

**Presentation to Media Charles Lynch National Press Theatre
June 1, 2011, 1 A.M. EST**

**Systemic Failure of Disability Insurance in Health and Welfare Trusts:
Solutions to Stop Financial Abuse of Disabled Employees in Canada**

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My name is Diane Urquhart. I am an Independent Financial Analyst who has written a comprehensive research report on employer sponsored disability insurance. The title of my report is:

**Systemic Failure of Disability Insurance in Health and Welfare Trusts:
Solutions to Stop Financial Abuse of Disabled Employees in Canada**

On five prior occasions since October 2009, Nortel disabled spokespeople have come to the Charles Lynch National Press Theatre to explain their financial hardship due to the failure of their disability insurance.

The weakened health of the dissenting Nortel disabled and the death of Peter Burns means that the spokespeople are now largely unable to attend Parliament Hill in person. [Carol Sampson is here today, despite severe pain.] We have on the telephone Greg McAvoy from Calgary, Alberta. Greg is a Nortel former employee with Multiple Sclerosis.

I am here today to correct the misinformation being given by the Nortel bankruptcy lawyers and the Canadian Bankers Association to former Industry Minister Tony Clement, the Parliamentary Secretary to the Industry Minister Mike Lake and the Conservative Senators. The government appears to rationalize not helping the Nortel disabled on the wrong belief that the Nortel disabled have gotten the best they could under current statutes, after bankruptcy court procedures were duly followed.

What has happened to the Nortel disabled meets the definition of abuse written by Professor Hilary Brown, U.K. Canterbury Christ Church University, in her report called Safeguarding adults and children with disabilities against abuse.

I paraphrase the relevant parts of her definition of abuse as follows: "Any act, or failure to act, which results in a significant breach of a vulnerable person's ... dignity or general well-being, whether intended or inadvertent, including ... financial transactions to which the person has not or cannot validly consent, or which are deliberately exploitative.

Abuse may be perpetrated by any person (including by other people with disabilities) but it is of special concern when it takes place within a relationship of trust characterised by powerful positions based on:

- legal, professional or authority status;
- unequal physical, economic or social power; "
- ...

Let me turn to the corrections of misinformation needed before this new majority Conservative government can turn the page on the disability insurance file.

Ernst & Young, the Court Monitor, and its legal counsel Goodmans LLP imply in the 39th Court Monitor's Report that there are no statutory or legal obligations associated with Nortel's disability insurance. However, once an employer decides to sponsor disability insurance, it does have legal obligations within the common law applicable to private contracts and constructive trusts. Furthermore, once an employer establishes a real trust for this disability insurance, the Third Party Trustee and members of the Corporation Governance Committees have fiduciary duties relating to the trust.

My report provides a long list of all the common law cases and statutes that define the legal obligations and tools, which were available to protect Nortel's disability insurance. The legal obligations are defined in the Nortel Health and Welfare Trustee Agreement and the sound actuarial basis referred to in this agreement. Legal considerations are also defined in the Income Tax Act and Canada Revenue Agency Rules for Health and Welfare Trusts and for Disability Wage Loss Replacement Plans. There is an Ontario Trustee Act that applies.

Despite the efforts by Rochon Genova LLP to present these legal tools, the court gave deference to the Court Monitor's legal counsel, the court appointed representative legal counsel for the non-union disabled, Koskie Minsky LLP and the CAW Canada legal counsel. None of these legal counsel presented the common law and statutes provided by Rochon Genova LLP and in my report. These lawyers made no legal arguments in the court to remedy the Nortel disabled's poverty and risk of death using the available legal tools.

Remedies for constructive trust and breach of fiduciary obligations in a trust have been validated in subsequent bankruptcy court cases. On June 25, 2010, the bankruptcy court gave a full priority settlement of \$7 M for the deferred retirement income of 9 Nortel executives using the reasons of constructive trust and unjust enrichment to the creditors. On April 7, 2011, the Court of Appeal of Ontario granted a CCAA appeal awarding full priority remedy for breach of fiduciary obligation in a trust by Indalex for not fully funding its Executive Pension Plan for 26 Indalex executives. The 9 Nortel executives and the 26 Indalex executives were represented by Koskie Minsky.

Nortel's Governance Committees and its third party trustee Northern Trust did nothing to stop over \$100 M of money being misdirected from the Nortel Health and Welfare Trust. The court and this government have done nothing to hold these trustees to account for their breach of fiduciary duties and to restore the money that has been wrongfully taken from the disabled.

- (1) \$32 M Health and Welfare Trust assets were withdrawn during May 2005 to April 2006 to pay for the medicines of the pensioners, active and disabled employees and the life insurance premiums of the active and disabled employees. \$18 M of the \$32 M assets were withdrawn from the disabled account according to the the Mercers' Valuation of the Obligations of the Health and Welfare Trust for the year ending September 30, 2005.

- (2) A \$27 M Health and Welfare Trust loan to Nortel was written off at December 31, 2009. Assets in a trust are supposed to be protected in bankruptcies.
- (3) \$44 M of the remaining Health and Welfare Trust assets are being used as a settlement to the pensioners for future life insurance benefits, even though they're not dead yet. The dissenting disabled employees say pensioners life insurance benefits are the legal obligation of Nortel and not the legal obligation of the legally distinct Health and Welfare Trust. They have filed a Leave to Appeal to the Supreme Court of Canada. If the Appeal is heard and won, there is a legal path for the Nortel disabled beneficiaries to get another \$30 M settlement.

The Ontario bankruptcy court has not welcomed external experts, choosing to rely instead on Ernst and Young, the Court Monitor and Goodmans, the Court Monitor's legal counsel. The judge rejected the expert opinion of both senior actuaries familiar with the accepted actuarial practice for Health and Welfare Trusts. He also rejected my financial expert's assessment of there being wrongdoing in Nortel's use of trust assets to pay for the pay-as-you-go medical and life insurance expenses and the write-off of the trust loan to Nortel. I corroborated my detailed financial analysis with four Nortel executives responsible for activities within the Health and Welfare Trust at Nortel, including the former Treasurer who provided a sworn affidavit to the Nortel bankruptcy court. Justice Morawetz also rejected the sworn affidavit of the former Treasurer of Nortel, whose duty it was to supervise the Health and Welfare Trust and to establish the funding policy for the pensioners' life insurance benefits.

The court decisions relating to Nortel's disability insurance have unfortunately caused all employer sponsored disability insurance to be unsafe. Employers are free to misdirect Health and Welfare Trust assets for uses other than their intended purpose. Pensioners can now litigate for access to Health and Welfare Trust assets as a settlement for future death benefits and life insurance premiums. This is even though the CRA does not permit the prefunding of these benefits.

There have been no Leaves to Appeal granted by the Court of Appeal of Ontario on the decisions of Justice Morawetz, despite the catastrophic impact it has had on the Nortel disabled and despite there being no remedial purpose to force a compromise to enable Nortel's urgent restructuring.

This government says it must not supersede a settlement agreed to by the lawyers and ordered by the court because the bankruptcy court procedures were duly followed. But, the duly followed bankruptcy court procedures were patently unjust. An unelected disabled person is selected by the court appointed legal counsel to become the court appointed representative. This single disabled person is given the power to bind the whole disabled group to a settlement under the duress of medicines being cut off. There can be no informed consent because material financial information was not released by the Court Monitor until 5 months after Interim Settlement was

agreed to by the representative. The representative is not qualified to question what she is told by her court appointed legal counsel. The court appointed legal counsel is not advising her or the court about the legal rights of the disabled group for remedy of breach of constructive trust and breach of fiduciary duties in their real trust.

Former Government Leader John Baird said the Federal Government cannot make retroactive legislation that will avoid litigation by the other creditors against the Nortel disabled. My report provides the case law to demonstrate that John Baird is plain wrong on retroactivity.

Mike Lake, Parliamentary Secretary to the Industry Minister, has said protection of disability insurance is a provincial and not federal jurisdiction. He says, federal bankruptcy laws are a tool of economic policy and should absolutely not be used for protection of disability insurance

Both Federal and Provincial legislative amendments are needed to more clearly require and enforce the full funding of employer sponsored disability insurance within trusts at both Federally and Provincially registered corporations.

The Federal Companies' Creditors Arrangement Act and Bankruptcy and Insolvency Act amendments are also essential to provide for the priority of disability insurance claims at insolvent employers. The federal bankruptcy laws need to provide the same priority for employer sponsored disability insurance at insolvent corporations as disability insurance policyholders get above the creditors at insolvent insurers. The insurance policyholders get priority under the Federal Winding-up and Insolvency Act applicable to insolvent insurers.

Hopefully, the decision-makers named in my report will read all of my report and recognize the collective and unnecessary abuse that has been put onto this vulnerable group of disabled Canadians.

The Federal Government has the responsibility and jurisdiction to provide a solution for unsafe employer sponsored disability insurance. All governments and courts must stop the abuse of disabled employees in Canada.

IF THERE ARE NO QUESTIONS, MOVE ON TO:

Former Industry Minister Tony Clement accepted the advice of the Canadian Bankers Association (CBA) delivered to the Senate Banking Trade and Commerce Committee hearing on November 17, 2010 to reject bankruptcy law amendments to give priority to disability insurance over the unsecured creditors because it will raise the cost of credit, prevent restructuring of corporations and harm economic growth. My research report provides financial analysis to prove this cannot be so, as the impact is de minimus by the simple fact that only 0.90% of the workforce become long term disabled. The cost of disability insurance is only \$640 per year.

The bankruptcy law amendment in 2007 for no court stay and super-priority for credit default swaps gave full protection on \$236 billion of what is effectively insurance for the credit default losses of the banks and other financial intermediaries. Yet the Federal Government listens to the banks' advice for no such full protection of employer sponsored disability insurance, causing Canada's most vulnerable citizens to be forced into poverty and death. CDSs and their super-priority protection at insolvent corporations are well-acknowledged to have been causes of the financial crisis, including the freeze-up of \$32 B of Canadian Non-Bank Asset Backed Commercial Paper in 2007. There are over \$12 B of losses today for Canadian governments, pension funds, and corporations that were sold the Non Bank Asset Backed Commercial Paper by the banks.

A remedy for the financial abuse of the Nortel disabled can be achieved in various ways. Two straightforward examples are: (1) a retroactive bankruptcy law amendment to have the Nortel estate creditors repay money to the Nortel disabled that does not rightfully belong to them, because it is money taken from their trust account; or (2) an \$80 M emergency relief payment from Governments to compensate for their negligence in failing to protect employer sponsored disability insurance known to be unsafe since the Massey Combines bankruptcy in 1988.

Solution (1) is preferred because there is over \$6.1 B in the Nortel bankruptcy estate as of February 5, 2011, even before taking into account the current \$900 M stalking horse bid from Google for the intellectual patents. In solution (1), the taxpayer is not forced to accept the downloading of the Nortel disabled onto Canada's social security programs.

APPENDIX A - Federal and Provincial Funding of Compensation for Nortel Disabled Employees' Financial Abuse

Present Value of Actuarial Liabilities Owed and Solutions (\$ M)	Combined	Federal	Provinces	Ontario	Quebec	Alberta
		0%	100%	67%	22%	10%
		70%	30%	20%	7%	3%
Actuarial Liabilities Owed	\$134					
HWT Settlement	\$29					
Net Amount Owed After HWT Settlement	\$105					
HWT Settlement Nov. 9, 2010						
Income Tax Free	\$4	\$3	\$1	\$1	\$0	\$0
Provincial Drug Prescription Programs	\$23	\$0	\$23	\$15	\$5	\$2
TO DATE - Total Taxpayer Downloading	\$26	\$3	\$24	\$16	\$5	\$2
SOLUTION # 1						
Incremental Government Emergency Relief Payment	\$80	\$45	\$35	\$23	\$7	\$3
SOLUTION # 1 - Total Taxpayer Downloading	\$105	\$47	\$57	\$38	\$13	\$6
SOLUTION # 2						
Introduce a Nortel Disabled Emergency Act (Force the Creditors to Pay)	\$80					
Incremental Government Emergency Relief Payment	\$0	\$0	\$0	\$0	\$0	\$0
SOLUTION # 2 - Total Taxpayer Downloading	\$26	\$3	\$24	\$16	\$5	\$2