SCC File No. 37562

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

**BETWEEN:**

**JENNIFER HOLLEY**

**APPLICANT**
Acting in Person

**AND:**

**NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INC. AND OTHER U.S. DEBTORS, ERNST & YOUNG INC. IN ITS CAPACITY AS MONITOR, OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF NORTEL NETWORKS INC. ET AL, AD HOC GROUP OF BONDHOLDERS, THE EMEA DEBTORS, CANADIAN FORMER EMPLOYEES AND DISABLED EMPLOYEES COURT APPOINTED REPRESENTATIVES, NORTEL CANADIAN CONTINUING EMPLOYEES COURT APPOINTED REPRESENTATIVES**

**RESPONDENTS**
Legal Counsel Listed

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# MEMORANDUM OF ARGUMENT OF THE REPLY
**JENNIFER HOLLEY, APPLICANT**
(Pursuant to Rules 28(1) and 28(2) of the *Rules of the Supreme Court of Canada*)

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**MEMORANDUM OF ARGUMENT**

1. This Application for Leave to Appeal:
   a) Is not one where the Charter of Rights and Freedoms is clearly inapplicable as argued in Point 1 of the Response from the Court-Appointed Representatives' Counsel for the Nortel Pensioners, Severed and Long Term Disabled Former Employees ("Response of Representatives' Counsel");
   b) Is not without possibility for success and is not frivolous as argued in Point 28 of the Response of Representatives' Counsel.
   c) Is not unmeritorious as argued in Point 17(a) and 21(c) of the Response of Representatives' Counsel.
2. Response of the Representatives' Counsel Points 21(b) and 23 argue that "The Applicant does not raise any conflicting appellate authorities or principles that would be engaged in its proposed appeal. The decisions below are consistent with principles set out in this Court and other appellate courts." This Application gives the Supreme Court the opportunity to grant an Appeal in order to clarify and improve the law in respect to the application of the Charter as the supreme law of Canada to the Federal CCAA in respect to persons with mental or physical disabilities. No previous case has examined this and if the Charter is found to apply in the manner argued by this Application, a new precedent will be set for future CCAA orders to apply the Oakes Test to all CCAA settlements affecting persons with mental or physical disabilities.
3. The Response of the Monitor & Canadian Debtors at Points 43 and 44 and the Response of the Representatives' Counsel at Points 16(d) and 25 that S. 7 of the Charter is not violated due to the Charter not protecting the economic interests of persons is a component of the major constitutional question to be considered in the Appeal, if granted. The Application seeks an Appeal to provide the opportunity for both sides to present their case and to have the Supreme Court make a precedent decision on whether S. 7 protects economic interests of person(s) with mental or physical disability, who are unable to work and who had disability income protection provided or purchased from their employer, deeply compromised by a court order under S. 6(1) or S. 11 of the CCAA to a level that deprives the person(s) of life, liberty and security. The Application Point 7 says that "The *Irwin Toy* decision shows that the Supreme Court is open to a case to decide whether an economic component fundamental

to human life or survival is protected under S. 7."

4. The Response of the Monitor & Canadian Debtors at Point 45 says "Ms. Holley submits no authority for the proposition that any provision in international human rights covenants or conventions regarding the rights of persons with disabilities entails recognition of a *Charter* right for one group of creditors to be subsidized by another when their private contractual rights against an insolvent private-sector debtor are being compromised." Point 8 of the Applications says: "The Supreme Court decided in *Baker* and *Slaight* that its interpretation of Charter S. 7 deprivation of rights to life, liberty and security needs to be consistent with international human rights documents ratified by the Federal Government, such as the *International Covenant on Economic, Social and Cultural Rights* (ICESC) and *United Nations Convention on the Rights of Persons with Disabilities* (UNRPD.) Again, this is a subject for the requested Appeal and for the Supreme Court, if it chooses to grant an Appeal, to make a precedent decision on its interpretation of S. 7 in the context of international human rights documents and the application of the Oakes Test in *R. v. Oakes*, [1986] 1 SCR 103, [1986] (SCC) and related Proportionality Test in *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 (SCC) (both referred to as the "Oakes Test") to CCAA orders affecting persons with mental or physical disability.
5. Response of the Monitor & Canadian Debtors Points 49 to 52 and Response of the Representatives' Counsel Points 16 (e), 24 and 26 argue that S. 15(1) of the Charter is not violated due to the pari passu treatment and lack of discrimination between the LTD relative to other creditors. This is also arguing a component of the major constitutional question to be considered in the Appeal, if granted. In the Appeal if granted, the Supreme Court will assess whether or not CCAA orders deeply compromising the disability income of person(s) with mental or physical disability are depriving the person(s) of substantive equality in Canadian society, through loss of dignity, and exclusion and marginalization. The Appeal will consider the Oakes Test and decide if the loss of substantive equality of persons with mental or physical disability is necessary to serve the purposes of the CCAA. The purpose of the CCAA has not been specified in the Act or in SCC case law to be pari passu treatment of all creditors.
6. The Response Points in 5 a) to 5 c) below are also arguing the Appeal case and should not be a significant factor in deciding whether a Leave to Appeal should be granted.

a) Response of the Monitor & Canadian Debtors at Point 46 that SCC decisions have already declined to extend the scope of s. 7 to include a positive obligation to ensure life, liberty or security of the person. The Appeal would examine the difference in interpreting S. 7 between a government having a positive obligation to ensure an adequate amount of disability income for housing, food, clothing and medicines and an obligation on a government act or act not to deprive a person of disability income he or she already had been provided or purchased from his or her employer.

b) Response of the Representatives' Counsel at Point 22 that the Charter has no application to a dispute about contractual entitlement amongst private parties. J. Newbould in his Reasons of the Ontario Superior Court of Justice dated Jan. 30, 2017 already disagreed with the Representatives' Counsel on this point and the Appeal would decide if the Supreme Court concurs with J. Newbould on the application of the Charter to CCAA orders approving CCAA settlements.

> [25] In this case, the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute. While it is not strictly necessary for me to decide whether the *Charter* applies to such an order in light of the view that I take of the section 7 and 15 rights asserted by the LTD Objectors, I accept that any order I make to sanction the Plan may be subject to the *Charter*.

c) Response of the Monitor & Canadian Debtors at Point 47-48 that the deleterious loss of disability income was caused by the insolvency of Nortel and not by any CCAA court order where almost everyone loses something. The Appeal would assess the application of the Oakes Test on whether a CCAA order, that deprives the disability income of persons with mental or physical disability to a level inadequate for housing, food, clothing and medicines or for substantive equality without loss of dignity, exclusion and marginalization in society, is necessary to further the purpose of the CCAA.

6. Response of the Representatives' Counsel at Point 4 and 7 that "Nortel has many creditors, including pensioners, their surviving spouses, unemployed former employees and trade creditors who suffered significant financial devastation as a result of this insolvency" and "Nortel's registered pension plans were significantly underfunded and pensions were eventually cut by about 30-40%." Pensioners and severed workers are not an expressly protected group within the Charter. Severed workers can work again. According to TABLE 6 in the Affidavit of Financial Expert Diane Urquhart dated January 12, 2017, Canadian pensioners have combined

pension plan wind-up and CCAA settlements at 77% to 100% of the actuarial liability owed to them (assuming the CCAA cash settlement ratio of 45%.) The majority of pensioners worked in Ontario, and TABLE 6 shows Ontario pensioners get 88% to 100% of what is owed to them, due to a $380 million payment from the Ontario Pension Guaranty Fund. Pensioners' Nortel pension and CCAA settlements, CPP + OAS public pensions, and ability to amass personal savings during their full working career put this group in a much better financial position than the LTD's Nortel 66% combined HWT and CCAA disability income settlements (assuming the CCAA cash settlement ratio of 45%), lower CPP disability income, and depleted savings during the six years hiatus between the 38% HWT settlement in 2011 and the CCAA settlement in 2017, which were small to begin with due to disability cutting their working career short.

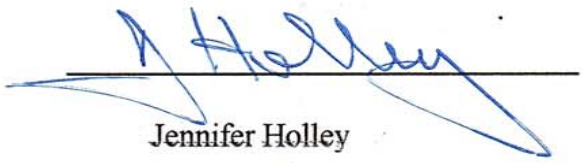
7. Response of Monitor & Canadian Debtors Point 8 that Ms. Holley facts are not based on materials in evidence in court below or proven by affidavit is simply not true. The Affidavit of Financial Expert Diane Urquhart dated January 12, 2017 is attached to the Response to the Motion to Expedite of the Monitor & Canadian Debtor May 25, 2017. This affidavit was attached to the Submission of Greg McAvoy and Jennifer Holley dated January 13, 2017 for the Fairness Hearing held before J. Newbould on January 24, 2017. Neither the absolute facts of the Nortel LTD, nor the relative facts of the Nortel LTD compared to other creditors, in this Expert Affidavit was disputed by the Respondents at the Fairness Hearing.
8. Response of the Monitor & Canadian Debtors Point12 and Response of the Representatives' Counsel Point 17 (C) argue that the Nortel CCAA Final Plan has the unanimous support of creditors with 99.97% of the number and 99.24% of the value voting in favour and only 2 LTD opposed. There was no vote of individual persons in the LTD Group. Only Sue Kennedy voted all the votes in the LTD Group under the authority granted to her by the Representative Order dated July 9, 2017. The Representative Order July 30, 2009, the Court of Appeal of Ontario Interim Settlement Agreement Order June 3, 2010 and Court of Appeal of Ontario Sanction Order March 13, 2017 are all related CCAA Court Orders relying on the decision of one LTD representative, where the CCAA orders potentially violate Charter rights of any one person or group of disabled persons and the Oakes Test is potentially not met. The Supreme Court is the proper court to decide the constitutional questions and not a representative of the LTD group and the majority of creditors in a CCAA proceeding.
9. Response of the Monitor & Canadian Debtors Points 4-5 and Response of the Representatives' Counsel Point 21(a) argue that the proposed appeal raises no issue of

national or public importance warranting consideration by this Court. The Respondents appear to be arguing that there can be no national or public importance because Jennifer Holley is bound by the Representative Order July 30, 2009 and the Court of Appeal of Ontario Interim Settlement Agreement Order June 3, 2010. The Application requests that the Supreme Court apply its discretion to not apply issue estoppel to these prior Orders for two reasons:

a) There are 937,000 Canadians in self-insured group long term disability benefit plans who would gain certainty and peace of mind from a successful Appeal providing Charter protection to group long term disability insurance provided and purchased from employers.

b) Contrary to the Respondents Point 36 that "reopening of matters previously determined would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice, the Supreme Court's use of discretion to not apply issue estoppel to the Representative Order and Interim Settlement Agreement Order gives it the opportunity to clarify the validity of CCAA S. 6(1) and S. 11 from the perspective of compliance with the Charter in respect to persons with mental or physical disability, and to improve the integrity of the administration of justice by correcting a serious injustice against the Nortel LTD that resulted in the unjust enrichment of the other creditors, as described in Point 31 of this Application and in the Affidavit of Jennifer Holley dated May 29, 2017 attached to this Reply.

c) The Supreme Court has the opportunity to achieve the objectives noted in Point 9b) above without materially impacting or prejudicing the outcome of the Nortel CCAA proceeding on the other creditors, who get more than 99.2% of what they would get if the Leave to Appeal was not granted and the Appeal was successful.



Jennifer Holley

SCC File No. 37562

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

**BETWEEN:**

**JENNIFER HOLLEY**

**APPLICANT**
Acting in Person

**AND:**

**NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INC. AND OTHER U.S. DEBTORS, ERNST & YOUNG INC. IN ITS CAPACITY AS MONITOR, OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF NORTEL NETWORKS INC. ET AL, AD HOC GROUP OF BONDHOLDERS, THE EMEA DEBTORS, CANADIAN FORMER EMPLOYEES AND DISABLED EMPLOYEES COURT APPOINTED REPRESENTATIVES, NORTEL CANADIAN CONTINUING EMPLOYEES COURT APPOINTED REPRESENTATIVES**

**RESPONDENTS**

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## AFFIDAVIT

**JENNIFER HOLLEY, APPLICANT**

(Pursuant to Rules 28(1) and 28(2) of the *Rules of the Supreme Court of Canada*)

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1. I am Jennifer Holley, the Applicant and a Nortel long term disabled ("LTD") former employee.
2. I am 53 years of age and reside in the Village of Ompah, Ontario.
3. I was previously a software designer with Nortel until I was forced to go on LTD in the year 2000, when I was diagnosed with Crohn's Disease at 36 years of age. I have also developed depression for which I receive treatment. I have tried to return to work, but my health will not support it. It is unlikely, with my current health, that I will ever be able to return to work either part-time or full-time.
4. I and my fellow Nortel long term disabled former employees got a good education and a

good job with a large corporation that provided long term disability benefits to replace 50% of our pre-disability income. I and most of us responsibly bought additional disability insurance from Nortel with my own money deducted from my paycheque to raise my protection from 50% to 70% of my pre-disability income.

5. Then one day at the young age of 36, I got sick, and my life changed forever in a sequence of developments that I have had absolutely no control over and that has destroyed my faith in the values of Canadian society expressed in the Charter and my trust in the Canadian legal system.

6. At the time of the Representative Order July 30, 2009, I reasonably thought that my Nortel long term disability benefits were fully funded. Prior to 2005 there was no disclosure that Nortel's disability insurance was sponsored by Nortel and that Nortel did not buy disability insurance from a third party insurer. In fact, Nortel's employee benefit handbooks make multiple mentions of approvals required from Sun Life, or its predecessor insurance companies, Mutual Life and Clarica Life, in order to first get and then to continue to get disability income. From the reading of these earlier employee benefit handbooks, I could reasonably expect that Sun Life, or its predecessor insurance companies, Mutual Life and Clarica Life, was the insurer of my long term disability income.

7. Nortel first disclosed that my long term disability benefits were self-insured in its 2005 and subsequent benefit handbooks on or about p. 2:

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

9. When I read the Monitor's First Report January 14, 2009 saying that "Funding payments to

HWT account are suspended post-filing as it is forecast that the HWT trust has sufficient surplus assets to sustain itself during the Forecast Period," I reasonably concluded from this Monitor statement combined with the latest disclosure from Nortel that it plays a role similar to that of an insurance company, that the HWT had sufficient assets to not only fund my disability income for the next three months but to sustain my and my fellow LTD disability income up to when we returned to work, died or reached age 65.

10. I firmly believe based on the evidence that did get disclosed by the Monitor at August 26, 2010 and that was assessed by financial expert Diane Urquhart, that Nortel took $60 million of insurance reserves out of the Health and Welfare Trust ("HWT"), including my employee contributions, during 2005 to 2006 to materially improve its own cash flow. This was unknown to me at the time because I was getting my Nortel disability income at 70% of what I was earning before I got sick, I thought I was insured by a licensed insurer, and there were no public disclosures on the financial position of the HWT.
11. J. Paul Perell decided I had a tenable case of constructive fraud in his February 11, 2014 decision of Holley v. The Northern Trust Company, Canada, 2014 ONSC 889, but he summarily dismissed the Nortel HWT fraud class action due to his interpretation of the word "fraud" in the legal release of the Interim Settlement Agreement of March 31, 2010 meaning that "actual fraud" was not barred while "constructive fraud" was barred by the legal release.
12. The Interim Settlement Agreement paid me just 9 months of income and medical and dental benefits in exchange for release of my tenable case of constructive fraud, which no reasonable person would consider an adequate amount relative to my income needs for the balance of my life that would have been paid to me had there not been a constructive fraud

within the HWT.

13. The Respondents to this Application have not refuted the special circumstances I raised in Application Point 31 of the legal system's (a) failure to release the full body of evidence into the court on the alleged wrongdoings within the HWT before the court orders approving the Interim Settlement Agreement with persons with mental or physical disability; and, (b) failure of the legal system to properly assess the legal obligations of Nortel to fund in full the HWT benefits and to not remove HWT funds earmarked for LTD disability income reserves in the name of each of the LTD persons to pay for its own expenses and improve its own cash flow.

    a) I was amongst the six Nortel LTD who wrote J. Morawetz a letter on November 2, 2009 to request that Ernst & Young publicly release all the material contracts and legal documents pertaining to the Nortel Canadian long term disability benefits plan and the Nortel Health & Welfare Trust (HWT). Ernst & Young LLP through its legal counsel Goodmans LLP wrote us a letter at November 5, 2009 refusing to release the documents we requested and saying "the Monitor exercises its discretion on issues of disclosure in light of a number of competing considerations, including some that are not always readily apparent. Considering all of the relevant factors, the Monitor then determines to whom, how and when disclosure of documents should be made, taking into account the interests of all stakeholders and other facets of the restructuring."

    b) J. Morawetz refused to permit a two month adjournment at the March 3-5, 2010 hearing on the First Interim Settlement Agreement requested by Rochon Genova LLP who had been retained by dissenting LTD and had only five days to prepare for this hearing. J. Perell's decision concludes that J. Morawetz knew about the constructive fraud when

making his March 31, 2010 order approving the Revised Interim Settlement Agreement. I do not understand how J. Morawetz could have known there was constructive fraud or other wrongdoings at the time of the March 2010 hearings on the First and Revised Interim Settlement Agreements because Ernst & Young had not released the full body of evidence to the courts.

c) Ernst & Young as Monitor, Koskie Minsky LLP as Court Appointed Legal Counsel for the LTD Group, and Sue Kennedy as Court-Appointed Representative of the LTD Group all told the court verbally and in legal documents for the March 3-5, 2010 hearing, which I have read again in the court transcript and Sue Kennedy Affidavit of February 24, 2010, that "there was no statutory obligation under the terms of the Trust Agreement which required Nortel to fund in full the HWT benefits." The Ontario Superior Court of Justice and Court of Appeal of Ontario 2010 orders in respect to the Interim Settlement Agreement were without the full body of evidence before them, and with a premise on legal obligations that was inconsistent with J. Perell's subsequent conclusion there was a tenable case of constructive fraud.

d) J. Perell also summarily dismissed the Nortel HWT fraud class action because he determined it was filed 6 months too late from his starting date of February 18, 2010 when the Monitor publicly released the 2008 HWT financial statement showing a large deficit in the HWT rather than Rochon Genova LLP's argued starting date of August 27, 2010 when the Monitor released the full body of evidence, including 1982 to 2010 HWT financial statements and tax filings, historical Mercers actuarial reports, the Sun Life administration agreement and historical employee benefits' booklets and benefit plan legal documents. While we knew there was a serious deficit in the HWT from the 2008

HWT financial statement at the time of the Interim Settlement Agreement at March 2010, I, financial expert Diane Urquhart and Rochon Genova LLP could not have known and proven the constructive fraud, actual fraud, even breach of trust or any other wrongdoings that had occurred within the HWT as this required discovery of all the historical documents that had been asked for and denied by Ernst & Young and J. Morawetz.

14. When J. Morawetz decided in his HWT Wind-up Order at November 9, 2010 that pensioners' life insurance claimants were beneficiaries of the HWT because of a 1979 CRA Advance Tax Ruling and an initial transfer of $10 million of Mutual Life pre-paid pensioners' life insurance premiums into the HWT created in 1980, I lost getting 82% of my disability income funded from the HWT. The HWT Wind-Up Order resulted in only a 38% HWT settlement, which is an actuarial reduction of 44% of my disability income due to pensioners getting paid for life insurance that would otherwise have been payable to their successors and not to them. Taking into account the 45% to 49% CCAA settlement ratio, had the pensioners' life insurance claim not been funded from the HWT Wind-Up, the end result of the HWT Wind-Up and the CCAA Final Plan would have put me in the position of 90% to 91% of my disability income being funded on an actuarial basis.
15. The Nortel Canadian insolvency professionals have also reduced my disability income with their disclosed fees to date of Cdn$698 million, which is 11% of the peak Nortel Canada estate assets. So my disability income has been reduced by this 11% amount also.
16. When legal counsel who represent the Respondents say that I must be treated pari passu with the other creditors because this is the bedrock principle of insolvency law in Canada, they have given no consideration to how well they have done in this CCAA proceeding

compared to the LTD, and their role in the denial of evidence disclosure and failure to properly assess the legal obligations of Nortel to fund in full the HWT benefits and to not remove HWT funds earmarked for LTD to improve Nortel's own cash flow (in what became labelled by J. Perell as a tenable case for constructive fraud.)

17. The less than 0.8% that the other creditors keep due to the Representative Court Order, Interim Settlement Agreement Court Orders and Final Plan Sanction Court Orders, if this Application is not granted, is de minimis to the Responding Parties and hugely beneficial to me and my fellow LTD if the Application is granted and the Appeal is successful. I believe for all the reasons I have explained in this affidavit that the other creditors are not losing something that they deserve to have as they were unjustly enriched by the money Nortel unlawfully removed from the HWT and they have taken away from me disability income to a degree that violates my S.7 and S. 15(1) Charter rights without serving any purpose of the CCAA.

18. The legal system gave legal counsel for dissenting LTD just five days to prepare a dissenting case and refused to take even two months to discover evidence and no time to assess in a hearing the alleged wrongdoings that occurred, including the tenable case of constructive fraud that J. Perell determined. The artificial rush for the court to approve the Interim Settlement Agreement, summarily dismiss the HWT fraud class action and to dismiss this Application, when the Nortel CCAA proceeding took place over 8 years, is not fundamental justice for me and my fellow LTD persons.

19. Granting of my Application and success of my appeal means I can meet my basic expenses: food, housing, hydro, insurances, telephone, licenses, taxes, transportation until retirement age. In addition, I can continue to receive regular dental care, continue to buy my

required prescribed medication that is not covered by the Ontario government drug plan, and my companion pets can continue to receive annual shots and veterinary checkups.

20. In 2010, I cut all non-essentials from my monthly expenses leaving only essentials. Even with this effort, my income is far less than my basic expenses. I have used any savings I had in order to survive financially since 2010. I now live CPP disability income deposit to deposit, hoping that no emergencies arise that might impact my finances.

21. It is true that I am about to get another payment from the Nortel estate, but that won't last long. In a few years, the payment will be gone, as it must be used to cover a monthly deficit since my basic expenses are much higher than my monthly CPP disability income of $975. My savings are exhausted. I can't even work part-time, to help make ends meet, because of my health. There is no fallback plan. I don't know what I'll do when that payment is gone.

22. Success of my appeal would mean I could return to attending to my health without the worry and anxiety associated with not being able to pay for basic expenses and being disabled. This peace of mind is what I thought I had when Nortel told me that part of my employment package included disability insurance; the peace of mind I prepared for by paying, out of my earnings, for additional long-term disability insurance coverage (70% of pre-disability income instead of Nortel's basic 50%)

Sworn (or Affirmed) before me at in Perth, Ont of Township of North Frontenac

In the Province of Ontario this 29th of May 2017

B. Hawley
*(A Commissioner of Oaths)*

J Hawley
*(Signature of deponent)*

BROOKE HAWLEY
Deputy Clerk
Township of North Frontenac
Commissioner, etc.