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July 15, 2014

By Email:* *insolvency-insolvabilite@ic.gc.ca

Paul Halucha, Director-General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor, East Tower
Ottawa, Ontario, K1A 0H5

Dear Mr. Halucha

Re: Statutory Review of the *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act*

These submissions on behalf of Unifor address a number of issues arising out of the union's experiences in representing current and former members in a large number of insolvency proceedings across Canada. Unifor is the largest private sector union in Canada, representing more than 300,000 workers in some 20 economic sectors, including transportation, aerospace, manufacturing and communications. Unifor also represents public sector employees in the health, education and transit sectors.

Included among the bankruptcy, receivership, proposal and CCAA proceedings that Unifor, or its predecessors, has been involved with are Lear Seating, Dura Automotive, Allied Transportation, General Motors, Polywheels, Northstar Aerospace, P.J. Wallbank, Sears Home Services, Neptunus Yachts, LaChaumiere Retirement Home, Fibrex Insulation, Pegasus Plastics, Scanwood Canada, Priszm Income Trust, Lofthouse, and Nortel.

Unifor's role in these proceedings included representation of members' rights with respect to the recovery of or claims with respect to unpaid wages, vacation, severance pay vis-à-vis debtors and directors and officers, as well as their pensions and benefits, the pensions and benefits of retirees and their survivors, the claims of disabled members and former members and assistance or representation with respect to the Wage Earner Protection Program and the filing of Proofs of Claim in support thereof.

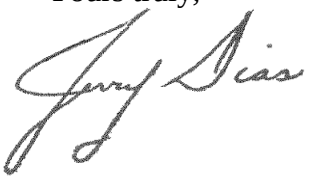
As a result of these various proceedings the Union has garnered experience which has informed our belief that there are a number of revisions to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* which would better protect workers and retirees who find themselves as involuntary creditors of their employers or former employers. Some of these revisions would be procedural, some

legislative and some with respect to the broader context in which employees, retirees and their survivors find themselves when an employer chooses or is forced into insolvency proceedings.

We appreciate your acceptance of these submissions on behalf of not only our members, but workers throughout Canada, many of whom have suffered great hardship in the face of the financial devastation visited upon them as a result of lost employment, disability and pension incomes when their employer became insolvent. We look forward to engaging in further discussions to revise Canada's Insolvency Legislation to better protect the women and men who build and sustain this nation's economy.

Should you have any questions regarding the Union's submissions please contact Wendy White at wendy.white@unifor.org or (416) 495-3750.

Yours truly,



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National President

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Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

THE COMPANIES' CREDITORS ARRANGEMENT ACT

Initial Stay Orders

1. The Union has been involved in a number of CCAA proceedings where it had not been provided with notice at the time initial orders were granted. The following assumes that there exists a factual *basis* upon which an initial order may be granted, i.e., the statutory requirements are met.

2. The terms of any initial stay order should be limited to those matters that are necessary to give effect to the intent of the CCAA, including the pre-emption of potential harm to the vulnerable debtor and assuring the existence of financing necessary to maintain operations until a come-back hearing;

   a) the terms of the initial order should stay all potential harm that might result from opportunistic or protective-reaction steps by anyone in advance of a come-back hearing at which time representations can be made regarding the necessity and repercussions of terms that will likely be built upon throughout the restructuring process;

   b) the initial order should provide for the granting of an administrative charge for interim DIP financing where required to maintain the operations of the Company during the period between the filing and the come-back hearing, at which time representations could be made on the terms of further DIP or other financing of the company's operations during the restructuring.

3. The granting of DIP financing and the terms relating thereto in initial orders, without the opportunity to review the financing terms and the repercussions to creditors resulting therefrom cannot be undone once granted. Indalex is a supreme example of a situation where the unions involved did not have an adequate opportunity to review such an agreement and make timely representations prior to the granting of the order approving the agreement;

    a) in terms of both the initial and comeback stay orders, each should be based upon an evidentiary record upon which other parties can cross-examine to determine the veracity of such information and the degree to which it subjectively supports the terms of the requested orders.

4. Lack of worker representation at the time fulsome stay orders are granted can very rarely be undone at the time of come-back hearings. Far too many issues become entrenched, including the debtor's authority to override the terms of a collective agreement or employment contract and the financing of the company's operations during restructuring which might have an unwarranted deleterious effect on creditors, including the Company's employees;

    a) initial orders should not grant sweeping and at times unnecessary authority to eliminate health and other benefits for current and retired members, terminate employment and stay normal grievance/arbitration processes. Such orders can have unintended results, including damaging effects on productivity as employees and their unions attempt to determine the extent to which the debtor intends to act upon the granting of such authority.

The Role of the Monitor at the time of the Initial Order and thereafter

1. Until such time as the monitor is appointed and thereby has authority as the eyes and ears of the Court, it should not opine or give recommendations lending credence or support to a debtor's application.

2. Clearly, it is more than likely that the proposed monitor will have had involvement with the debtor prior to the filing, but should not provide a pre-filing report;

    a) the Monitor can provide a full report prior to the comeback motion, upon which the Court and the creditors can ruminate in the face of the evidence brought by the debtor in support of further terms for incorporation into the initial order.

3. Cases where a monitor proffers evidence in support of contested relief necessarily creates a conflict between it and any party in opposition. In effect then, the opposing party must, if necessary, cross-examine the appointed eyes and ears of the court. Never is this an advantageous step for a party to take. One notable except would be in the event the Monitor concludes that the Debtor has failed in its duty to act in good faith as required of it under the CCAA;

    a) at no time should the Monitor provide an evidentiary basis for its reports, including the come-back hearing. Such evidence as is required to support any relief sought by any party should be proffered by the moving or responding party(ies). In addition, at the request of the court the parties could provide the evidence necessary where a step is proposed by the Monitor in order to advance the proceeding. Any authorization to step beyond an amicus type role should be extremely limited due to the monitor's need to maintain the trust and confidence of all parties.

4. The Union has observed that in a number of proceedings the Monitor has acted as mediator in an attempt to resolve conflicts prior to their appearance before the bar. Although these efforts have met with varying degrees of success, the Union has generally found the efforts of various monitors worth the time and expense. In addition, such efforts are generally of assistance to the court and the parties in clarifying, if not resolving, the issues in dispute.

Claims Processes

1. In numerous instances Unifor has had to seek the assistance of the Company to determine amounts owing to the union, its members and the applicable pension plan. Only the employer has access to the information necessary to determine the amounts owing. Employee wages, vacation pay, benefit entitlements, benefit claims or premiums, and RRSP, defined contribution or defined benefit premiums, are all solely within the knowledge of the employer.

2. As the exclusive bargaining agent for all matters relating to the hiring, terms of employment and the termination of employment for those employees it represents, the union is statutorily mandated to assume the role of representative in insolvency proceedings.

3. The duplication of effort and downloading of employer responsibilities to workers, and if such is the case, their unions, is unnecessary given the degree of work required to produce and verify the information required so that an employee or union can then turn around and submit a claim based almost exclusively on the employer's records.

4. Unifor is in favour of a statutory or regulatory default claims procedure;

   a) the debtor should provide the monitor or a court appointed claims officer with the information necessary to determine any and all creditor claims. The monitor or officer would thereafter notify creditors of the calculated claim, with supporting documentation, and adjudicate any additional claims or determine revisions based on evidence provided by the creditor. The determination of the adjudicator would then be subject to review by the court upon application by the creditor.

Unsecured Creditors Committees

1. Unifor is not in favour of statutorily mandated creditor committees made up of unsecured creditors. The multiplicity and divergence of interests of creditor committees can result in stalemate with respect to negotiations and conflict in relation to approval or rejection of plans of compromise;

   a) the Court's current authority to approve ad hoc committees or groups of like interest creditors works and creates a cost effective means of representation.

2. The Union cautions that courts have occasionally approved financial support from the company coffers for groups that should not be approved and refused reimbursement for other groups, such as unions. Certain distressed investors in the Nortel proceeding have obtained financing to support their litigation efforts. On the other hand, requests for funding from the union in CanWest were denied despite the fact that the union required the same additional, and likely outsourced, resources in terms of actuaries, financial advisors and specialists, as the Nortel investors;

a) automatic rejection of compensation requests on behalf of unions seeking the same assistance available to private counsel representing individual employees who form an ad hoc committee is unfair and puts an additional strain on some unions with limited membership and financial means. It is notable, with respect to this argument, that Unifor did not ask for any compensation in relation to the 130 employees, and long-term disabled, or 632 retirees that is has represented in the five and one-half years of the Nortel proceedings.

3. The statue or the courts must ensure transparency with respect to costs relating to ad hoc creditor groups though the disclosure of costs relating to such groups in regular monitor reports;

a) an the event the court becomes concerned with the costs related to one or more of the groups in a proceeding, it must have or assume the responsibility of appointing an officer to review and, if necessary, reject unjustifiable claims for compensation and disbursements.

Acting in good faith

1. Unifor is in support of a specific provision within the CCAA requiring all creditors to act in good faith. Parties will often take positions which may not have a solid base of jurisprudence upon which to ground a claim or position. But that is not bad faith. Certain of the union's arguments were upheld by the Supreme Court in Indalex, despite the fact that they had previously not garnered the support of the courts.

2. The difference between a position taken in bad faith and a sustainable position is the degree to which the argument in support of it can be legally articulated or defended on justifiable principles. Mandating good faith on the part of those who will ultimately determine the success or failure of a proposed plan of compromise can only enhance the endeavour.

Professional fees in CCAA Proceedings

1. If the Nortel multi-jurisdictional liquidating insolvency has proven anything, it is that professional fees can quickly run amok. Nortel is a uniquely vexing set of circumstances for the court(s). There are main insolvency proceedings in Canada, the United States, and a multi-jurisdictional administration in the United Kingdom relating to Europe, the Middle East and Africa, all of which

intertwine through intercompany and intra-jurisdictional contractual, common law and statutory claims.

2. Even with five plus years involving multiple attempts at mediation or consensual resolution, numerous jurisdictional wranglings, small and large interlocutory proceedings designed to obtain or maintain advantage, as well as decisions by courts of ultimate appellate review in three jurisdictions; it is still staggering that professional fees have exceeded $1.5 billion U.S.;

   a) as with costs related to creditor groups, in the event the court becomes concerned with the cost of professional fees to the debtor estate it must have or assume the responsibility of appointing an officer to review and, if necessary, reject unjustifiable claims for compensation and disbursements. It is believed that the Monitor should not fulfill this role due to the necessity that it not be in direct conflict with any party to the proceeding.

3. In Nortel, the Ontario Court took the position that counsel for the creditor parties were not required in cases of uncontested motions and issued a directive to that effect. The court's directive was in reaction to the fact that in the first years of the proceeding counsel would regularly attend on motions in which they had no interest or had already consented to the relief requested.

INSOLVENCY GENERALLY

Distressed Investors

1. In Nortel, distressed investors hold $4.2 billion U.S. in Nortel bonds issued by the Canadian Estate but are also guaranteed by the U.S. Estate.

2. These distressed investors made their investments subsequent to the CCAA filing at rates dramatically less than face value. Not only are they seeking the face value of the bonds, but also post-filing interest. In Canada, there is no statutory requirement that distressed investors provide disclosure relating to holdings and purchase price.

3. A lack of transparency as to holdings and the value of debt held by these distressed investors, or investors generally, has made negotiations directed at the resolutions of certain singular issues, and potentially the larger picture, much more difficult. Conventional wisdom is that investors

focus on the time value of money and seek the earliest and the highest rate of return. However, the delay in Nortel has been of advantage to those cross-over bond-holders who have determined that they are entitled to post-filing interest.

4. In addition, the existence of, among other things, credit default swaps, which are a sort of debt insurance not available to involuntary creditors such as employees and retirees, creates a decoupling of economic interests between distressed investors and the debtor. Pension plans and those who have lost sustaining benefits such as long-term disability payments are looking at increased personal hardship, poor health outcomes and years of uncertainty, as opposed to massive profits obtainable by anonymous and amorphous investor entities.

5. All of these issues relate to the extent to which creditor parties are working to obtain a result that not only meets their own interests, but the purpose of insolvency legislation that has as its purpose the restructuring of companies to ensure their continued operation. To address, although not entirely resolve these issues, Unifor endorses certain of the suggestions arising out of the Sara Report, including the following:

    a) all debt creditors must be required to file disclosure documents identifying the beneficial owner of the debt, the extent of their claims and the value of their investment. Such disclosure would include secondary market trading and each post-filing trade, reported at intervals throughout the proceeding;

    b) for the same reasons, creditors holding credit default swap protections or similar credit derivatives should also be subject to disclosure;

    c) all post-filing trading in debt and settling in relation to CDSs or other credit derivatives should be subject to a stay and court approval;

    d) the Court should look seriously at the real economic interests of parties in determining whether to approve a restructuring plan and should have the authority to reduce the voting value of claims where creditors have access to CDSs or other derivatives.

Interest Claims

1. In Nortel, where secured creditors are financial non-entities, there is a significant issue involving bonds issued by the Canadian Debtor and guaranteed by the U.S. Debtor. These "cross-over" bondholders have claimed aggregate principal and pre-filing interest claims of $4.092 billion U.S., as well as post-filing interest of approximately $1.6 billion U.S. Based on the cross guarantees, the bold holders have claimed their interest in both the Canadian and U.S. jurisdictions.

2. Even though they are equal to the bond holders in in status as unsecured creditors in Canada, the diminishing numbers of pensioners have to suffer the loss of their benefits and the permanent reduction in the funding status of their pension plan caused by the untimely winding up of the plan caused by the Nortel insolvency. On the other hand, the five year interval since the initial filing has benefited those seeking post-filing bond interest. The granting of $1.6 Billion U.S. in post-filing interest will result in minimal compensation for the losses suffered by pensioners, their survivors, and the terminated and disabled employees;

    a) there is a requirement for the codification of the Interest Stops rule in insolvency related legislation, including expressly or by reference in the CCAA. In addition, where all creditors are paid out in full, post-filing interest should be statutorily limited so as to ensure that shareholders are not unduly prejudiced by post-filing interest claims.

Cross Border Insolvencies

1. Long-arm legislation is designed to address a negative circumstance involving an entity in one geographic jurisdiction by placing all or part of the burden of rectifying it on an entity, albeit related, in another geographic jurisdiction. For instance, Nortel U.K. pension trustee has sought to apply a provision in the United Kingdom's *Pensions Act 2004*, by which it is attempting to make the insolvent Canadian Nortel entity liable for underfunding in Nortel UK's employee pension plan.

2. Almost without exception, insolvencies result in there being insufficient resources to meet the claims of creditors, including pensioners, employees and those who depend upon benefits provided through their employer. In most instances, such individuals stand in a long line well

behind the secured creditors. Canadian employment related creditors should not see the line become longer through the application of foreign long-arm legislation;

a) there needs to be a statutory limitation on the application of foreign long-arm legislation to domestic insolvent employers. Unless based on claims arising within Canada, such claims should be disallowed by legislation and, in any event, stayed until the determination of whether they do or do not.

Cross-Border Cases

1. In Nortel, significant costs have been incurred as a result of main proceedings being seemingly conducted concurrently in Canada and the U.S. Joint hearings on numerous issues have resulted in the engagement of Canadian and U.S. counsel to research, draft and present documents and appear to make argument in both courts.

2. In Allied Trucking, a foreign main proceeding under the CCAA, required that Unifor appear in the Delaware Court in order to defend its bargaining rights. In the initial asset purchase agreement, which was later disapproved by the U.S. Bankruptcy Court, and in the initial iterations of the second asset purchase agreement, the terms thereof did not address the particular rights afforded bargaining agents under Canadian law.

3. Specifically, terms of employment, employment rights, pension obligations and collective bargaining rights were either not addressed or were contrary to Canadian law. Through negotiation and intervention in the U.S. proceedings, the issues of concern to the union were addressed. However, without intervening in the U.S. proceeding the Union would have been forced to be reactive by opposing an order of the U.S. Court upon presentation for recognition by the Canadian Court on the grounds that the order contravenes Canadian public policy.

4. There are also the Dura Automotive cases; the first where resolution to Canadian employment related claims were determined through the U.S. proceedings and the second where the pledges made to make payments to continue benefits and pension premiums were underfunded and so where subject to a second CCAA proceeding;

a) Canadian Courts should be hesitant to cede jurisdiction over insolvency proceedings involving Canadian companies. The potential harm to Canadian creditors, particularly those without the means to obtain counsel in a foreign jurisdiction can restrict their access to the forum in which their rights are determined;

b) small unions, not to mention individual employees and retirees, can get lost in the shuffle quite easily. Their rights must be seriously considered before a determination is made to grant a foreign court the primary responsibility over what may very well be the protection of Canadian creditors' rights.

UNION AND EMPLOYEE ISSUES

Federal Wage Earner Protection Program

1. Unifor has, unfortunately, extensive experience in relation to employee attempts to access and obtain the benefit of the Federal Government's Wage Earner Protection Program (WEPP). WEPP was developed to ensure the timely payment of at least part of the monies owed to workers when employers become bankrupt or are subject to receivership. There are numerous problems with the administration and application of the WEPP.

2. Under the WEPP, employees are entitled to a payment of $3,738 (as of 2014) from the federal government for unpaid wages, vacation pay, termination pay, and severance pay that an employee earned or became entitled to in the last six months before a bankruptcy or receivership.

3. Particularly in the case of vacation pay, the six month limitation means the amount accrued to the employee during the six-month period before the receivership, not the total amount that they are owed at the time of the receivership/bankruptcy, is the subject of the claim.

4. For example, where a collective agreement states that employees accumulate 10% of wages annually for vacation pay, the employees are eligible to receive only 5% as part of their claim;

   a) An employee should be entitled to a WEPP claim for all of the monies owing to them.

5. In addition, the ordering of priorities under the Act creates, possibility intentionally, the elimination of an avenues of redress for employees vis-à-vis directors. Most federal and provincial employment standards legislation and legislation regarding the regulation of corporations provide that directors are liable for unpaid wages to employees, but not outstanding vacation pay.

6. Under the WEPP, a post-filing payment made to employees by a receiver/trustee on account of unpaid wages and vacation pay is deducted from any WEPP payment available. Any such payment is allocated first as outstanding wages with the remainder allocated to unpaid vacation pay.

7. In the event that there is a remainder, the employee could normally make a claim against directors for unpaid wages, except the WEPP has already made an allocation for wages, which provides fodder for directors to argue that wages have already been paid, and they are not liable for vacation pay;

    a) there should be no such ordering of payments under the WEPP to permit employees to seek what redress they can to recoup the greatest amount possible for the losses they have suffered.

8. Further, if the member does apply for an receive a WEPP payment, and if the member receives Employment Insurance, a large portion of the amount that they will receive under the WEPP will become an E.I. overpayment and will have to be repaid to Service Canada, the administrators of the EI program. As a result, the employee ends up with a WEPP payment of approximately (depending on the specific case) $1,800. On the other hand, after recouping the overpayment from the employee the Government of Canada still has a subrogated claim for the full $3,738 as against the debtor under the WEPP.

9. The WEPP payment that the employee does receive must be individually reported as earnings for income tax purposes, as deductions are not made at source. This usually leads to the payment of tax upon filing the following year;

a) in terms of administration and benefit to the individual employee, a review should be conducted to determine if a much better means could be found to obtain the initial objectives of the legislation.

10. *Additionally, s*ubmitting a proof of claim to a receiver/trustee is required before an applicant can complete his or her application for WEPP benefits so that the Government of Canada can pursue recovery of WEPP payments as a subrogated creditor. In bankruptcies and receiverships Unifor has usually completed this task for members to ensure the claim is made in a timely manner and to ensure that all members' claims are submitted. The authority to do this is set out in the BIA.

11. Overall, the process of a bargaining agent filing proofs of claim on behalf of members makes it easier for both the members and the Receiver/Trustee as there is one point of contact and issues that arise can be addressed quickly. At times Unifor has had to file grievances and proceed to expedited arbitration to obtain the documentation necessary to file these claims;

a) receiver/trustees should be specifically authorized in their appointing orders to provide such documentation to a union to facilitate disclosure of information necessary to file a claim on behalf of its members;

b) in addition, Service Canada, which administers the WEPPA has not allowed the Union to file a group WEPP claim on behalf of all of the members. This means that each of the members have to file their own on–line or mailed in forms and have had to follow up on their own when a receiver/trustee has not filed the proper forms or provided Service Canada with all of the necessary information. This creates delay and anxiety for the members. For the same reasons provided in relation to the filing of proofs of claim, that either by amendment to the legislation or by administrative determination, Service Canada should permit the filing of WEPPA documentation by the employees' bargaining agent.

Nortel as an Example

1. It is now five years after Nortel's CCAA filing. Since that time employees, including those on long-term disability, as well as retirees and their survivors, have lost health related benefits including life insurance, hospitalization coverage, drug benefits, and dental and vision care. A

large number of employees or their survivors have lost income derived from early retirement payments, supplementary early retirement, non-retiree survivor payments, and the termination and severance pay to which they were entitled.

Pensions

1. The 2010 pension reductions imposed on Nortel retirees and their survivors, the application of pension legislation from multiple provinces to the two registered Nortel pension plans in Canada and the application of Ontario's Pension Benefits Guarantee Fund for pension credit arising as a result of work performed in Ontario with its concomitant elimination of pension indexing, has resulted in differing payment ratios for employment performed in different provinces.

2. Overall, the funding ratio for non-Ontario service was approximately 59% for the non-union employee Managerial Plan and 57% for the Negotiated Plan, applicable to unionized employees. Non-Ontario pensions will continue to receive CPI indexed increases upon the purchase of annuities after the wind-up of the plans. For service in Ontario, which are all now non-indexed, the ratio is 70% for the Managerial Plan and 75% for the Negotiated Plan.

3. In addition, due to the retroactive nature of the pension wind-up, pensions were further reduced to account for the recovery of overpayments made between the retroactive wind-up date and the date that pensions were reduced to account for the underfunding

4. The majority of retirees, either by choice or by legislative edict, take reduced pension payments in order to provide income continuation for their spouse in the event the retiree passes on first. The survivors, who only receive 60% of the joint income payment prior to their spouse's death, have had their income reduced further, as a result of the under-funding of the pension plan.

5. A report of the Standing Senate Committee on Banking, Trade and Commerce "*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; gave the following reason for not recommending changes to Canada's insolvency laws to better protect pensions and pensioners:

> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit

availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

6. It cannot be that honouring the pledges made to retirees who built and sustained their employer, all the while deferring compensation by way of pensions, can be seen as a simply a negative impact on the capital markets. This cannot be the reply given by the Government of Canada in response to why pensioners rank below other creditors who come to the game long after the promise to pensioners was made and they have commenced enjoying the fruits of their labour;

   a) insolvency legislation must be amended to provide that pension plan deficiencies must rank above secured creditors. Pensioners have no ability to contend with the potential losses they might suffer in the event their former employer becomes subject to insolvency proceedings. Pension deficiencies are more than simply debts, they are obligations, and failing to meet them places unrecoverable emotional and financial burdens on the elderly which Canadian society as a whole will have to bear so that they do not fall into the abyss.

7. Financial creditors, on the other hand, have the ability to make prospective determinations of risk/reward in light of the employer's pension obligations, among other things, and to make determinations regarding applicable lending rates based on that information. This, in turn might very well have salutary effects on an employer's determination to address pension deficits in a timely manner. In any event, capital markets will adjust – they always do;

   a) in a larger sense, Unifor's agrees with the Canadian Labour Congress' position regarding amendments to increase the benefits available under the Canada Pension Plan, which would provide a safety net available for all Canadian employees in the event their employer becomes insolvent. This proposal would ensure that catastrophic reductions in pension benefits would, at the least, have a floor under which no retired employee suffering the loss of their pension would fall;

   b) In addition, Unifor also believes that the Federal Government should explore with the provinces the idea of a nationally administered pension benefit guarantee fund. Its implementation would clearly run into the wall that can be the federal/provincial separation of powers. On the other hand, the general fact of provincial authority over pension plans has created disparate treatment for Nortel employees whose primary differing characteristic is the province in which they worked. The differences in treatment have resulted in significant

variances in entitlements on the winding up of the plans. Other countries, including the United Kingdom and the United States, both of which have resident Nortel pensioners, have such national pension benefit guarantee funds. In Canada, only Ontario has such protective legislation.

Long-Term Disability Benefits

1. In Nortel, those on Long-Term Disability have had their LTD incomes eliminated entirely with devastating effect. As a result of Nortel's insolvency, payments on account of continuing disabilities ceased on December 10, 2010. Most of the Nortel disabled were eligible for disability payments under the Canada Pension Plan. However, this amounts to approximately $13,000 per year CDN. In many cases this is insufficient to pay for the drugs and other needed supports. When they become eligible, the disabled employees will also have to face the fact that the pensions which they had worked for will also be significantly less than they anticipated.

2. Most of Nortel's non-pension employee benefits, including life insurance, long-term disability, medical, dental and survivor income benefits were funded by Nortel on a pay-as- you-go basis, albeit the company used a health and welfare trust as the payment mechanism.

3. Approximately one million employees in Canada have disability benefits that are self-insured by their employers, which is approximately 40 per cent of all long-term disability plans. As with Nortel, if a company with self-funded, long-term disability benefits goes bankrupt, its employees who depend on those benefits are given the same standing as an unsecured creditor, which means they stand well behind the secured creditors whose position on the pole is protected by legislation.

4. In 2010, Senator Art Eggleton sponsored Bill S-216: *An Act to Amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in Order to Protect Beneficiaries of Long Term Disability Benefits Plans*. The Bill was designed to protect beneficiaries of long-term disability benefits plans by simply granting preferred status of claims of those who have lost their LTD benefits due to their employer's insolvency. The bill was defeated in the Senate Banking Committee in an along party lines vote, 6 to 5;

a) there are two means of ensuring that those who have lost disability incomes due to insolvency are less likely to fall in to abject poverty and lose homes and what savings they have managed to obtain. The first is to provide a higher priority for claims by LTD recipients. The second is to provide universally available CPP disability benefits at a rate that would not leave such individuals with the potential of falling into abject poverty with the potential of losing homes and savings.

Hardship

1. On July 30, 2009, the Ontario Superior Court of Justice issued an order approving the establishment of a Nortel Hardship Fund, which, through a number of iterations, was available to the long-term disabled, pensioners and survivors. The fund, initially established at $750,000, has financed payments to those have been most deeply affected by the loss of LTD incomes and/or the reduction of pension benefits. Payments from the Hardship Fund are treated as an advance on future distributions from the Nortel Estate, so any amount provided will simply be deducted from the recipient's recovery on their claim against the Nortel Estate;

a) a hardship charge should be a consideration, if not a mandate, in every insolvency proceeding where the potential for harm exists for those who are most vulnerable: people, not corporate creditors. The charge, like the Nortel Hardship Fund could be a draw on future recoveries. However, even in situations where the debts owing to secured creditors are such that the calculable recoveries of employees are insufficient to fund the establishment of such a hardship charge, it should be strongly considered. These involuntary creditors of insolvent corporations also need breathing space and the ability to keep the lights on while matters regarding which they have very little say are determined, and so they can do their best to order their affairs.

Collective Bargaining

1. On September 18, 2009, statutory amendments to the BIA and CCAA were brought into force. Among the changes were provisions clarifying that within the applicable insolvency proceedings "any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force" unless the parties to it voluntarily agree to revise the contract during the insolvency proceedings. On notice and under defined conditions, the debtor may "apply to the court for an order authorizing the insolvent person to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining

between the insolvent person and the bargaining agent" after a failure to agree on terms to revise the collective agreement;

a) courts have not had to test Parliament's constitutional authority to enact these legislative provisions or the ramifications of trying to implement them. However, it is Unifor's belief that it would be worth the effort of gathering labour and insolvency experts to discuss and opine on the potential outcomes of applying the provisions before the situation is thrust upon the courts in a haphazard and likely urgent set of circumstances.

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