

Nortel employees to take fight to SCC



Ongoing case has already run up \$600,000 in docketed time

By Michael McKiernan | Publication Date: Monday, 07 February 2011

A group of dissident former Nortel Networks employees on long-term disability benefits is taking their fight to the Supreme Court of Canada after their payments were cut off and they were left to face an uncertain future.

As part of a settlement approved by Ontario Superior Court Justice Geoffrey Morawetz in March 2010 between Nortel and its 19,000 former workers, the beleaguered company agreed to continue paying benefits to employees, including 360 of them on long-term disability, until the end of last year.

They would then split up the remaining assets of its health and welfare trust that was supposed to fund health benefits to employees and pensioners. In return, the employees effectively agreed to release those responsible for the alleged breaches of trust that left the health and welfare trust with gaping holes in its finances.

It was terminated with \$548 million in liabilities and just \$80 million in assets. According to documents filed with the court, Nortel had underfunded the trust and owed it almost \$40 million, information that was only revealed to employees on long-term disability after representative counsel for various groups of employees had reached an agreement.

Toronto lawyer Joel Rochon of Rochon Genova LLP, working with actuaries and financial experts, has taken up the case of 40 dissenting employees on long-term disability on an unpaid retainer. He got involved in February 2010 after representative counsel for various groups of employees came to an agreement. He opposed the settlement in court.

Rochon is also working to increase the proportion of the remaining trust funds reserved for the employees on long-term disability, arguing they'll be hardest hit by the cessation of benefits. "The situation facing Nortel's disabled employees is dire," he told *Law Times*.

"Through no fault of their own, they were being forced, under the duress of an imminent termination of vital disability income and medical benefits, to accept a settlement that provided very minimal benefits relative to what Nortel agreed to provide through the [trust] and what the trustees should have ensured was contributed to [it]."

Many of the disabled have no other source of income, have very high medical expenses, and would be left to rely on social assistance after Dec. 31."

In a separate decision, Morawetz approved the distribution of funds from the trust that will see employees on long-term disability receive about \$30 million, a quarter of what they're owed. The liability for income benefits alone stands at \$80 million.

Nortel's 11,000 pensioners will get \$35 million to cover death benefits that would have been paid out for life insurance policies. Rochon argued the court should have accepted a different scenario contemplated by Ernst & Young, the court-appointed monitor. In that case, the employees on long-term disability would have received \$58 million and the pensioners would receive nothing for their life insurance policies.

That scenario may look harsh on the pensioners, but on an individual level, they'd lose an average of \$3,500 per person, compared with the \$72,000 lost by each employee on long-term disability under the settlement, according to Rochon.

"We believe the imposition of an obligation on the [trust] to pay for death benefits to still-living pensioners upon the trust's termination is in error, particularly as the assets of the [trust] are insufficient to pay for the actual incurred disability income claims of the [trust] for which the trust is incontrovertibly liable," said Rochon, who believes the death-benefit payments may also violate the Income Tax Act.

Representative counsel for both employee groups advised them to accept the releases for Nortel directors because it would be risky and time-consuming to advance any claims and because they could end up with nothing or fighting among themselves.



'The situation facing Nortel's disabled employees is dire,' says Joel Rochon.

Rochon said that claim was “exaggerated,” but Morawetz disagreed, finding the releases were fair and reasonable. The releases would “reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs,” Morawetz wrote in his decision last year.

Rochon later appealed both of Morawetz’ decisions, seeking to eliminate the releases and change the trust allocations, but both were dismissed. “Granting leave to appeal would unduly hinder the progress of the action,” wrote Court of Appeal Justice Karen Weiler, who dismissed the appeal of the trust distribution on Jan. 7.

But according to Rochon, the dissenting employees intend to fight on. The case has already run up \$47,000 in disbursements and almost \$600,000 in docketed time, but Rochon has been instructed to appeal to the Supreme Court.

“We remain deeply committed to finding a remedy to ameliorate the dire circumstances faced by Nortel’s disabled,” he said. “We believe there are a number of issues of national importance raised by these proceedings.”

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