

MEDIA RELEASE FROM RIGHTS FOR NORTEL DISABLED EMPLOYEES

Wednesday, December 15, 2010, 12:30 PM EST

SUBJECT: J. Morawetz Is Expected to Approve Interim Nortel Health and Welfare Trust Long Term Disabled Employee Payment Today

Today J. Morawetz will hear and most likely approve an interim settlement for the Nortel disabled employees prior to them receiving their Final HWT Distribution Settlement sometime in the first quarter of 2011. The amount of Final HWT Distribution Settlement is dependent upon whether The Dissenting Nortel Disabled Beneficiaries get Leave to Appeal and then whether they win their Appeal or not.

From the communication at the following link,

[Letter from CAW Canada on HWT Distribution December 7, 2010:](#)

"The Monitor is recommending that the interim distribution be 10% of the payment which would have been received by each LTD, SIB, STB recipient for the income portion of the payment they would receive under the Monitor's proposed distribution. The proposed interim distribution will result in a lump sum amount representing 3 months of payments for the majority of those receiving payment."

The Dissenting Nortel Disabled Beneficiaries expect to have their Leave to Appeal be reviewed by a Court of Appeal of Ontario judge in early January 2011. If the Dissenting Nortel Disabled Beneficiaries are granted and then win their appeal, the next step will likely be a hearing before J. Morawetz on the recommended alternative Scenario for the HWT Distribution. The Dissenting Nortel Disabled Beneficiaries seek to have Scenario 3 apply and not Scenario 2 recommended by the Nortel Court Monitor and decided by J. Morawetz on November 9, 2010. Scenario 3 says that only the LTD Income and Survivors' Income Beneficiaries are legally entitled to the HWT assets, whereas Scenario 2 says that the LTD Income Beneficiaries, Survivors' Income Beneficiaries and Pensioners' Life Insurance Claimants are legally entitled to the HWT assets.

The monetary difference for the Nortel LTD beneficiaries if they are granted and win their appeal is an additional settlement of \$28 million, which will double the proposed settlement for the LTD Income Beneficiaries. A successful appeal raises the post HWT settlement LTD income from 27%-34% to 56%-72% of the pre-liquidation disability income. There is a range of impact because there is a difference of view about the final actuarial liabilities owed to the LTD Income Beneficiaries and this is a matter that is yet to be determined in the Nortel CCAA Claims Process. Using the Nortel's actuary estimates of \$80 million owed to the LTD Income Beneficiaries, winning the appeal would raise the funding ratio for the LTD Income from 34% to 72%. Using the higher actuarial liabilities owed to the LTD Income Beneficiaries that were disclosed by Nortel during 2005 to 2009, winning the appeal would raise the funding ratio for the LTD Income from 27% to 56%. **The impact on the Nortel pensioners if the appeal was granted and won, would be a loss of a \$3,500 lump-sum settlement of the life insurance premiums that Nortel promised to pay its pensioners until their death. The significant income loss for the disabled from losing the appeal is for the balance of their lives until age 65, death or recovery.**

Winning the appeal is critical for the Nortel disabled to be kept out of abject poverty, although even winning the appeal leaves them considerably short of the standard of living they had before this Nortel bankruptcy because they have lost their \$45 million share of the assets that were wrongfully removed from the HWT. Furthermore, LTD employees' medical funding is cut off on Dec. 31, 2010 and this is not changed with an appeal win because medical benefits are not legal obligations of the HWT. Medical benefits are a legal obligation of the Nortel CCAA liquidation estate, but this may not be forthcoming for years and it may be only a nominal amount due to billions of dollars owed by the Canada Estate to the US and UK estates in inter-country claims made against the Canada Estate.

The CAW Canada representing both Nortel union pensioners and union long term disabled employees and Sachs Goldblatt Mitchell LLP (SGM) representing Sue Kennedy, in her capacity of CCAA court appointed representatives for the non-union long term disabled employees, are opposing the Dissenting Nortel Disabled Beneficiaries Leave to Appeal.

SGM has been instructed by Sue Kennedy, the CCAA court appointed representatives for the LTD employees, to oppose the Dissenting Nortel Disabled Beneficiaries Leave to Appeal, despite the objective of this appeal being to raise the settlement for LTD Income Beneficiaries by \$28 million and raise the post HWT settlement LTD income from 27%-34% to 56%-72% of the pre-liquidation disability income. **SGM may be entitled to have its legal fees paid from the HWT and as such may be reducing the HWT distribution under Sue Kennedy's instructions to oppose the Leave to Appeal.** From the SGM communication to a Dissenting Nortel Disabled Beneficiary below, the reasons given for opposing the Leave to Appeal are the risk of the court approving an HWT Scenario that pays the LTD Income Beneficiaries much less than they have already been awarded, the cost of litigation coming from the HWT, and the delay this appeal would cause for the LTD income beneficiaries getting their currently approved settlement. Today's expected interim settlement payment order mitigates the last reason as it is already contemplated that there will be a delay and this interim settlement approved today provides emergency bridge funding for the LTD employees.

The HWT Distribution was to have been determined only on law and not on the consent of the three groups of former employees to the HWT Distribution offered by Nortel. The Leave to Appeal and the Appeal of the Dissenting Nortel Disabled Beneficiaries finds errors in the law applied to select Scenario 2 recommended by the Nortel Court Monitor, consented to by the three employee groups and ordered by J. Morawetz on November 9, 2010. **SGM, the legal counsel selected by Sue Kennedy, has advised one of the Dissenting Nortel Disabled Beneficiaries in its communication below, that if the appeal is won, it is reserving its right to make arguments later in support of a Scenario that would pay a higher HWT settlement to the Nortel disabled employees.**

One would think that if SGM had legal arguments to make later to support a Scenario that pays their LTD clients more money than these legal arguments would be made now and not later. The LTD employees are being pushed into poverty in 16 days from now. Why is SGM opposing a Leave to Appeal for reasons of expediency, when in fact it could support later the Scenario sought by the Dissenting Nortel Disabled Beneficiaries if the appeal is successful? The appeal would be more likely to be successful if SGM did not oppose it.

If the appeal is successful, it is most likely that SGM would find itself legally arguing for the same Scenario 3 that the lawyers for the Dissenting Nortel Disabled Beneficiaries argued for at the September 29, 30 & Oct. 1st HWT Distribution Methodology hearing. Jeremy Bell, Chief Actuary and Chief Investment Officer for one of Canada's top 3 Health and Welfare Trusts, BC Health Care Trust, and actuarial expert for the Dissenting Nortel Disabled Beneficiaries, gave his professional opinion that Scenario 3 sought by the Dissenting Nortel Disabled Beneficiaries is the right one in terms of how actuarial principles and practices used at his HWT applies in the interpretation of the Nortel HWT Trustee Agreement. Joann Williams, the other senior actuarial expert for the Dissenting Nortel Disabled Beneficiaries, working with Welton Parent Inc. in Ottawa, also provided her expert opinion that Scenario 3 is the right one based on how insurance and actuarial principles and practices apply to the right interpretation of the Nortel HWT Trustee Agreement. Ms. Williams also provided the opinion that the HWT Trustee Agreement required employer contributions and claims payments to be made on a sound actuarial basis and that a sound actuarial basis would mean that actuarial calculations for the HWT would need to respect the CRA tax rules for HWTs, that are a CRA prescribed tax vehicle. She concluded that Scenario 3 met the HWT Trustee Agreement Termination Clause terms, whereas Scenario 2 recommended by the Court Monitor and subsequently approved by the judge did not.

On November 9th, J. Morawetz refused to accept the expert affidavits of these two top Canadian actuaries, a financial expert and the former Treasurer. After finding these experts to be neither necessary nor relevant, the judge added his own words to interpret the HWT Trust Agreement's Termination Clause, where the words added cause an outcome that is in breach of industry practice. Under the Court Monitor's and J. Morawetz's added words, the pensioners get paid most of the remaining money in the trust account for a settlement of deaths that have not occurred yet. The Nortel long term disabled with already incurred disability insurance events are left with almost nothing to live on for the rest of our life.

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Related Documents

[Motion for Leave to Appeal on HWT Distribution Decision November 29, 2010](#)

[Factum Dissenting LTD Beneficiaries November 30, 2010](#)

2. The plain reading of the Termination Clause demonstrates that only the benefits and claims of the HWT actually made or incurred prior to the termination date can participate in the wind-up distribution. Such claims would include the ongoing income payments

which flow from claims incurred up to the date of termination. This interpretation is consistent with insurance, actuarial and tax principles and is supported by reading the Termination Clause in the context of the Trust Agreement as a whole which supports an intention.

3. Despite this, the motions judge approved an allocation scenario recommended by the Monitor that not only contemplated a distribution between beneficiaries whose claims are "in pay", but those whose claims are said to be "certain to be payable at some future date" as well. In his decision, the motions judge accepted that the latter claims include the payment of death benefits to living Pensioners. In approving the inclusion of such extraneous future claims, the motions judge ventured far beyond the plain wording of the Termination Clause and breached basic rules of contractual interpretation leading to a commercially absurd result.

4. The motions judge's decision yields an untenable result in that although the HWT has no obligation to pay death benefits to Pensioners while in operation (such benefits are provided by a third party insurer), the "certain to be payable in the future" read-in has the effect of nevertheless imposing an obligation on the HWT to pay such benefits on termination. This read-in has no known significance in insurance and actuarial practice and is not grounded in any objective evidence that would support an intention or reasonable expectation of the parties that the Termination Clause should be interpreted in such a foreign way in breach of industry practice.

5. Moreover, in finding that Pensioner Life benefits could participate in a wind-up distribution of the HWT, the motions judge improperly applied the vesting concept articulated by the Supreme Court of Canada in *Dayco (Canada) Ltd. v. CAW-Canada* to impose an obligation of Nortel on to the HWT. However, the HWT is a distinct legal entity - a formal trust - subject to prevailing insurance, actuarial, and tax principles. Therefore, it was an error for the motions judge to hold that there was no reason to "decouple" the obligations of Nortel from the obligations of the HWT.

[**Nortel HWT Distribution Endorsement of J. Morawetz Nov. 9, 2010**](#)

[**Email from Sachs Goldblatt Mitchell LLP to Jennifer Holley on HWT Distribution Dec. 9, 2010**](#)

If the motion for leave to appeal is successful, there will be an appeal of Justice Morawetz's decision approving Scenario 2. If Mr. Rochon then wins the appeal, it will be necessary to go back to Justice Morawetz to determine the allocation of the HWT. The representatives for the former employees and the active employees, among others, have said that if Scenario 2 is not approved, they may well argue in favour of other scenarios. Many of these scenarios would be considerably less favourable to the LTD beneficiaries than Scenario 2 and there is a significant risk that one of these less favourable scenarios would be approved rather than the scenario which Mr. Rochon is advocating for. If the litigation goes forward, this would also likely result in delays in the payment of the HWT proceeds. In addition, given the wording of the Settlement Agreement, there is a large risk that costs of the litigation will come out of the HWT. This would, of course, reduce the amount available for distribution.

Given the risks, delays and costs associated with the route Mr. Rochon is pursuing, Ms. Kennedy continues to be of the view that the approval of Scenario 2 is in the best interests of the LTD beneficiaries and she has instructed us to oppose the motion for leave to appeal.

At this point, we do not know whether SGM's legal costs for the leave to appeal motion or any appeal will be paid from the HWT assets.

As stated previously, if leave to appeal is granted, the court of appeal will not be deciding whether the LTD beneficiaries get more money, only whether Scenario 2 will be approved. If the appeal is successful and the matter of the HWT allocation goes back before Justice Morawetz, we have reserved the right to argue in favour of other scenarios which are more favourable to the LTD beneficiaries.

Letter from CAW Canada on HWT Distribution December 7, 2010

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The Monitor is of the view that the proposed interim distribution is prudent and conservative and will not prejudice other beneficiaries. The reason for the lower level of payment is in the event that those who are seeking leave to appeal are successful, and their subsequent appeal is also successful, all of the issues relating to the distribution of the remaining funds in the HWT will be subject to future litigation. As such, the Monitor wants to ensure that the funds in the HWT are not too far depleted in case the Court later determines that the LTD, SIB and STB recipients are not entitled to the amounts under its original proposal."