Request to Amend CCAA and BIA Legislation or Prescribe a Self-Insured Long Term Disability Benefit Plan as an "Eligible Financial Contract" in the Regulations

We request that Bill C-624 amending the CCAA and BIA legislation from Parliamentary Session 40-3 (2010-03-03 to 2011-03-26) be reintroduced, or that a Self-Insured Long Term Disability Benefit Plan be prescribed as an "Eligible Financial Contract" ("EFT") in the Regulations. These are solutions for the Nortel long term disabled ("LTD") former employees having their disability income severely reduced because of a low and substantially delayed CCAA cash settlement ratio for Canadian creditors, a low Health and Welfare Trust ("HWT") settlement because of pensioners' life insurance and Nortel taking $60 million from the HWT to materially improve its own cash flow during its financial distress prior to bankruptcy. The Nortel bankruptcy court and other Ontario court divisions have ignored the intentionally delayed disclosure of HWT financial statements and actuarial reports, which provided evidence of HWT wrongdoings by Nortel and third party trustees. Common law on trusts and both consumer protection and trust legislation have not protected the Nortel LTD former employees.

The reasons for re-introducing Bill C-624, or alternatively prescribing a Self-Insured Long Term Disability Benefit Plan as an "Eligible Financial Contract" in the Regulations are summarized below:

- Unfunded LTD benefit liabilities are pari passu with all the unsecured creditors under the Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act applicable to corporations, and not with priority above all creditor claims like in the Winding Up and Restructuring Act applicable to insurers providing disability insurance;

- Unfunded LTD benefit liabilities will be deeply compromised and the compromised amounts are not being paid for years to come, while insiders have taken billions of dollars of cash from the Nortel estate.

    - bankruptcy professionals have been paid Cdn$2.0 billion of cash disclosed so far (about 15% of estate assets and 11% of creditor claims) with much litigation to come in the appeal courts of Canada and the US;

    - Nortel executives and key employees have received US$190 million in cash for retention and special incentive bonuses, on top of their regular annual incentive plan bonuses post the bankruptcy filing.

- LTD former employees are amongst Canadian creditors getting a much lower cash settlement per dollar of creditor claim than US bondholders and other US creditors and UK/EMEA creditors primarily due to US$3,159 million inter-company claims against the Canadian estate and US$3,825 million bond guarantees that permit claims against both the Canada and US estates, together swamping the US$ 2,510 million Canadian estate creditor claims from Nortel's Canadian pensioners, severed and LTD former employees. A document called "Plan Member Choices for the Nortel Negotiated Plan" released on November 26, 2015 says: "based on preliminary data provided by the estates and certain assumptions, we estimate that the recoveries in Canada would be in the 45% to 49% range if the allocation decision could be implemented today. Litigation and appeal costs will detract….Success on these appeals could put Canadian creditor recoveries at an estimated range of 10 to 15%."

- The two former CEO's most responsible for Nortel's bankruptcy filing have made large unsecured creditor claims. Mike Zafirofski has a US$12.25 million creditor claim in the US Estate for severance,

which is expected to be paid at close to 90%. Frank Dunn has a US$215 creditor claim for wrongful dismissal in the Canada estate, which is pari passu with the Nortel Canadian LTD former employees.

- The LTD former employees received only 38% of what is owed to them from the HWT since the Ontario bankruptcy court deemed their disability income benefit to be pari passu with pensioners' life insurance benefits within the HWT and Nortel wrongfully removed $60 million from the HWT. LTD must live on this cut in income while they are alive, while pensioners' life insurance was to be paid to successors after their death, and pensioners' life insurance benefits beyond the current year are not entitled to be funded and receive an employer tax deduction within the CRA rules for HWT's;

- The LTD former employees are the most badly impacted creditor group, and substantially worse off than the pensioners. The document "Plan Member Choices for the Nortel Negotiated Plan" released on November 26, 2015 says: "In general, the PBGF guarantees that the first $1,000 per month in pension is paid in full – any pension in excess of $1,000 is paid at the plan funded ratio, or 79.59%.... and 57% for other provinces (later adjusted to 69% for Nova Scotia service.)… Ontario and Nova Scotia eliminate indexation." Using the CCAA cash settlement ratios of worst case on appeal of 10% to best case of 45% for the lower court allocation decision and assuming more litigation expenses, the combined HWT/Pension Plan and CCAA cash settlement ratios for pensioners in Ontario for pension income under $1000 is 100% and for the amount over $1000 is 82% to 90%, in Nova Scotia is 72% to 85%, and rest of Canada is 61% to 79%. These compare to the LTD former employees at 44% to 69%, which is lower primarily due to HWT wrongdoings by Nortel and its trustees.

- The LTD benefit plan is a failed peace of mind insurance contract bought by employees that became LTD by illness or accident through no fault of their own, while institutionally owned quasi-credit insurance, known as credit default swaps, have eligible financial contract status within the CCAA that cannot be stayed by the bankruptcy court and have absolute top priority for payment in bankruptcy above both secured and unsecured creditors and bankruptcy professional fees;

- The LTD benefit plan is a misrepresented insurance contract sold by Nortel to Nortel employees using their own money to buy a top amount of coverage at 20% of income and without an opt out provision on the basic amount at 50% of income paid for by Nortel to permit employees to purchase alternative private disability insurance. The Ontario Consumer Ministry refused to enforce the Ontario Consumer Protection Act on the premise that insurance services sold to employees are not consumer services, even though there is no language in the Act providing for this exemption and self-insurance was exempt from regulation under the Insurance Act;

- Ontario courts refused to remedy the LTD former employees' claims of wrongdoings, such as breach of trust, fraudulent breach of trust, constructive fraud and fraud. Despite another Ontario court division judge outside of the bankruptcy court determining constructive fraud had occurred within the HWT, there was no trial on the evidence for any of these wrongdoings for initial reasons of needing to be expeditious, no money and no HWT wrongdoings at the time of the February 8, 2010 interim settlement agreement, and then later retroactive court knowledge of the constructive fraud and failure to meet the limitation period. Appeal courts deferred to the bankruptcy court judge's expertise and intent for expeditious resolution of the bankrupt company's situation to avoid fire-sale liquidation, preserve valuation for the creditors and preserve jobs. Yet, what actually happened is the successful sale of businesses and patents for a peak global estate of US$10.5 billion dollars by 2011, US$1.6 billion of bankruptcy professional fees paid to date, executives paid US$190 million of bonuses, and bondholders getting paid close to full value, while Canadian Nortel LTD former employees live in poverty despite determined constructive fraud and alleged fraud within the HWT.

- The Federal Liberal, NDP and Bloc Quebecois Parties all supported Bill C-624 in 2011, while the Conservative Party opposed it. The similar Bill S-216 was defeated by 3 votes in the Senate at 2010, with the Liberal Senators supporting it. The Conservative Senators' reasons given for defeating Bill S-216 was that it could not be retroactive and it would cause litigation by other creditors, delaying for many years the LTD former employees getting their much needed interim settlement money (9 months of income and health benefits). Now five years later litigation is still ongoing on other matters.

- The 350 LTD former employees and their 120 children face a long term future of having to survive on just CPP disability income of an average of $11,148 to the maximum of $15,175 for 2015. The average medical and dental expenses for the Nortel LTD former employees are $7,754 annually.

The remainder of this report provides additional details on the current situation of the Nortel LTD former employees and of self-insured long term disability benefits plans in general.

Recent Bills Concerning Group Long Term Disability Benefits

CCAA & BIA Amendments	Party	Sponsor	Date Introduced	Status
Bill C-624	Liberal	MP Mark Eyking	Feb. 11, 2011	3rd Session, 40th Parliament Adjourned
Bill C-610	Liberal	MP Judy Sgro	Dec. 15, 2010	3rd Session, 40th Parliament Adjourned
Bill S-216	Liberal	Senator Art Eggleton	March 25, 2010	Defeated - December 8, 2010
Bill C-487	NDP	MP Wayne Marston	Dec. 3, 2009	2nd Session, 40th Parliament Prorogued
Mandatory Insurance				
Federal Bill C-38 S. 434-440	Conservative	Minister of Finance James Flaherty	Budget March 29, 2012; Certain Provisions of Budget April 26, 2012	Royal Assent June 29, 2012
Ontario Bill 14 Schedule 14	Liberal	Minister of Finance Charles Sousa	Budget May 1, 2014	Royal Assent July 24, 2014

TRANSCRIPTS

House of Commons Hansard Key Statements on Nortel Disabled 2009 & 2010

Senate Hansard Transcripts on Nortel Disabled 2010

VIDEOS

House of Commons - Liberal MP Mark Eyking on Bill C-624 March 11, 2011

House of Commons - Liberal MP Michael Savage on Bill C-624 March 11, 2011

House of Commons - NDP John Rafferty on Bill C-624 March 11, 2011

House of Commons - Bloc MP Josee Beaudin on Bill C-624 March 11, 2011

House of Commons - Parliamentary Sect'y Mike Lake on Bill C-624 March 11, 2011

House of Commons - Conservative MP Lois Brown on Bill C-624 March 11, 2011

House of Commons - Prime Minister Stephen Harper on Nortel Disabled Nov. 30, 2010

House of Commons - Industry Minister Tony Clement on Bill S-216 Nov. 18, 2010

Senate Banking Trade and Commerce - Vim Kochhar on Bill S-216 Nov. 18, 2010

Senate Banking Trade and Commerce - Irving Gerstein on Bill S-216 Nov. 17, 2010

Transitional Provisions and Retroactivity

Federal Bill C-38 and Ontario Bill 14 have solved the problem of unsafe self-insured long term disability for employees, working at Federal and Ontario private sector employers, who become disabled in the future. Group long term disability benefits offered by these employers must now be provided by licensed insurers.

The Nortel LTD former employees who fought for this mandatory insurance and other disabled Canadians currently covered by self-insured long term disability benefit plans are not helped by Federal Bill C-38 and Ontario Bill 14. The transitional provisions in these bills specify mandatory insurance coverage for only employees that are not currently LTD. Shortfalls in reserves for the current LTD employees in self-insured plans are not being required to be made up with special contributions so that their liabilities may be transferred to insurance companies for payment of promised income until age 65, recovery, or death. Therefore, this group needs Bill C-624 implemented, or self-insured long term disability benefit plans prescribed as an EFC on a retroactive basis.

The Conservative Senators opposed Bill S-216 on the premise of it not helping the Nortel LTD former employees due to the interim settlement agreement approved in 2010 having a clause H1 provision shown below that prohibits higher than pro-rata final CCAA settlement for the LTD former employees, and to J. Morawetz having denied an earlier version of the interim settlement agreement containing clause H2, which would have allowed the employee groups to argue that an amendment to any provision of the BIA raising priority for pensions, severance or LTD benefits applied to their situation. A last minute adjusted interim settlement agreement was reached and approved that removed the earlier H2 clause.

> ***H. CCAA PLAN OR SUBSEQUENT BANKRUPTCY***
>
> 1. The Representatives agree on their own behalf and on behalf of the Pension HWT Claimants that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "**Plan**") be proposed or approved if: (i) the Plan provides for separate classification of any Pension HWT Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) the Pension HWT Claimants and the other ordinary unsecured creditors of Nortel do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against Nortel pursuant to the Plan.
>
> 2. Notwithstanding anything else in this Settlement Agreement, including for greater certainty paragraph G.2 hereof, in the event of a bankruptcy of Nortel, if there is an amendment to any provision of the Bankruptcy and Insolvency Act that changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability or non- applicability of any such amendment in relation to any such claim.

Bill C-624's Transitional Provision below ensures that the Nortel LTD former employees receive a CCAA settlement such that the HWT settlement and the CCAA settlement combined equals the actuarial liabilities for income and health benefits committed to in their LTD benefits plan.

> "8. For greater certainty, this Act applies to a debtor in respect of whom proceedings under the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* have commenced before the coming into force of this section."

The adjusted interim settlement agreement without clause H2 does not preclude the application of Bill C-624 on a retroactive basis. New Federal statutes can apply retroactively, even if they affect the substantive rights and obligations of prior Court approved settlements. The prospects for successful litigation of the retroactive statute is squashed by clear language in the retroactive clause to achieve the specific purpose of altering specific provisions in a specific prior Court approved settlement: *Smith Estate v. National Money Mart Company, 2008 CanLII 27479 (ON S.C.); British Columbia v. Imperial Tobacco Canada Ltd., S.C.C. 49 [2005]; Angus v. Sun Alliance Insurance Co., 1988 CanLII 5 (S.C.C.), [1988] 2 S.C.R. 256;* and, *Acme (Village) School District No. 2296 v. Steele Smith, [1933] S.C.R. 47.*

British Columbia v. Imperial Tobacco Canada Ltd., S.C.C 49, [2005] says:

> 69. Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(*g*) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution.

Professor P. W. Hogg sets out the state of the law accurately (in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 48-29):

> Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.
>
> 71. The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 US 244 (1994), at p. 268.

In the face of a clearly worded retroactivity clause, it is highly unlikely that any litigation will be commenced on the retroactive effect of this government bill, striving to obtain a preference for the Nortel disability income and medical claims above the unsecured creditors notwithstanding the adjusted interim settlement agreement approved by the court on March 30, 2010.

Add Self-Insured Long Term Disability Benefits Plan to Prescribed List of Eligible Financial Contracts

Adding a Self-Insured Long Term Disability Benefits Plan to the prescribed list of EFC's under the CCAA and BIA regulations is another alternative, which is a simpler and faster way to provide a solution for Canadians who are currently long term disabled and covered by self-insured long term disability benefit plans (both those impacted by corporations already filed under CCAA protection and those whose employers may file under CCAA protection in the future.) This does not require amendments to the CCAA and BIA. The EFC prescription does not require that under-funded LTD benefits for current LTD employees be made whole prior

to any bankruptcy filing and so there is no cost to corporations providing self-insured long term disability benefits until the corporation files for bankruptcy.

The power to prescribe an EFC is provided in the **Companies Creditors' Arrangement Act - Section 32(9) Exceptions to Disclaim or Resiliate Any Agreement .** A prescribed "EFC" cannot be disclaimed or resiliated on the day on which proceedings commence under the CCAA and BIA Acts and cannot be stayed by the CCAA or BIA court.

Contracts become prescribed by being added to the list of EFC in the **Companies Creditors' Arrangement Act - Eligible Financial Contract Regulations.**

The banks lobbied for the EFC process, and so far derivatives, such as interest rate swaps and credit default swaps, contracts for the borrowing or lending of securities and commodities, and margin loans to financial intermediaries are on the EFC list to protect bank interests. The addition of Self-Insured Long Term Disability Benefits Plan to the prescribed list of EFC's would have to have clear language in the retroactive clause to achieve the specific purpose of the Nortel LTD benefit plan being an EFC that cannot be disclaimed or resiliated despite it have been done so at the time of the Nortel CCAA filing at January 14, 2009 and despite the adjusted interim settlement agreement approved at March 30, 2010.

Regulations are not made by Parliament. Rather, they are made by persons or bodies to whom Parliament has delegated the authority to make them, such as the Governor in Council, a Minister or an administrative agency. CCAA Section 62 specifically delegates the authority to make regulations to The Governor in Council who may make regulations for carrying out the purposes and provisions of this Act, including regulations … (b) prescribing anything that by this Act is to be prescribed.

The Federal Minister of Innovation, Science and Economic Development is responsible for Industry Canada that oversees the CCAA and BIA legislation and regulations. Typically it is this Minister that authorizes the drafting of new CCAA and BIA regulations.

According to the Government of Canada Privy Council Office Guide to Making Federal Acts and Regulations, the Statutory Instruments Act include requirements that:

- draft regulations be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice;
- regulations be transmitted to the Clerk of the Privy Council to be registered and published in the Canada Gazette;
- regulations be referred to the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations (Committee).

A new regulation requires Cabinet approval when it applies retroactively. The Memorandum to Cabinet seeking approval must provide reasons for requesting the authority to have the new regulation apply retroactively.

A regulation is "made" when it is officially established by the regulation-making authority. This is usually done through a separate document called an executive order. The regulation is attached to the order as an annex. If the authority is the Governor in Council, the executive order is an "order in council" and the regulation is made when the Governor General indicates that the order in council is made.

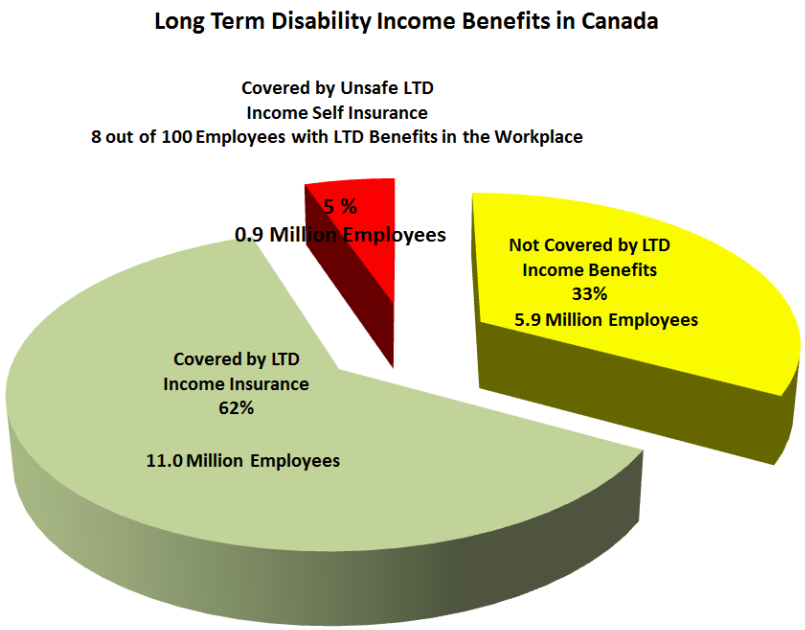
CPP Disability Income is Grossly Inadequate

The 2010 Nortel HWT wind-up settlement was at just 38% of the actuarial liabilities for the HWT beneficiaries. Nortel's LTD former employees' disability income, until age 65, recovery or death, averaged $30,829 per person, plus any CPP disability income. Not everyone has qualified for CPP disability income, making the Nortel disability income their only source of income. Hypothetically, if the average LTD former employee was able to live on his 62% compromised Nortel disability income of $11,715, plus his CPP disability income ranging from the average $11,148 to the maximum $15,175 for 2015, the combined disability income in 2015 from the two sources would be $22,863 to $26,890.

However, in practical terms, an LTD former employee, with annual expenses of $35,000 for shelter, food and other basic living expenses, will use up his average 2010 HWT settlement of $78,333 within about three years. The $35,000 benchmark used is substantially less than the average household expenditures in Canada of $73,457 in 2011, according to Statistics Canada. **Statistics Canada Average household expenditure, by province (Canada) 2011**

The LTD former employees, not close to normal retirement age, face a long term future of having to survive on just CPP disability income of an average of $11,148 to the maximum of $15,175 for 2015. The average medical and dental expenses for the Nortel LTD former employees are $7,754 annually.

CPP	Average amount (July 2015)	Maximum amount (2015)	Annual amount (2015)
Retirement pension (at age 65)	$640.23	$1,065.00	$12,780.00
Disability benefit	$929.01	$1,264.59	$15,175.08
Old Age Security		$569.95	$6,839.40
CPP + OAS		$1,634.95	$19,619.40
GIS		$772.83	$9,273.96
GIS + OAS		$1,342.78	$16,113.36



Source CLHIA 2014

Nortel Professional Bankruptcy Fees Already High % of Estate and Will Continue for Years to Come

Nortel bankruptcy professional fees (including disbursements within this report) are US $1.6 billion (Cdn $2.1 billion) or 15% of the Nortel global estate assets at their peak. The Nortel global estate had peak assets of US $10.5 billion at November 26, 2011. It now has assets of estimated US $9 billion, including the US $7.3 billion in the lock-box, which is the escrowed account for the major businesses' and patents' sale proceeds that were completed by July 1, 2011.

In the Ernst & Young Canada Court Monitor Report Number 121 dated September 22, 2015, there are forecasted Canadian bankruptcy professional fees of US $19 million for the period Sept. 13, 2015 to April 2, 2016. This suggests that no Final Plan of Arrangement is being submitted to the Canadian court anytime soon.

Nortel Bankruptcy Professional Fees

		US $ Millions	Cdn $ Millions
Canada	**Jan. 14, 2009 to Sept. 12, 2015**	**493**	**658**
U.S.	**Jan. 14, 2009 to July 31, 2015**	**639**	**851**
U.K. (17 EMEA Countries)	**Jan. 14, 2009 to July 13, 2015**	**424**	**565**
Total Professional Fees		**1556**	**2074**

Sources:

U.S. Debtor-In-Possession Monthly Operating Reports for Feb. 2009 to July 2015

Ernst & Young Canada Court Monitor Report Numbers 8, 15,16, 25, 33, 35, 43, 50, 55, 59, 70, 78, 84, 87, 89, 91, 94, 98, 103, 104, 108, 114, 121 (to Sept. 12, 2015)
U.K. Joint Administrators Progress Report Aug. 11, 2015 (to July 13, 2015)

Canadian $ Per US $ **Nov. 24, 2015** **1.3327**

Compiled by Diane Urquhart, Independent Financial Analyst

The bankruptcy professional fees paid from the Nortel global estate appear to be made to a small number of firms. The US Chapter 11 and UK Administration court rules require detailed disclosure from each of the professional firms being paid from the Nortel US and UK(EMEA) estates. From these disclosures we see that Cleary Gottlieb Steen Hamilton LLP, legal counsel to the US debtors has been paid US$309.7 million. Herbert Smith LLP, legal counsel for the UK Administrator (covering the Nortel UK/EMEA estate) has been paid US$204.8 million, while local counsel sub-contracted by this law firm, including Davies Ward Phillips & Vineberg LLP Lax O'Sullivan Lisus LLP, have received another US$99.5 million. Canadian law firm Torys LLP has collected professional bankruptcy fees of US$18.7 million as Canadian legal counsel for the US debtors and Cassels Brock & Blackwell LLP received US 4.5 million as Canadian legal counsel for the US Unsecured Creditor Committee appointed by the US Trustee to administer the Chapter 11 proceedings on its behalf.

Unfortunately the CCAA court rules do not require disclosure of what specific professional firms are being paid during the CCAA proceedings, although disclosure typically is made in the final plan of arrangement documents. Ernst & Young does not disclose its fees in Canada for its role as Canada CCAA Court Monitor, whereas it is forced to do so in the US at US$30.6 million and in the UK at US$118 million disclosed to date. Assuming Ernst & Young's Canadian professional fees to date are at least as high as in the UK Administration, Ernst & Young likely has professional fees to date of well over US$250 million. Ernst & Young has responsibility to monitor the professional fees paid in Canada within its capacity of Canada CCAA Court Monitor and in the UK/EMEA in its capacity of UK Administrator. There is a conflict between Ernst & Young itself collecting exorbitantly high professional fees and it turning a blind eye to the exorbitantly high professional fees paid to the law firms representing the debtors, itself as Canada Court Monitor and UK Administrator, and the US Unsecured Creditor Committee. In Canada the debtors are represented by Norton Rose Fulbright LLP and Gowling Lafluer Henderson LLP. Goodmans LLP represents Ernst & Young as the Canada Court Monitor.

Nortel Bankruptcy Professioal Fees by Firm Where Disclosed

Firm	Role	Period	Fees and Disbursements US $ Millions
Cleary Gottlieb Steen Hamilton LLP	Counsel to US Debtors	Jan. 14, 2009 to Aug. 31, 2015	309.7
Herbert Smith LLP	Counsel to UK Administrator	Jan. 14, 2009 to July 13, 2015	204.8
Herbert Smith LLP Local Counsel	Counsel to UK Administrator	Jan. 14, 2009 to July 13, 2015	99.5
Ernst & Young	Tax Counsel to US Debtors	Jan. 14, 2009 to April 30, 2015	30.6
Ernst & Young	UK Administrator	Jan. 14, 2009 to July 13, 2015	118.0
Ernst and Young	Canada Court Monitor	Jan. 14, 2009 to Sept. 12, 2015	NOT DISCLOSED
Sub-total Disclosed			148.6
Akin Gump Strauss Hauer & Feld LLP	Counsel to US UCC	Jan. 22, 2009 to July 31, 2015	68.7
Torys LLP	Counsel to US Debtors	Oct. 28, 2010 to July 31, 2015	18.7
Cassels Brock & Blackwell LLP	Counsel to US UCC	March 4, 2014 to Aug. 31, 2015	4.5
Richards, Layton & Finger, P.A.	Counsel to US UCC	Jan. 26, 2009 to Feb. 20, 2015	1.4

Sources: Nortel Chapter 11 EPIQ Filed Documents

Compiled by Diane Urquhart, Independent Financial Analyst

Further Nortel CCAA and Chapter 11 Legal Steps

Update from the Koskie Minsky LLP website: **http://kmlaw.ca/cases/nortel-networks-corporation/**

Leave to appeal material has been filed at the Ontario Court of Appeal by various US Interests, including the US Debtors, Bondholders, Unsecured Creditors Committee (UCC), the Bank of NY Mellon and a newly formed trade creditor consortium. In addition, a newly appointed conflict administrator on behalf of French Estate provided notice to stakeholders of their intention to seek leave to appeal.

In the US, notices of appeal were filed by the US Debtors, Bondholders, Pension Benefits Guarantee Corporation (PBGC) and the Unsecured Creditor Committee. Cross appeals were filed by the Trade Claims Consortium, as well as the UK Joint Administrators, the Canadian Monitor and the Canadian Creditors Committee.

The U.S. appeal is scheduled to be heard April 5, 2016, while the Canadian appeal is still awaiting approval," according to the Globe and Mail's Janet McFarland in "Pressure Mounting on Nortel mediation talks as legal costs soar," Nov. 3, 2015.

In addition, a motion has been brought by the Canadian Monitor in the US for a determination that (i) the allocation order is interlocutory and not a final order such that appeal from the order is not a matter of right and requires motion for leave to appeal, and (ii) the appeals filed should be treated as motions for leave and leave to appeal should be granted. We will advise as soon as this motion is heard."

Nortel Allocation Decision is Not Proportionate Due to Bond Guarantees and Inter-Company Claims

The Nortel court allocation decision is described as a proportionate settlement, where the three regions of the US, Canada and the UK/EMEA get a share of the US $7.3 billion in the lock-box equal to each region's share of total creditor claims. However, the final outcome will not be the same cash settlement per dollar of claim in the three regions due to huge inter-company claims against the Canada estate, bond guarantees allowing bondholders to be paid from both the Canada and US estates, and cash within the regions that is not in the lock-box.

Inter-company claims against the Canadian estate total US $3,159 million, compared to the about US $2,510 million of Nortel Canadian pensioners, severed and LTD employees' claims. There are US $2,517 million inter-company claims against the Canada estate in favour of the US estate. There are US $125 million inter-company claims of Nortel Networks UK and Nortel Networks SpA against the Canada estate pursuant to the agreement settling EMEA Canadian claims and related claims dated July 9, 2014. Plus, there is a £339.75 million [= US $517 million] claim of the UK pension recognized in the court decision of December 9, 2014.

There are US$3,825 million of bond guarantees within covenants entitling the bond holders to look to both Canada's Nortel Networks Limited and US's Nortel Network Inc. for payment of their claims and if one if these companies did not have sufficient funds to pay the bonds in full, they could look to the other.

Nortel HWT Class Action Was Dismissed in a Summary Judgement Without a Trial

The Ontario courts were unwilling to conduct a trial and provide remedy for the wrongdoings within the HWT by Nortel and third party trustees. Common law on trusts and trust legislation did not protect the Nortel LTD former employees. Corporations and unions had rejected mandatory insurance or an LTD benefits regulatory regime in Alberta during 2003 on the premise that the common law on trusts and trust legislation were sufficient protection. The Nortel LTD former employees' court treatment belies this supposition, and makes both mandatory insurance and Bill C-624 or self-insured LTD benefits becoming an eligible financial contract essential changes in government policy.

The bankruptcy court prematurely approved a February 8, 2010 interim settlement with a legal release of litigation against third party trustees for the HWT, despite the monitor having refused the group's requested disclosure into the court of the HWT financial statements and actuarial reports. The interim settlement agreement approved by J. Morawetz paid them just Cdn $12 million or 9 months of benefits in exchange for the legal release. The withheld disclosures contained evidence of breach of trust, constructive fraud, and the alleged fraudulent breach of trust and fraud occurring starting in 2005. The denied disclosure of the HWT financial statements and actuarial reports, contained evidence of Nortel taking $60 million from the HWT, without intervention from its third party trustees, and using the trust funds to materially increase its own cash flow during its period of financial distress in 2005-2006.

Constructive fraud was later decided by J. Perell in another Ontario court division, but it nonetheless was summarily dismissed due to the interim settlement agreement's legal release being interpreted to cover the constructive fraud said to be known by the bankruptcy judge at the time of its approval (despite contrary indications of this in court transcripts from the judge, the monitor's legal counsel and the court-appointed representative legal counsel for the LTD former employees, and despite the HWT financial statements and actuarial reports containing the fraud evidence not disclosed at the time) .

The fraudulent breach of trust and fraud class action claims were also summarily dismissed by J. Perell for the reason of no dishonesty by the company and trustees (without a trial on dishonesty and with dishonesty being an inherent component within these two claims). The Ontario appeal court said the large shortfall in funding of the HWT known at the time of the interim settlement was sufficient knowledge to file the fraudulent breach of trust and fraud claims within two years of the interim settlement agreement at February 8, 2010. They said these claims should have been in the reasons for opposition to the February 8, 2010 interim settlement agreement and should not have been delayed six months based on the limitation period starting August 27, 2010 when the HWT financial statements and actuarial reports containing the evidence of the alleged fraud was released.

Had the fraudulent breach of trust and fraud claims been added to the reasons for opposition to the interim settlement agreement without evidence, they would have most certainly been dismissed by J. Morawetz at the time of the interim settlement agreement since his transcript comments show his belief there were no HWT wrongdoings. Also, no appeal would likely have been granted, with the appeal court almost always deferring to the bankruptcy court judge's expertise and intent for expeditious resolution of the bankrupt company's situation to avoid fire-sale liquidation, preserve valuation for the creditors and preserve jobs.

Prepared By:

Diane A. Urquhart
Independent Financial Analyst
November 27, 2015
Cell: (647) 980-7618
urquhart@rogers.com

November 30, 2015