

Humanitarian Plea For Non-Partisan All Party Support For Senator Art Eggleton's Senate Bill S-216

We are making a humanitarian plea for non-partisan all party support for Senator Art Eggleton's Senate Bill S-216, which provides for the preferred status of long term disability (LTD) benefit claims over unsecured creditor claims within the CCAA and BIA.

The March 31, 2010 Settlement Agreement between Nortel and its Former Employees and Long Term Disabled Employees, and its approval by J. Geoffrey Morawetz of the Ontario Superior Court of Justice, make it necessary for the Canadian Government to use its power of paramountcy to implement amendments of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act to protect the life and quality of life of Canadian long term disabled employees.

These amendments are necessary on humanitarian grounds at this time since 400 Nortel long term disabled (LTD) employees are being driven into poverty after January 1, 2011.

A. The settlement agreement approved on March 31, 2010 puts Nortel LTD employees into poverty.

- (i) it denies the right to sue parties responsible for an alleged Breach of Trust involving Nortel not making required employer contributions into the Health and Welfare Trust (HWT) and the HWT loaning Nortel \$37 million, resulting in a total shortfall within the HWT of an estimated \$112 million for payment of the LTD wage loss replacement income, medical, dental and life benefits;
- (ii) it seeks to prevent a BIA amendment for preferred status of long term disability claims to be applicable to them.

B. The evidence of Nortel long term disability employees' poverty is submitted to the CCAA court and the House of Commons Standing Committee of Finance.

- (i) A single disabled person is expected to have an effective income after medical costs post January 1, 2011 of under \$16,700 per year as shown in Table 1 and 2 below;
- (ii) There is an estimated additional \$26 million of pension accruals lost between now and when the LTD employees reach age 65, causing poverty in their retirement years, as well;
- (iii) It is patently unfair to put LTD employees into poverty, while Nortel is paying retention bonuses of \$137M and over \$330M of other annual incentive payments post the bankruptcy filing.
- (iv) The disabled are not treated equally from both the social security pension perspective and the regulation of Health and Welfare Trusts versus Pension Funds: disability pensions are lower and less secure than retiree pensions from combined government and employer sources.

The single long term disabled person in Canada has a maximum CPP disability income of just **\$13,521** in 2010. The single retiree gets a combined maximum CPP and OAS pension of **\$17,414** in 2010.

C. The CCAA court process for approving settlements between an employer and disabled employees is deeply flawed.

- (i) Three persons on the Retirees and Severed Employees' Legal Steering Committee and one person on the LTD Employees' Legal Steering Committee capitulated on a combined basis to a settlement under which a remedy for Breach of Trust would not be put forward and for which bankruptcy law amendments for the preferred status of LTD benefits would not apply to Nortel.
- (ii) The Steering Committees, their court-appointed legal counsel Koskie Minsky LLP, CAW Internal Legal Counsel and J. Morawetz seem to have all been persuaded that there was a crisis caused by Nortel planning to cut off medical benefits beginning April 1st. The pensioners who are losing an estimated \$2,100 per person for the balance of 2010 in medical benefits wanted the certainty of not losing these benefits. There was a legitimate concern for an undetermined number of both pensioners and disabled persons, who have catastrophic medical costs that Nortel would cut off after April 1, 2010.
- (iii) Legal steering committees and Court-appointed representative legal counsel are operating with conflicts of interest. Koskie Minsky LLP and the CAW Canada represented both the pensioners and LTD employees. The LTD employees will always be a minority in a group of combined pensioners and LTD employees, will be a small number and will have a high propensity for their interests to be compromised due to their illnesses and limited financial means to retain their own legal counsel. The fight for fair treatment in complex bankruptcy proceedings dominated by sophisticated creditor groups, like the bond holders and foreign government agencies, is an unacceptable burden to be placed on the disabled who need peace of mind.

While both the pensioners and LTD employees received short term medical benefits and additional contributions to their Pension Fund and HWT for the remaining 9 months of 2010, the LTD employees bore an excessive burden in the concessions made to not sue the parties involved with the alleged Breach of Trust in the HWT.

Nortel long term disabled employees have just 17% funding of their wage loss replacement income from a Health and Welfare Trust (HWT), compared to the retirees that have a 69% to 92% funding of their pension income from a Pension Fund. The higher average funding ratio is in Ontario due to the Ontario Government's decision to provide at least \$200 million of payments into the Nortel Pension Fund under the Ontario Pension Benefit Guarantee Fund.

- (iv) Special care is not being undertaken to ensure that the disabled have information supplied to them in a sufficiently clear manner and with adequate accommodation of time so that the disabled and their guardians can make informed decisions.
- (v) Silence from the disabled is being considered approval of a settlement despite their lesser ability to interpret information and make communications and their natural fear of adverse outcomes affecting their life. Without evidence of absolute confirmation or any vote, a single disabled person on a Legal Steering Committee is granted the authority of the bankruptcy court to bind disabled persons to deficient settlements, even where there is evidence of serious Breach of Trust causing their poverty.

- D. The UN Convention for the Rights of Persons With Disability signed on March 11th requires the Federal Government to ensure within its sphere of responsibility that it promotes equality for persons with disabilities.
 - (i) The Federal Government needs to amend the Federal bankruptcy laws and not wait for or rely on Provincial initiatives to protect LTD benefits.
 - (ii) Even if there were to be Federal and Provincial Company Acts, Employment Standards Acts, Health and Welfare Trust Standards Acts to require the establishment of trust accounts, trustee agreements and full funding requirements for all LTD benefits plans in Canada, there would still be a need to amend the Federal bankruptcy laws so as to protect disabled employees, because they are the most vulnerable in Canadian society.

E. Broader public policy implications must be addressed.

- (i) The Ontario Superior Court of Justice decision to find third party releases not overly broad and not offensive to public policy, despite the allegations of Breach of Trust in Health and Welfare Trusts, must be taken in the context of a private agreement reached where a benefit is supplied to the former employees, and in exchange, the former employees agree to not sue the debtor company and third parties, such as the trustees of trust accounts.

However, for the reasons noted above the private agreements involving the disabled are rife with problems due to: the conflicts of interest amongst different former employee groups and court acceptance of Steering Committees and court -appointed representatives covering these different former employee groups; the disabled's minority status and small numbers; and, their illnesses and lack of financial resources to obtain independent legal counsel to fight for fair treatment.

- (ii) Long term disability benefits are insecure throughout the country due to unregulated self-insurance and due to breach of trust or simply no effort by employers to conduct any funding beyond Pay as You Go. This Ontario Superior Court of Justice CCAA proceeding's handling of the Nortel disabled group provides a message to other employers that it is acceptable for employers to abuse their employees with insecure self-insured LTD wage loss replacement and medical benefits. It is now acceptable in Canada for employers to commit a Breach of Trust against their disabled employees for the financial benefit of the company owners and for executives being paid incentives to maximize the profits and value of the company.

F. The fix is doable without disrupting the Nortel bankruptcy and is politically palatable too.

- (i) Retroactive repair of this untenable situation for Nortel LTD employees is a humanitarian response that is not apt to be contested by the Nortel CCAA players,
- (ii) There is projected \$6 billion of cash for disbursement in Nortel's liquidation to creditors around the world. While the Canada Estate has projected cash of only \$134 million at April 24, 2010, it will be getting a future share of the projected \$4 billion cash in the lock box from business sale proceeds. The bankruptcy law amendment applicable to Nortel would have incremental cost about \$120 million or less than 2% of the Nortel global estate.

- (iii) The four Federal opposition parties support the objectives of Senator Art Eggleton's Bill S-216 for the long term disabled to get preferred status under the BIA and CCAA. We remain very optimistic that Industry Minister Tony Clement and Finance Minister James Flaherty will support the cause of making sure every Canadian worker has secure long term disability benefits and that no-one is forced to go through the duress of settlements like the one approved today.
- (iv) The Transition Provision for Bill S-216 will need to apply to proceedings under the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act that have commenced before the coming into force of the new amendment, and be applicable to interim settlement agreements in these proceedings.

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Table 1 - Summary Comparison Effective Income Net of M & D Costs Sum of Income from Nortel and Government Social Security Plans Medical and Dental Costs Without Provincial Government Assistance Nortel Bankruptcy Canada Estate Cash Settlement Ratio 15%	Long Term Disabled Employee Employer Paid to 50%	Employee Paid Optional Added to 70%	Survivor Not in Ontario	Retiree Not in Ontario	Retiree In Ontario
Working Income Before	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000
Effective Income Net of Medical and Dental Costs Before	\$25,000	\$35,000	\$24,204	\$36,204	\$36,204
Effective Income Net of Medical and Dental Costs After	\$13,727	\$16,672	\$19,775	\$29,467	\$33,187
% Reduction Effective Income Net of M & D Costs	-45%	-52%	-18%	-19%	-8%
Multiple of Survivor/Retiree \$50,000 versus LTD Employee \$50,000 @ 50%			1.4	2.1	2.4
Working Income Before	\$70,000	\$70,000	\$70,000	\$70,000	\$70,000
Effective Income Net of Medical and Dental Costs Before	\$35,000	\$49,000	\$31,404	\$48,204	\$48,204
Effective Income Net of Medical and Dental Costs After	\$16,672	\$20,795	\$24,751	\$38,305	\$42,025
% Reduction Effective Income Net of M & D Costs	-52%	-58%	-21%	-21%	-13%
Multiple of Survivor/Retiree \$70,000 versus LTD Employee \$70,000 @ 50%			1.5	2.3	2.5
Multiple of Survivor/Retiree \$50,000 versus LTD Employee \$70,000 @ 50%			1.2	1.8	2.0

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Table 2 - Individual With Working Income of \$50,000	Long Term Disabled Employee Employer Paid to 50%	Employee Paid Optional Added to 70%	Survivor Not in Ontario	Retiree Not in Ontario	Retiree In Ontario
Working Income Before	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000
% Benefit Relative to Working Income	50%	70%	36%	60%	60%
Health & Welfare Trust / Pension Fund Funding % on Income	17%	17%	69%	69%	92%
Medical and Dental Benefits Funding %	17%	17%	0%	0%	0%
Income and Medical and Dental Funding %	17%	17%	58%	62%	83%
Bankruptcy Cash Settlement Ratio %	15%	15%	15%	15%	15%
H & WT / Pension Fund and Bankruptcy Cash Settlement %	29%	29%	64%	68%	86%
Income All Sources and M & D Benefits Before	\$29,500	\$39,500	\$26,304	\$38,304	\$38,304
Medical and Dental Costs Before	\$4,500	\$4,500	\$2,100	\$2,100	\$2,100
Effective Income Net of Medical and Dental Costs Before	\$25,000	\$35,000	\$24,204	\$36,204	\$36,204
Medical and Dental Benefits Nortel Before	\$4,500	\$4,500	\$2,100	\$2,100	\$2,100
Income All Sources Before	\$25,000	\$35,000	\$24,204	\$36,204	\$36,204
Guaranteed Income Supplement	\$0	\$0	\$0	\$0	\$0
Old Age Security	\$0	\$0	\$6,204	\$6,204	\$6,204
CPP First Payer	\$13,521	\$13,521	\$6,726	\$11,210	\$11,210
Income Nortel Before	\$11,479	\$21,479	\$11,274	\$18,790	\$18,790
Income All Sources and M & D Benefits After	\$18,227	\$21,172	\$21,875	\$31,567	\$35,287
Medical and Dental Costs After	\$4,500	\$4,500	\$2,100	\$2,100	\$2,100
Effective Income Net of Medical and Dental Costs After	\$13,727	\$16,672	\$19,775	\$29,467	\$33,187
Medical and Dental Benefits Nortel After	\$1,325	\$1,325	\$315	\$315	\$315
Income All Sources After	\$16,902	\$19,847	\$21,560	\$31,252	\$34,972
Guaranteed Income Supplement	\$0	\$0	\$327	\$0	\$0
Old Age Security	\$0	\$0	\$6,204	\$6,204	\$6,204
CPP First Payer	\$13,521	\$13,521	\$6,726	\$11,210	\$11,210
Income Nortel After	\$3,381	\$6,326	\$8,303	\$13,839	\$17,559
% Reduction Nortel Income and M & D Benefits	-71%	-71%	-36%	-32%	-14%
% Reduction Effective Income Net of M & D Costs	-45%	-52%	-18%	-19%	-8%

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