

**Ontario Consumer Protection Act Jurisdiction for Employer Sponsored/Insurer Administered Disability Insurance**  
**June 15, 2011**

**Nature of Complaint from Nortel Disabled under the *Ontario Consumer Protection Act***

360 Nortel former employees were covered by Employer Sponsored/Insurer Administered Disability Insurance until Dec. 31, 2010, when their disability income was cut off by Nortel Networks and Sun Life Financial. Nortel's employees were given documents that said they had coverage for wage loss replacement should they become disabled and unable to work, until they reached age 65, died or became fit to resume work.

Nortel disabled employees have filed a Complaint against suppliers, Nortel Networks and Sun Life Financial, for unfair practices, in the form of false, misleading or deceptive representations about their disability insurance, under the [Ontario Consumer Protection Act](#) ("*OCPA*") S. 14 (1) & (2) and S. 5 (1) & (2). (See Figure 1).

**[Complaint Application to Ontario Consumer Services Ministry May 30, 2011](#)**

The *OCPA* was introduced in 2002 by former Ontario Minister of Consumer Services Tim Hudak, who is current Leader of the Ontario Conservative Party.

**Why Complaint is Under the Jurisdiction of the *OCPA***

Nortel sponsored and Sun Life administered disability insurance supplied to Nortel's employees is under the jurisdiction of the *OCPA* because it meets the test of applicable jurisdiction set out in *OCPA* S. 2. (1), (2) & (3) of the *OCPA*. (See Figure 2.) Employment contracts, collective union agreements, employee benefits and insurer ASO services are not in the list of exceptions for applicability of the *OCPA* in *OCPA* S. 2. (2) & (3).

Nortel disabled employee is a "consumer," defined in the *OCPA* to be an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes. There is no exception in the applicability of the *OCPA* for an employee consumer

Employer Sponsored/Insurer Administered Disability Insurance was supplied under a "consumer agreement", which is defined in the *OCPA* to be an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment. Most Nortel disabled employees used their own money to purchase optional disability insurance to raise their coverage for wage loss replacement from 50% to 70% of pre-disability income.

But even where the Nortel employees were covered by just the core employer paid disability insurance at 50% of the pre-disability income, Justice Robert Blair, in the case [Attorney General](#)

[v. Confederation Life Insurance, \[1995\] \(ON S.C.\)](#), concludes it is well established that payment or consideration for a "contract of insurance" need not take the form of a cash payment. Common law cases say consideration includes the employee's contribution of labour, skill and knowledge within the employee's compensation package as a whole (See Figure 3.)

Employer Sponsored/Insurer Administered Disability Insurance is a "consumer transaction," defined in the *OCPA* to be any act or instance of conducting business or other dealings with a consumer, including a consumer agreement.

### **Why Employer Sponsored/Insurer Administered Disability Insurance is Not Regulated Under the *Ontario Insurance Act***

Employer Sponsored/Insurer Administered Disability Insurance is not in the category of "financial products or services regulated under the *Insurance Act*", and so, it is not in the category of "Exceptions, this Act does not apply in respect of."

As noted in Figure 4, both suppliers, Nortel and Sun Life, are under the jurisdiction of the *OCPA*. There are different reasons for each supplier, specific to the role they each undertook in relation to the disability insurance supplied to Nortel's employees.

The Nortel sponsored disability insurance is a "contract of insurance," as defined in the case *Attorney General v. Confederation Life Insurance*. (See Figure 3.)

While "contracts of insurance" are regulated under the [Ontario Insurance Act](#), ("*OIA*") employer sponsored "contracts of insurance" are specifically exempt from jurisdiction under the *OIA*. This is because (a) Nortel is not required to be licensed as an insurer in Ontario under the *OIA*, and (b) Nortel's disability insurance is through an insurance fund applied to a corporation not incorporated exclusively for the transaction of insurance. (a) and (b) together are clear exceptions to jurisdiction under the *OIA* according to *OIA* S. 40 (5) 2. and S. 343 (3) & (4). (See Figure 5.)

Sun Life's Administrative Services Only ("*ASO*") services are under an [ASO contract](#). *ASO* contracts are not "contracts of insurance," as determined in *Attorney General v. Confederation Life Insurance*. So, Sun Life's provision of *ASO* services in relation to Nortel sponsored disability insurance are not insurance undertaken or carrying on business of insurance within the definitions of the *OIA*. The *ASO* services, therefore, are not within the jurisdiction of the *OIA* as set out in *OIA* S. 39 (1), (2) & (3) . (See Figure 6.)

In addition to employment contracts, collective union agreements, employee benefits and insurer *ASO* services not being in the list of exceptions in the *OCPA* S. 2 (2) & (3), there is an Anti-Avoidance Clause at *OCPA* S. 3 shown in Figure 7, which is also helpful to the legal position on

the *OCPA* having jurisdiction over Employer Sponsored/Insurer Administered Disability Insurance.

### **OCPA Anti-Avoidance Clause Reinforces the Complaint's Jurisdiction Under the OCPA**

The *OCPA* S. 3 Anti-Avoidance allows the court to consider the real substance of the Nortel sponsored disability benefits to be a "contract of insurance" and a consumer transaction. The court may disregard the outward form of the transaction being presented as an employee benefit. Being an employee benefit is not an explicit exception to the *OCPA*, in any case.

*OCPA* S. 102, 105 & 110 give the powers shown in Figure 8 to the Minister and Director of Consumer Services to receive complaints, investigate, freeze assets or trust funds, and lay charges of an offence relating to Unfair Practices in the form of False, Misleading or Deceptive Representation. The Court of Justice Provincial Offences Division determines the offence and has the right to order compensation or restitution as set out in *OCPA* S. 116. (See Figure 9.)

### **Civil Class Action Unavailable Due to Representative Waiving Legal Right in Settlement**

The Nortel disabled have been barred from the civil class action authority given under the *OCPA* S. 8 (1) shown in Figure 10. They are not permitted to litigate Nortel and other parties, such as Northern Trust and Sun Life, due to the legal release provisions of the [March 30, 2010 Settlement Agreement](#) ("Settlement") between Nortel and its Former Employees.

As discussed in my research report at the following link,

[Systemic Failure of Employer Sponsored Disability Insurance June 2011 - Research Report](#) the Nortel *Companies' Creditors Arrangement Act* ("*CCAA*") court proceedings have been part of the systemic failure of Employer Sponsored/Insurer Administered Disability Insurance. The central starting point for the court's systemic failure has been its reliance on bankruptcy court procedures that enable a single unelected and unsophisticated disabled person to be a representative of the Nortel disabled with the power to bind them to settlements. The Settlement between Nortel and the Nortel disabled did not have informed consent, nor any evidence provided or vote taken to demonstrate majority support for the waiving of their legal rights to remedy misrepresentations and breaches of trust relating to the Nortel sponsored and Sun Life administered disability insurance and the Nortel Health and Welfare Trust ("*HWT*").

To be clear, misrepresentations and breach of trust relating to the Nortel sponsored and Sun Life administered disability insurance and the Nortel *HWT* have not been adjudicated in the Nortel *CCAA* court proceeding due to the court's reliance on the disabled representative approving the Settlement.

### **CCAA Provisions Address Regulatory Investigations, Offences and Restitution Orders**

The Minister or Director of Consumer Services is not a signatory to the Settlement and so the Settlement legal release cannot bar the enforcement responsibilities and actions taken under the *OCPA*. Furthermore, the *CCAA* has specific provisions on how the *CCAA* court proceedings are to address the regulatory investigations, and the offences and restitution orders of the court. (See Figure 11.)

*CCAA* S. 11, shown in Figure 11, says that Nortel may make a motion for J. Geoffrey Morawetz to put a stay on the Ministry of Consumer Services' investigation and court proceedings on regulatory offence charges. J. Geoffrey Morawetz cannot stay the *OCPA* enforcement activities unless he sees that these regulatory actions will prevent successful Nortel restructuring and that staying the regulatory actions will harm the public interest. Nortel is liquidating and not restructuring. It is in the public interest that there be *OCPA* enforcement taken on the Nortel Employer Sponsored/Insurer Administered Disability Insurance, because the consequences of no enforcement and restitution is that employers and insurers providing ASO services are generally free to execute unfair practices involving false, misleading and deceptive representations of disability insurance. The consequences of these *OCPA* offences are likely catastrophic for the beneficiaries of this type of disability insurance at employers who are liquidating.

*CCAA* S. 19 (2) (a) says that there cannot be a compromise of a restitution order imposed by a court in relation to an offence, unless the compromise or arrangement under *CCAA* has been voted upon by the affected creditor group. *CCAA* S. 19 (2) (c) has a similar requirement for a vote of the affected creditor group where there is a claim arising from fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

### **Nortel Without Disclosure of Self-Insurance Until 2005 and Disclaimer is Misleading**

A large body of compelling evidence on unfair practices by Nortel and Sun Life has been gathered together by the dissenting Nortel disabled former employees and members of the dissenting Nortel disabled professional team.

Nortel employees were first informed that their disability insurance was sponsored by Nortel and not a third party insurance company in 2005. This disclosure occurred in the Flex 2005 Handbook and all subsequent Benefit Handbooks, in the form of the following statement:

**"Did you know: Most of Nortel's Health & Group Benefits, including short-term disability, long-term disability, medical and dental/vision/hearing care, are self-insured.** This means that Nortel plays a role similar to that of an insurance company for its employees. In other words, the Company assumes the risks and pays the claims directly from its net income or retained earnings. The insurance company only provides administrative services such as claims processing."

The employees, who were already disabled before 2005, never received the annual Flex Booklets that contained the above self-insured disclaimer, so they were shocked to learn that their disability insurance was sponsored by Nortel and not Sun Life. They learned this fact after Nortel filed for bankruptcy protection. But, the prospect for their disability income being cut did not become a major concern until the February 18, 2010 disclosure of the 2008 Nortel HWT Financial Statement. The full extent of the disability income cut and the reasons for a massive \$75 M shortfall in the HWT allocable to the disabled did not get disclosed until August 27, 2010. This was 5 months after the Settlement with its comprehensive legal release was ordered by the CCAA court. All CCAA court appeals relating to Nortel's HWT have been denied, with the Supreme Court of Canada denying the dissenting Nortel disabled application for Leave to Appeal on the HWT Wind-Up Settlement on June 9, 2011.

### **Sun Life's ASO Role in Nortel's Disability Insurance**

In employer sponsored disability insurance, an Administrative Services Only (ASO) provider is hired, which in the Nortel case is Sun Life, or its predecessors Clarica Life and Mutual Life.

The Nortel disabled employees thought they were insured by Sun Life, or its predecessors, because virtually all their personal interactions, communications and income cheques were with Sun Life, or its insurer predecessors. The Sun Life documents did not disclose that Sun Life was not the insurer of their wage loss replacement benefits. Beginning in about 2007, the phrase "Administered by Sun Life Assurance Company of Canada" was at the top of Sun Life correspondence to the Nortel disabled. The Nortel disabled employees did not know there was a difference between being "administered by" an insurer and being "insured by" an insurer. In any case, the persons receiving the Sun Life correspondence with the new terminology on "administered by" were already long term disabled and could not buy alternative personal disability insurance.

In the [Nortel ASO Agreement](#) with a predecessor of Sun Life, the ASO provider is responsible for administering all aspects of the employer sponsored long term disability insurance, except for providing the funding to pay the incurred disability claims. The ASO duties include: preparing and maintaining documents for the plan; assisting with the plan design and review; approving the Evidence of Insurability Form for the first time employee purchase of optional disability insurance; making initial assessment of the employee's long term disability claim; reviewing each year the Ongoing Total Disability Form and communicating continuance of income payments; issuing monthly income cheques; maintaining book-keeping records and issuing income tax T-4 forms; providing annual estimates of incurred but not reported claims; and providing annual estimates of disability and survivor reserves.

It is clear from the ASO Agreement that Sun Life is fully indemnified by Nortel from all claims, damages, lawsuits, losses, costs and charges incurred by it as a result of its performance of the

ASO agreement, unless caused by a wilful act, negligence or a breach of contract. However, it is not unreasonable to consider that Nortel employees were deceived into thinking that their disability insurance was insured by Sun Life or its predecessors and therefore safe. The Nortel disabled have reported that they never doubted the safeness of their Nortel disability insurance. Consequently, they did not consider the purchase of additional personal disability insurance. Furthermore, there would not be incremental disability income gained from the second disability income policy.

### **Systemic Failure of Employer Sponsored/Insurer Administered Disability Insurance is Financial Abuse of Disabled**

Systemic failure of disability insurance in HWTs is financial abuse of Canadian employees who are struck with serious diseases and injuries. The financial abuse of this vulnerable minority cannot be accepted by our governments, regardless of their political ideology.

Professor Hilary Brown of Canterbury Christ Church University in the UK provides a useful definition of what constitutes abuse of the disabled at page 9 of her 2003 report prepared for the Council of Europe called [Safeguarding adults and children with disabilities against abuse](#).

"Abuse is defined as:

**Any act, or failure to act, which results in a significant breach of a vulnerable person's human rights, civil liberties, bodily integrity, dignity or general well-being, whether intended or inadvertent, including sexual relationships or 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;**

– responsibility for the person's day-to-day care;

– and/or inequalities of gender, race, religion or sexual orientation.

It may arise out of individual cruelty, **inadequate service provision or society's indifference.**

It requires a proportional response – one which does not cut across valid choices made by individuals with disabilities but one which does recognise vulnerability and exploitation."

### **Other Recent Regulatory Enforcement Actions and Related Court Decisions**

On April 20, 2011, the U.K. appeal court made a decision to enforce the estimated \$6 B restitution order relating to Payment Protection Insurance (PPI) mis-selling in the U.K. This reminds us about the importance of governments enforcing their consumer protection regulations.

[http://www.eapdlaw.com/files/upload/4\\_20\\_11\\_Judgment.pdf](http://www.eapdlaw.com/files/upload/4_20_11_Judgment.pdf)

The May 11, 2011 London Free Press indicates that Nortel's lawyers are seeking a stay on the Ontario Government's \$10 M Environmental Reclamation Damages Claim relating to its London, Ontario plant. J. Geoffrey Morawetz is scheduled to hear this motion for 3 days starting Sept. 19, 2011.

**"Nortel, formerly Northern Telecom, is seeking a stay of the earlier order in Ontario's Superior Court of Justice in a three-day motion set to begin Sept. 19 in Toronto. The company argues bankruptcy law trumps environmental law and it shouldn't be forced to spend the \$10 million it estimates it would cost to clean up its old site."**

If the Ontario Ministry of the Environment is fighting for priority of its Environmental Reclamation Damages Claim, the Ontario Ministry of Consumer Services should be willing to fight for priority payment of an *OCPA* restitution order on behalf of the Nortel disabled.

The April 7, 2011 Indalex *CCAA* pension plans' case where the Court of Appeal of Ontario gave a priority remedy for Indalex breaching its fiduciary obligation to fund the Executive Pension Plan for 26 Indalex executives should help the *CCAA* courts make a similar decision for a Nortel disabled *OCPA* restitution order.

[Indalex \(Re\), \[2011\] ONCA 265 April 7, 2011](#)

## **Conclusions**

The Ontario Government should be enforcing the *OCPA* Unfair Practices within the Nortel and Sun Life supplied disability insurance covering Nortel former employees. This is a solution for the catastrophic loss imposed on the Nortel disabled through no fault of their own. It does not cost taxpayers money, except for litigation costs. Ontario MPs have been saying, there is no current Ontario Government program to help the Nortel disabled, like the Ontario Pension Benefit Guarantee Fund for the Nortel pensioners. But, the Ontario Government administers the *OCPA*. The Ontario Government must not fail to act to protect the Nortel disabled by failing to enforce its *OCPA* in respect to the Unfair Practices within the Nortel sponsored and Sun Life administered disability insurance.

In taking *OCPA* enforcement action, the Ontario Government is in an excellent position to raise the bar for the benefit of all 1.1 M Canadians covered by Employer Sponsored/Insurer Administered Disability Insurance.

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**Figure 1: Unfair Practices Under Ontario Consumer Protection Act**

**Consumer Protection Act, 2002**  
**S.O. 2002, CHAPTER 30**

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02c30\\_e.htm#BK146](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c30_e.htm#BK146)

**Unfair Practices**

**False, misleading or deceptive representation**

**14. (1)** *It is an unfair practice for a person to make a false, misleading or deceptive representation.*

**Examples of false, misleading or deceptive representations**

**(2)** Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.

...

3. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.

...

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

**Disclosure of information**

**5. (1)** If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent.

**Delivery of information**

**(2)** If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be retained by the consumer.

**Unfair practices prohibited**

**17. (1)** No person shall engage in an unfair practice.

**Rescinding agreement**

**18. (1)** Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

**Remedy if rescission not possible**

**(2)** A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

(a) because the return or restitution of the goods or services is no longer possible; or

(b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

Figure 2: List of Goods and Services Not Within the Jurisdiction of the Ontario Consumer Protection Act

**Consumer Protection Act, 2002**  
**S.O. 2002, CHAPTER 30**

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02c30\\_e.htm#BK146](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c30_e.htm#BK146)

**Application**

**2. (1)** Subject to this section, this Act applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.

**Exceptions**

- (2)** This Act does not apply in respect of,
- (a) consumer transactions regulated under the *Securities Act*;
  - (b) financial services related to investment products or income securities;
  - (c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006*;
  - (d) consumer transactions regulated under the *Commodity Futures Act*;
  - (e) prescribed professional services that are regulated under a statute of Ontario;
  - (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
  - (g) consumer transactions regulated under the *Residential Tenancies Act, 2006*.

**Same**

**(3)** This Act does not apply to the supply of a public utility or to any charge for the transmission, distribution or storage of gas as defined in the *Ontario Energy Board Act, 1998* if such charge has been approved by the Ontario Energy Board.

[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_050017\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_050017_e.htm)

**Professional services regulated by statute**

**1.** A professional service provided by a person governed by, or subject to, any of the following Acts is exempt from the application of the *Consumer Protection Act, 2002*:

1. The *Architects Act*.
2. The *Certified General Accountants Association of Ontario Act, 1983*.
3. The *Chartered Accountants Act, 1956*.
4. The *Drugless Practitioners Act*.
5. The *Law Society Act*.
6. The *Ontario College of Teachers Act, 1996*.
7. The *Professional Engineers Act*.
8. The *Professional Foresters Act, 2000*.
9. The *Professional Geoscientists Act, 2000*.
10. The *Public Accountancy Act*.
11. The *Regulated Health Professions Act, 1991* and any Act named in Schedule 1 to the *Regulated Health Professions Act, 1991*.
12. The *Social Work and Social Service Work Act, 1998*.
13. The *Society of Management Accountants of Ontario Act, 1941*.
14. The *Surveyors Act*.
15. The *Veterinarians Act*. O. Reg. 17/05, s. 1.

Figure 3: Definition of "Contract of Insurance" in the *OIA* and Common Law

[Canada \(Attorney General\) v. Confederation Life Insurance Co., 1995 CanLII 7097 \(ON SC\)](#)

[82] There is no definition of "contract of insurance" in the federal *Insurance Companies Act* but in Ontario, "insurance" is defined in s. 1 of the *Insurance Act*, R.S.O. 1990, c. 1.8, as amended, as follows:

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance.

[83] Since a "contract" under the *Insurance Act* simply means "a contract of insurance" and includes "a writing evidencing the contract", Confederation Life's promise to provide the group benefits, as evidenced by the booklets, handbook and retirement pamphlets, and by the group benefit plan documents, would seem to amount to a "policy of insurance". It is evidenced in writing, albeit in one or more documents; and it constitutes "the undertaking by one person [Confederation Life] to indemnify another person [the retiree] against loss or liability from loss in respect of a certain risk or peril to which the object of the insurance may be exposed [i.e., to the risk or peril of illness and the costs of dealing with it]". Why, then, is it not a "written contract of insurance", as contemplated by the *Insurance Companies Act* and therefore a "policy", as contemplated by the *Winding-up Act*? In my opinion, it is.

[84] What is missing from the foregoing analysis, and from the specific definition of "insurance" in the *Insurance Act* is the concept of "premium", an essential characteristic of a contract of insurance—the consideration in exchange for which the benefit is provided. While consideration is necessary, it is well established, however, that it need not take the form of a cash payment: see *Prudential Insurance Co. v. Commissioners of Inland Revenue*, [1904] 2 KB. 658 at p. 663; *California Physicians' Service v. Garrison, Insurance Commissioner*, 172 P.2d 4 (1946) at pp. 17-18, adopted by Pennell J. in *Bendix Automotive of Canada Ltd. v. United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 195*, [1971] 3 O.R. 263 at pp. 270-71, 20 D.L.R. (3d) 151 (H.C.J.). In the latter case, the court held that an employer's obligation under a collective agreement to reimburse employees for what today would be called "extra billing" payments constituted "a contract of insurance" and that the consideration was to be found in the employees' own covenants in the collective agreement. Here, the consideration is found in the retirees' former contributions of labour, skill and knowledge in exchange for which Confederation Life's compensation package as a whole had been offered.

[88] To my mind, however, the distinction which needs to be made on these facts is the following. There is a difference between the nature of the relationship between Confederation Life, as *employer*, and its employees, and the nature of the relationship between Confederation Life, as *insurer*, and itself (i.e., the trustees) as the holder of the ASO contracts. With regard to the latter, there is no contract of insurance. In relation to the former, however, in these circumstances, a contract of insurance exists.

Figure 4: Suppliers and Nature of Contracts Exempt from Jurisdiction of the Ontario Consumer Protection Act

Supplier	"Contract of Insurance"	Not a "Contract of Insurance"
Insurer		
<p>Sun Life needs an insurer license under jurisdiction of the <i>OIA</i></p> <p><i>OIA</i> S. 40 (1)</p>		<p>ASO Contract is not a "contract of insurance", and therefore it is not undertaking insurance within jurisdiction of the <i>OIA</i></p> <p><i>OIA</i> S. 1 Definitions of "contract" and "insurance"</p> <p>+ <i>OIA</i> S. 39 (1) , (2) &amp; (3) "Undertaking insurance" and "Carrying on business"</p> <p>+ Confederation Life Case</p>
Corporation		
<p>Nortel exempt from needing insurer license under jurisdiction of <i>OIA</i></p> <p><i>OIA</i> Exception S. 40 (5) 2. and S. 343 (3) &amp; (4)</p>	<p>Nortel disability insurance is a "contract of insurance" that is exempt from jurisdiction under <i>OIA</i></p> <p>So both Nortel supplier and the Nortel disability insurance are exempt from jurisdiction under the <i>OIA</i></p> <p><i>OIA</i> S. 1 Definition of "insurance fund"</p> <p>+ <i>OIA</i> Exception S. 40 (5) 2. and S. 343 (3) &amp; (4)</p> <p>+ Confederation Life Case</p>	

Figure 5: Ontario Insurance Act Exemption from Insurer Licence for Corporations With Insurance Funds

## Insurance Act

R.S.O. 1990, CHAPTER I.8

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90i08\\_e.htm#](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90i08_e.htm#)

### Necessity for licence

**40. (1)** Every insurer undertaking insurance in Ontario or carrying on business in Ontario shall obtain from the Superintendent and hold a licence under this Act.

### Prohibition re: licence

**(2)** No person shall carry on business as an insurer or engage in an act constituting the business of insurance in Ontario without a licence under this Act.

### Idem

**(3)** No insurer shall carry on business in Ontario as an insurer of a class of insurance that is not authorized by its licence under this Act.

### Prohibition against acting on behalf of unlicensed insurer

**(4)** No person in Ontario shall do or cause to be done any act or thing mentioned in subsection 39 (3) on behalf of or as agent of an insurer that is not licensed under this Act.

### Exception

**(5)** The following shall not be deemed insurers within the meaning of this Act or required or entitled to be licensed as such:

1. Pension fund societies incorporated under the *Corporations Act*.
2. Corporations mentioned in paragraphs 3 and 4 of section 343.
3. A trade union in Ontario that under the authority of its incorporating Act or charter has an assurance or benefit fund for the benefit of its own members exclusively.
4. Mutual benefit societies.

### Societies deemed not to be fraternal societies

**343.** The following shall be deemed not to be fraternal societies within the meaning of this Part and shall not be required or entitled to be licensed as such:

1. Societies known as mutual benefit societies as defined in section 1.
2. Pension fund societies incorporated under the *Corporations Act* or a predecessor thereof.
3. A corporation not otherwise provided for in this Act that has by or under the authority of an Act of the Parliament of Canada created a fund for paying a gratuity on the happening of death, sickness, infirmity, casualty, accident, disability or any change of physical or mental condition.
4. A corporation not otherwise provided for in this Act that has by or under the authority of an Act of the Parliament of Canada an insurance and provident society or association, or an insurance or guarantee fund in connection with the corporation.
5. A corporation that undertakes or offers to undertake contracts of insurance prohibited by section 342.
6. A corporation in which the insurance fund is used for the purposes of a mercantile or business enterprise, or for mercantile profit, or a society formed on the lodge system, whose insurance fund is held other than as a trust fund for the members insured.
7. A society in which the persons insured do not exercise, either directly or through representatives elected for a term not exceeding four years, effective control over the insurance fund of the society, or in which the officers or other persons having the disposition, control or possession of the insurance fund are elected or appointed for a longer period than four years.
8. Any corporation that undertakes contracts of insurance but is not formed exclusively for that purpose and that does not for the purposes of such contracts keep distinct

Figure 6: Ontario Insurance Act Exemptions for Services that are Not "Contract of Insurance" or Insurance Undertaken

## Insurance Act

R.S.O. 1990, CHAPTER I.8

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90i08\\_e.htm#](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90i08_e.htm#)

### Definitions

**1.** In this Act,

“contract” means a contract of insurance, and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement;

“insurance” means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;

“insurance fund” or “insurance funds”, as applied to a fraternal society or as applied to a corporation not incorporated exclusively for the transaction of insurance, includes all money, securities for money and assets appropriated by the rules of the society or corporation to the payment of insurance liabilities or appropriated for the management of the insurance branch or department or division of the society, or otherwise legally available for insurance liabilities, but does not include funds of a trade union appropriated to or applicable for the voluntary assistance of wage earners unemployed or upon strike;

“insurance money” means the amount payable by an insurer under a contract, and includes all benefits, surplus, profits, dividends, bonuses, and annuities payable under the contract;

“insurance on the cash plan” means any insurance that is not mutual insurance;

“insurer” means the person who undertakes or agrees or offers to undertake a contract;

### Application of Part, insurance business in Ontario

**39. (1)** This Part applies to insurance undertaken in Ontario and to all insurers carrying on business in Ontario.

#### Undertaking insurance

**(2)** An insurer undertaking a contract of insurance that under this Act is deemed to be made in Ontario, whether the contract is original or renewed, except the renewal from time to time of life insurance policies, shall be deemed to be undertaking insurance in Ontario within the meaning of this Part.

#### Carrying on business

**(3)** An insurer undertaking insurance in Ontario or that in Ontario sets up or causes to be set up a sign containing the name of an insurer, or that in Ontario maintains or operates, either in its own name or in the name of its agent or other representative, an office for the transaction of the business of insurance either in or out of Ontario, or that in Ontario distributes or publishes or causes to be distributed or published any proposal, circular, card, advertisement, printed form or like document, or that in Ontario makes or causes to be made any written or oral solicitation for insurance, or that in Ontario issues or delivers any policy of insurance or interim receipt or collects or receives or negotiates for or causes to be collected or received or negotiated for any premium for a contract of insurance or inspects any risk or adjusts any loss under a contract of insurance, or that prosecutes or maintains in Ontario an action or proceeding in respect of a contract of insurance, or a club, society or association incorporated or unincorporated that receives, either as trustees or otherwise, contributions or money from its members out of which gratuities or benefits are paid directly or indirectly upon the death of its members, or any of them, shall be deemed to be an insurer carrying on business in Ontario within the meaning of this Act.

Figure 7: Anti-Avoidance Clause in Ontario Consumer Protection Act

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02c30\\_e.htm#BK2](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c30_e.htm#BK2)

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**Anti-avoidance**

**3.** 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. 2002, c. 30, Sched. A, s. 3; 2008, c. 9, s. 79 (2).

Figure 8: OCPA Powers and Duties of Minister and Director of Consumer Services

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**PART X  
POWERS AND DUTIES OF MINISTER AND DIRECTOR**

**Powers of Minister**

102. (1) The Minister may,

- (a) disseminate information for the purpose of educating and advising consumers;
- (b) provide information to consumers about the use of alternate dispute resolution techniques as a means of resolving disputes arising out of consumer transactions; and

**(c) enforce this Act and other legislation for the protection of consumers. 2002, c. 30, Sched. A, s. 102 (1).**

Delegation of powers and duties

(2) The Minister may delegate in writing any of his or her powers or duties under subsection (1) to the Deputy Minister of Consumer and Business Services or to any persons employed in a specified capacity in the Ministry.

(3) The Deputy Minister of Consumer and Business Services may in writing delegate any of the powers or duties delegated to the Deputy Minister by the Minister under subsection (2) to any person employed in a specified capacity in the Ministry.

**Enforcement agreements**

**(4) For the purpose of enforcing this Act and other legislation for the protection of consumers, the Minister may,**

**(a) enter into agreements with law enforcement agencies in Canada and other jurisdictions; and**

(b) for the purposes of clause (a), share and exchange information concerning breaches or possible breaches of this Act or other legislation for the protection of consumers.

**Ministry receives complaints and makes inquiries**

105. The Ministry may,

- (a) receive complaints concerning conduct that may be in contravention of this Act, of other legislation for the protection of consumers or of any other prescribed Act, whether the conduct constitutes an offence or not; and
- (b) make inquiries, gather information and attempt to mediate or resolve complaints, as appropriate, concerning any matter that comes to its attention that may be in contravention of this Act, of other legislation for the protection of consumers or of any other prescribed Act, whether the matter constitutes an offence or not.

**Freeze order**

110. (1) If the conditions in subsection (2) are met, the Director may, in writing,

**(a) order any person having on deposit or controlling any assets or trust funds of a supplier or former supplier to hold those funds or assets;**

(b) order a supplier or former supplier to refrain from withdrawing any asset or trust fund from a person having them on deposit or controlling them; or

**(c) order a supplier or former supplier to hold any asset or trust fund of a consumer or other person in trust for the person entitled to it. 2002, c. 30, Sched. A, s. 110 (1).**

**Conditions**

(2) The Director may make an order under subsection (1) if he or she believes that it is advisable for the protection of consumers and,

(a) a search warrant has been issued under this Act;

**(b) an order has been made under section 111 or 112; or**

(c) there has been an undertaking of voluntary compliance under section 114.

**Person engaged in unfair practice**

**(3) Subsections (1) and (2) apply with necessary modifications to any person, whether or not the person is or was a supplier, if the person has engaged or is engaging in unfair practices under this Act. 2002, c. 30, Sched. A, s. 110 (3).**



## Figure 9: OCPA Offences, Penalties and Restitution

### Offences

- 116. (1)** A person is guilty of an offence if the person,
- (a) fails to comply with any order, direction or other requirement under this Act; or
  - (b) contravenes or fails to comply with,
    - (i) in respect of Part II, Consumer Rights and Warranties, subsection 10 (1), section 12, subsections 13 (2) and (7) and subsections 13.1 (1) and (2),
    - (ii) in respect of Part III, Unfair Practices, subsection 17 (1),**
    - (iii) in respect of Part IV, Rights and Obligations Respecting Specific Consumer Agreements, subsection 30 (2), clauses 33 (a) and (b), subsections 34 (1) and (2) and 36 (1),
    - (iv) in respect of Part V, Sectors Where Advance Fee Prohibited, section 49, subsection 50 (1) and section 53,
    - (v) in respect of Part VI, Repairs to Motor Vehicles and Other Goods, subsections 56 (1), 57 (1) and (3), 58 (1) and (2), section 60, subsections 61 (1) and (2) and sections 62 and 64,
    - (vi) in respect of Part VII, Credit Agreements, section 71, subsections 72 (2) and 76 (2), section 77 and subsections 78 (1) and (2), 79 (1), 80 (1), (2), (3) and (5), 81 (1), (3), (5), (6) and (7) and 82 (1) and (2),
    - (vii) in respect of Part VIII, Leasing, section 88 and subsection 89 (1), and
    - (viii) in respect of Part IX, Procedures for Consumer Remedies, subsections 96 (1), 98 (2) and 99 (5).

### Same

**(2)** A person who contravenes or fails to comply with a provision of a regulation made under this Act is guilty of an offence.

### Corporation

**(3)** An officer or director of a corporation is guilty of an offence if he or she fails to take reasonable care to prevent the corporation from committing an offence mentioned in subsection (1) or (2).

### Attempt

**(4)** Any person who attempts to commit any offence referred to in subsection (1) or (2) is guilty of an offence.

### Penalties

**(5)** An individual who is convicted of an offence under this Act is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than two years less a day, or both, and a corporation that is convicted of an offence under this Act is liable to a fine of not more than \$250,000.

### Limitation

**(6)** No proceeding under this section shall be commenced more than two years after the facts upon which the proceeding is based first came to the knowledge of the Director.

### Orders for compensation, restitution

**117.** If a person is convicted of an offence under this Act, the court making the conviction may, in addition to any other penalty, order the person convicted to pay compensation or make restitution. 2002, c. 30, Sched. A, s. 117.

## Figure 10: OCPA Authorization for Civil Class Actions

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#### Class proceedings

**8. (1)** A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

## Figure 11: Companies' Creditors Arrangement Act Provisions for Regulatory Actions

### Meaning of “regulatory body”

**11.1** (1) In this section, “regulatory body” means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

### Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

### Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

### Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

### Claims that may be dealt with by a compromise or arrangement

**19.** (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of (i) the day on which proceedings commenced under this Act, and (ii) if the company filed a notice of intention under section 50.4 of the [Bankruptcy and Insolvency Act](#) or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the [Bankruptcy and Insolvency Act](#), the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

### Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim’s compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).