

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

IN THE MATTER OF THE *COMPANIES' CREDITORS*
***ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED,
NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS
INTERNATIONAL CORPORATION AND NORTEL NETWORKS
TECHNOLOGY CORPORATION

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

(s. 40 (1) of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, as amended)

TAKE NOTICE that the Applicants, a group of 37 Nortel employees on long-term disability (the "Dissenting LTD Beneficiaries"), hereby apply for an order granting leave to appeal to this Honourable Court, pursuant to s. 40 of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, from the order of the Court of Appeal for Ontario made on January 7, 2011, Court File No. M39469, or for such further or other order as to the Court may seem just.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of this application for leave to appeal:

1. Applicants' Memorandum of Argument and the Documents referred to in the Table of Contents herein; and

2. Such further and other material as counsel may advise and this Honourable Court permit.

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds:

National and Public Importance

1. This case raises extremely important legal questions on the law affecting long term disability income benefits for up to **1.1 million Canadians** who participate in long-term disability plans self-insured by their employer using Canada Revenue Agency (“CRA”) prescribed Health and Welfare Trusts (“HWTs”) to achieve tax advantages provided in the *Income Tax Act*.
2. The lower court decision, in respect of which the Court of Appeal for Ontario refused leave to appeal, held that future death benefits are an obligation of Nortel’s Health and Welfare Trust (the “Nortel HWT”) on termination of the trust, despite the fact that the event giving rise to the obligation to pay the benefit, namely death, only occurs *after* the termination date. In arriving at this conclusion, the motions judge misapplied the vesting concept articulated by this Court in *Dayco (Canada) Ltd. v. CAW-Canada*,¹ resulting in an outcome that is inconsistent with accepted insurance practice.
3. Because the Nortel and other HWTs are not permitted to comprise permanent life insurance and cannot pay death benefits, nor pre-fund future life insurance premiums, the effect of the decision is to dilute incurred claims such as long term disability income

¹ *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 (“*Dayco*”).

benefits, for which there *is* an obligation to accumulate funds within the HWT. As such, even in the case of an adequately funded HWT, long-term disability income benefits for the most vulnerable in our society, the disabled, risk being significantly compromised upon termination of the trust.

4. As there is no case law directly addressing the status of HWTs or the significance of the *Income Tax Act*, CRA rules and practices, as well as accepted insurance and actuarial practice that apply to HWTs in interpreting the obligations of HWTs on termination, intervention is required by this Honourable Court to clarify the law governing these widely employed trusts.

5. Another key question of public importance is whether the rigorous test for leave to appeal to Courts of Appeal that applies to decisions from proceedings commenced under the *Companies' Creditors Arrangement Act* ("CCAA" or "Act") should be adhered to where the decision involves a distinct trust not subject to the *CCAA* and involves neither an interpretation of the *CCAA* nor engages the rehabilitative purpose of the Act. Here, it bears noting that Nortel is liquidating and not being rehabilitated through a restructuring.

6. The decision below is manifestly wrong and yields an unjust result, yet has effectively been insulated from appellate review through the inappropriate application of the test for leave in *CCAA* matters, which involves considerations of delay and expedience, as well as whether the issue is of significance to the insolvency practice. Matters of life, dignity and in some cases, quite literally death for hundreds of disabled

persons arising out of the alleged mismanagement of Nortel's HWT should not turn on such considerations.

7. Applying these leave factors is particularly inappropriate where the question is one of legal interpretation concerning the distribution of trust assets which do not form part of the debtor's assets, does not engage the provisions or purposes of the *CCAA*, and where the decision would normally give rise to an automatic right of appeal under the *Court of Justice Act*.

Background – The Motion Below

8. This application arises out of a motion for approval of a methodology for the allocation of the corpus of the Nortel HWT. The allocation of the Nortel HWT assets turns on *legal entitlement* based on the interpretation of the Termination Clause in the Trust Agreement in accordance with general trust and contract interpretation principles.

The Termination Clause provides:

Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy **all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice of Termination**. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy **all future benefits and claims to be made under the Plan in respect to benefits and claims up to the date of the Notice of Termination**.

9. The plain reading of the termination clause indicates that only the benefits and claims of the Nortel HWT actually made or *incurred* as of the termination date can participate in the wind-up distribution, including the ongoing future income payments which flow from claims incurred up to the date of termination.

10. However, the motions judge approved an allocation scenario which also included claims said to be “certain to be payable at some future date”, which were held to include the payment of *death* benefits to *living* Pensioners². The central issue on the motion was whether Pensioner Life benefits consisting of death benefits and future life insurance coverage (for some 10,000 Pensioners) were eligible to participate in the wind-up distribution of the Nortel HWT.

11. The interpretation of the motions judge yields a result which is commercially unsustainable in that although the Nortel HWT is under no obligation to pay death benefits to deceased Pensioners (let alone living Pensioners) while in operation (such benefits are provided by a third party insurer and are only triggered upon death), an obligation was nevertheless imposed on the Nortel HWT to pay death benefits to living Pensioners on termination.

12. Further, the “certain to be payable” eligibility criterion created by the motions judge and the vesting concept have no known significance in insurance practice and is inconsistent with basic principles of insurance. Insurance consists of an undertaking to make payments upon the occurrence of a specified event. Prior to that occurrence there is simply no obligation to make a payment for the insured benefit or claim.

13. The effect of the motions judge’s decision is incredibly significant to the 360 LTD Beneficiaries and their 160 dependent children. The actuarial liability owing to LTD Beneficiaries for income benefits alone is estimated to be \$79.9 million. However, under the approved allocation scenario the LTD Beneficiaries would recover just \$27.6

² All defined terms that are not otherwise defined herein, have the meanings set out in the Schedule of Defined Terms, attached as Schedule “A” to this Notice of Application for Leave to Appeal.

million for LTD Income benefits (and \$29.2 million for both LTD Income and LTD Life benefits). If Pensioner Life (and LTD Life) benefits are found not to be entitled to participate in the distribution, the recovery is \$57.6 million, **the difference being \$28.4 million.**

14. In individual comparative terms, if the Allocation Decision is allowed to stand, the average LTD Beneficiary will lose approximately **\$76,000** whereas the average Pensioner will recover just \$3,500. The evidence at the proceedings below demonstrated that a drastic cut in disability income payments would force the LTD Beneficiaries to rely on social assistance and push them below the poverty line.

15. In summary, the hardship faced by the LTD Beneficiaries in these proceedings is of such significance that their plight strongly engages the public interest.

16. It is respectfully submitted that this is the quintessential case for this Honourable Court to exercise its responsibility as the ultimate appellate tribunal to dispense justice to some of Canada's most vulnerable citizens.

17. Such further and other grounds that counsel may advise and this Honourable Court permit.

DATED at Toronto, Ontario, this 8th day of March, 2011.



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Beneficiaries

GLOSSARY OF TERMS

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| Allocation Decision | Decision of Justice Morawetz dated November 9, 2010, in respect of the allocation of the assets of the Nortel Health and Welfare Trust. |
| LTD Beneficiaries | Employees of Nortel who are currently not working due to an injury, illness or medical condition in respect of which they are receiving or entitled to receive disability income benefits by or through Nortel, and who may assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with Nortel or termination thereof, a pension or benefit plan sponsored by Nortel, including in relation to medical, dental, long-term or short-term disability benefits, life insurance or any other benefit, obligation or payment to which such persons (or others who may be entitled to claim under or through such person) may be entitled from or through Nortel, save and except those who are currently employee and whose benefit or other payments, as described above, arise directly or inferentially out of a collective agreement between Nortel, or any of them, and the CAW. |
| Nortel | Nortel Networks Corporation, collectively with all its subsidiaries Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation that filed for and obtained protection under the <i>Companies' Creditors Arrangement Act</i> on January 14, 2009. |
| Pensioners | All of Nortel's pensioners and their beneficiaries and survivors. |
| Pensioner Life Benefits | A group life insurance benefit for Pensioners that includes the payment of a death benefit and future life insurance coverage. |
| Settlement Agreement | An agreement entered into by Nortel, the Monitor, the Former Employee Representative, the LTD Employee Representative (on her own behalf and on behalf of parties they represent), the Former Employees' Representative Counsel, the LTD Employees' Representative Counsel, the LTD Beneficiaries' Representative Counsel and the CAW regarding certain issues related to, among other things, Nortel's registered Pension Plans, certain employee benefits for, among other, Pensioners and LTD Beneficiaries and certain employment related issues, as amended and restated on |

March 30, 2010, approved by the Ontario Superior Court by order of Justice Morawetz, March 31, 2010.

Termination Clause

The provision in the Trust Agreement which determines entitlement to participate in the wind-up distribution of the Health and Welfare Trust upon termination.

Trust Agreement

The agreement entered into by Northern Telecom Limited (a predecessor company to Nortel Networks Limited) and Montreal Trust Company (as trustee) dated January 1, 1980, and amended by subsequent agreements, which created a trust fund for the purpose of providing the Health and Welfare Plan benefits of Nortel's active and retired employees.