

MEDIA RELEASE FROM RIGHTS FOR NORTEL DISABLED EMPLOYEES

Tuesday, December 28, 2010, 12 A.M. Mountain Time

Leave to Appeal for Last Minute Reprieve from Life of Poverty And Medical Crisis

400 Nortel disabled employees have their disability income and medical funding cut off in three days. 39 Dissenting LTD Beneficiaries have persevered through various debilitating conditions to file a Leave to Appeal and a Reply on Christmas Eve to six bullying adversaries who oppose it.

WHAT'S AT STAKE IN THE LEAVE TO APPEAL FOR THE NORTEL DISABLED?

The objective of the Dissenting LTD Beneficiaries' Leave to Appeal is to gain a last minute reprieve from the life of poverty and medical crisis that is imposed on them by two decisions of J. Geoffrey Morawetz in the Ontario Superior Court of Justice Nortel CCAA proceeding: the first one on March 31st on a interim settlement providing for a 9 months extension of medical benefits in exchange for a legal release of trustees who are alleged to have breached their fiduciary duties by permitting \$45 million their assets to be wrongfully removed from the Health and Welfare Trust (HWT); and, the second one on November 9th, which awarded 55% of the little remaining HWT assets to pay death benefits to living pensioners upon the trust's termination.

A Court of Appeal of Ontario judge is reviewing the Dissenting LTD Beneficiaries' Leave to Appeal in the first week of January 2011. **If this Appeal is granted and won, the LTD Beneficiaries gain an extra \$28 million settlement from the HWT. The total HWT settlement would become \$58 million and there would be a doubling of disability income.** Final actuarial liabilities owed to sustain the disability income will not be determined until later in the Nortel CCAA Claims Process. Using the Nortel's actuary estimates of \$80 million owed, winning the Appeal would raise the disability income funding ratio from 34% to 72%. Using the higher actuarial liabilities owed as disclosed by Nortel during 2005 to 2009, winning the Appeal would raise the disability income funding ratio from 27% to 56%. **A 73% loss of disability income from losing the Appeal would be devastating for the disabled and is for the balance of their lives, until age 65, death or recovery.**

The impact on the Nortel pensioners if the Appeal is 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.

LTD employees' medical funding is cut off in 3 days too 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, and this may not be forthcoming for years. The future CCAA liquidation settlement is expected to be nominal due to billions of dollars in inter-country claims against the Nortel Canada estate from the US and UK estates.

WHAT ARE THE MAIN APPEAL ISSUES?

This Leave to Appeal is important to the 1.1 million Canadians with self-insured long term disability income and medical benefits at their workplace. It examines whether life insurance and medical

benefits are obligations of an employer rather than obligations of a distinct formal trust. If trust accounts are liable for pensioners life insurance even though they are required by tax law to be pay as you go benefits, then disabled employees will generally become impoverished by trust wind-ups at insolvent corporations. This is because pensioners are always a much larger group than the disabled, who are only 9 out of 1000 workers in Canada.

The motions judge, Justice Geoffrey Morawetz, has used a vesting argument to cause a Nortel estate obligation for pensioners life insurance to become an HWT obligation to pay for death benefits to living pensioners upon the trust's termination.

- **This violates fundamental legal principles for contractual interpretation of the HWT Trustee Agreement Termination Clause, which is discrete from promises made by Nortel through its benefit plan booklets.** The HWT Trustee Agreement Termination Clause provides for payment of claims and future benefits actually made or incurred prior to the Notice of the Termination of the HWT.
- **It is commercially absurd to pay death benefits, when the insured death events have not occurred before the HWT is terminated, and when the assets of the HWT are insufficient to pay for the insured disability events, which have occurred before the HWT is terminated.**
- Joann Williams gave expert actuarial opinion based on tax, actuarial and insurance principles that the obligations of the HWT on termination should be calculated only in respect of claims for insured events occurring up to the date of the wind-up, which were the LTD and Survivors income benefits for the current and future years. **Justice Geoffrey Morawetz found the expert opinions provided by senior actuaries, Joann Williams and Jeremy Bell, financial expert Diane Urquhart, and former Nortel Treasurer Michael McCorkle, to be unnecessary and not relevant to assist him in making his own interpretation of the HWT Trustee Agreement Termination Clause. Yet Justice Morawetz's November 9th interpretation violates tax, actuarial and insurance principles and practices that would have governed the intentions of the parties who signed the HWT Trustee Agreement dated January 1, 1980.**
- **Most disturbing is the fact that the Income Tax Act after December 11, 1979 provides a restriction on current year tax deductions for employer contributions made to pay for insurance in respect to a period after the end of the year.** The actuarial practice, based on published CRA interpretations, has been to define employer contributions for future life insurance premiums to be contingent only and to be considered HWT surplus that is restricting the deductibility of employer contributions for incurred disability claims. **Maintaining an HWT surplus jeopardizes the status of a Health and Welfare Trust as a CRA approved tax efficient vehicle. A single trust cannot have contingent reserves for the funding of future pensioners life insurance premiums allocated to pensioners, when there is inadequate HWT assets to fund the incurred disability and survivor income claims.**

WHY IS THE APPEAL OPPOSED BY THE CAW AND THE COURT-APPOINTED REPRESENTATIVE OF NON-UNION LTD EMPLOYEES?

The CAW Canada representing 632 Nortel union pensioners and 98 union LTD employees and Sachs Goldblatt Mitchell LLP (SGM) representing Sue Kennedy, in her capacity of CCAA court

appointed representative for the non-union LTD employees, are opposing the Dissenting LTD Beneficiaries' Leave to Appeal.

CAW Canada has a conflict of interest in representing the union pensioners and LTD employees in its opposition to the Leave to Appeal, since the pensioners win and the LTD employees lose if the Leave to Appeal is denied. The court-appointed legal counsel in the CCAA proceeding, Koskie Minsky LLP, recused itself from the HWT Distribution court process due to the same conflict of interest affecting it.

SGM has been instructed by Sue Kennedy to oppose the Dissenting LTD Beneficiaries' Leave to Appeal, despite its objectives to raise the HWT settlement by \$28 million and to double 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. SGM, the legal counsel selected by Sue Kennedy, has advised one of the Dissenting LTD Beneficiaries in an email communication, that if the Appeal is won, it is reserving its right to make arguments later in support of a higher HWT settlement for the Nortel LTD employees.

One would think that if SGM had legal arguments to make later to support a higher settlement for their LTD clients that these legal arguments would be made now and not later. The LTD employees are being pushed into poverty in 3 days from now. Why is SGM opposing a Leave to Appeal for reasons of expediency, when in fact it is likely to support later the HWT Distribution sought by the Dissenting LTD Beneficiaries if the Appeal is successful? The Appeal would be more likely to be successful if SGM did not oppose it.

REMOVAL OF MONEY FROM THE HWT IS A BREACH OF TRUST AND A FORM OF MISAPPROPRIATION

While the Leave to Appeal is strictly about how the remaining \$80 million of HWT assets are to be distributed to its legal beneficiaries, Justice Morawetz's Nov. 9th decision and the Court Monitor's Dec. 17th Response to the Leave to Appeal went out of their way to attempt to undermine the credibility of Diane Urquhart's financial expert affidavit. The Dissenting LTD Beneficiaries' Leave to Appeal says:

- "It bears noting that Ms. Urquhart's evidence is derived from a forensic review of the HWT financial statements from 1982 to 2009 and of Appendix GGG - Mercer's Valuation of the Obligations of the Health & Welfare Trust as at September 30, 2005, all disclosed for the first time in the Monitor's Fifty -First Report dated August 27, 2010, long after the Settlement Agreement had been finalized and approved by the Court. The plain view alone of a table on page 28 of Mercer's Valuation of the Obligations of the Health & Welfare Trust as at September 30, 2005 shows that \$18 million was removed from the HWT during the year ending September 30, 2005."
- "Further, Ms. Urquhart's findings are supported by Michael McCorkle, Nortel's past Treasurer and past member of Nortel's Pension Investment Committee, which oversaw the funding and investment management of the HWT as well as the Canadian pension funds. In his affidavit, Mr. McCorkle corroborates Ms. Urquhart's analysis on his "on the ground" information from supervising the HWT activities.

- "Despite this uncontroverted evidence, the Monitor's factum remarkably states at Paragraph 22, the "the Dissenting LTD Beneficiaries have not provided any evidence to substantiate this serious and baseless allegation." **It is respectfully submitted that the Monitor's actions as described below raise concerns in relation to the Monitor's objectivity and the Monitor's submissions should be assessed accordingly... "**

"The Dissenting LTD beneficiaries maintain the removal of monies from a formal, irrevocable trust amounts to a breach of trust and is, in fact, a form of misappropriation."

It is a form of misappropriation because tax rules prescribe the purpose of HWT assets to be funding for incurred claims and not to be used for pay as you go life insurance premiums and medical expenses that Nortel is obliged to pay annually. Future income for the disabled beneficiaries are part of the incurred disability claims against the HWT because insurance principles and an "Insurance Plan" are requirements for LTD wage loss replacement plans. On the other hand, future life insurance premiums cannot be claims or liabilities of the HWT due to the Dec. 11, 1979 income tax amendment restricting tax deductions for employer contributions funding insurance beyond the current year and the CRA restricting the status of Health and Welfare Trusts with surplus.

For additional information on unsafe long term disability benefits in the workplace go to www.protectourtomorrow.com , which is developed and maintained by the following Canadian Nortel disabled employees:

Greg McAvoy
jgmcavoy@shaw.ca
403 288-5568

Arlene Borenstein
arleneplante@hotmail.com
613 692-5461

Carol Sampson
sammygirl1@rogers.com
613 224-2791

Connie Walsh
connie@walshclan.biz
613 424-1146

Lawrence Clooney
lkclooney@hotmail.com
613 825-9969

Jackie Bodie
jbodie@blinc.ca
403 247-8782

Jennifer Holley
jholley@xplornet.com
613 479-2653

RIGHTS FOR NORTEL DISABLED EMPLOYEES

LEAVE TO APPEAL ON HWT DISTRIBUTION COURT DOCUMENTS

[Reply Factum of the Dissenting LTD Beneficiaries Dec. 24, 2010](#)

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

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

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

[LTD Beneficiaries Representative Responding Factum Dissenting LTD Beneficiaries Leave to Appeal Dec. 17, 2010](#)

[CAW-Canada Responding Factum Dissenting LTD Beneficiaries Leave to Appeal Dec. 17, 2010](#)

[Former Employees Representatives Responding Factum Dissenting LTD Beneficiaries Leave to Appeal Dec. 17, 2010](#)

[Continuing Employees Representative Responding Factum on Dissenting LTD Beneficiaries Leave to Appeal Dec. 17, 2010](#)

[Monitor Responding Factum Dissenting LTD Beneficiaries Leave to Appeal Dec. 17, 2010](#)

[Applicants Responding Factum Dissenting LTD Beneficiaries Leave to Appeal Dec. 17, 2010](#)

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