

**INVESTIGATION BUREAU
BUREAU DES ENQUÊTES**

**ANTI-RACKETTS
CRIMES COMMERCIAUX**

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April 23, 2012

File Reference: RM11123204
Référence :

MEMORANDUM TO:

Paul Beesley
Detective Inspector
Manager, Anti-Rackets Branch
Criminal Investigation Services

Re: Request for Criminal investigation into Nortel Networks Long Term Disability Pension Fund.

Inspector Beesley,

Complaint Information

The complaint taken from an email, from Diane Urquhart, dated January 26th, 2012 is as follows;

"We do verily believe that during the period from May 2005 to and including April 2006, persons with authority over the management of the "Trust" funds committed fraudulent acts, in relation to the withdrawal of "Trust" funds for an unauthorized purpose, a purpose for which those "Trust" funds were never intended to be used, funds which were protected under a Health and Welfare Trust and governed by common Trust laws, held in trust for the direct benefit for Nortel's employees on Long-Term Disability."

After reviewing all of the material submitted by Diane Urquhart as well as conducting an audio interview of her on January 26th 2012, it is obvious that there have been many years of legal battles surrounding this file.

The allegation brought forward to the Ontario Provincial Police (OPP) on behalf of the long-term disabled Nortel employees is that approximately \$32M has either been stolen or misappropriated

Fraud...Recognize it...Report it...Stop it...

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from Nortel Networks Limited (Nortel) Health and Welfare Trust (HWT) by senior Nortel executives.

Diane Urquhart, in her recorded statement of January 26th, 2012, asserted that only \$18M worth of the alleged fraud should be investigated. However in her email she requested that the entire \$32M be looked at for any criminality. I therefore reviewed the entire \$32M in question.

Background

On January 1st, 1980 Nortel established a HWT as a tax efficient vehicle through which Nortel could continue to provide employee benefits by agreement between Northern Telecom Limited (a predecessor company to Nortel) and Montreal Trust Company (Trustee). The agreements between companies were amended a number of times throughout the HWT funds existence with a final amendment on December 1, 2005.

Nortel's long-term disabled employees were funded by Nortel on a "pay-as-you-go" basis using the HWT as a payment mechanism. Numerous non-pension employee benefits, including life insurance, medical, dental and survivor income benefits were funded through the HWT in the same manner as the long-term disabled employees and as a result there was a commingling of assets in the HWT. Nortel would use the HWT to pay all employee benefits on a "pay-as-you-go" basis and at the end of each month would replenish the account through payments from Nortel and insurance providers. These remittances would have approximately a two month lag for payment to the HWT to replenish the account.

Employees and former employees of Nortel were not informed of the existence of the HWT until at least 2007 nor were they promised that their benefits would be provided through a health and welfare trust. None of Nortel's collective bargaining agreements referenced the HWT or promised to provide benefits through a health and welfare trust.

Investigation

s.21(1)
s.21(2)(f)
s.21(3)(b)

Request Number: CSCS-P-2012-01532

Pages 97 to 100 have been exempted pursuant to sections 21(1), 21(2)(f) and 21(3)(b) of the Freedom of Information and Protection of Privacy Act.

Type of Document: Ontario Provincial Police report

s.21(1)
s.21(2)(f)
s.21(3)(b)

Civil Proceedings

As a result of the Nortel bankruptcy on January 14th, 2009, Nortel filed for and obtained protection under the Companies' Creditors Arrangement Act (CCAA). On July 30th, 2009 the courts appointed Koskie Minsky LLP to represent the 400 disabled Nortel employees. Susan Kennedy from Koskie Minsky LLP was appointed as the representative to oversee the interest of Nortel's employees that were covered by the HWT.

On February 8th, 2010 a proposed settlement agreement under the CCAA was reached where Nortel agreed to pay nine (9) months of benefits to their long-term employees, in addition, the long-term disabled employees would waive their legal rights to any further litigation or other actions that would lead to them seeking any remedy for any activities related to the HWT. Koskie Minsky LLP counsel advised Sue Kennedy to accept the proposed settlement agreement, which she had done. A group of 40 (10% "dissenting group") Nortel long-term disabled employees claimed that this agreement was made without their informed consent, a vote and that the agreement did not have the required majority support that was required by law. This group of dissenting Nortel long-term disabled employees were able to present their case in court on March 3-5, 2010. This agreement was overturned, "not due to uninformed consent and not having a vote as was argued by the long-term disabled employers counsel but due to an unsecured creditor committee in the United States that stated there was a clause that if legislation were to change, Nortel would have to pay back all of the money."

On Friday March 26th, 2010 Ontario Court Justice Geoffrey Morawetz approved a settlement agreement put forward by Nortel and its long-term disabled employees. This agreement was supported by Sue Kennedy on behalf of Koskie Minsky LLP. Justice Morawetz's agreement was appealed by the dissenting groups of Nortel long-term disabled employees to the Supreme Court of Ontario without success. As part of the agreement signed by Justice Morawetz there was a clause that precluded any further litigation of any sort between the long-term disabled employees and Nortel, this essentially terminated any hope of a remedy for the disabled employees.

Conclusion

It is clear from the interviews that have been conducted for this review that Nortel's pension committee and senior executives were acting in good faith and in the best interest of the company and that of the disabled employees. A substantial fund of approximately \$100-120M had been created to administer dental and medical benefits, life insurance, survivor and long-term disabled employee benefits for Nortel. This fund was established during the high tech boom of the 1980's when financial surpluses were extensive and it was used as a tax benefit to Nortel.

Nortel used this HWT fund to operate and administer its dental, medical, life insurance, survivor benefits and disabled benefits to its employees. This was not the standard policy used by private sector companies operated in Canada and the United States of America. Most companies operated what was called an ASO administered policy that was funded on a "pay as you go" basis. This means that each month, payments were made on actual costs and billed back to the company, not taken from a HWT that the company administered.

Leading up to 2005, a similar HWT operated by Nortel in the United States of America was wound down and then operated as a standard ASO policy like the one mentioned above. In early 2005, Nortel's Canadian pension committee was looking to wind down their HWT fund as was done in the United States. In May of 2005, the pension committee and senior executives knowingly and openly took a moratorium on funding the HWT as it was determined that there was no legal obligation to continue funding the account in this manner. These decisions were made by Nortel lawyers and human resource managers as well as Mercer's financial consulting. This was not a rash decision by the senior executive and pension committee members. They clearly conducted their due diligence and all decisions were openly discussed and properly minuted by the pension committee and senior executives.

From May 2005 to April 30th, 2006 payments were not made to the HWT fund by Nortel, instead, they drew payments for this expense directly from the HWT account itself. This caused the HWT account to be drawn down over \$30M. This is the \$30M in question relating to the complaint. Nortel's employees continued to fund the HWT from Insurance Companies and employee source deductions. Insurance Companies and source deductions did not fund the long-term disabled; they were solely funded by Nortel alone.

During the suspension of payments into the HWT, Nortel utilized its funds for other company specific requirements; however the Insurance Companies and the source deductions continued to flow into the HWT to fund the benefits not related to the long-term disability program. The HWT was drawn down by approximately \$30M during the suspension of payments by debits related to the long-term disability program specifically. When the PIC realized that the commingling of funds in the HWT made it difficult to transition from the HWT to a standard

ASO policy, they decided to continue with the HWT, even though this was coming at an added cost because they were no longer receiving substantial tax benefits to utilize this type of investment vehicle. In good faith and prior to any allegations of wrongdoing being made, they decided that they would pay back the \$30M to the Trust. This would be done in small amounts until the \$30M was fully replaced.

Nortel's pension committee and executives were being as open and transparent as they could have been in the situation. The reduction to the HWT was realized by Nortel as a long-term financial obligation to the HWT and it was agreed to replenish the fund to the \$100M it was at before the moratorium on payments took place.

Dishonesty on behalf of the Nortel pension committee or that of the senior executives relating to the HWT has not been encountered. A decision was made by those that administered the HWT account that was thought to be in the best interest of Nortel and its disabled employees. Once it was determined that the Canadian HWT could not be wound down as had been done by its American counterparts, Nortel re-established funding the HWT as it had done for many years. Nortel openly realized that it had to replenish the HWT account and that it had a long-term financial obligation to return this money. In fact, between April 2006 and the bankruptcy declaration in January of 2009, Nortel managed to repay a small portion of the money that was owed to the HWT, once again accepting the realization of the long-term financial obligation to the HWT had to be repaid.

The entire process of Nortel taking a moratorium of funding the HWT and looking into winding down the HWT was an open and transparent decision made by the pension committee and senior executives. There was nothing nefarious or deceitful encountered in this business decision.

If not for the subsequent collapse of Nortel and bankruptcy filing, it is believe the Nortel pension committee and senior executives would have ensured that the HWT had been replenished the entire \$30M.

Upon review of the entire complaint, I have determined that there is no evidence to support charges of fraud, theft or any other criminal code offences. There are no grounds to believe that the Nortel pension committee or its senior executives used deceit or any other fraudulent means that resulted in the deprivation of the HWT or Nortel's long-term disabled employees. This is the criminal benchmark and it was not met.

Respectfully,

Brian Mason