

## **Humanitarian Plea For Non-Partisan All Party Support For Senator Eggleton's 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 Settlement 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 on March 31, 2010, make it necessary for the Canadian Government to use its power of paramountcy to implement amendments of the *Bankruptcy and Insolvency Act (BIA)* and the *Companies' Creditors Arrangement Act (CCAA)* to protect the life and quality of life of Canadian long term disabled employees.

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

### **A. The Settlement approved on March 31, 2010 puts Nortel LTD employees into poverty. Specifically:**

- (i) The Settlement denies the right to sue third parties responsible for an alleged Breach of Trust involving Nortel not making required employer contributions into the Health and Welfare Trust (HWT) and Nortel taking a loan from the HWT of \$37 million. There is a shortfall within the HWT of an estimated \$112 million, which should have been available for payment of the LTD wage loss replacement income, medical, dental and life benefits;
- (ii) It seeks to remove a fundamental clause within the First Settlement rejected by the court, which would have allowed the LTDs to receive the benefit of a *BIA* amendment giving preferred status to LTD claims.

### **B. The evidence of Nortel long term disability employees' poverty has been submitted to the CCAA court and the House of Commons Standing Committee of Finance. In particular:**

- (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 in the face of Nortel 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 perspective and the regulation of Health and Welfare Trusts versus Pension Funds: disability wage loss replacement income is lower and less secure than retiree pensions from combined government and employer sources.

A 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, and may qualify for Guaranteed Income Supplement.

**C. The UN Convention for the Rights of Persons With Disability signed on March 11th requires the Federal Government to take proactive steps within its sphere of responsibility to promote 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, which have not materialized over many decades;
- (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. Here in the case of Nortel, even the established trust for the disabled has been jettisoned.

**D. The CCAA court process for approving settlements between an employer and disabled employees is deeply flawed under the current legislation. Consider:**

- (i) Three persons on the Retirees and Severed Employees' Legal Steering Committee and one person on the LTD Employees' Legal Steering Committee accepted the settlement, which gave consideration of just 7% of what is owed to the LTD employees in the form of nine months of benefits in 2010, while precluding the LTDs from pursuing any legal remedies against third parties responsible for the Breach of Trust;
- (ii) The affect of this settlement on the LTDs will be dramatic following January 1, 2011 when their wage loss replacement income, medical and life benefits are expected to be slashed by as much as 71%, causing the LTD employees to live in poverty. The LTD employees are losing over \$270,000 of actuarial value *per person* post 2011 due to the March 31st settlement, without any possibility of recourse for the Breach of Trust within the bankruptcy process, or through supplementary litigation or mediation;
- (iii) Legal steering committees and Court-appointed representative legal counsel are operating under an apparent conflict of interest. Koskie Minsky LLP and the CAW Canada represented both the pensioners and LTD employees.

The LTD employees will always be the minority in a group of combined pensioners and LTD employees. The disabled employees of a corporation 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 pensioners received \$2,100 per person of short term medical benefits and additional contributions to their Pension Fund for the remaining nine months of 2010. LTD employees also have continuation of their medical benefits through December 31, 2010, but they carry an excessive burden by being forced to give up their right to 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. This is not to take anything away from Pensioners but only to underscore the vast disparity between these two groups.

- (iv) The fight for fair treatment in complex bankruptcy proceedings dominated by sophisticated creditor groups, like the junk bond holders and foreign government agencies, is an unacceptable burden to be placed on the disabled who are the most vulnerable in our 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 monetary consideration 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 apparent 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; settlements made under the duress of corporations threatening to cut off medical benefits; and, LTD employees being ill and lacking the 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 so called self-insurance and due to Breach of Trust or simply no effort by employers to conduct any funding beyond Pay as You Go. The message from this decision of the Ontario Superior Court of Justice CCAA proceeding's surely cannot be: "It is acceptable for employers to breach trust agreements designed to protect their 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) Bill S-216 solves the disabled self-insurance problem, without materially impacting the cost of doing business or disrupting bankruptcy proceedings.
- (ii) Nortel's Directors and governance committees for the HWT could have put the missing money back into the trust for the disabled prior to its bankruptcy filing, since the company had \$1.8 billion of available cash world-wide at that time. The bankruptcy law amendment for Nortel's disabled would have incremental cost of less than 2% of the Nortel world-wide estate, which has projected cash of \$6 billion for disbursement to world-wide creditors later this year or in 2011. While the Canada Estate has estimated 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 Nortel's business sale proceeds.
- (iii) The four Federal opposition parties support the objectives of Senator Art Eggleton's Bill S-216 for the long term disabled to obtain preferred status under the BIA and CCAA. We are optimistic that Industry Minister Tony Clement and Finance Minister James Flaherty will support the cause of

Canadian workers having secure long term disability benefits within the context of a BIA or CCAA proceeding, and that no-one is forced to go through the duress of settlements like the one approved on March 31, 2010.

- (iv) Bill S-216 has a Transition Provision that will enable the Nortel LTD employees' to be made whole. The lawyers will be sorting out all the details of how this Transition Provision will work.

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<b>Table 1 - Summary Comparison Effective Income Net of M &amp; 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%</b>	<b>Long Term Disabled Employee Employer Paid to 50%</b>	<b>Employee Paid Optional Added to 70%</b>	<b>Survivor Not in Ontario</b>	<b>Retiree Not in Ontario</b>	<b>Retiree In Ontario</b>
<b>Working Income Before</b>	\$50,000	\$50,000	\$50,000	\$50,000	\$50,000
<b>Effective Income Net of Medical and Dental Costs Before</b>	\$25,000	\$35,000	\$24,204	\$36,204	\$36,204
<b>Effective Income Net of Medical and Dental Costs After</b>	\$13,727	\$16,672	\$19,775	\$29,467	\$33,187
<b>% Reduction Effective Income Net of M &amp; D Costs</b>	<b>-45%</b>	<b>-52%</b>	<b>-18%</b>	<b>-19%</b>	<b>-8%</b>
<b>Multiple of Survivor/Retiree \$50,000 versus LTD Employee \$50,000 @ 50%</b>			1.4	2.1	2.4
<b>Working Income Before</b>	\$70,000	\$70,000	\$70,000	\$70,000	\$70,000
<b>Effective Income Net of Medical and Dental Costs Before</b>	\$35,000	\$49,000	\$31,404	\$48,204	\$48,204
<b>Effective Income Net of Medical and Dental Costs After</b>	\$16,672	\$20,795	\$24,751	\$38,305	\$42,025
<b>% Reduction Effective Income Net of M &amp; D Costs</b>	<b>-52%</b>	<b>-58%</b>	<b>-21%</b>	<b>-21%</b>	<b>-13%</b>
<b>Multiple of Survivor/Retiree \$70,000 versus LTD Employee \$70,000 @ 50%</b>			1.5	2.3	2.5
<b>Multiple of Survivor/Retiree \$50,000 versus LTD Employee \$70,000 @ 50%</b>			1.2	1.8	2.0

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

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