

of Counsel

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SENT VIA EMAIL & POST

Frank E. Denton
Assistant Deputy Minister
Ministry of Consumer Services
Policy and Consumer Protection Services Division
777 Bay Street, 5th Floor
Toronto, Ontario, M7A 2J3
Email: frank.denton@ontario.ca

Dear Mr. Denton:

Re: Nortel and Sun Life Consumer Protection Act Complaint

We have received your letter dated July 18, 2011 stating the Ministry will not be commencing an investigation into my clients' complaint filed under the Ontario *Consumer Protection Act, 2002*, ("CPA" or "Act") alleging unfair practices regarding Nortel funded and Sun Life administered disability insurance services (the "Complaint"). We are surprised that your letter was sent prior to our further written position regarding the jurisdiction of the Ministry to pursue the Complaint, which you agreed to receive prior to the Ministry making its final determination on this matter. This follows the apparent reversal of the Ministry's legal position between the June 16th meeting where the Director of Legal Services Jim Girling acknowledged that there was nothing in the letter of the CPA which indicated that the Complaint fell outside the Act's jurisdiction, but was rather outside of the Ministry's Internal Policy, and the July 15th meeting, where senior legal counsel Marilyn Marshall, a subordinate to Jim Girling, said the Complaint was, on its face, not within the legal jurisdiction of the CPA.

In any event, as we agreed to do on July 15th, we provide below our position as to why the Complaint falls within the jurisdiction of the Act. This submission responds to your letter of July 18, 2011 where you indicate that the CPA is not intended to regulate terms and conditions of employment or address disputes arising in the context of workplace relationship. As discussed below, the Complaint has nothing to do with regulating the terms and conditions of employment and the fact that it happens to arise in the context of the complainants' status of former employees of Nortel is irrelevant. The Ministry's position regrettably represents a flawed understanding of the nature of the Complaint and of the services to which it relates. It further runs counter to the CPA's anti-avoidance provision which requires that consideration be given to the "real substance of the transactions" rather than their "outward form".

The Nature of the Complaint

The Complaint covers three components in the supply of disability insurance services to the Nortel disabled former employees, all of which are within the literal meaning of the words in the definition of “consumer transaction” and “consumer”.

“consumer transaction” means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;

“consumer” means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

The three components in the supply of disability insurance services are:

- (1) the core group disability insurance for wage loss replacement of 50% of pre-disability income, paid for by Nortel as part of its total financial rewards package for the employee's labour, skill and knowledge; (“Component 1”)
- (2) the optional group disability insurance for wage loss replacement raised from 50% to 70% up to 2006 and 66-2/3% thereafter of pre-disability income, paid for with after-tax income deductions or a combination of after-tax income and flex credits of prescribed monetary value at the rate of 0.45% up to 2007 and 0.50% thereafter of pre-disability income; (“Component 2”)
- (3) the administrative services provided by Sun Life and predecessor insurers, relating to the Nortel funded core group disability insurance and the Nortel employee funded optional group disability insurance. (“Component 3”)

While Component 1 of core group disability insurance is a term and condition of employment in the sense that it is supplied to all employees and employees of Nortel based on its combination of wages and benefits compared to alternative employers, Component 1 of core group disability insurance is nevertheless within the literal meaning of “other dealings with a consumer” as “an individual acting for personal, family or household purposes”. The Nortel employee is not a “person who is acting for business purposes”, such as reselling the core disability insurance to a customer of his, or using it as an input into a product or service that he sells to a customer.

With respect to Component 2, Nortel employees bought optional group disability insurance in a choice between buying this or an individual disability insurance policy to raise their coverage from 50% to 70% of pre-disability income. The optional group disability insurance was supplied by Nortel at a cost of at or about 15% to 25% of what individual disability insurance costs due to the economies of scale and bargaining power of large employers. It was much cheaper to buy the additional 20% optional group disability insurance coverage through the employer than to buy the same amount of individual disability insurance.

Component 2 optional group disability insurance is within the literal meaning of “consumer transaction” and “consumer” as captioned above for the same reason as Component 1. Given its optional nature, Component 2 is not a term and condition of employment and has nothing to do with “regulating the terms and conditions of employment”. While the dispute happens to arise in the context of an employment relationship the real substance of the transactions relate to the supply of disability insurance services.

Component 3 of the Complaint relating to the administrative services provided by Sun Life in relation to Nortel's disability insurance is within the literal meaning of “other dealings with a consumer” as “an individual acting for personal, family or household purposes”. The Nortel employee is not a “person who is acting for business purposes”, such as reselling Sun Life administrative services to a customer of his, or using it as an input into a product or service that he sells to a customer. Further, as Component 3 relates to the administrative services provided by Sun Life, this aspect of the Complaint has nothing to do with “regulating the terms and conditions of employment”.

The Scheme of the Act

As a result, each component of the Complaint falls within the literal meaning of the defined terms “consumer transactions” and “consumer” in Part 1 Interpretation of the CPA. In particular, Components 2 and 3 are so far removed from employment matters that the Ministry's position refusing to investigate the Complaint on the basis that the CPA was not intended to regulate terms and conditions of employment is untenable and suggests that the Complaint has not been considered in good faith.

Beyond falling within the literal meaning of the defined terms “consumer transactions” and “consumer” in Part 1 Interpretation of the CPA, that the Complaint is within the jurisdiction Act is made evident through a review or consideration of the systematic arrangement of correlated parts, and the overall scheme, of the Act.

First, the Complaint is not barred by the exceptions set out in section 2(2). None of Component 1 core group disability insurance and Component 2 optional group disability insurance supplied by Nortel, nor Component 3 administrative services supplied by Sun Life fall within the category of “financial products or services regulated under the *Insurance Act*” and are thus not excluded from the CPA. It bears mention that the CPA contains a long list of exceptions indicating that the legislators turned their mind to the types of transactions that would be excluded from the Act's jurisdiction. If all transactions emanating from an employment relationship, however remote, even those relating to optional services purchased by employees, as well as activities of an entity other than the employer, were intended to fall outside of the CPA, the Act would certainly have specifically said so.

Further, none of the three components to the Complaint are regulated activities under the *Employment Standards Act* (“ESA”) and are further not within the jurisdiction of the ESA since

former employees receiving payment of disability income benefits are not employees receiving wages as defined within the ESA for jurisdiction of this Act.

Moreover, the CPA's jurisdiction over the Complaint is captured through the anti-avoidance clause in section 3 since the real substance of the transaction is disability insurance and not a term and condition of employment. This anti-avoidance provision provides as follows:

In determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.

Investigating the Complaint is within the Object of the CPA

Pursuing regulatory remedies for the unfair business practices and misrepresentations of Nortel and Sun Life in respect of their disability insurance services is within the spirit and object of the Act.

The object of the Act is expressed in the Powers of Minister at section 102(1) The Minister may (c) enforce this Act and other legislation for the protection of consumers.

The Explanatory Notes on the Legislative Assembly of Ontario website say "The new Act, subject to limited exceptions, applies to all consumer transactions where the consumer or the person with whom the consumer is conducting the transaction is located in Ontario. There is an anti-avoidance provision that allows the substance of a transaction or entity to be examined to determine whether it is covered by the Act, permitting the form to be ignored."

Although the CPA, or in Explanatory Notes on the Act, expressly states that the object of the CPA is to "regulate transactions between individual consumers and supplier of goods and services with a view to promoting a fair and balanced marketplace", it bears noting that such an object would, in any case, cover the promotion of a fair and balanced marketplace for disability insurance services. However, nowhere in the CPA, or in Explanatory Notes on the Act, is it stated that the CPA "is not intended to regulate terms and conditions of employment, or to address disputes which arise in the context of workplace relationships".

It also bears mention that the intention of Parliament, as gleaned from the Hansard Transcripts of debates at the Legislative Assembly of Ontario and Ontario Standing Committee of Finance and Economic Affairs found in APPENDIX A, is for the CPA to have broad scope and flexibility and to adapt and prepare for the future. The Act is intended as an important legislative tool to help individuals who have been unfairly taken advantage of or who are hard done by when it comes to the practices of business.

Summary


Based on a plain meaning interpretation of the CPA, as well as the documented legislative intent and broad and flexible scope of the Act, which Ontario courts have accepted, we believe that a judge hearing the Ministry's application for determination of offences and remedies under the Act relating to Nortel's and Sun Life's group disability insurance services would accept that the Complaint is within the jurisdiction of the CPA. It is not necessary for the court to engage in gap-filling powers to find that jurisdiction could be asserted and find a judicial solution for the poverty and potential premature death of Nortel disabled former employees within the CPA. We note that the judge has the power to make orders for compensation and restitution under section 117. The evidence on these unfair practices and misrepresentations in the Report on Misrepresentation Evidence found at APPENDIX B provides compelling support for the Ministry to achieve a successful prosecution of these offences under the CPA.

The Ministry of Consumer Services not commencing an investigation into my clients' Complaint is tantamount to the Ontario Government deciding not to use a regulatory and judicial tool available to provide a remedy for the poverty and potential premature deaths of the Nortel disabled former employees caused by the unfair business practices of Nortel and Sun Life in the form of false, misleading and deceptive representations of their group disability insurance services. Inaction by the Ministry also permits other employer and insurers to engage in unfair practices and misrepresentations that is affecting 1.1 million Canadians covered by employer funded and insurer administered group disability insurance services.

We ask that you as the representative Director of the Ministry of Consumer Services review the legal arguments made in this letter as you agreed to do in our meeting on July 15th and reconsider the Ministry's decision.

Thank you for your cooperation.

Yours very truly,



Joel H. Rochon

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