministry's concerns. In all of our communications with Mark Schaan and Paul Morrison, no Ministry evidence was provided to support these concerns. This is unusual for a Ministry that says any changes in law must be evidence-based. We, on the other hand, have

provided extensive evidence to support changing the CCAA legislation or regulations in respect to the disabled, and which refutes all of the concerns expressed by Mark Schaan and Paul Morrison in our 14 meetings and written communications shown below:

Request for Federal Disability Policy Change

[Email to Ministry of Innovation, Science and Economic Development Nov. 30, 2015](#)

[Federal Disability Policy Change](#)

Change Retroactive for Nortel LTD and Not for Nortel Pensioners

[Email to Ministry of Innovation, Science and Economic Development July 8, 2016](#)

[15 Reasons for Self-Insured LTD as Retroactive Eligible Financial Contract With No Pension Changes](#)

Self-Insured Group Long Term Disability Benefit Plans are an Insurance Contract

[Email to Mark Schaan, Ministry of Innovation, Science and Economic Development August 4, 2016](#)

Federal Government Has Legal Right to Make Retroactive Legislation and This is Exceptional Circumstances and a Deserving Case

[Email to Mark Schaan, Ministry of Innovation, Science and Economic Development August 12, 2016](#)

Deemed Financial Collateral for Self-Insured Group Long Term Disability Benefit Plan as an EFC Ensures that Nortel LTD Benefits Get Paid in Full

[Email to Ministry of Innovation, Science and Economic Development Aug. 31, 2016](#)

Negligible Risk of Successful NAFTA Claim from American Entities with Interests in the Nortel Canadian Estate

[Email to Ministry of Innovation, Science and Economic Development September 8, 2016](#)

[NAFTA Arbitration Claim on Expropriation of US Investor's Investment in Canada](#)

Benefits Canada Article Sept. 30, 2016 and the Serious Errors of Mark Zigler, Court Appointed Legal Counsel for the Nortel Disabled

[Email to Ministry of Innovation, Science and Economic Development Oct. 4, 2016](#)

Nortel CCAA Court Monitor and Judge Refused to Admit the Affidavits of Financial and Actuarial Experts and the Former Nortel Treasurer

[Email to Ministry of Innovation, Science and Economic Development Oct. 18, 2016](#)

No Impact on Cost of Capital Compared to Bankruptcy Professional Fees

[Email to Ministry of Innovation, Science and Economic Development Oct. 24, 2016](#)

Hansard Records Showing the Liberal Party Support for Retroactive Legislative Change to Ensure Full Payment of the Nortel Disabled Benefits

[Email to Ministry of Innovation, Science and Economic Development Oct. 24, 2016 #2](#)

Supremacy of Parliament Over Courts, Except Where New Law in Violation of the Charter

[Email to Ministry of Innovation, Science and Economic Development Oct. 27, 2016](#)

Compromise of Long Term Disabled Claims in Bankruptcy Violate the Charter of Rights and Freedoms

[Email to Ministry of Innovation, Science and Economic Development Nov. 8, 2016](#)

The Ministry staff are silent on whether they agree or disagree with our view that the CCAA and BIA violate the Charter in respect to disabled employees at bankrupt corporations. Perhaps you are waiting for a response from the Ministry of Justice on this critically important matter. Our position is that Minister Navdeep Bains prescribing self-insured group long term disability benefit plans as an Eligible Financial Contract on a retroactive basis in the CCAA regulations fulfils the Federal Government's obligation for the CCAA to be compliant with the Charter in respect to disabled persons. He, as a Minister, and the Cabinet have an obligation to act now so that the Nortel Canada estate rightfully pays for the damages of the Charter breach, rather than the Federal Government paying for it later after successful Charter litigation. Canadian disabled should be spared the need for Charter litigation given the poverty imposed upon them by an unconstitutional law and bankruptcy court practices.

We have the following questions about the issues your letter raises about the insolvency policy implications, significant economic consequences, domestic policy considerations and international commitments. Could you respond in writing your Ministry's answers to these

questions, including the evidence used to formulate these answers? In the interest of efficiency we provide our own answers to these questions, so that your written response can be more targeted.

- 1. What domestic policy objectives or insolvency law policy implications/purpose was served by the squashing of the Charter rights of the Nortel disabled?
S. 15(1) on right to substantive equality
S. 7 right not to be deprived of life, liberty and security.**

Our answer:

No purpose was served by the court forcing the limitation of Nortel disabled Charter rights, because Nortel was being liquidated. There were no possible delays or frustration of a restructuring or reorganization, since these were not happening.

There was no greater contribution to GDP or more jobs saved to benefit society because the Nortel disabled were forced into poverty.

The deleterious impact of the Nortel bankruptcy upon the Nortel disabled group is so severe that it cannot in any circumstances be justified by the purposes intended to be served by the CCAA. The Supreme Court has already approved of this overriding consideration for not limiting Charter rights.

The Nortel bankruptcy's impact on the disabled was worsened by the over 6 years delay between the first 38% HWT settlement of our disability income actuarial liabilities and the pending CCAA settlement. The capital from the HWT was used up during the delay, because their basic living and medical expenses far exceeded the maximum CPP disability income each year, now at \$15,490 in 2016. Nortel disabled average medical expenses are Cdn\$7,800 annually. Without any income contribution from the used up HWT settlement, the pending CCAA settlement capital will also be used up for basic living and medical expenses within just a few years. This leaves the Nortel disabled to live on only CPP disability income up to death or age 65.

- 2. The Supreme Court has decided in [Baker](#) and [Slaight](#) that its interpretation of S. 7 deprivation of rights to life, liberty and security needs to be consistent with international human rights documents ratified by the Federal Government, such as the [International Covenant on Economic, Social and Cultural Rights](#) (ICESC) and [United Nations Convention on the Rights of Persons with Disabilities](#) (UNRPD.) Both of these international human rights documents ratified by Canada say that States Parties must recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing.**

What international commitments has your Ministry made that take precedence over the Charter rights of the disabled in Canada, and the International Covenant on

Economic, Social and Cultural Rights and United Nations Convention on the Rights of Persons with Disabilities?

Our answer:

Not aware of any international commitments taking precedence over the ICESCR and UNCRPD.

None of the other Nortel creditors are protected under the Charter.

None of the other Nortel creditors qualify as investors entitled to make NAFTA claims of expropriation.

The Parliament has supremacy to make any law it chooses, and it is obliged to make its laws in compliance with the Charter that specifically protects the disabled. Parliament has the authority to make retroactive laws and the SCC advises that retroactive laws be clearly written so there is no ambiguity of what exactly is intended by the retroactivity.

3. The Supreme Court in *Vriend* says that “the final word in our constitutional structure is in fact left to the legislature and not the courts.”
Will the Minister uphold the Charter rights for disabled persons by prescribing self-insured group long term disability benefit plans as Eligible Financial Contracts?

Our answer:

The Minister has an obligation to correct the Charter breach for the Nortel disabled.

The Minister must ensure that future CCAA judges cannot use discretion to compromise a disabled person’s creditor claim in breach of the Charter?

To ignore the Charter issue, exposes the Federal Government to a Charter claim and damages to be paid to all disabled persons at bankrupt corporations since 1982.

4. What are the economic consequences of the Minister upholding the Charter rights for the Nortel disabled?

Our answer:

Economic consequences are de minimis as demonstrated by evidence in:

No Impact on Cost of Capital Compared to Bankruptcy Professional Fees

[Email to Ministry of Innovation, Science and Economic Development Oct. 24, 2016](#)

There is no proportionality between the damages to the Nortel disabled and the benefits to Canadian society.

Violation of Charter rights that have such a deleterious impact on the disabled, which is a specifically protected Charter group, cannot in any circumstances be justified by the purposes intended to be served by the CCAA or by economic consequences for others in Canadian society.

We look forward to your response. Our request to meet with the Minister is outstanding.

Sincerely

Diane A. Urquhart

Independent Financial Analyst

Pro Bono Advisor to the Nortel Canadian Long Term Disabled Former Employees

Cell: (647) 980-7618

urquhart@rogers.com

CC:

Minister Navdeep Bains

Mark Schaan, Director General, Marketplace Framework Policy Branch

Paul Morrison, Manager Policy Development (Insolvency)

Greg McAvoy, Nortel Long Term Disabled Former Employee

Jennifer Holley, Nortel Long Term Disabled Former Employee