Court of Appeal File No. M47511
Court File No. 09-CL-7950

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, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

DOCUMENTS REFERENCED IN THE NOTICE OF MOTION (MOTION SEEKING LEAVE TO APPEAL) DATED FEBRUARY 14, 2017 OF THE MOVING PARTIES GREG MCAVOY AND JENNIFER HOLLEY

Volume III

INDEX

24

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. **(81)**

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. **(82)**

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months. **(83)**

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

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(81) See section 50, and footnotes (40) and (42) to sections 85 and 88, of the *Constitution Act, 1867*.

(82) Replaces part of Class 1 of section 91 of the *Constitution Act, 1867*, which was repealed as set out in subitem 1(3) of the schedule to the *Constitution Act, 1982*.

(83) See footnotes (10), (41) and (42) to sections 20, 86 and 88 of the *Constitution Act, 1867*.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. **(84)**

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. **(85)**

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(84) Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.

(85) Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)* (*see* SI/93-54).

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. **(86)**

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. **(87)**

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. **(88)**

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. **(89)**

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. **(90)**

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. **(91)**

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

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(86) **See section 133 of the *Constitution Act, 1867* and footnote (67).**

(87) ***Ibid.***

(88) ***Ibid.***

(89) ***Ibid.***

(90) ***Ibid.***

(91) ***Ibid.***

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. **(92)**

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province. **(93)**

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have

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(92) See, for example, section 133 of the *Constitution Act, 1867* and the reference to the *Manitoba Act, 1870* in footnote (67) to that section.

(93) Paragraph 23(1)(*a*) is not in force in respect of Quebec. See section 59, below.

all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

GENERAL

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. **(94)**

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. **(95)**

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

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(94) Paragraph 25(*b*) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). Paragraph 25(*b*) originally read as follows:

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

(95) See section 93 of the *Constitution Act, 1867* and footnote (50).

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

CITATION

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. **(96)**

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. **(97)**

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(96) Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

(97) Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. **(98)**

PART IV

CONSTITUTIONAL CONFERENCE

37. Repealed. **(99)**

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(98) See footnotes (58) and (59) to sections 114 and 118 of the *Constitution Act, 1867*.

(99) Section 54 of the *Constitution Act, 1982* provided for the repeal of Part IV (section 37) one year after Part VII came into force. Part VII came into force on April 17, 1982 repealing Part IV on April 17, 1983. Section 37 read as follows:

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART IV.I

CONSTITUTIONAL CONFERENCES

37.1 Repealed. [100]

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA [101]

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the

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[100] Part IV.1 (section 37.1), which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), was repealed on April 18, 1987 by section 54.1 of the *Constitution Act, 1982*. Section 37.1 read as follows:

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

[101] Prior to the enactment of Part V, certain provisions of the Constitution of Canada and the provincial constitutions could be amended pursuant to the *Constitution Act, 1867*. See footnotes (44) and (48) to section 91, Class 1 and section 92, Class 1 of that Act, respectively. Other amendments to the Constitution could only be made by enactment of the Parliament of the United Kingdom.

members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part. **(102)**

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(102) A First Ministers Meeting was held June 20-21, 1996.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50. [(103)]

51. [(104)]

PART VII

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

[(103)] The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.

[(104)] The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.

Repeal and consequential amendments

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada. **(105)**

54.1 Repealed. **(106)**

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada. **(107)**

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

English and French versions of this Act

57. The English and French versions of this Act are equally authoritative.

Commencement

58. Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada. **(108)**

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(105) Part VII came into force on April 17, 1982 (*see* SI/82-97).

(106) Section 54.1, which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), provided for the repeal of Part IV.1 and section 54.1 on April 18, 1987. Section 54.1 read as follows:

54.1 Part IV.1 and this section are repealed on April 18, 1987.

(107) The French Constitutional Drafting Committee was established in 1984 with a mandate to assist the Minister of Justice in that task. The Committee's Final Report was tabled in Parliament in December 1990.

(108) The Act, with the exception of paragraph 23(1)(*a*) in respect of Quebec, came into force on April 17, 1982 by proclamation issued by the Queen (*see* SI/82-97).

Commencement of paragraph 23(1)(*a*) in respect of Quebec

59. (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec. **(109)**

Repeal of this section

(3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Short title and citations

60. This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

References

61. A reference to the "*Constitution Acts, 1867 to 1982*" shall be deemed to include a reference to the "*Constitution Amendment Proclamation, 1983*". **(110)**

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(109) No proclamation has been issued under section 59.

(110) Section 61 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). See also section 3 of the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I and the *Constitution Amendment, 1987 (Newfoundland Act)* (*see* SI/88-11).

SCHEDULE TO THE CONSTITUTION ACT, 1982
(Section 53)

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1867*." (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*." (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870		Rupert's Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871.		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1871*."	Constitution Act, 1871
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875

Item	Column I Act Affected	Column II Amendment	Column III New Name
8.	Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.		Adjacent Territories Order
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1886*."	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (*a*) section 4 is repealed; and (*b*) subsection 7(1) is repealed.	Statute of Westminster, 1931
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1940*."	Constitution Act, 1940

Item	Column I Act Affected	Column II Amendment	Column III New Name
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Newfoundland Act*."	Newfoundland Act
22.	British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1960*."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1964*."	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: "2. This Part may be cited as the *Constitution Act, 1965*."	Constitution Act, 1965
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act, 1974*."	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act (No. 1), 1975*."	Constitution Act (No. 1), 1975

Item	Column I Act Affected	Column II Amendment	Column III New Name
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act (No. 2), 1975*."	Constitution Act (No. 2), 1975

ENDNOTES

ENDNOTE 1

FURTHER DETAILS OF CONSTITUTION ACT, 1867, SECTION 5 [FOOTNOTE (6)]

The first territories added to the Union were Rupert's Land and the North-Western Territory (subsequently designated the Northwest Territories), which were admitted pursuant to section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), by the *Rupert's Land and North-Western Territory Order* of June 23, 1870, effective July 15, 1870. Prior to the admission of those territories, the Parliament of Canada enacted *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada* (32-33 Vict., c. 3), and the *Manitoba Act, 1870* (33 Vict., c. 3), which provided for the formation of the Province of Manitoba.

British Columbia was admitted into the Union pursuant to section 146 of the *Constitution Act, 1867*, by the *British Columbia Terms of Union*, being Order in Council of May 16, 1871, effective July 20, 1871.

Prince Edward Island was admitted pursuant to section 146 of the *Constitution Act, 1867*, by the *Prince Edward Island Terms of Union*, being Order in Council of June 26, 1873, effective July 1, 1873.

On June 29, 1871, the United Kingdom Parliament enacted the *Constitution Act, 1871* (34-35 Vict., c. 28) authorizing the creation of additional provinces out of territories not included in any province. Pursuant to this statute, the Parliament of Canada enacted the *Alberta Act* (July 20, 1905, 4-5 Edw. VII, c. 3) and the *Saskatchewan Act* (July 20, 1905, 4-5 Edw. VII, c. 42), providing for the creation of the provinces of Alberta and Saskatchewan, respectively. Both of these Acts came into force on September 1, 1905.

Meanwhile, all remaining British possessions and territories in North America and the islands adjacent thereto, except the colony of Newfoundland and its dependencies, were admitted into the Canadian Confederation by the *Adjacent Territories Order*, dated July 31, 1880.

The Parliament of Canada added portions of the Northwest Territories to the adjoining provinces in 1912 by *The Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40, *The Quebec Boundaries Extension Act, 1912*, 2 Geo. V, c. 45 and *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V, c. 32, and further additions were made to Manitoba by *The Manitoba Boundaries Extension Act, 1930*, 20-21 Geo. V, c. 28.

The Yukon Territory was created out of the Northwest Territories in 1898 by *The Yukon Territory Act*, 61 Vict., c. 6 (Can.).

Newfoundland was added on March 31, 1949, by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), which ratified the Terms of Union of Newfoundland with Canada.

Nunavut was created out of the Northwest Territories in 1999 by the *Nunavut Act*, S.C. 1993, c. 28.

Endnote 2

Further details of Constitution Act, 1867, section 51 [Footnote 27]

Section 51 was amended by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.) by repealing the words after "of the census" to "seventy-one and" and the word "subsequent".

By the *British North America Act, 1943*, 6-7 Geo. VI, c. 30 (U.K.), which Act was repealed by the *Constitution Act, 1982*, redistribution of seats following the 1941 census was postponed until the first session of Parliament after the war. The section was re-enacted by the *British North America Act, 1946*, 9-10 Geo. VI, c. 63 (U.K.), which Act was also repealed by the *Constitution Act, 1982*, to read as follows:

51. (1) The number of members of the House of Commons shall be two hundred and fifty-five and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

(1) Subject as hereinafter provided, there shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and fifty-four and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.

(2) If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and fifty-four, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and fifty-four.

(3) Notwithstanding anything in this section, if upon completion of a computation under rules one and two, the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.

(4) In the event that rules one and two cease to apply in respect of a province then, for the purpose of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and fifty-four shall be reduced by the number of members assigned to such province pursuant to rule three.

(5) Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by Chapter forty-one of the Statutes of Canada, 1901, together with any Part of Canada not comprised within a province which may from time to time be included therein by the Parliament of Canada for the purposes of representation in Parliament, shall be entitled to one member.

The section was re-enacted as follows by the *British North America Act, 1952*, S.C. 1952, c. 15 (which Act was also repealed by the *Constitution Act, 1982*):

51. (1) Subject as hereinafter provided, the number of members of the House of Commons shall be two hundred and sixty-three and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and sixty-one and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.

2. If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and sixty-one, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with

the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and sixty-one.

3. Notwithstanding anything in this section, if upon completion of a computation under rules one and two the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.

4. In the event that rules one and two cease to apply in respect of a province then, for the purposes of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and sixty-one shall be reduced by the number of members assigned to such province pursuant to rule three.

5. On any such readjustment the number of members for any province shall not be reduced by more than fifteen per cent below the representation to which such province was entitled under rules one to four of this subsection at the last preceding readjustment of the representation of that province, and there shall be no reduction in the representation of any province as a result of which that province would have a smaller number of members than any other province that according to the results of the then last decennial census did not have a larger population; but for the purposes of any subsequent readjustment of representation under this section any increase in the number of members of the House of Commons resulting from the application of this rule shall not be included in the divisor mentioned in rules one to four of this subsection.

6. Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by chapter forty-one of the statutes of Canada, 1901, shall be entitled to one member, and such other part of Canada not comprised within a province as may from time to time be defined by the Parliament of Canada shall be entitled to one member.

Subsection 51(1) was re-enacted by the *Constitution Act, 1974*, S.C. 1974-75-76, c. 13, to read as follows:

51. (1) The number of members of the House of Commons and the representation of the provinces therein shall upon the coming into force of this subsection and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following Rules:

1. There shall be assigned to Quebec seventy-five members in the readjustment following the completion of the decennial census taken in the year 1971, and thereafter four additional members in each subsequent readjustment.

2. Subject to Rules 5(2) and (3), there shall be assigned to a large province a number of members equal to the number obtained by dividing the population of the large province by the electoral quotient of Quebec.

3. Subject to Rules 5(2) and (3), there shall be assigned to a small province a number of members equal to the number obtained by dividing

(*a*) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces (other than Quebec) having populations of less than one and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census; and

(*b*) the population of the small province by the quotient obtained under paragraph (*a*).

4. Subject to Rules 5(1)(*a*), (2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained

(*a*) by dividing the sum of the populations of the provinces (other than Quebec) having populations of less than one and a half million by the sum of the number of members assigned to those provinces under any of Rules 3, 5(1)(*b*), (2) and (3);

(*b*) by dividing the population of the intermediate province by the quotient obtained under paragraph (*a*); and

(*c*) by adding to the number of members assigned to the intermediate province in the readjustment following the completion of the penultimate decennial census one-half of the difference resulting from the subtraction of that number from the quotient obtained under paragraph (*b*).

5. (1) On any readjustment,

(*a*) if no province (other than Quebec) has a population of less than one and a half million, Rule 4 shall not be applied and, subject to Rules 5(2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained by dividing

(i) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces, (other than Quebec) having populations of not less than one and a half million and not more than two and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census, and

(ii) the population of the intermediate province by the quotient obtained under subparagraph (i);

(*b*) if a province (other than Quebec) having a population of

(i) less than one and a half million, or

(ii) not less than one and a half million and not more than two and a half million

does not have a population greater than its population determined according to the results of the penultimate decennial census, it shall, subject to Rules 5(2) and (3), be assigned the number of members assigned to it in the readjustment following the completion of that census.

(2) On any readjustment,

(*a*) if, under any of Rules 2 to 5(1), the number of members to be assigned to a province (in this paragraph referred to as "the first province") is smaller than the number of members to be assigned to any other province not having a population greater than that of the first province, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the largest number of members to be assigned to any other province not having a population greater than that of the first province;

(*b*) if, under any of Rules 2 to 5(1)(*a*), the number of members to be assigned to a province is smaller than the number of members assigned to it in the readjustment following the completion of the penultimate decennial census, those Rules shall not be applied to it and it shall be assigned the latter number of members;

(*c*) if both paragraphs (*a*) and (*b*) apply to a province, it shall be assigned a number of members equal to the greater of the numbers produced under those paragraphs.

(3) On any readjustment,

(*a*) if the electoral quotient of a province (in this paragraph referred to as "the first province") obtained by dividing its population by the number of members to be assigned to it under any of Rules 2 to 5(2) is greater than the electoral quotient of Quebec, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the number obtained by dividing its population by the electoral quotient of Quebec;

(*b*) if, as a result of the application of Rule 6(2)(*a*), the number of members assigned to a province under paragraph (*a*) equals the number of members to be assigned to it under any of Rules 2 to 5(2), it shall be assigned that number of members and paragraph (*a*) shall cease to apply to that province.

6. (1) In these Rules,

"electoral quotient" means, in respect of a province, the quotient obtained by dividing its population, determined according to the results of the then most recent decennial census, by the number of members to be assigned to it under any of Rules 1 to 5(3) in the readjustment following the completion of that census;

"intermediate province" means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census but not more than two and a half million and not less than one and a half million;

"large province" means a province (other than Quebec) having a population greater than two and a half million;

"penultimate decennial census" means the decennial census that preceded the then most recent decennial census;

"population" means, except where otherwise specified, the population determined according to the results of the then most recent decennial census;

"small province" means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census and less than one and half million.

(2) For the purposes of these Rules,

(*a*) if any fraction less than one remains upon completion of the final calculation that produces the number of members to be assigned to a province, that number of members shall equal the number so produced disregarding the fraction;

(*b*) if more than one readjustment follows the completion of a decennial census, the most recent of those readjustments shall, upon taking effect, be deemed to be the only readjustment following the completion of that census;

(*c*) a readjustment shall not take effect until the termination of the then existing Parliament.

Subsection 51(1) was re-enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, as follows:

51. (1) The number of members of the House of Commons and the representation of the provinces therein shall, on the coming into force of this subsection and thereafter on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

Rules

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the total population of the provinces by two hundred and seventy-nine and by dividing the population of each province by the quotient so obtained, counting any remainder in excess of 0.50 as one after the said process of division.

2. If the total number of members that would be assigned to a province by the application of rule 1 is less than the total number assigned to that province on the date of coming into force of this subsection, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

ENDNOTE 3

FURTHER DETAILS OF CONSTITUTION ACT, 1867, SECTION 91 [FOOTNOTE (47)]

Acts conferring legislative authority on Parliament:

1. The *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.):

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively, — "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba", shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respect-

ing the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)), had previously conferred similar authority in relation to Rupert's Land and the North-Western Territory upon admission of those areas.

2. The *Constitution Act, 1886*, 49-50 Vict., c. 35 (U.K.):

1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.):

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Under section 44 of the *Constitution Act, 1982*, Parliament has exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. Sections 38, 41, 42 and 43 of that Act authorize the Senate and House of Commons to give their approval to certain other constitutional amendments by resolution.

Endnote 4

Further details of Constitution Act, 1867, section 93 [Footnote (50)]

An alternative was provided for Manitoba by section 22 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)), which section reads as follows:

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:

(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

An alternative was provided for Alberta by section 17 of the *Alberta Act*, 1905, 4-5 Edw. VII, c. 3, which section reads as follows:

17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in

amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Saskatchewan by section 17 of the *Saskatchewan Act*, 1905, 4-5 Edw. VII, c. 42, which section reads as follows:

17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Newfoundland by Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)). Term 17 of the Terms of Union of Newfoundland with Canada, set out in the penultimate paragraph of this note, was amended by the *Constitution Amendment, 1998 (Newfoundland Act)* (*see* SI/98-25) and the *Constitution Amendment, 2001 (Newfoundland and Labrador)* (*see* SI/2001-117), and now reads as follows:

17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this term shall apply in respect of the Province of Newfoundland and Labrador.

(2) In and for the Province of Newfoundland and Labrador, the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for courses in religion that are not specific to a religious denomination.

(3) Religious observances shall be permitted in a school where requested by parents.

Prior to the *Constitution Amendment, 1998 (Newfoundland Act)*, Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the *Constitution Amendment, 1997 (Newfoundland Act)* (*see* SI/97-55) to read as follows:

17. In lieu of section ninety-three of the *Constitution Act, 1867*, the following shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to education but

(*a*) except as provided in paragraphs (*b*) and (*c*), schools established, maintained and operated with public funds shall be denominational schools, and any class of persons having rights under this Term as it read on January 1, 1995 shall continue to have the right to provide for religious education, activities and observances for the children of that class in those schools, and the group of classes that formed one integrated school system by agreement in 1969 may exercise the same rights under this Term as a single class of persons;

(*b*) subject to provincial legislation that is uniformly applicable to all schools specifying conditions for the establishment or continued operation of schools,

(i) any class of persons referred to in paragraph (*a*) shall have the right to have a publicly funded denominational school established, maintained and operated especially for that class, and

(ii) the Legislature may approve the establishment, maintenance and operation of a publicly funded school, whether denominational or non-denominational;

(*c*) where a school is established, maintained and operated pursuant to subparagraph (*b*)(i), the class of persons referred to in that subparagraph shall continue to have the right to provide for religious education, activities and observances and to direct the teaching of aspects of curriculum affecting religious beliefs, student admission policy and the assignment and dismissal of teachers in that school;

(*d*) all schools referred to in paragraphs (*a*) and (*b*) shall receive their share of public funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature; and

(*e*) if the classes of persons having rights under this Term so desire, they shall have the right to elect in total not less than two thirds of the members of a school board, and any class so desiring shall have the right to elect the portion of that total that is proportionate to the population of that class in the area under the board's jurisdiction.

Prior to the *Constitution Amendment, 1997 (Newfoundland Act)*, Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the *Constitution Amendment, 1987 (Newfoundland Act)* (*see* SI/88-11) to read as follows:

17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(*a*) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(*b*) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

(2) For the purposes of paragraph one of this Term, the Pentecostal Assemblies of Newfoundland have in Newfoundland all the same rights and privileges with respect to denominational schools and denominational colleges as any other class or classes of persons had by law in Newfoundland at the date of Union, and the words "all such schools" in paragraph (*a*) of paragraph one of this Term and the words "all such colleges" in paragraph (*b*) of paragraph one of this Term include, respectively, the schools and the colleges of the Pentecostal Assemblies of Newfoundland.

Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)), which Term provided an alternative for Newfoundland, originally read as follows:

17. In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(*a*) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(*b*) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

See also sections 23, 29 and 59 of the *Constitution Act, 1982*. Section 23 provides for new minority language educational rights and section 59 permits a delay in respect of the coming into force in Quebec of one aspect of those rights. Section 29 provides that

nothing in the *Canadian Charter of Rights and Freedoms* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Endnote 5

Further details of Constitution Act, 1867, section 118 [Footnote (59)]

The section originally read as follows:

118. The following Sums shall be paid yearly by Canada to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.
	Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

The section was made obsolete by the *Constitution Act, 1907*, 7 Edw. VII, c. 11 (U.K.), which provided:

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:

(*a*) A fixed grant

where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(*b*) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census or statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the *Constitution Act, 1867*, or of any Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act, and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

See the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26, and the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

See also Part III of the *Constitution Act, 1982*, which sets out commitments by Parliament and the provincial legislatures respecting equal opportunities, economic development and the provision of essential public services and a commitment by Parliament and the government of Canada to the principle of making equalization payments.

25

Wayne Penner *Appellant*

v.

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow *Respondents*

and

Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association *Interveners*

Indexed as: Penner *v.* Niagara (Regional Police Services Board)

2013 SCC 19

File No.: 33959.

2012: January 11; 2013: April 5.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Issue estoppel — Administrative law — Police disciplinary proceedings — Complaint alleging police misconduct brought under Police Services Act, R.S.O. 1990, c. P.15 ("PSA") — Civil action for damages arising from same incident also commenced — PSA hearing officer finding no misconduct and dismissing complaint — Motion judge and Court of Appeal exercising discretion to apply issue estoppel to bar civil claims on basis of hearing officer's decision — Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created — Whether unfairness arises from application of issue estoppel in this case.

Wayne Penner *Appelant*

c.

Commission régionale de services policiers de la municipalité régionale de Niagara, Gary E. Nicholls, Nathan Parker, Paul Koscinski et Roy Federkow *Intimés*

et

Procureur général de l'Ontario, Alliance urbaine sur les relations interraciales, Criminal Lawyers' Association (Ontario), Association des libertés civiles de la Colombie-Britannique, Association canadienne des policiers et Association canadienne des libertés civiles *Intervenants*

Répertorié : Penner *c.* Niagara (Commission régionale de services policiers)

2013 CSC 19

N° du greffe : 33959.

2012 : 11 janvier; 2013 : 5 avril.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Procédure civile — Préclusion découlant d'une question déjà tranchée — Droit administratif — Procédures disciplinaires relatives à la police — Plainte alléguant l'inconduite policière déposée en vertu de la Loi sur les services policiers, L.R.O. 1990, ch. P.15 (« LSP ») — Action civile en réclamation de dommages-intérêts aussi intentée relativement au même incident — Agent d'audience nommé en application de la LSP conclut à l'absence d'inconduite et rejette la plainte — Exercice par le juge des motions et par la Cour d'appel de leur pouvoir discrétionnaire d'appliquer la préclusion découlant d'une question déjà tranchée pour bloquer les demandes civiles compte tenu de la décision de l'agent d'audience — Faudrait-il créer une règle d'intérêt public pour empêcher l'application de la préclusion découlant d'une question déjà tranchée relativement aux décisions disciplinaires relatives à la police? — L'application de la préclusion découlant d'une question déjà tranchée entraîne-t-elle une iniquité en l'espèce?

P was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act* ("*PSA*"), alleging unlawful arrest and unnecessary use of force. He also started a civil action claiming damages arising out of the same incident. The hearing officer appointed by the Chief of Police under the *PSA* found the police officers not guilty of misconduct and dismissed the complaint. That decision was reversed on appeal by the Ontario Civilian Commission on Police Services on the basis that the arrest was unlawful. On further appeal, the Ontario Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's decision. The police respondents then successfully moved in the Superior Court of Justice to have many of the claims in the civil action struck on the basis of issue estoppel. While finding several factors weighed against the application of issue estoppel, the Ontario Court of Appeal concluded that applying the doctrine would not work an injustice in this case and dismissed P's appeal.

Held (LeBel, Abella and Rothstein JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ.: It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in

P a été arrêté parce qu'il aurait eu un comportement perturbateur dans une salle d'audience en Ontario. Il a déposé une plainte contre deux agents de police, en vertu de la *Loi sur les services policiers* (« *LSP* »), pour arrestation illégale et usage de force injustifié. Il a également intenté une action civile en réclamation de dommages-intérêts à l'égard du même incident. L'agent d'audience, nommé en vertu de la *LSP* par le chef de police, a déclaré les agents de police non coupables d'inconduite et a rejeté la plainte. Cette décision a été infirmée en appel par la Commission civile des services policiers de l'Ontario qui a jugé l'arrestation illégale. Par suite d'un appel supplémentaire, la Cour divisionnaire de l'Ontario a conclu que les agents étaient légalement autorisés à procéder à l'arrestation et a rétabli la décision de l'agent d'audience. Les policiers intimés ont ensuite eu gain de cause devant la Cour supérieure de justice à qui ils demandaient la radiation de plusieurs des demandes de l'action civile par application de la préclusion découlant d'une question déjà tranchée. Tout en concluant que plusieurs facteurs militaient contre l'application de la préclusion découlant d'une question déjà tranchée, la Cour d'appel de l'Ontario a conclu que l'application de la doctrine n'emporterait pas d'injustice en l'espèce et a rejeté l'appel de P.

Arrêt (les juges LeBel, Abella et Rothstein sont dissidents) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Fish, Cromwell et Karakatsanis : Il n'est ni nécessaire ni souhaitable de créer une règle d'intérêt public qui exclurait de l'application de la préclusion découlant d'une question déjà tranchée les cas résultant d'audiences disciplinaires de la police. La doctrine de la préclusion invite les cours à exercer leur pouvoir discrétionnaire pour éviter l'injustice; elle appelle un examen au cas par cas des circonstances pour déterminer s'il résulterait une iniquité ou une injustice de son application même si, comme en l'espèce, les conditions de son application sont réunies. Il n'y a aucune raison de s'écarter de cette approche. Toutefois, dans les circonstances de l'espèce, il était injuste envers P d'appliquer la préclusion découlant d'une question déjà tranchée pour bloquer son action civile sur le fondement de la décision de l'agent d'audience. La Cour d'appel a commis une erreur dans son analyse relative aux différences importantes entre les deux instances sur les plans de l'objet et de la portée et elle n'a pas tenu compte des attentes raisonnables des parties relativement à l'incidence des instances sur leurs droits en général.

Le cadre juridique qui régit l'exercice du pouvoir discrétionnaire de ne pas appliquer la préclusion découlant

Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

In this case, the disciplinary hearing was itself fair and P participated in a meaningful way; however, the Court of Appeal failed to fully analyze the fairness of using the results of that process to preclude P's civil action. Nothing in the legislative text gives rise to an expectation that the disciplinary hearing would be conclusive of P's legal rights in his civil action: the standards of proof required, and the purposes of the two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provides no remedy or costs for the complainant. Another important policy consideration arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. P could have participated more fully by hiring counsel, however that would also have meant that the officers would effectively have been forced to face

d'une question déjà tranchée est énoncé dans *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460. Ce cadre n'a pas été supplanté par la jurisprudence subséquente de la Cour. S'il est vrai que le caractère définitif des décisions est important tant pour les parties que pour le système judiciaire, l'application de la préclusion peut tout de même engendrer une iniquité. Premièrement, l'instance antérieure a pu être inéquitable. Deuxièmement, même si l'instance antérieure s'est déroulée de manière juste, il pourrait néanmoins se révéler injuste d'opposer l'issue de la décision en résultant à toute action ultérieure. Par exemple, ce peut être le cas lorsque les objets, la procédure ou les enjeux des deux instances diffèrent grandement. Le libellé et l'objet du régime législatif définissent les attentes raisonnables des parties quant à la portée et à l'effet de l'instance administrative. Ils définissent le rôle des parties dans le déroulement de l'instance et l'étendue de leur apport. Lorsque le régime législatif prévoit des instances multiples dont les objets sont fort différents, l'application de la doctrine risque non seulement de bouleverser les attentes légitimes et raisonnables des parties, mais aussi de nuire à l'efficacité et aux objectifs d'intérêt général du régime administratif, en favorisant le formalisme et les lenteurs, ou en décourageant complètement l'exercice d'un recours administratif. Ces considérations sont également pertinentes pour évaluer les garanties procédurales dont jouissent les parties. La décision d'une partie de se prévaloir ou non des garanties procédurales propres à l'instance antérieure ne saurait être examinée sans que le soient également ses attentes raisonnables quant aux enjeux ou aux objets fondamentalement différents des deux types d'instances. Il convient d'analyser les liens entre les considérations pertinentes à la lumière de l'ensemble.

En l'espèce, l'audience disciplinaire était équitable et P a participé utilement au processus. Toutefois, la Cour d'appel n'a pas analysé de manière exhaustive la question de savoir s'il serait équitable d'opposer l'issue de cette procédure à l'action civile intentée par P. Le texte législatif ne comporte aucun élément susceptible de donner naissance à une attente raisonnable que l'audience disciplinaire soit concluante quant aux droits que P pourrait faire valoir dans le cadre d'une action civile : les normes de preuve exigée et l'objet des deux différentes procédures sont considérablement différents et, contrairement à l'action civile, le processus disciplinaire ne prévoit ni réparation ni dépens en faveur du plaignant. Une autre considération importante d'intérêt public se soulève en l'espèce, à savoir le risque de complexité et de longueur accrues des instances administratives du fait qu'une importance excessive soit accordée à leur issue par l'application

two prosecutors rather than one. This would enhance neither the efficacy nor the fairness to the officers in a disciplinary hearing and potential complainants may not come forward with public complaints in order to avoid prejudicing their civil actions. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as P's status as a party and the procedural protections afforded by the administrative process. Finally, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim and is therefore a serious affront to basic principles of fairness.

de la préclusion découlant d'une question déjà tranchée. P aurait pu participer plus pleinement à l'audience s'il avait retenu les services d'un avocat. Or, cela aurait signifié également que les agents de police se seraient vus obligés de comparaître devant deux poursuivants. Cela ne favoriserait ni l'efficacité de l'audience disciplinaire ni l'équité envers les agents de police. Enfin, des plaignants potentiels pourraient s'abstenir tout simplement de déposer des plaintes pour ne pas compromettre leur action civile. Il s'agit de considérations importantes dont la Cour d'appel n'a pas tenu compte lorsqu'elle a apprécié les autres facteurs telles la participation de P à titre de partie et les garanties procédurales de l'instance administrative. Finalement, l'application de la préclusion a eu pour effet d'utiliser la décision rendue par le délégué du chef de police pour soustraire le chef de police à l'action civile, ce qui choque gravement les principes fondamentaux d'équité.

Per LeBel, Abella and Rothstein JJ. (dissenting): The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel seeks to protect the reasonable expectation of litigants that they can rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. In applying issue estoppel in the context of administrative adjudicative bodies, differences in the process or procedures used by the administrative tribunal, including procedures that do not mirror traditional court procedures, should not be used as an excuse to override the principle of finality. The purposes and procedures may vary, but the principle of finality should be maintained.

Les juges LeBel, Abella et Rothstein (dissidents) : La doctrine de la préclusion découlant d'une question déjà tranchée vise à protéger le caractère définitif des décisions en empêchant la remise en cause de questions déjà tranchées de manière concluante lors d'une instance antérieure. Le caractère définitif des litiges est un principe fondamental qui garantit l'équité et l'efficacité du système de justice au Canada. La doctrine de la préclusion découlant d'une question déjà tranchée vise à protéger l'attente raisonnable des parties quant à leur capacité de se fier au résultat d'une décision rendue par un décideur habilité à trancher, peu importe que la décision ait été prise dans le contexte d'une procédure judiciaire ou d'une procédure administrative. Lorsqu'on applique la doctrine de la préclusion découlant d'une question déjà tranchée aux entités administratives chargées de trancher des litiges, il est inadmissible d'invoquer les différences entre le processus et les procédures utilisés par ces entités, y compris les procédures qui ne sont pas à l'image celles utilisées par les cours de justice traditionnelles, pour écarter le principe du caractère définitif des décisions. L'objet peut varier d'une instance à l'autre, tout comme les procédures applicables, mais le principe du caractère définitif des litiges doit être maintenu.

The applicable approach to issue estoppel in the context of prior administrative proceedings was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC

La Cour s'est penchée sur cette question le plus récemment en 2011, dans l'arrêt *Colombie-Britannique (Workers' Compensation Board) c. Figliola,* 2011 CSC 52, [2011] 3 R.C.S. 422. Ce précédent régit donc l'application de la doctrine en l'espèce. L'élément essentiel pertinent de ce jugement se retrouve dans la distance qu'il a prise par rapport à l'approche préconisée dans *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, où la Cour avait conclu qu'il

44, [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the "very limited" discretion applied to courts.

The twin principles which underlie the doctrine of issue estoppel — that there should be an end to litigation and that the same party shall not be harassed twice for the same cause — are core principles which focus on achieving fairness and preventing injustice by preserving the finality of litigation. The ultimate goal of issue estoppel is to protect the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola*, this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is also crucial to preserving the principles underlying our modern approach to administrative law. The Court's residual discretion to refuse to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with the principles of deference that lie at the core of administrative law. Where an adjudicative tribunal has the authority to make a decision, it would run counter to the principles of deference to uniquely broaden the court's discretion in a way that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn instead to the courts for a re-adjudication of the merits.

Under the principles set out in *Figliola*, issue estoppel should apply. The difference between the standard of proof required to establish misconduct under the *PSA* and that required in a civil trial is irrelevant in this case. The hearing officer made unequivocal findings that there was virtually no evidence to support P's claims. That means that there is simply no evidence to support P's

faut appliquer un pouvoir discrétionnaire différent et beaucoup plus large quant aux décisions des tribunaux administratifs que celui « très limité » qui s'applique quant aux décisions des cours de justice.

Les principes jumeaux qui sous-tendent la doctrine de la préclusion découlant d'une question déjà tranchée — soit que tout litige doit avoir une fin et que la même partie ne soit pas harassée deux fois pour la même cause — constituent des principes fondamentaux qui visent avant tout l'atteinte de l'équité et la prévention de l'injustice en préservant le caractère définitif des litiges. L'objectif ultime de la préclusion découlant d'une question déjà tranchée consiste à protéger l'équité du caractère définitif de la prise de décision et à éviter de nouvelles procédures quant à des questions déjà jugées par un décideur habilité à trancher. Comme la Cour l'a affirmé dans *Figliola*, ce principe tient, peu importe qu'il soit question de cours de justice ou de tribunaux administratifs. Une approche qui ne protège pas le caractère définitif des décisions mine ces principes et risque, en ce qui a trait aux tribunaux administratifs, de transformer la préclusion découlant d'une question déjà tranchée en une enquête dépourvue de tout encadrement. Cela reviendrait à raviver l'approche préconisée dans *Danyluk* que la Cour a refusé d'appliquer dans *Figliola*.

La confirmation récente par la Cour, dans *Figliola*, du principe du caractère définitif sous-jacent à la doctrine de la préclusion découlant d'une question déjà tranchée est également essentielle pour assurer le respect des principes sous-jacents de notre approche moderne du droit administratif. La Cour ne devrait pas se servir de son pouvoir discrétionnaire résiduel de ne pas appliquer la préclusion découlant d'une question déjà tranchée pour imposer un modèle particulier de décision, à l'encontre du principe de déférence qui est au cœur du droit administratif. Lorsqu'un tribunal chargé de trancher des litiges est investi du pouvoir nécessaire de prendre une décision, on contreviendrait aux principes de déférence en élargissant de manière particulière le pouvoir discrétionnaire des cours de justice de telle sorte que, dans la plupart des cas, cela permettrait à la partie perdante de contourner le contrôle judiciaire et de s'adresser plutôt à une cour de justice pour qu'elle se prononce une nouvelle fois sur le fond de l'affaire.

Suivant les principes énoncés dans *Figliola*, la préclusion découlant d'une question déjà tranchée devrait s'appliquer. La différence entre le fardeau de preuve exigé pour établir une inconduite au sens de la *LSP* et celui dont il faut s'acquitter dans le cadre d'un procès civil n'est pas pertinente en l'espèce. L'agent d'audience a tiré des conclusions de fait non équivoques

claims whatever standard of proof is applied. P should not be allowed to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding which would inevitably yield the same result.

The disciplinary hearing conducted by the hearing officer was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness. The hearing officer's decision was made in circumstances in which P knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding and the application of issue estoppel would have assisted him in a subsequent civil action for damages by relieving him of having to prove liability.

Preventing the courts from applying issue estoppel in the context of these disciplinary proceedings means that decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the reliability of the complaints process and in the integrity of the administrative decision-making process more broadly.

Nor does the method used to appoint an adjudicator in this case provide a basis for exercising the discretion in a way that precludes the application of issue estoppel. The Chief of Police designated an outside prosecutor and an independent adjudicator. Similar methods of appointment are quite common in other parts of the law and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

Cases Cited

By Cromwell and Karakatsanis JJ.

Applied: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; **referred to:** *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Dunsmuir v.*

selon lesquelles il n'existait virtuellement aucun élément de preuve pour étayer les allégations de P. Il n'y a donc tout simplement aucun élément de preuve pour étayer les allégations de P quelque soit le fardeau de preuve appliqué. P ne devrait pas pouvoir contourner les conclusions claires de l'agent d'audience et faire subir aux parties une nouvelle procédure qui aboutirait inévitablement au même résultat.

L'audience disciplinaire menée par l'agent d'audience s'est déroulée conformément aux exigences de la loi et aux principes de l'équité procédurale. P connaissait le fardeau de preuve qui lui incombait, il a pleinement eu la possibilité d'établir cette preuve et il a été débouté. S'il avait eu gain de cause, la décision de l'agent d'audience aurait lié tout autant les parties et l'application de la préclusion découlant d'une question déjà tranchée lui aurait été utile dans le cadre d'une action civile subséquente en dommages-intérêts en le libérant de l'obligation d'établir le préjudice.

Empêcher les tribunaux d'appliquer la préclusion découlant d'une question déjà tranchée dans le contexte de ces procédures disciplinaires signifierait que les décisions ne seraient pas définitives ou ne lieraient pas les parties et qu'elles pourraient être remises en cause et donner lieu à des résultats contradictoires. Cela minerait la confiance du public quant à la fiabilité du processus de plainte et à l'intégrité du processus de prise de décision administrative de manière plus large.

La méthode de nomination de l'arbitre en l'espèce ne devrait pas non plus justifier l'exercice par la cour de son pouvoir discrétionnaire de manière à refuser d'appliquer la préclusion découlant d'une question déjà tranchée. Le chef de police a désigné un poursuivant de l'extérieur et un arbitre indépendant. Des modes de nomination similaires sont plutôt fréquents dans d'autres domaines du droit et ne sont pas considérés comme un obstacle à l'indépendance du processus décisionnel. Le mandat de longue durée n'est pas le seul critère ou la seule condition de l'indépendance du processus décisionnel.

Jurisprudence

Citée par les juges Cromwell et Karakatsanis

Arrêt appliqué : *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460; **arrêts mentionnés :** *Parker c. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *Elsom c. Elsom*, [1989] 1 R.C.S. 1367; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3; *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63,

New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII); *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

By LeBel and Abella JJ. (dissenting)

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257, leave to appeal refused, [1999] 1 S.C.R. xiv; *Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279; *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Wong v. Shell Canada Ltd.* (1995), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv; *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

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Julian N. Falconer, *Julian K. Roy* and *Sunil S. Mathai*, for the appellant.

Eugene G. Mazzuca, *Kerry Nash* and *Rafal Szymanski*, for the respondents.

Malliha Wilson, *Dennis W. Brown*, *Q.C.*, and *Christopher P. Thompson*, for the intervener the Attorney General of Ontario.

Maureen Whelton and *Richard Macklin*, for the intervener the Urban Alliance on Race Relations.

Louis Sokolov and *Daniel Iny*, for the intervener the Criminal Lawyers' Association (Ontario).

Robert D. Holmes, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Ian J. Roland and *Michael Fenrick*, for the intervener the Canadian Police Association.

Tim Gleason and *Sean Dewart*, for the intervener the Canadian Civil Liberties Association.

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Julian N. Falconer, *Julian K. Roy* et *Sunil S. Mathai*, pour l'appelant.

Eugene G. Mazzuca, *Kerry Nash* et *Rafal Szymanski*, pour les intimés.

Malliha Wilson, *Dennis W. Brown*, *c.r.*, et *Christopher P. Thompson*, pour l'intervenant le procureur général de l'Ontario.

Maureen Whelton et *Richard Macklin*, pour l'intervenante l'Alliance urbaine sur les relations interraciales.

Louis Sokolov et *Daniel Iny*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Robert D. Holmes, *c.r.*, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Ian J. Roland et *Michael Fenrick*, pour l'intervenante l'Association canadienne des policiers.

Tim Gleason et *Sean Dewart*, pour l'intervenante l'Association canadienne des libertés civiles.

The judgment of McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ. was delivered by

[1] Cromwell and Karakatsanis JJ. — This appeal focuses on the discretionary application of issue estoppel. More particularly, the question is whether the Ontario courts erred by striking many of the claims in the appellant's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal.

[2] The appellant, Wayne Penner, was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*"), alleging unlawful arrest and use of unnecessary force. He also started a civil action against the court security officer, the two police officers, their chief of police, and the Regional Municipality of Niagara Regional Police Services Board ("Police Services Board") in the Superior Court of Justice, claiming damages arising out of the same incident.

[3] Mr. Penner's complaint under the *PSA* was referred by the Chief of Police to a disciplinary hearing presided over by a retired police superintendent. The police officers were found not guilty of misconduct. Mr. Penner was a party to the disciplinary hearing and the subsequent appeals to the Ontario Civilian Commission on Police Services ("Commission") and the Divisional Court.

[4] The respondents applied to have the civil action dismissed on the basis of issue estoppel because, in their view, the disciplinary hearing had finally resolved the key issues underpinning Mr. Penner's civil claims.

Version française du jugement de la juge en chef McLachlin et des juges Fish, Cromwell et Karakatsanis rendu par

[1] Les juges Cromwell et Karakatsanis — Le présent pourvoi porte sur l'application discrétionnaire de la doctrine de la préclusion découlant d'une question déjà tranchée. Plus précisément, il s'agit de savoir si les tribunaux ontariens ont commis une erreur en radiant plusieurs des demandes de l'action civile intentée par l'appelant contre la police au motif que sa plainte pour inconduite policière relativement aux mêmes faits avait été rejetée par un tribunal disciplinaire de la police.

[2] L'appelant, Wayne Penner, a été arrêté parce qu'il aurait eu un comportement perturbateur dans une salle d'audience en Ontario. Il a déposé une plainte contre deux agents de police en vertu de la *Loi sur les services policiers*, L.R.O. 1990, ch. P.15 (« *LSP* »), pour arrestation illégale et usage de force injustifiée. Il a également intenté une action civile contre l'agent de sécurité des tribunaux, les deux agents de police, leur chef de police et la Commission régionale de services policiers de la municipalité régionale de Niagara (« commission de services policiers ») devant la Cour supérieure de justice, afin de réclamer des dommages-intérêts à l'égard du même incident.

[3] Le chef de police a renvoyé la plainte déposée par M. Penner en vertu de la *LSP* en vue de la tenue d'une audience disciplinaire présidée par un surintendant de police à la retraite. Les agents de police ont été déclarés non coupables d'inconduite. M. Penner était partie à l'audience disciplinaire et aux appels ultérieurs devant la Commission civile des services policiers de l'Ontario (« Commission ») et la Cour divisionnaire.

[4] Les intimés ont demandé que l'action civile soit rejetée pour cause de préclusion découlant d'une question déjà tranchée, l'audience disciplinaire ayant, selon eux, réglé définitivement les principales questions en litige qui sous-tendent l'action civile intentée par M. Penner.

[5] Many of Mr. Penner's civil claims were struck on the basis of issue estoppel. The Ontario Court of Appeal agreed with the motion judge, and determined that the application of issue estoppel would not work an injustice in this case.

[6] On appeal to this Court, the appellant did not seriously challenge that the preconditions of issue estoppel had been met. The issue is whether the Court of Appeal erred in exercising its discretion to apply issue estoppel to bar Mr. Penner's civil claims. Mr. Penner contends that the application of issue estoppel in this context would work an injustice or unfairness because of the public interest in promoting police accountability. He submits that the courts, as guardians of the Constitution and of individual rights and freedoms, must oversee the exercise of police powers: the importance of this judicial oversight requires that issue estoppel not apply to a disciplinary hearing decision under the *PSA*.

[7] The respondents reply that this case turns upon its own exceptional circumstances, that the civil suit represents a collateral attack on the final decision of the complaints process, and that the courts below were right to apply issue estoppel in order to preclude relitigation of the same issues finally decided in the disciplinary proceedings.

[8] We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal

[5] Plusieurs des demandes de l'action civile ont été radiées par application de la préclusion découlant d'une question déjà tranchée. La Cour d'appel de l'Ontario, à l'instar du juge des motions, a conclu que l'application de cette doctrine n'entraînerait aucune injustice en l'espèce.

[6] Devant la Cour, l'appelant ne conteste pas sérieusement l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée. Il s'agit en l'espèce de savoir si la Cour d'appel a commis une erreur lorsqu'elle a exercé son pouvoir discrétionnaire d'appliquer ou non la préclusion découlant d'une question déjà tranchée pour bloquer l'action civile de M. Penner. Ce dernier soutient que l'application de cette doctrine, dans ce contexte, entraînerait une injustice ou une iniquité, vu l'intérêt du public à ce que la police rende des comptes. Il affirme que les tribunaux, à titre de gardiens de la Constitution et des droits et libertés individuels, doivent surveiller l'exercice par la police de ses pouvoirs. Ainsi, selon lui, l'importance de ce contrôle judiciaire est telle que la préclusion découlant d'une question déjà tranchée ne devrait pas s'appliquer à une décision rendue à l'issue d'une audience disciplinaire tenue sous le régime de la *LSP*.

[7] Les intimés répondent que le sort de la présente affaire dépend des faits exceptionnels qu'elle présente, que l'action civile constitue une contestation indirecte d'une décision définitive rendue dans le cadre du processus de plaintes, et que les tribunaux d'instance inférieure ont eu raison d'appliquer la préclusion découlant d'une question déjà tranchée pour empêcher que les questions réglées de manière définitive par le processus disciplinaire soient remises en cause.

[8] Nous concluons qu'il n'existe — et ne devrait exister — aucune règle d'intérêt public empêchant l'application de la préclusion découlant d'une question déjà tranchée aux décisions rendues à l'issue d'audiences disciplinaires de la police de manière à permettre le contrôle judiciaire des actes de la police. Une approche souple confère au tribunal le pouvoir discrétionnaire de refuser d'appliquer la préclusion s'il en résultait une injustice, même

erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.

si les conditions d'application sont réunies. Nous estimons toutefois que la Cour d'appel a commis une erreur dans son analyse relative aux différences importantes entre les deux instances sur les plans de l'objet et de la portée et qu'elle n'a pas tenu compte des attentes raisonnables des parties relativement à l'incidence des instances sur leurs droits en général. De plus, il est inéquitable d'opposer la décision rendue par le délégué du chef de police pour soustraire le chef de police à une action civile intentée ultérieurement. Dans les circonstances de l'espèce, il était injuste envers l'appelant d'appliquer la préclusion découlant d'une question déjà tranchée pour bloquer son action civile. Nous sommes d'avis d'accueillir l'appel.

I. Background

[9] In January 2003, Mr. Penner was sitting in a Provincial Offences Court while his wife was on trial for a traffic ticket issued by Constable Nathan Parker. It was alleged that Mr. Penner disrupted the proceedings, refused to stop interrupting and to leave when asked to do so, and resisted arrest by Constable Nathan Parker. Constables Parker and Koscinski used force to remove him from the courtroom. Once outside the courtroom, they again used force and handcuffed him. Handcuffed, Mr. Penner was then taken to the Niagara Regional Police station by Constable Parker, where he was strip-searched and put into a holding cell. He sustained a black eye, numerous scrapes, a bruised knee, and a sore wrist, elbow and sore ribs. Mr. Penner was escorted by police to a hospital where he was examined and treated for injuries he had sustained during the arrest. Mr. Penner was subsequently returned to the police station and charged with causing a disturbance, breach of probation and resisting arrest. All charges were withdrawn by the Crown some five months later, in June 2003.

[10] After his arrest, Mr. Penner filed a public complaint under ss. 56 and 57 of the *PSA* against Constables Parker and Koscinski, alleging unlawful

I. Contexte factuel

[9] En janvier 2003, M. Penner assistait à une audience de la Cour des infractions provinciales devant laquelle son épouse comparaissait pour une contravention dressée par le constable Nathan Parker. M. Penner aurait perturbé l'instance, n'aurait pas obtempéré à l'ordre de cesser d'interrompre les travaux de la cour et de quitter la salle et aurait tenté de résister à son arrestation par l'agent Parker. Les agents Parker et Koscinski auraient fait usage de force pour le sortir de la salle d'audience. Une fois à l'extérieur, les agents auraient encore fait usage de force et l'ont menotté. Le constable Parker a emmené M. Penner, menottes aux poings, au poste de police régional de Niagara, où ce dernier a été soumis à une fouille à nu et enfermé dans une cellule de détention temporaire. Il a eu un œil tuméfié, de nombreuses éraflures et une ecchymose au genou ainsi que des douleurs au poignet, au coude et aux côtes. Sous escorte policière, M. Penner s'est présenté à l'hôpital, où on l'a examiné et traité pour les blessures subies lors de son arrestation. Il a été reconduit par la suite au poste et accusé d'avoir troublé la paix, de ne pas s'être conformé à une ordonnance de probation et d'avoir résisté à une arrestation. Le ministère public a retiré ces accusations quelque cinq mois plus tard, en juin 2003.

[10] Après son arrestation, M. Penner a déposé une plainte en vertu des art. 56 et 57 de la *LSP* contre les agents Parker et Koscinski, invoquant qu'il y avait

or unnecessary arrest, as well as use of unnecessary force. This led to a disciplinary hearing for both police officers. In addition, in July 2003, Mr. Penner filed a statement of claim in the Ontario Superior Court of Justice in relation to the same arrest, by which a civil action was commenced against the Police Services Board, Constables Parker and Koscinski, the Chief of Police and the Court Security Officer. Mr. Penner claimed damages for unlawful arrest, false imprisonment, use of unnecessary force during and after the arrest, an unnecessary strip-search, failure on the part of other officers to prevent his mistreatment, failure to provide timely medical assistance, improper use of handcuffs, malicious prosecution and failure to co-operate with the investigation of his allegations.

II. Summary of the Complaint Proceedings

A. *Disciplinary Hearing Under the PSA (Decision of Superintendent R. J. Fitches, Dated June 28, 2004; A.R., at pp. 99-116)*

[11] Under the *PSA*, a complaint is referred to the chief of police: s. 60(4). (All statutory references are to the legislation as it existed at the relevant time.) The chief is obliged to have the complaint investigated (with some exceptions not relevant here) and, in light of the results, to order a hearing into the matter if he or she is of the opinion that the officer's conduct could constitute misconduct: s. 64(1) and (7). If a hearing is ordered, it is conducted by the chief or a designate on his or her behalf: ss. 64(7) and 76. The chief also appoints the prosecutor: s. 64(8). The complainant is made a party by statute and has participatory rights (s. 69(3) and (4); *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 10 and 10.1), but no access to discovery or production of documents beyond what the prosecution relies on, and there is no right to compel the officer in question to testify: *PSA*, s. 69(7). The issue at the hearing is whether the alleged misconduct has been "proved on clear and convincing evidence" (s. 64(10)) and, if so, what penalty is to be imposed on the officer

eu arrestation illégale ou inutile, ainsi qu'usage d'une force injustifiée. La plainte a donné lieu à une audience disciplinaire visant les deux agents. De plus, en juillet 2003, M. Penner a déposé à la Cour supérieure de justice de l'Ontario une déclaration au moyen de laquelle il a intenté une action civile, relativement à la même arrestation, contre la commission de services policiers, les agents Parker et Koscinski, le chef de police et l'agent de sécurité des tribunaux. M. Penner réclamait des dommages-intérêts pour arrestation illégale, détention injustifiée, usage de force injustifiée, pendant et après l'arrestation, fouille à nu arbitraire, défaut d'autres agents de police de prévenir les mauvais traitements qu'il avait subis, défaut de fournir rapidement des soins médicaux, mauvaise utilisation des menottes, poursuite malveillante et défaut de collaborer à l'enquête portant sur ses allégations.

II. Résumé de la procédure relative à la plainte

A. *L'audience disciplinaire tenue sous le régime de la LSP (décision du surintendant R. J. Fitches, datée du 28 juin 2004; d.a., p. 99-116)*

[11] Aux termes de la *LSP*, toute plainte est renvoyée au chef de police : par. 60(4). (Les dispositions indiquées renvoient à la version de la Loi en vigueur à l'époque pertinente.) Le chef de police est tenu de faire mener une enquête sur la plainte (sous réserve de certaines exceptions non pertinentes en l'espèce) et, compte tenu des résultats, d'ordonner la tenue d'une audience sur l'affaire s'il ou elle estime que la conduite de l'agent de police a pu constituer une inconduite : par. 64(1) et (7). Le cas échéant, l'audience est dirigée par le chef de police ou, pour le compte de ce dernier, par un délégué : par. 64(7) et art. 76. Le chef de police désigne également un poursuivant : par. 64(8). Le plaignant est partie à l'audience de par la loi et a le droit d'y participer (par. 69(3) et (4); *Loi sur l'exercice des compétences légales*, L.R.O. 1990, ch. S.22, art. 10 et 10.1). Il ne peut toutefois demander la communication ou la production de documents autres que ceux sur lesquels se fonde la partie poursuivante, ni contraindre l'agent de police en question à témoigner : *LSP*, par. 69(7). À

under ss. 68(1) and (5). No remedy or costs may be awarded to the complainant.

[12] Here, disciplinary charges of unnecessary and unlawful arrest and use of unnecessary force were laid against two police officers: O. Reg. 123/98, Part V, Sch., *Code of Conduct*, s. 2(1)(g)(i) and (ii). The Chief appointed a retired police superintendent of the Ontario Provincial Police to conduct the hearing on his behalf. The hearing took place over the course of several days in 2004. Mr. Penner represented himself. As the complainant, he led evidence, cross-examined witnesses and made submissions. Several individuals who were present in the courtroom at the time of Mr. Penner's arrest gave evidence before the hearing officer at the disciplinary hearing: the prosecutor, clerk of the court, court security officer, two lay people awaiting their own respective trials, Mr. Penner, his wife, and Constables Parker and Koscinski.

[13] The hearing officer rejected much of the Penners' testimony. Instead, he relied primarily on the testimony of other witnesses regarding the events surrounding Mr. Penner's arrest and concluded that Constables Parker and Koscinski had reasonable grounds to arrest Mr. Penner for causing a disturbance in a public place. On the issue of whether the officers had the lawful authority to make an arrest in a courtroom under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, while a Justice of the Peace was presiding, the hearing officer concluded that the prosecutor had failed to provide sufficient evidence to show, "in any clear and cogent way, that Mr. Penner's arrest was not authorized by statute": p. xiii (A.R., at p. 111). The hearing officer therefore dismissed the allegation of unlawful arrest and found the constables not guilty of misconduct on this count.

[14] Turning to the allegation of unnecessary use of force, the hearing officer found that the Constables

l'audience, il s'agit de déterminer si la présumée inconduite est « prouvée sur la foi de preuves claires et convaincantes » (par. 64(10)) et, dans l'affirmative, quelle peine infliger à l'agent de police en vertu des par. 68(1) et (5). Il ne peut être accordé de réparation ni de dépens au plaignant.

[12] En l'espèce, deux agents de police ont été accusés d'infractions disciplinaires pour avoir présumément procédé à une arrestation illégale ou inutile et pour avoir fait usage d'une force injustifiée : Règl. de l'Ont. 123/98, partie V, ann., *Code of Conduct*, sous-al. 2(1)(g)(i) et (ii). Le chef de police a désigné un surintendant à la retraite de la Police provinciale de l'Ontario pour diriger l'audience en son nom. L'audience s'est déroulée sur plusieurs jours en 2004. M. Penner s'est représenté lui-même. À titre de plaignant, il a présenté sa preuve, a contre-interrogé des témoins et a fait des observations. Plusieurs personnes qui se trouvaient dans la salle d'audience lors de l'arrestation de M. Penner ont témoigné à l'audience disciplinaire, à savoir l'avocat de la poursuite, le greffier, l'agent de sécurité des tribunaux, deux personnes qui attendaient chacune la tenue de leur propre procès, M. Penner, son épouse et les agents Parker et Koscinski.

[13] L'agent d'audience a rejeté en grande partie les témoignages des Penner. Il s'est plutôt fondé principalement sur les dépositions d'autres témoins concernant les faits entourant l'arrestation de M. Penner et a conclu que les agents Parker et Koscinski avaient des motifs raisonnables d'arrêter M. Penner pour avoir troublé la paix dans un endroit public. Quant à la question de savoir si les agents de police étaient légalement autorisés à procéder à une arrestation en application de la *Loi sur les infractions provinciales*, L.R.O. 1990, ch. P.33, lors d'une audience présidée par un juge de paix, l'agent d'audience a conclu que le poursuivant n'avait pas réussi à démontrer [TRADUCTION] « de façon claire et convaincante que l'arrestation de M. Penner n'était pas autorisée par la loi » : p. xiii (d.a., p. 111). L'agent d'audience a donc rejeté l'allégation d'arrestation illégale et a déclaré les agents de police non coupables d'inconduite sur ce chef.

[14] Quant à l'allégation d'usage de force injustifiée, l'agent d'audience a conclu que les policiers

used a level of force that was necessary to gain control over Mr. Penner. Relying upon his review of the video record at the police station, he found that there was "no clear, convincing, or cogent evidence whatsoever" of unnecessary force there either: p. xvi (A.R., at p. 114).

B. *Appeal Before the Commission (Decision Dated April 22, 2005; A.R., at pp. 117-30)*

[15] As a party to the disciplinary hearing, Mr. Penner appealed the decision of the hearing officer to the Commission pursuant to s. 70(1) of the *PSA*. He took the position before the Commission that there were no legal grounds for his arrest.

[16] The Commission concluded that the arrest in the courtroom was unlawful because the Justice of the Peace gave no direction to the Constables to arrest Mr. Penner. The Commission was satisfied that there was clear and convincing evidence that Constables Parker and Koscinski were guilty of misconduct due to an unlawful and unnecessary arrest, and thus any force used was unjustified and unnecessary.

C. *Appeal Before the Ontario Superior Court of Justice — Divisional Court (Parker v. Niagara Regional Police Service (2008), 232 O.A.C. 317)*

[17] On a further appeal by the constables pursuant to s. 71(1) of the *PSA*, the Divisional Court held that the Commission unreasonably ignored findings of fact made by the hearing officer, and that the Commission was not justified in substituting their own findings. The Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's finding that the constables were not guilty of misconduct.

III. History of the Civil Action

[18] Mr. Penner initiated a civil action in July 2003 based on the same events that formed the subject matter of the disciplinary hearing, alleging, among

avaient utilisé le degré de force qui était nécessaire pour maîtriser M. Penner. Après avoir visionné les bandes vidéo enregistrées au poste de police, il a conclu [TRADUCTION] « à l'absence de toute preuve claire, convaincante ou concluante » qu'il y avait eu usage de force injustifiée là aussi : p. xvi (d.a., p. 114).

B. *Appel devant la Commission (décision datée du 22 avril 2005; d.a., p. 117-130)*

[15] À titre de partie à l'audience disciplinaire, M. Penner a interjeté appel de la décision de l'agent d'audience à la Commission en vertu du par. 70(1) de la *LSP*. Il a prétendu devant elle qu'aucun motif d'ordre juridique ne justifiait son arrestation.

[16] La Commission a conclu que l'arrestation de M. Penner dans la salle d'audience était illégale parce que le juge de paix n'avait pas donné l'ordre aux agents d'y procéder. La Commission était convaincue que la preuve démontrait de façon claire et convaincante que les agents Parker et Koscinski étaient coupables d'inconduite pour avoir procédé à une arrestation illégale et inutile, et partant, toute force dont ils avaient fait usage était injustifiée et inutile.

C. *Appel interjeté devant la Cour supérieure de justice de l'Ontario — Cour divisionnaire (Parker c. Niagara Regional Police Service (2008), 232 O.A.C. 317)*

[17] Saisie d'un appel supplémentaire interjeté par les agents en vertu du par. 71(1) de la *LSP*, la Cour divisionnaire a jugé que la Commission avait fait fi, déraisonnablement, des conclusions de fait tirées par l'agent d'audience et qu'aucune raison ne justifiait qu'elle y substitue les siennes. La Cour divisionnaire a conclu que les agents de police étaient légalement autorisés à procéder à l'arrestation et a rétabli la conclusion de l'agent d'audience disculpant ces derniers des accusations.

III. Genèse de l'action civile

[18] En juillet 2003, M. Penner a intenté une action civile reposant sur les mêmes faits que ceux sur lesquels portait l'audience disciplinaire. Il alléguait,

other things, unlawful arrest and use of excessive force. After the decision from the disciplinary hearing was reinstated by the Divisional Court in January 2008, the respondents filed a motion to dismiss the civil action on the basis of issue estoppel.

A. *Ontario Superior Court of Justice (Fedak J.; 2009 CarswellOnt 9420)*

[19] The motion judge concluded that Mr. Penner was estopped from bringing these claims. Mr. Penner's civil action raised, among others, the same two questions that were already decided by the disciplinary hearing and restated by the Divisional Court: (1) was the arrest lawful? and (2) was unnecessary force used, either at the court or at the police station? The judge applied the test outlined in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, and concluded that the three preconditions for issue estoppel had been met.

[20] First, the hearing officer's decision was judicial and the hearing fulfilled the requirements of procedural fairness because Mr. Penner made the complaint, appeared before the decision maker, led evidence, examined witnesses and made written submissions. Second, the decision was final. And third, the same parties to the civil action were also engaged in the disciplinary hearing.

[21] As to the second part of the *Danyluk* test, the motion judge stated that there were no grounds to exercise his discretion to not apply issue estoppel.

[22] We are assuming but not deciding that the decision of the hearing officer was admissible before the motion judge for the purpose of considering issue estoppel. This issue was not addressed in the decisions below. Given our disposition, it is not necessary to decide the issue.

entre autres, l'arrestation illégale et l'usage de force injustifiée. Après que la Cour divisionnaire a rétabli, en janvier 2008, la décision rendue à l'issue de l'audience disciplinaire, les intimés ont déposé une motion visant à faire rejeter l'action civile sur le fondement de la préclusion découlant d'une question déjà tranchée.

A. *Cour supérieure de justice (le juge Fedak; 2009 CarswellOnt 9420)*

[19] Selon le juge des motions, M. Penner était préclus d'ester en justice à l'égard de ces réclamations. Son action civile soulevait, entre autres, les deux questions qui avaient déjà été tranchées à l'issue de l'audience disciplinaire, et dont la Cour divisionnaire avait confirmé le résultat : (1) l'arrestation était-elle légale? (2) avait-on fait usage d'une force injustifiée, à l'audience ou au poste de police? Le juge a appliqué le critère énoncé dans l'arrêt *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, et a conclu que les trois conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies.

[20] Premièrement, la décision de l'agent d'audience était de nature judiciaire, et l'audience répondait aux exigences en matière d'équité procédurale en ce que M. Penner avait déposé la plainte, comparu devant le décideur, présenté des éléments de preuve, interrogé des témoins et fait des observations écrites. Deuxièmement, la décision était définitive. Troisièmement, les parties à l'action civile étaient également parties à l'audience disciplinaire.

[21] En ce qui concerne la deuxième partie du critère formulé dans l'arrêt *Danyluk*, le juge des motions a déclaré que rien ne justifiait l'exercice de son pouvoir discrétionnaire de ne pas appliquer la doctrine de la préclusion découlant d'une question déjà tranchée.

[22] Nous tenons pour acquis, sans toutefois trancher la question, que la décision de l'agent d'audience pouvait être présentée au juge des motions pour que ce dernier décide si la préclusion découlant d'une question déjà tranchée s'appliquait. Les décisions des instances inférieures sont muettes à cet égard. Vu notre conclusion, il n'est pas nécessaire que nous nous prononcions sur la question.

B. *Ontario Court of Appeal (Laskin J.A., Moldaver and Armstrong JJ.A. Concurring; 2010 ONCA 616, 102 O.R. (3d) 688)*

[23] The Court of Appeal agreed with the motion judge that the three preconditions for issue estoppel had been met. However, the Court of Appeal found that the motion judge erred in failing to explain why there were no grounds to exercise his discretion to not apply issue estoppel. Accordingly, the Court of Appeal considered whether it would be unfair or unjust to apply issue estoppel despite the satisfaction of the three preconditions.

[24] The Court of Appeal acknowledged that the different purposes of the disciplinary hearing and the civil action weighed against the application of issue estoppel. The Court of Appeal concluded that the legislature did not intend to preclude Mr. Penner's civil action simply because he filed a public complaint under the *PSA*: para. 42. Further, the Court of Appeal considered that Mr. Penner had no financial stake in the disciplinary hearing (as the statute does not provide for compensation to a public complainant affected by police misconduct), although the strength of that factor was diminished, in its view, by the potential benefit to Mr. Penner had there been a finding of misconduct. Despite these factors weighing against the application of issue estoppel, the Court of Appeal concluded that they were not determinative considerations in the discretionary analysis.

[25] The Court of Appeal ultimately concluded that applying issue estoppel would not work an injustice and decided against exercising its discretion to not apply the doctrine based on the following factors:

- on issues of reasonable and probable grounds for arrest, as well as the use of excessive force

B. *Cour d'appel de l'Ontario (le juge Laskin, les juges Moldaver et Armstrong souscrivant à ses motifs; 2010 ONCA 616, 102 O.R. (3d) 700)*

[23] La Cour d'appel estimait, à l'instar du juge des motions, que les trois conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies. Toutefois, elle était d'avis que le juge des motions avait commis une erreur en ne motivant pas sa conclusion selon laquelle rien ne justifiait l'exercice de son pouvoir discrétionnaire de ne pas appliquer cette doctrine. Par conséquent, la Cour d'appel s'est demandé si appliquer la doctrine aurait un effet inéquitable ou injuste, et ce, même si les trois conditions d'application étaient réunies.

[24] La Cour d'appel a reconnu que les objets différents visés par l'audience disciplinaire et l'action civile militaient contre l'application de la préclusion découlant d'une question déjà tranchée. Elle était d'avis que le législateur n'avait pas l'intention d'empêcher quelqu'un dans la situation de M. Penner d'intenter une action civile du seul fait qu'il avait déposé une plainte sous le régime de la *LSP* : par. 42. De plus, la Cour d'appel a estimé que l'audience disciplinaire ne présentait pour M. Penner aucun intérêt financier (car la loi ne prévoit le versement d'aucune indemnité au plaignant touché par l'inconduite d'un agent de police), bien que le poids de ce facteur fût diminué, de l'avis de la cour, par le bénéfice potentiel qu'aurait apporté à M. Penner une éventuelle conclusion d'inconduite. Même si ces facteurs militaient contre l'application de la préclusion découlant d'une question déjà tranchée, la Cour d'appel a conclu qu'ils n'étaient pas déterminants dans l'analyse que commande l'exercice de ce pouvoir discrétionnaire.

[25] Finalement, la Cour d'appel a estimé que l'application de la préclusion découlant d'une question déjà tranchée n'emporterait pas d'injustice et a décidé de ne pas exercer son pouvoir discrétionnaire de ne pas appliquer la doctrine, et ce, en raison des facteurs suivants :

- en ce qui concerne les motifs raisonnables et probables de procéder à une arrestation, ainsi que

during arrest, the hearing officer had as much expertise as a court (para. 45);

- the disciplinary hearing had "all the hallmarks of an ordinary civil trial", and, in this case, the different standards of proof in police disciplinary hearings and in civil actions are immaterial (paras. 48-51);

- Mr. Penner actively participated in the disciplinary hearing (para. 52); and

- the *PSA* provides an aggrieved party with the right to appeal to the Commission, a right which Mr. Penner exercised (para. 53).

[26] Accordingly, the Court of Appeal dismissed the appeal.

IV. Standard of Review

[27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

V. Analysis

A. *Issue Estoppel: The Legal Framework*

[28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting

le recours à une force excessive au cours de l'arrestation, l'agent d'audience était tout aussi compétent qu'un tribunal pour trancher (par. 45);

- l'audience disciplinaire présentait [TRADUCTION] « toutes les marques d'un procès civil ordinaire », et, en l'espèce, l'écart entre la norme de preuve applicable à une audience disciplinaire de la police et celle applicable à une action civile est sans importance (par. 48-51);

- M. Penner a participé activement à l'audience disciplinaire (par. 52);

- la *LSP* accorde à la partie déboutée le droit d'interjeter appel à la Commission, un droit que M. Penner a exercé (par. 53).

[26] Par conséquent, la Cour d'appel a rejeté l'appel.

IV. Norme de contrôle

[27] La décision discrétionnaire d'un tribunal de juridiction inférieure est infirmée lorsque celui-ci s'est fondé sur des considérations erronées en droit ou que sa décision est erronée au point de créer une injustice : *Elsom c. Elsom*, [1989] 1 R.C.S. 1367, p. 1375. La décision discrétionnaire d'une instance inférieure peut également être infirmée à bon droit dans le cas où cette dernière n'accorde pas suffisamment d'importance aux considérations pertinentes ou ne leur en accorde pas du tout : *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 76-77.

V. Analyse

A. *Préclusion découlant d'une question déjà tranchée : le cadre juridique*

[28] La tenue d'une nouvelle instance à l'égard d'une question déjà tranchée gaspille les ressources, fait en sorte qu'il soit risqué pour les parties d'agir sur la foi du jugement obtenu à l'issue de l'instance antérieure, expose inéquitablement les parties à des frais additionnels, soulève le risque d'incohérence décisionnelle et, lorsque le premier décideur exerce

up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[29] The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

[30] The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.

[31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to

une fonction qui relève du droit administratif, risque de contrecarrer l'intention du législateur qui a mis en place le régime administratif. Pour ces motifs, le droit a développé un certain nombre de doctrines visant à limiter la tenue de nouvelles instances.

[29] La doctrine pertinente en l'espèce est celle de la préclusion découlant d'une question déjà tranchée. Elle établit un équilibre entre le caractère définitif des décisions et l'économie, d'une part, et d'autres considérations intéressant l'équité envers les parties, d'autre part. Toujours selon cette doctrine, une partie ne peut pas engager une nouvelle instance à l'égard d'une question tranchée de façon définitive à l'issue d'une instance judiciaire antérieure opposant les mêmes parties ou celles qui les remplacent. Toutefois, même si ces éléments sont réunis, la cour de justice conserve le pouvoir discrétionnaire de ne pas appliquer la préclusion découlant d'une question déjà tranchée lorsqu'il en découlerait une injustice.

[30] Selon le principe sur lequel repose ce pouvoir discrétionnaire, « [u]ne doctrine élaborée par les tribunaux dans l'intérêt de la justice ne devrait pas être appliquée mécaniquement et donner lieu à une injustice » : *Danyluk*, par. 1; voir également *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 52-53.

[31] La préclusion découlant d'une question déjà tranchée, de même que le pouvoir discrétionnaire qui s'y rattache, s'applique aux décisions des tribunaux administratifs. Le cadre juridique qui régit l'exercice de ce pouvoir discrétionnaire est énoncé dans *Danyluk*. À notre avis, ce cadre n'a pas été supplanté par la jurisprudence subséquente de la Cour. Lorsque les cours de justice exercent leur pouvoir discrétionnaire, elles doivent tenir compte de l'éventail et de la diversité des structures, des mandats et des règles de procédure qui circonscrivent le travail des décideurs dans la sphère administrative; toutefois, il ne faut pas exercer ce pouvoir discrétionnaire de manière à, dans les faits, sanctionner une attaque collatérale, ou à miner l'intégrité du régime administratif. Comme le souligne la jurisprudence de la Cour, particulièrement depuis *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, les lois qui créent les tribunaux administratifs sont le reflet des choix

ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

B. *No Public Policy Rule Precluding Issue Estoppel With Respect to Police Disciplinary Hearings*

[32] The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in *Danyluk*. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

[33] Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for "institutional bias" in the manner of appointing a hearing officer under s. 76(1) of the *PSA*: *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371, at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature's authority, and the Divisional Court in *Sharma*, at para. 28, concluded that the ability to appoint "retired police officers not associated with

politiques des législateurs et la prise de décision par ces tribunaux doit être traitée avec respect par les cours de justice. Cela dit, comme la Cour l'a affirmé dans *Danyluk*, au par. 67 : « [L]'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice concrète dans une affaire donnée. »

B. *Aucune règle d'intérêt public n'interdit l'application de la préclusion découlant d'une question déjà tranchée dans le cas d'audiences disciplinaires de la police*

[32] La Cour d'appel de l'Ontario a procédé à une analyse conventionnelle de la préclusion découlant d'une question déjà tranchée, selon les facteurs énoncés dans *Danyluk*. M. Penner et certains intervenants demandent à la Cour, et ce, dans l'intérêt public, d'interdire l'application de cette doctrine dans le contexte d'une audience disciplinaire de la police si cette application empêche un plaignant d'intenter une action en dommages-intérêts à l'égard des mêmes faits. De leur avis, appliquer la doctrine dans le cas d'une audience disciplinaire de la police a pour effet de nier au tribunal son rôle de gardien de la Constitution et de la primauté du droit. Selon eux également, l'intérêt public exige que la surveillance de l'action policière soit soumise au contrôle judiciaire. Ces arguments sont soulevés ouvertement pour la première fois devant la Cour.

[33] La surveillance de l'action policière est une question complexe qui suscite une vive attention de la part du public et appelle différentes réponses d'intérêt public. Au fil des ans, les cadres législatifs ont été révisés dans les buts exprès de favoriser l'efficacité des services policiers et d'accroître la transparence et la reddition de comptes du processus relatif aux plaintes du public. Dans une décision rendue en 2006, la Cour divisionnaire de l'Ontario a conclu que le législateur avait permis une « partialité institutionnelle » dans la nomination d'un agent d'audience effectuée en vertu du par. 76(1) de la *LSP* : *Sharma c. Waterloo Regional Police Service* (2006), 213 O.A.C. 371, par. 27. En l'espèce, les parties ne contestent pas qu'il s'agit là d'un exercice légitime du pouvoir du législateur,

this force is capable of founding such independence as necessary". See also the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005), at pp. 77-78.

et la Cour divisionnaire, dans *Sharma*, au par. 28, était d'avis que la faculté de nommer un « agent de police à la retraite qui n'a aucun lien avec le service permet d'assurer l'indépendance nécessaire ». Voir également l'honorable Patrick J. LeSage, *Rapport sur le système ontarien de traitement des plaintes concernant la police* (2005), p. 84-85.

[34] The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the *PSA*, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the *PSA* is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

[34] Le processus de plaintes du public comporte un certain nombre de mécanismes permettant de favoriser la participation du public et la reddition de comptes. Par exemple, aux termes de la partie II de la *LSP*, la Commission, à titre d'organisme composé de membres civils, procède en toute indépendance au contrôle des services policiers en Ontario afin d'assurer l'équité et la reddition de comptes dans l'intérêt du public. La partie V prévoit un processus complet permettant aux membres du public de déposer des plaintes officielles contre des politiques ou des services. Le contrôle des décisions résultant d'audiences disciplinaires tenues sous le régime de la *LSP* est possible, la *LSP* prévoyant un droit d'appel devant la Commission et ensuite devant la Cour divisionnaire : voir par. 70(1) et 71(1).

[35] We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

[35] Nous ne sommes pas convaincus qu'il est nécessaire ni souhaitable de créer une règle d'intérêt public qui exclurait de l'application de la préclusion découlant d'une question déjà tranchée les cas résultant d'audiences disciplinaires de la police. Cette doctrine invite les cours à exercer leur pouvoir discrétionnaire pour éviter l'injustice; elle appelle un examen au cas par cas des circonstances pour déterminer s'il résulterait une iniquité ou une injustice de son application.

C. *Discretionary Application of Issue Estoppel*

(1) Approach to the Exercise of Discretion

[36] We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

C. *Application discrétionnaire de la préclusion découlant d'une question déjà tranchée*

(1) Exercice du pouvoir discrétionnaire

[36] Nous souscrivons à la conclusion des tribunaux d'instance inférieure selon laquelle les trois conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies en l'espèce. La présente affaire porte donc sur l'exercice, par la Cour d'appel, de son pouvoir discrétionnaire de déterminer s'il serait injuste d'appliquer cette doctrine en l'espèce.

[37] This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

[38] The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

[39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) *Fairness of the Prior Proceedings*

[40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

[41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the

[37] Dans *Danyluk*, aux par. 68-80, la Cour a repris plusieurs facteurs relevés par le juge Laskin dans *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), qui sont pertinents pour l'analyse préalable à l'exercice du pouvoir discrétionnaire dans le contexte où un tribunal administratif s'est déjà prononcé sur la question en litige.

[38] Les facteurs énumérés dans *Danyluk* indiquent simplement certaines circonstances susceptibles d'être pertinentes dans un cas particulier pour déterminer si, dans l'ensemble, il est équitable d'appliquer cette doctrine. Cette liste n'est pas exhaustive. Il ne s'agit ni d'une liste de contrôle ni d'un appel à une analyse mécanique.

[39] De manière générale, les facteurs relevés dans la jurisprudence montrent que l'iniquité peut se manifester de deux façons principales qui se chevauchent et ne s'excluent pas l'une l'autre. Premièrement, l'iniquité de l'application de la préclusion découlant d'une question déjà tranchée peut résulter de l'iniquité de l'instance antérieure. Deuxièmement, même si l'instance antérieure s'est déroulée de manière juste et régulière, eu égard à son objet, il pourrait néanmoins se révéler injuste d'opposer la décision en résultant à toute action ultérieure.

a) *Caractère équitable de l'instance antérieure*

[40] Si l'instance antérieure a été inéquitable envers une partie, ce serait redoubler l'iniquité que cette partie soit liée par l'issue en résultant aux fins d'une action ultérieure. Par exemple, dans *Danyluk*, la décision administrative antérieure découlait d'un processus dans le cadre duquel M^me^ Danyluk n'avait pas été informée des allégations formulées par l'autre partie et n'avait pas eu la possibilité d'y répondre.

[41] Bon nombre des facteurs établis dans la jurisprudence, dont les garanties procédurales, l'existence d'un droit d'appel et l'expertise du décideur, ont trait à la possibilité de participer à la procédure administrative et au caractère équitable de cette dernière. Ces considérations sont importantes parce qu'elles permettent de déterminer si les parties ont eu une possibilité raisonnable de présenter leur position, si les questions soulevées ont été tranchées

issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) *The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings*

[42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

[43] Two factors discussed in *Danyluk* — "the wording of the statute from which the power to issue the administrative order derives" (paras. 68-70)

et s'il est possible de faire réexaminer la décision. Dans la négative, il pourrait se révéler injuste qu'elles se voient liées par la première décision aux fins d'autres actions.

b) *Caractère équitable du fait d'opposer l'issue d'une instance antérieure à une action intentée ultérieurement*

[42] La deuxième façon dont l'application de la préclusion découlant d'une question déjà tranchée peut se révéler inéquitable n'intéresse pas tant le caractère équitable de l'instance antérieure que celui du *fait d'opposer la décision issue de cette instance* à une autre action. Dans ce deuxième sens, l'équité fait l'objet d'un examen beaucoup plus nuancé. D'une part, une partie est censée soulever toutes les questions pertinentes et ne dispose pas de multiples tentatives pour obtenir un jugement favorable. Le caractère définitif est important tant pour les parties que pour le système judiciaire. En revanche, même si l'instance antérieure s'est déroulée de manière juste et régulière eu égard à son objet, il pourrait se révéler injuste d'empêcher, sur le fondement de l'issue d'une procédure antérieure, la tenue d'une autre instance. Par exemple, ce peut être le cas lorsque les objets, la procédure ou les enjeux des deux instances diffèrent grandement. Nous reconnaissons que la procédure administrative et la procédure judiciaire différeront toujours sur ces plans. Or, pour démontrer qu'il y a iniquité selon ce deuxième sens que nous venons de décrire, il faut un écart considérable, évalué à la lumière de l'importance que revêt également en droit administratif, selon la Cour, le caractère définitif des litiges. Comme l'ont souligné les juges Doherty et Feldman dans *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 39, si les tribunaux refusaient systématiquement d'appliquer la préclusion découlant d'une question déjà tranchée parce que les garanties procédurales applicables en matière administrative et en matière judiciaire ne correspondent pas, cette doctrine serait l'exception plutôt que la règle.

[43] Deux facteurs analysés dans *Danyluk* — « le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative » (par. 68-70)

and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.

[44] For example, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), a defendant in a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire would be a final resolution of that issue, it followed that it "was not within the reasonable expectation of either party at the time of those proceedings" that it would be: *Bugbusters*, at para. 30.

[45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.

[46] There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and

et « l'objet de la loi » (par. 71-73), y compris la teneur de l'enjeu financier — sont forts pertinents en l'espèce quant à l'analyse relative à l'équité selon ce deuxième sens. Ces facteurs tiennent compte de l'intention du législateur lorsqu'il a créé le régime administratif et définissent les attentes raisonnables des parties concernant la portée et l'effet de l'instance ainsi que son incidence sur les droits en général des parties au litige : *Minott*, p. 341-342.

[44] Par exemple, dans *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), le défendeur dans une action civile a invoqué la décision du chef forestier adjoint pour empêcher la Couronne d'intenter une action civile en dommages-intérêts en réparation du préjudice causé par un incendie de forêt. La Cour d'appel a confirmé la décision du juge en cabinet d'exercer son pouvoir discrétionnaire de refuser d'appliquer la préclusion découlant d'une question déjà tranchée. La loi ne prévoyant pas que la décision du chef forestier adjoint sur la cause d'un incendie soit définitive, la finalité de cette décision [TRADUCTION] « n'appartenait pas aux attentes raisonnables de l'une ou l'autre des parties à l'instance » : *Bugbusters*, par. 30.

[45] Par conséquent, lorsque l'objet de deux instances diffère grandement, l'application de la préclusion découlant d'une question déjà tranchée pourrait se révéler injuste, même si l'instance antérieure s'est déroulée dans le respect scrupuleux de l'équité, eu égard à l'objet du régime législatif la régissant. Par exemple, lorsque les enjeux de l'instance antérieure ne sont pas assez importants pour une partie, cette dernière n'aurait guère avantage à offrir une participation vigoureuse et complète : *Toronto (Ville)*, par. 53.

[46] Il existe aussi une considération de politique générale liée à l'objet du régime législatif qui régit l'instance antérieure. En appliquant la préclusion découlant d'une question déjà tranchée dans le cas d'un litige où une partie s'attend raisonnablement à des enjeux peu importants, on risque d'inciter à l'avenir d'éventuelles parties à escamoter complètement ce recours ou à y participer plus activement et vigoureusement que ne le commande le bon sens.

efficiency of administrative regimes and therefore undermine the purpose of creating the tribunal: *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII), at para. 28; *Minott*, at p. 341; and *Danyluk*, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.

[47] Thus, the text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

[48] These considerations are also relevant to weighing another factor identified in *Danyluk*: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party's decision whether to take advantage of procedural protections available in the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in This Case

[49] In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a

Cette situation nuirait au caractère expéditif et à l'efficacité du régime administratif et compromettrait donc l'objet sous-jacent à la création du tribunal : *Burchill c. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII), par. 28; *Minott*, p. 341; et *Danyluk*, par. 73. Dans le contexte qui nous occupe, cela pourrait décourager des citoyens de déposer des plaintes pour inconduite policière.

[47] Ainsi, le libellé et l'objet du régime législatif définissent les attentes raisonnables des parties quant à la portée et à l'effet de l'instance administrative. Ils définissent le rôle des parties dans le déroulement de l'instance et l'étendue de leur apport. Lorsque le régime législatif prévoit des instances multiples dont les objets sont fort différents, l'application de la doctrine risque non seulement de bouleverser les attentes légitimes et raisonnables des parties, mais aussi de nuire à l'efficacité et aux objectifs d'intérêt général du régime administratif, en favorisant le formalisme et les lenteurs, voire en décourageant complètement l'exercice d'un recours administratif.

[48] Ces considérations sont également pertinentes pour évaluer un autre facteur énoncé dans *Danyluk*, à savoir les garanties procédurales applicables dans le cadre du processus administratif antérieur. La décision d'une partie de se prévaloir ou non des garanties procédurales propres à l'instance antérieure ne saurait être examinée sans que le soient également ses attentes raisonnables quant aux enjeux ou les objets fondamentalement différents des deux types d'instances. Il convient d'analyser les liens entre les considérations pertinentes à la lumière de l'ensemble.

(2) Caractère équitable de l'opposition des conclusions issues de l'enquête disciplinaire à l'action civile en l'espèce

[49] En toute déférence, nous estimons que la Cour d'appel n'a pas axé son examen sur l'équité selon le deuxième sens que nous venons de décrire. Nous ne trouvons rien à redire à ses conclusions selon lesquelles l'audience disciplinaire était équitable

meaningful way. However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

et M. Penner a participé utilement au processus. Toutefois, bien qu'elle ait analysé en détail la procédure disciplinaire en soi pour en déterminer le caractère équitable, elle n'a pas analysé de manière exhaustive la question de savoir s'il serait équitable d'opposer le résultat de cette procédure aux demandes civiles de l'appelant, à la lumière de la nature et de la portée de cette instance antérieure ainsi que des attentes raisonnables des parties à cet égard.

(a) *The Legislation Establishing the Disciplinary Hearing*

a) *Loi établissant la procédure d'audience disciplinaire*

[50] As the Court of Appeal pointed out, "the legislature did not intend to foreclose [Mr. Penner's] civil action simply because he filed a complaint under the [*PSA*]": para. 42. The *PSA* features statutory privilege provisions, three of which are noteworthy here. Documents generated during the complaint process are inadmissible in civil proceedings: s. 69(9). Persons who carry out duties in the complaint process cannot be forced to testify in civil proceedings about information obtained in the course of their duties: s. 69(8). Finally, persons engaged in the administration of the complaints process are obligated to keep information obtained during the process confidential, subject to certain exceptions: s. 80. These provisions specifically contemplate parallel proceedings in relation to the same subject matter.

[50] Comme l'a souligné la Cour d'appel, [TRADUCTION] « l'intention du législateur n'était pas de faire obstacle à [l]'action civile [de M. Penner] au seul motif qu'il a porté plainte en vertu de la [*LSP*] » : par. 42. La *LSP* prévoit des dispositions établissant des privilèges, dont trois méritent d'être mentionnées. Les documents préparés au cours du processus de plainte ne sont pas admissibles dans une instance civile : par. 69(9). La personne qui exerce ses fonctions dans le cadre du processus de plainte ne peut être tenue de témoigner dans une instance civile relativement aux renseignements obtenus dans l'exercice de ses fonctions : par. 69(8). Enfin, la personne qui participe à l'administration du processus de plainte doit tenir confidentiel tout renseignement obtenu au cours de ce processus, à quelques exceptions près : art. 80. Ces dispositions prévoient expressément la possibilité d'instances parallèles relativement aux mêmes faits.

[51] Here, as recognized by the Court of Appeal, the legislation does not intend to foreclose parallel proceedings when a member of the public files a complaint. This would shape the reasonable expectations of the parties and the nature and extent of their participation in the process.

[51] En l'espèce, comme l'a reconnu la Cour d'appel, la loi ne vise pas à empêcher la tenue d'instances parallèles dans le cas d'une plainte du public. Cela a une incidence sur les attentes raisonnables des parties ainsi que sur la nature et la portée de leur participation au processus.

[52] Nothing in the legislative text, therefore, could give rise to a reasonable expectation that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the constables, the Chief of Police or the Police Services Board in his civil action.

[52] Le texte législatif ne comporte donc aucun élément susceptible de donner naissance à une attente raisonnable que l'audience disciplinaire serait concluante quant aux droits que M. Penner pourrait faire valoir contre les agents de police, le chef de police ou la commission de services policiers dans le cadre d'une action civile.

(b) *Reasonable Expectations of the Parties: Different Purposes of the Proceedings and Other Considerations*

[53] The Court of Appeal recognized that the purposes of a police disciplinary proceeding and a civil action were different and that this weighed against the application of issue estoppel.

[54] The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the *PSA* promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.

[55] In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

[56] First, Mr. Penner's civil action was filed in July 2003, almost a year *before* the hearing officer released his decision on June 28, 2004. In *Danyluk*, the civil proceedings had commenced before the administrative proceedings concluded. Binnie J. reasoned that this weighed against applying issue estoppel because "the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings": para. 70.

[57] Second, Hermiston J., in the most pertinent Ontario case on the question of issue estoppel in the police disciplinary hearing context at the time, *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL) (S.C.J.), stated that an acquittal of an officer at a disciplinary hearing *did not* give rise to issue estoppel in relation to the same issues in a subsequent civil action.

b) *Attentes raisonnables des parties : objets différents des deux types d'instances et autres considérations*

[53] La Cour d'appel a reconnu que les objets visés par une procédure disciplinaire de la police et une action civile diffèrent et que ce fait militait contre l'application de la préclusion découlant d'une question déjà tranchée.

[54] L'audience disciplinaire appartient au processus par lequel l'employeur décide de l'opportunité de mesures disciplinaires contre un agent de police. En faisant du plaignant une partie à l'instance, la *LSP* favorise la transparence et la reddition de comptes dans l'intérêt du public. Ce processus ne prévoit toutefois ni réparation ni dépens en faveur du plaignant. En revanche, une action civile fournit une tribune permettant s'il y a lieu à la partie lésée d'être indemnisée.

[55] Outre le texte de loi, plusieurs faits appellent la même conclusion sur les attentes raisonnables des parties quant à l'incidence de l'audience disciplinaire sur l'action civile.

[56] Premièrement, M. Penner a déposé son recours civil en juillet 2003, soit environ un an *avant* que l'agent d'audience rende sa décision, le 28 juin 2004. Dans *Danyluk*, l'action civile avait été intentée avant que la procédure administrative ne prenne fin. Selon le juge Binnie, cette situation militait contre l'application de la préclusion découlant d'une question déjà tranchée parce que « les intimés savaient parfaitement, en droit et en fait, qu'ils devaient se défendre dans des procédures parallèles se chevauchant dans une certaine mesure » : par. 70.

[57] Deuxièmement, suivant l'opinion du juge Hermiston, dans la décision ontarienne la plus pertinente à l'époque en matière d'audience disciplinaire de la police et de préclusion découlant d'une question déjà tranchée, *Porter c. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL) (C.S.J.), l'acquittement d'un agent de police à l'issue d'une audience disciplinaire *ne* donne *pas* lieu à l'application de cette doctrine relativement aux mêmes questions invoquées dans une action civile intentée ultérieurement.

[58] Third, a person in Mr. Penner's position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action.

(c) *Financial Stake in the Disciplinary Hearing*

[59] The Court of Appeal noted that the lack of a financial stake in the administrative proceeding, on its own, does not ordinarily resolve how the court should exercise its discretion in applying issue estoppel in a civil action. However, the Court of Appeal went further. With respect to the absence of a financial stake in the outcome of the disciplinary hearing, the court said, at para. 43:

> This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner's civil action. In other words, issue estoppel works both ways.

[60] In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel "works both ways" here. As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different

[58] Troisièmement, il se peut très bien qu'une personne dans la même situation que M. Penner estime improbable qu'une instance ne présentant pour elle ou lui aucun enjeu personnel ou financier puisse l'empêcher d'intenter une action civile pour réclamer des dommages-intérêts considérables.

c) *Enjeu financier de l'audience disciplinaire*

[59] Selon la Cour d'appel, l'absence d'enjeu financier de la procédure administrative ne règle pas habituellement en soi la question de savoir dans quel sens la cour saisie d'un recours civil devrait exercer son pouvoir discrétionnaire en matière de préclusion découlant d'une question déjà tranchée opposable à une telle action civile. Or, la Cour d'appel n'en est pas restée là et a tenu les propos suivants au sujet de l'absence d'enjeu financier à l'audience disciplinaire :

> [TRADUCTION] Il s'agit d'une considération importante qui milite à l'encontre de l'application de la préclusion découlant d'une question déjà tranchée. Cependant, son poids est réduit en raison de l'avantage indirect que peut procurer l'instance disciplinaire à M. Penner. Par exemple, si l'agent d'audience avait conclu que les deux agents de police n'avaient eu aucun motif raisonnable et probable d'arrêter M. Penner ou qu'ils avaient employé une force excessive à son encontre, de telles conclusions auraient probablement empêché les agents de soutenir le contraire dans le cadre de l'action civile de M. Penner. En d'autres termes, la préclusion découlant d'une question déjà tranchée joue dans les deux sens. [par. 43]

[60] À notre avis, cette analyse est viciée. On ne peut pas nécessairement dire que la préclusion découlant d'une question déjà tranchée « joue dans les deux sens » en l'espèce. Comme l'a reconnu la Cour d'appel, puisque la *LSP* exige que l'inconduite d'un agent de police soit « prouvée sur la foi de preuves claires et convaincantes » (par. 64(10)), il s'ensuit que la conclusion d'inconduite, selon la nature des constatations de fait, pourrait empêcher que la question de la responsabilité soit réexaminée dans le cadre d'une action civile, où s'appliquerait la prépondérance des probabilités, une norme de preuve moins exigeante. Toutefois, il n'en va pas de même de l'acquittement. Il ne faut pas déduire du fait que le poursuivant n'a pas prouvé les accusations sur la foi de « preuves claires et convaincantes » qu'elles n'auraient pu être établies

standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

[61] By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

(d) *Issue Estoppel May Work to Undermine the Purpose of Administrative Proceedings*

[62] Another important policy consideration referred to earlier arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants in Mr. Penner's position will have every incentive to mount a full-scale case, which

selon la prépondérance des probabilités. Compte tenu des normes de preuve différentes, le plaignant n'aurait aucun motif de croire que la préclusion découlant d'une question déjà tranchée s'appliquerait en cas d'acquittement des agents de police. En effet, dans *Porter*, la cour a refusé d'appliquer cette doctrine à la suite d'un acquittement prononcé à l'issue d'une audience disciplinaire de la police parce que l'agent d'audience avait rendu sa décision sur le fondement d'une [TRADUCTION] « norme de preuve exigeante et que sa décision aurait pu se révéler différente si l'agent avait appliqué la norme moins exigeante que commande la procédure civile » : par. 11. Par conséquent, les parties ne pouvaient pas raisonnablement envisager que l'acquittement des agents de police à l'issue de l'audience disciplinaire serait déterminant pour l'issue de l'action civile intentée par M. Penner.

[61] En tenant pour acquis que la préclusion découlant d'une question déjà tranchée « joue dans les deux sens », la Cour d'appel a accordé un poids insuffisant au fait que l'audience disciplinaire ne présentait aucun enjeu financier pour M. Penner, et elle a eu tort de conclure que l'enjeu était plus important que ce qu'il aurait raisonnablement pu croire à l'époque.

d) *La préclusion découlant d'une question déjà tranchée risque de compromettre l'objet du régime administratif*

[62] Une autre considération importante d'intérêt public mentionnée précédemment se soulève en l'espèce, à savoir le risque de complexité et de longueur accrues des instances administratives du fait qu'une importance excessive soit accordée à leur issue par l'application de la préclusion découlant d'une question déjà tranchée. Certes, M. Penner aurait pu participer plus pleinement à l'audience qu'il ne l'a fait s'il avait retenu les services d'un avocat pour tenter d'obtenir une conclusion d'inconduite qui aurait profité à son action civile. Or, suivre trop facilement un tel raisonnement risque de conduire à des résultats imprévus et non souhaitables. Il se pourrait qu'ainsi le processus administratif se substitue à l'action civile intentée par M. Penner. Si c'est non pas devant le tribunal, mais devant l'agent d'audience qu'une action

would tend to defeat the expeditious operation of the disciplinary hearing.

[63] In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of the disciplinary hearing, or the fairness to the officers in that hearing. Finally, a further significant risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

(e) *The Role of the Chief of Police*

[64] Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.

[65] It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account in assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.

[66] Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

en dommages-intérêts se décide en fin de compte, les justiciables qui se trouvent dans la situation de M. Penner auront tout intérêt à monter un dossier très étoffé, ce qui irait à l'encontre du caractère expéditif de l'audience disciplinaire.

[63] Dans le contexte du présent pourvoi, cela signifierait également que les agents de police, pour qui l'audience présente un enjeu important, se verraient, dans les faits, obligés de comparaître devant deux poursuivants plutôt qu'un, vu la présence du conseiller juridique du plaignant. Nous doutons que cette situation favorise l'efficacité de l'audience disciplinaire ou l'équité envers les agents de police dans le cadre de ce type d'audience. Enfin, la situation présenterait un autre risque important, soit celui qu'un plaignant potentiel ne s'abstienne tout simplement de déposer une plainte pour ne pas compromettre son action civile.

e) *Le rôle du chef de police*

[64] Suivant la procédure relative aux plaintes du public prévue dans la *LSP* de l'époque, le chef de police faisait mener une enquête sur toute plainte et déterminait si la tenue d'une audience était justifiée. Il nommait l'enquêteur, le poursuivant et l'agent d'audience.

[65] Il a été reconnu que ces arrangements ne sont pas répréhensibles pour les besoins d'une audience disciplinaire (notamment dans *Sharma*). Nous estimons toutefois que, pour évaluer s'il est équitable d'opposer l'issue du processus disciplinaire aux demandes civiles de M. Penner, il faut tenir compte du fait que cette décision a été rendue par le délégué du chef de police. À notre avis, bien qu'il n'ait pas été présenté clairement à la Cour d'appel, ce point est important.

[66] En l'espèce, l'application de la préclusion découlant d'une question déjà tranchée contre le plaignant a fait en sorte que le chef de police a jugé sa propre affaire; la décision de son délégué a ainsi eu pour effet de soustraire le chef de police et son service de police à toute responsabilité civile. À notre avis, appliquer la doctrine dans ce cas choque gravement les principes fondamentaux d'équité.

[67] We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.

[67] Il importe de préciser que l'iniquité ne découle pas de l'exercice, par le chef de police, de ses fonctions prévues par la loi. Les parties en conviennent et, compte tenu du cadre législatif, elles ne soulèvent aucune objection liée à l'équité quant au rôle du chef de police prévu par le cadre législatif, et sont d'accord pour dire que rien ne permet d'affirmer que celui-ci a erré dans l'exercice des fonctions que lui confère la loi. De plus, aucune iniquité flagrante ne ressortirait d'une conclusion d'inconduite policière, puisqu'il s'agirait d'une décision contraire aux intérêts du chef de police ou de la commission de services policiers. L'iniquité qui nous intéresse se manifeste seulement lorsque la décision du chef de police (ou de son délégué) concluant à l'absence d'inconduite policière dans un contexte disciplinaire est utilisée à une fin tout à fait différente, soit pour le soustraire, par le jeu de la préclusion découlant d'une question déjà tranchée, à toute responsabilité civile relativement aux mêmes faits.

[68] Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue estoppel against the appellant in the circumstances of this case was fundamentally unfair.

[68] À notre avis, si elle avait eu la possibilité d'examiner pleinement l'importance de ces points, la Cour d'appel aurait constaté qu'appliquer cette doctrine contre l'appelant dans les circonstances de l'espèce était fondamentalement inéquitable.

VI. Conclusion

VI. Conclusion

[69] Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.

[69] La doctrine de la préclusion découlant d'une question déjà tranchée sert à établir un équilibre entre le caractère définitif des décisions et l'économie des ressources d'une part, et d'autres considérations intéressant l'équité envers les parties d'autre part. Il s'agit d'une doctrine souple qui permet au tribunal d'apprécier le caractère équitable d'une affaire donnée. Nous ne voyons aucune raison de nous écarter de cette approche et de créer une règle d'intérêt public visant à empêcher l'application de la préclusion découlant d'une question déjà tranchée dans le contexte d'une plainte du public contre la police.

[70] Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important

[70] Compte tenu du régime législatif et des objets et enjeux financiers fort différents des deux types d'instance, les parties ne pouvaient pas raisonnablement envisager que l'acquittement des agents de police à l'audience disciplinaire serait déterminant quant à l'issue de l'action civile intentée par

considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.

[71] Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

VII. Disposition

[72] We would allow the appeal with costs to the appellant throughout.

The reasons of LeBel, Abella and Rothstein JJ. were delivered by

[73] LeBel and Abella JJ. (dissenting) — Litigation must come to an end, in the interests of the litigants themselves, the justice system and our society. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. The purposes of proceedings may vary like the governing procedures, but the principle of finality of litigation should be maintained.

[74] This appeal concerns the proper approach to the discretionary application of issue estoppel in the context of prior administrative proceedings dealing with police conduct.

M. Penner. Il s'agit de considérations importantes dont la Cour d'appel n'a pas tenu compte lorsqu'elle a apprécié les autres facteurs tels que la participation de M. Penner à titre de partie et les garanties procédurales de l'instance administrative. De plus, cette application de la préclusion a eu pour effet d'utiliser la décision rendue par le délégué du chef de police pour soustraire le chef de police à l'action civile.

[71] L'application de la préclusion découlant d'une question déjà tranchée contre M. Penner pour bloquer son action civile en dommages-intérêts était fondamentalement inéquitable dans les circonstances de l'espèce.

VII. Dispositif

[72] Nous sommes d'avis d'accueillir le pourvoi avec dépens en faveur de l'appelant dans toutes les cours.

Version française des motifs des juges LeBel, Abella et Rothstein rendus par

[73] Les juges LeBel et Abella (dissidents) — Tout litige doit avoir une fin, et ce, dans l'intérêt des parties, du système de justice et de notre société. Le caractère définitif des litiges est un principe fondamental qui garantit l'équité et l'efficacité du système de justice au Canada. La doctrine de la préclusion découlant d'une question déjà tranchée vient appuyer ce principe. Elle vise à protéger l'attente raisonnable des parties quant à leur capacité de se fier au résultat d'une décision rendue par un décideur habilité à trancher, peu importe que la décision ait été prise dans le contexte d'une procédure judiciaire ou d'une procédure administrative. L'objet peut varier d'une instance à l'autre, tout comme les procédures applicables, mais le principe du caractère définitif des litiges doit être maintenu.

[74] Le présent pourvoi porte sur l'approche à adopter quant à l'application discrétionnaire de la doctrine de la préclusion lorsqu'une question a déjà été tranchée dans le contexte d'une procédure administrative intentée antérieurement au sujet de la conduite d'un policier.

[75] The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent, therefore, that governs the application of the doctrine in this case.

[76] The key relevant aspect of this precedent is that it moved away from the approach taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals. In so doing, *Danyluk* said that the approach should be "fairness" and set out a number of factors for assessing how "fairness" applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court's subsequent jurisprudence starting with *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160. The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471).

[77] The approach of our colleagues is not only inconsistent with recent developments in the law of judicial review, it also raises potential difficulties in the branch of judicial review which is concerned with procedural fairness. Inasmuch as a process is considered to be unfair, the proper way to attack it would be to challenge it, under the principles of natural justice. In addition, the position of our colleagues may also ignore the ability of legislatures

[75] La Cour s'est penchée sur cette question le plus récemment en 2011, dans l'arrêt *Colombie-Britannique (Workers' Compensation Board) c. Figliola*, 2011 CSC 52, [2011] 3 R.C.S. 422. Ce précédent régit donc l'application de la doctrine en l'espèce.

[76] L'élément essentiel pertinent de ce jugement se retrouve dans la distance qu'il a prise par rapport à l'approche préconisée dans *Danyluk c. Ainsworth Technologies Inc.*, 2001 CSC 44, [2001] 2 R.C.S. 460, où la Cour a énoncé un test différent quant à l'application discrétionnaire de la préclusion découlant d'une question déjà tranchée dans le contexte des décisions administratives. Ce faisant, *Danyluk* précisait que l'approche devait être fondée sur l'« équité » et a énuméré un certain nombre de facteurs à prendre en considération pour juger de l'« équité » appliquée. Selon nous, ces facteurs ne peuvent plus jouer le même rôle, et on ne saurait continuer à leur accorder le même poids, compte tenu de la jurisprudence subséquente de la Cour, à commencer par *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190. En effet, la pertinence de ces facteurs a été considérablement limitée par la jurisprudence en question. Par exemple, le facteur de la violation des règles de justice naturelle, dégagé à partir des différences de nature procédurale entre les cours et les tribunaux administratifs ainsi que de celle relative à l'expertise du décideur, porte principalement à des concepts écartés par la Cour dans *Dunsmuir* et dans *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160. Quant aux facteurs relatifs au libellé et à l'objet du texte législatif, on y réfère désormais en parlant du mandat du tribunal (*Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471).

[77] L'approche que préconisent nos collègues est non seulement incompatible avec l'évolution récente du droit relatif au contrôle judiciaire, elle pose aussi des difficultés potentielles dans la branche de ce domaine du droit relative à l'équité procédurale. Dans la mesure où un processus est jugé inéquitable, sur la base des principes de justice naturelle, la façon correcte de l'attaquer consisterait à le contester directement sur la base de ces principes. De plus,

to design administrative processes and define the nature and limits of procedural fairness in the absence of constitutional considerations. Finally, the justice system faces important difficulties in respect of access to civil and criminal justice. To hold that the traditional model of civil and criminal justice is the golden standard against which the fairness of administrative justice is to be measured clearly does not meet the needs of the times from a policy perspective.

[78] The "twin principles" which underlie the doctrine of issue estoppel — "that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause" (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.), at p. 946) — are core principles which focus on achieving fairness and preventing injustice *by preserving the finality of litigation*. This, as the majority said in *Figliola*, is the case whether we are dealing with courts or administrative tribunals. Our colleagues' approach undermines these principles and risks transforming issue estoppel into a free-floating inquiry into "fairness" and "injustice" for administrative tribunals and revives an approach that our Court refused to apply in *Figliola*.

I. Background

[79] The appellant, Wayne Penner, filed a public complaint against two police officers alleging that the officers were guilty of police misconduct under the *Police Services Act*, R.S.O. 1990, c. P.15, and the *Code of Conduct* (O. Reg. 123/98, Part V, Sch.). His complaint alleged that the officers made an unlawful arrest and used unnecessary force, both during the arrest and at the police station. Mr. Penner also commenced a civil action in the Ontario Superior Court of Justice seeking damages against the same police officers for unlawful arrest,

la position de nos collègues ignore possiblement la capacité des législateurs de concevoir des processus administratifs et de définir la nature et les limites de l'équité procédurale en l'absence de considérations constitutionnelles. Finalement, des problèmes importants d'accès à la justice tant civile que criminelle se posent pour le système de justice. Soutenir que le modèle traditionnel de justice civile et criminelle constitue la norme par excellence à l'aune de laquelle il faut juger de l'équité de la justice administrative ne sert clairement pas les besoins actuels d'un point de vue de politique juridique.

[78] Les « principes jumeaux » qui sous-tendent la doctrine de la préclusion découlant d'une question déjà tranchée — soit que [TRADUCTION] « tout litige doit avoir une fin et [. . .] que la même partie ne doit pas être harassée deux fois pour la même cause » (*Carl Zeiss Stiftung c. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.), p. 946) — constituent des principes fondamentaux qui visent avant tout l'atteinte de l'équité et la prévention de l'injustice *en préservant le caractère définitif des litiges*. Cela demeure vrai, comme l'ont affirmé les juges majoritaires dans *Figliola*, tant à l'égard des cours de justice que des tribunaux administratifs. L'approche préconisée par nos collègues mine ces principes et risque de transformer la préclusion découlant d'une question déjà tranchée en une enquête dépourvue de tout encadrement sur l'« équité » et l'« injustice » de la procédure des tribunaux administratifs et ravive une approche que la Cour a refusé d'appliquer dans *Figliola*.

I. Contexte factuel

[79] L'appelant, Wayne Penner, a déposé une plainte contre deux agents de police, dans laquelle il alléguait que ceux-ci étaient coupables d'inconduite au sens de la *Loi sur les services policiers*, L.R.O. 1990, ch. P.15, et du *Code of Conduct* (Règl. de l'Ont. 123/98, partie V, ann.). Il alléguait que les agents de police avaient effectué une arrestation illégale et avaient fait usage d'une force excessive tant lors de l'arrestation qu'au poste de police. M. Penner a également intenté une action civile devant la Cour supérieure de justice de l'Ontario pour que les mêmes agents de police

use of unnecessary force, false imprisonment, and malicious prosecution.

[80] In 2004, Mr. Penner's complaint under the *Police Services Act* proceeded to a disciplinary hearing before a hearing officer, a retired superintendent of the Ontario Provincial Police, who was appointed by the Chief of Police. The hearing took place over the course of several days, during which time 13 witnesses were called, exhibits were filed, including audio and video recordings of the relevant events, and each party including Mr. Penner had the opportunity to make submissions on points of law. Mr. Penner, as the complainant, had the option to retain legal counsel but chose to represent himself. He was active in the proceedings: he testified, participated in cross-examination, and provided written submissions.

[81] The hearing officer gave written reasons for his decision. In his reasons, he dismissed Mr. Penner's complaint and found the police officers not guilty of any misconduct, rejecting most of Mr. Penner's evidence, and preferring the testimony of the other witnesses, as well as the audio and video recordings of the events.

[82] He made the following findings of fact:

- he "was unable to see any evidence whatsoever of any excessive or unnecessary force used on Mr. Penner" (A.R., at p. 112 (emphasis added));
- "there is no clear, convincing or cogent evidence whatsoever to indicate that Mr. Penner was the victim of the unnecessary or unlawful application of force while in custody at the police station" (p. 114 (emphasis added)); and
- he was "convinced that Mr. Penner was exhibiting behaviour that would be consistent with escalating hostility" and that therefore "the force that was used during Mr. Penner's arrest was totally justified" (p. 115 (emphasis added)).

soient condamnés à lui verser des dommages-intérêts pour arrestation illégale, recours à une force excessive, détention injustifiée et poursuite abusive.

[80] En 2004, la plainte de M. Penner, déposée en application de la *Loi sur les services policiers*, a donné lieu à une audience disciplinaire devant un agent d'audience, un surintendant à la retraite de la Police provinciale de l'Ontario, nommé par le chef de police. L'audience s'est déroulée pendant plusieurs jours durant lesquels 13 témoins ont été appelés, des pièces ont été produites — notamment des enregistrements audio et vidéo des événements pertinents — et où chaque partie, y compris M. Penner, a pu présenter des observations sur des questions de droit. À titre de plaignant, M. Penner pouvait retenir les services d'un avocat, mais il a choisi de se représenter lui-même. Il a participé activement à l'instance : il a livré un témoignage, a participé au contre-interrogatoire et a présenté des observations écrites.

[81] L'agent d'audience a motivé sa décision par écrit. Il a rejeté la plainte de M. Penner et a déclaré les agents de police non coupables d'inconduite. Il a rejeté la plus grande partie du témoignage de M. Penner, lui préférant les dépositions des autres témoins, ainsi que les enregistrements audio et vidéo des événements.

[82] L'agent d'audience a tiré les conclusions de fait suivantes :

- il n'a [TRADUCTION] « trouvé aucun élément de preuve démontrant que les agents ont fait usage d'une force inutile ou excessive à l'endroit de M. Penner » (d.a., p. 112 (nous soulignons));
- il a conclu qu'« il n'y a aucune preuve claire, convaincante ou pertinente démontrant que M. Penner a été victime d'un usage excessif ou illégal de la force lorsqu'il a été placé sous garde au poste de police » (p. 114 (nous soulignons));
- il était « convaincu que M. Penner a adopté un comportement qui s'est transformé en hostilité » et que, par conséquent, « le degré de force utilisé lors de l'arrestation de M. Penner était tout à fait justifié » (p. 115 (nous soulignons)).

[83] Mr. Penner appealed on the basis of these findings to the Ontario Civilian Commission on Police Services. The Commission overturned the decision of the hearing officer for the reason that the officers did not have the lawful authority to arrest Mr. Penner in a courtroom presided over by a Justice of the Peace.

[84] The respondents sought judicial review of the Commission's decision in the Ontario Divisional Court. The Divisional Court unanimously found the Commission's decision to be unreasonable and restored the hearing officer's decision (*Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317). The Divisional Court found that the findings of fact made by the hearing officer were based on an "ample evidentiary foundation" and that there was "no manifest error, no ignoring of conclusive or relative evidence, nor any indication he misunderstood the evidence or drew erroneous conclusions from it" (para. 28). Mr. Penner did not appeal the decision of the Divisional Court to the Ontario Court of Appeal.

[85] Following the conclusion of the judicial review proceedings, the respondents (who are defendants in the civil action) brought a motion under Rule 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss Mr. Penner's civil claims for unlawful arrest, use of unnecessary force, false imprisonment and malicious prosecution, all on the basis of issue estoppel. The motion judge granted the Rule 21 motion and struck these allegations from Mr. Penner's statement of claim.

[86] The Ontario Court of Appeal dismissed Mr. Penner's appeal (2010 ONCA 616, 102 O.R. (3d) 688). The Court of Appeal agreed with the motion judge that the preconditions for issue estoppel had been met and found that there were no grounds to exercise their discretion not to apply the doctrine in this case.

[83] Invoquant ces conclusions, M. Penner a interjeté appel à la Commission civile des services policiers de l'Ontario. Celle-ci a infirmé la décision de l'agent d'audience au motif que les agents de police n'étaient pas légalement autorisés à arrêter M. Penner dans une salle d'audience pendant qu'un juge de paix présidait la séance.

[84] Les intimés ont alors demandé le contrôle judiciaire de la décision de la Commission devant la Cour divisionnaire de l'Ontario. Cette dernière a conclu à l'unanimité que la décision de la Commission était déraisonnable et a rétabli la décision de l'agent d'audience (*Parker c. Niagara Regional Police Service* (2008), 232 O.A.C. 317). Selon la Cour divisionnaire, les conclusions de fait tirées par l'agent d'audience étaient [TRADUCTION] « fondées amplement sur la preuve » et il n'y avait « aucune erreur manifeste, aucune omission de tenir compte d'éléments de preuve concluants ou pertinents, ni aucune indication qu'il a mal interprété la preuve ou qu'il en a tiré des conclusions erronées » (par. 28). M. Penner n'a pas interjeté appel de la décision de la Cour divisionnaire devant la Cour d'appel de l'Ontario.

[85] Au terme de la procédure de contrôle judiciaire, les intimés (les défendeurs à l'action civile) ont présenté une motion en vertu de la règle 21.01 des *Règles de procédure civile*, R.R.O. 1990, Règl. 194, visant à faire rejeter l'action civile intentée par M. Penner pour arrestation illégale, recours à une force excessive, détention injustifiée et poursuite abusive, en invoquant contre toutes ces allégations la préclusion découlant d'une question déjà tranchée. Le juge des motions a accueilli la motion présentée en vertu de la règle 21 et a radié ces allégations de la déclaration de M. Penner.

[86] La Cour d'appel de l'Ontario a rejeté l'appel de M. Penner (2010 ONCA 616, 102 O.R. (3d) 700). Elle a convenu avec le juge des motions que les conditions d'application de la préclusion découlant d'une question déjà tranchée avaient été réunies et a conclu qu'elle n'avait aucune raison d'exercer son pouvoir discrétionnaire et de refuser d'appliquer cette doctrine dans la présente affaire.

[87] In his appeal to this Court, Mr. Penner does not directly challenge the Court of Appeal's finding that the preconditions for issue estoppel are satisfied. Rather, his appeal focuses on whether the Court of Appeal properly exercised its discretion to apply issue estoppel and argues that it should have declined to do so.

II. Analysis

A. *The Role of Issue Estoppel*

[88] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. It arose as a doctrinal response to the "twin principles . . . that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause" (*Carl Zeiss Stiftung*, at p. 946; K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at p. 4; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 4-7).

[89] These twin principles are often expressed in terms of the public interest in ensuring the finality of litigation, whether it is civil, criminal or administrative, and the individual interests of protecting the parties against the unfairness of repeated suits and prosecutions (see *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 53; Handley, at p. 4; Lange, at p. 7). However, it is clear that the overarching goal underlying both principles is to protect the fairness and integrity of the justice system by preventing duplicative proceedings. In other words, these principles are not competing values, but are fundamentally linked. As this Court recently recognized in *Figliola*, the ultimate goal of issue estoppel is not achieved by simply balancing fairness and finality, but in seeking to protect the "fairness of finality in decision-making and the

[87] Dans son pourvoi devant la Cour, M. Penner ne conteste pas directement la conclusion de la Cour d'appel selon laquelle les conditions d'application de la préclusion découlant d'une question déjà tranchée ont été réunies. Son pourvoi porte plutôt sur la question de savoir si la Cour d'appel a correctement exercé son pouvoir discrétionnaire d'appliquer la préclusion découlant d'une question déjà tranchée, et il fait valoir qu'elle aurait dû refuser de le faire.

II. Analyse

A. *Le rôle de la doctrine de la préclusion découlant d'une question déjà tranchée*

[88] La doctrine de la préclusion découlant d'une question déjà tranchée vise à protéger le caractère définitif des litiges en empêchant la remise en cause de questions déjà tranchées lors d'une instance antérieure. Elle constitue la réaction théorique aux [TRADUCTION] « principes jumeaux [. . .] selon lesquels tout litige doit avoir une fin et [. . .] la même partie ne doit pas être harassée deux fois pour la même cause » (*Carl Zeiss Stiftung*, p. 946; K. R. Handley, *Spencer Bower and Handley : Res Judicata* (4e éd. 2009), p. 4; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (3e éd. 2010), p. 4-7).

[89] Ces principes jumeaux sont souvent définis en fonction de l'intérêt public quant à la sauvegarde du caractère définitif des litiges — que ceux-ci donnent lieu à des recours civils, criminels ou administratifs — et en fonction des intérêts individuels quant à la protection des parties contre l'iniquité des poursuites répétitives (voir *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1, par. 53; Handley, p. 4; Lange, p. 7). Toutefois, il est clair que les deux principes ont pour objectif fondamental de protéger l'équité et l'intégrité du système de justice en empêchant les procédures répétitives. En d'autres termes, ces principes ne sont pas concurrents, mais plutôt fondamentalement liés. Comme l'a reconnu récemment la Cour dans *Figliola*, l'objectif ultime de la préclusion découlant d'une question déjà tranchée n'est pas atteint simplement en établissant un équilibre entre l'équité et le caractère définitif des

avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them" (para. 36 (emphasis added)).

[90] The foundational importance of finality to the judicial system and the individual parties was emphatically explained by Doherty J.A. in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), at pp. 264-65, leave to appeal refused, [1999] 1 S.C.R. xiv:

> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.
>
> The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change.

[91] As a species of *res judicata*, issue estoppel is conceptually related to the doctrines of cause of action estoppel, collateral attack, and abuse of process (Lange, at pp. 1-4). Both individually and together, these doctrines are of fundamental importance to the finality principle — they are "not merely . . . technical rule[s]" but rather, "g[o] to the heart of a system of civil justice that strives for the truth of the matter [and] recognizes that perfection is an unattainable goal and finality is a practical

décisions, mais en cherchant à protéger « l'équité du caractère définitif du processus décisionnel et [à] éviter la remise en cause de questions déjà tranchées par un décideur ayant compétence pour en connaître » (par. 36 (nous soulignons)).

[90] Dans l'arrêt *Tsaoussis (Litigation Guardian of) c. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), p. 264-265, autorisation de pourvoi refusée, [1999] 1 R.C.S. xiv, le juge Doherty a fortement souligné l'importance fondamentale que revêt le caractère définitif pour le système juridique et pour les parties :

> [TRADUCTION] Le caractère définitif est une caractéristique importante de notre système de justice, à la fois pour les parties au litige et, sur le plan institutionnel, pour la collectivité en général. Pour les parties, il est nécessaire sur le plan économique et psychologique. Pour la collectivité, il limite en quelque sorte le fardeau économique qu'impose chaque litige au système et confère aux décisions rendues par le système l'autorité qu'elles ne pourraient espérer détenir si elles étaient assujetties à une réévaluation et à une variation constantes : J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, p. 23-24.
>
> Les parties et la collectivité ont besoin que les litiges aient un caractère définitif déterminé et discernable. Les parties doivent pouvoir, à un certain point, savoir que la question a été tranchée et que leurs droits et obligations respectifs ont fait l'objet d'une décision définitive. En l'absence d'une telle issue discernable, les parties ne peuvent pas avoir la certitude que la question a été tranchée définitivement; elles doivent supporter le fardeau économique et psychologique considérable d'instances de durée indéterminée où leurs droits et obligations respectifs sont réexaminés au fur et à mesure que les circonstances changent.

[91] En tant que type de chose jugée, la préclusion découlant d'une question déjà tranchée s'apparente sur le plan conceptuel aux doctrines de la préclusion fondée sur la cause d'action, de la règle interdisant les contestations indirectes et de l'abus de procédure (Lange, p. 1-4). Tant individuellement que prises dans leur ensemble, ces doctrines deviennent fondamentales pour assurer le respect du principe du caractère définitif des jugements — elles ne sont [TRADUCTION] « pas de simple[s] règle[s]

necessity" (*Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, at para. 17).

B. *The Test for Issue Estoppel*

[92] The three preconditions for the operation of issue estoppel were set out by Dickson J. in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248: (1) whether the same question has been decided; (2) whether the judicial decision which is said to create the estoppel is final; and (3) whether the parties to the decision or their privies were the same in both proceedings (p. 254).

[93] However, as this Court recognized in *Danyluk*, courts retain a residual discretion not to apply issue estoppel in an individual case. Thus, in that case, this Court set out a two-step test for the application of issue estoppel:

> The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra.* If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied . . . . [Emphasis in original; citations omitted; para. 33.]

[94] Although initially developed in the context of prior court proceedings, issue estoppel has long been applied to judicial or quasi-judicial decisions pronounced by administrative boards and tribunals. In the administrative law context, "the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by

technique[s] », mais « se situe[nt] plutôt au cœur même du système de justice civile qui est voué à la recherche de la vérité [et] qui reconnaît aussi que la perfection est un objectif irréalisable et que le caractère définitif des décisions est nécessaire du point de vue pratique » (*Revane c. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, par. 17).

B. *Le critère régissant la doctrine de la préclusion découlant d'une question déjà tranchée*

[92] Le juge Dickson a énoncé dans *Angle c. Ministre du Revenu National*, [1975] 2 R.C.S. 248, les trois conditions d'application de la préclusion découlant d'une question déjà tranchée : (1) que la même question ait été décidée; (2) que la décision judiciaire invoquée comme créant la fin de non-recevoir soit finale; (3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la fin de non-recevoir est soulevée (p. 254).

[93] Toutefois, comme la Cour l'a reconnu dans *Danyluk*, les tribunaux conservent un pouvoir discrétionnaire résiduel d'appliquer ou non la doctrine de la préclusion découlant d'une question déjà tranchée dans un cas individuel. Par conséquent, dans l'affaire mentionnée précédemment, la Cour a énoncé le test suivant à deux volets quant à l'application de la préclusion découlant d'une question déjà tranchée :

> Il s'agit, au cours de la première étape, de déterminer si le requérant [. . .] a établi l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Dans l'affirmative, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion *devrait* être appliquée . . . [En italique dans l'original; références omises; par. 33.]

[94] Bien que formulée, au départ, dans le contexte d'une procédure judiciaire antérieure, la doctrine de la préclusion découlant d'une question déjà tranchée est appliquée depuis longtemps aux décisions judiciaires ou quasi judiciaires prononcées par les commissions et les tribunaux administratifs. En droit administratif, « l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect de l'équité envers les

too readily permitting collateral attack or relitigation of issues once decided" (*Danyluk*, at para. 21).

[95] Consistent with the principles underlying issue estoppel, the fairness to the parties is focused on preventing parties from undergoing the burden of duplicative litigation — the objective of fairness is linked to the principle of finality. Indeed, in *Danyluk*, Binnie J., writing for the Court, focused on the importance of finality in litigation:

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [para. 18]

[96] In other words, Binnie J. stated, "[a] litigant . . . is only entitled to one bite at the cherry" (para. 18). Underlying the application of issue estoppel in this context is the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

[97] This Court revisited the exercise of discretion to apply issue estoppel in the context of prior administrative proceedings in *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279. The Court acknowledged the different purposes of the competing procedures. Nevertheless, in that case considerable emphasis was placed on the stability and finality of decisions and the importance of deference and adequate alternative remedies in the administrative context as crucial considerations in determining whether issue estoppel should be applied in a particular case:

parties et la protection du processus décisionnel administratif, dont l'intégrité serait compromise si on autorisait trop facilement les contestations indirectes ou l'engagement d'une nouvelle instance à l'égard de questions déjà tranchées » (*Danyluk*, par. 21).

[95] Selon les principes sous-jacents à la doctrine de la préclusion découlant d'une question déjà tranchée, l'équité envers les parties vise à empêcher le fardeau lié aux instances faisant double emploi — l'objectif de l'équité est associé au principe du caractère définitif. En effet, dans *Danyluk*, le juge Binnie, s'exprimant au nom de la Cour, s'est penché sur l'importance du caractère définitif des instances :

> Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités. [par. 18]

[96] Autrement dit, comme l'a indiqué le juge Binnie, « un plaideur n'a droit qu'à une seule tentative » (par. 18). C'est la thèse selon laquelle « la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice » (par. 19) qui sous-tend l'application de la préclusion découlant d'une question déjà tranchée dans ce contexte.

[97] La Cour a réexaminé, dans *Boucher c. Stelco Inc.*, 2005 CSC 64, [2005] 3 R.C.S. 279, l'exercice du pouvoir discrétionnaire d'appliquer ou non la préclusion découlant d'une question déjà tranchée dans le contexte d'une procédure administrative antérieure. La Cour a reconnu les objectifs différents des procédures concurrentes. Néanmoins, dans cette affaire, la Cour a accordé un poids considérable à la stabilité et au caractère définitif des décisions ainsi qu'à l'importance de la déférence et d'autres recours appropriés en matière administrative, en tant que facteurs cruciaux pour déterminer s'il convient d'appliquer la doctrine de la préclusion découlant d'une question déjà tranchée dans un cas particulier :

The situation in which the respondent could find itself if the principles of *res judicata* or issue estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties. [Emphasis added; para. 35.]

[98] More recently, in *Figliola*, this Court considered the discretionary application of issue estoppel and its related doctrines in administrative proceedings. In that case, the majority emphasized the importance of the underlying principle of finality to the integrity of the justice system, noting that the discretionary application of doctrines such as issue estoppel, "should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of . . . relitigation" (para. 36).

[99] In *Figliola*, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice:

Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]

[100] This approach is consistent with the long-standing principles underlying issue estoppel and *res judicata* that emphasize and protect the finality of litigation.

La situation dans laquelle pourrait se trouver l'intimée si ce n'était l'application des règles de la chose jugée ou de la préclusion illustre le danger d'une contestation incidente et du défaut d'exercer en temps utile les recours que connaît le système judiciaire canadien contre la décision d'un organisme administratif ou d'une cour de justice. La stabilité et le caractère définitif des jugements constituent des objectifs fondamentaux et des conditions de l'efficacité de l'action judiciaire comme de l'effectivité des droits des intéressés. [Nous soulignons; par. 35.]

[98] Plus récemment, dans *Figliola*, la Cour s'est penchée sur l'application discrétionnaire de la préclusion découlant d'une question déjà tranchée et des doctrines connexes dans les procédures administratives. Dans cette affaire, les juges majoritaires ont souligné l'importance du principe sous-jacent du caractère définitif pour l'intégrité du système de justice, faisant remarquer que « ce ne sont pas tant des dogmes doctrinaux précis qui devraient guider [l'application discrétionnaire des doctrines telle la préclusion découlant d'une question déjà tranchée] que les objets de la disposition, qui sont d'assurer l'équité du caractère définitif du processus décisionnel et d'éviter la remise en cause de questions déjà tranchées . . . » (par. 36).

[99] Dans *Figliola*, les juges majoritaires ont rejeté expressément l'approche voulant que l'équité et le caractère définitif des décisions soient des objectifs distincts. Ils ont plutôt décidé que préserver le caractère définitif d'une décision administrative et empêcher les remises en cause protégeait mieux l'équité et l'intégrité du système de justice ainsi que les intérêts de la justice :

La justice est accrue par la protection de l'attente des parties qu'elles ne soient pas sujettes à des instances supplémentaires, devant un forum différent, pour des questions qu'elles estimaient résolues définitivement. Le magasinage de forum pour que l'issue d'un litige soit différente et meilleure peut être maquillé de nombreux qualificatifs attrayants, l'équité n'en fait toutefois pas partie. [par. 36]

[100] Cette approche respecte les principes bien établis sous-jacents à la doctrine de la préclusion découlant d'une question déjà tranchée et à celle de la chose jugée qui mettent en valeur et protègent le caractère définitif du litige.

C. *Issue Estoppel and Administrative Decisions*

[101] This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues' failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of "fairness". To do so would undermine the entire system of administrative law.

[102] In *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), the purpose of administrative tribunals was described as follows:

> [Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly . . . .
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> . . . The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to *its* consumers. [Emphasis in original; pp. 279-80.]

[103] In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings

C. *La doctrine de la préclusion découlant d'une question déjà tranchée et les décisions administratives*

[101] La confirmation récente par la Cour, dans *Figliola*, du principe du caractère définitif sous-jacent à la doctrine de la préclusion découlant d'une question déjà tranchée est essentielle pour assurer le respect des principes sous-jacents de notre approche moderne du droit administratif. L'approche préconisée par nos collègues en ne sauvegardant pas le caractère définitif des décisions sape aussi gravement ces principes. Lorsqu'on applique la doctrine de la préclusion découlant d'une question déjà tranchée, il n'existe aucune raison de traiter la procédure administrative différemment de la procédure judiciaire au nom de l'« équité ». Agir ainsi minerait l'ensemble du système de droit administratif.

[102] Dans *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), la Cour a décrit de la manière qui suit la raison d'être des tribunaux administratifs :

> [TRADUCTION] [Les tribunaux administratifs] ont été expressément créés à titre d'organismes indépendants comme solution de rechange au processus judiciaire et notamment à sa panoplie de procédures. Conçus pour être plus légers, plus accessibles, moins formels et plus expéditifs, ces organismes décisionnels impartiaux devaient trancher les litiges dans leur domaine de spécialisation plus rapidement et plus facilement, mais de manière tout aussi efficace et crédible . . .
>
> . . . La méthode de règlement des litiges devant ces tribunaux peut sembler peu orthodoxe aux personnes habituées à la salle d'audience, mais bien qu'elle soit peu connue des connaisseurs des principes judiciaires, elle constitue tout autant une forme et une tribune de justice pour *ses* usagers. [En italique dans l'original; p. 279-280.]

[103] Lorsqu'on applique la doctrine de la préclusion découlant d'une question déjà tranchée dans le contexte du droit administratif, il est inadmissible d'invoquer les différences entre le processus et les procédures judiciaires et ceux utilisés par l'organisme administratif pour écarter le principe du caractère définitif des décisions. On ne saurait non plus invoquer les objectifs différents visés par la procédure des tribunaux administratifs. Autrement, toute question

have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (*Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 41).

substantive de droit pourrait être réexaminée dans le cadre d'instances civiles ultérieures ou concurrentes, car on peut dire presque dans tous les cas que ces procédures ont des objectifs différents. L'application discrétionnaire de la doctrine de la préclusion découlant d'une question déjà tranchée en droit administratif reconnaît que toute la panoplie de mesures de protection et de procédures ne se retrouve peut-être pas dans le cadre d'une procédure administrative. Cependant, ni l'absence de telles mesures ni les objectifs différents d'un processus administratif ne suffisent en eux-mêmes pour justifier l'exercice par le tribunal de son pouvoir discrétionnaire. En d'autres termes, la partie requérante ne peut chercher à [TRADUCTION] « s'appuyer sur des préoccupations touchant à l'équité en général qui surgissent chaque fois que la conclusion invoquée est tirée par un tribunal dont les procédures sont sommaires et dont les fonctions sont plus restreintes que celles des cours de justice » (*Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 41).

[104] The majority in *Figliola* consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).

[104] Dans *Figliola*, les juges majoritaires font constamment référence conjointement aux décisions des tribunaux et des cours de justice lorsqu'ils discutent des principes applicables — y compris l'exercice du pouvoir discrétionnaire — et ils ne font jamais de distinction entre celles-ci. L'idée que ce pouvoir discrétionnaire devrait être plus étendu lorsqu'il est question de tribunaux administratifs n'est évoquée que dans la dissidence (par. 61).

[105] The policy objectives underlying issue estoppel — avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings — are enhanced by acknowledging administrative decisions as binding in appropriate circumstances. As this Court recognized in *Figliola*,

[105] Les objectifs stratégiques sous-jacents à la doctrine de la préclusion découlant d'une question déjà tranchée — éviter les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives — sont renforcés si l'on admet que les décisions administratives sont exécutoires dans des circonstances appropriées. Comme l'a reconnu la Cour dans *Figliola*,

> [r]espect for the finality of a[n] . . . administrative decision increases fairness and the integrity of . . . administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily

> [l]e respect du caractère définitif d'une décision [. . .] administrative renforce l'équité et l'intégrité des tribunaux [. . .] administratifs ainsi que de l'administration de la justice; à l'opposé, la remise en cause de questions déjà tranchées par un forum compétent peut miner la confiance envers l'équité et l'intégrité du système en créant de l'incohérence et en suscitant des recours faisant

duplicative proceedings (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 38 and 51). [para. 34]

[106] Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The application of issue estoppel recognizes that "[p]arties should be able to rely particularly on the conclusive nature of administrative decisions . . . since administrative regimes are designed to facilitate the expeditious resolution of disputes" (*Figliola*, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to administrative decisions (see, for example, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). It also gives effect to the "adequate alternative remedy" principle, which requires parties to use the appropriate judicial review or appeal mechanism to challenge the validity or correctness of an administrative decision, by preventing parties from circumventing these processes to seek a different result in a new forum. The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

[107] The court's residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the requisite authority to make a decision, and that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases,

inutilement double emploi (*Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 38 et 51). [par. 34]

[106] En outre, le principe du caractère définitif des décisions qui sous-tend la doctrine de la préclusion découlant d'une question déjà tranchée est directement lié au principe de la déférence en droit administratif. L'application de cette doctrine reconnaît que « les parties devaient pouvoir être assurées du caractère définitif des décisions administratives, en particulier, parce que ces régimes visent à faciliter le règlement rapide des différends » (*Figliola*, par. 27). Elle reconnaît aussi le principe de déférence qui sous-tend la jurisprudence de la Cour en matière de contrôle judiciaire ainsi que l'importance et la valeur accordées aux décisions administratives (voir, par exemple, *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 11). Elle donne aussi effet au principe selon lequel l'existence d'un autre recours approprié oblige les parties de se prévaloir du mécanisme approprié de contrôle judiciaire ou d'appel pour contester la validité ou le bien-fondé d'une décision administrative, en les empêchant de contourner ces processus pour rechercher un résultat différent devant un nouveau forum. En l'espèce, il est difficile de concilier le vaste exercice du pouvoir discrétionnaire résiduel de ne pas appliquer la doctrine de la préclusion découlant d'une question déjà tranchée avec l'importance de la déférence envers les décisions administratives qui est à la base de la jurisprudence de la Cour en matière de contrôle judiciaire. Ce faisant, nos collègues nient ainsi la valeur et l'importance des décisions des tribunaux administratifs, que la Cour a tout particulièrement soulignée à maintes reprises.

[107] Les cours ne devraient pas se servir de leur pouvoir discrétionnaire résiduel de ne pas appliquer la préclusion découlant d'une question déjà tranchée pour imposer un modèle particulier de décision, à l'encontre du principe de déférence qui est au cœur du droit administratif. Lorsque le législateur confère à un tribunal le pouvoir nécessaire de prendre une décision et que la décision en question est de nature judiciaire ou quasi judiciaire, on contreviendrait au principe de déférence. En effet, on élargirait la portée

permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in *Schweneke*, an overly broad application of discretion in the administrative context would "swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation" (para. 39).

du pouvoir discrétionnaire des cours de justice d'une manière qui, dans la plupart des cas, permettrait à la partie perdante de contourner le contrôle judiciaire et de s'adresser plutôt à une cour de justice pour qu'elle se prononce une nouvelle fois sur le fond de l'affaire. Comme l'a écrit la Cour d'appel de l'Ontario dans *Schweneke*, une application trop large du pouvoir discrétionnaire dans le contexte administratif aurait pour effet [TRADUCTION] d'« écarter complètement la règle qui permet l'application de la doctrine aux conclusions tirées par les tribunaux dont les procédures, quoique de nature judiciaire, sont moins élaborées que celles applicables dans le cadre d'un litige civil » (par. 39).

[108] This leads us to consider how the principles set out in *Figliola* should be applied to this case.

[108] Ces réflexions nous amènent à examiner la manière dont il convient d'appliquer en l'espèce les principes énoncés dans l'arrêt *Figliola*.

D. *Application*

D. *Application*

[109] The thrust of Mr. Penner's submissions on appeal is that the police disciplinary proceedings lacked the "hallmarks of an ordinary civil trial". In particular, he emphasizes that he had limited rights of participation as a public complainant, that the statutory scheme is incompatible with the application of issue estoppel, that the hearing officer lacked true independence, and that the standard of proof in the disciplinary proceedings was higher than a civil trial. For these reasons, he argues, the Court should exercise its discretion not to apply issue estoppel in this case.

[109] Les arguments présentés par M. Penner dans le cadre de l'appel portent pour l'essentiel que les procédures disciplinaires de la police ne possédaient pas [TRADUCTION] « les caractéristiques d'un procès civil ordinaire ». Plus particulièrement, il plaide que ses droits de participation à titre de plaignant étaient limités, que le régime législatif n'est pas compatible avec l'application de la préclusion découlant d'une question déjà tranchée, que l'agent d'audience ne jouissait pas d'une véritable indépendance et que la norme de preuve dans le cadre des procédures disciplinaires était plus élevée qu'en matière civile. Pour ces motifs, soutient-il, la Cour devrait exercer son pouvoir discrétionnaire et refuser, en l'espèce, d'appliquer la préclusion découlant d'une question déjà tranchée.

[110] Mr. Penner's submissions are completely inconsistent with this Court's prior jurisprudence and the approach to issue estoppel recently articulated by this Court in *Figliola*. The Court's residual discretion not to apply issue estoppel should be governed by the interests of fairness in preserving the finality of litigation. It should not be exercised in a manner that would impose a particular model of adjudication, undermine the integrity of administrative tribunals, and deny

[110] Les arguments de M. Penner sont totalement incompatibles avec la jurisprudence antérieure de la Cour et avec l'approche concernant la préclusion découlant d'une question déjà tranchée formulée récemment par notre Cour dans *Figliola*. L'exercice du pouvoir discrétionnaire résiduel de la Cour de ne pas appliquer la préclusion découlant d'une question déjà tranchée devrait obéir à un souci d'équité et préserver le caractère définitif d'un litige. Il ne devrait pas être exercé de manière à

their decisions the deference owed to them under the jurisprudence of this Court. Applying these principles to the case before us, there is no reason to exercise our discretion not to apply issue estoppel.

imposer un modèle particulier de décision, à miner l'intégrité des tribunaux administratifs, et à refuser à leurs décisions la déférence qu'elles commandent selon la jurisprudence de la Cour. En appliquant ces principes en l'espèce, nous constatons qu'il n'y a pas lieu d'exercer notre pouvoir discrétionnaire de ne pas appliquer la préclusion découlant d'une question déjà tranchée.

[111] The disciplinary hearing conducted by the hearing officer is designed to be an independent, fair, accountable and binding adjudicative process. It was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness: see *Police Services Act*, ss. 64(7) to (10), 69; *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The hearing officer considered sworn testimony and written submissions. Mr. Penner, as a party to the proceedings, had the opportunity to lead evidence, cross-examine witnesses, and make submissions. He had the option to retain legal counsel. Judicial oversight of the proceedings was available under a statutory right of appeal — a right Mr. Penner exercised in this case and which ultimately led to a review of the hearing officer's decision by the Divisional Court.

[111] L'audience disciplinaire menée par l'agent d'audience est conçue pour établir un processus décisionnel indépendant, équitable, responsable et exécutoire. Elle s'est déroulée conformément aux exigences de la loi et aux principes de l'équité procédurale : voir la *Loi sur les services policiers*, par. 64(7) à (10) et art. 69; *Loi sur l'exercice des compétences légales*, L.R.O. 1990, ch. S.22. L'agent d'audience a examiné des témoignages sous serment et des observations écrites. À titre de partie à l'instance, M. Penner a eu la possibilité de présenter des éléments de preuve, de contre-interroger les témoins et de présenter des observations. Il avait le choix de retenir les services d'un avocat. Il pouvait demander le contrôle judiciaire de la procédure en vertu du droit d'appel prévu par la loi — droit que M. Penner a exercé en l'espèce et qui, en fin de compte, a mené au contrôle de la décision de l'agent d'audience par la Cour divisionnaire.

[112] Thus, the hearing officer's decision was made in circumstances in which Mr. Penner knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding.

[112] Par conséquent, l'agent d'audience a rendu sa décision dans des circonstances où M. Penner connaissait le fardeau de preuve qui lui incombait, il a pleinement eu la possibilité d'établir cette preuve et il a été débouté. S'il avait eu gain de cause, la décision de l'agent d'audience aurait lié tout autant les parties.

[113] This *quid pro quo* of issue estoppel, in turn, bears directly on Mr. Penner's argument that the purpose of the proceedings was different and that, because the disciplinary hearing did not permit him to seek damages, he should be permitted to pursue a civil action. As the Court of Appeal found, the different purposes of the two proceedings is not determinative in this case, since Mr. Penner had the opportunity to receive an indirect financial benefit in the disciplinary hearing. Had the hearing officer made a positive finding of police misconduct, the

[113] Or, la contrepartie que procure la doctrine de la préclusion découlant d'une question déjà tranchée porte directement sur l'argument de M. Penner selon lequel l'instance avait un objet différent et que, parce que l'audience disciplinaire ne lui permettait pas de réclamer des dommages-intérêts, il devrait être autorisé à intenter une action civile. Comme l'a conclu la Cour d'appel, la différence entre les objets des deux instances n'est pas un facteur déterminant en l'espèce, puisque M. Penner a eu la possibilité de tirer un avantage

application of issue estoppel would have assisted the complainant in a subsequent civil action for damages. Essentially, in such a case, the complainant would be relieved of having to prove liability and the civil case would proceed straight to an assessment of damages. In other words, as the Court of Appeal noted, in the present case, "issue estoppel works both ways" (para. 43).

[114] Mr. Penner further relies on specific provisions of the *Police Services Act*, which he states are incompatible with the application of issue estoppel, since they specifically contemplate parallel civil proceedings. He relies, in particular, on ss. 69(8), 69(9) and 80 (now ss. 83(7), 83(8) and 95), which deal with statutory privilege and confidentiality. We do not find this to be persuasive. These provisions of the *Police Services Act* are designed to ensure the integrity of the disciplinary process. They do not suggest that issue estoppel cannot apply to bar civil proceedings. As Lange observes, where legislatures intend issue estoppel not to apply to an administrative decision, there should be clear language in the statute to foreclose this possibility (p. 122).

[115] Even in cases where the wording of the statute specifically contemplates corollary civil rights or remedies, the courts have applied issue estoppel. For example, in *Wong v. Shell Canada Ltd.* (1995), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv, the Alberta Court of Appeal considered whether s. 9(1)(a) of the *Employment Standards Code*, S.A. 1988, c. E-10.2, precluded the application of issue estoppel. Section 9(1)(a) provided that "[n]othing in this Act affects any civil remedy that an employee has against his employer".

financier indirect dans le cadre de l'audience disciplinaire. Si l'agent d'audience avait conclu à l'inconduite des agents de police, l'application de la préclusion découlant d'une question déjà tranchée aurait été utile au plaignant dans le cadre d'une action civile subséquente en dommages-intérêts. Pour l'essentiel, dans un tel cas de figure, le plaignant serait libéré de l'obligation d'établir le préjudice et l'instance civile se poursuivrait directement par l'évaluation des dommages-intérêts. Autrement dit, comme l'a indiqué la Cour d'appel en l'espèce, [TRADUCTION] « la doctrine de la préclusion découlant d'une question déjà tranchée est applicable dans les deux sens » (par. 43).

[114] M. Penner se fonde aussi sur des dispositions particulières de la *Loi sur les services policiers*, qui, d'après lui, sont incompatibles avec l'application de la préclusion découlant d'une question déjà tranchée puisqu'elles prévoient expressément des instances civiles parallèles. Il invoque notamment les par. 69(8), 69(9) et l'art. 80 (maintenant les par. 83(7), 83(8) et l'art. 95), qui portent sur le privilège prévu par la loi et la confidentialité. Cet argument n'est pas convaincant. Les dispositions en question de la *Loi sur les services policiers* visent à garantir l'intégrité du processus disciplinaire. Elles ne donnent pas à entendre que la préclusion découlant d'une question déjà tranchée ne peut pas être appliquée pour prononcer l'irrecevabilité d'instances civiles. Comme le fait observer l'auteur Lange, lorsque le législateur a l'intention d'empêcher l'application de la préclusion découlant d'une question déjà tranchée à une décision administrative, il doit exprimer clairement dans la loi son intention à cet égard (p. 122).

[115] Même lorsque le libellé de la loi prévoit expressément des droits ou des recours civils connexes, les tribunaux ont appliqué la doctrine de la préclusion découlant d'une question déjà tranchée. Par exemple, dans *Wong c. Shell Canada Ltd.* (1995), 174 A.R. 287, autorisation de pourvoi refusée, [1996] 3 R.C.S. xiv, la Cour d'appel de l'Alberta a examiné la question de savoir si l'al. 9(1)(a) du *Employment Standards Code*, S.A. 1988, ch. E-10.2, empêchait l'application de la préclusion découlant d'une question déjà tranchée. Selon l'alinéa 9(1)(a),

The employee argued that s. 9(1) of the *Code* was intended to preserve a civil action regardless of the fact that he had sought relief under the *Code* and obtained a final decision. The Court of Appeal rejected this interpretation:

> While s. 9(1)(a) does not purport to remove any common law rights, and, in fact, seeks to preserve them, the wording does not preclude the application by the courts of issue estoppel. The legislature has provided the employee with a choix of forum. The employee may commence an action or may pursue remedies under the *Code*. The legislation does not provide that both remedies may be pursued by the employee in respect of the same complaint. [para. 14]

(See also *Rasanen.*)

[116] Similarly, the provisions relied upon by Mr. Penner in this case, which contemplate civil proceedings, do not specifically preclude the application of issue estoppel by a court.

[117] Moreover, to interpret these provisions in a manner that would preclude the application of issue estoppel would be contrary to the purposes of the *Police Services Act*, which is designed to increase public confidence in the provision of police services, including the processing of complaints. Preventing the courts from applying issue estoppel in the context of disciplinary proceedings would run counter to this purpose — decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the complaints process and in the integrity of the administrative decision-making process more broadly.

[118] Mr. Penner further takes issue with the independence of the hearing officer in this case. In particular, Mr. Penner submits that because the

[TRADUCTION] « [l]a présente loi n'a pas pour effet de porter atteinte aux recours civils que l'employé peut exercer contre son employeur ». L'employé faisait valoir que le par. 9(1) du *Code* visait à protéger une action civile, sans égard au fait qu'il avait demandé une réparation en vertu du *Code* et obtenu une décision définitive. La Cour d'appel a rejeté cette interprétation :

> [TRADUCTION] Bien que l'al. 9(1)(a) ne vise pas à supprimer de droits reconnus par la common law, et qu'il cherche en fait à les préserver, son libellé ne fait pas obstacle à l'application par les tribunaux de la préclusion découlant d'une question déjà tranchée. Le législateur donne à l'employé le choix du tribunal à qui il va s'adresser. L'employé peut intenter une action ou exercer les recours prévus dans le *Code*. La loi ne prévoit pas la possibilité que l'employeur exerce les deux recours à l'égard de la même plainte. [par. 14]

(Voir également *Rasanen*.)

[116] Dans le même ordre d'idées, les dispositions — qui prévoient des instances civiles — invoquées par M. Penner en l'espèce n'empêchent pas expressément l'application par un tribunal de la préclusion découlant d'une question déjà tranchée.

[117] Qui plus est, interpréter ces dispositions de façon à empêcher l'application de la préclusion découlant d'une question déjà tranchée contredirait les objectifs de la *Loi sur les services policiers*, qui vise à rehausser la confiance du public dans la prestation de services policiers, notamment le traitement des plaintes. Empêcher les tribunaux d'appliquer la préclusion découlant d'une question déjà tranchée dans le contexte d'une procédure disciplinaire irait à l'encontre de cet objectif — les décisions ne seraient pas définitives ou ne lieraient pas les parties, elles pourraient être remises en cause et donner lieu à des résultats contradictoires. Un résultat semblable minerait la confiance du public dans le processus de traitement des plaintes et, de façon plus générale, dans l'intégrité du processus décisionnel administratif.

[118] M. Penner conteste en outre la question de l'indépendance de l'agent d'audience en l'espèce. Plus particulièrement, M. Penner soutient que,

Police Services Act required that the chief of police appoint the investigator, prosecutor, and hearing officer to handle the complaint, the disciplinary hearing process lacked an independent and unbiased adjudicator. This issue was raised *de novo* on Mr. Penner's appeal to this Court.

[119] The method used to appoint an adjudicator should not provide a basis for the exercise of the court's discretion not to apply issue estoppel in this case.

[120] In 2004, the Government of Ontario commissioned a report from the Honourable Patrick J. LeSage, Q.C., to review the complaints process under the *Police Services Act* (see the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005)). The LeSage *Report* was published in 2005 and made a number of recommendations with respect to the investigation and hearing of police complaints. In the *Report*, LeSage explicitly rejected concerns with respect to the independence of investigators and adjudicators in the complaints process:

> I also heard submissions advocating an independent hearings process where the matter has arisen from a public complaint. This would include fully independent prosecutions and fully independent adjudication. I appreciate the demands for greater independence in the hearings process. Indeed, there is much merit to the arguments in support of independence. Conflicts of interest need to be avoided. It would be inappropriate for hearings to be staffed entirely by members of the police service who interact with each other on a daily basis. This problem is especially acute in small police services where outside prosecutors and hearing officers would be necessary. This is already addressed in the current legislation by allowing chiefs of police to appoint prosecutors and hearing officers from outside the police service. [Emphasis added; pp. 77-78.]

[121] In short, the LeSage *Report* upheld the method used to appoint investigators and adjudicators under the *Police Services Act*. In fact, LeSage

puisque la *Loi sur les services policiers* exige que le chef de police nomme l'enquêteur, le poursuivant et l'agent d'audience pour traiter la plainte, le processus d'audience disciplinaire est privé d'un arbitre indépendant et impartial. M. Penner a soulevé de nouveau cette question dans son pourvoi devant la Cour.

[119] La méthode de nomination de l'arbitre ne devrait pas justifier l'exercice par la cour de son pouvoir discrétionnaire de refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée.

[120] En 2004, le gouvernement de l'Ontario a demandé à l'honorable Patrick J. LeSage, c.r., de rédiger un rapport sur le processus de traitement des plaintes régi par la *Loi sur les services policiers* (voir l'honorable Patrick J. LeSage, *Rapport sur le système ontarien de traitement des plaintes concernant la police* (2005)). Le rapport LeSage, publié en 2005, contient de nombreuses recommandations concernant l'enquête sur les plaintes concernant la police et l'audition de ces plaintes. Dans son rapport, LeSage a expressément rejeté les préoccupations relatives à l'indépendance des enquêteurs et des arbitres dans le cadre du processus de traitement des plaintes :

> D'autres intervenants préconisent l'instauration d'un processus indépendant d'audience en cas de plainte du public. Les poursuites et le processus décisionnel seraient tout à fait indépendants. Je reconnais que l'on réclame une indépendance accrue du processus d'audience. Les arguments en sa faveur sont d'ailleurs convaincants. Il faut éviter les conflits d'intérêts; c'est pourquoi la responsabilité des audiences ne devrait pas être confiée intégralement à des membres du corps de police, qui ont des rapports quotidiens. Ce problème touche particulièrement les petits corps de police, qui devraient faire appel à des poursuivants et à des agents enquêteurs de l'extérieur. La loi actuelle aborde déjà cette situation en permettant aux chefs de police de désigner des poursuivants et des agents enquêteurs qui ne font pas partie du corps de police. [Nous soulignons; p. 84-85.]

[121] Bref, le rapport LeSage a confirmé le mode de nomination des enquêteurs et des arbitres prévu par la *Loi sur les services policiers*. En fait, selon

found that concerns with respect to conflicts of interest and independent adjudication were already sufficiently addressed by the very system of appointment Mr. Penner seeks to challenge in this appeal.

[122] In any event, the Chief of Police played no role in the events that formed the basis of the complaints in this case. He designated an outside prosecutor and an independent adjudicator who was a retired superintendent from another police service. There was no challenge to the hearing officer's impartiality at the disciplinary hearing itself or at any of the proceedings below. There is no evidence that the Chief of Police interfered in any manner with the work of the adjudicator. We must add that similar methods of appointment are quite common in labour law, as well as in other areas of law, and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

[123] Finally, Mr. Penner argues that issue estoppel should not apply in this case since the burden of proof is different in civil proceedings. The statutory standard of proof under the *Police Services Act* requires that a finding of misconduct against a police officer be "proved on clear and convincing evidence" (s. 64(10); now s. 84(1)). This standard is higher than the balance of probabilities standard required in a civil trial.

[124] Mr. Penner relies on *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL), where the Ontario Superior Court of Justice reasoned that because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard" (para. 11), issue estoppel should not preclude a subsequent civil action.

l'auteur du rapport, le système de nomination même que M. Penner cherche à contester dans le présent pourvoi avait déjà bien répondu aux préoccupations quant aux conflits d'intérêts et à l'indépendance du processus décisionnel.

[122] Quoi qu'il en soit, le chef de police n'a joué aucun rôle dans les événements à l'origine des plaintes en l'espèce. Il a désigné un poursuivant de l'extérieur et un arbitre indépendant, soit un surintendant à la retraite d'un autre corps de police. L'impartialité de l'agent d'audience à l'audience disciplinaire ou dans le cadre de l'une ou l'autre des procédures tenues devant les instances inférieures n'a pas été contestée. Rien dans la preuve n'indique que le chef de police a entravé de quelque manière que ce soit le travail de l'arbitre. Nous devons ajouter que des modes de nomination similaires sont plutôt fréquents en droit du travail, ainsi que dans d'autres domaines du droit, et ne sont pas considérés comme un obstacle à l'indépendance du processus décisionnel. Le mandat de longue durée n'est pas le seul critère ou la seule condition de l'indépendance du processus décisionnel.

[123] Enfin, M. Penner soutient qu'il ne convient pas d'appliquer la doctrine de la préclusion découlant d'une question déjà tranchée en l'espèce puisque le fardeau de la preuve est différent dans le cadre des instances civiles. La norme de preuve prévue par la *Loi sur les services policiers* exige que l'inconduite d'un agent de police soit « prouvée sur la foi de preuves claires et convaincantes » (par. 64(10); maintenant par. 84(1)). Il s'agit d'une norme plus élevée que la norme de la prépondérance des probabilités qui est requise en matière civile.

[124] M. Penner invoque la décision *Porter c. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL), où la Cour supérieure de justice de l'Ontario a affirmé que, parce que la décision de l'agent d'audience [TRADUCTION] « reposait sur une norme de preuve élevée et qu'elle aurait pu être différente si elle avait été rendue en fonction d'une norme civile moins exigeante » (par. 11), la doctrine de la préclusion découlant d'une question déjà tranchée ne devait pas empêcher une action civile subséquente.

[125] Unlike *Porter*, however, the standard of proof was immaterial to the hearing officer's decision in this case. The hearing officer made unambiguous findings of fact against Mr. Penner. His findings are unequivocal: he found "no . . . evidence whatsoever" to support Mr. Penner's claims (A.R., at p. 114 (emphasis added)). On judicial review, the Divisional Court found that there was no error in these factual findings and that they were supported by "an ample evidentiary foundation" (para. 28). The burden of proof is therefore irrelevant in this case — there is simply *no evidence* to support Mr. Penner's claims on any standard.

[126] We see no reason to allow Mr. Penner to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding, which, in this case, would inevitably yield the same result.

[127] We would therefore dismiss the appeal with costs throughout.

Appeal allowed with costs throughout, LeBel, Abella *and* Rothstein JJ. *dissenting.*

Solicitors for the appellant: Falconer Charney, Toronto.

Solicitors for the respondents: Blaney McMurtry, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Urban Alliance on Race Relations: Stevensons, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

[125] Toutefois, contrairement à la situation qui a mené à la décision *Porter*, la norme de preuve n'a pas eu d'incidence sur la décision de l'agent d'audience en l'espèce. Celui-ci a tiré des conclusions de fait claires à l'encontre de M. Penner. Les conclusions de l'agent d'audience sont non équivoques : il n'a constaté [TRADUCTION] « aucun [. . .] élément de preuve » qui étaye les allégations de M. Penner (d.a., p. 114 (nous soulignons)). Lors du contrôle judiciaire, la Cour divisionnaire a conclu que les conclusions de fait n'étaient pas entachées d'erreur et qu'elles étaient [TRADUCTION] « fondées amplement sur la preuve » (par. 28). Le fardeau de la preuve n'est donc pas pertinent en l'espèce — il n'existe tout simplement *aucun élément de preuve* qui étaye les allégations de M. Penner quelque soit la norme de preuve.

[126] Nous ne voyons aucune raison de permettre à M. Penner de contourner les conclusions claires de l'agent d'audience et d'imposer aux parties une instance faisant double emploi qui, en l'espèce, conduirait forcément au même résultat.

[127] Par conséquent, nous sommes d'avis de rejeter le pourvoi avec dépens devant toutes les cours.

Pourvoi accueilli avec dépens devant toutes les cours, les juges LeBel, Abella *et* Rothstein *sont dissidents.*

Procureurs de l'appelant : Falconer Charney, Toronto.

Procureurs des intimés : Blaney McMurtry, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante l'Alliance urbaine sur les relations interraciales : Stevensons, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Holmes & King, Vancouver.

Solicitors for the intervener the Canadian Police Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Dewart Gleason, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Holmes & King, Vancouver.

Procureurs de l'intervenante l'Association canadienne des policiers : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Dewart Gleason, Toronto.

26

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson *Respondents*

INDEXED AS: DANYLUK *v.* AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Issue estoppel — Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions — Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions — Employment standards officer dismissing employee's complaint — Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel — Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel — Whether preconditions to application of issue estoppel satisfied — If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking

Mary Danyluk *Appelante*

c.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh et Joseph McBride Watson *Intimés*

RÉPERTORIÉ : DANYLUK *c.* AINSWORTH TECHNOLOGIES INC.

Référence neutre : 2001 CSC 44.

Nº du greffe : 27118.

2000 : 31 octobre; 2001 : 12 juillet.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »),

unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recoupait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Arrêt : Le pourvoi est accueilli.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a mat-

Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont au nombre de trois : (1) que la même question ait été décidée dans une procédure antérieure; (2) que la décision judiciaire antérieure soit définitive; (3) que les parties ou leurs ayants droit soient les mêmes dans chacune des instances. Si le requérant réussit à établir l'existence des conditions d'application, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion devrait être appliquée.

Suivant ces conditions, la décision antérieure doit être une décision judiciaire. En l'espèce, la décision fondée sur la LNE était judiciaire. Premièrement, le décideur administratif ayant rendu la décision peut être investi d'un pouvoir juridictionnel et il est capable d'exercer ce pouvoir. Deuxièmement, sur le plan juridique, la décision devait être prise judiciairement. Bien que les agents des normes d'emploi aient recours à des procédures plus souples que celles des cours de justice, leurs décisions juridictionnelles doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective.

L'appelante conteste l'application de la préclusion découlant d'une question déjà tranchée parce que, conformément à la conclusion de la Cour d'appel, la décision fondée sur la LNE a été rendue sans qu'on donne à l'appelante un préavis suffisant et la possibilité de répondre aux prétentions de l'employeur. Il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Lorsque le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin* et celles relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*.

En l'espèce, les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies : la même question est à l'origine des deux instances, la décision de l'agente des normes avait un caractère définitif pour l'application de la Loi en raison du fait que ni l'employeur ni l'employée ne se sont prévalus du mécanisme de révision interne, et les parties

ter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

Cases Cited

Considered: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado*

sont les mêmes. La Cour doit par conséquent décider si elle doit exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion. En l'espèce, notre Cour a le droit d'intervenir puisque les tribunaux de juridiction inférieure ont commis une erreur de principe en omettant d'examiner la question de l'exercice du pouvoir discrétionnaire. La liste des facteurs à considérer pour l'exercice de ce pouvoir n'est pas exhaustive. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice dans une affaire donnée. Parmi les facteurs pertinents en l'espèce, mentionnons : le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative, l'objet du texte de la loi, l'existence d'un droit d'appel, les garanties offertes aux parties dans le cadre de l'instance administrative, l'expertise du décideur administratif, les circonstances ayant donné naissance à l'instance administrative initiale et, facteur le plus important, le risque d'injustice. Vu l'effet cumulatif des facteurs susmentionnés, la Cour, dans l'exercice de son pouvoir discrétionnaire, doit refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. En effet, le fait demeure que la réclamation de l'employée visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

Jurisprudence

Arrêt examiné : *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248; **arrêt critiqué en partie :** *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **arrêts mentionnés :** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell c. La Reine* (1894), 22 R.C.S. 553; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223; *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103; *Bell c. Miller* (1862), 9 Gr. 385; *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273; *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706; *McIntosh c. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay c. Lafleur*, [1965] R.C.S. 12; *Thoday c. Thoday*,

v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132; *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19; *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183; *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145; *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58; *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Poucher v. Wilkins* (1915), 33 O.L.R. 125; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72; *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660; *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1.

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APPEAL from a judgment of the Ontario Court of Appeal (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and *J. Michael Mulroy*, for the appellant.

John E. Brooks and *Rita M. Samson*, for the respondents.

The judgment of the Court was delivered by

BINNIE J. — The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), qui a rejeté l'appel formé par l'appelante contre une décision de la Cour de l'Ontario (Division générale) rendue le 10 juin 1996. Pourvoi accueilli.

Howard A. Levitt et *J. Michael Mulroy*, pour l'appelante.

John E. Brooks et *Rita M. Samson*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'appelante prétend que, le 12 octobre 1993, elle a été congédiée du poste de chargée de projet qu'elle occupait chez l'intimée Ainsworth Technologies Inc. Elle soutient que, au moment de son congédiement, son employeur lui devait quelque 300 000 $ en commissions impayées. Les cours de justice ontariennes ont jugé que l'appelante était précluse (« *estopped* ») de saisir les tribunaux de ce différend en raison de sa tentative infructueuse d'obtenir le paiement de cette somme en vertu de la *Loi sur les normes d'emploi*, L.R.O. 1990, ch. E.14 (la « LNE » ou la « Loi »). Adoptant une procédure que la Cour d'appel de l'Ontario a jugé inappropriée et inéquitable, une agente des normes d'emploi a rejeté la demande de l'appelante. En règle générale, la préclusion découlant d'une question déjà tranchée (« *issue estoppel* ») peut, j'en conviens, être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif. Toutefois, je suis d'avis que la présente espèce

should not be applied mechanically to work an injustice. I would allow the appeal.

n'est pas une affaire où il convenait d'appliquer cette doctrine. Une doctrine élaborée par les tribunaux dans l'intérêt de la justice ne devrait pas être appliquée mécaniquement et donner lieu à une injustice. J'accueillerais le pourvoi.

I. Facts

I. Les faits

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

À l'automne 1993, un différend relatif à des commissions impayées a opposé l'appelante et son employeur, l'intimée Ainsworth Technologies Inc. L'appelante a rencontré ses supérieurs et elle leur a envoyé diverses lettres exposant son point de vue. Copie conforme de chacune de ces lettres était généralement transmise à son avocat, Me Howard A. Levitt. L'appelante prétendait principalement avoir droit à environ 200 000 $ à titre de commissions à l'égard d'un projet connu sous le nom de projet CIBC Lan, ainsi qu'à d'autres commissions portant à approximativement 300 000 $ la somme totale réclamée.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

L'appelante a rejeté le règlement proposé par l'employeur. Le 4 octobre 1993, elle a déposé, en vertu de la LNE, une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. Le dossier n'indique pas clairement si elle a profité des conseils d'un avocat sur cet aspect du litige. Le 5 octobre, l'employeur a écrit à l'appelante, lui indiquant qu'il rejetait sa demande visant les commissions. Subséquemment, lorsqu'elle s'est présentée au travail, il l'a fait conduire hors de ses locaux, considérant qu'elle avait remis sa démission.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

On a demandé à une agente des normes d'emploi, Mme Caroline Burke, d'enquêter sur la plainte déposée par l'appelante. Madame Burke a d'abord eu un entretien téléphonique avec l'appelante puis, vers le 30 janvier 1994, elle l'a rencontrée pendant environ une heure. L'appelante a remis à Mme Burke divers documents, dont sa correspondance avec l'employeur. Aucune autre rencontre n'a eu lieu par la suite.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed

Le 21 mars 1994, plus de 6 mois après avoir déposé sa plainte en vertu de la Loi, mais sans qu'une décision ait encore été rendue à cet égard, l'appelante a intenté, par l'entremise de Me Levitt,

damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait également le paiement du salaire et des commissions impayés qui faisaient déjà l'objet de la plainte qu'elle avait présentée en vertu de la LNE.

On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop. 6

Le 1er juin 1994, les procureurs de l'employeur ont écrit à Mme Burke au sujet de la plainte de l'appelante. La lettre de l'employeur était accompagnée d'un certain nombre de documents étayant la thèse de ce dernier. Aucun de ces documents n'a été communiqué à l'appelante. Madame Burke n'a pas non plus fourni d'information à l'appelante relativement à la thèse de l'employeur et elle ne lui a pas donné la possibilité de répondre aux arguments qui, selon l'appelante, seraient vraisemblablement avancés par l'employeur. Bref, l'appelante a été tenue à l'écart.

On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts. 7

Le 23 septembre 1994, l'agente des normes d'emploi a informé l'employeur intimé (mais non l'appelante) qu'elle avait rejeté la réclamation de l'appelante pour commissions impayées. Par contre, elle a ordonné à l'employeur de verser à l'appelante la somme de 2 354,55 $, soit deux semaines de salaire, à titre d'indemnité de préavis. Dix jours plus tard, dans une lettre datée du 3 octobre 1994, Mme Burke a informé l'appelante de l'ordonnance intimant à l'employeur de lui verser deux semaines de salaire à titre d'indemnité de licenciement et du rejet de la réclamation visant les commissions. La lettre disait notamment ce qui suit : [TRADUCTION] « [r]elativement à votre réclamation pour salaire impayé, l'enquête a révélé que vous n'avez pas droit aux 300 000,00 $ que vous réclamez à titre de commissions ». Elle ajoutait que l'appelante pouvait présenter au directeur des normes d'emploi une demande de révision de cette décision, information que Mme Burke a répétée lors d'un entretien téléphonique subséquent avec l'appelante. L'appelante n'a toutefois pas demandé la révision de la décision de Mme Burke, décidant plutôt de poursuivre son action en dommages-intérêts pour congédiement injustifié déposée au civil.

The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs 8

Les intimés ont invoqué la préclusion découlant d'une question déjà tranchée à l'encontre de la réclamation pour salaire et commissions impayés. Dans le cadre de l'instance civile engagée par l'ap-

from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. *Ontario Court (General Division)* (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. *Court of Appeal for Ontario* (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision

pelante, ils ont présenté une requête en radiation des paragraphes pertinents de la déclaration. Le 10 juin 1996, le juge McCombs de la Cour de l'Ontario (Division générale) a accueilli cette requête. Seule la demande de dommages-intérêts pour congédiement injustifié a pu suivre son cours. Le 2 décembre 1998, la Cour d'appel de l'Ontario a rejeté l'appel formé par l'appelante.

II. Les décisions des juridictions inférieures

A. *Cour de l'Ontario (Division générale)* (10 juin 1996)

Le juge McCombs devait décider si la doctrine de la préclusion découlant d'une question déjà tranchée s'appliquait en l'espèce. S'appuyant sur l'arrêt *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), il a estimé que cette doctrine pouvait s'appliquer à une question déjà tranchée par un décideur administratif — fonctionnaire ou tribunal. Selon lui, la seule question à trancher était de savoir si la décision de l'agente des normes d'emploi était une décision définitive. Le juge des requêtes a souligné que l'appelante n'avait pas demandé la révision de la décision de l'agente des normes d'emploi ainsi que le lui permettait le par. 67(2) de la Loi. Il a considéré que la décision de l'agente des normes d'emploi était définitive. Les critères d'application de la doctrine de la préclusion découlant d'une question déjà tranchée étaient donc respectés. Les paragraphes de la déclaration de l'appelante ayant trait aux salaire et commissions impayés ont été radiés.

B. *Cour d'appel de l'Ontario* (1998), 42 O.R. (3d) 235

Après examen des faits de l'espèce, le juge Rosenberg, s'exprimant pour la Cour d'appel, a fait état des questions que soulevait l'appel aux p. 239-240 :

[TRADUCTION] La présente affaire porte sur la seconde condition d'application de la préclusion découlant d'une question déjà tranchée, savoir celle voulant que la décision qui, affirme-t-on, donne ouverture à la préclusion soit une décision judiciaire définitive. L'appelante prétend que la décision que rend un agent des normes d'emploi n'est ni judiciaire ni définitive. Elle soutient

should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

également que, quoiqu'il en soit, la procédure suivie par M^me^ Burke en l'espèce était inéquitable et donc que sa décision ne devrait pas donner naissance à la préclusion. De façon plus particulière, l'appelante plaide qu'elle n'a pas été traitée équitablement puisqu'on ne lui a pas remis copie des observations de l'employeur et qu'on ne lui a pas, de ce fait, accordé la possibilité de les réfuter.

In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

11 Le juge Rosenberg a rejeté les prétentions de l'appelante, qu'il a regroupées sous les trois questions suivantes : La décision de l'agente des normes d'emploi était-elle une décision définitive? Cette décision était-elle une décision judiciaire? Quel est l'effet d'une iniquité procédurale sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée?

In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

12 Selon lui, la décision de l'agente était une décision définitive, étant donné que ni l'une ni l'autre des parties n'avaient exercé le droit d'appel interne prévu au par. 67(2) de la Loi. De plus, bien que les décisions administratives statuant définitivement sur les droits des parties ne soient pas toutes considérées comme « judiciaires » pour l'application de la doctrine de la préclusion découlant d'une question déjà tranchée, le juge Rosenberg a estimé que la procédure établie par la Loi respectait les conditions requises. Il a jugé que l'arrêt *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), était [TRADUCTION] « décisif à cet égard » (p. 249).

Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

13 Enfin, le juge Rosenberg s'est demandé si l'inobservation par l'agente des normes d'emploi des règles d'équité procédurale avait un effet en l'espèce sur l'application de la doctrine de la préclusion découlant d'une question déjà tranchée. Il a reconnu que l'agente des normes avait effectivement manqué à ces règles en statuant sur la plainte de l'appelante. Il a néanmoins jugé que ce manquement ne faisait pas obstacle à l'application de la doctrine (à la p. 252):

The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to con-

[TRADUCTION] L'agente était tenue de donner à l'appelante la possibilité de consulter et de réfuter toute information préjudiciable à sa réclamation recueillie par l'agente dans le cours de l'enquête. L'appelante aurait dû tout au moins recevoir copie de la lettre du 1^er^ juin 1994 ainsi qu'un résumé de toute autre information préjudiciable à sa réclamation recueillie dans le cours de l'enquête. Elle aurait également dû se voir accorder la

sider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

possibilité d'examiner cette information et d'y répondre. L'appelante n'a pas reçu communication des allégations formulées contre elle et elle a été privée de la possibilité de les réfuter : M^me^ Burke n'a donc pas agi judiciairement. En l'espèce, toutefois, ce manquement n'empêche pas l'application de la doctrine de la préclusion découlant d'une question déjà tranchée.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

De l'avis du juge Rosenberg, même si les agents des normes d'emploi ont l'obligation d'agir judiciairement, le manquement à cette obligation dans un cas donné, du moins lorsqu'il est possible d'interjeter appel, ne fait pas obstacle à l'application de la préclusion découlant d'une question déjà tranchée. Sa conclusion s'appuie sur les considérations de politique d'intérêt général qui sont à la base de deux règles de droit administratif (à la p. 252):

These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

[TRADUCTION] Ces deux règles sont les suivantes : (1) la règle écartant les recours discrétionnaires en matière de contrôle judiciaire lorsqu'il existe un autre recours approprié; (2) la règle prohibant les contestations indirectes. Dans les faits, ces règles exigent que les parties demandent réparation au moyen de la procédure administrative établie par le législateur. Lorsque les parties disposent d'une voie d'appel, elles ne sont pas admises à l'écarter pour s'adresser aux cours de justice.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

Le juge Rosenberg de la Cour d'appel a souligné que, si l'appelante avait demandé la révision de la décision de l'agente des normes d'emploi en vertu du par. 67(3) de la Loi, l'arbitre saisi de l'affaire aurait dû tenir une audience. Cette constatation étayait son opinion selon laquelle la procédure de révision prévue par la Loi constitue un autre recours approprié. Le juge Rosenberg a conclu ainsi, à la p. 256 :

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

[TRADUCTION] En résumé, M^me^ Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

La Cour d'appel a en conséquence appliqué la doctrine de la préclusion découlant d'une question déjà tranchée et a débouté l'appelante.

III. Relevant Statutory Provisions

Employment Standards Act, R.S.O. 1990, c. E.14

1. In this Act,

. . .

"wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,

(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c) travelling allowances or expenses,

(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

. . .

6. — (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. — (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the

III. Les dispositions législatives pertinentes

Loi sur les normes d'emploi, L.R.O. 1990, ch. E.14 17

1 Les définitions qui suivent s'appliquent à la présente loi.

. . .

« salaire » Rémunération en espèces payable par un employeur à un employé aux termes d'un contrat de travail, verbal ou écrit, exprès ou implicite, paiement qu'un employeur doit verser à un employé en vertu de la présente loi, et allocations de logement ou de repas prescrites par les règlements ou prévues par un accord ou un arrangement à cette fin, à l'exclusion des éléments suivants :

a) les pourboires et autres gratifications,

b) les sommes versées à titre de cadeaux ou de primes qui sont laissées à la discrétion de l'employeur et qui ne sont pas liées au nombre d'heures qu'un employé a travaillé, à sa production ou à son efficacité,

c) les allocations ou indemnités de déplacement,

d) les cotisations de l'employeur à une caisse, un régime ou un arrangement auxquels la partie X de la présente loi s'applique. (« wages »)

. . .

6 (1) La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte.

(2) Si un employé introduit une instance civile contre son employeur en vertu de la présente loi, l'avis d'instance est signifié au directeur, selon la formule prescrite, le jour même où l'instance civile est inscrite au rôle.

65 (1) Si l'agent des normes d'emploi conclut qu'un employé a le droit de percevoir un salaire d'un employeur, il peut, selon le cas :

a) s'entendre avec l'employeur pour que celui-ci verse directement à l'employé le salaire auquel ce dernier a droit;

b) recevoir de l'employeur, au nom de l'employé, le salaire qui doit être versé à ce dernier par suite d'une transaction;

c) ordonner, par écrit, que l'employeur verse sans délai au directeur, en fiducie, le salaire auquel un employé a droit; il ordonne également à l'employeur de verser au directeur, à titre de frais d'administration, celle

Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

. . .

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

. . .

67. — (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

. . .

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

. . .

des deux sommes suivantes qui est la plus élevée, à savoir : 10 pour cent du salaire ou 100 $.

. . .

(7) Si un employeur ne fait pas la demande visée à l'article 68 en vue de la révision d'une ordonnance rendue par un agent des normes d'emploi, l'ordonnance devient sans appel et lie l'employeur même si une audience en révision est tenue afin de déterminer l'obligation d'une autre personne aux termes de la présente loi.

. . .

67 (1) Si, à la suite d'une plainte par écrit d'un employé, l'agent des normes d'emploi conclut que l'employeur a versé à un employé le salaire auquel ce dernier a droit ou a conclu que l'employé n'a droit à rien d'autre ou qu'il n'y a rien que l'employeur doive faire ou s'abstenir de faire pour se conformer à la présente loi, il peut refuser de rendre une ordonnance visant l'employeur. Il en avise l'employé par lettre affranchie à sa dernière adresse connue.

(2) L'employé qui se croit lésé par le refus de l'agent de rendre une ordonnance contre l'employeur ou par une ordonnance qui, à son avis, ne comprend pas le salaire complet auquel il a droit ni ses autres droits peut, dans les quinze jours de la mise à la poste de la lettre visée au paragraphe (1) ou de la date où l'ordonnance a été rendue ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, demander au directeur, par écrit, de réviser le refus ou le montant fixé dans l'ordonnance.

(3) Sur réception de la demande de révision, le directeur peut nommer un arbitre de griefs pour tenir une audience.

. . .

(5) L'arbitre de griefs qui tient l'audience peut exercer, avec les adaptations nécessaires, les pouvoirs que la présente loi confère à un agent des normes d'emploi, et peut rendre une ordonnance à l'égard du refus ou une ordonnance modifiant, annulant ou confirmant l'ordonnance de l'agent des normes d'emploi.

. . .

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

68. — (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

. . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

(7) L'ordonnance de l'arbitre de griefs n'est pas susceptible de révision dans le cadre de l'article 68. Elle est sans appel et lie les parties.

68 (1) Après avoir versé le salaire qu'il lui est ordonné de payer ainsi que la somme à titre de pénalité qui s'y rapporte, s'il y a lieu, l'employeur qui s'estime lésé par une ordonnance rendue en vertu de l'article 45, 48, 51, 56.2, 58.22 ou 65 peut, dans les quinze jours qui suivent la remise ou la signification de l'ordonnance ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, et à la condition que le salaire n'ait pas été versé en vertu du paragraphe 72 (2), demander que l'ordonnance fasse l'objet d'une révision par voie d'audience.

. . .

(3) Le directeur choisit un arbitre au sein du tableau des arbitres pour tenir l'audience de révision.

. . .

(7) La décision que l'arbitre prend en vertu du présent article est sans appel et lie les parties et les autres personnes que l'arbitre peut préciser.

IV. Analysis

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of

IV. L'analyse

18 Le droit tend à juste titre à assurer le caractère définitif des instances. Pour favoriser la réalisation de cet objectif, le droit exige des parties qu'elles mettent tout en œuvre pour établir la véracité de leurs allégations dès la première occasion qui leur est donnée de le faire. Autrement dit, un plaideur n'a droit qu'à une seule tentative. L'appelante a décidé de se prévaloir du recours prévu par la LNE. Elle a perdu. Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités.

19 Le caractère définitif des instances est donc une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est

justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (looseleaf), vol. 3 Supp., at 21§17 *et seq*. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-

une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable (conclusion tirée par la Cour d'appel elle-même), l'application de cette doctrine empêche l'appelante de s'adresser aux cours de justice pour réclamer les 300 000 $ qui lui seraient dus, il convient de réexaminer certains principes fondamentaux.

Le droit s'est doté d'un certain nombre de moyens visant à prévenir les recours abusifs. L'un des plus anciens est la doctrine de la préclusion *per rem judicatem*, qui tire son origine du droit romain et selon laquelle, une fois le différend tranché définitivement, il ne peut être soumis à nouveau aux tribunaux : *Farwell c. La Reine* (1894), 22 R.C.S. 553, p. 558, et *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248, p. 267-268. La doctrine est opposable tant à l'égard de la cause d'action ainsi décidée (on parle de préclusion fondée sur la demande, sur la cause d'action ou sur l'action) que des divers éléments constitutifs ou faits substantiels s'y rapportant nécessairement (on parle alors généralement de préclusion découlant d'une question déjà tranchée) : G. S. Holmested et G. D. Watson, *Ontario Civil Procedure* (feuilles mobiles), vol. 3 suppl., 21§17 et suiv. Un autre aspect de la politique établie par les tribunaux en vue d'assurer le caractère définitif des instances est la règle qui prohibe les contestations indirectes, c'est-à-dire la règle selon laquelle l'ordonnance rendue par un tribunal compétent ne doit pas être remise en cause dans des procédures subséquentes, sauf celles prévues par la loi dans le but exprès de contester l'ordonnance : *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223.

Initialement, ces règles ont été établies dans le contexte de procédures judiciaires antérieures. Leur champ d'application a depuis été élargi, avec les adaptations nécessaires, aux décisions de nature judiciaire ou quasi judiciaire rendues par les juridictions administratives — fonctionnaires ou tribunaux. Dans ce contexte, l'objectif spécifique poursuivi consiste à assurer l'équilibre entre le respect

making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

de l'équité envers les parties et la protection du processus décisionnel administratif, dont l'intégrité serait compromise si on autorisait trop facilement les contestations indirectes ou l'engagement d'une nouvelle instance à l'égard de questions déjà tranchées.

The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* (2000), at p. 94 *et seq.*, including *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); *Rasanen*, *supra*; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

22 Dans *The Doctrine of Res Judicata in Canada* (2000), p. 94 et suiv., D. J. Lange attribue l'application aux organismes administratifs canadiens de la doctrine de la préclusion découlant d'une question déjà tranchée à certaines décisions datant du milieu du XIX^e^ siècle — notamment les affaires *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103 (C.S.), p. 104-105, et *Bell c. Miller* (1862), 9 Gr. 385 (Ch. H.-C.), p. 386. Parmi les arrêts contemporains rendus par des cours d'appel, mentionnons les suivants : *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622 (C.A.C.-B.); *Rasanen*, précité; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182 (C.A. Alb.); *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326 (C.A. Ont.); et *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112 (C.A.). Voir également *Thrasyvoulou c. Environment Secretary*, [1990] 2 A.C. 273 (H.L.). Des modifications s'imposaient en raison des « différences importantes qui peuvent exister entre ces deux types d'ordonnances [c.-à-d. les ordonnances administratives et les ordonnances judiciaires], notamment quant à leur nature juridique et la place des institutions qui les rendent à l'intérieur de la structure étatique » : *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, par. 4. On s'entend généralement pour dire que les ordonnances des cours de justice sont des ordonnances de nature judiciaire; il n'en est pas de même pour les innombrables ordonnances rendues par les différents tribunaux administratifs.

In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on

23 Dans le présent pourvoi, les parties n'ont pas plaidé la préclusion fondée sur la « cause d'action », estimant apparemment que le cadre législatif de la demande fondée sur la LNE distingue suffisamment cette demande du cadre juridique de common law de l'instance judiciaire. Je n'en dirai par conséquent pas davantage à ce sujet. Les parties ont cependant lié contestation quant à l'application de la préclusion découlant d'une question

the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that

déjà tranchée et à la pertinence de la règle prohibant les contestations indirectes.

La préclusion découlant d'une question déjà tranchée a été définie de façon précise par le juge Middleton de la Cour d'appel de l'Ontario dans l'arrêt *McIntosh c. Parent*, [1924] 4 D.L.R. 420, p. 422 :

> [TRADUCTION] Lorsqu'une question est soumise à un tribunal, le jugement de la cour devient une décision définitive entre les parties et leurs ayants droit. Les droits, questions ou faits distinctement mis en cause et directement réglés par un tribunal compétent comme motifs de recouvrement ou comme réponses à une prétention qu'on met de l'avant, ne peuvent être jugés de nouveau dans une poursuite subséquente entre les mêmes parties ou leurs ayants droit, même si la cause d'action est différente. Le droit, la question ou le fait, une fois qu'on a statué à son égard, doit être considéré entre les parties comme établi de façon concluante aussi longtemps que le jugement demeure. [Je souligne.]

Le juge Laskin (plus tard Juge en chef) a souscrit à cet énoncé dans ses motifs de dissidence dans l'arrêt *Angle*, précité, p. 267-268. Cette description des aspects visés par la préclusion (« [l]es droits, questions ou faits distinctement mis en cause et directement réglés ») est plus exigeante que celle utilisée dans certaines décisions plus anciennes à l'égard de la préclusion fondée sur la cause d'action (par exemple [TRADUCTION] « toute question ayant été débattue ou qui aurait pu à bon droit l'être », *Farwell*, précité, p. 558). S'exprimant au nom de la majorité dans l'arrêt *Angle*, précité, p. 255, le juge Dickson (plus tard Juge en chef) a également fait sienne la définition plus exigeante de l'objet de la préclusion découlant d'une question déjà tranchée. « Il ne suffira pas », a-t-il dit, « que la question ait été soulevée de façon annexe ou incidente dans l'affaire antérieure ou qu'elle doive être inférée du jugement par raisonnement. » La question qui est censée donner naissance à la préclusion doit avoir été « fondamentale à la décision à laquelle on est arrivé » dans l'affaire antérieure. En d'autres termes, comme il est expliqué plus loin, la préclusion vise les faits substantiels, les conclusions de droit ou les conclusions mixtes de fait et de droit (« les questions ») à l'égard desquels on a nécessairement statué (même si on ne

were necessarily (even if not explicitly) determined in the earlier proceedings.

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. *The Statutory Scheme*

1. The Employment Standards Officer

The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum

l'a pas fait de façon explicite) dans le cadre de l'instance antérieure.

25 Les conditions d'application de la préclusion découlant d'une question déjà tranchée ont été énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254 :

(1) que la même question ait été décidée;

(2) que la décision judiciaire invoquée comme créant la [préclusion] soit finale; et

(3) que les parties dans la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties engagées dans l'affaire où la [préclusion] est soulevée, ou leurs ayants droit.

26 L'appelante soutient que l'agente des normes d'emploi n'a pas — bien quelle ait été tenue de le faire — pris sa décision de manière judiciaire. L'agente disposait, en vertu de la LNE, de la compétence nécessaire pour connaître de la réclamation, mais elle a perdu cette compétence en omettant de communiquer à l'appelante les prétentions de l'employeur et de lui donner la possibilité de les réfuter. L'agente n'a donc jamais rendu une « décision judiciaire » comme elle était tenue de le faire. L'appelante soutient en outre que sa propre omission d'exercer son droit de demander la révision administrative interne de la décision de l'agente ne devrait pas se voir accorder l'effet déterminant que lui a attribué la Cour d'appel de l'Ontario. Selon elle, même si les conditions d'application de la préclusion découlant d'une question déjà tranchée étaient réunies, la cour avait, dans les circonstances de l'espèce, le pouvoir discrétionnaire de la soustraire aux effets draconiens de la préclusion *per rem judicatem*, et elle a commis une erreur en s'abstenant de le faire.

A. *Le cadre législatif*

1. L'agent des normes d'emploi

27 La LNE s'applique à « tout contrat de travail, verbal ou écrit, exprès ou implicite » en Ontario (par. 2(2)), sous réserve de certaines exceptions prévues par règlement, et elle établit un certain

employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

nombre de normes d'emploi minimales en vue de protéger les employés. Ces normes portent notamment sur les heures de travail, le salaire minimum, le salaire pour les heures supplémentaires, les régimes d'avantages sociaux, les jours fériés et les congés payés. Plus particulièrement, la Loi établit une procédure sommaire permettant aux employés qui s'estiment lésés parce que leur employeur aurait omis de se conformer à ces normes de demander réparation à cet égard. L'objectif est d'offrir, dans les cas appropriés, un recours rapide et peu coûteux. Au premier palier, l'examen du différend est confié à un agent des normes d'emploi. Fonctionnaires du ministère du Travail, ces personnes n'ont généralement pas de formation juridique, mais elles possèdent une certaine expérience en matière de relations de travail. La Loi ne prescrit pas la procédure à suivre pour statuer sur les demandes. L'agent des normes d'emploi dispose de pouvoirs étendus qui l'autorisent notamment à pénétrer dans des locaux, à effectuer des inspections, à emporter des documents avec lui et à interroger toute personne à l'égard de questions pertinentes. S'il constate l'inobservation de la loi, l'agent dispose de larges pouvoirs afin de la faire respecter (art. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

En règle générale, sur réception de la demande d'un employé, l'agent des normes d'emploi communique avec l'employeur pour vérifier si le salaire est effectivement impayé et, dans l'affirmative, pour connaître la raison du non-paiement. Bien que, dans la présente affaire, l'agente des normes d'emploi se soit entretenue avec l'appelante pendant une heure, rien n'exige la tenue d'une telle rencontre et, manifestement, aucune audience à laquelle participeraient les deux parties n'est envisagée. D'aucuns estimeraient qu'il s'agit d'une procédure expéditive tout à fait inappropriée pour trancher de façon définitive des prétentions contractuelles présentant une certaine complexité sur les plans juridique et factuel.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There

Ce mécanisme présente de nombreux avantages pour les employés. Les services de l'agent des normes d'emploi sont gratuits. La représentation par avocat n'est pas nécessaire. L'instance se déroule plus rapidement que ce à quoi on pourrait

are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

vraisemblablement s'attendre devant les tribunaux judiciaires. À ces avantages correspondent toutefois des désavantages. Il est probable que l'agent n'a pas de formation juridique et qu'il n'a ni le temps ni les ressources nécessaires pour examiner une demande de nature contractuelle comme cela se passerait dans la salle d'audience d'une cour de justice. Au moment où ces procédures se sont déroulées, des règles inégales s'appliquaient en matière d'appel (ou de « révision » selon les termes de la Loi). En effet, l'employeur pouvait demander de plein droit la révision de la décision (art. 68). Toutefois, comme nous le verrons plus loin, l'employé pouvait lui aussi présenter une demande de révision, mais le directeur pouvait refuser d'y donner suite (par. 67(3)). De même, au cours de la période pertinente le montant des demandes à l'égard desquelles l'agent des normes d'emploi avait compétence n'était pas plafonné. La Loi a depuis été modifiée et seules les réclamations d'au plus 10 000 $ sont maintenant visées (L.O. 1996, ch. 23, par. 19(1)). Si, en l'espèce, l'agente avait statué en faveur de l'employée, l'employeur aurait pu devoir supporter une obligation de 300 000 $ découlant d'une décision présentant de profondes lacunes, à moins d'avoir gain de cause à la suite d'une révision administrative ou d'un contrôle judiciaire.

2. The Review Process

2. La procédure de révision

The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

30 Comme nous l'avons indiqué, les employés ne peuvent pas interjeter appel de plein droit. En vertu du par. 67(2) de la Loi, l'employé insatisfait de la décision rendue au premier palier peut, dans les 15 jours qui suivent la mise à la poste de la décision, demander par écrit au directeur de réviser cette décision. Aux termes du par. 67(3), « le directeur peut nommer un arbitre de griefs pour tenir une audience » (je souligne). L'emploi du mot « peut » confère au directeur le pouvoir discrétionnaire de décider s'il y aura ou non une audience. La Cour d'appel de l'Ontario a souligné ce point, mais a affirmé que les parties y avaient attaché peu d'importance.

It seems clear the legislature did not intend to confer an appeal as of right. Where the Director

31 Il paraît clair que le législateur n'a pas voulu créer un appel de plein droit. Lorsque le directeur

does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "*peut nommer un arbitre de griefs pour tenir une audience*" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

nomme un arbitre de griefs, la Loi exige la tenue d'une audience. Il en résulte évidemment des délais et des dépenses supplémentaires pour le ministère et les parties. La juxtaposition des auxiliaires « *may* » et « *shall* » dans la version anglaise du par. 67(3) (et, dans la version française, l'indication que le directeur « peut nommer un arbitre de griefs pour tenir une audience » (je souligne)) écarte tout doute à cet égard. Le législateur ontarien entendait que le directeur dispose du pouvoir discrétionnaire de refuser de saisir un arbitre de griefs d'une demande qui, à son avis, n'est tout simplement pas justifiée. Même les arbitres chargés de la révision prévue au par. 67(3) de la LNE ne sont pas tenus par la loi de posséder une formation juridique. Le législateur ontarien a probablement jugé qu'il n'était pas souhaitable que tout employé insatisfait d'une décision puisse obtenir de plein droit la révision de celle-ci, compte tenu particulièrement du fait que la somme en jeu est souvent relativement modeste. Il va de soi que ce pouvoir discrétionnaire doit être exercé en conformité avec les principes pertinents, mais il n'en demeure pas moins un pouvoir discrétionnaire.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

Si une révision interne avait été ordonnée, un arbitre aurait alors examiné *de novo* la demande de l'appelante et aurait sans aucun doute permis à cette dernière de prendre connaissance des documents de l'employeur et lui aurait donné la possibilité d'y répondre et de les commenter. Je reconnais que, sous le régime de la Loi, les vices procéduraux qui surviennent à l'étape de la décision initiale, y compris l'omission de donner aux intéressés un préavis suffisant et la possibilité de se faire entendre pour réfuter la thèse de la partie adverse, peuvent être corrigés à l'étape de la révision. L'intimée soutient que, du fait que l'appelante a choisi de se prévaloir de la Loi, elle devait recourir au mécanisme de révision prévue pour celle-ci si elle était insatisfaite de la décision rendue au premier palier. Comme elle ne l'a pas fait, elle est précluse de continuer de réclamer la somme de 300 000 $. L'appelante réplique que la procédure prévue par la LNE souffrait de lacunes si profondes qu'il lui était loisible de renoncer à y recourir.

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, *The Doc-*

B. *L'applicabilité de la préclusion découlant d'une question déjà tranchée*

1. Préclusion découlant d'une question déjà tranchée : analyse à deux volets

33 Les règles régissant la préclusion découlant d'une question déjà tranchée ne doivent pas être appliquées machinalement. L'objectif fondamental est d'établir l'équilibre entre l'intérêt public qui consiste à assurer le caractère définitif des litiges et l'autre intérêt public qui est d'assurer que, dans une affaire donnée, justice soit rendue. (Il existe des intérêts privés correspondants.) Il s'agit, au cours de la première étape, de déterminer si le requérant (en l'occurrence l'intimée) a établi l'existence des conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Dans l'affirmative, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion *devrait* être appliquée : *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), par. 32; *Schweneke c. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), par. 38-39; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), par. 56.

34 L'appelante avait parfaitement le droit, en première instance, de saisir la Cour supérieure de l'Ontario de ses diverses réclamations financières. L'intimée ne pouvait se voir accorder de plein droit l'application de la préclusion. Il appartenait à la cour de décider, dans l'exercice de son pouvoir discrétionnaire, s'il convenait qu'elle refuse de connaître ou non de certains aspects de la demande ayant déjà fait l'objet de la procédure administrative engagée sous le régime de la LNE.

2. La nature judiciaire de la décision

35 L'exigence fondamentale selon laquelle la décision antérieure doit être une décision judiciaire est un élément qui est commun aux conditions préalables à l'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité. Selon la doc-

trine of Res Judicata (3rd ed. 1996), at paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

trine (voir, par exemple, G. Spencer Bower, A. K. Turner et K. R. Handley, *The Doctrine of Res Judicata* (3e éd. 1996), par. 18-20), trois éléments peuvent être pris en considération. Premièrement, il faut se pencher sur la nature du décideur administratif ayant rendu la décision. S'agit-il d'un organe pouvant être investi d'un pouvoir juridictionnel et capable d'exercer ce pouvoir? Deuxièmement, sur le plan juridique, la décision litigieuse devait-elle être prise judiciairement? Troisièmement — question mixte de fait et de droit — la décision *a-t-elle été* rendue de manière judiciaire? Il s'agit d'exigences distinctes :

> It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.
>
> (Spencer Bower, Turner and Handley, *supra*, para. 20)

> [TRADUCTION] Il ne sert à rien de prouver que la prétendue chose jugée était une décision ou qu'elle a été prononcée conformément aux principes applicables aux tribunaux judiciaires à moins qu'elle ait été rendue par un tel tribunal dans l'exercice de son pouvoir juridictionnel; il ne suffit pas non plus qu'elle ait été prononcée par un tel tribunal, sauf s'il s'agit d'une décision judiciaire sur le fond. Par conséquent, il importe de bien saisir dès le départ ce qu'est un tribunal judiciaire et ce qu'est une décision judiciaire pour les fins qui nous occupent.
>
> (Spencer Bower, Turner et Handley, *op. cit.*, par. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that:

En ce qui concerne le troisième élément, soit la question de savoir si la décision en cause a effectivement été rendue conformément aux exigences applicables aux décisions judiciaires, je souligne l'affirmation suivante, faite récemment par le juge Handley (éditeur actuel de l'ouvrage *The Doctrine of Res Judicata*) en dehors du cadre de ses fonctions de juge :

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.
>
> ("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

> [TRADUCTION] La décision antérieure — qu'elle soit judiciaire, arbitrale ou administrative — doit avoir été rendue dans les limites de la compétence du décideur pour que puisse être plaidée la préclusion découlant d'une question déjà tranchée.
>
> (« Res Judicata : General Principles and Recent Developments » (1999), 18 *Aust. Bar Rev.* 214, p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue

En l'espèce, le désaccord porte principalement sur ce troisième élément : une décision prise sans avoir respecté les exigences en matière de préavis et sans avoir donné à l'intéressé la possibilité de se

estoppel? In my opinion, the answer to this question is yes.

(a) *The Institutional Framework*

The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Re Downing and Graydon*, *supra*, *per* Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) *The Nature of ESA Decisions Under Section 65(1)*

An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

One distinction between administrative and judicial decisions lies in differentiating adjudicative entendre est-elle *capable* de fonder l'application de la préclusion découlant d'une question déjà tranchée? À mon avis, la réponse à cette question est oui.

a) *Le cadre institutionnel*

38 La décision sur laquelle s'est appuyé le juge Rosenberg de la Cour d'appel de l'Ontario à cet égard a trait à la fonction et au rôle génériques de l'agent des normes d'emploi : *Re Downing and Graydon*, précité, le juge Blair, p. 305 :

> [TRADUCTION] En l'espèce, l'agent des normes d'emploi a le pouvoir de décider ainsi que celui d'enquêter. Il fait enquête afin de recueillir les renseignements qui fonderont la décision qu'il doit rendre. Ses fonctions comportent tous les indices importants de l'exercice d'un pouvoir judiciaire, notamment la détermination des faits, l'application du droit à ces faits et la prise d'une décision liant les parties.

Les parties ne contestent pas le fait que les fonctionnaires chargés de l'application de la LNE pouvaient à bon droit être investis de fonctions juridictionnelles devant être exercées de manière judiciaire. Le plafond de 4 000 $ que prévoyait la Loi à l'égard des réclamations pour salaire impayé (à l'exclusion de l'indemnité de cessation d'emploi et des prestations payables au titre des dispositions relatives au congé de maternité et au congé parental) a été aboli en 1991 par L.O. 1991, ch. 16, par. 9(1), mais après la décision rendue en application de la LNE dans la présente affaire, un nouveau plafond de 10 000 $ a été fixé. Il s'agit du même plafond auquel est assujettie la Cour des petites créances par la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43, par. 23(1), et le Règl. de l'Ont. 626/00, par. 1(1).

b) *La nature des décisions rendues en application du par. 65(1)*

39 Un tribunal administratif peut exercer des fonctions judiciaires ainsi que des fonctions administratives ou ministérielles. Il en est de même d'un fonctionnaire.

40 Une des caractéristiques qui distinguent les décisions administratives des décisions judiciaires est

tive from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur*, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday*, [1964] P. 181 (Eng. C.A.), at p. 197.

la différence qui existe entre des fonctions juridictionnelles et des fonctions d'enquête. Dans l'exercice des secondes, l'agent des normes d'emploi prend l'initiative de recueillir des éléments d'information. Il agit en tant qu'enquêteur autonome et n'est pas assujetti aux contraintes de la procédure contradictoire. La distinction entre les pouvoirs d'enquête et les pouvoirs juridictionnels a été examinée dans l'arrêt *Guay c. Lafleur*, [1965] R.C.S. 12, p. 17-18. L'inapplicabilité de la préclusion découlant d'une question déjà tranchée aux enquêtes administratives a été mentionnée par le lord juge Diplock dans *Thoday c. Thoday*, [1964] P. 181 (C.A. Angl.), p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, § 7:1310, p. 7-7.

Quoique les agents des normes d'emploi puissent avoir des fonctions non juridictionnelles, lorsqu'ils accomplissent des fonctions juridictionnelles ils sont tenus de le faire de manière judiciaire. Bien qu'ils aient recours à des procédures plus souples que celles des cours de justice, leurs décisions doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective. Il s'agit là d'une caractéristique de fonctions judiciaires : D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, par. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

La décision qui statue sur une plainte après l'obtention de l'information pertinente est une décision de nature judiciaire.

(c) *Particulars of the Decision in Question*

c) *Le détail de la décision en cause*

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

La Cour d'appel de l'Ontario a conclu que la décision de l'agente des normes d'emploi avait de fait été rendue au mépris des principes de justice naturelle. L'appelante n'a pas été informée des prétentions de l'employeur et n'a pas eu la possibilité de les réfuter.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen*, *supra*, *per* Abella J.A., at p. 280:

L'appelante soutient qu'il ne suffit pas de dire que la décision *aurait dû* être prise de manière judiciaire, mais qu'il faut plutôt se demander : La décision a-t-elle été prise de manière judiciaire en l'espèce? Cet argument trouve un certain appui dans l'arrêt *Rasanen*, précité, où madame le juge Abella de la Cour d'appel de l'Ontario a dit ceci, à la p. 280 :

As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

[TRADUCTION] Pour autant que la procédure d'instruction du tribunal administratif donne à chacune des parties la possibilité de connaître les prétentions de l'autre et de les réfuter et que la décision rendue relève de la compétence du tribunal, peu importe alors à quel point la procédure s'apparente à un procès ou aux procédures préalables à celui-ci, je ne vois aucune raison fondée sur des principes qui justifierait, dans le cadre d'une action subséquente, de soustraire les questions décidées par un tribunal administratif à l'application de la préclusion découlant d'une question déjà tranchée. [Je souligne.]

Trial level decisions in Ontario subsequently adopted this approach: *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); *Heynen v. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in *Munyal v. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position: 45

Cette approche a subséquemment été retenue par des tribunaux de première instance en Ontario : *Machado c. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132 (C. Ont. (Div. gén.)); *Randhawa c. Everest & Jennings Canadian Ltd.* (1996), 22 C.C.E.L. (2d) 19 (C. Ont. (Div. gén.)); *Heynen c. Frito-Lay Canada Ltd.* (1997), 32 C.C.E.L. (2d) 183 (C. Ont. (Div. gén.)); *Perez c. GE Capital Technology Management Services Canada Inc.* (1999), 47 C.C.E.L. (2d) 145 (C.S.J.). Les propos suivants du juge Métivier dans l'affaire *Munyal c. Sears Canada Inc.* (1997), 29 C.C.E.L. (2d) 58 (C. Ont. (Div. gén.)), p. 60, reflètent ce point de vue :

The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

[TRADUCTION] La partie demanderesse s'appuie sur [l'arrêt *Rasanen*] et sur d'autres décisions au même effet pour affirmer que le principe de la préclusion découlant d'une question déjà tranchée devrait s'appliquer aux décisions administratives. Ce n'est le cas que lorsque la décision est le fruit d'un processus décisionnel équitable et impartial « comportant une audience dans le cadre de laquelle chacune des parties a la possibilité de prendre connaissance des prétentions de l'autre et de les réfuter ».

In *Wong*, *supra*, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also *Alderman v. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (B.C.S.C.). 46

Dans l'arrêt *Wong*, précité, la Cour d'appel de l'Alberta a rejeté une contestation visant la décision d'un agent de révision en matière de normes d'emploi et a conclu qu'il était possible de plaider la préclusion à l'égard de cette décision dans la mesure où [TRADUCTION] « l'appelant connaissait les prétentions formulées contre lui et avait eu la possibilité de faire valoir son point de vue » (par. 20). Voir également *Alderman c. North Shore Studio Management Ltd.*, [1997] 5 W.W.R. 535 (C.S.C.-B.).

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

En toute déférence, j'estime que la thèse voulant que l'inobservation des principes de justice naturelle ait pour effet d'enlever tout caractère « judiciaire » à la décision fondée sur la LNE repose sur une idée fausse. Il se peut que la décision présente des failles, mais elle demeure « judiciaire » (plutôt qu'administrative ou législative). Une fois qu'il est établi que l'auteur de la décision pouvait être investi d'un pouvoir juridictionnel, qu'il pouvait exercer ce pouvoir et que la décision litigieuse devait être rendue de manière judiciaire, celle-ci ne perd pas son caractère « judiciaire » parce que son auteur a commis une erreur dans l'accomplissement de ses fonctions. Dans un vieil arrêt, *R. c. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), il a été jugé que la déclaration de culpabilité inscrite par un magistrat albertain ne pouvait être annulée pour cause d'absence de compétence sur le fondement que les témoignages ne révélaient aucune preuve étayant la déclaration de culpabilité ou parce que le magistrat s'était donné des directives erronées dans l'examen de la preuve. Une distinction a été établie entre le pouvoir de juger les accusations et les erreurs qui auraient été commises en matière d'[TRADUCTION] « observation de la loi dans l'exercice de ce pouvoir » (p. 156). Si les conditions préalables à l'exercice d'une compétence de nature judiciaire sont réunies (comme c'est le cas en l'espèce), toute erreur subséquente dans l'exercice de cette compétence, y compris les manquements aux règles de la justice naturelle, ne rend pas la décision nulle mais annulable : *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561, p. 584-585. La décision reste une décision « judiciaire », quoiqu'elle souffre de sérieuses lacunes du fait de l'absence de préavis suffisant et du défaut d'accorder la possibilité de se faire entendre.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin*, *supra*. In that case a university student failed in his judicial review application to quash the decision of a

Comme je l'ai mentionné plus tôt, la préclusion *per rem judicatem* est étroitement liée à la règle prohibant les contestations indirectes et, de fait, aux principes régissant le contrôle judiciaire. Si l'appelante s'était adressée à une cour de justice pour demander le contrôle judiciaire de la décision de l'agente des normes d'emploi sans se prévaloir au préalable du mécanisme de révision administrative interne, on lui aurait opposé l'arrêt *Harelkin*, précité, de notre Cour. Dans cette affaire, la

faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

demande de contrôle judiciaire qu'avait présentée un étudiant de l'université de Regina en vue d'obtenir l'annulation de la décision rendue par un comité d'une faculté de cet établissement et portant que ses notes étaient insatisfaisantes a été rejetée. Ce comité était tenu d'agir judiciairement, mais, tout comme en l'espèce, il avait omis de donner à l'étudiant un préavis suffisant et la possibilité de se faire entendre. Il a été jugé que cette omission n'avait pas fait perdre au comité sa compétence juridictionnelle. La décision du comité était susceptible de contrôle judiciaire, mais notre Cour, dans l'exercice de son pouvoir discrétionnaire, a refusé de faire droit à ce recours. Retenir la thèse de l'appelante en l'espèce entraînerait un résultat anormal. Si elle a raison de prétendre que l'agente des normes d'emploi a cessé d'agir judiciairement et a perdu compétence, à tout point de vue, y compris pour l'application de la préclusion découlant d'une question déjà tranchée, l'obstacle au contrôle judiciaire que constitue l'arrêt *Harelkin* serait habilement contourné. Elle n'aurait en effet pas besoin de demander le contrôle judiciaire de la décision de l'agente pour la faire annuler puisque, selon ce qu'elle soutient, elle a d'office droit à ce qu'on n'en tienne pas compte dans le cadre de son action au civil.

The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Maybrun, supra,* says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Maybrun,* on which forum

49 La thèse avancée par l'appelante créerait également une situation anormale pour ce qui concerne la règle prohibant les contestations indirectes. Comme l'a souligné l'intimée, le refus d'appliquer la préclusion découlant d'une question déjà tranchée en l'espèce équivaudrait, en un sens, à faire droit à une contestation indirecte de la décision de l'agente des normes d'emploi, décision qui n'a été contestée ni par voie de révision administrative ni par voie de contrôle judiciaire. Suivant la thèse de l'appelante, un excès de compétence pendant le déroulement de la procédure administrative prévue par la LNE empêche l'application de la préclusion découlant d'une question déjà tranchée, bien que dans l'arrêt *Maybrun*, précité, notre Cour ait dit qu'une mesure outrepassant la compétence que possédait initialement le décideur ne donne pas nécessairement ouverture aux contestations indirectes de cette décision. Suivant cet arrêt, tout dépend du forum devant lequel le législateur a

the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law

voulu que soit présentée la contestation d'ordre juridictionnel, savoir le tribunal administratif chargé de la révision ou une cour de justice (par. 49).

À mon sens, il faut inciter le plaideur qui n'a pas gain de cause dans le cadre d'une instance administrative à se prévaloir de tous les recours administratifs qui lui sont ouverts. Il convient de rappeler que, en l'espèce, l'appelante a opté pour le recours prévu par la LNE. Tant les employeurs que les employés doivent être en mesure de s'en remettre aux décisions rendues sous le régime de la LNE à moins qu'une mesure ne soit prise rapidement pour en obtenir l'annulation. Un objectif important du régime établi par le législateur dans la LNE est de faciliter le règlement rapide des différends portant sur les indemnités de licenciement, de sorte que l'employé et l'employeur puissent tourner la page. Dans les cas où, comme en l'espèce, les questions touchant à l'application de la LNE sont tranchées dans un délai d'un an ou moins, il est néanmoins possible, en Ontario, d'intenter une action contractuelle dans les six ans qui suivent le manquement allégué, ce qui peut donner lieu à cinq années d'incertitude. De telles situations doivent être évitées.

En résumé, il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Les conditions préalables à l'exercice de la compétence juridictionnelle doivent être réunies. Lorsqu'il est possible d'affirmer que le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais qu'il a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin*, précité, et celles

governing judicial review in *Harelkin*, *supra*, and collateral attack in *Maybrun*, *supra*.

Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) *That the Same Question Has Been Decided*

A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law

relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*, précité.

52 Là où je diverge d'opinion avec la Cour d'appel de l'Ontario, c'est relativement à sa conclusion que le fait pour l'appelante de ne pas avoir demandé la révision administrative de la décision lacunaire de l'agente porte un coup fatal à la thèse de l'appelante. En toute déférence, je suis d'avis que le refus de l'agente des normes d'emploi de donner à l'appelante un préavis suffisant et la possibilité de se faire entendre est un facteur très important dans l'exercice du pouvoir discrétionnaire de la cour, comme nous le verrons plus loin.

53 Je vais maintenant examiner les trois conditions d'application de la préclusion découlant d'une question déjà tranchée énoncées par le juge Dickson dans l'arrêt *Angle*, précité, p. 254.

3. La préclusion découlant d'une question déjà tranchée : application des conditions

a) *La condition requérant que la même question ait déjà été tranchée*

54 Traditionnellement, on définit la cause d'action comme étant tous les faits que le demandeur doit prouver, s'ils sont contestés, pour étayer son droit d'obtenir jugement de la cour en sa faveur : *Poucher c. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Pour que le demandeur ait gain de cause, chacun de ces faits (souvent qualifiés de faits substantiels) doit donc être établi. Il est évident que des causes d'action différentes peuvent avoir en commun un ou plusieurs faits substantiels. En l'espèce, par exemple, l'existence d'un contrat de travail est un fait substantiel commun au recours administratif et à l'action pour congédiement injustifié intentée au civil par l'appelante. L'application de la préclusion découlant d'une question déjà tranchée signifie simplement que, dans le cas où le tribunal judiciaire ou administratif compétent a conclu, sur le fondement d'éléments de preuve ou d'admissions, à l'existence (ou à l'inexistence) d'un fait pertinent — par exemple un contrat de travail valable — , cette même question ne peut être débattue à nouveau dans le cadre d'une instance ultérieure opposant les mêmes parties. En d'autres termes, la pré-

that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) *That the Judicial Decision Which Is Said to Create the Estoppel Was Final*

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike *Harelkin*, *supra*, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA

clusion vise les questions de fait, les questions de droit ainsi que les questions mixtes de fait et de droit qui sont nécessairement liées à la résolution de cette « question » dans l'instance antérieure.

En l'espèce, les parties conviennent que la condition relative à l'existence d'une « même question » est remplie. Dans son action pour congédiement injustifié, l'appelante réclame 300 000 $ à titre de commissions impayées. Cela met en jeu le droit même qui lui a été refusé dans le cadre de l'instance fondée sur la LNE. Une ou plusieurs des questions de fait ou de droit essentielles à la reconnaissance de ce droit ont nécessairement été tranchées en faveur de l'employeur dans le cadre de la procédure administrative. Si la préclusion découlant d'une question déjà tranchée s'applique, cela a pour effet d'empêcher l'appelante de soutenir que ces questions devraient maintenant être tranchées en sa faveur.

b) *La condition requérant que la décision judiciaire qui entraînerait l'application de la préclusion ait un caractère définitif*

Comme il a été indiqué plus tôt, la condition requérant que la décision antérieure soit une décision « judiciaire » (plutôt qu'administrative ou législative) est satisfaite en l'espèce.

En outre, je souscris à l'opinion de la Cour d'appel de l'Ontario selon laquelle, en raison du fait que l'employée ne s'est pas prévalue du mécanisme de révision interne, la décision de l'agente des normes d'emploi avait un caractère définitif pour l'application de la Loi et était donc susceptible, dans le cours normal des choses, de faire naître la préclusion.

J'ai déjà souligné que, en l'espèce, contrairement à l'affaire *Harelkin*, précitée, l'appelante ne disposait d'aucun droit d'appel. Elle pouvait uniquement demander au directeur de faire réviser par un arbitre la décision de l'agente des normes d'emploi. Bien qu'il puisse s'agir d'un facteur à prendre en considération dans l'exercice du pouvoir discrétionnaire de refuser l'application de la préclusion découlant d'une question déjà tranchée, il n'a aucun effet sur le caractère définitif de la décision.

decision must nevertheless be treated as final for present purposes.

L'appelante pourrait à juste titre prétendre, dans le cadre d'une demande de contrôle judiciaire, que contrairement à M. Harelkin elle ne disposait pas, de plein droit, d'un autre « recours approprié ». Néanmoins, la décision de l'agente des normes d'emploi doit être tenue pour définitive pour les fins du présent pourvoi.

(c) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

c) *La condition requérant que les parties à la décision judiciaire invoquée, ou leurs ayants droit, soient les mêmes que les parties aux procédures au cours desquelles la préclusion est plaidée, ou leurs ayants droit*

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin*, *supra*; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), *per* Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, *supra*, at 21§24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

Cette condition garantit la réciprocité. Si elle ne s'appliquait pas, un tiers aux procédures antérieures pourrait exiger qu'une partie à celles-ci soit considérée comme liée, dans le cadre d'une instance ultérieure, par les conclusions tirées au cours des premières procédures, alors que ce tiers, qui ne serait partie qu'à la seconde instance, ne serait pas lié par ces conclusions : *Machin*, précité; *Minott c. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), le juge Laskin, p. 339-340. Cette condition de réciprocité a fait l'objet de certaines critiques par le juge McEachern (plus tard Juge en chef de la Colombie-Britannique), pendant qu'il siégeait en première instance, dans l'affaire *Saskatoon Credit Union Ltd. c. Central Park Ent. Ltd.* (1988), 22 B.C.L.R. (2d) 89 (C.S.), p. 96, et elle a été modifiée de façon substantielle dans bon nombre d'États américains : voir Holmested et Watson, *op. cit.*, 21§24, et G. D. Watson, « Duplicative Litigation : Issue Estoppel, Abuse of Process and the Death of Mutuality » (1990), 69 *R. du B. can.* 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

Évidemment, la notion de « lien de droit » est assez élastique. J. Sopinka, S. N. Lederman et A. W. Bryant, les éminents éditeurs de l'ouvrage *The Law of Evidence in Canada* (2e éd. 1999), affirment avec un certain pessimisme, à la p. 1088, qu'[TRADUCTION] « [i]l est impossible d'être catégorique quant à l'étendue de l'intérêt qui crée un lien de droit » et qu'il faut trancher au cas par cas. En l'espèce, les parties sont les mêmes et il n'y a pas lieu d'explorer davantage les confins des notions de « réciprocité » et d'« identité des parties ».

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In *Bugbusters*, *supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke*, *supra*, at paras. 38 and 43:

J'arrive à la conclusion que les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies en l'espèce.

4. L'exercice du pouvoir discrétionnaire

L'appelante fait valoir que la Cour doit néanmoins exercer son pouvoir discrétionnaire et refuser l'application de la préclusion. Il ne fait aucun doute que ce pouvoir discrétionnaire existe. Dans l'arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, le juge Estey a souligné, à la p. 101, que dans le contexte d'une instance judiciaire « ce pouvoir discrétionnaire est très limité dans son application ». À mon avis, le pouvoir discrétionnaire est nécessairement plus étendu à l'égard des décisions des tribunaux administratifs, étant donné la diversité considérable des structures, missions et procédures des décideurs administratifs.

Dans l'arrêt *Bugbusters*, précité, le juge Finch de la Cour d'appel (maintenant Juge en chef de la Colombie-Britannique) a fait les observations suivantes, au par 32 :

> [TRADUCTION] Il faut toujours se rappeler que, bien que les trois conditions d'application de la préclusion découlant d'une question déjà tranchée doivent être réunies pour que celle-ci puisse être invoquée, le fait que ces conditions soient présentes n'emporte pas nécessairement l'application de la préclusion. Il s'agit d'une doctrine issue de l'*equity* et, comme l'indique la jurisprudence, elle présente des liens étroits avec l'abus de procédure. Elle se veut un moyen de rendre justice et de protéger contre l'injustice. Elle implique inévitablement l'exercice par la cour de son pouvoir discrétionnaire pour assurer le respect de l'équité selon les circonstances propres à chaque espèce.

Mis à part, entre parenthèses, le fait que la préclusion *per rem judicatem* soit généralement considérée comme une doctrine de common law (contrairement à la préclusion fondée sur une promesse, qui tire clairement son origine de l'*equity*), j'estime qu'il s'agit d'un énoncé fidèle du droit applicable. Cette remarque incidente du juge Finch a été retenue et appliquée par la Cour d'appel de l'Ontario dans l'affaire *Schweneke*, précitée, par. 38 et 43 :

The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask — is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

. . .

. . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite*, *supra*, at para. 56.

Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:

One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . .

In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

In my view it was an error of principle not to address the factors for and against the exercise of

[TRADUCTION] Le pouvoir discrétionnaire de refuser de donner effet à la préclusion découlant d'une question déjà tranchée ne naît que lorsque les trois conditions d'application de la doctrine sont réunies. [. . .] Ce pouvoir discrétionnaire est nécessairement exercé au cas par cas et son application dépend de l'ensemble des circonstances. Dans l'exercice de ce pouvoir discrétionnaire, la cour doit se poser la question suivante : existe-t-il, en l'espèce, une circonstance qui ferait en sorte que l'application normale de la doctrine créerait une injustice?

. . .

. . . L'exercice du pouvoir discrétionnaire doit tenir compte des réalités propres à chaque affaire et non de préoccupations abstraites, qui sont présentes dans pratiquement tous les cas où la décision invoquée au soutien de la demande d'application a été rendue par un tribunal administratif et non par un tribunal judiciaire.

Voir également *Braithwaite*, précité, par. 56.

64 Les cours de justice d'autres pays du Commonwealth appliquent des principes analogues. Dans l'arrêt *Arnold c. National Westminster Bank plc*, [1991] 3 All E.R. 41, la Chambre des lords a exercé son pouvoir discrétionnaire et refusé d'appliquer la préclusion découlant d'une question déjà tranchée à l'égard d'une sentence arbitrale. Voici ce qu'a dit lord Keith of Kinkel, à la p. 50 :

[TRADUCTION] L'une des raisons d'être de la préclusion étant de rendre justice aux parties, il est loisible aux cours de justice de reconnaître que, dans certaines circonstances, son application rigide produirait l'effet contraire. . .

65 Dans la présente affaire, le juge Rosenberg a mentionné, aux p. 248-249, l'existence possible d'un pouvoir discrétionnaire potentiel mais, en toute déférence, il ne s'y est pas attardé. Il n'a ni examiné ni analysé le bien-fondé de l'exercice de ce pouvoir. Il a simplement conclu ainsi, à la p. 256 :

[TRADUCTION] En résumé, M^me^ Burke n'a pas accordé à l'appelante le bénéfice des règles de justice naturelle. Le recours qui s'offrait à cette dernière était de demander la révision de la décision de l'agente. Elle ne l'a pas fait. Elle et son employeur sont liés par cette décision.

66 Je suis d'avis que la Cour d'appel a commis une erreur de principe en omettant de soupeser les fac-

the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott*, *supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: *Rasanen*, *supra*, *per* Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

teurs favorables et défavorables à l'exercice du pouvoir discrétionnaire dont elle était clairement investie. Il ne s'agit pas d'un cas où notre Cour est invitée par la partie appelante à substituer son opinion à celle du juge des requêtes ou de la Cour d'appel. L'appelante a droit à ce que, à un certain point dans le processus, on examine de façon appropriée les facteurs pertinents à l'exercice du pouvoir discrétionnaire, et jusqu'à maintenant on ne l'a pas fait.

La liste de ces facteurs n'est pas exhaustive. Elle comporte bon nombre de ceux qui ont été mentionnés dans l'arrêt *Maybrun* en rapport avec la règle prohibant les contestations indirectes. Le juge Laskin a lui aussi proposé une liste fort utile dans l'affaire *Minott*, précitée. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice concrète dans une affaire donnée. Sept facteurs, mentionnés ci-après, sont pertinents dans la présente affaire.

a) *Le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative*

En l'espèce, la LNE comporte le par. 6(1), qui prévoit ce qui suit :

> La présente loi ne suspend pas les recours civils dont dispose un employé contre son employeur ni n'y porte atteinte. [Je souligne.]

Cette disposition tend à indiquer que, à l'époque pertinente, le législateur ontarien n'entendait pas que le forum prévu par la LNE ait pour effet d'exclure tous les autres. (De récentes modifications apportées à la Loi obligent désormais l'employé à choisir entre la procédure prévue par la LNE ou le recours aux tribunaux judiciaires. Cependant, même avant ces modifications, les cours de justice pouvaient à bon droit conclure que l'engagement de nouvelles procédures à l'égard d'une question constituait un abus : *Rasanen*, précité, le juge en chef adjoint Morden de la Cour d'appel de l'Ontario, p. 293, le juge Carthy, p. 288.)

While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings — including any available appeals — has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

70 Bien qu'il soit généralement raisonnable pour un défendeur d'escompter pouvoir tourner la page après des procédures — y compris tout appel possible — au terme desquelles sa responsabilité n'a pas été retenue, en l'espèce l'appelante a intenté son action civile contre les intimés avant que l'agente des normes d'emploi n'ait rendu sa décision (comme l'y autorisait clairement la loi pertinente à l'époque). En conséquence, les intimés savaient parfaitement, en droit et en fait, qu'ils devaient se défendre dans des procédures parallèles se chevauchant dans une certaine mesure.

(b) *The Purpose of the Legislation*

b) *L'objet de la loi*

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters*, *supra*, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].

Il est fort possible que le nœud d'une instance administrative soit totalement différent de celui d'un litige subséquent, même si une ou plusieurs des questions litigieuses sont les mêmes. Dans l'affaire *Bugbusters*, précitée, une entreprise forestière a été conscrite afin d'aller combattre un incendie de forêt en Colombie-Britannique. Elle a par la suite demandé le remboursement de ses dépenses en vertu de la *Forest Act*, R.S.B.C. 1979, ch. 140, de cette province. On a fait droit à sa demande *malgré* des allégations selon lesquelles l'incendie avait été causé par un de ses employés qui aurait négligemment jeté une cigarette. (Si l'allégation avait été prouvée, Bugbusters n'aurait pas eu droit au remboursement.) Sa Majesté a par la suite intenté une action en négligence de 5 000 000 $ contre Bugbusters pour être indemnisée des pertes occasionnées par le feu de forêt. Cette dernière a plaidé la préclusion découlant d'une question déjà tranchée. Exerçant son pouvoir discrétionnaire, la Cour d'appel a refusé d'appliquer la doctrine, notamment pour le motif suivant, exposé par le juge Finch, au par. 30 :

> [TRADUCTION] . . . pendant l'instance [en remboursement fondée sur la *Forest Act*], aucune des parties ne pouvait raisonnablement s'attendre à ce qu'il soit statué définitivement sur le droit de Sa Majesté d'être indemnisée de ses pertes.

A similar point was made in *Rasanen*, *supra*, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking dis-

Une remarque au même effet a été formulée par le juge Carthy dans l'affaire *Rasanen*, précitée, p. 290 :

> [TRADUCTION] Il serait injuste vis-à-vis d'un employé qui a demandé sans délai une indemnité limitée de

covery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American *Restatement of the Law, Second: Judgments 2d* (1982), vol. 2 § 83(2)(e), which refers to

procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages. . . .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) *The Availability of an Appeal*

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin*, *supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it

4 000 $, renonçant de ce fait à la communication de la preuve et au droit d'être représenté par avocat, de lui opposer ensuite qu'il est lié par le résultat de ce recours et par son effet sur la réclamation d'une somme dix fois plus élevée.

Une réserve semblable est formulée dans l'ouvrage américain *Restatement of the Law, Second : Judgments 2d* (1982), vol. 2, § 83(2)(e), où l'on fait état

[TRADUCTION] . . . des éléments procéduraux requis pour que l'instance permette de régler décisivement le différend, compte tenu de l'ampleur et de la complexité de celui-ci, de l'urgence avec laquelle il faut le trancher et de la possibilité pour les parties de recueillir de la preuve et de formuler des arguments juridiques.

Je suis bien sûr conscient du fait que, en l'espèce, l'appelante a choisi la procédure prévue par la LNE. L'avocat de l'intimée a fait remarquer à juste titre, non sans une certaine exaspération :

[TRADUCTION] Comme l'indique clairement le dossier, M^me^ Danyluk était représentée par avocat avant la cessation d'emploi, au moment de celle-ci et par la suite. Son avocat et elle savaient fort bien qu'elle avait au départ le choix du forum devant lequel présenter sa réclamation pour salaire et commissions impayés. . .

Néanmoins, l'objet de la LNE est d'offrir un moyen relativement rapide et peu coûteux de régler les différends entre employés et employeurs. Accorder un poids excessif aux décisions prises en vertu de la LNE, dans le contexte de l'application de la préclusion découlant d'une question déjà tranchée, obligerait vraisemblablement les parties, en pareils cas, à préparer une demande et une défense équivalentes à celles préparées dans le cadre d'un véritable procès et tendrait ainsi à enlever à l'ensemble du régime établi par la LNE son caractère expéditif. Cette situation compromettrait l'objectif visé par la loi.

c) *L'existence d'un droit d'appel*

Ce facteur correspond à celui de l'autre « recours approprié » applicable en matière de contrôle judiciaire : *Harelkin*, précité, p. 592. Dans la présente affaire, l'employée ne disposait d'aucun *droit* d'appel, mais la possibilité d'une révision

must be counted against her: *Susan Shoe Industries Ltd. v. Ricciardi* (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

Morden A.C.J.O. pointed out in his concurring judgment in *Rasanen*, *supra*, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in *Minott*, *supra*, at pp. 341-42.

(e) *The Expertise of the Administrative Decision Maker*

In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (*Maybrun*, *supra*, at para. 50):

administrative et l'omission de s'en prévaloir doivent être retenues contre elle : *Susan Shoe Industries Ltd. c. Ricciardi* (1994), 18 O.R. (3d) 660, (C.A.), p. 662.

d) *Les garanties offertes aux parties dans le cadre de l'instance administrative*

75 Comme il a été mentionné précédemment, la procédure expéditive propre à permettre la réalisation des objectifs de la LNE peut tout simplement ne pas convenir pour l'examen de complexes questions de fait ou de droit. Étant maîtres de leur procédure, les organismes administratifs peuvent écarter des éléments de preuve que les cours de justice estiment probants ou encore agir sur le fondement d'éléments que ces dernières ne jugent pas fiables. Si cela s'est produit, il peut s'agir d'un facteur à prendre en compte dans l'exercice du pouvoir discrétionnaire de la cour. En l'espèce, le manquement aux règles de justice naturelle est un facteur clé en faveur de l'appelante.

76 Dans l'affaire *Rasanen*, précitée, p. 295, le juge en chef adjoint Morden a souligné le point suivant, dans ses motifs de jugement concourants : [TRADUCTION] « Je n'exclus pas la possibilité que des lacunes dans la procédure ayant conduit à la première décision puissent à juste titre constituer un facteur dans la décision d'appliquer ou non la préclusion découlant d'une question déjà tranchée. » Le juge Laskin de la Cour d'appel de l'Ontario a tenu des propos analogues dans l'affaire *Minott*, précitée, p. 341-342.

e) *L'expertise du décideur administratif*

77 Dans la présente affaire, l'agente des normes d'emploi, qui n'avait aucune formation juridique, était appelée à trancher une question potentiellement complexe en matière de droit des contrats. L'approche expéditive qui convient pour la grande majorité des demandes fondées sur la LNE n'est pas le genre d'expertise requise en l'espèce. Un facteur similaire s'applique à l'égard de la règle prohibant les contestations indirectes (*Maybrun*, précité, par. 50) :

. . . where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

. . . le fait que la contestation de l'ordonnance repose sur des considérations étrangères à l'expertise ou à la raison d'être d'une instance administrative d'appel suggère, sans toutefois être déterminant en lui-même, que le législateur n'a pas voulu réserver à cette instance le pouvoir exclusif de se prononcer sur la validité de l'ordonnance.

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*

f) *Les circonstances ayant donné naissance à l'instance administrative initiale*

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott*, *supra*, at pp. 341-42:

Un argument qui peut être avancé en faveur de l'appelante est qu'elle s'est prévalue du recours fondé sur la LNE à un moment où l'imminence de son congédiement faisait d'elle une personne vulnérable. Il est peu probable que le législateur ait voulu qu'une procédure sommaire applicable à la réclamation de petites sommes fasse obstacle à l'examen approfondi de réclamations plus considérables. (La décision ultérieure du législateur de plafonner à 10 000 $ les réclamations pouvant être présentées en vertu de la LNE concorde avec cette interprétation.) Comme l'a fait observer le juge Laskin dans l'arrêt *Minott*, précité, p. 341-342 :

. . . employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them . . . .

[TRADUCTION] . . . les employés présentent une demande au moment où ils sont le plus vulnérables, soit immédiatement après la perte de leur emploi. Le fait qu'ils doivent invariablement agir rapidement pour demander réparation compromet leur aptitude à présenter adéquatement leur point de vue ou à réfuter la thèse de la partie adverse. . .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

Par contre, il convient de rappeler que dans la présente affaire l'appelante, agissant alors de son propre chef ou sur les conseils de son avocat, a inclus dans sa demande fondée sur la LNE les 300 000 $ réclamés à titre de commissions et elle doit assumer la responsabilité d'au moins une partie des difficultés résultant de cette décision.

(g) *The Potential Injustice*

g) *Le risque d'injustice*

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the

Suivant ce dernier facteur, qui est aussi le plus important, notre Cour doit prendre un certain recul et, eu égard à l'ensemble des circonstances, se demander si, dans l'affaire dont elle est saisie, l'application de la préclusion découlant d'une question déjà tranchée entraînerait une injustice. Le juge Rosenberg de la Cour d'appel a conclu que l'appelante n'avait pas été informée des allégations

problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Lang Michener, Toronto.

Solicitors for the respondents: Heenan Blaikie, Toronto.

de l'intimée et n'avait pas eu la possibilité d'y répondre. Le juge Rosenberg était donc aux prises avec le problème signalé par le juge Jackson, dans ses motifs dissidents dans l'arrêt *Iron c. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (C.A. Sask.), p. 21 :

> [TRADUCTION] Constituant un moyen de rendre justice aux parties dans le contexte d'une procédure contradictoire, la doctrine de l'autorité de la chose jugée porte en elle-même le germe de l'injustice, spécialement lorsque le droit des parties de se faire entendre est en jeu.

Indépendamment des diverses erreurs de nature procédurale commises par l'appelante en l'espèce, il n'en demeure pas moins que sa réclamation visant des commissions totalisant 300 000 $ n'a tout simplement jamais été examinée et tranchée adéquatement.

81 Vu l'effet cumulatif des facteurs susmentionnés, je suis d'avis que notre Cour doit exercer son pouvoir discrétionnaire et refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée.

V. Le dispositif

82 Je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Lang Michener, Toronto.

Procureurs des intimés : Heenan Blaikie, Toronto.

27

2002 CAF 210, 2002 FCA 210
Federal Court of Appeal

Apotex Inc. v. Merck & Co.

2002 CarswellNat 1188, 2002 CarswellNat 2310, 2002 CAF 210, 2002 FCA 210, [2002] F.C.J. No. 811, [2003] 1 F.C. 242, 114 A.C.W.S. (3d) 925, 19 C.P.R. (4th) 163, 214 D.L.R. (4th) 429, 226 F.T.R. 281 (note), 291 N.R. 96

Apotex Inc., Appellant (Plaintiff) and Merck & Co., Inc., and Merck Frosst Canada Inc., Respondents (Defendants)

Malone J.A., Sharlow J.A., Stone J.A.

Heard: April 11, 2002
Judgment: May 28, 2002
Docket: A-120-01

Proceedings: affirmed *Apotex Inc. v. Merck & Co.*, 2001 CarswellNat 143, 2001 FCT 11, 11 C.P.R. (4th) 38 ((Fed. T.D.)); refused leave to appeal *Apotex Inc. v. Merck & Co.* ((February 13, 2003)), Doc. 29324 ((S.C.C.))

Counsel: *Mr. H.B. Radomski*, *Mr. Nando DeLuca*, for Appellant
Mr. G. Alexander Macklin, Q.C., *Ms Constance To*, for Respondents

Subject: Intellectual Property; Civil Practice and Procedure; Property

APPEAL by defendant from judgment reported at (2001), 11 C.P.R. (4th) 38 (Fed. T.D.) granting plaintiff's motion for summary judgment and dismissing defendant's cross-motion.

Malone J.A.:

Introduction

1 This is an appeal from an order of McKeown J. ("the Motions Judge") dated February 2, 2001, granting a motion for summary judgment in favour of Merck and Co., Inc. and Merck Frosst Canada Inc. (collectively, "Merck") and dismissing a cross-motion brought by Apotex Inc. ("Apotex") for similar relief. The Motions Judge based his decision on the doctrine of *res judicata*, holding that the issues in this action had already been decided in a final judgment by this Court dated April 19, 1995, between these same parties and on substantially the same facts (reported as *Merck & Co. v. Apotex Inc.* (1995), 60 C.P.R. (3d) 356 (Fed. C.A.), varying (1994), 59 C.P.R. (3d) 133 (Fed. T.D.) , leave to appeal to the SCC denied December 7, 1995). Apotex now challenges the finding of *res judicata* on various grounds.

Grounds of Appeal

2 Apotex's grounds of appeal may be grouped under three broad headings:

a. McKeown J. erred insofar as he held that *res judicata* applied, since the question to be decided in the present action differs from that decided by MacGuigan J.A. in 1995 in the original action;

b. Special circumstances in the present action vitiate the application of *res judicata* and allow a Motions Judge to hear the matter anew. Special circumstances arise here (1) by virtue of the Supreme Court of Canada's decision in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, (1998), 80 C.P.R. (3d) 321 (S.C.C.) ("*Eli Lilly*"), which Apotex urges has overruled the 1995 decision of MacGuigan J.A., and (2) due to the serious question of statutory interpretation raised by the within proceeding as to the application of section 12 of the *Patent Act Amendment Act, 1992*, S.C. 1993 c.2 ("the Amendment Act"), which came into force February 14, 1993; and

c. McKeown J. erred in his application of the *Federal Court Rules, 1998* in granting Merck's motion for summary judgment under Rule 216.

The Facts

3 The facts, legislative scheme, and procedural steps underlying this appeal are somewhat complex and must be carefully examined.

4 The subject matter of this action is Canadian Letters Patent No. 1,275,349 ("the '349 Patent"), which was issued to Merck on October 16, 1990, and covers claims for the invention of certain compounds known as enalapril and enalapril maleate. Enalapril maleate is a stable salt of enalapril which, once combined with a pharmaceutically inactive carrier into tablets or liquid dosage form, comprises a prescription drug for the treatment of hypertension and congestive heart failure. The '349 Patent includes compound claims, pharmaceutical composition claims, and claims to the use of the compounds as anti-hypertensitives.

5 In 1983, Merck obtained a United States patent for its invention of enalapril, and in 1985 was authorized by U.S. authorities to market enalapril maleate under the trade name Vasotec. After receiving a notice of compliance in 1987 from Health and Welfare Canada, Merck began marketing Vasotec in Canada, in four tablet strengths and in injectable liquid form.

6 Apotex first became aware of enalapril maleate in the mid-1980s. Ordinarily, Apotex would have sought a compulsory licence under the *Patent Act*, R.S.C. 1985, c. P-4 ("the Act"), but was unable to do so until enalapril became the subject of a Canadian patent. Apotex was also aware that amendments to the Act were being discussed that could eliminate the compulsory licensing system and extend the rights of patentees. As a result, Apotex began to purchase enalapril maleate in bulk form from two related Canadian manufacturers, Delmar Chemicals Inc. and Torcan Chemical Ltd. (collectively "Delmar"), which is not a party in this matter. Delmar was granted a compulsory licence on April 24, 1992 under the '349 Patent to manufacture, use and sell enalapril maleate, with royalties payable to Merck.

7 Pursuant to its licence, Delmar did manufacture and sell bulk enalapril maleate. By invoice dated January 29, 1993, and identified as no. 100559, Delmar sold a quantity of bulk enalapril totalling 44.9 kilograms ("the 44.9 kgs") to an unidentified foreign customer. Delmar's compulsory licence was "extinguished" upon the coming into force of section 12 of the Amendment Act on February 14, 1993. That section reads as follows:

12. (1) Every licence granted under section 39 of the former Act on or after December 20, 1991 shall cease to have effect on the expiration of the day preceding the commencement day, and all rights or privileges acquired or accrued under that licence or under the former Act in relation to that licence shall thereupon be extinguished.

(2) For greater certainty, no action for infringement of a patent lies under the Patent Act in respect of any act that is done before the commencement day under a licence referred to in subsection (1) in accordance with the terms of that licence and sections 39 to 39.17 of the former Act.

12. (1) Toute licence accordée au titre de l'article 39 de law loi antérieure le 20 décembre 1991 ou après cesse d'être valide à l'expiration du jout précédant la date d'entrée en vigeur et les droits et priviléges acquis au titre de cette licence ou de la loi antérieure relativement à cette licence s'éteignent.

(2) Il ne peut être intenté d'action en contrefaçon d'un brevet sous la régime de la *Loi sur les brevets* à l'égard d'un act accompli, préalablement à la date d'entrée en vigeur, au titre d'une licence visée au paragraphe (1) et conformément aux articles 39 à 39.17 de la loi antérieure ou à cette licence.

8 On March 10, 1993, Apotex purchased the 44.9 kgs from the aforesaid unidentified foreign customer and proceeded to formulate its generic version of the substance, Apo-Enalapril, into tablet form the Canadian market on September 2, 1993. Apotex's version was similar in size, shape, colour and concentration of enalapril maleate to the corresponding tablets of Vasotec. In May and October of 1994, Apotex purchased a further 772.9 kg of bulk enalapril maleate from the same unidentified foreign customer of Delmar.

9 On September 20, 1991, Merck brought an action against Apotex in the Trial Division before MacKay J. (action T-2408-91, reported as [*Merck & Co. v. Apotex Inc.*] (1994), 59 C.P.R. (3d) 133 (Fed. T.D.)), alleging infringement of their exclusive rights under the '349 Patent. Apotex sought a declaration by counter-claim that certain claims in the '349 Patent were invalid. The evidence at trial included evidence of the March 1993 purchase of the 44.9 kgs but, of course, there was no evidence of the two 1994 purchases, which occurred after the trial was over.

10 Since most of the enalapril maleate in Apotex's possession was manufactured before the issuance of the '349 Patent, Apotex relied on section 56 of the Act so as to enable it to use the purchased product without being liable to Merck. Under section 56, certain rights are provided to a person who, before the patent application becomes open to inspection by the public, has acquired the invention for which a patent is afterwards obtained. Prior to 1987, the relevant date for the purchase, construction or acquisition of the invention was the date "on which the patent was issued." However, on the facts of this case, the change in wording makes no difference; Merck's patent did not become open to inspection by the public until it was issued. Section 56 read as follows:

56. Every person who, before an application for a patent becomes open to the inspection of the public under section 10, has purchased, constructed or acquired the invention for which a patent is afterwards obtained under this Act, has the right to use and sell to others the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired without being liable to the patentee or the legal representatives of the patentee for so doing, but the patent shall not, with respect to other persons, be held invalid by reason of that purchase, construction or acquisition or use of the invention by the person first mentioned, or by those to whom that person has sold it, unless it was purchased, constructed, acquired or used before the date of filing of the application or, in the case of an application to which section 28 applies, before the priority date of the application, and in consequence whereof the invention was disclosed in such a manner that it became available to the public in Canada or elsewhere.

56. Tout personne qui, avant la déliverance d'un brevet, a acheté, exécuté ou acquis une invention pour laquelle un brevet es subséquemment obtenu sous l'autorité de la présente loi, a le droit d'utiliser et de vendre à d'autres l'article, la machine, l'object manufacturé ou la composition de matières, spécifique, breveté et ainsi acheté, exécuté ou acquis avant la déliverance du brevet s'y rapportant, sans encourir de ce chef aucune responsabilité envers le breveté ou ses représentants légaux. Toutefois, à l'égard des tiers le brevet ne peut être considéré comme invalide du fait de cet achat, de cette exécution ou acquisition ou utilisation de l'invention par la personne en premier lieu mentionnée ou par des personnes auxquelles elle l'a vendue, à moins que cette invention n'ait été achetée exécutée, acquise ou utilisée durant une periode de plus de deux ans avant la demande d'un brevet portant sur cette invention, en consequence de quoi l'invention est devenue publique et disponsible pour l'usage du public.

11 On December 14, 1994 MacKay J. granted judgment in favour of Merck, and dismissed Apotex's counterclaim. The relevant portions of MacKay J.'s reasons as they relate to the 44.9 kgs read as follows at page 164 C.P.R.:

I agree with [Apotex] that s. 12(2) of the Patent Act Amendment Act, 1992 precludes any claim for infringement in respect of any act done before the licence was terminated if done in accord with the terms of the licence and the

> former legislation for compulsory licences. Neither of those sources, in my view, created any right in [Apotex] to infringe [Merck's] interests under its patent, which were exclusive interests subject only to the compulsory licence to Delmar.
>
> ...It seems to me clearly implicit that Delmar could contract, under its licence, for production of the final dosage form. The producer of that product, acting under contract for Delmar and not on its own account, in my opinion, does not infringe [Merck's] patent claims by producing the final dosage from from bulk product it held only on consignment, and at a time when Delmar's licence was in effect under the law as it was until February, 1993.
>
> On the other hand, Apotex has no right, derived from or under the compulsory licence to Delmar, to produce tablets for use as an antihypertensive from the 44.9 kg of bulk enalapril maleate purchased in March, 1993, after the licence to Delmar was terminated by statute. That result is not based on extinguishment of any rights Delmar may have had, under the licence, in accord with the statutory amendment which terminated its licence effective February 14, 1993. Rather, it is based on the lack of any right in the defendant to use the invention after the grant of the patent. It had not acquired this lot of enalapril maleate before the grant of Merck's patent and so has no claim to immunity by reason of s. 56 of the Act.

12 In essence, MacKay J., after hearing submissions on both section 12 and section 56, chose to base his decision on the lack of any right in the defendant to use the invention after the grant of the patent. As such, section 56 could not be said to apply, since Apotex had acquired the 44.9 kgs subsequent to the issuance of the '349 patent. He expressly added the *caveat* that his conclusion was not based on extinguishment of any rights Delmar may have had under its licence.

13 Apotex appealed to this Court, which issued reasons for judgment on April 19, 1995 (reported as (1995), 60 C.P.R. (3d) 356 (Fed. C.A.) , varying (1994), 59 C.P.R. (3d) 133 (Fed. T.D.)). MacGuigan J.A. for this Court reversed MacKay J. in part. He held that section 56 did apply to hold Apotex harmless from an infringement action for those lots of enalapril maleate that it acquired prior to the issuance of the '349 Patent. Any lots acquired after issuance of the '349 Patent, however, were held not to be protected by section 56. Apotex had argued that since it had purchased the 44.9 kgs from the unidentified foreign customer, which had purchased the same lot from Delmar during the operation of Delmar's compulsory licence, use of the 44.9 kgs could not be held to infringe the '349 Patent. MacGuigan J.A. disagreed and held that Apotex's legal rights relative to the 44.9 kgs were extinguished with Delmar's licence; as such, any use by Apotex following that extinguishment would be subject to potential actions for infringement of Merck's patent. At page 376 C.P.R. he wrote as follows:

> Again, I am in agreement with the conclusion of the learned trial judge, though I should prefer to rest my conclusion on the extinguishment of Delmar's rights and so of any right in the appellant, rather than on a return to s. 56, which I am not at all certain is in play on this point.

14 Some confusion as to what MacGuigan J.A. actually decided arose from a clerical error in the formal judgment issued by this Court on April 19, 1995. The formal judgment originally read that Apotex had purchased the 44.9 kgs directly from Delmar, which was in clear conflict with the facts as described in MacGuigan J.A.'s reasons. As a result, on May 16, 1995, the formal judgment was amended to indicate that Apotex had purchased the 44.9 kgs from Delmar's foreign customer. On July 6, 1995, Merck executed the infringement order and seized the infringing lots.

15 The facta before this Court in 1995 indicate that section 12 was not raised, at least in written argument. Apotex now asserts that section 12 was not argued orally, and Merck does not dispute the point. Accordingly, I will proceed on the basis that section 12 was not argued before this Court. Apotex then sought leave to appeal to the Supreme Court of Canada. In its application for leave to appeal, Apotex argued at paragraph 33 that this Court had erred in its interpretation of section 12 and that it had considered the matter without written or oral submissions. Leave to appeal to the Supreme Court was denied on December 7, 1995.

16 By judgment dated March 7, 2000, reported as *Merck & Co. v. Apotex Inc.* [2000] F.C.J. No. 297 (Fed. T.D.), MacKay J. found the appellant and several of its officers in contempt on the basis that they had knowingly continued to sell Apo-Enalapril in contravention of his injunction prohibiting such actions. These contempt proceedings are presently under appeal.

17 On February 5, 1996, Apotex filed the present action, T-294-96 [*Apotex Inc. v. Merck & Co.* (March 5, 1999), Doc. T-294-96 (Fed. T.D.)], seeking relief as against Merck in the form of a declaration that the manufacture and sale of enalapril tablets from the bulk enalapril purchased in May and October of 1994 did not infringe the '349 patent. By amended counterclaim filed on May 27, 1999, Merck sought a declaration that this use did indeed infringe its patent. Apotex's affidavit of documents included invoices for enalapril maleate dated May 26 and October 10, 1994. Apotex's allegations of the '349 patent's invalidity were struck from its statement of claim by an order of Lemieux J. dated November 5, 1999 ([*Apotex Inc. v. Merck & Co.*] [1999] F.C.J. No. 1706 (Fed. T.D.)) on the basis of issue estoppel. In his view, the validity of the patent had conclusively been determined between the parties by MacKay J, and on appeal to this Court in 1995.

18 During the discovery process in the present action, Merck learned for the first time that Apotex had purchased a further 772.9 kg supply of bulk enalapril maleate in May and October of 1994 from the same undisclosed foreign purchaser ("the 772.9 kgs"). This purchase by Apotex occurred after the trial and prior to MacKay J.'s judgment. Accordingly, as stated above, with respect only to the 44.9 kgs, MacKay J.'s decision dealt expressly with the 44.9 kgs that Apotex purchased in March of 1993, but not with the 772.9 kgs.

19 The current motions for summary judgment before McKeown J. were heard on October 30, 2000. In the Motions Judge's view, the matter was disposed of by the operation of the doctrine of *res judicata* or issue estoppel, which applies to every point in issue which the parties, exercising reasonable diligence, might have brought forward at the original trial. He relied on *Dominion Ready Mix Inc. c. Rocois Construction Inc.*, [1990] 2 S.C.R. 440 (S.C.C.), where the Supreme Court stated that *res judicata* implies identity of parties, identity of object, and identity of cause.

20 McKeown J. indicated that the only difference between the 1991 and 1996 actions is that in the former, the 44.9 kgs was acquired by Apotex in March of 1993, while the 772.9 kgs involved in the latter action was acquired by Apotex in May and October of 1994. In his view, "[n]othing turns on this factual difference between the two cases, as in both cases the subject enalapril maleate was acquired after the Delmar compulsory licence was extinguished by statute on February 14, 1993." In essence, the legal facts were the same, while the specifics differed.

21 Apotex argued that the decision of the Supreme Court of Canada in *Eli Lilly*, *supra*, changed the law to the degree that *res judicata* should not bar its case. Essentially, Apotex argued that the *Eli Lilly* decision altered the law insofar as a purchaser's rights would henceforth exist *in rem*. Accordingly, because the 772.9 kgs at issue in this action had been sold to the unnamed foreign customer prior to the extinguishment of Delmar's compulsory licence, such extinguishment therefore had no effect on Apotex's rights to use the enalapril maleate. The Motions Judge did not accept this argument, choosing to distinguish *Eli Lilly*, holding that the decision involved different facts. There, the question arose from the termination of a licence by a patentee rather than the extinguishment of a compulsory licence by statute, as is the case here.

22 The proper interpretation of section 12 was argued extensively before McKeown J. However, he chose not to render a decision on the substantive content of that section. He noted that the primary task before him was not to re-try a case that has already come before the Court. Instead, he defined his task to be the determination of whether or not the case before him was *res judicata* by virtue of the operation of issue estoppel.

23 The Motions Judge concluded that as a result of the judgments of the Trial Division and Court of Appeal in T-2408-91 [*Merck & Co. v. Apotex Inc.* (1993), 51 C.P.R. (3d) 170 (Fed. T.D.)] and A-724-94 [*Apotex Inc. v. Merck & Co.* (1996), 66 C.P.R. (3d) 167 (Fed. C.A.)], respectively, there was no genuine issue to be tried in respect of the claim for

declaratory relief by Apotex in its Statement of Claim and Apotex had no defence to the Merck claim for infringement of the '349 Patent.

Analysis

The Law of Issue Estoppel

24 The relevant principles behind the doctrine of *res judicata* were established in two leading Supreme Court of Canada decisions: *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) and *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.) . In *Angle* , *supra*, at 254 Dickson J. noted that *res judicata* essentially encompasses two forms of estoppel, being "cause of action estoppel" and "issue estoppel," both based on similar policies. First, there should be an end to litigation, and second, an individual should not be sued twice for the same cause of action.

25 These two estoppels, while identical in policy, have separate applications. Cause of action estoppel precludes a person from bringing an action against another where the cause of action was the subject of a final decision of a court of competent jurisdiction. Issue estoppel is wider, and applies to separate causes of action. It is said to arise when the same question has been decided, the judicial decision which is said to create the estoppel is final, and the parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised (see *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.)., at p. 93, cited by Dickson J. in *Angle supra*, at 254).

26 Issue estoppel applies to preclude re-litigation of an issue which has been conclusively and finally decided in previous litigation between the same parties or their privies (*Angle* and *Doering* , *supra*). It applies not only to issues decided finally and conclusively, but also to arguments that could have been raised by a party in exercise of reasonable diligence (*Fidelitas Shipping Co. v. V/O Exportchieb* (1965), [1966] 1 Q.B. 630 (Eng. C.A.); *Merck & Co. v. Apotex Inc.* (1999), 5 C.P.R. (4th) 363 (Fed. C.A.)). Issue estoppel applies where an issue has been decided in one action between the parties, and renders that decision conclusive in a later action between the same parties, notwithstanding that the cause of action may be different (*Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.); *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. C.A.)). The second cause of action, however, must involve issues of fact or law which were decided as a fundamental step in the logic of the prior decision. Issue estoppel does not arise if the question arose collaterally or incidentally in the earlier proceedings. The test for such an inquiry is whether the determination on which it is sought to found the estoppel is so fundamental to the substantive decision that the latter cannot stand without the former (*Angle* , *supra*; *R. v. Duhamel* (1981), 33 A.R. 271 (Alta. C.A.), aff'd [1984] 2 S.C.R. 555 (S.C.C.)).

27 In the words of Moir J.A. in *Duhamel* , *supra*, adopted by Lamer C.J. on appeal, "this contemplates that the prior decision could not have been obtained without the point in issue being resolved in favour of the party urging the estoppel" (*Duhamel* , *supra*, at 278 (C.A.)). In essence, this statement is merely an affirmation of the principles articulated by Dickson J. in *Angle* in 1974. This does not necessarily imply, however, that the issue must have been the main point or *ratio decidendi* of the first decision, but rather that resolution of the issue is an essential element of the logic or reasoning behind it (*Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.), at 11). The decision which is said to give rise to the estoppel need not be a decision which determines the entire subject matter of the litigation. The test for issue estoppel is a substantive issue test where the decision affects substantive rights of the parties with respect to a matter bearing on the merits of the cause of action (see Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 78).

28 It is also clear from the Supreme Court of Canada's judgments in *Maynard v. Maynard* (1950), [1951] S.C.R. 346 (S.C.C.), and *Doering* , *supra*, that issue estoppel operates to preclude a party from litigating new issues which could have been raised, but were not, at the earlier hearing. The judgment of the Judicial Committee of the Privy Council in *Hoystead v. Commissioner of Taxation*, *supra*, at 165 is cited with approval in *Angle, Doering*, and *Maynard* , *supra*:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

It follows that a party will not be permitted to return to Court to litigate that which could have been raised in the earlier litigation before the Court.

29 Finality in litigation is the paramount policy concern; a party should not be vexed twice for resolution of an issue already decided conclusively. A litigant should have only "one bite at the cherry" (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.) at paras. 18-19; *Hoystead* , *supra*). However, special circumstances may operate to restrict the application of the issue estoppel rule, and allow a party to re-litigate what would, absent those special circumstances, be estopped. Dealing with the matter of special circumstances, Ritchie J. in *Doering* , *supra* wrote as follows at p. 304:

> It will be noted, however, that the Lord Chancellor did not question the rule in *Henderson v. Henderson*; but found that in the case before him there were exceptional circumstances which he described as follows:
>
> I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are "odious"; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action.

30 The jurisprudence is unclear as to what factors will, in principle, constitute special circumstances. Recent jurisprudence from the Supreme Court of Canada, however, has affirmed that a discretion is vested in the Court as to the application of issue estoppel. This discretion is restricted where the estoppel arises from a final decision of a competent Court (*Danyluk* , *supra*, at paragraph 62; *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), at 10). In determining whether justice will be done between the parties, the Court must as a final and most important factor, stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice (*Danyluk* , *supra*, at paragraph 80). It follows that any special circumstances which would give rise to an injustice would, at the least, make the Court reluctant to apply the estoppel.

Does issue estoppel apply in the present appeal?

31 In my analysis, the present case is not one where cause of action estoppel could be said to apply. The factual underpinnings in this case, the use of the 772.9 kgs, is not identical to that decided in the 1991 action, which arose from Apotex's use of the 44.9 kgs. As such, there cannot be an identity of actions between the 44.9 and 772.9 kgs. Accordingly, the question, in my analysis, is whether McKeown J. erred in applying the doctrine of *res judicata* in its issue estoppel form.

32 The facts of both cases are materially identical and may be summarized as follows: Some time prior to February 14, 1993, Delmar, under the compulsory licence it held, manufactured and sold a quantity of bulk enalapril maleate to an unnamed foreign purchaser. On that date, Delmar's compulsory licence was extinguished by section 12 of the Amendment Act. Some time after the extinguishment of Delmar's compulsory licence, Apotex purchased the quantity of bulk enalapril maleate from the unnamed foreign purchaser. This statement of the facts applies equally to the 44.9 kgs as it does to the 772.9 kgs.

33 In my analysis, it follows that the question, or issue, is the same as that finally decided by MacGuigan J.A. in 1995. The question in the 1995 decision was the extent to which Apotex had infringed the '349 Patent in its use of enalapril maleate and the same central issue arises in the present case regarding the 772.9 kgs. MacGuigan J.A. ruled that Apotex's use of the 44.9 kgs was not protected by virtue of Delmar's now-extinguished licence rights, and his decision prescribes the result in the present case. The issue of the extent of infringement arising from Apotex's use of the 44.9 kgs was not collateral, but was instead an integral element of the Court's determination of the extent of Apotex's infringement of the '349 Patent. The decision was final, and the parties are the same. Based on the identity of issues and material facts, I can only conclude that the same question has been raised in both proceedings. *Prima facie*, issue estoppel applies. McKeown J. committed no error in this regard.

Special Circumstances

34 Apotex asserts that under special circumstances, the application of issue estoppel is to be relaxed. In its view, this case discloses two such circumstances. First, Apotex argues that the Supreme Court of Canada has changed the law in *Eli Lilly*, *supra*, and essentially overruled the 1995 decision of MacGuigan J.A.; as such, issue estoppel must be relaxed in order to do justice between the parties. Second, Apotex urges that section 12 of the Amendment Act has never been interpreted judicially, and should be so treated in the present case. As such, Apotex submits that McKeown J. erred in applying the issue estoppel rule, since this circumstance works an injustice on the parties.

Subsequent Change in the Law

35 With regard to Apotex's first argument, that special circumstances arise from a change in the jurisprudence, I note that neither this Court nor the Supreme Court of Canada has stated that a change in the law is sufficient to justify relaxing the application of issue estoppel. Other courts, however, including the British Columbia, Nova Scotia and Ontario Courts of Appeal, have done so. Most explicit was the Ontario Court of Appeal in *Minott v. O'Shanter Development Co.*, *supra*, where Laskin J.A. wrote as follows at 340:

> Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.
>
> That the courts have always exercised this discretion is apparent from the authorities. For example, courts have refused to apply issue estoppel in "special circumstances", which include a change in the law or the availability of further relevant material. If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings. It would be unfair to do otherwise.

As support for this proposition, Laskin J.A. relied on the decision of the House of Lords in *Arnold v. National Westminster Bank plc*, [1991] 2 A.C. 93 (U.K. H.L.), at 110-11.

36 It follows from this decision that where a subsequent, binding decision renders a previous decision clearly wrong, it would be unfair not to allow a party to re-litigate the matter. For present purposes, I will assume without deciding that Apotex is correct, and a change in the law could constitute a special circumstance in the context of this case.

37 Apotex argues that *Eli Lilly* changes the law with respect to the rights inherent in patented material purchased from a licenced vendor. It is said that the Supreme Court of Canada embraced the dissenting reasons of Pratte J.A., and may consequently be interpreted as holding that use rights exist *in rem*, and are not consequently affected by extinguishment of the compulsory licence under which the goods were sold. In the interests of clarity, I will set out in full the relevant portions of the Supreme Court's decision. At paras 99-101, Iacobucci J. writes as follows:

In the Federal Court of Appeal, Pratte J.A., with whom the majority agreed on this point, disposed of this argument in the following concise and useful passage, at p. 343 with which I agree:

> If a patentee makes a patented article, he has, in addition to his monopoly, the ownership of that article. And the ownership of a thing involves, as everybody knows, "the right to possess and use the thing, the right to its produce and accession, and the right to destroy, encumber or alienate it" ... If the patentee sells the patented article that he made, he transfers the ownership of that article to the purchaser. This means that, henceforth, the patentee no longer has any right with respect to the article which now belongs to the purchaser who, as the new owner, has the exclusive right to possess, use, enjoy, destroy or alienate it. It follows that, by selling the patented article that he made, the patentee impliedly renounces, with respect to that article, to [sic] his exclusive right under the patent of using and selling the invention. After the sale, therefore, the purchaser may do what he likes with the patented article without fear of infringing his vendor's patent.
>
> The same principles obviously apply when a patented article is sold by a licensee who, under his licence, is authorized to sell without restrictions. It follows that, if Apotex were to purchase bulk Nizatidine manufactured or imported by Novopharm under its licence, Apotex could, without infringing Lilly's patents, make capsules from that substance or use it in any other possible way.

Perhaps the principles underlying this well-founded statement of the law merit some brief elaboration at this stage. As I have already noted in connection with the distinction between a sublicence and an ordinary agreement of purchase and sale of a patented or licensed article, the sale of a patented article is presumed [page 364] to give the purchaser the right "to use or sell or deal with the goods as the purchaser pleases": see *Badische Anilin und Soda Fabrik v. Isler*, *supra*. Unless otherwise stipulated in the licence to sell a patented article, the licensee is thus able to pass to purchasers the right to use or resell the article without fear of infringing the patent. Further, any limitation imposed upon a licensee which is intended to affect the rights of subsequent purchasers must be clearly and unambiguously expressed; restrictive conditions imposed by a patentee on a purchaser or licensee do not run with the goods unless they are brought to the attention of the purchaser at the time of their acquisition: see *National Phonograph Co. of Australia, Ltd. v. Menck*, [1911] A.C. 336 (P.C.).

Therefore, it is clear that, in the absence of express conditions to the contrary, a purchaser of a licensed article is entitled to deal with the article as he sees fit, so long as such dealings do not infringe the rights conferred by the patent. [emphasis added]

38 And further at paragraphs 106-107:

Any doubt as to this conclusion of non-infringement must, in my view, be eliminated by an examination of Novopharm's compulsory licence, which specifically contemplates the sale of the licensed material in bulk form by providing a formula for calculating royalties on product thus sold. As I see it, because there is no other practical use for bulk medicine, this must also be taken to contemplate and implicitly permit the reformulation of the product by the purchaser into final dosage form. This conclusion is only reinforced, in my view, by the fact that the contemplated royalty rates are based on the amounts received by subsequent purchasers in consideration of the sale of final dosage forms to the retail trade. Had the Commissioner of Patents intended to restrain such use of the medication, he would have provided for this expressly, or, at least, would not have specifically delineated the procedure that is to compensate the patentee for such use.

Therefore, Eli Lilly is incorrect to assert that the reformulation proposed by Apotex would either have to be carried out pursuant to a sublicence granted by Novopharm, which would justify the termination of Novopharm's compulsory licence and, therefore, the sublicence, or would be entirely unauthorized and infringe Eli Lilly's patents. The better view, as I have stated, is that the right to reformulate is premised on the inherent right of an owner of property to deal with that property as he or she sees fit. In the absence of some express term in the compulsory

> licence, prohibiting purchasers of bulk nizatidine from Novopharm from reformulating it into final-dosage form, the weight of the case law supports the view that Apotex, having validly acquired the bulk medicine, would be free to reformulate it for resale without fear of infringing any right under Eli Lilly's patents. [emphasis added]

39 In my analysis, Apotex's argument that the Supreme Court of Canada embraced Pratte J.A.'s reasons in their entirety is erroneous. It is true that Iacobucci J. clearly accepted Pratte J.A.'s general statement of the law. However, Iacobucci J.'s reasons disclose only that the sale of licenced material by a licencee to an unlicenced purchaser passes the right to do with the material as the purchaser sees fit without fear of infringement, subject at all times to explicit restrictions in the licence itself. It seems clear from the extracts above that Iacobucci J. tied the rights of the unlicenced purchaser to the licence itself; the unlicenced purchaser, given adequate notice, would be bound by the restrictions imposed by the licence. Further, Iacobucci J. noted the royalty scheme created under the compulsory licence before him bolstered the conclusion that certain rights had passed with the material to the unlicenced purchaser. Nor does Iacobucci J. address how the consequences of the statutory extinguishment of the licence affects the licencee or any unlicenced purchaser. Such an occurrence is simply not contemplated by the facts of that case. On this basis alone, *Eli Lilly* is readily distinguishable. In any event, *Eli Lilly*, *supra*, did not, in my view, change the law from that which had been enunciated by the earlier case law that was relied upon by Iacobucci J.: *Betts v. Willmott* (1871), 6 L.R. Ch. 245 (Eng. C.A.); *Badische Anilin und Soda Fabrik v. Isler*, [1906] 1 Ch. 605 (Eng. Ch. Div.), at 610; *Gillette v. Rea* (1910), 1 O.W.N. 448 (Ont. Ch.); and *National Phonograph Co. of Australia v. Menck*, [1911] A.C. 336 (Australia P.C.). It was thus open to the appellant to rely upon the principles of these decisions in arguing the 1995 appeal before this Court, which it did not do.

40 Nor, in my view, can Iacobucci J. be taken as adopting, in full, Pratte J.A.'s reasons. He adopted, at paragraph 99, the "concise and useful passage" cited above. In fact, in his conclusion, Iacobucci J. wrote that:

> I am in agreement with Pratte J.A. and the majority of the Federal Court of Appeal, and conclude that the reformulation of the bulk nizatidine into final-dosage form would not infringe Eli Lilly's patent. Accordingly, I conclude that Eli Lilly has failed in its various efforts to establish that Apotex's NOA was not justified and that a prohibition order should thus be issued. [emphasis added]

In my view, this statement demonstrates clearly that Iacobucci J. did not adopt Pratte J.A.'s reasons insofar as they may be interpreted to provide for continuing protection for unlicenced purchasers upon extinguishment of the compulsory licence.

41 I should also note that Iacobucci J. cited the 1995 decision of MacGuigan J.A. with approval, and at no point suggested an error with regard to the 44.9 kg allotment. In light of this fact, I conclude that *Eli Lilly* does not operate to overrule the 1995 decision of MacGuigan J.A.. No special circumstances can be said to apply. As such, there is no need to discuss whether it was within McKeown J,'s discretion to relax the rules of issue estoppel on this basis.

Section 12 of the Amendment Act

42 Section 12 of the Amendment Act was in force at the time of the 1991 trial. The operation of section 12, insofar as it extinguished Delmar's compulsory licence, was raised at trial by Merck in its statement of claim, but was not dealt with by MacKay J. Section 12 was, in fact, interpreted by MacGuigan J.A. in his decision when he held that all the rights in the 44.9 kgs, including those of Apotex, were extinguished with Delmar's licence; an event which occurred on the coming into force of section 12 (see paragraph [12] herein). Apotex now asserts that an injustice has arisen from the fact that it had not pleaded nor argued section 12 in either oral or written argument before the 1995 panel of this Court; a special circumstance that defeats the operation of issue estoppel.

43 In my analysis, there is no question that issue estoppel should *prima facie* apply with respect to Apotex's section 12 argument in this case. The parties are identical, and the issue has been conclusively decided in a judgment of this Court which must be deemed to be final, given that leave to appeal to the Supreme Court was denied. The only remaining question, then, is whether, given the jurisprudence summarized above, the circumstances of that decision affect the

analysis so as to avoid the operation of issue estoppel. In the end, the Court must decide whether McKeown J. erred in refusing to exercise his discretion to relax the issue estoppel rules, an inquiry made by standing back and taking into account the entire circumstances of the case.

44 Apotex urges that the recent Supreme Court of Canada decision in *Danyluk* , *supra*, sets out new rules under which a motions judge must exercise his or her discretion in the application of issue estoppel. *Danyluk* was decided approximately five months after McKeown J. granted Merck's motion for summary judgment. The *Danyluk* decision deals with the application of issue estoppel arising from the final decision of an administrative tribunal. Binnie J. canvassed the law of issue estoppel, noting, as the Supreme Court has done in *Angle* and *Doerning*, *supra*, that finality in the litigation process is strongly favoured as a matter of policy.

45 The main thrust of Justice Binnie's reasons is that the application of issue estoppel is discretionary, and should not be applied strictly where doing so would work an injustice on the parties. In his view, issue estoppel should be applied less rigidly where it arises from the decision of an administrative tribunal; in the *Danyluk* case, the administrative tribunal had clearly failed to meet the requirements of procedural fairness. To use Binnie J.'s words at paragraph 1, "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice." He concluded that the court below had not properly considered any factors relevant to the exercise of discretion, and noted at paragraph 80 that,

> [a]s a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.

46 However, Binnie J. also distinguished administrative decisions, which would receive a more relaxed application of the issue estoppel rule, from final judicial decisions. At paragraph 62, he agreed with Estey J. in *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), at 101, that in the context of court proceedings "such a discretion must be very limited in application". It follows that the decision to relax the rules of issue estoppel will not be made lightly with regard to a final judicial decision, such as that rendered by MacGuigan J.A. in this case.

47 The test on an appellate review of a motions judge's discretion is whether he gave sufficient weight to all the relevant circumstances: *Reza v. Canada*, [1994] 2 S.C.R. 394 (S.C.C.), at 404-5. In this case, the Motions Judge granted a motion for summary judgment, where the test is whether or not there is a genuine issue for trial (Rule 216(1) of the *Federal Court Rules, 1998*.) Following *Danyluk* , McKeown J. must be said to have erred if his exercise of discretion fails to do justice between the parties.

48 McKeown J. recognized that a discretion was vested in him when he wrote at paragraph 27:

> I also note that I am not convinced by the Plaintiff's argument that there are special circumstances inherent to this case which warrant the Court's exercise of its discretion to circumvent the normal workings of the doctrine of res judicata.

In my view, the Motions Judge did not err in failing to relax the rules of issue estoppel in this case. Apotex's actions suggest to me that this is not the clearest of cases which would justify relaxation of the issue estoppel rule. As such, given that all these factors were before McKeown J., I cannot conclude he erred in weighing the factors as he did. He gave sufficient weight to all relevant circumstances, and no palpable or overriding error is apparent on the record. In my analysis, neither the exercise of discretion by the Motions Judge nor his decision work an injustice between the parties. As Estey J. wrote in *General Motors of Canada Ltd.* , *supra*, at 101:

> The operation of the defence of res judicata has a long history in our courts... It is true that there is a discretion in the courts where the defence of res judicata is raised, but such a discretion must be very limited in application. ... The fact that harsh results follow the application of the doctrine has not deterred its application by the courts. *Vide Cox v. Robert Simpson Co. Ltd.* (1973), 1 O.R. (2d) 333 (Ont. C.A.).

McKeown J.'s Application of Rule 216

49 Lastly, Apotex argued that McKeown J. erred in his interpretation and application of summary judgment rule 216 of the *Federal Court Rules, 1998*, based principally on authorities dealing with the summary judgment rules of provincial superior courts. It must be noted that the *Federal Court Rules, 1998*, insofar as they provide for summary judgment where there is no genuine issue for trial, are unique. The *Federal Court Rules, 1998* empower a motions judge to make findings of fact or law necessary to dispose of the motion, provided the relevant evidence is available on the record, and does not involve a "serious" question of fact or law which turns on the drawing of inferences. In essence, where a trial would add detail, but not significant additional evidence, it is better for the motions judge to determine the question of law or fact in issue (see *Pawar v. R.* (1998), [1999] 1 F.C. 158 (Fed. T.D.), affirmed (1999), 247 N.R. 271 (Fed. C.A.), leave to appeal to SCC denied *Pawar v. R.* (2000), 257 N.R. 398 (note) (S.C.C.); *Warner-Lambert Co. v. Concord Confections Inc.*, 2001 FCT 139 (Fed. T.D.) ; *Wetzel v. Canada (Attorney General)*, [2000] F.C.J. No. 155 (Fed. T.D.).

50 Apotex urges that the issues it raises under its special circumstances argument are best left for trial, and not for a motions judge. In my analysis, however, McKeown J. was in as good a position as a trial judge to interpret the *Eli Lilly* decision and determine whether it raised an issue for trial. He concluded, correctly, that no such issue was raised. In the circumstances of this case, a trial would have added detail, but not significant additional evidence. With regard to Apotex's section 12 argument, it was within McKeown J.'s discretion to decide whether the application of issue estoppel would result in an injustice. He held that it did not. In my analysis, McKeown J. correctly canvassed the law of *res judicata*, and properly weighed the evidence before him. He conducted an analysis of the various rules and authorities regarding issue estoppel and undertook a careful review of the similarities between the present case and the 1991 action. He considered Apotex's arguments regarding special circumstances, and ultimately concluded that there was no genuine issue for trial. As it is not for this Court to re-weigh the evidence in the absence of a legal or palpable or overriding factual error, his exercise of discretion should remain undisturbed.

51 I would dismiss the appeal with costs.

***A.J. Stone J.A.*:**

I agree.

***K. Sharlow J.A.*:**

I agree.

Appeal dismissed.

28

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Rules of Civil Procedure, RRO 1990, Reg 194

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Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2017 to the e-Laws currency date.

Last amendment: O. Reg. 487/16.

This is the English version of a bilingual regulation.

GENERAL MATTERS

RULE 1 CITATION, APPLICATION AND INTERPRETATION

CITATION

Title

1.01 (1) These rules may be cited as the Rules of Civil Procedure. O. Reg. 575/07, s. 6 (1).

Subdivision

(2) In these rules,

7.07 (1) If a party to an action is under a disability, the party may be noted in default under rule 19.01 only with leave of a judge. O. Reg. 19/03, s. 2.

(2) Notice of a motion for leave under subrule (1) shall be served on the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) on the Children's Lawyer, if the party is a minor; or

(b) on the Public Guardian and Trustee, in any other case. O. Reg. 259/14, s. 1.

DISCONTINUANCE BY OR AGAINST PARTY UNDER DISABILITY

7.07.1 (1) If a party to an action is under a disability, the action may be discontinued by or against the party under rule 23.01 only with leave of a judge. O. Reg. 19/03, s. 3.

(2) Notice of a motion for leave under subrule (1) shall be served on the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) on the Children's Lawyer, if the party is a minor; or

(b) on the Public Guardian and Trustee, in any other case. O. Reg. 259/14, s. 2.

APPROVAL OF SETTLEMENT

Settlement Requires Judge's Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1).

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).

Exception

(2.1) This rule does not apply to a settlement or judgment respecting the appointment under the *Substitute Decisions Act, 1992* of a guardian of property or guardian of the person. O. Reg. 281/16, s. 3 (1).

Where no Proceeding Commenced

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application. R.R.O. 1990, Reg. 194, r. 7.08 (3).

Material Required for Approval

(4) On a motion or application for the approval of a judge under this rule, there shall be served and filed with the notice of motion or notice of application,

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement. R.R.O. 1990, Reg. 194, r. 7.08 (4); O. Reg. 69/95, s. 18; O. Reg. 575/07, s. 10.

(4.1) If there is no litigation guardian and the settlement that is the subject of the motion or application is in respect of a matter under the *Substitute Decisions Act, 1992* to which this rule applies, the affidavit referred to in clause (4) (a) shall be provided by the moving party or applicant (as the case may be), and the affidavit referred to in clause (4) (b) shall be provided by his or her lawyer. O. Reg. 281/16, s. 3 (1).

Children's Lawyer or Public Guardian and Trustee

(5) On a motion or application for the approval of a judge under this rule, the judge may,

(a) direct that material filed on the motion or application be served on the Children's Lawyer or on the Public Guardian and Trustee; and

(b) direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make a written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement. O. Reg. 281/16, s. 3 (2).

MONEY TO BE PAID INTO COURT

7.09 (1) Any money payable to a person under disability under an order or a settlement shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (1).

(2) Any money paid to the Children's Lawyer on behalf of a person under disability shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (2); O. Reg. 69/95, s. 19.

RULE 8 PARTNERSHIPS AND SOLE PROPRIETORSHIPS

PARTNERSHIPS

8.01 (1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership. R.R.O. 1990, Reg. 194, r. 8.01 (1).

(2) Subrule (1) extends to a proceeding between partnerships having one or more partners in common. O. Reg. 535/92, s. 4.

DEFENCE

8.02 Where a proceeding is commenced against a partnership using the firm name, the partnership's defence shall be delivered in the firm name and no person who admits having been a partner at any material time may defend the proceeding separately, except with leave of the court. R.R.O. 1990, Reg. 194, r. 8.02.

NOTICE TO ALLEGED PARTNER WHERE ENFORCEMENT SOUGHT AGAINST PARTNER

8.03 (1) In a proceeding against a partnership using the firm name, where a plaintiff or applicant seeks an order that will be enforceable personally against a person as a partner, the plaintiff or applicant may serve the person with the originating process, together with a notice to alleged partner (Form 8A) stating that the person was a partner at a material time specified in the notice. R.R.O. 1990, Reg. 194, r. 8.03 (1).

(2) A person served as provided in subrule (1) shall be deemed to have been a partner at

29

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

FACTUM OF THE COURT APPOINTED REPRESENTATIVES OF THE FORMER EMPLOYEES AND LTD BENEFICIARIES OF NORTEL

(Plan Sanction Motion returnable January 24, 2017)

January 23, 2017

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TO: SERVICE LIST

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

FACTUM OF THE COURT APPOINTED REPRESENTATIVES THE FORMER EMPLOYEES AND LTD BENEFICIARIES OF NORTEL (THE "REPRESENTATIVES")

(Plan Sanction Motion returnable January 24, 2017)

PART I - INTRODUCTION

1. This factum is filed in support of the Monitor and Canadian Debtors' motion to sanction the Plan of Compromise and Arrangement.[1]

2. On October 12, 2016, after almost eight years of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended) (the "***CCAA***") the Canadian Debtors announced that, following extensive negotiations among the Monitor, U.S. Debtors, EMEA Debtors and major stakeholder groups involved in the Nortel CCAA Proceedings, a Settlement and Support Agreement had been entered into (the "**Allocation Settlement**").

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[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Plan of Compromise and Arrangement dated November 30, 2016 and related Information Circular dated November 30, 2016 or the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017.

3. The Allocation Settlement is conditioned on and contemplated to be effected, in part, through a Plan of Compromise and Arrangement in Canada and chapter 11 plans of reorganization in the United States.

4. A Plan of Compromise and Arrangement dated November 30, 2016 (the "**Plan**") and related information circular dated November 30, 2016 (the "**Information Circular**") were filed by the Monitor.

5. A meeting of Affected Unsecured Creditors was held on January 17, 2017 and the Plan was approved by over 99% of Affected Unsecured Creditors.

6. The Monitor and Canadian Debtors now seek the sanction of the Court, and the Representatives of the Former Employees and LTD Beneficiaries support this request.

7. Two LTD Beneficiaries (the "**Dissenting LTD Beneficiaries**") have sought to vary the Plan alleging violations under the *Charter of Rights and Freedoms* (the "***Charter***"). The Representatives object to any modification of the Plan and submit that the *Charter* has no application here and, in any event, no rights have been violated.

PART II – THE FACTS

A. Background

8. The Representatives rely on the background and allocation litigation facts as set out in the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017, the Plan and the related Information Circular and the Factum of the Monitor dated January 22, 2017. The Representatives further set out additional facts below relating to employee matters.

B. Employee Related Matters

9. At the time of the CCAA Filing, Nortel employed approximately 6,000 people and had promised pensions and other benefits to some 15,000 others. Most Former Employees lost one or more of their termination and severance pay, health benefits, disability income and supplemental pensions, among other things, on January 14, 2009 or relatively soon

thereafter. In addition, Nortel's registered pension plans were significantly underfunded and pensions were eventually cut by about 30-40%. Such registered pensions will be improved by the proposed Plan but not fully restored.[2]

10. Specific measures were taken throughout the CCAA Proceedings to address some of the hardship imposed by the cuts and loss of benefits. The Representatives and Representative Counsel have worked with the Monitor and the Canadian Debtors to devise and implement those measures, and communicate with Former Employees, LTD Beneficiaries, pensioners and surviving spouses, providing them with advice and information, and assisting them in a variety of ways.

The Hardship Process

11. A Hardship Process was developed by Nortel, the Monitor and Representative Counsel following directions from the CCAA Court. The direction was provided following a motion by Representative Counsel and the Canadian Auto Workers (now Unifor) for an order requiring Nortel to make payments to terminated employees and other similar relief. The CCAA Court denied the motion but recognized the cases of hardship that had been referenced in the motion materials that were filed.[3] On July 30, 2009, the CCAA Court approved a Hardship Process for former employees of Nortel who were resident in Canada and had no available source of income (including employment income such as wages, salary or bonuses, consulting income, or pension or disability payments or income replacement, or the income of a spouse) as of the date of application and were not reasonably expected to be in receipt of income during the application period. Under the Hardship Process, eligible applicants could apply for an advance on their CCAA claim.[4]

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[2] Information Circular, Monitor's Motion Record at Tab 2B, pg. 11.

[3] *Re Nortel Networks Corp.*, [2009] OJ No 2558 at para. 88, Book of Authorities of the Representatives of Former Employees and LTD Beneficiaries ("**Book of Authorities of the Representatives**") at Tab 1.

[4] One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017 ("**135th Monitor's Report**"), Monitor's Motion Record at Tab 2, para. 108; See also Information Circular, Monitor's Motion Record at Tab 2B, pg. 19.

The Employee Settlement Agreement

12. In February 2010, the Representatives, Representative Counsel, the Canadian Debtors and the Monitor reached a settlement for the continuation of certain employee benefits.[5]

13. Approval of the settlement agreement was initially withheld as a result of opposition over a clause regarding future amendment to bankruptcy legislation.[6] However, an Amended and Restated Settlement Agreement was subsequently approved by the CCAA Court on March 31, 2010 (the "**Employee Settlement Agreement**") despite opposition by a small group of dissenting LTD Beneficiaries, including Mr. McAvoy and Ms. Holley.[7]

14. Leave to appeal was sought by the same small group of Dissenting LTD Beneficiaries and denied by the Court of Appeal for Ontario.[8]

15. The key terms of the Employee Settlement Agreement included:

    (a) the payment by Nortel of an estimated $57 million through 2010 to ensure the continuation of medical, dental and life insurance benefits for pensioners, their survivors and LTD Beneficiaries, and other benefits described below, thus ensuring benefits coverage for all affected Former Employees and LTD Beneficiaries for the first two years of Nortel's insolvency;

    (b) for LTD Beneficiaries, continuation of disability income benefits to the end of 2010;

    (c) continuation and current service funding of registered pension plans for all defined benefit pension plan members until the end of September 2010;

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[5] Information Circular, Monitor's Motion Record at Tab 2B, pg. 19.
[6] *Re Nortel Networks Corp.*, [2010] O.J. No. 1232, Book of Authorities of the Monitor and Canadian Debtors at Tab 15.
[7] *Re Nortel Networks Corp.*, [2010] O.J. No. 1408, Book of Authorities of the Monitor and Canadian Debtors at Tab 16.
[8] *Re Nortel Networks Corp.*, [2010] O.J. No. 2361, Book of Authorities of the Monitor and Canadian Debtors at Tab 16.

(d) a lump sum payment of up to $3,000 as an advance against their claim under the CCAA for eligible employees terminated without severance pay (the "**Termination Fund**");

(e) for those receiving survivor income and survivor transition benefits, the payment of those income benefits through 2010; and

(f) a requirement to wind-up the Health and Welfare Trust ("**HWT**") and distribute its substantial assets to beneficiaries, including LTD Beneficiaries.[9]

16. The Representatives, Representative Counsel, and the Monitor developed a sophisticated and thorough employee claims process which included the creation of a methodology for valuing employee claims, and a process to confirm them, later approved by the CCAA Court on October 6, 2011 (the "**Compensation Claims Process**"). The Compensation Claims Process involved, *inter alia*, the preparation of claims packages for all non-registered pension, employment and post-employment benefits for over 14,500 Former Employees, LTD Beneficiaries, pensioners and surviving spouses.

17. The Hardship Process was later amended to expand the scope of eligibility to include LTD Beneficiaries, pensioners and survivors of Nortel pensioners when income benefits stopped and pensions were cut. The Termination Fund was also extended to include LTD Beneficiaries, whose employment was terminated with the termination of disability income as of December 31, 2010.

18. With the assistance of Representative Counsel, the Representatives negotiated optional medical benefits coverage for those who were interested in replacing their lost Nortel benefit plans.

19. On January 6, 2012, Representative Counsel filed a number employment claims on behalf of certain groups of employees (the "**Omnibus Claims**"). All of the Omnibus Claims

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[9] 135th Monitor's Report, Monitor's Motion Record at Tab 2, para. 109; See also the Forty Second Report of the Monitor dated March 30, 2010.

have now been resolved, including a claim on behalf of all LTD Beneficiaries for the Employee Assistance Program.

20. The Compensation Claims Process is ongoing to date, and is nearing completion so that distributions can be made to Compensation Creditors as soon as possible after Nortel's Plan is approved and implemented.

Health and Welfare Trust Wind-Up

21. Pursuant to the Employee Settlement Agreement, Representative Counsel worked with the Monitor and Canadian Debtors to wind-up the HWT. The allocation of the HWT was based on methodology agreed to by the parties to the Employee Settlement Agreement for the purpose of the HWT distribution (the "**HWT Methodology**") as set out in the valuation report prepared by Nortel's actuarial firm, the Mercer Company dated August 27, 2010, as amended.[10]

22. The HWT Methodology was approved by this Court by order dated November 9, 2010 (the "**HWT Allocation Order**") despite objections of a dissenting group of LTD Beneficiaries (including Mr. McAvoy and Ms. Holley) advised by Ms. Diane Urquhart.[11] The CCAA Court rejected their arguments which sought a priority for LTD Beneficiaries in the distribution of HWT assets. [12]

23. The Dissenting LTD Beneficiaries filed an application for leave to appeal the HWT Allocation Order, which was denied by the Court of Appeal for Ontario.[13] A subsequent

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[10] Mercer Valuation of the Obligations of the Non-Pension Benefits for Claim Purposes as at the Determination Date, dated September 19, 2011, Motion Record of the Representatives of Former Employees and LTD Beneficiaries at Tab 1.

[11] *Re Nortel Networks Corp.*, [2010] O.J. No. 4785, Book of Authorities of the Monitor and Canadian Debtors at Tab 14.

[12] *Ibid* at para. 75.

[13] *Re Nortel Networks Corp.*, [2011] O.J. No. 22 (ONCA), Book of Authorities of the Monitor and Canadian Debtors at Tab 14.

application by the same group of Dissenting LTD Beneficiaries was also denied leave to appeal by the Supreme Court of Canada (the "**SCC**").[14]

24. Distributions from the HWT were made in accordance with the HWT Allocation Order starting in January 2011, just in time to assist LTD Beneficiaries and survivor income beneficiaries, whose payments had ceased as of December 31, 2010. To date, the HWT has distributed 38% of participating benefits to participating beneficiaries, subject to certain adjustments. Accordingly LTD Beneficiaries have received a payment of 38% of the value of their lost disability income claims from the HWT.[15]

The Advance Tax Ruling

25. The Representatives and Representative Counsel sought advance tax rulings with respect to certain lump sums that were being made from the HWT. On July 19, 2011 the Canada Revenue Agency ("**CRA**") provided a ruling that lump sum distributions to LTD Beneficiaries relating to disability income from the HWT were not taxable (the "**Advance Tax Ruling**").[16] When the LTD Beneficiaries were receiving regular monthly disability cheques from Nortel, the benefits were taxable as income. Based on the favourable Advance Tax Ruling, Representative Counsel expects that the distribution to LTD Beneficiaries for lost disability income under the Plan will not be subject to income tax, resulting in a higher after-tax recovery for the LTD Beneficiaries.

The Registered Pension Plans

26. The Representatives and Representative Counsel have worked with Morneau Shepell Ltd. ("**Morneau**") since Morneau was appointed by the provincial regulator in September of 2010 to wind-up the registered pension plans. In an attempt to alleviate the hardship, the Representatives and Representative Counsel:

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[14] *Dissenting Nortel Ltd. Beneficiaries v Nortel Networks Corp.*, [2011] S.C.C.A. No. 124 (SCC), Book of Authorities of the Monitor and Canadian Debtors at Tab 14.
[15] 135th Monitor's Report, Monitor's Motion Record at Tab 2, para. 105; See also Fifty First Monitor's Report dated August 27, 2010, Monitor's Motion Record at Tab 2I.
[16] 135th Monitor's Report, Monitor's Motion Record at Tab 2, para. at 108.

(a) sought and obtained approval from the provincial regulator for interim transfers of up to 50% of the estimated commuted value for LTD Beneficiaries with service in Ontario, Alberta and Nova Scotia suffering financial hardship;[17] and,

(b) advocated for alternative arrangements for the registered pension plans beyond the traditional wind-up provided under the *Pension Benefits Act*, R.S.O. 1990, C. P. 8, which led to the Province of Ontario enacting a regulation enabling Ontario pensioners to transfer lump sums from the Nortel pension plans.

27. Throughout the CCAA proceedings, the Representatives have lobbied the provincial and federal government to provide assistance to former employees and LTD Beneficiaries of Nortel. These lobbying efforts resulted in automatic acceptance to the Trillium Drug Program for all Nortel LTD Beneficiaries who were Ontario residents and requests were made to the Minister to have case workers designated to assist Nortel LTD Beneficiaries in obtaining information about Trillium and gaining access to specific drugs they require.[18]

28. Most importantly, the Representatives were among the leading proponents of a *pro rata* distribution position in the Allocation Dispute which resulted in a substantial recovery for Canadian Compensation Creditors and the Canadian Pension Claim.[19]

C. The Plan of Compromise and Arrangement – Creditor Vote and Sanction Hearing

29. A Plan of Compromise and Arrangement dated November 30, 2016 (the "**Plan**") and related information circular dated November 30, 2016 (the "**Information Circular**") were filed by the Monitor.

30. A meeting of Affected Unsecured Creditors was held on January 17, 2017 and as reported by the Monitor, the Plan was approved by over 99% of Affected Unsecured

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[17] *Ibid.*
[18] *Ibid.*
[19] *Re Nortel Networks Corp.*, [2015] O.J. No. 2440, leave to appeal refused [2016] O.J. 2287, Book of Authorities of the Monitor and Canadian Debtors at Tab 1.

Creditors. Pursuant to their respective Representation Orders, the Representatives voted in favour of the Plan.

31. On January 12, 2017, Joseph Greg McAvoy and Jennifer Holley, two LTD Beneficiaries represented by the LTD Representative pursuant to the LTD Representation Order, filed a "Notice of Intention to Appear and Submissions for Anticipated January 24, 2017 Fairness Hearing to Sanction the Nortel CCAA Plan" alleging violations of their rights pursuant to the *Charter* (the "**Dissenting LTD Submissions**").

32. Mr. McAvoy and Ms. Holley are both subject to the Representation Order for LTD Beneficiaries and did not opt-out of representation by the LTD Representative.[20] The Representation Order provides:

> 3. THE COURT ORDERS that, subject to paragraph 9 hereof, Susan Kennedy is hereby appointed as representative of all LTD Beneficiaries in the proceedings under the *Companies' Creditors Arrangement Act (Canada)*, ("CCAA"), the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") or in any other proceeding which has been brought before this Honourable court (the "Proceedings") including, without limitations, for the purpose of settling or compromising claims by the LTD Beneficiaries in the Proceedings.
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> ....
>
> 9. THIS COURT ORDERS that any individual LTD Beneficiary who does not wish to be bound by this Order and all other related Orders which may subsequently be made in these proceedings shall, within 30 days of mailing of notice of this Order, notify the Monitor, in writing, by facsimile, mail or delivery, and in the form attached as Schedule "A" hereto and shall thereafter not be bound and shall be represented themselves as an independent individual party to the extent they wish to appear in these Proceedings.[21]

PART III – ISSUES

33. The only issue to be considered on this motion is whether the CCAA Court should sanction the Plan.

34. The Representatives support the Monitor's submissions and make additional submissions below.

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[20] 135th Monitor's Report, Monitor's Motion Record at Tab 2, para. 106.
[21] Representation Order for Disabled Employees dated July 30, 2009, Monitor's Motion Record at Tab J.

PART IV – THE LAW

(A) The application should be granted

35. In order for a Plan of Compromise and Arrangement to be sanctioned by a court, the application must meet the following three step test:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the *CCAA*; and,

(c) the plan is fair and reasonable.[22]

36. The Representatives agree with the Monitor that the sanction test has been met and add the following:

(a) The recovery to Compensation Creditors is expected to be 45-49 cents on the dollar, which is far superior to the amount that would have been recovered had the arguments of the U.S. Debtors and EMEA Debtors at the allocation trial been accepted. Those positions would have generated recoveries of approximately 10% and 25% respectively to Canadian unsecured creditors;

(b) While the final recovery to Compensation Creditors is slightly less than the 52-53 percent estimated recovery that would have resulted had the Allocation Decisions been implemented on their terms, the Plan is a preferable compromise in that:

(i) it brings an end to eight years of litigation, and all the costs that are incurred in such proceedings;

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[22] *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771 at para. 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9 (ABCA), leave to appeal refused [2001] S.C.C.A. No. 60 (SCC), Book of Authorities of the Monitor and Canadian Debtors at Tab 2.

(ii) avoids future litigation over the magnitude of the funding shortfall in the Nortel Canadian Registered Pension Plans and guards against any challenges to the aggregate claims of Compensation Creditors; and,

(iii) results in prompt payments to Nortel's creditors in the first half of 2017, after more than eight years without recoveries.

Substantive Changes to the Plan cannot be made by a Sanctioning Court

37. Section 6(2) of the *CCAA* provides that the court may order amendments to a Plan of Compromise and Arrangement to reflect any changes that may lawfully be made under federal or provincial law. Courts have held that technical amendments to a plan may be made but not changes of substance.[23] The CCAA Court has the power to either sanction or reject the plan but not to rewrite it.

38. The Dissenting LTD Submissions essentially seek to rewrite the Allocation Settlement and Plan, with a special preference for one sub-class of creditors. After almost eight years of litigation and three mediations it is in no one's best interests to reject the Plan. The parties have negotiated this Plan to resolve all disputes in this major cross-border insolvency, it is a fair and reasonable settlement for all stakeholders and has been approved by an overwhelming majority of creditors.

The Plan is beyond the Scope of the Charter

39. The Dissenting LTD Submissions allege violations of *Charter* rights. Such arguments have no application here and are legally incorrect. The Charter governs relations between the government and private persons.[24] The SCC has held on many occasions that the *Charter* does not apply to relations between private persons.[25] In *McKinney v. University of Guelph,* the SCC discussed the rationale for confining the scope of the *Charter* at length. It addition to noting the clear language of section 32 explicitly confining the

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[23] *Wandlyn Inns Ltd. (Re)*, [1992] N.B.J. No. 681, Book of Authorities of the Representatives at Tab 4.
[24] *Charter* at s. 32.
[25] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (SCC), Book of Authorities of the Representatives at Tab 5, paras. 22-26 [***McKinney***]; Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Toronto: Carswell, 2007, Book of Authorities of the Representatives at Tab 6, pg.37-29 .

Charter's application to relations involving the government, the SCC also reviewed the policy rationale for this limited application:

> To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act"...
>
> Opening up private activities to judicial review could impose an impossible burden on the courts. Both government and the courts have recognized the need to limit judicial review by means, for example, of privative clauses and deference to specialized tribunals, techniques that would be unavailable in a *Charter* context. As well, as I noted earlier, government may, in many cases, establish more flexible means to deal with individual rights.[26]

40. A Plan of Compromise and Arrangement reflects a proposed settlement under the *CCAA* among a debtor company and its secured or unsecured creditors regarding the debtor company's pre-filing liabilities. It is fundamentally an agreement reached among private parties and is beyond the scope of the *Charter*.

41. The Dissenting LTD Submission further argues that the "Judge's use of discretion within the CCAA violates the Charter in respect to LTD".

42. As a general rule, the *Charter* does not apply to the courts. In *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, the SCC declined to set aside an injunction on the basis that a court order does not constitute governmental action for the purposes of the *Charter*. It thus held the lower court's injunction to be immune from *Charter* scrutiny. In a unanimous decision, the SCC stated that the judicial branch is not an element of governmental action for the purposes of the *Charter*. The word "government" in section 32 of the *Charter* referred to the legislative, executive, and administrative branches of government. [27]

43. The Dissenting LTD Submissions rely on *Slaight Communications Inc. v. Davidson* for the proposition that the exercise of judicial discretion pursuant to a statute is subject to the *Charter*. The Dissenting LTD Submissions quote from the minority judgment to the

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[26] *McKinney,* Book of Authorities of the Representatives at Tab 5, paras. 21 and 23-24. See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (SCC), Book of Authorities of the Representatives at Tab 7 [***Hill***].

[27] *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (SCC), Book of Authorities of the Representatives at Tab 8, paras. 34 and 36.

effect that: "the adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute."[28]

44. *Slaight Communications* is an administrative law case concerning the decision of an adjudicator under the *Canada Labour Code*. By contrast, a judge presiding over *CCAA* proceedings is not a creature of statute, nor do *CCAA* proceedings fall under the rubric of administrative law. The fact that a statute confers powers on a judge does not make a judge a creature of statute.

45. In the event that the CCAA Court finds that the *Charter* does apply to the Plan or to the CCAA Court, there is no violation of either section 15 or section 7 of the *Charter* as alleged in the Dissenting LTD Submissions.

46. Section 15 of the *Charter* requires a claimant to show that the impugned law or government action creates a distinction or treats individuals differently based on an enumerated or analogous ground. The court must then determine whether that distinction amounts to arbitrary or discriminatory disadvantage contrary to section 15. This analysis will consider whether the impugned law fails to respond to the actual capacities and needs of the member group and instead imposes a burden or denies a benefit in a manner that perpetuates the disadvantage.[29] The equality analysis also requires the identification of a comparator group to show that discrimination has occurred. The SCC has held that discrimination can on occasion also arise from the identical treatment of different groups. This is the notion of substantive equality, which may require the government to accommodate enumerated groups through differential treatment.[30]

47. While disability is certainly an enumerated ground of discrimination under section 15 of the *Charter*, there is no evidence that the LTD Beneficiaries have suffered discrimination because of their disability in these CCAA proceedings. In fact, the LTD Beneficiaries

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[28] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (SCC), Book of Authorities of the Representatives at Tab 9, para. 87 [***Slaight Communications***].

[29] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, Book of Authorities of the Representatives at Tab 10, para. 20.

[30] *Ibid* at para. 17.

have throughout the insolvency proceedings been represented by a court appointed Representative who have always acted in their best interest. A small group of Dissenting LTD Beneficiaries (including Mr. McAvoy and Ms. Holley) objected to the March 31, 2010 order approving the Employee Settlement Agreement and when their objections were denied, leave to appeal was sought by these individuals and denied by the Court of Appeal for Ontario.[31] No *Charter* arguments were raised at that time and it is not appropriate to re-litigate the Employee Settlement Agreement seven year later.

48. Further, all LTD Beneficiaries have benefited from the following:

(a) the Employee Settlement Agreement which provided LTD Beneficiaries with:

(i) the continuation of disability income benefits, medical, life and dental benefits until December 31, 2010 (as opposed to cessation of benefits as of March 31, 2010 or earlier) so that they had their monthly disability income and other benefits for almost two years after the CCAA filing, from January 14, 2009 to December 31, 2010;

(ii) continuation and current service funding of registered pension plans until the end of September 2010 for defined benefit pension plan members, including those on long term disability; and,

(iii) requirement to wind-up the HWT and distribute its assets to beneficiaries, including to LTD Beneficiaries.

(b) the wind-up of the HWT provided for 38% of all benefits paid out, including disability income benefits and LTD life insurance with the remaining 62% of entitlements to be paid at 45-49% from the Canadian Estate under the Allocation Settlement and the Plan for a total recovery of 66 to 68.4% of their lost disability income and other benefits;

(c) the Advance Tax Ruling obtained from the CRA confirming that lump sum distributions to LTD Beneficiaries for disability income from the HWT are not taxable under the Canadian Income Tax Act. Prior to the Filing Date, LTD Beneficiaries were taxed on their disability income upon receipt. Based on the

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[31] *Re Nortel Networks Corp.*, [2010] O.J. No. 1408, leave to appeal refused [2010] O.J. No. 2361 (ONCA), Book of Authorities of the Monitor and Canadian Debtors at Tab 16.

favourable Advance Tax Ruling, Representative Counsel expects that the distribution to LTD Beneficiaries for lost disability income under the Plan will not be subject to income tax, resulting in a higher after-tax recovery for the LTD Beneficiaries;

(d) Omnibus Claims were filed by Representative Counsel including on behalf of the LTD Beneficiaries for the loss of the Employee Assistance Program ("**EAP**"). The EAP claim was accepted by the Monitor for all LTD Beneficiaries, thereby increasing their claim values;

(e) following the termination of disability income and other benefits to LTD Beneficiaries, the following sources became available to LTD Beneficiaries:

(i) the Hardship Process was amended to allow LTD Beneficiaries to apply for advances on their claim for up to $24,200;

(ii) the Termination Fund provided up to $3,000; and,

(iii) the first HWT distribution was completed in January 2011, in time to assist LTD Beneficiaries whose benefits had ceased as of December 31, 2010.

(f) medical benefits coverage was negotiated with a replacement insurer providing optional benefit plans for those who signed up;

(g) at the request of the LTD Representative, approval was obtained from the provincial pension regulator for interim transfers of up to 50% of the estimated commuted value for LTD Beneficiaries with service in Ontario, Alberta and Nova Scotia suffering financial hardship;

(h) the LTD Representative lobbied the provincial and federal government to provide assistance to Former Employees and LTD Beneficiaries of Nortel. These lobbying efforts resulted in automatic acceptance to the Trillium Drug Program for all Nortel LTD Beneficiaries who were Ontario residents, and requests were made to the Minister to have case workers designated to assist Nortel LTD Beneficiaries in obtaining information about Trillium and gaining access to specific drugs they require; and,

(i) the Representatives advocated for a *pro rata* distribution of Nortel assets in the Allocation Dispute, a version of which was ultimately accepted by the Courts and has resulted in a significant recovery for LTD Beneficiaries as compared to the allocation positions argued by the U.S. and EMEA Debtors.

49. LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, without discrimination. Pensioners, their beneficiaries, surviving spouses of deceased employees, Former Employees and LTD Beneficiaries are all unsecured creditors who are experiencing hardship due to lost income and benefits in the Nortel insolvency. All are disadvantaged to varying degrees, depending on personal circumstances and there is no basis for preferring one group above others. All have suffered losses in the Nortel insolvency. This was already recognized by this court in the Nortel proceedings:

> 75 There is no doubt that the position of the Dissenting LTD Beneficiaries has been severely compromised by Nortel's insolvency. However, the Dissenting LTD Beneficiaries are not alone in this respect. All of the parties claiming entitlement to the HWT have been adversely impacted by Nortel's insolvency.
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> ...
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> 110 As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need. (emphasis added)[32]

50. There is no discrimination against LTD Beneficiaries in the proposed Plan. Only Parliament can enact legislation giving anyone a preference.

51. The Dissenting LTD Submissions also assert that section 7 of the *Charter* has been violated. Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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[32] *Re Nortel Networks Corp.*, [2010] O.J. No. 4785 at para. 75, leave to appeal refused [2011] O.J. No. 22 (ONCA), leave to appeal refused [2011] S.C.C.A. No. 124 (SCC), Book of Authorities of the Monitor and Canadian Debtors at Tab 14.

52. The Dissenting LTD Submissions assert that the CCAA Court's approval of the Plan deprives the LTD Beneficiaries of their section 7 rights by "forcing a compromise and poverty" on them. The Dissenting LTD Submissions request that the CCAA Court adjust the Plan by re-allocating $44 million of the Allocation Settlement to LTD Beneficiaries. The Court has no jurisdiction to do so.

53. No evidence of the Plan forcing poverty on the LTD Beneficiaries has been tendered. It is difficult to fathom how a significant payment to LTD Beneficiaries under the Plan forces poverty on anyone. Such payments will help to alleviate hardship in addition to any government social programs designed to assist disabled persons, such as the Canada Pension Plan disability benefit.

54. The request in the Dissenting LTD Submissions to have the Allocation Settlement money re-allocated constitutes an economic interest beyond the scope of section 7. The SCC has on many occasions stated that section 7 does not protect economic rights. In *Siemens v. Manitoba*, Justice Major writing for the Court stated:

> ...as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests.[33]

55. Professor Peter Hogg has made similar observations regarding the scope of section 7:

> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with no power over the purely economic interests of individuals or corporations. It also requires, as have noticed in the earlier discussion of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise property, having been shut out of the front door, would enter by the back. [34] [Emphasis added]

56. Accordingly, no case for violation of any Charter rights is made out here.

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[33] *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R 6, Book of Authorities of the Monitor and Canadian Debtors at Tab 23, para. 45; See also *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 (SCC), Book of Authorities of the Monitor and Canadian Debtors at Tab 21, paras. 76-83.

[34] Peter Hogg, *Constitutional Law of Canada*, 5 ed (Toronto: Carswell, 2007), Book of Authorities of the Representatives at Tab 6, at 47-18.1.

PART V - RELIEF REQUESTED

57. The Representatives respectfully submit that this Court should sanction the Plan and ensure its prompt implementation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2017.

January 23, 2017

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SCHEDULE 'A'
LIST OF AUTHORITIES

1. *Re Nortel Networks Corp.*, [2009] OJ No 2558.
2. *Wandlyn Inns Ltd. (Re)*, [1992] N.B.J. No. 681.
3. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.
4. Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Toronto: Carswell, 2007.
5. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.
6. *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573.
7. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.
8. *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

SCHEDULE 'B'
RELEVANT STATUTES

The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended)

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

***Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11**

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
Equality before and under law and equal protection and benefit of law

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (84)

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-35, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, et. al.

Court File No. 09-CL-7950

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM
(Plan Sanction Motion returnable January 24, 2017)

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Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

FACTUM OF THE MONITOR AND CANADIAN DEBTORS

(Motion for Plan Sanction and Canadian Escrow Release Order)

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Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

FACTUM OF THE MONITOR AND CANADIAN DEBTORS

(Motion for Plan Sanction and Canadian Escrow Release Order)

PART I – INTRODUCTION

1. This factum is filed in support of the Monitor[1] and Canadian Debtors' motion for an Order (the "**Plan Sanction Order**") sanctioning the Canadian Debtors' Plan of Compromise and Arrangement dated November 30, 2016 (the "**Plan**") and an order authorizing and directing the release of the escrowed Sale Proceeds to the Canadian Debtors, U.S. Debtors and EMEA Debtors in the manner contemplated by the Settlement and Support Agreement.

2. The Plan is consistent with, and gives effect to, the Settlement and Support Agreement entered into in October 2016 among the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors and the major stakeholder groups involved in the Nortel insolvency proceedings,

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan or the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017 (the "**One Hundred and Thirty Fifth Report**"). Unless otherwise specified, monetary amounts contained herein are expressed in U.S. dollars.

and, together with the concurrently filed U.S. Plans also contemplated by the Settlement and Support Agreement, achieves the substantive resolution of the global Nortel insolvency proceedings, including the release of more than $4.1 billion to the Canadian Estate for distribution to its creditors and the resolution of most significant unresolved claims against the Canadian Debtors.

3. At the Creditors' Meeting held on January 17, 2017, Affected Unsecured Creditors voting in person or by proxy voted overwhelmingly – indeed almost unanimously – to approve the Plan, both by number and value.

4. At a high level, the Plan: (i) effectuates the Settlement and Support Agreement, including the resolution of the Allocation Dispute and various claims set forth therein; (ii) substantively consolidates the assets and liabilities of the Canadian Debtors into a single Canadian Estate; (iii) provides for payment of certain established priority claims; (iv) provides for *pro rata* distributions to Affected Unsecured Creditors from Available Cash of the Canadian Estate; and (v) releases and discharges the Canadian Debtors, their former Directors and Officers, and the Monitor from all claims. These features are all appropriate in the circumstances, consistent with applicable law (including prior Orders made in these CCAA Proceedings) and necessary to the successful implementation of the Plan and the Settlement and Support Agreement.

5. The sanction of the Plan is also required as a condition to the Settlement and Support Agreement, which, among other things, sets out a timeline for the development and approval of coordinated Canadian and U.S. plans of arrangement and implementation of the Settlement and Support Agreement, including a joint hearing on January 24, 2017, for the

purpose of sanctioning and confirming the Canadian and U.S. Plans under the applicable tests in each jurisdiction.

6. In addition to sanctioning the Plan, the Sanction Order and the related Canadian Escrow Release Order sought by the Monitor and Canadian Debtors on this motion also approves the Settlement and Support Agreement, authorizes and directs the release of Sale Proceeds in the manner contemplated by the Settlement and Support Agreement, extends the stay of proceedings under the CCAA indefinitely, and provides for certain relief in respect of the reserves to be established in respect of certain Unresolved Affected Unsecured Claims that have been asserted on an unliquidated basis or in an otherwise uncertain amount. The Monitor and Canadian Debtors submit that all of these heads of relief are fair, reasonable and necessary in the circumstances, will allow the Plan to be implemented in accordance with its terms in an expeditious and efficient manner, and will allow for maximum distributions to be made to holders of Proven Affected Unsecured Claims as soon as possible.

7. In presenting the Plan for sanction, the Monitor and Canadian Debtors are cognizant that the outcomes achieved through the Plan and the Settlement and Support Agreement, while significantly better than what could otherwise have been the case, will still leave Affected Unsecured Creditors, including certain vulnerable stakeholder groups, with significantly less than full recovery on their claims.

8. The reality of a shortfall and a compromise have been apparent to all stakeholders from the earliest days of this case and are a function of Nortel's global insolvency. Implementation of the Plan and the Settlement and Support Agreement and the prompt distribution of money to creditors is the best means of ameliorating the hardship that has been felt by many of the Canadian Debtors creditors over the past eight years.

9. For these and the other reasons that follow, the Monitor and Canadian Debtors respectfully submit that this Court should exercise its discretion to sanction the Plan, thus allowing for the coordinated implementation of the Canadian and U.S. Plans and the Settlement and Support Agreement to proceed for the benefit of all stakeholders.

PART II – FACTS

10. The facts relevant to this motion, including the procedural history of this case, are more fully set out in the One Hundred and Thirty Fifth Report and the One Hundred and Thirty Third Report of the Monitor dated November 23, 2016 (the "**One Hundred and Thirty Third Report**").

(A) The Settlement and Support Agreement

11. As this Court is aware, the Canadian Debtors, along with the U.S. Debtors, EMEA Debtors, and certain of their respective key stakeholder groups are party to protracted litigation in the Canadian and U.S. Courts regarding the allocation of Sale Proceeds. Following a 21-day cross-border trial, this Court and the U.S. Bankruptcy Court issued their respective decisions with respect to the Allocation Dispute in May 2015 (as defined in the Settlement and Support Agreement, the "**Allocation Decisions**"). The Allocation Decisions remain subject to appeal in both the U.S. and Canada.

12. Following extensive negotiation, on October 12, 2016, the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors, EMEA Non-filed Entities, Joint Administrators, NNSA Conflicts Administrator, French Liquidator, Bondholder Group, the members of the CCC, the UCC, the U.K. Pension Trustee, the PPF, the Joint Liquidators and the NNCC Bondholder

Signatories executed the Settlement and Support Agreement. The Settlement and Support Agreement, among other things:

(a) contains the terms of settlement of the Allocation Dispute, including the payment of 57.1065% of the Sale Proceeds to the Canadian Debtors (being in excess of $4.1 billion), plus an additional amount of $35 million on account of the M&A Cost Reimbursement;

(b) resolves a number of significant claims against the Canadian Debtors, including the claims of the Crossover Bondholders, the UKPI and the Canadian Pension Claims;

(c) contemplates the substantive consolidation of the Canadian Debtors into the Canadian Estate;

(d) provides that the Canadian Estate will retain the value of its remaining assets, which means, among other things, the release to the Canadian Estate of approximately $237 million from the Canada Only Sales and additional amounts held on account of IP address sales;

(e) provides for the exchange of comprehensive releases among the Estates and the other parties to the Settlement and Support Agreement; and

(f) contains the framework for the development and implementation of coordinated plans of arrangement in Canada and the U.S., and a timeline for the approval and implementation thereof. [2]

13. Should the Plan and U.S. Plans be sanctioned, pending the satisfaction of applicable conditions precedent, the Settlement and Support Agreement will become fully effective on February 15, 2017.[3]

(B) Overview of Plan

14. The Plan provides for a comprehensive resolution of these CCAA Proceedings and implementation of the Settlement and Support Agreement and paves the way for distributions to creditors in a timely manner. The Plan provides for, among other things, the following:

(a) substantive consolidation of the Canadian Debtors into the Canadian Estate;

(b) the payment in full of certain Proven Priority Claims and other payments contemplated by the Plan;

(c) a compromise of all Affected Unsecured Claims in exchange for a *pro rata* distribution of the cash assets of the Canadian Estate available for distribution to Affected Unsecured Creditors, and the full and final release and discharge of all Affected Claims;

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[2] One Hundred and Thirty Fifth Report at paras. 15 - 19 (Motion Record, Tab 2, p. 15 - 19).

[3] One Hundred and Thirty Third Report at para. 18 (Motion Record, Tab 3, p. 519).

(d) the subordination of Equity Claims such that Equity Claimants and holders of Equity Interests will not receive a distribution or other recovery under the Plan;

(e) authorization for the Canadian Debtors and Monitor to direct the Escrow Agents to effect the allocation and distribution of the Sale Proceeds contemplated by the Settlement and Support Agreement and to otherwise implement the Settlement and Support Agreement, including the giving and receiving of the Settlement and Support Agreement Releases;

(f) release of all amounts held by NNL pursuant to the Canadian Only Sale Proceeds Orders or held as Unavailable Cash to the Canadian Estate;

(g) the establishment of certain reserves for the ongoing administration of the Canadian Estate and in respect of Unresolved Claims; and

(h) the release and discharge of all Affected Claims and Released Claims as against, among others, the Canadian Debtors, the Directors and Officers and the Monitor.[4]

15. The Plan is consistent with a prior order of this Court in that it provides that no Post-Filing Date Interest will be included in any claims provable under the Plan and no distributions will be made on account of Post-Filing Date Interest.[5]

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[4] One Hundred and Thirty Fifth Report at para. 21 (Motion Record, Tab 2, p. 19 - 20).

[5] One Hundred and Thirty Fifth Report at para. 30 (Motion Record, Tab 2, p. 23).

(C) Meeting of Creditors

16. On December 1, 2016, this Court issued the Meeting Order which, among other things, accepted the filing of the Plan and authorized the Monitor to call and hold a meeting of Affected Unsecured Creditors to consider and vote on the Plan.

17. Notification of the meeting was given in the manner prescribed by the Meeting Order.[6]

18. The Creditors' Meeting was held on January 17, 2017.

19. The Plan was approved by an overwhelming majority of Affected Unsecured Creditors voting at the meeting in person or by proxy, with 99.97% in number and 99.24% in value voting to approve the Plan.[7]

(D) Substantive Consolidation

20. The consolidation of the Canadian Debtors into a single estate is fundamental to the implementation of the Settlement and Support Agreement and the Plan, both of which are prefaced on the substantive consolidation of the Canadian Debtors into the Canadian Estate.

21. This Court has previously made findings of fact regarding the highly integrated nature of the Nortel group of companies and their business operations, including as set forth in its Reasons for Judgment in respect of the Allocation Dispute dated May 12, 2015:

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6 One Hundred and Thirty Fifth Report at paras. 48 - 50 (Motion Record, Tab 2, p. 28 - 30).

7 One Hundred and Thirty Fifth Report at paras. 55 - 63 (Motion Record, Tab 2, p. 31 - 33).

(a) "The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world";[8]

(b) "Nortel was organized along global product lines and global R&D projects pursuant to a horizontally integrated matrix structure and no one entity or region was able to provide the full line of Nortel products and services. R&D took place in various labs around the world in a collaborative fashion";[9]

(c) "[…] it is clear beyond peradventure that Nortel has had significant difficulty in determining the ownership of its principle assets. […] It is clear that these assets are in the language of Dr. Janis S[a]rra 'so intertwined that it is difficult to separate them for purposes of dealing with different entities'";[10] and

(d) "Moreover, the evidence in this case is clear and uncontested that Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope."[11]

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8 *Nortel Networks Corp., Re*, 2015 ONSC 2987 at para. 16 [*Allocation Decision*], leave to appeal refused 2016 ONCA 332 (Book of Authorities, Tab 1).

9 *Allocation Decision* at para. 202 (Book of Authorities, Tab 1).

10 *Allocation Decision* at para. 222 (Book of Authorities, Tab 1).

11 *Allocation Decision* at para. 223 (Book of Authorities, Tab 1).

22. The highly integrated nature of Nortel's business led to competing positions regarding the ownership of Nortel's assets (in particular its valuable intellectual property) and the proceeds derived therefrom by the individual Nortel legal entities and their respective creditors, and ultimately to years of contested litigation in respect of that issue, which disputes have now been resolved pursuant to the Settlement and Support Agreement.

23. With respect to the Canadian Debtors specifically, many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor. Moreover, many claims filed against the Canadian Debtors were filed against two or more of the Canadian Debtors on the basis of some form of alleged joint and several liability, including approximately $3 billion of former employee and pension related claims. Indeed, the vast majority of claims filed against the Canadian Debtors by quantum were asserted against two or more of the Canadian Debtors. The substantive consolidation of the Canadian Debtors into the Canadian Estate and the elimination of Duplicative Claims obviates the need for the determination of (and potentially litigation in respect of) whether these types of claims are provable against more than one Canadian Debtor.[12]

24. Substantive consolidation is supported by all major creditor constituencies of the Canadian Debtors pursuant to the Settlement and Support Agreement and by the overwhelming majority of creditors who have voted to approve the Plan.

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[12] One Hundred and Thirty Fifth Report at para. 73 (Motion Record, Tab 2, p. 35 - 36).

(E) The Canadian Debtors Have Complied with the CCAA and the Monitor Supports Approval of the Plan

25. The Monitor has been extensively involved in these CCAA Proceedings since they were commenced and has issued 135 reports to this Court outlining the various activities of the Canadian Debtors and the Monitor throughout these CCAA Proceedings.

26. To the best of the knowledge of the Monitor, the Canadian Debtors have complied with all statutory requirements for the sanctioning of a Plan and the prior Orders of this Court and nothing has been done that is not authorized by the CCAA. The Canadian Debtors have also acted in good faith and with due diligence.[13]

27. The Monitor supports the granting of the Sanction Order and the Canadian Escrow Release Order.[14]

(F) Unresolved Claims Reserve

28. The Plan provides for the establishment of an Unresolved Claims Reserve. In the case of Unresolved Affected Unsecured Claims, the amount to be reserved is an amount equal to the amount that would have been paid if the full amount of all Unresolved Affected Unsecured Claims had been Proven Affected Unsecured Claims as of such date, or such lesser amount as may be ordered by the CCAA Court.[15]

29. Certain holders of Unresolved Affected Unsecured Claims have asserted unliquidated claims, and, in certain instances, Creditors have purported to assert liabilities (in,

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[13] One Hundred and Thirty Fifth Report at para. 66 (Motion Record, Tab 2, p. 33).

[14] One Hundred and Thirty Fifth Report at para. 113 (Motion Record, Tab 2, p. 49).

[15] One Hundred and Thirty Fifth Report at para. 78 (Motion Record, Tab 2, p. 37). See also Plan at s. 1.1 "Unresolved Claims Reserve" (Motion Record, Tab 2(a), p. 73).

for instance, pleadings delivered in the context of Claim disputes) against the Canadian Debtors in excess of the amounts set forth in their Proof of Claim or dispute notice (which documents form the basis for the Monitor's reserve calculation and pursuant to which a Creditor was required to specify the amount of its claim or disputed claim, as the case may be).[16]

30. In light of the uncertainty caused by the foregoing with respect to establishing reserve amounts, the proposed form of Sanction Order sought will cap the maximum Proven Affected Unsecured Claim that could be proven in respect of an Unresolved Affected Unsecured Claims specified on Appendix "H" to the One Hundred and Thirty Fifth Report at the corresponding Claim Reserve Amount specified on Appendix "H".

(G) The LTD Rep Order and the Employee Settlement Agreement

31. On January 12, 2017, Joseph Greg McAvoy and Jennifer Holley (collectively, the "**LTD Objectors**"), two former LTD recipients, filed a "Notice of Intention to Appear and Submission for Anticipated January 24, 2017 Fairness Hearing to Sanction the Nortel CCAA Plan". The submission requests that CA$44 million be set aside and paid to the Canadian Debtors' former LTD recipients (the "**LTD Beneficiaries**") in "…full payment of the Nortel LTD income and medical and dental claims…"[17]

32. LTD benefits were funded through the Nortel Health and Welfare Trust (the "**HWT**"). Pursuant to various prior Orders of the Court, substantially all of the assets of the HWT have been distributed to beneficiaries thereof. In the case of LTD Beneficiaries,

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[16] One Hundred and Thirty Fifth Report at para. 80 (Motion Record, Tab 2, p. 37 - 38).

[17] One Hundred and Thirty Fifth Report at para. 103 (Motion Record, Tab 2, p. 45).

distributions from the HWT have satisfied approximately 38% of the LTD obligations owing to them pursuant to the HWT Allocation Order.[18]

33. The LTD Beneficiaries, including the LTD Objectors, are subject to the terms of the Order (Representation Order for Disabled Employees) of this Court dated July 30, 2009 (the "**LTD Rep Order**"). Pursuant to the LTD Rep Order:

(a) The LTD Rep was appointed as representative of the LTD Beneficiaries in the CCAA Proceedings, including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the CCAA Proceedings;

(b) LTD Beneficiaries had the option to "opt-out" from the LTD Rep Order in accordance with its terms. Neither of the LTD Objectors (or any other LTD Beneficiary) elected to opt-out in accordance with the terms of the LTD Rep Order;

(c) In 2010, certain of the Canadian Debtors, the Monitor, the Representatives (including the LTD Rep) and Representative Counsel entered into an Amended and Restated Settlement Agreement dated March 30, 2010 (the "**Employee Settlement Agreement**") which was approved by this Court in its Settlement Approval Order dated March 31, 2010 (the "**Settlement Approval Order**");

(d) Pursuant to the Employee Settlement Agreement and the Settlement Approval Order:

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[18] One Hundred and Thirty Fifth Report at para. 105 (Motion Record, Tab 2, p. 46).

(i) the Canadian Debtors agreed to continue paying LTD benefits to LTD Beneficiaries for the remainder of 2010;

(ii) the Canadian Debtors agreed to establish a CA$4.3 million fund pursuant to which CA$3,000 termination payments were made to former employees, including the LTD Objectors;

(iii) claims of LTD Beneficiaries were agreed to rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(iv) the Representatives (including the LTD Rep) agreed, on behalf of those they represent and on their own behalf, that in respect of any funding deficit in the HWT or any HWT related claims in these CCAA Proceedings or in any subsequent receivership or bankruptcy proceedings (among other situations) they would not advance, assert or make any claim that any HWT claims are entitled to any priority or preferential treatment over ordinary unsecured claims and that to the extent allowed against the Canadian Debtors, such HWT claims would rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(v) the Representatives (including the LTD Rep) agreed on their own behalf and on behalf of the Pension HWT Claimants (as defined in the Employee Settlement Agreement) that under no circumstances shall any CCAA plan be proposed or approved if, among other things, the Pension HWT

Claimants and the other ordinary unsecured creditors of the Canadian Debtors do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against the Canadian Debtors pursuant to the Plan; and

(vi) certain LTD Beneficiaries, including the individual LTD Objectors, sought leave to appeal the Settlement Approval Order, which leave to appeal was denied by the Ontario Court of Appeal such that the Settlement Approval Order is no longer subject to or capable of appeal.[19]

PART III – ISSUES AND LAW

34. The main issue for this motion is whether this Court should approve the Plan as fair and reasonable in the circumstances.

35. Section 6 of the applicable version of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double-majority vote. The effect of the Court's approval is to bind the debtor companies and their creditors:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 or 5, or either of those sections, agree to any compromise or arrangement either as proposed or altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

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[19] One Hundred and Thirty Fifth Report at para. 109 (Motion Record, Tab 2, p. 47 - 49). See also: (i) LTD Rep Order at paras. 3 and 9 (Motion Record, Tab 2(j), p. 473 - 474); (ii) Settlement Approval Order at paras. 10, 11 and 18 (Motion Record, Tab 2(k), p. 483 - 484, 486 - 487); and (iii) Settlement Approval Order, Schedule "A" – Employee Settlement Agreement at paras. B. 5., C. 2. and H. 1. (Motion Record, Tab 2(k), p 492 - 494 and 497).

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

36. The general requirements for Court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.[20]

(A) Compliance with all Statutory Requirements

37. *Canadian Airlines Corp., Re*, provides that in assessing whether a debtor company has complied with statutory requirements, the court will enquire as to whether:

(a) the applicant comes within the definition of a "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of CA$5 million;

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[20] *Canadian Airlines Corp., Re*, 2000 ABQB 442 at para. 60, leave to appeal refused 2000 ABCA 238, leave to appeal refused [2001] S.C.C.A. No. 60 (SCC) [*Canadian Airlines*] (Book of Authorities, Tab 2); *Cline Mining Corp., Re*, 2015 ONSC 622 at para. 19 (Book of Authorities, Tab 3).

(c) the notice calling the meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double-majority of creditors.[21]

38. The Monitor and Canadian Debtors submit that each of these requirements has been satisfied in this case:

(a) In granting the Initial Order dated January 14, 2009 (as amended and restated from time to time), this Court found that each of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation is a "debtor company" to which the CCAA applies;[22]

(b) In granting the New Applicants Order dated March 18, 2016, this Court declared that each of Nortel Communications Inc., Architel Systems Corporation, and Northern Telecom Canada Limited were companies to which the CCAA applies;[23]

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[21] *Canadian Airlines, supra* at para. 62 (Book of Authorities, Tab 2).

[22] *Nortel Networks Corp., Re*, [2009] O.J. No. 154 (ONSC [Commercial List]) at para. 36 (Book of Authorities, Tab 4).

[23] *Nortel Communications Inc., Re*, 2016 CarswellOnt 4213 (ONSC [Commercial List]) at para. 4 (Book of Authorities, Tab 5).

(c) The extensive notification requirements contemplated by the Meeting Order in connection with the Meeting were duly completed;[24]

(d) In granting the Meeting Order, this Court approved the classification of Affected Unsecured Creditors into a single class, being the Affected Unsecured Creditors Class.[25] There was no opposition to this classification raised at the Meeting Order motion, and the Meeting Order was not appealed;

(e) The Meeting was properly constituted, and voting was carried out in accordance with the Meeting Order;[26] and

(f) 99.97% in number representing 99.24% in value of the Affected Unsecured Creditors that were present and voting in person or by proxy at the Meeting voted in favour of the Plan, which exceeds the double majority required by section 6 of the CCAA.[27]

(i) No Distribution for Equity Claims under Plan

39. Although the pre-amendment version of the CCAA applicable to these proceedings does not contain the statutory requirement in section 6(8) of the current CCAA which prohibits any payment in respect of equity claims until all non-equity claims are paid in full, the Plan conforms to this standard, which is consistent with the pre-amendment common law applicable to these proceedings. Specifically, section 2.5 of the Plan provides that Equity

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[24] One Hundred and Thirty Fifth Report at paras. 48 - 50 (Motion Record, Tab 2, p. 28 - 30).

[25] Meeting Order at para. 10 (Motion Record, Tab 2(c), p. 348).

[26] One Hundred and Thirty Fifth Report at paras. 55 - 63 (Motion Record, Tab 2, p. 31 - 33).

[27] One Hundred and Thirty Fifth Report at para. 59 (Motion Record, Tab 2, p. 32).

Claimants and holders of Equity Interests shall not receive a distribution or other consideration under the Plan.

40. The 2009 amendments to the CCAA codified the treatment of equity claims,[28] incorporating and clarifying their historical subordinated treatment.[29] Even prior to being explicitly subordinated by section 6(8), courts treated equity claims as ranking below the claims of creditors,[30] and the policy of pre-amendment federal insolvency law was clear that shareholders did not have the right to look to the assets of the corporation until creditors had been paid in full.[31]

41. The subordination of Equity Claimants under the Plan is consistent with the pre-amendment common law treatment of equity claims, and also meets the requirements under section 6(8) of the current CCAA.

(ii) Section 18.2 Not Applicable and Required Crown Payments Satisfied in any Event

42. This Court has not made an order under CCAA subsection 11.4(1) in these proceedings, and therefore the requirements relating to certain Crown claims under section 18.2 of the pre-amendment CCAA do not apply. In any event, there are no amounts owing of the type

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[28] *Sino-Forest Corp., Re,* 2012 ONCA 816 at para. 30 [*Sino-Forest*] (Book of Authorities, Tab 6).

[29] *Nelson Financial Group Ltd.*, 2010 ONSC 6229 at paras. 25 and 27 [*Nelson Financial*] (Book of Authorities, Tab 7); see also *Return on Innovation Capital Ltd. v Gandi Innovations Ltd.*, 2011 ONSC 5018 (Ont SCJ [Commercial List]) at para. 55, leave to appeal refused 2012 ONCA 10 (Book of Authorities, Tab 8).

[30] *U.S. Steel Canada, Re,* 2016 ONCA 662 at para. 96 (Book of Authorities, Tab 9) and *Sino-Forest, supra* at para. 30 (Book of Authorities, Tab 6); see also *Nelson Financial, supra* at para. 25 (Book of Authorities, Tab 7) and *Central Capital Corp., Re,* [1996] O.J. No. 359 (ONCA) at paras. 67 and 90 [*Central Capital*] (Book of Authorities, Tab 10).

[31] *Central Capital, supra* at para. 90 (Book of Authorities, Tab 10).

contemplated under subsections 18.2(a), (b), or (c) of the CCAA, all of which (as applicable) were required to be paid pursuant to the Initial Order.[32]

43. Accordingly, the Monitor and Canadian Debtors submit that the statutory and common law prerequisites to the sanctioning of the Plan are satisfied.

(B) No Unauthorized Steps taken by Canadian Debtors

44. In determining whether anything has been done (or is purported to have been done) that is not authorized by the CCAA, *Re Canadian Airlines Corp*. provides that the court "must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan."[33]

45. These CCAA Proceedings, as well as the related insolvency proceedings in the U.S. and United Kingdom, have been highly publicized and highly scrutinized throughout, with active stakeholder participation and Court oversight. To date, the Monitor has submitted 135 reports and this Court has issued some 273 orders throughout the course of the proceedings. There has been no suggestion anything has been done that is contrary to the CCAA, and the Monitor (who has acted with expanded powers since very early in the case) has stated that, to the best of its knowledge, the Canadian Debtors have complied with all statutory requirements for the sanctioning of a Plan and the prior orders of this Court and nothing has been done that is not authorized by the CCAA.[34]

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[32] See Initial Order, para. 8.

[33] *Canadian Airlines, supra* at para. 64 (Book of Authorities, Tab 2).

[34] One Hundred and Thirty Fifth Report at para. 66 (Motion Record, Tab 2, p. 33).

46. The Settlement and Support Agreement and the Plan, which follow on extensive cross-border litigation and numerous prior attempts at settlement, represent a major milestone in these proceedings by resolving the Allocation Dispute and a number of contentious claims and other matters, and providing a framework for the resolution of these prolonged insolvency proceedings.

47. The fact that the Settlement and Support Agreement and the Plan are supported by all key stakeholders (including those who have found little common ground in these proceedings to date) and by virtually all other creditors of the Canadian Debtors is further proof that the Plan is consistent with the spirit (and letter) of the CCAA.

(C) The Plan is Fair and Reasonable in the Circumstances

48. *Re Canadian Airlines Corp.* posits that "fairness" and "reasonableness" are "necessarily shaped by the unique circumstances of each case, within the context of the CCAA."[35] When considering whether a plan of arrangement is fair and reasonable, a CCAA court will consider the relative degrees of prejudice that would flow from granting or denying the sanction request, and whether the proposed plan represents a fair balancing of interests, in light of other available commercial alternatives (if any).[36]

49. Other factors commonly considered by a CCAA court on a plan sanction motion include:

(a) whether the claims were properly classified, and whether the requisite double majority of creditors approved the proposed plan;

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[35] *Canadian Airlines, supra* at para. 94 (Book of Authorities, Tab 2).

[36] *Canadian Airlines, supra* at paras. 3 and 145 (Book of Authorities, Tab 2).

(b) what creditors would likely receive on bankruptcy or liquidation as compared to the proposed plan;

(c) any commercially viable alternatives to the proposed plan;

(d) whether there is any oppression of the rights of creditors;

(e) whether there is any unfairness to shareholders; and

(f) the public interest.[37]

50. The Monitor and Canadian Debtors submit that each of these factors supports the Court's approval of the Plan as fair and reasonable in the circumstances of this case.

(i) Classification and Creditor Approval

51. As set out above, a single class of Affected Unsecured Creditors voted on the Plan at the Meeting. The creditors comprising the Affected Unsecured Creditors Class share a commonality of interest with respect to the Canadian Debtors because they each hold an unsecured claim against one or more of the Canadian Debtors. The Plan was approved by the requisite double-majority of creditors by an overwhelming margin. *Re Canadian Airlines Corp.* notes that creditor approval creates an inference that a plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the proposed plan.[38] The Settlement and Support Agreement shows that the Plan is the result of negotiation and dialogue among the major stakeholder groups.

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[37] *Canadian Airlines, supra* at para. 96 (Book of Authorities, Tab 2).

[38] *Canadian Airlines, supra* at para. 97 (Book of Authorities, Tab 2).

(ii) Recovery on Bankruptcy

52. The case is a liquidating CCAA and the Plan is consistent with the priorities established under the *Bankruptcy and Insolvency Act*[39] in that it provides for payment in full of Proven Priority Claims, and *pro rata* distributions to holders of Proven Affected Unsecured Claims. No better outcome could be obtained by any Affected Creditor pursuant to a BIA liquidation.

(iii) No Viable Alternatives to Plan

53. The Plan and the Settlement and Support Agreement are the result of extensive negotiations among the major stakeholder groups in these CCAA Proceedings, following on years of litigation and failed settlement efforts. In the absence of the Plan and the Settlement and Support Agreement being implemented, the most likely result is that parties will resume the Allocation Dispute and other outstanding litigation. There will be no monies released from the lock box accounts and no distributions will be made to any Canadian creditors in the foreseeable future.[40] In the circumstances, there is simply no basis to assert there is any better or more viable option available to the Canadian Debtors and their creditors.

(iv) No Oppression of Creditors

54. The Plan respects the rights and priorities of Affected Creditors, and does not oppress any creditor rights.

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[39] R.S.C. 1985, c. B-3, as amended [*BIA*].

[40] One Hundred and Thirty Fifth Report at paras. 69 - 70 (Motion Record, Tab 2, p. 34).

55. Here, the Plan provides for the payment in full of a relatively small class of Proven Priority Claims ($62.7 million to NNI and CA$3,000 to a limited number of former employees) that have already been established as secured or priority claims pursuant to prior Orders of this Court. In addition, the Plan contemplates a $77.5 million payment to NNI pursuant to the Settlement and Support Agreement in settlement of (among others things) any obligations arising under a host of side letters entered into between the Canadian Debtors and U.S. Debtors after the Filing Date relating to the sharing of transaction costs and related liabilities and as part of the comprehensive and integrated settlement contemplated by the Settlement and Support Agreement.

56. Each of these claims is appropriately afforded a priority at law and, in the case of the $77.5 million payment to NNI, also represents a component of the Settlement and Support Agreement.

57. Beyond these few priority payments based on priority legal entitlement, all Affected Unsecured Creditors of the Canadian Debtors – which represents virtually all of the Canadian Debtors' creditors – will share rateably in distributions under the Plan consistent with the bedrock *pari passu* principle of insolvency law.[41]

58. Further submissions regarding the request of the LTD Objectors and the relative fairness of the Plan to them are set forth beginning at paragraph 61.

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[41] *Nortel Networks Corp., Re*, 2014 ONSC 5274 at paras. 12 – 14 [*Nortel Post-Filing Interest Decision*], affirmed 2015 ONCA 681, leave to appeal refused 2016 CarswellOnt 7202 (SCC) (Book of Authorities, Tab 11), citing *Indalex Ltd., Re*, [2009] O.J. No. 3165 (ONSC [Commercial List]) at para. 16 (Book of Authorities, Tab 12) and *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.*, [2005] O.J. No. 1081 (ONCA) at para. 25 [*Shoppers Trust Co.*] (Book of Authorities, Tab 13).

(v) No Unfairness to Shareholders

59. Given that Affected Unsecured Creditors are not being paid in full, there is no unfairness in shareholders receiving no recoveries under the Plan.[42]

(vi) Public Interest Favours Approval of Plan

60. It is in the public interest for these long running insolvency proceeding to be resolved and distributions made to Affected Unsecured Creditors, including LTD Beneficiaries, former employees, pensioners and financial and trade creditors, all of whom have been waiting for more than eight years to be paid. Approval of the Plan creates a path for that to occur promptly.

(D) Response to Submissions of the LTD Objectors

(i) The Plan is Fair and Reasonable to LTD Beneficiaries

61. The LTD Objectors have stated that the Plan is unfair and unreasonable for LTD Beneficiaries and have requested that CA$44 million be set aside and paid to the LTD Beneficiaries in full satisfaction of amounts owing to them.

62. While the Monitor and Canadian Debtors are sympathetic to the circumstances of the LTD Beneficiaries – and have supported various initiatives, such as the Hardship Fund, that have sought to ameliorate the significant impacts Nortel's insolvency has had on them and other vulnerable stakeholders – they respectfully submit that the Plan is fair and reasonable and the request of the LTD Objectors should be denied.

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[42] See the discussion and cases cited at paragraphs 39 to 41 hereof.

63. At its core, the LTD Objectors' complaint is that their need is greater than other creditors. But as stated by Morawetz J. (as he then was) in addressing the wind-up and distribution of the HWT to its various beneficiaries, including LTD Beneficiaries, former employees and pensioners, allocation of funds in an insolvency is a function of entitlements, not needs:

> As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. ***The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need.***[43] [emphasis added]

64. The Plan is consistent with fundamental principles of insolvency law and prior orders of this Court (discussed below) in confirming that all unsecured creditors – be they bondholders, trade creditors, pensioners or LTD Beneficiaries – will receive the same *pari passu* treatment under the Plan. They are treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable; to the contrary, it is the fundamental tenet of insolvency law.

(ii) The LTD Objectors are Precluded from Seeking Priority Treatment

65. The treatment of the LTD Beneficiaries pursuant to the Plan is also fair and reasonable as: (i) the LTD Beneficiaries, including the LTD Objectors, are bound to support the Plan and Settlement and Support Agreement; and (ii) the LTD Beneficiaries, including the LTD

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[43] *Nortel Networks Corp., Re*, 2010 ONSC 5584 at para. 110, leave to appeal denied 2011 ONCA 10, leave to appeal denied [2011] S.C.C.A. No. 124 (SCC) (Book of Authorities, Tab 14).

Objectors, are bound by the prior court approved Employee Settlement Agreement and the related Settlement Approval Order which have already established that the claims of LTD Beneficiaries will rank as unsecured claims under any plan in these proceedings. The treatment of the LTD Objectors under the Plan is consistent with these prior contractual agreements and Court approvals, which are accepted measures of fairness and reasonableness.

(iii) LTD Objectors Bound by LTD Rep Order and Settlement and Support Agreement

66. In 2009, the LTD Rep was appointed as representative of the LTD Beneficiaries pursuant to the LTD Rep Order, "…including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the Proceedings."[44] Pursuant to the LTD Rep Order, LTD Beneficiaries had the option to opt-out of representation by the LTD Rep within 30 days of mailing of notice of the LTD Rep Order to them in mid-2009.[45] Neither of the LTD Objectors (or any other LTD Beneficiary) elected to opt out of representation by the LTD Rep pursuant to the terms of the LTD Rep Order and thus are bound by it and the actions of the LTD Rep.[46] An attempt to opt out now, some 7.5 years after the fact, is not permissible.[47]

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[44] One Hundred and Thirty Fifth Report at para. 106 (Motion Record, Tab 2, p. 46). See also LTD Rep Order at para. 3 (Motion Record, Tab 2(j), p. 473).

[45] LTD Rep Order at para. 9 (Motion Record, Tab 2(j), p. 474).

[46] One Hundred and Thirty Fifth Report at para. 106(b) (Motion Record, Tab 2, p. 46). In his Endorsement regarding the Employee Settlement Agreement, Morawetz J. (as he then was) confirmed "It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf": *Re Nortel Networks Corp.*, 2010 ONSC 1708 at para. 59 (Book of Authorities, Tab 15) [*Employee Settlement Motion 1*]. Note that Morawetz J. originally declined to approve a prior version of the Employee Settlement Agreement based on a provision relating to future legislative amendment to the BIA (the so-called "Clause H.2") that he found created uncertainty which potentially undermined the finality of the settlement. Morawetz J. subsequently approved the Employee Settlement Agreement as amended to remove that provision. See: *Nortel Networks Corp., Re*, 2010 ONSC 1977 at paras. 5, 7 and 40 [*Employee Settlement Motion 2*], leave to appeal denied 2010 ONCA 402 (Book of Authorities, Tab 16).

[47] *Urlin Rent a Car Ltd. v. Furukawa Electric Co.*, 2016 ONSC 7965 at para. 22 (Book of Authorities, Tab 17).

67. The LTD Rep is a signatory to the Settlement and Support Agreement, which she executed pursuant to the LTD Rep Order for and on behalf of the LTD Beneficiaries.[48] As such, pursuant to the LTD Rep Order, the LTD Beneficiaries, including the LTD Objectors, are bound to support and not oppose the Plan which was arrived at with substantial input from all of the Representatives.[49]

(iv) The Employee Settlement Agreement and Settlement Approval Order Conclusively Resolved the Ranking of the Claims of the LTD Beneficiaries

68. Moreover, the Plan and the *pari passu* treatment of the LTD Beneficiaries thereunder merely gives effect to matters that were settled and approved by order of this Court *nearly seven years ago*.

69. On March 31, 2010, Morawetz J. (as he then was) granted the Settlement Approval Order approving the Employee Settlement Agreement. The Employee Settlement Agreement (including the Settlement Approval Order) is a comprehensive settlement negotiated among Representative Counsel (in consultation with the Representatives, including the LTD Rep), the Monitor and numerous other stakeholders that addressed a host of employee-related issues, including the period of time during which the Canadian Debtors would continue to fund pension and other employee and former employee benefits and pursuant to which a CA$4.3

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[48] Plan, Exhibit "A" - Settlement and Support Agreement, signature page of Susan Kennedy (Motion Record, Tab 2(a), p. 187).

[49] See, for instance: Plan, Exhibit "A" - Settlement and Support Agreement at paras. 6(h)(i) and 6(h)(iii)(B) (Motion Record, Tab 2(a), p. 143 - 144).

million fund used to pay CA$3,000 priority termination payments to former employees was established.[50]

70. In exchange, the Representatives, including the LTD Rep, provided (among other things) definitive confirmation on behalf of those they represent that the employee, benefit and pension related obligations of the Canadian Debtors, including LTD benefits funded through the HWT, would rank as ordinary unsecured claims that would share *pari passu* with the claims of the Canadian Debtors other unsecured creditors, including pursuant to any plan. In addition, it was agreed that any priority claim for such benefits was released.

71. Specifically, pursuant to the Employee Settlement Agreement:

> C. 2. The CAW, Representative Counsel, ***the LTD Representative*** and the Former Employee Representatives (the "Representatives") ***agree, on behalf of those they represent and on their own behalf, that in respect of any funding deficit in the HWT or any HWT related claims (the "HWT Claims"), in these proceedings*** or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel […] or the HWT, ***they shall not advance, assert or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including without limitation that they rank as priority claims against Nortel*** […] ***and such claims, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings, shall rank as ordinary unsecured claims on a pari passu basis with the claims of the ordinary unsecured creditors of Nortel***. [emphasis added][51]
>
> H. 1. ***The Representatives agree on their own behalf and on behalf of the Pension HWT Claimants that under no circumstances shall any***

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[50] One Hundred and Thirty Fifth Report at para. 109 (Motion Record, Tab 2, p. 47). See also Settlement Approval Order, Schedule "A" – Employee Settlement Agreement, at para. B (Motion Record, Tab 2(k), p. 491 - 493).

[51] Settlement Approval Order, Schedule "A" – Employee Settlement Agreement, at para. C. 2. (Motion Record, Tab 2(k), p. 493 - 494). See also Settlement Approval Order, Schedule "A" – Employee Settlement Agreement at para. B. 5. where it was confirmed that, for greater certainty, the claims of LTD Beneficiaries (including but not limited to claims for future lost long term disability or income continuation benefits, pension benefits or pension benefit accruals, and medical, dental and life insurance benefits) shall rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors (Motion Record, Tab 2(k), p. 492 - 493).

> ***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***. [emphasis added][52]
>
> G. 2. The CAW, ***the LTD Representative*** and the Former Employees Representatives ***agree on their own behalf and on behalf of the Pension HWT Claimants that Nortel*** and the Nortel Worldwide Entities and their respective successors and assigns (collectively, the "Nortel Releasees") ***are hereby released, discharged and remised from any and all direct and indirect claims*** (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) ***that the Pension Claims and the HWT Claims, or any part thereof, rank as preferential or priority claim over the claims of ordinary unsecured creditors of Nortel, as a trust (whether deemed or otherwise) or a lien, or under any other legal or equitable theory***. […] [emphasis added] [53]

72. Pursuant to the Settlement Approval Order, this Court granted certain relief confirming the foregoing covenants:

> 10. ***THIS COURT ORDERS AND DECLARES that any HWT Claims made in these proceedings*** or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the HWT ***shall***, to the extent they are allowed against Nortel pursuant to any claims adjudication procedure established in such proceedings, ***rank as ordinary unsecured claims on a pari passu basis with the claims of ordinary unsecured creditors of Nortel, and no part of any such HWT Claims shall rank as a preferential or priority claim*** or shall be the subject of a constructive trust or trust of any nature or kind.[54] [emphasis added]

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[52] Settlement Approval Order, Schedule "A" – Employee Settlement Agreement at para. H. 1. (Motion Record, Tab 2(k), p. 497).

[53] Forty Second Report of the Monitor dated March 30, 2010, Appendix "B" – Employee Settlement Agreement at para. G.2.

[54] Settlement Approval Order at para. 10 (Motion Record, Tab 2(k), p. 483).

11. ***THIS COURT ORDERS AND DECLARES that no person or entity, including without limitation, the trustee of the HWT, the Employee Claimants and the Representatives, shall***, directly or indirectly (i) advance, assert, re-assert, re-file or ***make any HWT Claim in these proceedings*** or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity (to the extent that such claims are provable) or the HWT ***except as an ordinary unsecured claim ranking on a pari passu basis with the claims of ordinary unsecured creditors of Nortel, or (ii) advance, assert, re-assert, re-file or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including without limitation that they rank as preferential or priority claims against Nortel*** or any Nortel Worldwide Entity, or are the subject of a constructive trust or trust of any nature or kind, ***and all such claims are hereby forever barred, enjoined, released and extinguished as against Nortel***, any Nortel Worldwide Entity, the HWT and the trustee of the HWT, and their respective officers, directors, employees, agents, members, legal counsel, financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing.[55] [emphasis added]

16. ***THIS COURT ORDERS AND DECLARES that the Nortel Releasees be and they are hereby released, discharged and remised from any and all direct and indirect claims*** (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) ***that the Pension Claims and the HWT Claims, or any part thereof, rank as a preferential or priority claim over the claims of ordinary unsecured creditors of Nortel, as a trust (whether deemed or otherwise) or a lien or charge, or under any other legal or equitable theory***. […].[56]

18. ***THIS COURT ORDERS AND DECLARES that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "Plan") be proposed or approved by the Court if:*** (i) the Plan provides for separate classification of any Employee Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) ***the Employee Claimants and the other ordinary unsecured creditors do not receive the same pari passu treatment of their allowed claims against Nortel pursuant to the Plan***.[57] [emphasis added]

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[55] Settlement Approval Order at para. 11 (Motion Record, Tab 2(k), p. 483 - 484).

[56] Settlement Approval Order at para. 16 (Motion Record, Tab 2(k), p. 486).

[57] Settlement Approval Order at para. 18 (Motion Record, Tab 2(k), p. 486 - 487).

73. The foregoing agreement and order comprehensively establish that the claims of LTD Beneficiaries are to rank as unsecured claims that share *pari passu* with other unsecured claims against the Canadian Debtors, that any claim for priority treatment was released, and that no plan could be proposed or approved if "Employee Claimants" (including the LTD Beneficiaries) and other unsecured creditors did not receive the same *pari passu* treatment of their allowed claims pursuant to such plan.

74. The Plan prescribes precisely the *pari passu* treatment that the agreement and order require for the LTD Beneficiaries. The LTD Objectors seek an amendment to the Plan that is contrary to the existing agreement and order.

75. The Employee Settlement Agreement was approved after considering the objections of a group of dissenting LTD Beneficiaries (which included the LTD Objectors).[58] This group sought leave to the Ontario Court of Appeal, who in denying leave to appeal found that:

> The moving parties have not demonstrated that they have been subjected to any procedural unfairness. They have been represented throughout in a case that has been carefully judicially managed from the beginning. Their counsel accepts the settlement. No other LTD beneficiaries assert any unfair process, and the applicants can show none that they have been exposed to.
>
> ***Nor have they been able to show any substantive unfairness in the settlement. The motion judge exercised his discretion to carefully balance the various interests at stake in approving the settlement. In our view he made no demonstrable error in doing so. The settlement cannot be said to be unreasonable***.[59] [emphasis added]

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[58] *Employee Settlement Approval Motion 1*, *supra* at para. 49 (Book of Authorities, Tab 15).

[59] *Nortel Networks Corp., Re*, 2010 ONCA 402 at paras. 2 - 3 (Book of Authorities, Tab 16).

76. The Employee Settlement Agreement and the Settlement Approval Order prescribe a treatment for LTD Beneficiaries as unsecured claimants sharing rateably with other unsecured claimants pursuant to any plan in these proceedings. The Plan complies with this. The objection and request of the LTD Objectors cannot be accepted in the face of this.

(v) Reconsideration of the Settlement Approval Order is Unavailable

77. Nor is there any basis, as the LTD Objectors suggest, for the Court to somehow reconsider the Employee Settlement Agreement and the Settlement Approval Order nearly seven years after the fact.

78. This Court recently canvassed the applicable Canadian law regarding a court's narrow jurisdiction to change or amend a judgment before it has been formally drawn up and signed in its Ruling on Reconsideration/Clarification Motion dated July 6, 2015.[60]

79. In the circumstances here, "reconsideration" is sought not only following taking out of the order, but after an unsuccessful attempt to appeal it, and the passage of almost seven years. The Monitor and Canadian Debtors respectfully submit that there is simply no ability for the Court to reconsider the Settlement and Approval Order.

80. Even if there were an ability for the Court to reconsider, the supposed grounds for reconsideration, being the "final" and "certain" realization that the LTD Beneficiaries will suffer a shortfall on their claims, cannot reasonably constitute a ground for reconsideration. The main Canadian Debtors were declared insolvent in 2009, at which point it was readily apparent they may not be able to honour their obligations in full. Indeed, the very fact that the LTD Objectors

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[60] *Nortel Networks Corp., Re*, 2015 ONSC 4170 at paras. 3 - 6 (Book of Authorities, Tab 18).

opposed the Employee Settlement Agreement can only have been motivated by a concern that the treatment of LTD claims as unsecured claims left them exposed to a compromise in the future. With respect to the balance of the grounds asserted for reconsideration, they are simply a repeat of arguments that were raised and rejected at the time.

81. In the circumstances, there is no basis for the Court to reconsider the Settlement Approval Order.

(vi) The LTD Objectors Charter Argument

82. In light of the foregoing it may not be necessary for the Court to consider the *Canadian Charter of Rights and Freedoms* (the "***Charter***") argument of the LTD Objectors.[61] But even if it were considered it leads to no different result.

83. The LTD Objectors claim that this Court in exercising its discretion to sanction the Plan would violate the LTD Beneficiaries' rights under sections 7 and 15 of the *Charter*.

84. The LTD Objectors do not appear to question the constitutional validity or applicability of the CCAA itself or of any common law rule or principle, and have not served a notice of constitutional question under s. 109 of the *Courts of Justice Act*[62], which would be required if they did. This is fundamental. As a general rule, the CCAA – the constitutional validity of which the LTD Objectors must accept – anticipates, as does all of Canada's insolvency legislation, the *pari passu* treatment of creditors based on entitlements. The *pari passu* principle, that "the assets of the insolvent debtor are to be distributed amongst classes of

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[61] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[62] R.S.O. 1990. c. C.43.

creditors rateably and equally, as those assets are found at the date of insolvency" is one of the governing principles of insolvency law.[63]

85. While creditors in a CCAA proceeding maintain the ability to bargain for and agree to different treatment, in the absence of such agreement the *pari passu* principle, prefaced on the BIA, appropriately governs.[64] There is no agreement by creditors to differential treatment in this case. To the contrary, the Employee Settlement Agreement and the Settlement Approval Order mandate equal treatment for all unsecured creditors. The LTD Objectors' proposition that approving a plan under the constitutional CCAA providing for the very *pari passu* treatment that serves as the foundation of Canadian insolvency law would be an unconstitutional exercise of discretion under the CCAA is a contradiction in terms.

86. This is not a case where a broad discretion conferred by statute must be read down to avoid a *Charter* breach; it is a case where the Court's discretion to approve the Plan is being exercised to fulfill the very purpose of the statute whose constitutionality is not challenged – the *pari passu* treatment of creditors.

87. In any event, the additional payment that the LTD Objectors seek relates to their economic rights, which are not protected under the *Charter*. The cases the LTD Objectors cite, such as *Gosselin*[65] and *Eldridge*[66], concern the government's use of public funds, not the

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63 *Nortel Networks Corp., Re*, 2015 ONCA 681 at para. 23 [*Nortel Post-Filing Interest OCA Decision*] (Book of Authorities, Tab 11), citing *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 at para. 20 (S.C.J.) (Book of Authorities, Tab 19); *Shoppers Trust Co., supra* at para. 25 (Book of Authorities, Tab 13).

64 *Nortel Post-Filing Interest OCA Decision, supra* at paras. 23 – 24 (Book of Authorities, Tab 11); *Nortel Post-Filing Interest Decision, supra* at paras. 28 - 31 (Book of Authorities, Tab 11), citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 at paras 23, 24, 47, 54, and 78 (Book of Authorities, Tab 20).

65 *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (Book of Authorities, Tab 21) [*Gosselin*].

66 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (Book of Authorities, Tab 22).

division of a limited pool of assets of insolvent corporate debtors based on the claimants' private contractual or other rights against those debtors. Arguments that the right to security of the person under section 7 create a responsibility for the government to ensure that survival needs are met[67] or that section 15 requires benefits provided by government to be extended in such a way as to enable equal participation by disadvantaged groups, apply to the use of public funds by the government, not to the administration of the insolvent estate of private enterprises. Nor do the cases the LTD Objectors cite, or sections 7 or 15 themselves, imply a *Charter* right for one group of creditors with a set of private contractual rights to be subsidized by another.

88. The LTD Objectors cite no authority for the proposition that the right to equal benefit of the law guaranteed by s. 15 of the *Charter* is infringed by the application of the *pari passu* principle which is fundamental to insolvency legislation. The application of the *pari passu* principle (and its corollary, the interest stops rule) has already resulted in more being available to unsecured creditors such as the LTD Beneficiaries than would have been the case if those principles were not applied and the relative entitlements of creditors affected by, for example, the accrual of post-filing interest.[68]

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[67] The argument has not yet been accepted in any event. In *Gosselin*, *supra*, at para. 80 (Book of Authorities, Tab 21), McLachlin J. (for the majority) held that section 7 of the *Charter* did not create the positive economic right to sufficient social assistance funding to meet basic needs or adequate living standards: "Nothing in the jurisprudence thus far suggests that section 7 [of the *Charter*] places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to *deprive* people of these." See also *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at paras. 45 - 46 (Book of Authorities, Tab 23).

[68] *Nortel Post-Filing Interest Decision*, *supra*, at para. 3 (Book of Authorities, Tab 11).

(E) Substantive Consolidation of the Canadian Estate is Necessary and Appropriate in the Circumstances

89. The consolidation of the Canadian Debtors into a single estate is fundamental to the implementation of the Settlement and Support Agreement and the Plan, both of which are prefaced on the substantive consolidation of the Canadian Debtors into the Canadian Estate.

90. Consolidated plans of arrangement are a common feature of CCAA proceedings.[69] For example, in *Re PSINet Ltd.* a CCAA court approved a consolidated plan because consolidation (i) avoided complex allocation litigation, and (ii) reflected the intertwined nature of the debtor companies' operations:

> The consolidated plan avoids the complex and likely litigious issues surrounding the allocation of the proceeds from the sale of substantially all of the assets of the applicants […] The consolidated plan also reflected the intertwined nature of the applicants and their business operations, which businesses in essence operated as a single business […][70]

91. The court in *PSINet* also considered that a significant majority of voting creditors had voted in favour of a consolidated plan in that case.[71]

92. Several other factors have been recognized as supporting substantial consolidation in prior cases. These factors include: the existence of inter-company debt,[72] the existence of cross-guarantees (i.e. a guarantee by one debtor company of the liabilities of another debtor

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[69] See, generally, Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 527 – 529 (Book of Authorities, Tab 24) and *Allocation Decision*, *supra*, at paras. 213 and 215 - 223 (Book of Authorities, Tab 1).

[70] *PSINet Ltd., Re*, [2002] O.J. No. 1156 (ONSC [Commercial List]) at para. 2 [*PSINet*] (Book of Authorities, Tab 25).

[71] Ibid. at para. 8.

[72] Ibid. at para. 2. See also *Lehndorff General Partner Ltd., Re* (1993), 17 CBR (3d) 24 (Ont Gen Div [Commercial List] at paras. 2 and 4 [*Lehndorff*] (Book of Authorities, Tab 26).

company),[73] and the existence of cross-default provisions.[74] All of these factors are present in these CCAA Proceedings.[75]

93. The Monitor and Canadian Debtors submit that all of the factors identified in the cases are present in the within CCAA Proceedings and support the approval of a consolidated plan.

(i) The Canadian Debtors Were Highly Integrated and Intertwined and Substantive Consolidation Avoids Further Potential Litigation and is Supported by Creditors

94. This Court has already made a number of factual findings, outlined above at paragraph 21, that establish the Nortel Group was a highly integrated and intertwined business.

95. Although made in the context of the Nortel Group as a whole, these findings are equally applicable to the Canadian Debtors, a fact recognized by this Court in its recent endorsement regarding the "Calgary Employee" claim dispute when it adopted its "matrix structure" findings in respect of the Nortel Group as being applicable to the Canadian Debtors.[76]

96. With respect to the Court's prior observation of the presence of intercompany guarantees throughout the Nortel Group, the same is true when considering the Canadian Debtors in isolation. Many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor. Moreover, many claims filed against the Canadian Debtors were filed against two or more of the Canadian Debtors on the basis of some form of

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[73] See *Atlantic Yarns Inc., Re*, 2008 NBQB 144 at paras. 32 and 34 [*Atlantic Yarns*] (Book of Authorities, Tab 27); *Lehndorff, supra*, at para. 2 (Book of Authorities, Tab 26).

[74] *Atlantic Yarns, supra*, at para. 32 (Book of Authorities, Tab 27); *Lehndorff, supra*, at paras. 2 and 4 (Book of Authorities, Tab 26).

[75] See, for instance, *Allocation Decision, supra*, at para. 223 (Book of Authorities, Tab 1).

[76] *Nortel Networks Corp., Re*, 2016 ONSC 6030 at paras. 38 - 40 (Book of Authorities, Tab 28), citing *Allocation Decision, supra* (Book of Authorities, Tab 1).

alleged joint and several liability, including approximately $3 billion of former employee and pension related claims. Indeed, the vast majority of claims filed against the Canadian Debtors by quantum have been asserted against two or more of the Canadian Debtors.[77]

97. The substantive consolidation of the Canadian Debtors into the Canadian Estate and the elimination of Duplicative Claims obviates the need for the determination of (and potentially litigation in respect of) whether these types of claims are provable against more than one Canadian Debtor. Substantive consolidation also eliminates the possibility of any further litigation regarding the specific dollar amount that could be allocated to each Canadian Debtor pursuant to the Allocation Decisions, a distinct possibility in the absence of a consolidated Plan given creditors would be motivated to ring fence allocation entitlements in specific Canadian Debtors.

98. Finally, the appropriateness of substantive consolidation is supported by the virtually unanimous approval of the Plan by Affected Unsecured Creditors.

(ii) Any Prejudice Arising as a Result of Substantive Consolidation is Far Outweighed by the Benefits of the Plan

99. In considering the appropriateness of substantive consolidation, the Court will also consider any prejudice that may arise to individual creditors. In making this assessment, the Court must bear in mind the overall impact of a sanctioned and implemented Plan in this case. As stated in *PSINet*: "While consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect."[78]

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[77] One Hundred and Thirty Fifth Report at para. 73(c) (Motion Record, Tab 2, p. 35).

[78] *PSINet, supra*, at para. 11 (Book of Authorities, Tab 25).

100. The general effect of a sanctioned and implemented Plan in the context of the CCAA Proceedings is the negotiated resolution of the most significant impasse in these proceedings – the Allocation Dispute – and a path forward to distributions to creditors in respect of their proven claims.

101. The Monitor and Canadian Debtors submit that any prejudice to individual creditors arising from substantive consolidation is far outweighed by the positive outcomes generated by the Plan and the Settlement and Support Agreement.

(F) The Capping of the Claims Reserve for Specified Unresolved Affected Unsecured Claims is Fair and Reasonable

102. The Monitor proposes to establish reserves for Unresolved Affected Unsecured Claim consistent with the maximum amount contemplated by the Plan, i.e. the amount that would be required to be paid if the Unresolved Affected Unsecured Claim were subsequently proven in full. This approach is consistent with standard practice in CCAA cases as well as the BIA and cases thereunder.[79] The Monitor has adopted this approach notwithstanding its view that many Unresolved Affected Unsecured Claims are duplicative and have been asserted for amounts far in excess of which they can be proven.

103. However, to avoid any ambiguity regarding the specific reserve amount to be set aside in respect of the Unresolved Affected Unsecured Claims specified on Appendix "H" to the One Hundred and Thirty Fifth Report, the Monitor seeks to "cap" the maximum Proven Affected

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[79] See *Bankruptcy and Insolvency Act*, s. 148(2) and *Re Mohawk Sports Entertainment Ltd.* (1971), 15 C.B.R. (N.S.) 63 (Ont. H.C.) at paras. 9 - 12 (Book of Authorities, Tab 29).

Unsecured Claim that could be proven in respect of such a claim at the corresponding Claim Reserve Amount specified on Appendix "H".[80]

104. In addition to avoiding any ambiguity generally by providing holders of Unresolved Affected Unsecured Claims with notice of their specific Claim Reserve Amount, the relief is required given that, notwithstanding this Court's prior Claims Orders approving forms requiring creditors to specify the specific amount claimed or disputed, certain creditors have asserted unliquidated claims or otherwise evidenced an intention to seek to establish a claim for greater than the amount set forth in their Proof of Claim or dispute notice, as applicable.[81]

105. By granting the relief sought, this Court is merely giving effect to its prior orders and assisting in establishing certainty regarding reserve and claim amounts so that maximum distributions can be made to holders of Proven Affected Unsecured Claims without unnecessary or inappropriate holdbacks. In the respectful submission of the Monitor, the relief sought is fair and reasonable in the circumstances and should be granted.

(G) Plan Releases are Appropriate

106. It is common practice that the debtor company, its directors and officers, and the Monitor and its counsel are released by a plan of arrangement.[82] Further, section 5.1 of the

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[80] Being the liquidated claim amount asserted by the Creditor in its Proof of Claim or dispute notice, as applicable.

[81] See Claims Procedure Order dated July 30, 2009, requiring a Creditor to file a Proof of Claim substantially in the form prescribed, which form specifies the Creditor is to *state the amount* the Canadian Debtor was/were and still is/are indebted to the Creditor (*see* s. 9, s. 3 "Proof of Claim" and Schedule "B"). See also the "Guide to Completing the Proof of Claim Form" (Schedule "C") directing the Creditor to indicate *the amount* the relevant Canadian Debtor was indebted to the Creditor for. Note the Claims Procedure Order was subsequently amended and restated with respect to unrelated points. Similarly, pursuant to the Claims Resolution Order dated September 16, 2010, in response to a Notice of Disallowance (as defined therein) issued by the Monitor, Creditors are obligated to deliver a Dispute Notice (as defined therein) substantially in the form prescribed which requires the Creditor to specify the amount claimed in the dispute (*see* s. 17 and s. 6 "Dispute Notice").

[82] *Canadian Airlines, supra,* at paras. 85 - 93 (Book of Authorities, Tab 2).

applicable CCAA specifically contemplates the release of directors of the debtor company by a plan of arrangement.[83] Accordingly, the releases set out in Section 7 of the Plan in favour of each of the Canadian Debtors, the Directors and Officers, the Monitor and the Monitor's legal counsel, each of whom are (or have been) integrally involved in the CCAA Proceedings, are fair and reasonable, are directly connected to the objectives of the Plan, and assist in bringing finality to these long running proceedings.

107. In addition, the Settlement and Support Agreement Releases and the releases provided for in section 7.4 of the Plan have been agreed to by the relevant parties giving and receiving such releases and are appropriate in the circumstances.

(H) Extension of CCAA Stay is Appropriate

108. The proposed Sanction Order also provides that the stay of proceedings in favour of the Canadian Debtors shall be extended indefinitely, subject to further Order of this Court. Although an initial distribution to creditors is expected in the April 2017 timeframe, as alluded to in Section 10.1 of the Plan, there remains many activities to be completed, including the resolution of Unresolved Claims, the realization of remaining residual assets, the decommissioning of the remaining IT infrastructure, the wind-down and repatriation of funds from the Canadian Debtors' foreign controlled subsidiaries and a further distribution or distributions.

109. The extension of the CCAA stay on an indefinite basis will facilitate the implementation of the Plan, the continuation of these and other restructuring activities and the

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[83] The releases set forth in section 7 of the Plan in favour of the Directors appropriately reflect the limitation on such releases prescribed by Section 5.1(2) of the CCAA. See Plan at s. 7.1(b) (Motion Record, Tab 2(a), p. 95).

making of distributions, and will avoid the cost incurred by the Canadian Estate having to return to the Court to seek periodic stay extensions post-Plan implementation. Pursuant to the Sanction Order, reporting to the Court and stakeholders by the Monitor will occur on no less than an annual basis. Moreover, it will always be open to stakeholders to contact the Monitor with any questions or requests, and to move to the Court on appropriate notice for a modification of the CCAA stay or any other relief which may be appropriately sought. In the circumstances, the Monitor submits that an indefinite extension of the CCAA stay is fair and reasonable and no Creditor will be harmed by such relief.

(I) Canadian Escrow Release Order

110. The Settlement and Support Agreement contemplates each of the U.S. Debtors and Canadian Debtors obtaining Escrow Release Orders from the U.S. Bankruptcy Court and this Court, respectively, authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated by the Settlement and Support Agreement.

111. The Escrow Release Orders: (i) constitute the order required under Section 12(b) of the Interim Funding and Settlement Agreement dated June 9, 2009; and (ii) constitute the orders of the "dispute resolvers" contemplated by the Escrow Agreements to permit and authorize the Escrow Agents to distribute the Sale Proceeds.

112. The Monitor and Canadian Debtors respectfully submit that the granting of the Canadian Escrow Release Order will assist in implementing the Settlement and Support Agreement and the distribution of Sale Proceeds to the Estates contemplated thereby and is appropriate in the circumstances.

PART IV– RELIEF REQUESTED

113. For the reasons set out herein, the Monitor and Canadian Debtors respectfully request that this Court grant the proposed form of Sanction Order and Canadian Escrow Release Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF JANUARY, 2017.

Per: Goodmans LLP

GOODMANS LLP

Lawyers for the Monitor, Ernst & Young Inc.

Per:

GOWLING WLG (CANADA) LLP

Lawyers for the Canadian Debtors

SCHEDULE A - LIST OF AUTHORITIES

1. *Nortel Networks Corporation, Re*, 2015 ONSC 2987, leave to appeal refused 2016 ONCA 332
2. *Canadian Airlines Corp., Re*, 2000 ABQB 442, leave to appeal refused 2000 ABCA 238, leave to appeal refused [2001] S.C.C.A. No. 60 (SCC)
3. *Cline Mining Corp., Re*, 2015 ONSC 622
4. *Nortel Networks Corp., Re*, [2009] O.J. No. 154 (ONSC [Commercial List])
5. *Nortel Communications Inc., Re*, 2016 CarswellOnt 4213 (ONSC [Commercial List])
6. *Sino-Forest Corp., Re*, 2012 ONCA 816
7. *Nelson Financial Group Ltd.*, 2010 ONSC 6229
8. *Return on Innovation Capital Ltd. v Gandi Innovations Ltd.*, 2011 ONSC 5018 (Ont SCJ [Commercial List]), leave to appeal refused 2012 ONCA 10
9. *U.S. Steel Canada, Re*, 2016 ONCA 662
10. *Central Capital Corp., Re*, [1996] O.J. No. 359 (ONCA)
11. *Nortel Networks Corp., Re*, 2014 ONSC 5274, affirmed 2015 ONCA 681, leave to appeal refused 2016 CarswellOnt 7202 (SCC)
12. *Indalex Ltd., Re*, [2009] O.J. No. 3165 (ONSC [Commercial List])
13. *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.*, [2005] O.J. No. 1081 (ONCA)
14. *Nortel Networks Corp., Re*, 2010 ONSC 5584, leave to appeal denied 2011 ONCA 10, leave to appeal denied [2011] S.C.C.A. No. 124 (SCC)
15. *Nortel Networks Corp., Re*, 2010 ONSC 1708
16. *Nortel Networks Corp., Re*, 2010 ONSC 1977, leave to appeal denied 2010 ONCA 402
17. *Urlin Rent a Car Ltd. v. Furukawa Electric Co.*, 2016 ONSC 7965
18. *Nortel Networks Corp., Re*, 2015 ONSC 4170
19. *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (S.C.J.)
20. *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60
21. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84
22. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
23. *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6
24. Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013)
25. *PSINet Ltd., Re*, [2002] O.J. No. 1156 (ONSC [Commercial List])
26. *Lehndorff General Partner Ltd., Re* (1993), 17 CBR (3d) 24 (Ont Gen Div [Commercial List])

27. *Atlantic Yarns Inc., Re*, 2008 NBQB 144

28. *Nortel Networks Corp., Re*, 2016 ONSC 6030

29. *Re Mohawk Sports Entertainment Ltd.* (1971), 15 C.B.R. (N.S.) 63 (Ont. H.C.)

SCHEDULE B – STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, AS AMENDED
version in force between November 17, 2007 and September 17, 2009

Claims against directors — compromise

s. 5.1

(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

Compromises to be sanctioned by court

s. 6

Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or

meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Her Majesty affected

s. 11.4 (1)

An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

> (i) the expiration of the order,
>
> (ii) the refusal of a proposed compromise by the creditors or the court,
>
> (iii) six months following the court sanction of a compromise or arrangement,
>
> (iv) the default by the company on any term of a compromise or arrangement, or
>
> (v) the performance of a compromise or arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

> (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

Admission of claims

s. 12(3)

Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

Certain Crown claims

s. 18.2

(1) If an order contains a provision authorized by subsection 11.4(1), unless Her Majesty consents, no compromise or arrangement shall be sanctioned by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

Default of remittance to Crown

(2) Where an order contains a provision authorized by subsection 11.4(1), no compromise or arrangement shall be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (1) that became due after the time of the application for an order under section 11.

COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, AS AMENDED
currently in force

Payment – equity claims

s. 6(8)

No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

***BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3**

Trustee to pay dividends as required

s.148

(1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, from time to time as required by the inspectors, declare and distribute dividends among the unsecured creditors entitled thereto.

Disputed claims

(2) Where the validity of any claim has not been determined, the trustee shall retain sufficient funds to provide for payment thereof in the event that the claim is admitted.

***COURTS OF JUSTICE ACT*, R.S.O. 1990. c. C.43**

Notice of constitutional question

s.109

(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24(1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

THE CONSTITUTION ACT, 1982, being SCHEDULE B TO THE CANADA ACT 1982
(UK), 1982, c 11

Life, liberty and security of person

s.7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality before and under law and equal protection and benefit of law

s.15

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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 ET AL.

Court File No.: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE MONITOR AND CANADIAN DEBTORS
(Motion for Plan Sanction and Canadian Escrow Release Order)

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31

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT R.S.C. 1985, c. C-36 AS AMENDED

AFFIDAVIT OF SUSAN KENNEDY
(sworn February 23, 2010)

I, Susan Kennedy, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am an employee of Nortel Networks Limited ("Nortel") and am currently not working due to a medical condition in respect of which I receive long term disability ("LTD") income benefits. I have been receiving LTD income benefits from Nortel since June 23, 1995.

2. I am the Court-appointed Representative for all employees of Nortel who are not working due to an injury, illness or medical condition in respect of which they are receiving or are entitled to receive disability income benefits by or through Nortel ("the LTD Beneficiaries") pursuant to the Representation Order for Disabled Employees dated July 30, 2009 (the "Representation Order"). Attached hereto as **Exhibit "A"** is the Representation Order dated July 30, 2009 (the "Representation Order").

3. As such, I have personal knowledge of the matters to which I hereinafter depose in this Affidavit. Where I do not possess personal knowledge, I have stated the source of my information and, in all such cases, believe it to be true.

4. Capitalized terms used in this Affidavit and not otherwise defined shall have the meanings given to them in the Settlement Agreement dated February 8, 2010, the Monitor's Thirty-Sixth report dated February 8, 2010 (the "Thirty-Sixth Report") and the Monitor's Thirty-Ninth report dated February 18, 2010 (the "Thirty-Ninth Report") that have already been filed with this Court. Attached at Schedule "A" to this Affidavit is a list of those defined terms and their meanings.

5. I swear this Affidavit in support of a motion for the approval of a Settlement Agreement which provides all former employees of Nortel, including pensioners and surviving spouses (the "Former Employees"), and all LTD Beneficiaries, with continued health, dental, life and income benefits until the end of 2010.

6. The specific relief being sought in this motion by the Applicants is outlined in detail at paragraph 4 of the Affidavit of Elena King sworn February 18, 2010 in support of this motion (the "King Affidavit"). I have reviewed the King Affidavit and I am in agreement with the relief being sought as outlined in its paragraph 4. Based on information I have received from a broad cross-section of the LTD Beneficiaries, and after much discussion with Representative Counsel, our financial and actuarial advisors and the Representatives of the Former Employees, I swear this Affidavit in support of this motion on my behalf and on behalf of the individuals I represent, in its form put forward before this Court including in particular, the following relief:

   (a) Approval of the Settlement Agreement, dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives[1], the LTD Representative[2], Representative Settlement Counsel and the CAW (the "Settlement Parties") which requires, among other things, that the Applicants pay to the LTD Beneficiaries their disability income benefits on a "pay as you

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[1] On their own behalf and on behalf of the parties they represent.
[2] On her own behalf and on behalf of the parties she represents.

go basis" and shall continue to pay medical and dental benefits and life insurance benefits to Pensioners and LTD Beneficiaries until December 31, 2010;

(b) An Order that the Applicants shall make all current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of these insolvency proceedings, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month; and

(c) An Order that notwithstanding anything else in the Settlement Agreement, 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 the Applicants, no party will be precluded by the Order from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

7. As the Court-appointed Representative of the LTD Beneficiaries, I have been closely involved with Representative Counsel throughout the discussions concerning and negotiations leading up to the Settlement Agreement. In my opinion, this Settlement Agreement represents a fair and reasonable solution for the provision of benefits through 2010 to a small, but vulnerable group of disabled individuals who, for the most part, do not have any other source of income or ability to replace their benefits, and in particular, the health, dental, life and income benefits they receive from Nortel. It also provides more time for the LTD Beneficiaries to prepare to live and support themselves and their families, and to deal with their health concerns and disabilities after Nortel, as we know it, ceases to exist.

BACKGROUND

8. On January 14, 2009, the Applicants ("Nortel") were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. c. C-36, as amended ("CCAA")

pursuant to an initial order (as subsequently amended and restated, the "Initial Order") of this Honourable Court. Ernst & Young Inc. was appointed as Monitor (the "Monitor") in the CCAA proceedings. Details regarding the background to the company's proceedings, and the insolvency proceedings of Nortel's related foreign entities, are set out in the affidavit of John Doolittle, sworn January 14, 2009, and previously filed by the Applicants in these proceedings and are therefore not repeated herein.

9. The committee now known as the Canadian Nortel Employees on Long Term Disability ("CNELTD") was formed at the end of January 2009, shortly after Nortel filed for protection under the CCAA. It was originally called the Nortel Networks Long Term Disability Survivors ("NNLTDS"). A number of LTD Beneficiaries, including Charles Black, Connie Walsh and myself, formed the committee for support, information sharing, legal guidance and in order to ensure we had a voice in Nortel's insolvency proceedings. Upon the resignation of Connie Walsh as committee leader and Yahoo! Group facilitator on April 23, 2009, I volunteered to take over this role. In addition to communicating with the committee via the internet, I set up two face-to-face meetings among committee members in Ottawa on April 30, 2009 and June 1, 2009.

10. Anyone who is an LTD Beneficiary is permitted to join the CNELTD. Membership in the CNELTD grew from about 20 members in June 2009 to approximately 84 members by the end of 2009.

11. At my request, our legal counsel sent a letter to all Nortel LTD Beneficiaries on January 15, 2010. Since then an additional 46 LTD Beneficiaries have contacted and joined the CNELTD, which now has 130 members (a number that continues to increase).

12. Since its establishment, members of the CNELTD have engaged in numerous projects and undertakings to assist in the plight of LTD Beneficiaries. We have done extensive research into Nortel's decision to self-insure our income benefits, including benefit industry practices, tax implications, the historical documents and legal aspects of the matter. Our members have also met with politicians to lobby for legislative and policy

change, have broadcast information about our situation through the media, and we have created a database of information and documents relevant to our research.

13. From the outset, it has been the mandate of the CNELTD to protect the income and health benefits of the LTD Beneficiaries, as we learned very soon after the Initial Order was issued that both our income benefits and health benefits were in jeopardy by virtue of the insolvency proceedings. Many disabled employees were unaware that our disability income benefits were not insured. We discovered through our research and our discussions with Koskie Minsky LLP that Nortel provided our income benefits on a self-funded basis through a vehicle known as the Health and Welfare Trust ("HWT").

14. I contacted Koskie Minsky LLP in May of 2009 to determine whether they would provide legal representation to the LTD Beneficiaries. I was in regular communication with Koskie Minsky LLP through that period, as the LTD Beneficiaries were very concerned about the effect of Nortel's insolvency on them. It was ultimately agreed that Koskie Minsky LLP would represent us and would seek a representation order from the Court to that effect.

15. By the July 30, 2009 Representation Order, I was appointed as Representative of all LTD Beneficiaries, and Koskie Minsky LLP was appointed as Representative Counsel, subject to certain exceptions. Individuals who are not bound by the Representation Order are:

    (a) Those LTD Beneficiaries who are employed and whose benefit or other payments arise directly or inferentially out of a Collective Agreement between the Applicants, or any of them, and the CAW; and

    (b) Any individual LTD Beneficiary who did not wish to be bound by the Order and filed an opt-out notice with the Monitor by September 25, 2009.

16. Individuals who wished to opt-out of the Representation Order were required to do so within thirty days of the publication of the Notice of the Order. As indicated in paragraph 30 of the Monitor's Thirty-Ninth Report already filed with this Court in support of this motion, which I have reviewed, none of the LTD Beneficiaries opted-out

of representation by me and by Representative Counsel. Accordingly, I have the mandate and authority to represent the interests of an estimated 250 individuals.

17. The individuals who belonged to the CNELTD organization at the time of the Representation Order were very pleased to have Koskie Minsky LLP appointed as our Representative Counsel, as we knew from our research that they had experience in this area of law. Additionally, we were glad to be represented as a separate group, rather than as a subgroup of the company's active employee group. Attached hereto as **Exhibit "B"** is a copy of the Representation Order dated July 22, 2009 appointing Representative Counsel on behalf of certain of Nortel's active employees.

18. As indicated in paragraph 3 of our Representation Order, the scope of my mandate is to represent all LTD Beneficiaries in the insolvency proceedings or any other proceeding which has been or may be brought before this Honourable Court, including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the insolvency proceedings. I take this significant responsibility very seriously.

ORGANIZATION AND COMMUNICATIONS

19. By the date of my appointment as Representative, I had already been very involved with the CNELTD. I was responsible for communications, maintaining a database of LTD Beneficiaries joining the CNELTD, sending information to members, and interfacing with Koskie Minsky LLP. I also participated with other CNELTD members in meetings with politicians and media events, such as demonstrations. Following my appointment as Representative, I gathered together the key people who had been involved in the CNELTD up to that point, to establish a working group to assist me in these activities and to ensure that the varying interests among the LTD Beneficiaries were being heard and addressed.

20. After July 30, 2009, on an informal basis, we started to regularly seek input from Koskie Minsky LLP as our counsel, to gather information about our situation and to seek guidance from our lawyers as to what steps we could take to improve our position.

21. I arranged for Susan Philpott and Andrea McKinnon of Koskie Minsky LLP to participate in a conference call with the CNELTD members on August 18, 2009. The

CNELTD members then had an opportunity to listen to a Webinar presented by Koskie Minsky LLP on August 25, 2009. We held a meeting on August 28, 2009 with a number of members of our group and discussed different roles that individuals could take on.

22. We established a Legal Steering Committee which participated in periodic calls with Koskie Minsky LLP. We sent out a call for volunteers and from these volunteers, I selected the people I felt would work well together with each other, and with our Representative Counsel. Attached hereto as **Exhibit "C"** is a copy of the Call for Volunteers which was posted on our Yahoo! Group.

23. The CNELTD has had a communications structure in place since September 2009 through the CNELTD Yahoo! Group, and for several months before this date, certain LTD Beneficiaries communicated through the NNLTDS Yahoo! Group. Individuals on long term disability can join CNELTD group by sending an e-mail to CNELTD-Owner@yahoogroups.com. Membership in the group enabled individuals to partake in the e-mail communications that occurred within that group including the circulation of reports and answers to questions pertaining to the circumstances of the LTD Beneficiaries in Nortel's insolvency proceedings. As some LTD Beneficiaries did not wish to join the Yahoo! Group, we established a separate email mechanism to send them information of importance. We also communicate with other LTD Beneficiaries by telephone.

24. We also instructed our counsel to include information for the LTD Beneficiaries on their website. A special page was established on the Koskie Minsky LLP website tabbed "Information for Disabled Employees". We use that page as a means of communication with the members of the CNELTD and all other LTD Beneficiaries who have not joined the group. Anyone with internet access can access that page.

25. At the end of September, 2009 the CNELTD established a formal Legal Steering Committee to liaise regularly with counsel, seek their guidance, provide instructions and provide information to the LTD Beneficiaries group as a whole. The Legal Steering Committee was originally comprised of myself, Johanne Bérubé, Anne Clark-Stewart, Kevin Leblanc, Manon Gaudreau and Sylvain de Margerie, four of whom are bilingual.

Both Manon Gaudreau and Sylvain de Margerie have resigned from the Legal Steering Committee.

26. In addition, Anne Clark-Stewart, who is a Nortel pensioner and a member of the Political Action Committee of the Nortel Retiree and former employee Protection Canada ("NRPC") and who was a disabled employee of Nortel until shortly after the Initial Order was issued, also sits on the Legal Steering Committee. Ms. Clark Stewart fills a valuable role in providing us with information about the political and lobbying efforts of the NRPC and assisting with our own lobbying, and in providing a liaison with the NRPC.

27. The CNELTD and NRPC work together in many circumstances where our collaboration and coordination is advantageous to our constituencies.

28. The Legal Steering Committee participates in weekly teleconference calls with Representative Counsel and our actuarial advisors, the Segal Company. With the assistance of counsel, we prepare reports of those meetings and deliver periodic updates by e-mail to the CNELTD Yahoo! Group. The agendas of our conference calls with counsel and our actuaries are typically informed by the questions and inquiries that we receive from the LTD Beneficiaries.

29. The Legal Steering Committee receives a vast number of e-mail questions and inquiries about the status of the proceedings, the projects in which we are engaged, seeking status reports on the work of counsel, and raising possible legal actions that should be investigated. Despite our disabilities, Johanne, Anne and I spend many hours per day responding to e-mails, speaking with LTD Beneficiaries on the telephone, speaking with our counsel, coordinating with the members of the Legal Steering Committee, preparing presentations and reports and meeting with politicians. Johanne and Kevin are both bilingual.

30. In addition, information is also available to any LTD Beneficiary who wishes to access it through the Koskie Minsky LLP website or by leaving a message on the toll free number that is administered by Koskie Minsky LLP. Individuals can also contact me directly by e-mail (and regularly do) for any information they require.

31. There are approximately 391 LTD Beneficiaries, which include an estimated 100 members of the CAW. CAW members are represented by counsel for the CAW in these proceedings. I have been provided with a list of the individuals in our constituency by Nortel. We communicate with members of our constituency who have contacted us by telephone, email and through the Yahoo! Group and in doing so, keep them advised of all developments in the proceedings.

NATURE OF ISSUES AND CONCERNS OF THE LTD BENEFICIARIES

32. I have personally spoken with numerous LTD Beneficiaries and have had e-mail communications with many more. The range of illnesses, disabilities and medical conditions that exist among the LTD Beneficiaries are quite diverse.

33. In addition, the characteristics of the group in terms of their financial needs and their medical needs vary as well. Included in the group are single parents, individuals with spouses who work and have benefits coverage, individuals who are close to retirement or already qualify for retirement pension, those who are still very young and have no reasonable prospect of ever working again, and those who are highly dependent on costly prescription drugs and medical benefits. The common characteristic of the individuals in the group, however, is that they are all extremely anxious about their futures. They have no financial security or certainty and this is causing great anxiety among members of our group.

34. Many of the LTD Beneficiaries with whom I have spoken or from whom I have received e-mail communication were unaware and shocked about the uninsured nature of their disability income benefits and to learn that those benefits could disappear through Nortel's insolvency. It takes considerable time for people to accept that the benefits were not insured, and I have noticed that some individuals are unwilling to accept that they will receive a future reduction, in any amount, to their monthly income benefit payments. This has been and continues to be a constant source of discontent and disagreement within the CNELTD group.

35. The key concerns of the LTD Beneficiaries that have been articulated to me, and which I share, are as follows:

a) **Income** – The LTD Beneficiaries want to know whether and for how long their disability income will continue, and from what source it will be paid. They want to know when it will stop and how much notice they will be provided of the cessation of payments because they require time to make other arrangements and plan for their financial futures.

b) **Medical Benefits** – The LTD Beneficiaries want to know if their health plan will continue, whether they will be able to replace their medical benefits in some way at an affordable cost and whether they will be able to replace their life insurance once coverage by Nortel is terminated.

OUR BENEFITS SINCE THE CCAA FILING

36. I understand from counsel that in accordance with the Initial Order, Nortel was "entitled but not required" to make payment of outstanding and future wages, salaries and employee benefits, which specifically included medical benefit plans, and both current service and special payment contributions into the registered Pension Plans. In other words, Nortel could have terminated our income benefit payments at any time after January 14, 2009.

37. However, Nortel chose to continue paying and providing the LTD Beneficiaries with our health and medical benefits, to continue making our long term disability income payments out of the HWT, a trust vehicle Nortel uses as a mechanism to fund some of our benefits, and also to continue to make both current service contributions and special payment contributions into the registered Pension Plans.

38. The current structure of the HWT, the benefits relevant to the motion that are paid from it and its history, are described by the Monitor in paragraphs 45 through 52 of its Thirty-Ninth Report dated February 18, 2010 (the "Thirty-Ninth Report"), which I have reviewed. I have also reviewed the trust agreement, and amendments thereto[3],

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[3] The Trust Agreement is more fully described at paragraph 46 of the Thirty-Ninth Report, and attached as Appendix "E" thereto.

establishing the HWT and understand from my counsel that based upon the documents and information that they have received, this description is accurate.

39. The HWT is the vehicle through which Nortel provided a Health and Welfare Plan to its employees and retirees. The Health and Welfare Plan included a health care plan, a management long term disability plan, a union long term disability plan, a management survivor income benefit plan, a management short term disability plan and a group life insurance plan. Certain employee benefits, including the income benefits for LTD Beneficiaries, in recent years, have been paid by the HWT with trust assets, whereas other employee benefits, including medical and dental benefits, have been funded by the Applicants on a pay-as-you-go basis, but paid through the HWT as an administrative matter.

40. There was fear among our group that our medical benefits and our monthly income benefits would be discontinued, or worse, that they would be discontinued without notice. This concerned me, and other LTD Beneficiaries who contact me regularly, as we are dependent on these plans to pay for prescription drugs, dental and other health related benefits. The LTD Beneficiaries have significant medical needs in this regard.

CNELTD EFFORTS SINCE REPRESENTATION ORDER

Maximize Replacement of LTD Income

41. One of the main concerns of the LTD Beneficiaries has been their financial security in the future. With this in mind, I and other members of the Legal Steering Committee and members of the CNELTD at large, have explored as many avenues as we can think of to find ways to replace as much of our disability income as possible, knowing that at some point in the not-to-distant future, our disability income payments from Nortel will cease. Accordingly, with the guidance and advice of our counsel at Koskie Minsky LLP, we have explored the following:

(a) **HWT – Payment of Assets to the LTD Beneficiaries**

We learned from the Thirty-Second Report of the Monitor dated November 30, 2009, that the assets in the HWT had a market value of approximately $84 million (see

paragraph 19). We have made it a priority to ensure that the LTD Beneficiaries would receive the largest portion of those assets to which we could reasonably claim entitlement. Our counsel, with our input, has been engaged in discussions about the allocation and distribution of the assets in the HWT since early October of 2009. As described in the Thirty-Ninth Report, the Settlement Agreement provides that the Settlement Parties will work towards a court-approved distribution of the HWT in 2010 to its beneficiaries entitled thereto, and to resolve any issues related to this distribution.

With the relief provided by the Settlement Agreement, I understand from our counsel that the objective is to be in a position to have a lump sum distribution from the HWT to the LTD members before our income payments from Nortel cease on December 31, 2010. I have asked our actuaries to calculate roughly what percentage of the future value of our disability income would be paid to us from the HWT assuming that the trust assets are divided pro-rata to the liabilities. I have been advised that although we are still awaiting 2009 numbers, we can expect that there will be a lump sum payment which will be equivalent to a sizeable percentage of the value of our future payments. Attached hereto as **Exhibit "D"** is a copy of an unofficial memorandum prepared by our actuary, Segal Company, delivered to our legal counsel on February 23, 2010.

We are also exploring the most tax effective way of distributing those assets to LTD Beneficiaries and will seek a tax ruling to ensure as tax-effective a distribution as possible.

(b) **HWT – Preservation of Assets**

Recognizing that the continued payment of our disability income from the HWT was depleting assets that belonged to us in any event, we raised this concern with counsel, and sought ways to have our disability income payments made by Nortel directly rather than from the HWT. The Settlement Agreement achieves that goal for a significant period of twelve (12) months. I am advised by my counsel that this change in payment, if Court approved, will apply retroactively, starting at January 1, 2010.

(c) **Making a Claim against Nortel for Negligent Misrepresentation**

One of the causes of action that we asked our counsel to explore was the possibility of a negligent misrepresentation claim. Many of our constituents wanted to see such a claim launched, however, our counsel were quite clear that no advantage would be gained by such a claim because Nortel is currently under Court protection and no lawsuits can be made against Nortel while it is under the protection of a stay of proceedings. Nortel will not emerge from Court protection as a viable entity, against which the LTD Beneficiaries could make a claim for the loss in our benefits. In any event, our claim against Nortel for 100% of the loss of our disability income benefits will be made in the claims process.

(d) **Making a Claim against Nortel for Failing to Fund the HWT**

We also asked our counsel to explore the possibility of suing Nortel for failing to fully fund the HWT and, in particular, failing to remit monies to the HWT sufficient to pay 100% of our disability income.

Again, many of our members urged us to make such a claim, however, our counsel advised us that (i) there was no statutory obligation under the terms of the Trust Agreement which required Nortel to fund in full the HWT benefits, and (ii) no advantage would be gained in any event by such a claim because Nortel is currently under Court protection, no lawsuits can be made against Nortel while it is under the protection of a stay of proceedings, Nortel will not emerge from Court protection as a viable entity, and our claim against Nortel for 100% of the loss of our disability income benefits will be made in the claims process in any event.

(e) **Making a Claim against Nortel's Directors**

The Legal Steering Committee asked our counsel to evaluate the viability of a claim against Nortel's directors for Nortel's decision to self-insure the LTD program, a claim for negligent misrepresentation by Nortel's directors, a claim against Nortel's directors for failing to ensure that the LTD program was fully funded, and any other possible claim we could make against the directors. We were advised that there are very strict limitations on the kinds of claims that can be made against directors of a corporation.

Our counsel reviewed the documentation pertaining to the HWT and the LTD program including the summary benefits booklets and other communications that were provided to Nortel employees. They also reviewed the applicable case law and statutory provisions. Based on the evidence that was available, our counsel advised us that any claim that could be made against the directors of Nortel would be risky, costly, lengthy and without any guarantee of success.

(f) Making a Claim against the Trustee of the HWT for Failing to Ensure that Nortel Fully Funded the LTD Program

The Trustee of the HWT has responsibility for undertaking actuarial calculations for the benefits to be paid under the health benefit programs in the HWT, but no obligation to pay them. Only Nortel is obliged to pay them and there is no clear obligation on the Trustee to enforce payment. We have been advised by counsel that actuarial calculations for accounting purposes were prepared for accounting purposes by Mercer, the actuaries for the plans, not the Trustee. Further, the Trust Agreement precludes legal action by trust beneficiaries against the Trustee. Any claim against the Trustee is therefore risky and uncertain, both as to liability of the Trustee and any damages that might result.

In summary, like many of our members, the Steering Committee also wished that we could find a way to end up with a greater percentage of our actuarial values. However, we understood that to pursue the lawsuits outlined above in these circumstances would just prolong the process, use up additional funds from Nortel's estate for legal fees, and possibly would lead to the cessation of our medical and income benefits. If this course was taken, we may have had to wait years to receive a distribution in respect to our claims against Nortel, and most disabled employees could not afford to take this chance. We felt that the responsible decision was to rely on the advice of our legal counsel and our actuarial advisors, rather than to proceed with what possibly could be prolonged and risky litigation.

(g) Lobbying

The CNELTD has also been very active politically and has approached various levels of government to request legislative reforms that would offer protection for the

vulnerable members of our group. One initiative is to elevate uninsured disability income benefits to preferred status in any insolvency proceedings. The other is to eliminate the ability of companies to "self-insure" their disability income programs or, if they do self-insure, to ensure that their programs are fully funded. Regardless, the latter request for legislative reforms would not benefit our group.

Ensure Replacement of Health Benefits

42. The second major concern of the LTD Beneficiaries is that they have access to continued prescription drug and other medical and dental benefits coverage. As I have explained, the LTD Beneficiaries are particularly vulnerable and dependent on their medical and drug coverage. Many have prescription drugs costs of thousands of dollars per month and without benefits coverage, would become more ill, and potentially die, and would be required to rely on the mercy of government programs.

43. Over the past year the CNELTD, with the help of Representative Counsel, has fought hard to keep medical, dental and life insurance benefits intact.

44. The CNELTD and the NRPC have formed a joint committee, which includes members of both the CNELTD and the NRPC to explore alternative solutions that would allow some form of replacement benefit coverage to continue once Nortel no longer exists as a company and the HWT is wound up. We have joined with the NRPC in this project because we have been advised that the sheer size of that group will assist in making a plan attractive and viable, and without the pensioners, the LTD Beneficiaries alone might not be in a position to secure benefits coverage.

45. With the help of our actuaries at the Segal Company, our legal counsel, Nortel's benefits personnel, actuaries and consultants at Mercer and the existing benefits administrator, Sun Life, the committee is exploring funding options, and whether there are viable benefit plan options which suit the varied needs of the constituencies. These explorations are still at a preliminary stage but I expect that the work of the joint committee will accelerate in the coming months if the Settlement Agreement is approved, as we will not be distracted by the uncertainty of our benefits continuation in the short term.

OPPOSITION TO CNELTD

46. Shortly after the CNELTD Legal Steering Committee was struck, a dissident group of LTD Beneficiaries formed, who, among other things, were unhappy with the way that the members of the Legal Steering Committee were selected. At various times since then, these individuals have sought to replace me as the Court-appointed Representative (but have never taken formal steps to do so), have insisted they be permitted to access the confidential information disclosed to me and counsel under a non-disclosure agreement, have refused to follow the civility protocols put in place for communications on the CNELTD Yahoo! Group, and have written abusive and harassing emails to me, other members of the Legal Steering Committee and our counsel.

47. Johanne Bérubé is the group owner and moderator of the CNELTD Yahoo! Group. The moderator controls the flow of messages among the members of the group. When emails from certain members became aggressive, threatening and hostile, the Legal Steering Committee instituted a moderating policy whereby all messages were first reviewed to ensure they met a standard of ordinary civility. Messages which did not meet such a standard were not allowed on the site by the moderator and one member was removed. That way the members of the CNELTD who were content with my representation and that of Representative Counsel were not unnecessarily exposed to the hateful communications. I must be clear, however, that I have not stopped responding to the communications and questions in those uncirculated emails. Johanne Bérubé and I conscientiously respond, to the best that we are able, to all of the inquiries that are sent to us. We also ensure that important messages are forwarded to members' email addresses whether or not they are members of the Yahoo group.

48. Most recently, these individuals wrote to Koskie Minsky LLP and a copy of their letter and the reply from counsel is attached hereto as **Exhibit "E"**. Counsel's response is attached.

49. There have been a number of individuals who have communicated to me their opposition to the Settlement Agreement, however, the majority of those who contacted me have been in support of the agreement.

THE SETTLEMENT AGREEMENT

General

50. Efforts of the CNELTD in conjunction with the NRPC have ultimately resulted in the Settlement Agreement that is the subject of this motion. I agreed to the terms of the Settlement Agreement, which was executed on February 8, 2010, following weeks of intensive negotiations by Representative Counsel with the Monitor, the Company, the CAW, the bondholder group and the Unsecured Creditors Committee from the U.S. insolvency proceedings. We were guided in those negotiations by our counsel.

51. The terms of the Settlement Agreement which was ultimately reached have been described by the Monitor in its Thirty-Ninth Report and in paragraph 19 of the King Affidavit. I have reviewed both of these documents and substantially agree with the description of the Settlement Agreement contained therein.

Negotiation of the Settlement Agreement

52. In December 2009, our concern about the future of our disability income, and our health, medical and life insurance benefits increased. We became aware, through discussions with our legal and financial advisors, that there was limited cash flow within the Canadian estate and that a new funding agreement (the "Funding Agreement") was being negotiated to fund Canadian operations through 2010 and beyond. We were uncertain how long the company planned to continue paying for our income and benefits, and were worried that our group's benefits might cease without notice.

53. We were eventually advised that the proposed Funding Agreement ensured the funding of our benefits and the Pension Plans only through to the end of Q1 of 2010. This was unacceptable to us.

54. On January 6, 2010, Representative Counsel, on behalf of both the CNELTD and the NRPC, sent correspondence to a representative of the Monitor, the Monitor's counsel and counsel for Nortel, which explained our discontent with the Funding Agreement in that it provided only for the funding of pension and benefits to March 31, 2010. In that letter our counsel indicated that we would object to the Funding Agreement unless there were some provisions made for the following:

a) health benefits;

b) pension funding;

c) payment of long-term disability and SIB income benefits directly by the company; and

d) provision for some minimum standards payment for those of our constituency whose employment with Nortel had been terminated without pay. Attached at **Exhibit "F"** is a copy of our counsel's letter dated January 6, 2010.

55. Subsequent to the date of that letter, Representative Counsel entered into negotiations with the Monitor, the company and various other parties concerning our pensions and benefits. I am advised by our counsel that these negotiations were extensive, and took place during various meetings with the company and Monitor, and also in separate meetings with other creditor groups.

56. Despite all parties' good faith negotiations and our best efforts to reach an agreement, there was no settlement agreement reached by January 21, 2010, the date scheduled for the court approval of the Funding Agreement.

57. Representative Counsel attended at the January 21, 2010 hearing to inform the Court that there were ongoing negotiations concerning our benefits. Our counsel insisted that if an Order approving the Funding Agreement was issued on that date, it should include a provision that the approval of the Funding Agreement would not preclude interested parties from seeking relief with respect to the payment of our benefits post-March 31, 2010. Further, our counsel requested that a clause be inserted in the Order to ensure that the Court would in no way be precluded from ordering such relief in the future. Paragraph 17 of the Order dated January 21, 2010 reflects this relief. Paragraph 18

further orders the Monitor to report to the Court on or before January 29, 2010 to advise on the status of the ongoing negotiations.

58. Negotiations continued after the January 21 hearing, and the Settlement Agreement was executed on February 8, 2010.

59. Throughout the negotiations, the inclusion of Clause H.2 in the Settlement Agreement remained critical to me and the Representatives of the Former Employees. The inclusion of this clause would ensure that if future amendments were made to the BIA that were favourable to our group, we would maintain the right to assert that such provisions would apply to our constituency. This clause was imperative to our group, given the lobbying efforts of the CNELTD to date.

60. In the end, I signed a Settlement Agreement with the company and the Monitor that did include clause H.2. When negotiations concluded and the Settlement Agreement had been executed, I was satisfied that we had achieved a good result, and the best outcome obtainable in the circumstances. Essentially, we traded away the right to file risky and uncertain litigation and the right to argue that the LTD Beneficiaries should be in a separate class or have priority in any CCAA Plan, for guaranteed money and benefits for a one year period, while we sort out our futures. We did not give up our claims to the assets in the HWT, our claims against Nortel in the CCAA proceedings, or the rights of the LTD Beneficiaries to object to any CCAA Plan. Attached as **Exhibit "G"** is a chart, in both French and English, that sets out the features of the Settlement Agreement versus rights if the Settlement Agreement is rejected by the Court.

Notice Procedure for the Settlement Agreement

61. Concurrent with the negotiations which resulted in the Settlement Agreement, I was consulted by our counsel about the best ways to provide the LTD Beneficiaries with appropriate notice of the Settlement Agreement, and an opportunity to voice their opinion on its appropriateness.

62. While we were confident that we could reach our CNELTD membership base quite easily through the Yahoo! Groups communication tool, personal emails and in a few cases via phone, we were more concerned with those who we have not been in close

contact with. After some discussion, we agreed that the Notice Procedure, which is outlined in paragraphs 27 through 46 of the Thirty Sixth Report and was approved by this Court on February 9, 2010, provides the members of our constituency with adequate notice and time to review and assess the Settlement Agreement, and to appear in Court and oppose the Settlement Agreement on March 3, 2010, if they wish to do so.

63. All of the members of the Legal Steering Committee reviewed and had input on the Notice Letter that was sent to, among others, each LTD Beneficiary and Former Employee of Nortel.

64. In order to ensure that all individuals are provided with full and accurate information of the Settlement Agreement, the Legal Steering Committee also engaged in a process to generate a set of frequently asked questions, and had our counsel provide responses, all of which have been posted on the website of Koskie Minsky LLP.

65. In addition, the Legal Steering Committee ensured that our Representative Counsel had an active toll-free hotline whereby individuals who do not have access to the internet were able to call and speak to Representative Counsel, or to be directed to a representative of the CNELTD, in order to obtain answers to their questions and concerns about the Settlement Agreement.

66. I, along with the court-appointed Representatives for the Former Employees, held a webcast information session on February 23, 2010. A dial-in audio-only option was available for individuals who did not have access to the internet and there was French translation available.

Benefits of the Settlement Agreement

67. Over the past year, I have come to the realization that Nortel is insolvent and is winding up its business. The company's cessation of the payment of our medical benefits, the discontinuation of our disability income payments, and the transfer of the administration of the Pension Plans is inevitable. These are very unfortunate circumstances. My constituency will suffer significant losses as a result of Nortel's insolvency. I see it as my responsibility to ensure that all available steps to minimize the harm suffered by our constituency are taken, and to seek solutions for the future.

68. From the perspective of the LTD Beneficiaries, the Settlement Agreement provides much-needed certainty and security for 2010. We will continue to receive our disability income and health and medical benefits through 2010 at 100% of current levels. This gives us time to plan for the future and structure our financial arrangements to the extent possible for the time when we know that we will not have 100% of our income and benefits.

69. After canvassing my constituency and engaging in many discussions with interested parties, I have concluded that in the circumstances, the Settlement Agreement represents a fair and reasonable one-year solution for the payment of our disability income and the continuation of our health benefits and in coming to that conclusion I have weighed the concessions we were asked to make. Individuals in our group, for the most part, do not have any other source of income or ability to replace the benefits they receive from Nortel.

70. LTD Beneficiaries will also receive their customary medical benefits through 2010. I am advised by my counsel that the Funding Agreement does not provide for our benefits after March 31, 2010, and there is nothing to require that these benefits continue after March 31, 2010 if the Settlement Agreement is not approved. Many of these people rely heavily on these benefits and continuing them for an additional nine months is critical for them.

71. As I discussed above, Nortel is not obligated to continue the payment of our medical and dental benefits and is able to cut off these payments at any time. Prior to the approval of the Funding Agreement, in January 2010, we were informed by our legal counsel and financial advisors that provisions for our continued benefits were only in the cash flow until March 31, 2010. Our success in securing payments until December 31, 2010 not only provides our constituency with an additional nine months of coverage, it also provides us with additional time to seek alternative replacement benefit coverage.

72. Another key benefit of the Settlement Agreement is that our income will come from Nortel directly through the Company's cash flow for 2010, and not from the HWT, thus preserving those assets as much as possible for the future distribution.

73. I am advised by our actuaries that the $12.2 million in LTD income payments that will be paid directly by Nortel in 2010 represent approximately 12% of the present value of our claims.

74. I have also been advised by our actuary that based on the existing assets in the HWT and a calculation of the existing obligations of the HWT as at December 31, 2009, a *pro rata* distribution of those assets would provide the LTD Beneficiaries with an approximate 30% of the present value of their LTD income benefits, which produces a higher aggregate recovery when added to future payments. We will also, of course, have a claim against the Nortel Estate for the balance of the value of our LTD income benefits which we know will be paid out at something less than 100% (see our actuaries' memorandum attached at **Exhibit "D"**).

75. The Settlement Agreement will see current service contributions to the Pension Plans continue until September 30, 2010 and special payments will continue to be paid until March 31, 2010. More importantly, the Settlement Agreement provides certainty that Nortel will continue to administer the Pension Plans until September 30, 2010 and that there will be no wind up of the plans before that date.

76. Because of this extension of payments, LTD Beneficiaries will also have their pension accruals continue until at least September 30, 2010, or, if the Pension Plans are not wound up at that time, until December 31, 2010, on which date their employment with Nortel will be terminated. To the extent that they have an entitlement to the continuation of those pension accruals past December 31, 2010, a claim against Nortel in the insolvency proceedings will be made on their behalf.

77. Finally, in order to ensure that the promised payments are made by Nortel, all amounts are secured by a $57 million charge on the estate, which survives a bankruptcy.

Quid Pro Quo of the Settlement Agreement

78. The Representative and the CNELTD have been involved in many discussions with our Representative Counsel and our constituency. Based on everything I have seen, it is my understanding that the Settlement Agreement can essentially be distilled down to

this: in exchange for security and certainty of our benefits through 2010, we were required to give up rights to future, risky and uncertain litigation.

79. Since the announcement of the Settlement Agreement, the CNELTD has been contacted about the reasons for our release of certain claims. For example, if the signed Settlement Agreement is approved by the Court, it will mean that the LTD Beneficiaries and the Former Employees have done the following:

a) Acknowledged that all claims made in respect of the Pension Plans or the HWT will be unsecured claims, and will rank as unsecured claims on equal footing with all other unsecured creditors, subject to Clause H.2 of the Settlement Agreement, described further below;

b) Released all Releasees, which includes directors, trustees and other parties listed in the defined term (see Schedule A), from claims in respect of the HWT and Pension Plans. However, there has been no release of any claim for fraud, and no release against any director for matters concerning misrepresentation or anything else referred to in subsection 5.1(2) of the CCAA;

c) Acknowledged that LTD Beneficiaries and the Former Employees will not be placed in a separate classification for the purposes of a CCAA Plan of Arrangement, and will be treated as unsecured creditors in terms of distribution, in any future CCAA Plan of Arrangement; and

d) Agreed that the LTD Beneficiaries and Former Employees will not object to the employee incentive program approved for 2010, provided the Monitor is of the view that the payments are reasonable.

80. The CNELTD Legal Steering Committee, along with the input of our advisors and many others, has discussed these concerns at length. I will address each in turn.

A. Ranking as Unsecured Claim

81. Our acknowledgement that all claims in respect of the Pension Plans or the HWT will rank as unsecured claims means that when it comes time for a distribution of Nortel's estate, we will rank as unsecured creditors and on equal footing with all other

unsecured creditors, subject to clause H.2 of the Settlement Agreement. I have been advised by my legal counsel that this position is consistent with the law and that pension claims are treated as unsecured claims and offered no priority status in a bankruptcy scenario. If we insisted on using our numbers to block a CCAA Plan of Arrangement that did not give us priority, other creditors could easily petition the Applicants into bankruptcy, where there is no priority under the BIA.

82. Clause H.2 of the agreement caused concern for the CNELTD. It was very important to the CNELTD and its membership to limit this clause to provide that in the event there is ever an amendment to the BIA giving the LTD Beneficiaries preferred status under the BIA, and that Nortel at the time of the distribution has moved into proceedings under the BIA, we maintained our right to argue that any amendment providing priority should apply to us. We were successful at achieving the inclusion of Clause H.2 in the Settlement Agreement.

B. Releases Against the Company, Directors and Trustee

83. The releases of the Pension Claimants simply means that we have agreed not to pursue claims based on the administration or funding of the Pension Plans against Nortel or its directors and officers or members of the Pension Plan' Committees, or any claims against the trustee of the HWT and Nortel's directors and officers (subject to section 5.1(2) of the CCAA).

84. Essentially, we are giving up the right to pursue risky, costly and very uncertain litigation, which would require evidence of misconduct on the part of these individuals or entities. We have expressly preserved the right to pursue claims with respect to allegations of fraud or misrepresentation. We have not given up that right.

85. Our counsel, actuaries and financial advisors have closely examined documentation pertaining to the Pension Plans and the HWT. I have been advised that any claims against the directors for failing to properly fund the Pension Plans are unlikely to succeed. I have also been advised that claims against the directors for failing to fund the HWT are risky and could take years to resolve without any guarantee of success. There is no evidence of any representation or statement by the directors that would

make them personally liable. However, misrepresentation and fraud claims are excluded from the release.

86. Our counsel have further advised us that any claim against the Trustee for failure of Nortel to adequately fund the HWT benefits is risky and unlikely to result in any significant recovery. Nothing in the trust document makes the Trustee personally responsible for funding the benefits, and the document precludes beneficiary claims against the Trustee.

C. Classification for the Purposes of the Plan

87. With respect to the agreement to be classified in the same group with other unsecured creditors, I am advised by my counsel that this means that LTD Beneficiaries and Former Employees will be placed in the same classification, for voting purposes of a CCAA Plan, as other unsecured creditors. Additionally, we will be entitled to distribution in the same proportion as all other unsecured creditors.

88. It is my understanding that the inclusion of this clause in the Settlement Agreement does not mean that the Court-appointed Representative, the LTD Beneficiaries, or the Representative on behalf of the LTD Beneficiaries, are not entitled to vote on any future Plan of Arrangement. It simply means that we cannot be treated differentially from other unsecured creditors.

D. Agreement not to Challenge 2010 Employee Incentive Programs

89. With respect to our agreement not to challenge the employee incentive programs for 2010, it is through the Monitor, who is involved in the review and assessment of the appropriateness of these payments, that the LTD Beneficiaries and other Canadian creditors have input. We rely on the Monitor as a court-appointed officer to ensure that all incentive payments are reasonable and necessary.

90. Further, we have been advised by our legal and financial counsel that the majority of the monies to be paid in bonuses in 2010 will be paid to eligible employees by the purchasers of Nortel's assets, not by Nortel, thus having little impact on our constituency.

E. Supreme Court of Canada Litigation

91. Finally, in recognition of the priority payments that eligible terminated employees would be entitled to receive from the Termination Fund, we have agreed to abandon the litigation that currently is pending at the Supreme Court of Canada. Again, by giving up this right, we are avoiding uncertain and costly litigation in favour of a payout of funds that is certain, and is payable within a reasonable time frame.

Conclusion

92. I have had a number of discussions with our legal counsel about the benefits of the Settlement Agreement in comparison to the releases of rights that we have agreed to in the agreement. I have had many discussions with our counsel, advisors and the Legal Steering Committee, about the impact the releases of claims against Nortel's directors and the Trustee of the HWT will have on the LTD Beneficiaries. I am advised, and I believe, that all we have given up is the opportunity to file difficult and risky law suits against those individuals and entities, that I am told may easily result in no recovery or a recovery that is less than the benefits attainable under the Settlement Agreement, and which will take years of litigation to resolve. I am advised that the LTD Beneficiaries maintain all valid claims against the assets in the HWT and the Nortel estate.

93. There have been a number of LTD Beneficiaries who have voiced concerns with me about giving up the right to commence a human rights claim against Nortel, and about releasing the right to appeal for fairness in the company's CCAA proceedings. I have discussed these issues with my Representative Counsel. I am advised that any human rights claim likely would take years to resolve and ultimately is just a claim against Nortel, which is insolvent and likely will no longer exist once these proceedings are completed. I am further advised that we have not given up the right to argue fairness at any future sanction hearing in the CCAA proceedings.

94. In assessing the merits of the Settlement Agreement, I, along with the help of the Legal Steering Committee, have canvassed and taken into consideration the interests of a wide cross-section of our constituency. We engaged in many lengthy discussions to assess the advantages and disadvantages of the Settlement Agreement. After careful

consideration and many discussions with our advisors and constituency, I, as Court-appointed Representative, and CNELTD fully support the Settlement Agreement. The Settlement Agreement provides the LTD Beneficiaries with a reasonable outcome, and the best outcome we were able to achieve, given the circumstances.

95. I make this Affidavit in good faith and in support of this motion to approve the Settlement Agreement dated February 8, 2010 and for no improper purpose.

SWORNBEFORE ME at the City of Toronto, in the province of Ontario, on February 23, 2010

Commissioner for Taking Affidavits

SUSAN KENNEDY

Schedule "A"
Defined Terms

Term	Definition	Cross-Reference
Affected Settlement Notice Parties	The Former Employees, the LTD Beneficiaries, the Unionized Employees, the Continuing Employees and provincial pension plan regulators	36th Report Para. 31
CAW	National Automobile, Aerospace, Transportation and General Workers Union of Canada	36th Report Para. 18
CAW Counsel	Lewis Gottheil, counsel to the CAW	36th Report Para. 18
Continuing Employees	All Canadian non-unionized employees of the Applicants whose employment with the Applicants is continuing	36th Report Para. 17(e)
Continuing Employees' Representatives	Kent Felske and Dany Sylvain, as appointed by the court on July 22, 2009	36th Report Para. 17(e)
Continuing Employees' Representative Counsel	Nelligan O'Brien Payne, as appointed by the court on July 22, 2009	36th Report Para. 17(f)
Employee Representatives	Continuing Employees' Representatives, together with the LTD Beneficiaries' Representative	36th Report Para. 17(f)
Former Employees	All former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of an Applicant pension, or group or class of them	36th Report Para. 17(a)
Former Employees' Representatives	Donald Sproule, David Archibald and Michael Campbell as representatives of the Former Employees, as appointed by the court on May 27, 2009	36th Report Para. 17(b)
Former Employees' Representative Counsel	Koskie Minsky LLP, as appointed by the court on May 27, 2009	36th Report

Term	Definition	Cross-Reference
HWT	Health and Welfare Trust	36th Report Para. 8
LTD Beneficiaries	Employees of the Applicants 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 the Applicants, and who may assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with the Applicants or termination thereof, a pension or benefit plan sponsored by the Applicants, 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 the Applicants, save and except those who are currently employed and whose benefit or other payments, as described above, arise directly or inferentially out of a collective agreement between the Applicants, or any of them, and the CAW	36th Report Para. 17(c)
LTD Beneficiaries' Representative	Sue Kennedy as representative of the LTD Beneficiaries, as appointed by the court on July 30, 2009	36th Report Para. 17(d)
LTD Beneficiaries' Representative Counsel	Koskie Minsky LLP, as appointed by the court on July 30, 2009	36th Report Para. 17(c)
Monitor	Ernst & Young Inc., appointed as Monitor on January 14, 2009	36th Report Para. 1
Nortel Releasees	Nortel and the Nortel Worldwide Entities	Settlement Agreement Para. G(2)
Nortel Worldwide Entities	Collectively, those entities listed in Schedule "A" to the Settlement Agreement	Settlement Agreement Para. C(2)
Nortel Worldwide Entity	Any entity listed in Schedule "A" to the Settlement Agreement	Settlement Agreement

Term	Definition	Cross-Reference
		Para. C(2)
Notice Letter	A notice letter substantially in the form attached to the 36th Report as Appendix "B"	36th Report Para. 30
Notice of Appearance	A notice of appearance substantially in the form attached to the 36th Report as Appendix "C"	36th Report Para. 30
Notice of Appearance Bar Date	March 1, 2010 at 10:30 a.m.	36th Report Para. 38
NNI	Nortel Networks Inc.	
PBGF	Pension Benefits Guarantee Fund	Settlement Agreement Para. E(1)
Payments Charge	Charge on Nortel's Property (as defined in the Initial Order) not to exceed $57 million to secure payment of the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments. (each individual payment as defined in the Settlement Agreement)	Settlement Agreement Para. G(4)
Pension Claims	Any claim for payment or damages related to any solvency or wind-up deficiencies, unfunded liabilities, or unpaid or accrued contributions (including, for greater certainty, any special payments whatsoever), any liability regarding the PBGF or any obligation of or claim arising against any person with respect to the Pension Plans or the administration thereof	Settlement Agreement Para. E(1)
Pension Claimants	Members of the Pension Plans and their beneficiaries and surviving spouses who are entitled to benefits from the Pension Plans	Settlement Agreement Para. E(1)
Pension Plans	Nortel Networks Negotiated Pension Plan (Registration No. 08587766), together with the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan (Registration No. 0342048)	Settlement Agreement Para. D(1)
Releasees	The trustee of the HWT, the Monitor, and all members of the Pension Plans' committees (in their personal capacity) and their respective	Settlement Agreement

Term	Definition	Cross-Reference
	officers, directors, employees, agents, members, legal counsel, financial advisors, and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing and the officers, directors, employees, agents, members, legal counsel, financial advisors of Nortel and the Nortel Worldwide Entities and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing	Para. G(1)
Representative Counsel	CAW Counsel, together with Settlement Representative Counsel and Continuing Employees' Representative Counsel	36th Report Para. 18
Salaried Plan	The Nortel Networks Limited Managerial and Non-Negotiated Pension Plan	
Settlement	Settlement that was reached between the Settlement Parties regarding certain issues related to, among other things, the Applicants' pension plans, HWT and certain employment related issues	36th Report Para. 8
Settlement Agreement	A Settlement Agreement dated February 8, 2009, among the Settlement Parties	36th Report Para. 23
Settlement Approval Motion	The motion returnable March 3, 2010 to request the approval of the Settlement Agreement and matters required to implement the Settlement	36th Report Para. 25
Settlement Employee Representatives	LTD Beneficiaries' Representative together with the Former Employees' Representatives	36th Report Para. 17(d)
Settlement Document Package	The Notice Letter, Notice of Appearance, Settlement Agreement and all schedules thereto, the Thirty-Sixth Report and the Notice Procedure Order	36th Report Para. 30
Settlement Parties	The Applicants, the Monitor, the Settlement Employee Representatives (on their own behalf and on behalf of the parties they represent), the Former Employees' Representative Counsel, LTD Beneficiaries' Representative Counsel and CAW	36th Report Para. 8
Settlement Representative Counsel	LTD Beneficiaries' Representative Counsel, together with the Former Employees' Representative Counsel	36th Report Para. 17

Term	Definition	Cross-Reference
		(c)
Superintendent	Superintendent of Financial Services	Settlement Agreement Para. D(3)
Unionized Employees	All active and retired employees of the Applicants represented by the CAW	36th Report Para. 18

TAB A

This is Exhibit "A"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER ~~FOR~~ TAKING AFFIDAVITS

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE	)	THURSDAY, THE 30TH DAY OF
	)	
MORAWETZ	)	JULY, 2009

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 (the "Applicants")

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

(Representation Order for Disabled Employees)

THIS MOTION, made by the Applicants (collectively, "Nortel") for an order appointing representative counsel for those 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 person (or others who may be entitled to claim under or through such person) may be entitled from or through Nortel (referred to individually as an "LTD Beneficiary" and collectively, as the "LTD Beneficiaries") save and except those LTD Beneficiaries who are currently employed and whose benefit or other payments, as described above, arise directly or inferentially out of a

collective agreement between the Applicants, or any of them, and the CAW-Canada was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Applicants and on hearing the submissions of counsel for the Representative, the CAW-Canada, Nortel, the Monitor and other parties,

1. **THIS COURT ORDERS** that the time for the service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and hereby dispenses of further service thereof.

2. **THIS COURT ORDERS** that further service of the Notice of Motion and Motion Record on any party not already served is hereby dispensed with, such that this motion was properly returnable July 9, 2009.

3. **THIS COURT ORDERS** that, subject to paragraph 9 hereof, Sue Kennedy is hereby appointed as representative of all LTD Beneficiaries in the proceedings under the *Companies' Creditors Arrangement Act (Canada)* ("CCAA"), the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") or in any other proceeding which has been or may be brought before this Honourable Court (the "Proceedings"), including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the Proceedings.

4. **THIS COURT ORDERS** that, subject to paragraph 9 hereof, Koskie Minsky LLP is hereby appointed as counsel for all LTD Beneficiaries in the Proceedings for any issues affecting the LTD Beneficiaries in the Proceedings.

5. **THIS COURT ORDERS** that Nortel shall provide to the Representatives and their counsel, without charge:

   (a) the names, last known addresses and last known e-mail addresses (if any) of all the Former Employees, whom they represent, as well as applicable data regarding their entitlements, subject to a confidentiality agreement and to only be used for the purposes of the Proceedings; and

   (b) upon request of the Representatives and their counsel, such documents and data, as may be relevant to matters relating to the issues in the Proceedings,

including documents and data, pertaining to the various long term disability, pension, benefit, supplementary pension, termination allowance plans, severance and termination payments and other arrangements for group health, life insurance, retirement and severance payments, including up to date financial information regarding the funding and investments of any of these arrangements.

6. **THIS COURT ORDERS** that all reasonable legal, actuarial and financial expert and advisory fees and all other incidental fees and disbursements, as may have been or shall be incurred by the Representatives and their counsel, shall be paid by Nortel on a bi-weekly basis, forthwith upon the rendering of accounts to Nortel. In the event of any disagreement regarding such fees, such matters may be remitted to this Court for determination.

7. **THIS COURT ORDERS** that notice of the granting of this Order be provided to the LTD Beneficiaries by regular mail to their last know address under such terms and conditions as to be agreed upon by the Representative, the Applicants and the Monitor.

8. **THIS COURT ORDERS** that the Representative, or her counsel on her behalf, are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

9. **THIS COURT ORDERS** that any individual LTD Beneficiary who does not wish to be bound by this Order and all other related Orders which may subsequently be made in these proceedings shall, within 30 days of mailing of notice of this Order, notify the Monitor, in writing, by facsimile, mail or delivery, and in the form attached as Schedule "A" hereto and shall thereafter not be bound and shall be represented themselves as an independent individual party to the extent they wish to appear in these Proceedings.

10. **THIS COURT ORDERS** that the Representative and Koskie Minsky LLP shall have no liability as a result of their respective appointment or the fulfilment of their duties in carrying out the provisions of this Order from and after January 14, 2009 save and except for any gross negligence or unlawful misconduct on their part.

11. **THIS COURT ORDERS** that the Representatives shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of theirs powers and duties.

SCHEDULE "A"

Court File No.: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

APPLICATION UNDER THE *COMPANIES CREDITORS' ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

OPT-OUT LETTER

Ernst & Young Inc.
Ernst & Young Tower
222 Bay Street
P.O. Box 251
Toronto, Ontario M5K 1J7

Attention: Lee K. Close
Tel: 1.866.942.7177
Fax: 416.943.3300

I, _____, am an employee of the Nortel companies, and am
[Insert Name]
currently in receipt of or have applied for disability income benefits.

Under Paragraph 9 of the Representation Order for Disabled Employees, LTD Beneficiaries who do not wish Koskie Minsky LLP to act as their representative counsel may opt out.

I hereby notify the Monitor that I do not wish to be bound by the Order and will be represented as an independent individual party at my own expense to the extent I wish to appear in these proceedings.

_____ _____

Date *Signature*

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

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

OGILVY RENAULT LLP
Suite 3800
Royal Bank Plaza, South Tower
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Email: dtay@ogilvyrenault.com

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Tel: (416) 216-4870
Email: mforte@ogilvyrenault.com

Jennifer Stam LSUC #46735J
Tel: (416) 216-2327
Email: jstam@ogilvyrenault.com
Fax: (416) 216-3930

Lawyers for the Applicants

TAB B

This is Exhibit "B"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 22ND DAY OF
	)	
JUSTICE MORAWETZ	)	JULY, 2009

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

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ORDER

THIS MOTION, made by Kent Felske and Dany Sylvain (collectively, the "Representatives") on behalf of all Canadian non-unionized employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International and/or Nortel Networks Technology Corporation (collectively, "Nortel") was heard Thursday, July 9, 2009 on the Commercial List at 330 University Avenue, Toronto, Ontario.

ON READING the motion record of the Representatives, the motion record of Nortel, and on hearing submissions of counsel for the Representatives, Nortel, the Monitor and other parties,

1. **THIS COURT ORDERS** that time for service of the notice of motion and the motion record is abridged, service of notice of motion material and the motion record is validated, all such that this motion is properly returnable on July 9, 2009.

2. **THIS COURT ORDERS** that Kent Felske and Dany Sylvain be and hereby are appointed as the representatives of all Canadian non-unionized employees of Nortel whose employment with Nortel is continuing (the "Continuing Employees") while it is continuing in the

proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") or in any other proceeding which has been or may be brought before this Honourable Court (collectively, the "Proceedings").

3. **THIS COURT ORDERS** that Nelligan O'Brien Payne, LLP and Shibley Righton LLP be and hereby are appointed as counsel (the "Continuing Employee Counsel") for the Continuing Employees to provide advice and representation with respect to Continuing Employees' employment-related claims and potential claims in the Proceedings, including issues arising with respect to pension plans and the health and welfare trust (such appointment to be referred to herein as the "Mandate"). For greater certainty, the Mandate does not include negotiations or requests with potential purchasers of assets of Nortel but the Continuing Employee Counsel shall from time to time be able to seek responses from the Monitor with respect to issues arising out of such negotiations and concluded arrangements on a need to know basis, including the recent Ericsson asset purchase agreement.

4. **THIS COURT ORDERS** that, subject to the prior written consent of the Monitor, Nortel shall provide to the Representatives and to the Continuing Employee Counsel, without charge upon request by the Representatives and their Counsel, such documents and data, as may be relevant to matters relating to the claims in the Proceedings, including documents and data pertaining to the entitlements of Continuing Employees, the terms and conditions of their employment including pension benefit, bonus, termination and severance entitlements and any agreements and documents related to the transfer or prospective transfer of employees from Nortel to new employers.

5. **THIS COURT ORDERS** that all reasonable legal fees and all other incidental fees and disbursements incurred in carrying out the Mandate, as may have been or shall be incurred by the Representatives and the Continuing Employee Counsel, shall be paid by Nortel on a bi-weekly basis, forthwith upon the rendering of accounts to Nortel and that, in the event of any disagreement regarding such fees, such matters may be remitted to this Court for determination.

6. **THIS COURT ORDERS** that notice of the granting of this Order be provided to the Continuing Employees by the Monitor, together with the information attached in Schedule "A", by electronic transmission of a copy hereof as soon as practicable after the granting of this Order,

together with the specific contact information provided by the Representatives and the Continuing Employee Counsel.

7. **THIS COURT ORDERS** that the Representatives or their Continuing Employee Counsel on their behalf be and hereby are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

8. **THIS COURT ORDERS** that any individual Continuing Employee who does not wish to be bound by this order and all other related orders which may subsequently be made in these proceedings shall by September 18, 2009 notify the Monitor in writing by facsimile, mail or delivery, and in the form attached as Schedule "B" hereto and shall thereafter not be bound and shall be represented themselves as an independent individual party to the extent they wish to appear in the Proceedings.

9. **THIS COURT ORDERS** that the Continuing Employees bound by this Order do not include any employees who are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission, and that the Representatives have no obligation to represent such persons.

10. **THIS COURT ORDERS** that the Representatives, Nelligan O'Brien Payne LLP and Shibley Righton LLP as Continuing Employee Counsel shall have no liability as a result of their appointment or the fulfilment of their duties in carrying out the provisions of this Order from and after January 14, 2009 save and except for any gross negligence or unlawful misconduct on their part.

11. **THIS COURT ORDERS** that the Representatives shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of theirs powers and duties.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 0 4 2009

PER / PAR: TV

SCHEDULE "A"

In an endorsement issued on July 22, 2009 by the Ontario Superior Court of Justice in Nortel's outstanding CCAA proceedings (the "Proceedings"), Nelligan O'Brien Payne and Shibley Righton were jointly appointed as counsel for Canadian non-unionized employees of Nortel whose employment with Nortel is continuing (the "Continuing Employees"). A copy of the Representation Order for the Continuing Employees dated July 22, 2009 is attached.

Justice Morawetz stated that the Continuing Employees at Nortel have an interest in the Proceedings and it is advisable that they have legal representation to provide general advice on employee issues that affect them. The Commercial Court also appointed Kent Felske and Dany Sylvain as representatives of the Continuing Employees.

Former employees of Nortel and employees whose employment is terminated in the future continue to be represented by Koskie Minsky.

Nortel will be responsible for the reasonable legal fees incurred by the court-appointed counsel in carrying out their prescribed mandate.

If you do not wish to be bound by this order, you may opt-out of the group in accordance with paragraph 8 of the Order.

Continuing Employees may in confidence directly contact Nelligan O'Brien Payne at – NCCE@nelligan.ca (use your personal email) or by telephone to Ms. Christine Seed (613) 231-8280 or 1-888-565-9912.

SCHEDULE "B"

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

OPT-OUT LETTER

Ernst & Young Inc.
Ernst & Young Tower
222 Bay Street
P.O. Box 251
Toronto, ON M5K 1J7

Attention: Lee K. Close
Tel.: 1.866.942.7177
Fax: 416.943.3300

I, _____, am a current employee of Nortel, as defined in the Order of
[Insert Name]

Mr. Justice Morawetz dated July 22, 2009.

Under Paragraph 8 of that Order, current employees who do not wish Shibley Righton LLP and Nelligan O'Brien Payne LLP to act as their representative counsel may opt out.

I hereby notify the Monitor that I do not wish to be bound by the Order and will be represented as an independent individual party at my own expense to the extent I wish to appear in these proceedings.

_____ _____

Date Signature

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

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER

OGILVY RENAULT LLP
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Email: dtay@ogilvyrenault.com

Jennifer Stam LSUC#: 46735UJ
Tel: (416) 216-2327
Email: jstam@ogilvyrenault.com

Lawyers for the Applicants

TAB C

This is Exhibit "C"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

CANADIAN NORTEL EMPLOYEES on LONG TERM DISABILITY (CNELTD)

STEERING COMMITTEE

CALL FOR VOLUNTEERS

It is time for the CNELTD to formalize its structure. As you know, the CNELTD was formed shortly after Nortel filed for court protection, and has been informally coordinating the communications among members of the group, collecting information, speaking with politicians and working with the lawyers that have been appointed to represent us, Koskie Minsky LLP (KM).

We are now establishing a Steering Committee of 5-6 people who will provide leadership to the members of the group, be responsible for areas of action, and act as the liaison between members and KM. The CNELTD aims to establish a committee that will reflect the wide-ranging and unique circumstances that affect each individual in the group. The CNELTD will ensure that the committee includes members who are bilingual, and who represent all facets of the group's constituency, in order to best represent all disabled employees of Nortel.

If you are interested in volunteering for one of these positions, please send an email to Johanne Berube, who has been managing communications for the group, at johanne.berube1@sympatico.ca by midnight Wednesday, September 30.

What will be required of the members of the Steering Committee?

- the Steering Committee will be responsible for areas such as:
    - providing updates to members
    - answering member questions
    - managing the database of members
    - collecting and providing input to KM
    - advocacy and political action
    - in some cases, interacting with leaders of subcommittees who are taking on special responsibilities such as co-ordinating a demonstration, engaging in media relations or other issues in which KM may not be involved
- the Steering Committee will be responsible to collect all concerns of members, and to organize and prioritize all concerns and issues into a weekly agenda to be discussed with KM
- the Steering Committee will meet by telephone once per week for one hour

- the Steering Committee will participate in weekly conference calls with KM, during which time KM will be address member questions (if possible) and update the Steering Committee on progress

- the Steering Committee will provide feedback to the CNELTD membership after each weekly conference call with KM

- the Steering Committee will ensure that member inquiries are properly managed through email and the use of the CNELTD Yahoo! forum

We look forward to hearing from you with any other ideas you may have about the CNELTD and how it can improve communications or action on behalf of Nortel's disabled employees.

TAB D

This is Exhibit "D"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

SEGAL

THE SEGAL COMPANY, LTD. - TORONTO

MEMORANDUM

To: Mark Zigler

From: Thomas D. Levy

Date: February 23, 2010

Re: Current view of Nortel LTD Recipient Potential Recoveries

At your request, we have reviewed what is currently known about the likely recovery of Nortel LTD recipients through the bankruptcy process. We have looked at the wage replacement benefits only. These projections are rough and subject to change. Further, the aggregate result will differ significantly from the impact on each specific individual.

Under the current settlement agreement, the 2010 wage replacement payments to the LTD group, paid by the company, are estimated to total $12 million. The current accounting estimate of the total actuarial present value of the future payments is just over $100 million. Thus, about 12% of the value will be paid at 100%. For someone age 64, there will no longer be any loss at all, whereas younger LTD recipients will receive progressively lower percentages of their total present value as a result of this aspect of the settlement agreement.

The Health and Welfare Trust (HWT) is discussed in Appendix H of the 39th Report of the Monitor. While there is not enough information to attempt to be precise, it appears that a pro-rata distribution of the HWT assets would lead to about a 30% recovery of the LTD wage replacement present value. That produces an aggregate recovery of 42% when added to the 2012 payments. On an individual basis, the older participants would receive the highest replacement percentages on a present value basis.

Note that the recovery is not uniform - there is no reduction in 2010, and a 70% reduction starting in 2011. Thus, it would be prudent, where economically possible, for the LTD recipients to save and invest a portion of their continuing unreduced payments.

Assuming the accuracy of the above analysis, the balance of the present value, perhaps $50-$60 million, would be treated as an unsecured claim, subject to whatever the final

recovery is on unsecured claims. We are not in a position to estimate what this might add to the above amounts.

As each LTD recipient reaches age 65 or receives a claim recovery, he or she should be able to elect commencement of a pension under the relevant defined benefit plan, based on the funded accrued benefit at the time the Plan is wound up, with payments starting at age 55 or later. The most recent calculations indicate that the Plans are about 69% funded. Benefits will be payable in accordance with the Plan provisions, which may include an option to transfer the commuted value of the reduced pension entitlement to a locked-in RRSP. Any benefits based on service in Ontario should be eligible for the Ontario PBGF guarantee, generally to provide full funding for the first $1,000 of the benefit for age 65 commencement. There is no indexing on the PBGF portion of the pension.

Other resources are also potentially available for those who qualify. These include:

- CPP/QPP disability benefits. This is a significant portion of the wage replacement for most of the LTD recipients, and there is no loss at all of this income. Note that it is an indexed benefit.
- Defined contribution plan balances. These are fully funded and held in trust, so there is no loss with respect to them.
- Registered plans, such as RRSPs and LIFs. To the extent that benefits are locked in, there are provisions for hardship and shortened life expectancy withdrawals that vary by province.

If you have any questions on this information, please let us know.

TAB E

This is Exhibit "E"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

RIGHTS FOR NORTEL DISABLED EMPLOYEES

RFNDE@HOTMAIL.COM

February 16, 2010

Koskie Minsky LLP
20 Queen Street West
Suite 900, Box 52
Toronto, Ontario
M5H 3R3

Attention: Mr. Mark Zigler, Lawyer for the Former Employees of Nortel

Dear Mr. Zigler:

RE: CANADIAN NORTEL CONTINUING EMPLOYEES ON LONG-TERM DISABILITY

We received a press release from the court-appointed representative Sue Kennedy on February 8th, late in the evening, with the shocking news that she had signed some sort of "settlement agreement" on our behalf. Some of us tried to get through all 64 pages of this agreement and have confessed that they cannot clearly understand how this will affect all the 409 Canadian Nortel Continuing Employees on Long-Term Disability Leave. Moreover, it can be safely stated that a great many of the 400+ Nortel LTD recipients have not even seen this press release let alone this agreement. Sue Kennedy stated in this press release that a letter will be going out on February 16, which means it may not even arrive in time to notify ALL 409 Continuing Nortel Employees on LTD Leave of this one-way only audio-only webinar that you've arranged for us to explain the intricacies of a 64-page contract that will forever affect our futures. What is even more disconcerting and disturbing to all of our members is that we were shocked to see a document that so greatly affects all our lives being thrust upon us when we were not involved in its creation, nor even consulted, though we have been asking for months and months to be included in decisions that affect our lives and have been consistently ignored.

What is even more disturbing is the time frame that has been imposed. How can we make an informed decision on a matter of such vital importance with no information at all and in such an incredibly short time? This is far too much stress for any of us to bear, especially since we have asked for months to be included in the decision-making process, we have asked Ms. Kennedy, Anne Clark, Johanne Berube, and Kevin Leblanc, for any information on any "negotiations" that they were doing on our behalf. As it stands, we are being asked to make a decision under duress, without any indication from our legal representation that they intend to explain in detail to ALL of us the pros and cons of this settlement.

We all know that of the entire LTD group, less than 25% are being kept up-to-date by email. And the email that has been sent to this very small % of the LTD beneficiaries, has contained little, to no important information. So we ask you this: Do the other 75% even know what is being proposed? To this end, we request contact information for all Canadian Nortel LTD Employees so that they may become informed of their right to independent legal counsel and professional independent financial advice on the February 8th Settlement Agreement.

We would have thought that the court would require proof that a certain % of the Canadian Nortel LTD Employees are in agreement with the terms of this Feb. 8th Settlement before it could be approved by the court. We strongly urge and insist that you, as our legal representatives:

1. Apply for an extension of the approval date (March 1, 2010) and the court date (March 3, 2010) so that the LTD group as a whole can make an informed decision; But we must first have the information regarding the HWT, which has YET to be provided.

2. Judge Morawetz should be provided with the following information:

    - The H&WT has no "surplus", that its liabilities are far greater than its assets. KM Law has informed us that the LTD plan in the HWT is underfunded, therefore, we are forced to recover most of our disability income through a creditor claim along with the loss of pension accrual, life insurance coverage, and the health and dental plan, as unsecured creditors.
    - We are "Continuing Employees", not "Former" and not "Ex-Nortel" Employees.
    - Retirees' Life Benefits are not different than Active or Continuing (which is in fact what we are) employees'. They are all group term life insurance, and therefore, retirees have no right to have any recovery for the value of their life insurance benefit from the assets in the Health and Welfare Trust.
    - The Retiree Life Benefit should not be recovered from the assets in the Health and Welfare Trust because the true and intended beneficiaries of these assets are the Canadian Nortel Employees on LTD (until full disclosure of H&WT-related documents is made, that is all we know for certain, i.e. any and all financial, plan, bank, investment, actuarial, transactional, trust agreements, amendments, transfers, succession of trustees, directives, audits, T3s, etc., from 1980 until 2010.)
    - The recovery for the value of the LTD beneficiaries' "health and dental" SHALL NOT be paid to us in the form of some "replacement medical plan" that you refer to in your last letter in January. We require full disclosure as described above before we could make any decisions about "replacement medical plans" or anything else for that matter.

3. In the meantime, please set up a conference call so that most, if not all, the LTD Employees can become fully informed of the arrangement and to thus VOTE ON IT. You must allow enough time and provide simple instructions for the teleconference in your letter to the 409 employees to allow for everyone who would like to ask questions and hear your answers about this "negotiated deal". The teleconference must be bilingual as many of our members are French-speaking. As well, the teleconference must be recorded, and made available on the KM Law web site, so that any members who are not able to attend can listen to the discussions.

4. Many LTD beneficiaries may wish, pending further evaluation of the February 8th Settlement Agreement, to file Notice of Appearance of Objection and to appear personally on their own behalf in Court in Toronto on March 3rd. We request assurance that the March 3rd court date will occur and that if it were to be altered, that the travel

expenses of all out of town LTD beneficiaries appearing in the court to object, will be paid for by Nortel.

5. We now require that Nortel pay for any legal fees incurred for the Canada LTD Employees to allow us to obtain a second legal opinion from insurance and human rights lawyers of our own choice. Of course, this second opinion can only be obtained with full public release of all the legal documents and financial statements of the H&WT and all Plans which have been previously disclosed to KM LLP, Segal and RSM Richter.

If the above cannot be done, we will consider retaining counsel to appear on March 3rd to explain the concerns expressed above and ask for an adjournment.

Sincerely,

Rights for Nortel Disabled Employees for:

Connie Walsh
Alix Sullivan
Lorna Ronacher
Jeri Rodrigs
Arlene Plante
Neil Pereira
Aggie Murray
Josée Marin
Tony Kempster
Jennifer Holley
Nanc Ekiert
Eva De Foor
Lawrence Clooney
Johanne Caron
Peter Burns
Jackie Bodie
Michelle Barnabe
Zehir Awadia

CC:

Susan Philpott, Koskie Minsky, Lawyers for the Former Employees of Nortel

Simon Archer, Koskie Minsky, Lawyers for the Former Employees of Nortel

Andrea McKinnon, Koskie Minsky, Lawyers for the Former Employees of Nortel

Ron Olsen, Segal & Company, Ltd., Actuary for Koskie Minsky

Tom Levy, Segal & Company, Ltd, Actuary for Koskie Minsky

Barry Wadsworth, CAW-CANADA, Lawyers for all active and retired Nortel employees represented by the CAW-Canada

Dan Goldstein, Schneider & Gaggino, Lawyers for the Teamsters Québec Local 1999

Pierre Lebrun, Business Agent, Teamsters Québec, Local Union 1999

Murray McDonald, Ernst & Young Inc., Monitor

Lee Close, Ernst & Young Inc., Monitor

KOSKIE
MINSKY LLP
BARRISTERS & SOLICITORS

February 17, 2010

Mark Zigler
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Direct Fax: 416-204-2877
mzigler@kmlaw.ca

By E-Mail

Connie Walsh
Alix Sullivan
Lorna Ronacher
Jeri Rodrigs
Arlene Plante
Neil Pereira
Aggie Murray
Josée Marin
Tony Kempster
Jennifer Holiday
Nanc Ekiert
Eva De Foor
Lawrence Clooney
Johanna Caron
Peter Burns
Jackie Bodie
Michelle Barnabe
Zehir Awadia

Dear Disabled Nortel Employees:

Re: Your Letter of February 16, 2010
Our File No. 09/0479

I am in receipt of your letter of February 16, 2010. Please note that we are not just lawyers for Former Employees of Nortel but also the Court-appointed Counsel for disabled employees of Nortel and Sue Kennedy is appointed as the Court-appointed Representative for the disabled employees. Our firm represents both groups and both groups have been in close cooperation throughout.

I will try to deal with the issues raised in your letter as follows:

1. Nortel health benefits for LTD members and retired members would end March 31 if this Motion is not dealt with promptly. Many of these people rely on these benefits and continuing them until year end is critical for them. In particular, there are many disabled employees whose costs for prescription medications and/or medical treatments cost thousands of dollars per month. These people would not have enough time before the March 3 Court date to make other arrangements such as applying for a Provincial Drug program such as Trillium. Pension contributions would also end. Therefore, the Motion must be dealt with on March 3 as the available date that gives enough time to deal with a decision on this matter. Information was available for the February 9 Notice of Motion on the Monitor's website and more information is being put on the Monitor's website before the end of this week. To the extent that any documents are filed they are always available on the Monitor's website. Your group has closely followed all of these developments and many of you were quick to send emails to us and Ms. Kennedy

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immediately after the February 8 announcement about the proposed settlement so I cannot see how any of you are in any way prejudiced.

2. Ms. Kennedy represents the overwhelming majority of LTD members who are indeed very vulnerable and require as much protection in these proceedings as is reasonably possible. Therefore she negotiated an agreement with the advice of counsel and financial advisors to provide continuation of disability income benefits payable out of Nortel funds for 2010. These are very meaningful to most disabled employees and also ensures that we do not erode the Health and Welfare Trust ("HWT") as well as allowing for future recoveries from the HWT and from the Nortel Estate. Extending medical benefits to the end of the year also gives people time to know what the future will bring and gives our clients together with the retired employees the opportunity to try and structure some form of continuing health benefit. The welfare of LTD members is foremost in Ms. Kennedy's mind and in the minds of her Committee. Most LTD members do not want to engage in risky litigation with the uncertainty and delays involved and the possibility of failure when significant benefits are available for the Group at this time. Ms. Kennedy has received indications of support for the Settlement from a sizeable number of Nortel LTD employees. Many of you requested payment of disability income benefits from Nortel operating expenses so as to preserve HWT assets.

3. This is not a situation where there can be a "vote" of over 400 people in the LTD Group or indeed 19,500 of the other former employees. This is a Court proceeding where there is a Court appointed representative. All LTD members (and you represent a minority of those with whom Ms. Kennedy and our firm are in contact) had the right to opt out of the Representation Order. As such you are bound by the Representative's decisions, subject to Court approval. In this case we have given people the extraordinary option of coming to Court and objecting if they do not like the Settlement but you must convince the judge that it would be erroneous to approve it. We believe it is a good settlement for the LTD Group.

4. Ms. Kennedy is in email contact with approximately 140 of the 270 non-union LTD people. The CAW is in contact with the former unionized disabled members and Ms. Kennedy speaks to them as well. We will not provide you with addresses for these people given privacy law concerns. You are a group of individuals that has no formal status with the Court but are free to make representations on your own or through counsel that you retain at your own expense.

5. You are not being asked to make a decision "under duress". Plenty of notice is being given and your group is fully aware of the Settlement having read the terms. An information webinar is being conducted on February 23 and we have already responded by email to many members of your group regarding your questions. We understand additional material will be filed in Court this week and made publicly available. The matter must be dealt with promptly or benefits will end on March 31. No individual has a right to participate in negotiations that the Court-appointed Representative has been selected to engage in by Order of the Court, with the advice of legal counsel, financial advisors and actuaries.

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Dealing with specific points raised on page 2 of your letter we point out the following:

1. There will be no extension of the March 3 date. There will be more information on the HWT released later this week as we have asked the Monitor to do so. However, this Motion is not about the HWT. It is about obtaining funds from the Canadian estate of Nortel (the lion's share of what is available to the Company after using up its budget for operations in 2010) and obtaining continued benefits for LTD employees and former employees of Nortel throughout 2010 so that they might be able to better organize their lives afterwards and obtain payments from the HWT and the Nortel estate.

2. The Court will have all of the information regarding the HWT and the various beneficiaries of the trust. We have asked the Monitor to make it publicly available this week and we believe that Ernst & Young will do so. It is incorrect to suggest that thousands of people who have been beneficiaries of this trust for various benefits should not receive assets from the trust but that only the LTD beneficiaries should receive payments. However, if you opt out of the Representation Order, you can feel free to retain your own counsel and argue this point yourself.

3. We will not set up a conference call just for your group or set up a vote for reasons noted above. We are conducting a webinar on February 23 for LTD and former employees of Nortel, where we will review all aspects of the Settlement Agreement, the information provided by the Monitor and the Company, and answer questions. We have also been exchanging emails with many members of your group and answering their questions. We understand these emails are circulated on your various email lists and chat rooms and many people have notice of the answers. We will continue to deal with emails and telephone inquiries.

4. We believe that the March 3 date will proceed as scheduled.

5. We are the representative counsel who must represent all LTD members regardless of their views. We take instructions from the Court-appointed Representative and her Committee. However, if you do not have confidence in our representation you are free to obtain your own counsel at your own expense. We will object to two sets of representative counsel being appointed in this case simply so that a minority dissident group can pursue its own agenda. Our client will consent to any individuals opting out and representing themselves individually (or through counsel retained at their own expense) in the rest of the CCAA proceeding if such relief is sought.

Yours truly,

KOSKIE MINSKY LLP

Mark Zigler
MZ:ds

KOSKIE
MINSKY LLP
BARRISTERS & SOLICITORS

c Gale Rubenstein, *Goodmans LLP*
Murray McDonald, *Ernst & Young Inc.*
Barry Wadsworth
Dan Goldstein
Sue Kennedy

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TAB F

This is Exhibit "F"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

KOSKIE
MINSKY LLP
BARRISTERS & SOLICITORS

January 6, 2010

Susan Philpott
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Via E-mail

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Murray McDonald
Ernst & Young Inc.
222 Bay Street
Toronto, ON M5K 1J7

Derrick Tay
Ogilvy Renault LLP
RBC Plaza, South Tower
200 Bay Street, P.O. Box 84
Toronto, ON M5J 2Z4

Dear Sirs:

Re: Nortel CCAA Proceedings
Re: Funding Agreement
Our File No. 09/0479

We write on behalf of both of our client groups, the Court appointed representatives for the Former Employees and the Disabled Employees of the Canadian Nortel companies. We understand that an agreement has been reached with the U.S. company and other stakeholders regarding the transfer of funding to the Canadian estate to permit its operations for the duration of the insolvency proceedings (the "Funding Agreement"). We were not privy to the negotiations which resulted in that agreement, and have not been provided a copy of the applicable documentation setting out the Funding Agreement, nor any draft of it. Our clients have grave concerns about the contents and terms of the Agreement that have been disclosed thus far, and the impact on them and their constituents. We require a copy of the latest draft of the Agreement and an opportunity to comment on its contents before it is finalized, and raise the following for your immediate consideration and action.

To date, our clients have supported the continuation of the CCAA stay of proceedings, and the interim funding agreement ("IFA") that was reached in June, because funding for the pension plans and benefit plans was provided for, and has continued during the CCAA process. Our clients did not oppose the expenditure of estate funds on employee bonuses under the KEIP, KERP and AIP programs because they were told that their benefits coverage would continue, and funding for that coverage was included under the IFA. However we have been advised that the current Funding Agreement, which is scheduled to be brought to court for approval on January 21, 2010, provides funding for these costs only through Q1 of 2010. There is no provision for these costs through the balance of 2010 and 2011, leaving our clients without health benefits and pension funding during the CCAA proceedings. This, along with the fact that Nortel has been depleting the health and welfare trust by failing to fund the ongoing LTD and SIB costs, is wholly unacceptable.

Accordingly, our clients will object to the Funding Agreement and any further extension of the CCAA stay of proceedings unless provision is made for:

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1) the continuation of our clients' medical and health benefits through the CCAA process;

2) pension funding to at least the end of September of 2010, when the next valuation must be filed with the Regulator;

3) payment of LTD and SIB income benefits directly by the company out of its operating revenues as an employee cost through 2010; and

4) provision of some minimum standards pay for severed employees in addition to the current hardship program.

We understand that funds are available in 2010 for the Canadian estate to pay these costs, and expect binding confirmation that they will be paid.

As has become clear through this most recent set of negotiations regarding the funding for the Canadian estate, the established process remains very unsatisfactory to our clients. They had no seat at the table and were thereby unable to press for the minimum guarantees required by their constituents for health benefits. And yet, the bondholder group successfully insisted upon a mandatory audit for 2009, at an exorbitant cost of over $20 million, the expenditure of which is unnecessary and benefits only the bondholders (and KPMG). It would be unconscionable that more than $20 million in audit fees, and millions more in employee bonuses, are to be paid out in 2010 while Nortel retirees and disabled people go without health benefits. Moreover, the IFA process is used as a mechanism to bind the Canadian estate to future transactions and our ability to object is hamstrung because of the terms of the IFA that our clients had no part in crafting.

We look forward to speaking with you immediately to discuss our clients' demands. In the absence of an agreement as set out above, we have no choice but to object to court approval of the Funding Agreement on January 21, 2010.

Yours truly,

KOSKIE MINSKY LLP

Susan Philpott
SP:mp
c NRPC Committee, Sue Kennedy
Tom Levy and Ron Olsen. Segal
Gus Tertigas, RSM Richter LLP
Gale Rubenstein, Goodmans LLP
Ken Rosenberg, Paliare Roland LLP
Mark Zigler/Andrea McKinnon, Koskie Minsky LLP

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TAB G

This is Exhibit "G"

referred to in the affidavit of Susan Kennedy

sworn before me, this 23rd day of February 2010

A COMMISSIONER FOR TAKING AFFIDAVITS

NORTEL – CHART

	Agreement is Court Approved	Agreement is Rejected
Monthly Disability Income	Paid until December 31, 2010 from Nortel's operating funds. Thereafter HWT distributions and revenues from Nortel estate recoveries will result in lump sum payments	Payments temporarily continued from HWT, thus depleting the assets, until it is wound up and distributed. $12 million payable for monthly disability income would not be obtained if there is no settlement
Health and Dental Claims	Continue to December 31, 2010 (claims may be filed up to February 28, 2011)	Stops at March 31, 2010
Life Insurance Coverage (Self)	Continue to December 31, 2010	Stops at March 31, 2010
Life Insurance Coverage (Dependents)	Continue to December 31, 2010	Stops at March 31, 2010
Pension Accrual for DBPP	Continue to September 30, 2010	Stops at March 31, 2010
Pension Contributions for DCPP	Continue to December 31, 2010	Continue to December 31, 2010?
Right to sue Sun Life for misrepresenting our LTD plan as being insured by them	Available but a risky lawsuit with limited chance of success.	Available subject to being risky litigation
Right to sue Nortel Directors for not funding our plan with sufficient amounts to ensure we would receive all the benefits promised to us under the LTD Plan	Not available but not a viable claim in our opinion	Available but still not a viable claim
Right to sue Northern Trust who is the Trustee of the Nortel Health and Welfare Trust for not enforcing the terms of the Trust Agreement	Not available and a risky claim with limited chance of recovery	Available but still a risky claim with limited chance of recovery
Right to sue Nortel Directors for fraud, oppression, or wrongful conduct	Available including misrepresentation claims	Available including misrepresentation claims
Right to sue trustees of the pension plan	Not available and not a viable claim	Available but not a viable claim
Right to ask that the LTD Employees be treated as a separate voting class which would seek a cash settlement that is higher compared to other unsecured creditors	Not available	Available but not a realistic outcome given other creditor classes similarly situated

Right to a Fairness Hearing which would seek a cash settlement that is higher compared to other unsecured creditors based on fairness reasons	Available to individuals but not representatives under the Settlement Agreement and not a likely result	Available to individuals but not a likely result
Right to object to the $92.3 million dollars that will be paid to current Nortel Executives	Not available to Representatives but likely to be approved by the Court anyway	Available but likely to be approved by the Court anyway
Right to file a Human Rights Complaint against Nortel for any reason	Not available due to CCAA stay and Settlement Agreement. Damages would be an unsecured claim against Nortel	Not available due to CCAA stay. Damages would be an unsecured claim against Nortel
Employment Status	CCAA Order permits termination at any time. Settlement Agreement requires it at end of December 31, 2010	CCAA Order permits termination at any time

NORTEL – TABLEAU

	Entente approuvée par le tribunal	Entente rejetée
Prestations d'invalidité mensuelles	Versement jusqu'au 31 décembre 2010 sur les fonds d'exploitation de Nortel. Par la suite, les distributions de la FSBE et les revenus tirés des sommes recouvrées au titre de l'actif de Nortel donneront lieu au versement de sommes forfaitaires	Maintien provisoire des paiements sur la FSBE, dont l'actif sera épuisé jusqu'à sa liquidation et distribution. Une somme de 12 millions $ payable au titre des prestations d'invalidité mensuelles ne serait pas versée en l'absence de règlement
Réclamations pour soins de santé et dentaires	Maintien jusqu'au 31 décembre 2010 (présentation possible des réclamations jusqu'au 28 février 2011)	Cessation le 31 mars 2010
Assurance-vie (personnelle)	Maintien jusqu'au 31 décembre 2010	Cessation le 31 mars 2010
Assurance-vie (personnes à charge)	Maintien jusqu'au 31 décembre 2010	Cessation le 31 mars 2010
Charge de retraite à payer au titre du RRPD	Maintien jusqu'au 30 septembre 2010	Cessation le 31 mars 2010
Cotisations de retraite au titre du RRCD	Maintien jusqu'au 31 décembre 2010	Maintien jusqu'au 31 décembre 2010?
Droit de poursuivre Sun Life pour avoir déclaré faussement que notre régime ILD était assuré par elle	Possible, mais poursuite risquée avec peu de chance de succès	Offert, mais litige risqué
Droit de poursuivre les administrateurs de Nortel pour ne pas avoir pourvu à la capitalisation suffisante de notre régime de manière à ce que nous recevions toutes les prestations nous ayant été promises en vertu du régime ILD	Non offert, mais réclamation non viable à notre avis	Offert, tout en restant une réclamation non viable
Droit de poursuivre Northern Trust, fiduciaire de la fiducie de santé et de bien-être Nortel pour ne pas avoir appliqué les dispositions de l'acte de fiducie	Non offert et réclamation risquée avec peu de chance de succès	Offert, tout en restant une réclamation risquée avec peu de chance de succès
Droit de poursuivre les administrateurs de Nortel pour	Offert, notamment au titre de déclarations trompeuses	Offert, notamment au titre de déclarations trompeuses

fraude, abus ou comportement fautif		
Droit de poursuivre les fiduciaires du régime de retraite	Non offert et réclamation non viable	Offert, mais réclamation non viable
Droit de demander que les employés ILD soient considérés comme une catégorie distincte aux fins du vote qui chercherait à obtenir un règlement en espèces plus élevé que dans le cas des autres créanciers non garantis	Non offert	Offert, mais irréaliste, les autres catégories de créanciers étant dans une situation semblable
Droit à une audience portant sur l'équité où serait recherché un règlement en espèces plus élevé que dans le cas des autres créanciers non garantis pour de motifs fondés sur l'équité	Offert aux personnes physiques, mais non aux représentants, en vertu de l'entente de règlement, mais résultat improbable	Offert aux personnes physiques, mais résultat improbable
Droit de s'opposer aux 92,3 millions $ qui seront versés aux dirigeants actuels de Nortel	Non offert aux représentants, mais approbation probable du tribunal de toute façon	Offert, mais approbation probable du tribunal de toute façon
Droit de déposer une plainte relative aux droits de la personne contre Nortel, quel que soit le motif	Non offert en raison de la suspension en vertu de la LACC et de l'entente de règlement. Les dommages-intérêts octroyés constitueraient une réclamation non garantie contre Nortel	Non offert en raison de la suspension en vertu de la LACC. Les dommages-intérêts octroyés constitueraient une réclamation non garantie contre Nortel
Emploi	L'ordonnance en vertu de la LACC permet de mettre fin à un emploi en tout temps. L'entente de règlement impose que l'emploi prenne fin le 31 décembre 2010	L'ordonnance en vertu de la LACC permet de mettre fin à un emploi en tout temps

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

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **TORONTO**

AFFIDAVIT OF SUSAN KENNEDY
(sworn February 23, 2010)

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Lawyers for the Former Employees and Disabled Employees

32

CITATION: Holley v. The Northern Trust Company, Canada, 2014 ONSC 889
COURT FILE NO.: 12-CV-462273CP
DATE: 20140211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JENNIFER HOLLEY Plaintiff	*Joel P. Rochon, Peter Jervis*, and *Remissa Hirji*, for the Plaintiff
– and –	
THE NORTHERN TRUST COMPANY, CANADA and THE ROYAL TRUST COMPANY Defendants	*Jeff Galway* and *Nicole Henderson*, for the Defendant The Northern Trust Company, Canada *R. Paul Steep, Christine L. Lonsdale,* and *Daniel Dawalibi*, for the Royal Trust Company
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: January 23 and 24, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Jennifer Holley is the Plaintiff in this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992. She sues The Royal Trust Company and The Northern Trust Company, Canada.

[2] As I will describe below, because of a release granted in proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA"), Ms. Holley can only sue the Defendants for fraud.

[3] Royal Trust and Northern Trust each move for an order striking out Ms. Holley's Amended Statement of Claim on the basis that her pleading discloses no reasonable cause of action for fraud or, in the alternative, they each seek a judgment dismissing her action as statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

[4] Royal Trust also asserts that Ms. Holley's action should be dismissed as an abuse of process.

[5] For the reasons expressed below, I do not regard Ms. Holley's action as an abuse of process. However, in my opinion, it is plain and obvious that her Amended Statement of Claim does not plead a tenable cause of action for fraud. She does plead a tenable cause of action for constructive fraud, but, in my opinion, constructive fraud is encompassed by the CCAA release. Further, it is my opinion that it is plain and obvious that her claims for constructive fraud or for common law fraud are statute-barred.

[6] Accordingly, for the reasons expressed below, I dismiss her action against Royal Trust and Northern Trust.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. Introduction

[7] In this part of my Reasons for Decision, I shall describe the factual and procedural background. In this introduction, I identify several contested issues of mixed fact and law that will be important to the legal analysis that will come later, and I explain why attention to these matters is important.

[8] I have already noted above that because of a release in CCAA proceedings, Ms. Holley can sue Royal Trust and Northern Trust only for fraud. The practical consequence of this restriction is that the Defendants advance a two-pronged argument. First, they say that their actions were compliant with the Trust Agreement, and second, they say that if there was non-compliance, it did not amount to fraud. This two-pronged argument makes for contested issues about: (a) the interpretation of the Trust Agreement; (b) whether Ms. Holley has a tenable argument that the conduct of Royal Trust and Northern Trust breached their respective obligations under the Trust; and (c) assuming that it is arguable that Royal Trust and Northern Trust acted unlawfully, was the alleged misconduct fraudulent?

[9] Further, the matter of the fraud exception in the CCAA release raises an interpretation issue about the scope of the release, and, in particular, there is the contested issue of whether as a matter of interpretation, constructive fraud was released by the CCAA release. Thus, it is necessary to pay attention to the circumstances in which the CCAA release came into existence in the CCAA proceedings.

[10] Moreover, it is necessary to pay attention to the circumstances in which the release was granted because those circumstances are important to Royal Trust's and Northern Trust's argument that the limitation period began to run at the time of the CCAA Monitor's 31st Report to the court, which Report discussed the delivery of a release.

[11] Ms. Holley denies that her claim is statute-barred, and she submits that the earliest date for discovery of her claims came with the Monitor's 51st Report, which Report, she submits, reveals the factual information necessary to discover a fraud action against the Defendants.

[12] Thus, there is a contested issue about discoverability that turns on the nature of the disclosures in these two Reports from the Monitor. It shall, therefore, be important to pay attention to the information disclosed by the Monitor and also to pay attention to what the circumstances reveal about what Ms. Holley and her lawyers knew or ought to have known about seeking a remedy against Royal Trust and Northern Trust at the time of the Monitor's 39th Report.

2. The Parties

[13] The Plaintiff, Jennifer Holley, was an employee of Nortel Networks Corporation ("Nortel"). Nortel is the applicant in ongoing proceedings under the CCAA. As an employee, Ms. Holley was on long-term disability ("LTD") for over 12 years. Given her current health, it is unlikely that she will ever be able to return to work. Because of the CCAA, she and other employees or former employees of Nortel will no longer receive LTD benefits, although they will receive something modest from the winding up of the Trust.

[14] Ms. Holley brings this proposed class action on her own behalf and on the behalf of the following class of persons:

> All Beneficiaries of the Nortel Health and Welfare Trust ("HWT"). Beneficiaries include:
>
> (a) LTD Beneficiaries for LTD Income and LTD Life;
>
> (b) LTD Beneficiaries participating under Optional Life for the LTD Optional Life Benefit;
>
> (c) STB Beneficiaries in pay on or before December 31,2010 for STBs;
>
> (d) SIB Beneficiaries in pay on or before December 31,2010 for SIBs; and
>
> (e) Pensioners (including LTD Beneficiaries) for Pensioner Life.
>
> (the "Class" or "Class Members").

[15] Nortel provided LTD and other benefits through the Nortel Health and Welfare Trust, which is also known as the HWT, which I will refer to as the Trust.

[16] Replacing the original trustee, which, from 1980 to 1997, was the Montreal Trust Company, Royal Trust was the trustee of the Trust from April 1997 to November 30, 2005.

[17] Then, Northern Trust was appointed as trustee of the Trust effective December 1, 2005, and it continues to act as trustee of the Trust, which is in the process of being wound-up. Northern Trust is also the trustee of Nortel's pension plans.

3. The Nortel Health and Welfare Trust

[18] Nortel (and its predecessors) provided LTD, health, and welfare benefits to its employees. The benefits were funded and administered through the Nortel Health and Welfare Trust ("the Trust").

[19] The Trust is governed by the Trust Agreement, which began with an agreement dated January 1, 1980 between Northern Telecom Limited (a predecessor to Nortel) and Montreal Trust Company, as trustee. The Trust Agreement was amended by agreements dated September 24, 1984, June 1, 1994, December 1, 2005, and by a letter agreement dated December 1, 2005.

[20] It may be noted that in the CCAA Proceedings, discussed below, Justice Morawetz held that the Trust constitutes one trust created for the purpose of providing health and welfare plan benefits for Nortel's employees. See *Nortel Networks Corporations (Re)*, 2010 ONSC 5584 at paras. 9, 10, and 33.

[21] For present purposes, the following provisions in the Trust Agreement are relevant:

RECITALS

1. The Corporation has established for the benefit of certain of its employees and the employees of such affiliated or subsidiary Corporations as the Corporation may designate, certain Health and Welfare Plans, and such other similar plan or plans as the Corporation may from time to time place in effect, as follows:

(a) a Health Care Plan;

(b) a Management Long Term Disability Plan;

(c) a Union Long Term Disability Plan;

(d) a Management Survivor Income Benefit Plan;

(e) a Management Short Term Disability Plan;

(f) a Group Life Insurance Plan

All of which are hereinafter collectively referred to as the "Health and Welfare Plan".

2. To give effect to the Health and Welfare Plan it is necessary to establish a trust fund to be known as the "Health and Welfare Trust".

Now therefore in consideration of the premises and the mutual covenants herein contained the Corporation and the Trustee, here covenant and agree as follows:

ARTICLE II – DEFINITIONS ...

1. The term "Trustee" shall mean the Trustee herein named its successors and assigns and shall include the person, legal entity or corporation to whom the Trustee may delegate such 'powers as are necessary for the sound and efficient administration of the Trust fund.

2. The term "Benefits" as used herein shall mean payments benefits as determined under the Health and Welfare Plan.

4. The term "Employees" shall mean those active and retired employees of the Corporation and designated affiliated or subsidiary corporations which have adopted the Health and Welfare Plan including dependents as defined in Schedule "A", on whose behalf contributions are or have been made to the Trust Fund and who are eligible for benefits under the Health and Welfare Plan.

5. The term "Employer's Contribution" as used herein shall mean payments required to be made by the Corporation and by designated affiliated or subsidiary corporations to the Trust Fund to enable the Trustee to discharge; the obligations arising under the Health and Welfare Plan.

6. Trust Fund as used herein shall mean all of the assets of the 'Health and Welfare Trust', including all funds received by way of contributions from the Corporation and those of its designated affiliated or subsidiary corporations in accordance with the provisions of the Health and Welfare Plan and of this Trust Agreement, and all employees' contributions together with all profits, increments, and earnings thereon.

ARTICLE II – TRUST FUND

1. The trust fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the Employees.

2. All payments made to the trustee from time to time by the Corporation and designated, affiliated or subsidiary corporations and by the employees, together with all profits, increments

and earning thereupon, shall be irrevocable and constitute upon receipt by the trustee, the trust funds to be administered by the trustee in accordance with the terms of this trust agreement, the Health and Welfare Benefit Plan and the Eligibility Requirements.

3. The Trustee shall from time to time on the written directions of an officer of the Corporation so designated by its Board of Directors, or failing such designation, by the Secretary, of the Employees' Benefit Committee of the Corporation, or a Plan Administrator appointed by the Corporation, make payments out of the Fund to such persons, in such manner and in such amounts as may be specified in such directions to the Trustee. In each instance, the written directions shall be deemed to include a certification to the Trustee that such directions and the payments to be made pursuant thereto are in accordance with the terms of the Health and Welfare Plan, which certification shall constitute full and complete protection to the Trustee in complying with such directions.

ARTICLE III - TRUSTEE

1. The Trustee, who shall also be known as the "Trustee of the Health and Welfare Trust", hereby accepts the trust created by the Trust Agreement and agrees to hold, invest, distribute and administer the Trust Fund in accordance with the terms and conditions of the Health and Welfare Plan and this Trust Agreement.

ARTICLE IV – EMPLOYER'S CONTRIBUTIONS

1. The Corporation and its designed affiliated or subsidiary corporations agree to make Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund as a result of the administration of the Health and Welfare Plan, and as may otherwise be required from time to time by the Trust for the purposes of the Health and Welfare Plan, as determined by the Trustee on a sound actuarial basis.

2. The Trustee shall determine or cause to be determined, on a sound actuarial basis from time to time, and in any event, once every calendar year, the level of contributions to the Trust Fund necessary to fund adequately the Health and Welfare Plan.

3. Subject to paragraphs (1) and (2) hereof, the Corporation and its designated affiliated or subsidiary corporations shall be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Health and Welfare Plan. (emphasis added)

ARTICLE VI – AMENDMENT AND TERMINATION

2. Upon sixty (60) days prior written notice to the Trustee, the Corporation may terminate its obligation to make Employer's contributions in respect of benefits after the date of written notice to the Trustee (hereinafter called the Notice of Termination)..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. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the trust Agreement and the Health and Welfare Plan shall revert to the Corporation.

[22] Effective December 1, 2005, Northern Trust replaced Royal Trust to become the trustee of the Trust.

[23] When Northern Trust became the trustee, the Trust Agreement was amended to provide that Nortel would assume sole responsibility for determining the amount of required contributions. The letter agreement stated:

> Notwithstanding anything to the contrary in the Health and Welfare Trust and for the avoidance of any doubt, we [Nortel] agree that you [Northern Trust] shall have no responsibility for determining, reviewing or monitoring the amounts of Nortel Networks Limited's contributions required in order to adequately fund the Health and Welfare Plan ("Contribution Amounts") nor to advise and carry out administrative procedures in accordance with the Health and Welfare Plan and the eligibility Requirements.
>
> Nortel Networks Limited agrees that it shall be solely responsible for determining said Contribution Amounts on a sound actuarial basis...and agrees to indemnify and hold you harmless from any and all costs, losses, damages, claims, actions, suits, liabilities, expenses or other charges (including attorneys' fees) that you incur directly or indirectly arising out of the contributions made (or not made) by Nortel to the Health and Welfare Trust or out of the administration of the Health and Welfare Plan.

4. The Operation of the Trust and the Allegations of Breach

[24] I will return several times below to the parties' arguments about whether Royal Trust or Northern Trust breached their obligations under the Trust or whether they were authorized to do what they did or what they allowed to be done. Answering that issue depends upon interpreting the Trust Agreement. However, there actually is little dispute about how the trust operated and how the various constituent benefit plans were administered. The disputed legal issue is whether the Trustees' administration of the Trust was compliant with the Trust Agreement.

[25] The Trust operated in the following way. Over the history of the Trust, Nortel made contributions of three sorts. First, Nortel made cash contributions for some plans for which the trustee had established a reserve account. The trustee would invest the contributions in accordance with the investment powers set out in the Trust Agreement. The trustee would pay the benefits for the Reserved Plans from the reserve account. A payment to an employee's survivor spouse is an example. LDT benefits are another example of benefits paid from the reserve account. It will be a matter of debate between actuaries about the extent to which and when, if ever, the reserve account had a surplus or was underfunded and had a deficit.

[26] Second, Nortel made cash contributions to put the trustee in funds or to reimburse the trustee for the payment of benefits by the trustee to employees under plans administered through the Trust for which there was no reserve account and for which the benefits were being paid on a pay-as-you-go basis. Medical or dental plan benefits are an example. This benefit was administered through the Trust but no reserve account was established for the benefit.

[27] Third, Nortel would, in effect, promise to pay the trustee for contributions to the reserve account or to reimburse the trustee for its payment of the pay-as-you-go benefits for the plans that did not have a reserve account.

[28] Before it became the subject matter of litigation, this third way of Nortel making a contribution was described by the parties as the "Due," which nickname derives from the Trust's financial report asset item "Due from Sponsoring Company." Now that the matter is in litigation,

the parties characterize the Due in different ways. Royal Trust and Northern Trust characterize it as a non-cash payment made by Nortel, much the way that a promissory note, IOU, or post-dated cheque is a payment or an account receivable.

[29] In contrast, Ms. Holley characterizes the Due as an unauthorized loan, a fraud, and a breach of the terms of the trust and the obligations owed by the trustee to the beneficiaries of the Trust. Ms. Holley submits that allowing the Due to persist uncollected and without security meant that reserve funds had to be used to pay non-reserve benefits and this practice imperilled the reserves earmarked for LTD beneficiaries and others, especially during the time when financial funnel clouds were in the financial weather forecast for Nortel.

[30] Royal Trust and Northern Trust submit that they did nothing wrong in accepting the Due. They submit that the Trust Agreement never imposed upon the trustee a duty to compel Nortel to make contributions and the Trust Agreement never imposed an obligation on the trustee to otherwise monitor Nortel's compliance with its contribution obligations.

[31] There was an issue between the parties during the hearing of the motion about whether the December 1, 2005 letter agreement acknowledged that but for the letter agreement, the trustee did indeed have a responsibility to determine the amount of Nortel's contribution or whether the December 1, 2005 letter agreement was introduced when Northern Trust became trustee out of its abundance of caution to make it clear that it did not have such an obligation.

[32] There was an issue between the parties about whether the trustee had a responsibility to ensure that the benefit plans were actuarially sound. In her Statement of Claim, Ms. Holley pleads that for Nortel to secure favourable tax treatment for its contributions, the LTD benefits under the Trust must respect the principles of insurance, even if the benefits are not insured with a licensed insurer. In this regard, paragraph 7 of CRA [Canada Revenue Agency] Interpretation Bulletin IT-428 provides:

> If, however, insurance is not provided by an insurance company, the plan must be one that is based on insurance principles, i.e., funds must be accumulated, normally in the hands of trustees or in a trust account, that are calculated to be sufficient to meet anticipated claims. If the arrangement merely consists of an unfunded contingency reserve on the part of the employer, it would not be an insurance plan.

[33] In her Amended Statement of Claim, Ms. Holley pleads that Nortel and the trustee played a role similar to that of an insurance company and thus the trustees had an obligation to ensure that the Trust reserve account reflected the funded liability for future long term benefit payments. She submits that the Trust Agreement imposed on Royal Trust and then Northern Trust the obligation to ensure that the Trust was adequately funded for future liabilities, especially the LTD benefits.

[34] It is thus a matter of significant controversy between the parties as to the nature of the funding to make payments of the benefits conferred by the Trust. As already noted above, in actual operation, some of the benefits under the Trust, described as the "Reserved Plans" and which included long term disability and survivor income benefits, were paid by the trustee from invested Trust assets. As noted above, other benefits under the Trust, which were described as "paid as incurred plans" or "pay-as-you-go plans" and which included medical and dental costs and life insurance premiums, were paid in a two-step process in which Nortel paid the beneficiaries' claims by funding the Trust on an as-needed basis. This was described as administering the payments through the Trust.

[35] As a factual matter, only the Reserved Plans had assets notionally allocated in the Trust as reflected by the Trust's financial statements; however, assets were not segregated in the Trust for each Reserved Plan and no separate bank accounts were established.

[36] All of the Trust assets were commingled in one common trust bank account. Royal Trust and Northern Trust submit that the Trust Agreement permits any trust asset to be used to pay benefits, which is in fact what occurred during the lifetime of the Trust.

[37] In the Statement of Claim, Ms. Holley pleads that when Northern Trust became trustee it was aware that Nortel and Royal Trust had been breaching the Trust Agreement by using the trust fund as an unfunded contingency reserve to pay as incurred short term employee benefits without compensating the Trust as required. She pleads that Northern Trust knew that Nortel had failed to maintain the Trust as required by sound actuarial analysis and by Article IV paragraph 1 and 2 of the Trust Agreement.

[38] Ms. Holley pleads that Northern Trust agreed to facilitate this breach of trust and continued the breach of the fiduciary duty owed to the beneficiaries of the Trust but demanded that Nortel provide an indemnification. She submits that by the December Letter Agreement, Nortel agreed to indemnify Northern Trust for any liability associated with employer contributions not being made on a sound actuarial basis. She pleads that the Letter Agreement does not derogate from Northern Trust's obligations to the beneficiaries of the Trust.

[39] Whether or not it was a breach of the trust, it is a fact that as at December 31, 2008, just before the CCAA proceedings, Nortel owed the Trust contributions of $37 million. There was a Due of $37 million.

5. The CCAA Proceedings

(a) The Monitor's 39th Report and the CCAA Releases

[40] On January 14, 2009, Nortel and its subsidiaries sought and were granted protection from their creditors under the CCAA. The CCAA Proceedings are ongoing. Pursuant to the Initial CCAA Order, Ernst & Young Inc. was appointed as the Monitor in the CCAA proceedings.

[41] Under the initial CCAA Order, Nortel continued to provide health and welfare benefits to its active employees, pensioners, and LTD employees. However, given Nortel's insolvency, it advised its employees that payment of benefits would cease after March 31, 2010.

[42] As might be expected all sorts of claims were made by creditors and stakeholders in the CCAA proceedings, and subject to court approval, by agreement dated February 8, 2010, various CCAA stakeholders, including representatives of the active, former, and LTD employees of Nortel, entered into a Settlement Agreement. There, however, was a dissenting group of LTD beneficiaries, including Ms. Holley, who opposed the proposed settlement or their claims.

[43] Under the Settlement Agreement, certain health and welfare benefits would continue to be paid past March 2010 until December 31, 2010. Under the proposed Settlement Agreement, Royal Trust and Northern Trust were released from claims regarding the Trust and the parties agreed to work towards developing a court-approved distribution of the corpus of the Trust in 2010.

[44] The Monitor provided information to the court about the proposed settlement. On February 18, 2010, the Monitor released its 39th Report in the CCAA Proceedings. The expressed purpose of the report was to provide the court with information about the settlement including an analysis of the impact of the settlement on the stakeholders.

[45] The 39th Report attached the Trust Agreements. The Report attached the unaudited financial statements for the Trust for the period ending December 31, 2008. The Monitor's report indicated that net assets of the Trust available for benefit payments at December 31, 2008 were approximately $123 million of which approximately $37 million was an unsecured promise from Nortel, which, as noted above, the parties call "the Due."

[46] In its 39th Report, the Monitor stated that in order to understand the Settlement Agreement, it was necessary to have basic information about the benefits and the role of the Trust. The Monitor noted that: "The HWT has been operated such that certain employee benefits have been paid by the HWT with trust assets, whereas other employee benefits have been funded by the Applicants on a pay-as-you-go basis, but paid through the HWT as an administrative matter."

[47] The Monitor noted that: "Based on the Monitor's review to date, the HWT has never had sufficient assets in the trust to pay the present value of all the benefits for all the plans that are designated under it nor was it legally required to do so."

[48] In paragraph 49 of the 39th Report, the Monitor noted the "Due". The report stated:

> 49. The net assets of the HWT available for benefit payments at December 31, 2008 were approximately $123 million, of which approximately $37 million was represented by an amount "Due from Sponsoring Company". The Monitor has been advised by the Applicants that this balance represents amounts due by the Applicants primarily related to benefit payments made to beneficiaries of the HWT prior to the Filing Date.

[49] The 39th Report described the releases that were part of the Settlement Agreement, and the Report expressed the Monitor's opinion that the releases were an important step in "resolving issues related to claims and potential claims against [Nortel], which will assist in the development of a [Restructuring] Plan." At paragraphs 101 to 103 of the Report, the Monitor described the importance of the releases under the heading "Avoiding Litigation Costs" as follows:

> *Avoiding Litigation Costs*
>
> 101. Provisions of the Settlement Agreement and the Settlement Approval Order result in the release of certain rights and claims primarily concerning pension plan administration, HWT administration and priorities (see paragraphs 94 and 95 above). The Monitor understands that the releases were part of the settlement process necessary in order for the Representatives, on their own behalf and on behalf of those they represent, to achieve certainty of payment of employee benefits and pension benefits, an achievement that Settlement Representative Counsel expressed as important to their constituents in the process leading up to the Settlement.
>
> 102. The release of certain claims and rights is an important step in the development of a Plan. The releases assist in claim determination and reduce the risk of litigation against the Applicants and their directors (who benefit from a priority charge pursuant to the Initial Order); thereby reducing the risk that assets would be depleted in order to fund potentially significant litigation costs.
>
> 103. The Monitor will not comment on the relative risks or potential success of any claims released as part of the Settlement; however, the Monitor is of the view that the releases represent a

> fair balancing of interests given the certainty achieved regarding employee benefits and the avoidance of potential litigation risks and costs and disruption to the development of a Plan.

[50] I pause here to note that Ms. Holley says that the Monitor's 39th Report did not disclose the facts that support her proposed class action for fraud. In particular, she says that the report did not disclose how the shortfall accrued or that the trustee had over a one-year period in 2005-2006 assisted Nortel to trust funds for unauthorized purposes. However, to foreshadow my conclusion below and as will become readily apparent from reading the affidavits and factums filed in opposition to the recommendations of the 39th Report and comparing them to the allegations in the Amended Statement of Claim, Ms. Holley did know the fundamental allegations that underpin her fraud action; namely, that there was a breach of trust by underfunding the Trust by $37 million and that there was a breach of trust by the trustee using trust assets reserved for the LTD and survivor beneficiaries to pay the pay-as-you-go plan beneficiaries.

[51] On March 26, 2010, Justice Morawetz declined to approve the February Settlement Agreement, but the agreement was amended and restated, and Justice Morawetz approved it on March 31, 2010, with written reasons released on April 8, 2010. See *Nortel Networks Corporation (Re)*, 2010 ONSC 1708.

[52] As mentioned above, at the time of the settlement approval motion, a group of LTD beneficiaries under the Trust opposed the Settlement Approval Order. This group was represented by the law firm of Rochon Genova LLP, who are Ms. Holley's lawyers of record and the proposed Class Counsel for Ms. Holley's proposed class action. In the CCAA proceedings, the objectors delivered affidavits from Diane Urquhart and from Ms. Holley.

[53] Ms. Urquhart, an economist, financial analyst, and mathematician, who was put forward as an expert, took the position that the Settlement Agreement ought not to be approved. In her affidavit she said that the settlement was grossly unfair and prejudicial. She referred to the information obtained from the Monitor's report, and she noted an underlying "breach of trust," and she referred to the negative impact of the Due. She deposed that she was extremely concerned because it appeared that there was a breach of trust and that the Trust had been seriously depleted by as much as $100 million. She noted that there appeared to be a $37 million loan made from the Trust to fund Nortel's pay-as-you-go plans. She said that there was evidence of a breach of trust.

[54] In her affidavit, Ms. Urquhart noted that she had reviewed the 39th Report and she understood it to reveal that there had been a breach of trust. She was concerned that the release would take away her rights of legal action as against the Releasees. Under the heading "The HWT is massively underfunded in breach of Nortel's trust obligations" she stated that the $37 million loan to record amounts owed to the Trust was likely cash taken out of the Trust to pay for the Pay-As-You-Go Employee Benefit Plans for which Nortel did make an annual contribution to fund annual claims. She said that this loan was effectively made from the assets belonging to the LTD beneficiaries and survivors of deceased Nortel employees. She stated that it was evident that there was a massive shortfall in the Trust of an amount likely in excess of $100 million and that the shortfall was only recently disclosed to the LTD beneficiaries. She said that Nortel's contributions in 2007 and 2008 were grossly inadequate at a time when the Trust was seriously underfunded. Her belief was that Nortel breached its obligations to make contributions from time

to time for the purpose of the Health and Welfare Plan, as determined by the Trustee on a sound actuarial basis.

[55] The Dissenting LTD Beneficiaries filed a factum opposing the Settlement Agreement. The factum alleges a breach of trust by one or more trustees with respect to the shortfall in the Trust, referred to the Due, and noted the withdrawal of reserve assets to fund benefits under the pay-as-you-go plans. The factum stated at paragraphs 58-60 as follows:

> 58. Although counsel have not had the opportunity to fully analyze the HWT Claims being released, the disclosure to date evidences a clear breach of the HWT trust agreement which required Nortel to make: "Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund as a result of the administration of the Health and Welfare Plan, and as may otherwise be required from time to time for the purpose of the Health and Welfare Plan, and determined by the Trustee on a sound actuarial basis."
>
> 59. This breach occurred under one or more of the trustee(s)' watch. Even where the trustee's stated role is more of a custodian, courts have still recognized the fiduciary obligations owed by the trustee to the beneficiaries of the trust. As stated by the British Columbia Court of Appeal in *Froesse v. Montreal Trust Co. of Canada* [1999] B.C.J. No. 1091 at para. 39 (B.C.C.A.) "there is what academics call an "overarching" obligation upon a custodial or administrative trustee to pay attention to the interest of the beneficiaries additional to its contractual duties provided in the trust indenture."
>
> 60. In *Froesse*, *supra*, the Court held that "within the scope of its duties as administrator ... the defendant breached its duty of care to the beneficiaries when it failed to respond to the discontinuance of Company contributions. ....

[56] Pausing here, it is worth noting for a variety of reasons that in paragraph 59 of this factum presented to oppose the CCAA release, Ms. Holley states that a breach of trust occurred while Royal Trust and Northern Trust were administering the Trust and that they breached their duties as defined by the British Columbia Court of Appeal in *Froesse v. Montreal Trust Co. of Canada,* [1999] B.C.J. No. 1091. Paragraph 59 of the factum for the CCAA proceedings is replicated as paragraph 58 in Ms. Holley's factum for these motions now before the court. In her current factum, she adds in the next paragraph a quote from *Froesse* at para. 26 that: "it is difficult to imagine a more significant indication of trouble than the virtual termination of contributions from the principal contributor to the plan."

[57] One reason why all this is notable, is that it belies Ms. Holley's argument that all the information released until August 2010 when the Monitor's 51st Report was released focused on Nortel's behaviour. A second reason that paragraph 59 of the CCAA factum is notable is that it indicates that as of the 39th Report, Ms. Holley was aware of alleged misconduct by Royal Trust and Northern Trust.

[58] Returning to the narrative of the CCAA proceedings, in his reasons for decision at paras. 45-47, Justice Morawetz summarized the objections to the Settlement Agreement, including the breach of trust allegations, of the dissenting group, as follows:

> 45. The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD employees are giving up legal rights in relation to a $100 million shortfall of benefits...

> 46. The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT [the Due] that they should be able to pursue.
>
> 47. Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, [visualize to avoid Nortel being sued by the trustee for an indemnity] rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue. [...]

[59] In his decision approving the Settlement Approval Order, after referring to the LTD group's argument that the Court should not release the trustee for breaches of trust including responsibility for the $37 million shortfall in contributions, Justice Morawetz stated at paras. 80-82:

> 80. In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.
>
> 81. The releases benefit creditors generally as they reduce the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.
>
> 82. Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

[60] Notwithstanding the objections, Justice Morawetz authorized a CCAA release. The Settlement Approval Order released Royal Trust and Northern Trust from all claims regarding the Trust except with respect to claims of fraud. The Order stated:

> THIS COURT ORDERS AND DECLARES that the Releasees, the trustee [Northern Trust] and the custodian of the Pension Plans ... are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to... (ii) the HWT, including without limitation the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in the subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

[61] It should be noted that the Settlement Agreement provided for a release in favour of various third-party releasees, which would include Royal Trust and Northern Trust. The Releasees are released from all claims relating to the Trust including without limitation, the administration of the Trust, funding of the Trust, and any obligation to contribute to the Trust, except claims with respect to fraud on the part of a Releasee.

[62] The Settlement Agreement also provides for a "claim-over release," which prohibits former and current Nortel employees and Trust beneficiaries from bringing any claim against

any third-party, if that third-party may reasonably be expected to have a claim against a Releasee.

[63] The objectors sought leave to appeal Justice Morawetz's approval of the Settlement Agreement. In a factum filed on May 18, 2010 in the Court of Appeal, they argued at paras. 29, 54, and 59 as follows:

> 29. The Objecting LTD Beneficiaries again emphasized that the Amended Settlement Agreement was patently unfair because the benefits it provided were far outweighed by the confiscation of their legal rights regarding the over $100 million breach of trust and ensuing shortfall in the HWT. [...]
>
> 54. It is equally offensive to public policy for solvent third parties such as the HWT trustee to escape liability for breaches of fiduciary duties without providing any "tangible and realistic" consideration to the releasing parties. In this regard, the limited disclosure to date evidences a clear breach of the HWT trust agreement which required Nortel to make 'Employer's contributions to the Trust Fund in amounts sufficient to pay any claims which may be asserted against the Trust Fund [...]
>
> 59. Beyond the third party releases, the LTD Beneficiaries' potential claims for priority are also meritorious. Here, given the nature of the alleged breaches of trust, the LTD Beneficiaries have, at a minimum, a very tenable basis for asserting priority in respect of the $37 million removed from the HWT.

[64] The Court of Appeal refused leave to appeal on June 3, 2010.

(b) The Monitor's 51st Report

[65] On August 27, 2010, the Monitor released its 51st Report. The purpose of this Report was to seek approval of a methodology for the termination of the Trust and for the allocation of the corpus of the Trust. The distribution was problematic because the Trust Agreement did not provide guidance and competing claimants had different interpretations and positions as to how the Trust's remaining assets should be distributed. With greater particularly about the various funds within the Trust, the Monitor's 51st Report described the history and operation of the Trust, in the same way that it had been described in the 39th Report.

[66] For the purposes of the motions now before the Court, it is particularly important to note what the Monitor had to say about the Trust's Financial Statements from 1982 to 2009, copies of which were attached as appendices to the Report. The Monitor attached a summary and a chart to assist in the review of the financial statements. The summary and the charts were described in paragraph 77 of the Report as follows:

> 77. To assist in a review of the financial statements:
>
> (a) A summary including certain notes that have evolved over the years from the years in which the notes first appeared is attached as Appendix "QQ"; and
>
> (b) A chart summarizing amounts from the financial statements called accounts receivable or "due from sponsoring corporations or company" is attached as Appendix "RR". As indicated therein, almost from the inception of the HWT, there have been amounts receivable from the sponsoring companies. As set out in the Thirty-Ninth Report, the Monitor has been advised by the Applicants that these amounts are primarily related to benefit payments made to beneficiaries of the HWT prior to the filing date. The Monitor

has found nothing to indicate that these amounts represent anything other than accumulated contributions owing.

[67] Appendix RR was a chart setting out the "Due" from the inception of the Trust. Ms. Holley states that knowing the information contained in this chart, most particularly, a footnote with respect to the Due for 2006 was necessary before her fraud claim could be discovered. For present purposes, the following excerpt will suffice:

APPENDIX "RR"

Health & Welfare Trust Fund

Debt Due from Sponsoring Company(ies) as shown on the HWT financial statements

Year	Amount $
1981	3,615,003
1982	2,488,577
1983	3,530,315
1984	7,575,941
1985	15,390,909

....

2000	29,697,000
2001	29,825,000
2002	27,759,000
2003	19,991,000
2004	20,290,00
2005	31,121,000
2006	42,518,000[1]
2007	40,643,000
2008	37,064,000
2009	1,358,000

1. As reported in the notes to the 2009 HWT financial statements, in 2005 Nortel undertook a valuation of the fund to determine the funded status of the plans. Nortel suspended contributions to the HWT for a 12 month period over 2005 and 2006, resulting in an increase in the Due from the Sponsoring Company amount.

[68] Once again, Ms. Holley with the aid of Ms. Urquhart represented a dissenting group that opposed the methodology for distributing the Trust's corpus. Ms. Urquhart again delivered an

affidavit setting out the alleged misappropriation of the Trust's assets. The objectors made written submissions to Justice Morawetz. In opposing the allocation methodology, the objectors noted the breaches of trust and the mishandling of the Trust's assets.

[69] Since, as noted above, Ms. Holley submits that she did not discover that there was an action in fraud against Royal Trust and Northern Trust until the delivery of the Monitor's 51st Report, it is necessary to examine what Ms. Urquhart said in her affidavit for the objectors.

[70] In her affidavit, under the heading "New Evidence Confirms $32 Million Withdrawal of Assets from HWT for 'Pay as You Go Items'," Ms. Urquhart stated that she had analyzed the contributions of Nortel by cash and by the Due and that she had identified a one-year moratorium in Nortel contributions between 2005 and 2006. She said the information in the Monitor's 51st Report confirmed that in 2005, $21 million, and in 2006, $11 million, was wrongly taken out of the Trust's assets and used to pay pay-as-you-go medical claims and life insurance premiums that Nortel was required to fund from its operations. She said this $32 million was removed when the Trust was under-funded for the incurred claims of the LTD and Survivors income beneficiaries.

[71] Referring to her March 2010 affidavit filed to oppose the Settlement Agreement, Ms. Urquhart said that new information in the 51st Report confirmed that the loan recorded as "Due from Sponsoring Company" in the Trust's financial statements meant that Nortel recognized it had an obligation to make contributions for the incurred claims of the LTD and Survivors income beneficiaries. She said the loan had existed for many years and had grown larger since 2005. It was her opinion that Nortel's ability to repay this loan was impaired by 2005 and that the reserve portion of the Trust was in a deficit position thereafter so that payments for pay-as-you-go insurance premiums of $17 million should not have been made from reserve assets.

[72] In November 2010, notwithstanding the objections of the objectors, by order dated November 9, 2010, Justice Morawetz approved an allocation methodology for the corpus of the Trust. See *Nortel Networks Corporation (Re)*, 2010 ONSC 5584, leave to appeal to Ontario Court of Appeal refused, 2011 ONCA 10, leave to appeal to SCC refused [2011] SCCA No. 124.

6. The Proposed Class Action

[73] On August 27, 2012, precisely on the second anniversary of the Monitor's 51st Report, Ms. Holley commenced this action by notice of action. The definition of the Class Members claimants is set out earlier in these Reasons for Decision.

[74] On September 26, 2013, there was a case conference at which the Defendants advised Ms. Holley that her Statement of Claim was defective.

[75] On October 29, 2013, Ms. Holley delivered an Amended Statement of Claim. She advances claims for fraudulent breach of trust, constructive fraud, and fraud. Given that she knew that a pleadings attack was inevitable, it is safe to assume that Ms. Holley held nothing back in pleading her case of fraud.

[76] Ms. Holley pleads that Royal Trust and Northern Trust knowingly and intentionally breached their trust and fiduciary duties because they knew that the trust fund was significantly underfunded. She submits that in concert with the soon to be insolvent Nortel they facilitated the breaches of trust and concealed the truth from the CCAA Monitor.

[77] She says Royal Trust and Northern Trust schemed with Nortel to unlawfully use trust funds for unauthorized purposes to protect Nortel's business interests. She alleges that the Defendants assisted Nortel to withdraw $32 million from the Trust between May 2005 and September 2006 without any actuarial basis or justification for the withdrawal of trust funds and any belief that the funds could be repaid and rather knowing that there was a high risk that the funds would not be paid. She says that Royal Trust and Northern Trust allowed Nortel to post an IOU (the Due) instead of actually making the necessary contributions to the Trust. She says that breached their duties by failing to collect on the Due before Nortel became insolvent.

[78] Ms. Holley pleads that the $32 million withdrawn was money for the Reserved Plans but was unlawfully used by Nortel to pay for benefits in the Paid as Incurred Plans, including active, LTD and pensioner medical and dental benefits, and active and LTD life insurance premiums that Nortel was obligated to pay directly from its own operations and funds. She submits that Nortel had no right to withdraw funds from the Trust to pay for benefits in the Pay as Incurred Plan.

[79] Ms. Holley submits that Royal Trust and Northern Trust knew, or were reckless and wilfully blind to the fact that the beneficiaries of the Trust would be at risk if the Trust was not funded on a sound actuarial basis. Ms. Holley pleads that Royal Trust and Northern Trust took unconscionable risks that would prejudice the rights of the beneficiaries, without having any right to take those risks by allowing trust funds to be removed from the Trust and not informing the beneficiaries. She pleads that the Defendants knew or ought to have known that their conduct would prejudice the beneficiaries who would not receive the benefits to which they were entitled.

[80] Ms. Holley pleads that the acceptance of the unsecured Due (the IOU) as Nortel's contribution to the Trust was a breach of fiduciary duty. She says the Due was effectively a varying loan from the Trust in favour of Nortel. She pleads that Royal Trust and Northern Trust granted increases to the Due despite their knowledge that Nortel's financial distress created a significant risk for the beneficiaries of the Trust who would not receive the benefits to which they were entitled.

[81] Ms. Holley pleads that Royal Trust and Northern Trust concealed their breaches of trust from the beneficiaries and the Monitor during Nortel's CCAA proceedings and secured the benefit of a third party release contained in a Settlement Agreement addressing employee-related claims.

[82] On November 22, 2013, Royal Trust filed a Statement of Defence. Royal Trust denies all allegations of wrongdoing.

[83] On November 25, 2013, Northern Trust filed a Statement of Defence. Royal Trust denies all allegations of wrongdoing.

[84] Both Royal Trust and Northern Trust deny any misconduct amounting to fraud and they rely on the CCAA release as barring Ms. Holley's action.

[85] The Defendants both plead that Ms. Holley's action is statute-barred under the *Limitations Act, 2002*. Northern Trust's pleading is illustrative. It states in paragraphs 20, 21, and 29, and 30 as follows:

> 20. Contrary to the allegations in paragraph 40 of the Amended Statement of Claim considerable information regarding the funding and operation of the HWT was disclosed in the CCAA

> Proceedings prior to the Settlement Approval Order being granted information contained in the 39th Report, including the 21st.
>
> 21. On the motion before Morawetz J. to approve the Settlement Agreement, the plaintiff made submissions to the Court in the CCAA Proceedings objecting to the Settlement Approval Order, and in particular to the Release in favour of Northern Trust contained therein. The plaintiff relied on substantially the same allegations contained in the Amended Statement of Claim, including but not limited to the existence of the Due, the use of HWT assets to fund "paid as incurred plan" benefits (which was permissible under the Trust Agreement), and the alleged non-disclosure of financial information regarding the HWT, to oppose the granting of the Release. The plaintiff's objections were not accepted by the Court, which ultimately granted the Settlement Approval Order.
>
> *Plaintiff's Claim is Statute-Barred*
>
> 29.. The plaintiff's claim is statute-barred, as the matters complained of in the Amended Statement of Claim were known to the plaintiff at the latest when the 39th Report was released on 29. February 18, 2010. Northern Trust pleads and relies on the provisions of the *Limitations Act*, S.O. 2002, c. 24, sch. B, as amended.
>
> 30. As to paragraph 46 of the Amended Statement of Claim, Northern Trust admits that the 51st Report of the Monitor in the CCAA Proceedings was delivered on or about August 27, 2010, but repeats that financial status of the HWT, including the existence and amount of the Due, the value of the HWT assets, and the estimated actuarial liabilities for the so-called "reserved plans," were all disclosed in the 39th Report.

C. DISCUSSION AND ANALYSIS

1. Introduction

[86] Three different attacks are made against Ms. Holley's proposed class action.

[87] The Defendants' first attack is the two-pronged attack that because of the release granted in the CCAA proceedings Ms. Holley can sue only for fraud and she has failed to do so for two mutually exclusive reasons. For the first prong, the Defendants argue that it is plain and obvious that there was no wrongdoing. For the second prong, they argue that if there was wrongdoing, it is plain and obvious that the wrongdoing does not equate to fraud and is rather the wrongdoing that was released by the release in the CCAA proceedings. As I will explain below, the Defendants' first argument fails at this juncture of the proceedings but their second argument succeeds.

[88] The Defendants' second attack is that in any event Ms. Holley's claim is statute-barred. As I will explain below, I agree that the action is statute-barred.

[89] The third attack is made just by Royal Trust. It argues that Ms. Holley's action is an abuse of process. As I will explain below, I disagree with this argument.

[90] Thus, as explained more fully below, because it is plain and obvious that Ms. Holley has no fraud claim to plead and also because her claim is statute-barred, I dismiss her action.

2. The Test on a Rule 21 Motion

[91] The Defendants' motions are brought pursuant to Rule 21.01, which states:

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that, ...

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

[92] Insofar as the motions were brought pursuant to rule 21.01 (1)(a), I grant leave to admit evidence. Ms. Holley did not consent to leave being granted, but she did not oppose the granting of leave.

[93] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[94] In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17-25, the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[95] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof: *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.).

[96] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.

[97] Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[98] Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

[99] A motion under rule 21.01(1)(a) for a determination before trial of a question of law may permit the court to strike out an action when it has been brought beyond a limitation period; *Beardsley v. Ontario*, [2000] O.J. No. 4057 (S.C.J.) at para. 11; aff'd [2001] O.J. No. 4574 (C.A.) at paras. 21 and 24. Under rule 21.01(1)(a), the court may consider whether the determination of the applicable limitation period is a question of law that would dispose of all or part of the action, if the material facts upon which such a determination depends are not in dispute: *Gowling Lafleur Henderson v. Springer*, 2013 ONSC 923 at para. 19; *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 (S.C.J.); *Whittaker v. Great-West Life Assurance Company*, [2008] O.J. No. 1194 (S.C.J.) at paras. 32-37 (S.C.J.).

[100] In the case at bar, I granted leave for evidence to be admitted, and the facts upon which I shall decide the limitation issue are indisputable or assume that the facts set out in the Amended Statement of Claim are taken as proven.

3. Was There Wrongdoing by Royal Trust and Northern Trust?

[101] Royal Trust and Northern Trust have decent arguments that they did nothing wrong in how they administered the Trust. They rely on Justice Morawetz's finding there was a single trust, and they say that if the reserve funds were depleted, they were depleted to make payments to the beneficiaries of the one trust. They point out that under the Trust Agreement there is no express obligation on the trustee to compel contributions from Nortel and there is the undisputable fact that the approach of accepting a "Due" from Nortel as a form of making contributions seems to have been an operative and transparent fact from the outset of the Trust. They point out that there was nothing hidden about how benefits were paid throughout the history of the Trust.

[102] In my opinion, although Royal Trust's and Northern Trust's arguments are decent arguments, the arguments are not so strong as to make it plain and obvious that Ms. Holley's claim is untenable and that she has no reasonable prospect of success.

[103] I do not see Justice Morawetz's finding of a single trust precluding Ms. Holley's possible success. As I suggested during oral argument, a last will and testament is often also a single trust and depending on the terms of the will, it might be wrong to use one beneficiary's trust fund assets to pay the legacies of another beneficiary under the same will. It is not plain and obvious that a similar type of wrongdoing did not occur in the case at bar.

[104] I do not see the circumstance that the trustees accepted a "Due" from Nortel as a form of making contributions from 1980 until the end of the Trust makes Ms. Holley's allegation of

wrongdoing untenable. Although a trial judge may agree with the trustees that there never was a breach, it is not plain and obvious that a trial judge could not conclude that the approach of the trustees was wrong. It is also not plain and obvious that a trial judge would not conclude that taking a Due or permitting a contribution holiday was only acceptable provided that the reserves of the Trust were actuarially sound to deliver the benefits for the designated beneficiaries.

[105] If a trial judge were to come to the conclusion that some Dues were unlawful, then it seems to me that it is not plain and obvious that the trustees taking a Due from Nortel, when it was attempting to put on some financial makeup to cover its business's blemishes, would not be wrongdoing.

[106] I appreciate that Northern Trust has the additional protection of the letter agreement dated December 1, 2005, but recalling that the plain and obvious standard sets a pole-vault high bar to jump over, it is not plain and obvious to me that this letter exculpates Northern Trust for what it did or what it allowed Nortel to do.

[107] Therefore, I conclude that it remains to be determined if Royal Trust's and Northern Trust's acts and omissions were compliant or non-compliant, authorized or unauthorized, under the Trust Agreement.

4. Fraud and Constructive Fraud and the Scope of the Release

(a) The Nature of Fraud and Constructive Fraud

[108] The second prong of Royal Trust's and Northern Trust's argument about their conduct not exposing them to liability is that assuming there was wrongdoing in the administration of the Trust, the wrongdoing did not amount to fraud and, therefore, the wrongdoing was released by the release ordered by Justice Morawetz in the CCAA proceedings.

[109] In order to evaluate the merits of the Defendants' argument that there was no constructive fraud or common law fraud, which I will consider in the next section of these Reasons, it is necessary to consider first the law about the nature of fraud and of constructive fraud.

[110] It is also necessary to consider the nature of fraud because Ms. Holley argued that the CCAA release did not release constructive fraud and conversely the Defendants argued that the exemption in the release for fraud was only for common law fraud.

[111] As a matter of the common law, fraud is associated with the tort of deceit, which is also called the tort of fraudulent misrepresentation.

[112] The constituent elements of a common law fraud, deceit, or fraudulent misrepresentation claim, as they are variously called, are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages: *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.) at p. 344; *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Hryniak v. Mauldin*, 2014 SCC 7 at para. 87; *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1990), 78 Alta. L.R. (2d) 62 (Q.B.), aff'd (1992), 3 Alta. L.R. (3d) 124 (C.A.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

[113] At the fundamental core of fraud, deceit, or fraudulent misrepresentation is the moral turpitude or the defendant. As Professor Emeritus G.H.L. Fridman states in *The Law of Torts in Canada* (3rd ed.) (Toronto: Carswell, 2010) at p. 707: "Liability for fraud or deceit is based upon the idea that to lie or to deceive are morally wrong acts which merit legal sanction when they result in suffered by the victim."

[114] While the notion of fraud may elude precise definition, it necessary involves some aspect of impropriety, deceit, or dishonesty: *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2001] O.J. No. 2344 at para. 8 (C.A.); *Cineplex Odeon Corp. v. 100 Bloor West Partner Inc.*, [1993] O.J. No. 112 at para. 30 (Gen. Div.).

[115] In *Washburn v. Wright* (1913), 31 O.L.R. 138 (App. Div.), Justice Riddell said, at p. 147:

> Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is ... done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" *Ex p. Watson* (1888), 21 Q.B.D. 301, per Wills, J., at p. 309.

[116] The moral turpitude of fraud, deceit, or fraudulent misrepresentation are found in the constituent elements that: (1) the defendant knows that his or her statement is false or the defendant is indifferent to the statements truth or falsity; and (2) the defendant having an intent to deceive the plaintiff. The common law punishes the immorality of lying for an evil purpose with an award of damages. In the contractual setting, equity also provided the remedy of rescission for fraudulent misrepresentation with the same constituent elements, save that it is not necessary for the plaintiff to show damages in order to obtain rescission.

[117] That the moral turpitude elements of fraud are fundamental to liability was very recently demonstrated by the Supreme Court of Canada's judgment in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, which was the companion case to *Hryniak v. Mauldin*, *supra*, now the leading judgment about the test for a summary judgment.

[118] In *Hryniak v. Mauldin*, the Supreme Court upheld a summary judgment for fraud, and in *Bruno Appliance and Furniture Inc. v. Hryniak*, the Supreme Court upheld the dismissal of a summary judgment for fraud precisely because there was a genuine issue for trial about the moral turpitude elements of fraud, which were confirmed by Justice Karakatsanis for the Court. At paragraphs 18 to 21 of her judgment, she stated:

> 18. The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:
>
> > First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false... . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.
>
> 19. This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 319-20, that tort law

> requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".
>
> 20. Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330 "fraud without damage gives ... no cause of action" (p. 340).
>
> 21. From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss..

[119] Constructive fraud is not a common law tort, but a doctrine of equity in its supervision of trustees, trustees *de son tort*, fiduciaries, and contracting parties, but constructive fraud also involves an element of immorality. However, the moral turpitude of constructive fraud is of a different sort than the lying with an intent to deceive which is the insignia of common law fraud. Thus, in *Guerin v. R.*, [1984] 2 S.C.R. 335 at p. 389, Justice Dickson focused on unconscionability and adopted the definition of equitable fraud from the English case of *Kitchen v. Royal Air Force Association*, [1958] 2 All E.R. 241 at p. 249 as: "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."

[120] In *Nocton v. Lord Ashburton*, [1914] A.C. 932 at p. 953, the famous case about a lawyer's breach of fiduciary duty, Lord Haldane stated that in equity, constructive fraud means "not moral fraud in the ordinary sense, but a breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

[121] Justice Blair recently discussed the utility of equitable or constructive fraud to supervise a variety of relationships in *Outaouais Synergest Inc. v. Keenan*, 2013 ONCA 526 at para. 93, where he stated:

> 93. Although not necessarily an exclusive list, there appear to be certain recognized circumstances where the concept of equitable fraud is engaged. First, conduct amounting to equitable fraud or fraudulent concealment may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability: see *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 356 (*per* Wilson J.) and at p. 390 (*per* Estey J.); *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278, 81 B.C.L.R. (4th) 199, leave to appeal refused, [2008] S.C.C.A. No. 416. Secondly, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake: see *Sylvan Lake*, at paras. 38-39. Finally, equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 571.

[122] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club*, 2002 SCC 19, Justice Binnie for the majority of the Supreme Court of Canada considered whether equitable fraud could provide the basis for a claim for rectification, and at para. 39 of his judgment, Justice Binnie described the nature of equitable or constructive fraud as follows:

> 39. What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (BCSC), McLachlin C.J.S.C. (as she then was) observed that "in this context fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable

> fraud or constructive fraud ... Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": [citations omitted].

[123] As appears from this passage in Justice Binnie's judgment, equitable fraud refers to conduct falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained by his or her conduct. The idea of unconscientiousness connotes the idea of conduct not guided by principles of what is the right thing to do but falling short of the evil or wickedness of deceitful conduct. Justice Binnie described constructive fraud as wider than strict fraud and including all kinds of unfair dealing and unconscionable conduct.

[124] Returning to *Guerin v. R.*, *supra*, where Justice Dickson referred to constructive fraud as unconscionable conduct, in this case, there was no trust relationship between the Federal Government and the Musqueam Indian Band, but the Federal Government was found liable for breach of fiduciary duty. The Band had surrendered lands from its reserve, and the Crown entered into a lease of the lands to a golf club. The breach of fiduciary duty was that the government agreed to terms of the lease that were contrary to the terms approved by the Band at the surrender meeting.

[125] For present purposes the important point to note is that the judges of the Supreme Court agreed that the trial judge had been correct in dismissing the alternative claim in deceit because there was no finding or dishonesty or moral turpitude. Justice Wilson (Justices Ritchie and McIntyre concurring) stated at paras. 39-40:

> 39. The appellants base their claim against the Crown in deceit as well as in trust. They were unsuccessful on this aspect of their claim at trial but have raised it again on appeal to this Court. While the learned trial judge found that the conduct of the Indian Affairs personnel amounted to equitable fraud, it was not such as to give rise to an action for deceit at common law. He found no dishonesty or moral turpitude on the part of Mr. Anfield, Mr. Arneil and the others. Their failure to go back to the Band and indicate that the terms it had approved were unobtainable, their entry into the lease on less favourable terms and their failure to report to the Band what those terms were all flowed, he found, from their paternalistic attitude to the Band rather than from any intent to deceive them or cause them harm.
>
> 40. Nevertheless, there was a concealment amounting to equitable fraud. It was "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (*Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, per Lord Evershed M.R., at p. 573). The effect of the finding of equitable fraud was to disentitle the Crown to relief for breach of trust under s. 98 of the *Trustee Act*, R.S.B.C. 1960, c. 390, now R.S.B.C. 1979, c. 414. A trustee cannot be exonerated from liability for breach of trust under that section unless he has acted "honestly and reasonably".

[126] It was in the context of the Supreme Court's conclusion that equitable fraud was sufficient to prevent the running of a limitation period that Justice Dickson (Justices Beetz, Chouinard, and Lamer concurring) made the comment noted above alluding to equitable fraud as defined by Lord Evershed *Kitchen v. Royal Air Force*. The complete text of his comment at para. 115 of his judgment about the distinction between fraud and equitable fraud is as follows:

> 115. It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or

> until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band. The limitations period did not therefore start to run until March 1970. The action was thus timely when filed on December 22, 1975.

[127] That equitable or constructive fraud does not necessarily connote dishonesty and is therefore less odious than common law fraud is a point that also emerges from Justice Sharpe's judgment in *Edwards v. Law Society of Upper Canada* (1998), 39 O.R. (3d) 10 (S.C.J.), revd. (2000), 48 O.R. (3d) 321 (C.A.), leave to appeal to the S.C.C. refused, [2000] S.C.C.A. No. 533.

[128] In this case, Edwards sued the executors of the estate of a deceased lawyer who was alleged to have committed fraud. Justice Sharpe dismissed the action based on the executor's plea of *plene administravit*. This decision was reversed by the Court of Appeal. However, the Court of Appeal agreed with Justice Sharpe's conclusion that that claim against the executors was not statute-barred by the two-year limitation period under the *Trustee Act* because under the former *Limitations Act,* R.S.O. 1990, common law actions for fraud were exempted from all limitation periods, including the one found in the *Trustee Act*. For present purposes, the point to note is that Justice Sharpe drew a distinction between common law civil fraud for which there was no limitation period and equitable fraud for which there was a limitation period under the *Trustee Act* and he explained the reason for the distinction at paragraphs 28-32 of his judgment.

[129] Justice Sharpe explained that the limitation period in the *Trustee Act* was designed to apply only to "innocent breaches of trust" and not applying to "fraudulent acts." He pointed to English cases that drew a distinction between "constructive or equitable fraud" and "actual fraud." As a matter of statutory interpretation, he concluded that the former *Limitations Act* exempted only common law fraud from the running of limitation periods but the statutory language did not apply to cover acts which are not dishonest. These claims could be statute-barred. At paragraph 32 of his judgment, Justice Sharpe stated:

> 32. .... The suggestion that an innocent breach of trust gains the protection accorded by s. 44 from otherwise applicable limitation provisions cannot, in my opinion, be reconciled with the language of s. 44 which only applies to "fraud or fraudulent breach of trust." That statutory language is simply not apt to cover acts which are not dishonest. Giving full allowance for the concept of constructive or equitable fraud, it is difficult to see how an innocent breach of trust could be included within the phrase "fraudulent breach of trust." ....

[130] To summarize, at its core, common law fraud involves dishonest and moral turpitude. The fraud elements of common law fraud are that the defendant has an intent to deceive and makes a false statement that he or she knows is false or the defendant makes a false statement that he or she is indifferent to its truth value. Constructive fraud does not necessarily involve dishonesty or moral fraud in the ordinary sense, but a breach of sort that would be enforced by a court of conscience.

(b) The Scope of the CCAA Release

[131] Justice Sharpe's interpretative reasoning commends itself to me in interpreting the scope of the release ordered in the CCAA proceedings in the immediate case. Given the factual circumstances of those proceedings and the arguments that the parties made in supporting or opposing the release, I would interpret the CCAA release as discharging liability for all forms of misconduct including equitable or constructive fraud and the exemption part of the release as excluding only common law fraud from the discharge of liability.

[132] Justice Morawetz was aware that Ms. Holley was objecting to the conduct of the Trustees and at paragraph 81 of his Reasons for Decision, set out above, he said that the CCAA release benefitted creditors generally because, amongst other things, it reduced the risk that Nortel would be sued by the trustees for contribution and indemnity if they were sued. The release he ordered covered the administration of the trust and the investment of the Trust's assets; i.e. it covered the activities of Royal Trust and Northern Trust. If Ms. Holley's interpretation of the release as not covering constructive fraud were correct, then the release would become sterile. In my opinion, Justice Morawetz intended the release to have the utility of barring constructive fraud and other breaches of trust or fiduciary duty by the trustees.

[133] Contrary to what I was told during the argument of these motions, Justice Morawetz could have also released Ms. Holley's claims for fraud against the trustees. Justice Morawetz, a scholar in bankruptcy and insolvency law, would have been aware of the Court of Appeal's 2008 decision in *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, where at para. 111, the Court held that the parties to a CCAA proceeding are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. Justice Morawetz recently invoked this authority in *Labourers' Pension Fund of Central and Eastern Canada (Trustees) v. Sino-Forest Corp.*, 2013 ONSC 1078.

[134] In the *Metcalfe & Mansfield* case, Justice Blair stated at para. 111:

> 111. The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotini's Restaurant Corp. v. White Spot Ltd.*, [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[135] The *Metcalfe & Mansfield* case at para. 115 is also authority that a CCAA release can release claims against third parties including claims for fraud, tort, breach of fiduciary duty, etc.

[136] For present purposes, the point to keep in mind is that Justice Morawetz had argument before him that the conduct of the trustees in their administration of the trust was being impugned as an egregious breach of trust; i.e., the trustees were being impeached for a constructive fraud, and yet while carving out fraud, Justice Morawetz approved a release that covers misconduct with respect to contributions to the Trust and with respect to the administration of the Trust. It appears that he was surgical in approving a release that encompassed constructive fraud (fraud in equity) but that did not cover common law civil law fraud.

[137] This interpretation that the CCAA release in the case at bar encompasses constructive fraud but not common law fraud is supported by the express language of the release, set out above. The discharge of liability part of the release expressly includes equitable claims; visualize:

> ... are hereby released, discharged ... from all ... claims ... whether arising by contract, agreement ... under statute, civil law, common law, or in equity ... related to... the HWT , including without limitation the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, ...

The exemption from the release does not refer to equity and refers only to fraud; visualize:

> ... provided that nothing herein shall release a director of Nortel from any matter referred to in the subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

[138] I conclude that the release bars constructive fraud claims but the common law torts of fraud, deceit, or fraudulent misrepresentation are not barred. It appears from the circumstances that Justice Morawetz intended that the CCAA release be as encompassing as possible while excluding civil law fraud.

[139] I will return to this conclusion below, but for the purposes of this Rule 21 motion, its significance is that if I am correct, then it is plain and obvious as a matter of interpretation of the release that Ms. Holley's constructive fraud or equitable fraud causes of action are barred by the release. If I am wrong, then the questions become: (a) whether or not Ms. Holley has pleaded a tenable cause of action of constructive fraud, with its taint of unconscionability or unconscientiousness; or (b) whether or not Ms. Holley has pleaded a tenable cause of action for common law fraud with its taint of dishonesty.

5. Does Ms. Holley Have a Cause of Action for Constructive Fraud?

[140] Assuming that constructive fraud is not released by the CCAA and assuming that the claim for constructive fraud is not statute-barred under the *Limitations Act, 2002*, the next question is whether or not Ms. Holley's Amended Statement of Claim pleads a tenable claim for constructive fraud.

[141] With the above assumptions, if her Amended Statement of Claim adequately pleads constructive fraud with its taint of unconscionability or unconscientiousness, then it would survive the attack being made by the Defendants' Rule 21 motions.

[142] I can be brief in answering this issue. With the above assumptions about the scope of the CCAA release and about the operation of the *Limitations Act*, in my opinion, Ms. Holley has adequately pleaded a claim for constructive fraud. In other words, to use the double-negative legal jargon of a Rule 21 motion, it is not plain and obvious that she has not pled a tenable constructive fraud claim.

[143] The problem for Ms. Holley, however, is that although she has pleaded a tenable constructive fraud claim, the claim is caught by the CCAA release.

6. Does Ms. Holley Have a Cause of Action in Fraud?

[144] Before considering the Defendants' arguments about the *Limitations Act, 2002* and Royal Trust's abuse of process argument, the last cause of action issue to consider is whether Ms. Holley has pleaded a tenable claim of common law fraud against Royal Trust and National Trust.

[145] Having regard to my conclusion that the CCAA release covers constructive fraud, for Ms. Holley's Amended Statement of Claim to survive the Defendants' Rule 21 motion, this issue is crucial.

[146] When one removes the rhetorical salt, pepper, and hot spices of conclusory adjectives of wrongdoing and moral turpitude, Ms. Holley's cause of action for fraud can be distilled to the following constituent elements of material fact:

- Royal Trust and Northern Trust knew that the Trust was underfunded and permitted Nortel or schemed with Nortel to allow it to withdraw $32 million from the Trust so that Nortel could pay its pay-as-you-go obligations rather than paying for them as required from its own assets.
- Royal Trust and Northern Trust knew or were willfully blind to the fact that the withdrawal of funds was unlawful, unjustified, and imperilled the viability of the Trust to pay the benefits under the Trust. They breached their trust and fiduciary duties by accepting the unsecured Due rather than requiring cash from Nortel and the acceptance of the Due imperilled the viability of the Trust to pay the benefits under the Trust.
- Royal Trust and Northern Trust breached their trust and fiduciary duties by not enforcing the unsecured Due and this failure imperilled the viability of the Trust to pay the benefits under the Trust.
- Royal Trust and Northern Trust concealed their breaches of trust from the beneficiaries and the Monitor during Nortel's CCAA proceedings and secured the benefit of a third party release contained in a Settlement Agreement addressing employee-related claims.

[147] In paragraphs 54 of her factum for this motion, Ms. Holley describes her claim for fraudulent breach of trust as follows:

> 54. The facts as pleaded demonstrate that Northern Trust and Royal Trust committed breach of trust in respect to the HWT that has reached the level of fraudulent breach of trust, as defined in numerous common law cases, which is: "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take." Northern Trust and Royal Trust knowingly took risks with the HWT assets, when they had no right to do so. Alternatively, the trustees were reckless or wilfully blind to the risks taken and to the rights of the HWT beneficiaries.

[148] In my opinion, accepting these material facts as true, there is no dishonesty or moral turpitude of the degree necessary to establish common law fraud, and it is plain and obvious that the Amended Statement of Claim does not plead the fraud elements of the common law torts of fraud, deceit, or fraudulent misrepresentation. There may be a breach of contract or a breach of trust, or a constructive fraud, but there is no dishonesty or moral turpitude of the degree necessary to constitute common law fraud, which is a very serious tort precisely because it responds to genuine and not constructive dishonesty and moral turpitude.

[149] If their interpretation of the Trust Agreement is wrong, then it may be that Royal Trust and Northern Trust were negligent, careless, and in breach of their contractual or fiduciary duties under the Trust Agreement, but there was no lying or trickery or intent to deceive in making payments to beneficiaries of the Trust or in accepting the Due from Nortel.

[150] There may be constructive fraud pleaded in the Amended Statement of Claim, but there is no common law fraud because there is no false statement by commission or omission. Rather, the Trustees transparently disclose that Nortel was not making its contributions and that there was a "Due from Plan Sponsor" and it is disclosed that the Trust is using its reserve account to pay not only for the Reserve Plans but also for the pay-as-you-go plans. Ms. Holley cannot plead that she was misled or deceived by any disclosures, non-disclosures, or false statements because she was not misled.

[151] Ms. Holley knew the truth that $37 million was being allocated in a way that she says was contrary to the terms of the Trust Agreement. While the Trust may arguably have been recklessly administered by the Defendants to the extent of their conduct constituting constructive fraud, they made no statements knowing the statements to be untrue and they made no statements with reckless indifference to their truth value. There is no malice or intent to deceive the beneficiaries of the Trust or any trick perpetrated by the trustees on Ms. Holley and the other LTD beneficiaries.

[152] In my opinion, it is plain and obvious that the material facts pleaded by Ms. Holley do not constitute a tenable plea of common law fraud and the Amended Statement of Claim should be struck out without leave to amend because Ms. Holley has had the opportunity to put her best case forward, and she has failed to show a reasonable cause of action for fraud.

7. Is Ms. Holley's Claim Statute-Barred?

[153] Royal Trust and Northern Trust argue that Ms. Holley's claim is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24. Sch. B. It should be appreciated that this defence applies to both the fraud claim and also the constructive fraud claim. In other words, this defence is mutually exclusive from the defence based on the effect of the CCAA release, which I have interpreted to discharge constructive fraud but not fraud claims.

[154] For this argument, the pertinent sections of the *Act* are a sections 1, 4, and 5, which state:

> *Definitions*
>
> 1. In this Act, ...
>
> "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> *Discovery*
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. ...

[155] The discoverability principle governs the commencement of a limitation period and stipulates that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief: *Kamloops v. Nielson* (1984), 10 DLR (4th) 641 (S.C.C.); *Central Trust Co. v. Rafuse* (1986), 31 DLR (4th) 481 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 at para. 26 (S.C.J.) affd. 2009 ONCA 692. Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.

[156] The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period, if he or she knows or ought to know the existence of the material facts, which is to say the constitute elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 at para. 27 (S.C.J.) affd. 2009 ONCA 692; *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (C.A.).

[157] I can be relatively brief in discussing whether or not Ms. Holley's claims are statute barred. Quite simply, I agree with the Defendants' argument, and I conclude that it is plain and obvious that Ms. Holley discovered her claim around the time of the Monitor's 39th Report.

[158] The case at bar may be somewhat unique in that the mental state of discovery, usually in the metaphysical realm of what a person knows or ought to know, has manifested itself through affidavits and factums and reported judgments with written expressions of knowledge, akin to admissions of what Ms. Holley discovered at the time of the 39th Report. Those written expressions reveal that with the 39th Report, she knew the factual basis for her constructive fraud and fraud claim against the Defendants.

[159] Although it is not necessary for the running of the limitation period for the plaintiff to know the legal significance of the facts, in the case at bar, Ms. Holley had legal representation and the record of the affidavits and factums and, in particular, the reference to *Froesse v.*

Montreal Trust Co. of Canada, *supra* shows that that she was aware of the legal basis of the claim against Royal Trust and National Trust.

[160] The case at bar is not the type of case in which the court should postpone deciding the application of the *Limitations Act, 2002* to a summary judgment motion or a trial. Apart from the presumption in s. 5 (2) of the *Act* that a person with a claim shall be presumed to have discovered the claim on the day the act or omission on which the claim is based took place, which would commence the running of the limitation period in 2006, the court's own record from the CCAA proceedings shows that Ms. Holley discovered the factual basis for her claim around the time of the 39th Report of the Monitor in February 2008. She did not commence her claim until August 2010 and, in my opinion, it is plain and obvious that both her claim for constructive fraud and also her claim for common law fraud, if any, are statute-barred.

8. Is Ms. Holley's Action Barred as an Abuse of Process?

[161] Having regard to my conclusions above that Ms. Holley's constructive fraud claim is barred by the release in the CCAA proceedings and that her claims for constructive fraud and common law fraud are statute-barred under the *Limitations Act, 2002*, it is not necessary to rule on Royal Trust's argument that Ms. Holley's action should be dismissed as an abuse of process.

[162] However, because the point was fully argued and because there may be an appeal, I will briefly explain why I would not dismiss her action on this basis. There are two reasons.

[163] First, it is not plain and obvious that her present action re-litigates any cause of action that was already decided by Justice Morawetz. He certainly did not decide whether any frauds had been committed and the CCAA release excludes fraud claims. He also did not decide whether constructive fraud had been committed but, in my opinion, he decided only that constructive fraud, if any, should be released by the CCAA release.

[164] There may be an *issue estoppel* about whether the Trust is a single trust, but as I explained above, the unanswered question is whether there was fraudulent conduct with respect to that singular trust and in my opinion that issue was not litigated on its merits.

[165] Second, the application of the abuse of process doctrine is discretionary. The court has a discretion in regards to estopping a litigant from re-litigating an issue, and the court will not preclude a litigant from proceeding with its claim, if a bar would lead to an injustice: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraph 19 (S.C.C.). See also: *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.); *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.); *Monteiro v. Toronto Dominion Bank* (2008), 89 O.R. (3d) 565 at paragraphs 53-54 (C.A.).

[166] In my opinion, in the circumstances of the case at bar, excepting the limitation period defence, and assuming that there was a tenable claim for fraud, it would be unjust to bar Ms. Holley from having that tenable fraud claim determined on the merits. Further, in my opinion, in the circumstances of the case at bar, excepting the limitation period defence, it would be unjust to bar Ms. Holley from having her tenable constructive fraud claim determined on the merits.

D. CONCLUSION

[167] For the above reasons, I grant Royal Trust's and Northern Trust's Rule 21 motions.

[168] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Royal Trust's and Northern Trust's submissions within 20 days of the release of these Reasons for Decision followed by Ms. Holley's submissions within a further 20 days.

Perell, J.

Released: February 11, 2014

CITATION: *Holley v. The Northern Trust Company*, Canada, 2014 ONSC 889
COURT FILE NO.: 12-CV-462273CP
DATE: 20140211

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JENNIFER HOLLEY

Plaintiff

- and -

THE NORTHERN TRUST COMPANY, CANADA and THE ROYAL TRUST COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

Perell, J.

Released: February 11, 2014

33

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November 5, 2009

Our File No.: 08-3800

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Dear Sirs/Mesdames:

Re: CCAA Proceedings of Nortel Networks Corporation *et al.* ("Nortel")

Your correspondence to Mr. Justice Morawetz was forwarded to us in our capacity as counsel to Ernst & Young Inc., the court appointed Monitor in Nortel's CCAA proceeding.

Having acted in this capacity in a large number of these kinds of proceedings, the Monitor and its representatives understand that Nortel's insolvency has created a very difficult and stressful situation for each of you and your families, and for all of those receiving long-term disability incomes from the Health and Welfare Trust established by Nortel.

Representatives of the Monitor and its legal counsel have met and continue to meet with your court-appointed counsel and participated in the Webinar for Nortel employees on long term disability held on October 27. In addition, we have provided your legal counsel and your court-appointed representative with the information and documents currently available with respect to the Health and Welfare Trust, the provision of which was made subject to a confidentiality agreement.

As with other matters in the Nortel proceeding, 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

Goodmans LLP

and when disclosure of documents should be made, taking into account the interests of all stakeholders and other facets of the restructuring.

Regarding your request, the Monitor is currently working with the Company and its advisors with respect to disclosure of information concerning the Health & Welfare Trust. For the time being, the Monitor remains of the view that the disclosure of certain of the requested information should remain subject to the non-disclosure agreement, given a number of matters currently in progress in the restructuring. However, we assure you that the Monitor and its counsel take your concerns seriously and will reconsider your request on an on-going basis as the restructuring evolves.

The Monitor will be reporting to the Court on a number of matters before November 30, 2009 and will provide an update on disclosure and timing of matters related to the Health and Welfare Trust at that time.

Yours very truly,

GOODMANS LLP

Gale Rubenstein
GOR/dm

cc: Lee Close (Ernst & Young Inc.)
Murray McDonald (Ernst & Young Inc.)
Mark Zigler (Koskie Minsky LLP)
Susan Philpott (Koskie Minsky LLP)
Barry Wadsworth (CAW)
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Urquhart

Subject: FW: [SPAM]Fw: Request for Public Disclosure of Legal Documents Related to Nortel Long Term Disabiity Benefits and the Health and Welfare Trust

From: Lawrence Clooney [mailto:lkclooney@hotmail.com]
Sent: November-02-09 4:02 PM
To: Arlene Plante (LTD); Nanc Ekiert (LTD); Josee Marin (LTD); Greg McAvoy (LTD); jholley@xplornet.com
Cc: Diane Urqhart
Subject: [SPAM]Fw: Request for Public Disclosure of Legal Documents Related to Nortel Long Term Disabiity Benefits and the Health and Welfare Trust

The contents of this email are CONFIDENTIAL for the time being. Do NOT send to anyone else for the time because we need to give the justice folks time to move on our request in a positive ethical manner.

Lawrence

From: Lawrence Clooney
Sent: Monday, November 02, 2009 2:38 PM
To: geoffrey.morawetz@jus.gov.on.ca
Cc: heather.j.smith@jus.gov.on.ca ; thomas.s.harrison@ontario.ca ; tara.stead@ontario.ca
Subject: Request for Public Disclosure of Legal Documents Related to Nortel Long Term Disabiity Benefits and the Health and Welfare Trust

Dear Justice Geoffrey Morawetz:

I'm writing to you on behalf of the Rights for Canadian Nortel Disabled Employees (RCNDE) group to request that you as judge for the Nortel CCAA proceeding require that Nortel post all the material contracts and legal documents pertaining to the Nortel Canadian long term disability benefits plan and the Nortel Health & Welfare Trust (H & WT) in an electronic format on the Ernst & Young Canada Nortel Court Monitor's Website. Please ensure that our requested documents are easily accessible and viewable by the Nortel Canadian long term disabled employees, with the English language being an acceptable format.

We are not satisfied with the Ernst & Young Canada Court Monitor Tom C. Ayres' pledge to provide a summary report of the Nortel H&WT in an upcoming Court Monitor's report. He made this pledge on the October 27, 2009 LTD Webinar hosted by Susan Philpott and Mark Zigler of KM LLP, your appointed Representative Counsel for the Nortel pensioners, long term disabled and severed employees. The lawyers at KM LLP have advised our group of disabled persons that they are unable to provide a copy of the material contracts and legal documents we request due to a Non Disclosure Agreement. Both KM LLP and the Ernst & Young Canada Court Monitor have received these documents.

Our group would like to examine for ourselves the legal documents relevant to our LTD benefit since our benefit brochures indicate that if there is a difference between the benefit brochure and the legal documents for the LTD plan the plan legal documents will prevail. Up until 2005, Nortel never disclosed to us that our long term disability benefits were not insured by an insurance company. Even in 2005, when Nortel said our long term disability benefits were self-insured, they said this meant that Nortel plays a role similar to that of an insurance company for its employees and that the Company assumes the risk. Many of us made employee contributions to the Nortel LTD plan to

raise our LTD coverage from 50% to 70% of pre-disability earnings, and now we wonder where did our money go.

The documents we wish to see are:

1. legal documents for the Long Term Disability Benefit
2. legal documents for the Survivor Income Benefit
3. all financial and legal documents pertaining to the H&WT, which includes contracts with all past and present trustees and benefit administrators.
4. the plan for wind-up of the H&WT upon Nortel's liquidation
5.

We believe the public disclosure of the requested information is key to our personal and group decisions about creditor claims, full examination of our legal rights for remedy of our situation in an expeditious manner and simply planning for our future in terms of living arrangements and the funding of our drug and other medical needs. Our request is of an urgent nature, since we have been advised in the October 27, 2009 LTD Webinar hosted by KM LLP that Nortel is paying for our current LTD income from the H & WT assets, that is only $69 million as of June 30, 2009. We are advised that this small amount of assets is also being depleted by other beneficiaries, such as survivor income for deceased Nortel employees. We would like to see our requested documents within 5 business days on the Nortel Court Monitor website.

I wish to thank you in advance for ensuring that the material contracts and legal documents that are our right to see as creditors in this bankruptcy proceeding will be posted on the Ernst & Young Canada Website as soon as possible.

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34

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE

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

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

MOTION HEARING

(March 3, 4, and 5, 2010)

-- Held before the Honourable Mr. Justice Morawetz, at 361 University Avenue, Courtroom 6-1, Toronto, Ontario, on the 3, 4, and 5th day of March, 2010.

APPEARANCES:

D. Tay J. Stam S. Wood	For Nortel Networks Corporation, et al.
L. Barnes	For the Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited
B. Zarnett C. Armstrong G. Rubenstein J. Carfagnini	For the Monitor, Ernst & Young Inc.
B. Wadsworth	For all active and retired Nortel employees represented by the CAW-Canada
K. Zych S. R. Orzy	For the Canadian Lawyers for the Informal Nortel Noteholder Group
M. Zigler S. Philpott	For the Former Employees of Nortel

J. Carhart For LG Electronics Inc.
M. Simms
J. Klotz

M. Starnino For the Superintendent of Financial Services as Administrator of the Pension Guarantee Fund

M. J. Wunder For the Canadian Lawyers for the Official
R. Jacobs Committee of Unsecured Creditors

A. Jaques For Recently Severed Canadian Nortel Employees Committee and NCCE

S. Dunphy For GENBAND

R.B. Schill For Nortel Networks UK (Administration)

A. Hirsh For the Board of Directors of NNL and NNC

J. Rochon For the Opposing LTD Employees

ALSO PRESENT:
A. MacFarlane
And other unidentified parties

March 3, 2010

Session

THE COURT REGISTRAR: Order, all rise. Court is in session, please be seated.

MR. TAY: Good morning, Your Honour. I've handed up pieces of paper. That is, to the best of our knowledge, the complete list of material that should be before you today. It's a lot to read, and I am sure it will be provided.

THE COURT: I have what is here. My law clerk was of great help. A couple of housekeeping announcements at the opening. I have been informed we have America Sign Language available. Is there anyone in the courtroom that requires America Sign Language and interpretation? If so, the interpreter will remain. If not, he will be excused. All right. I don't see anyone who requires this.

THE INTERPRETER: Your Honour, I will remain for awhile yet, even if I don't continue.

THE COURT: Thank you. We are on real-time reporting, and the reporter has requested that because of translation issues that if anyone is speaking that they do so in an elevated

voice, so there is an accurate transcript of what is transpiring.

MR. MACFARLANE: A housekeeping issue. There is a translator behind me, and I have a stereo vibe here. There is French interpreter behind me, and I am having a problem hearing. I wonder if she may sit somewhere else. I am sure other counsel are having the same problem hearing. It's hearing two different languages at once.

THE COURT: Where is she? Behind you?

THE FRENCH INTERPRETER: Good morning, I am the French interpreter. There is another one as well.

THE COURT: The difficulty, I gather, is it's a distraction as to where you are located?

MR. MACFARLANE: Yes, Your Honour.

MR. TAY: Perhaps she could sit over there, and it may be easier for her as well.

THE COURT: We usually put jurors there, but we have no jury today. So, if that is okay, it's fine with me.

MR. TAY: You can see everyone if you sit there.

THE FRENCH INTERPRETER: I have to be able to

see the screen. There will be a lot of information on the screen, and I would like to be able to see it. Okay. Thank you. Thank you, Your Honour.

THE COURT: Now, Mr. Tay, let's get some idea and make sure I have the right documents up here. Is there an order that has been established?

MR. TAY: I have a suggestion, and I will go through it. So, basically we have our motion today. There is also a motion from Genova. They indicate they represent a small group of employees on long-term disability and propose a settlement. They have a motion seeking adjournment and have counsel status, which I -- and I think almost everyone else opposes this, and I propose to deal with those reasons for why it shouldn't be granted, as far as my main submission.

So, I would start and following counsel for the employees will then follow. We then have CAW, the directors, to the extent they want to say anything, and then we would hear from opposing employees. And after that, we deal with the other issues that the UCC has, and

the committee and the other housekeeping matter with Nortel Trust.

So, that makes sense, given the fact that there are a lot of people here that are more interested in the issues raised by Rochon Genova and raised by UCC. Your Honour, it seems to make sense.

THE COURT: How does this follow with the 2:00 p.m. hearing?

MR. TAY: We have all day reserved for tomorrow, and we can go until a quarter to two, and then adjourn until ten a.m. tomorrow morning to continue. I don't see any alternative. We have this courtroom and the same facilities for tomorrow.

THE COURT: Counsel?

MR. ROCHON: Yes. I am Joel Rochon, and I am here for the LTD beneficiaries, and my only suggestion is, there is a lot of people here, but if we are able to start with the adjournment request, which if you see in the material is a serious request, that might short circuit things and shorten the day.

If the adjournment is granted, we will come back on another day and will not have to go

through the hearing at this time.
We have only just been retained this past Thursday, and we act for this special group of individuals.
THE COURT: So, I guess you want to launch into the adjournment request?
We will just hear from Mr. Tay for a second, but don't go back quite to your seat just yet.
MR. TAY: In part, we will deal with it up front, because in order to deal with that adjournment request we have to get through the whole process and how we got here, and you need to hear from me and the Monitor, and it makes no sense to adjourn this because something will change over some period of time.
So, I think if you get to the adjournment motion, you will end up hearing our submissions.
So, my submission is that we should proceed the way I suggest, and it will in substance deal with all of the reasons why, one, an adjournment makes no sense and, two, why counsel -- it's all bound in the same argument of why this settlement is appropriate and

fair.

THE COURT: I will invite Mr. Rochon to make preliminary comments, so I have an idea for the basis of the adjournment request. It may save hours of argument.

MR. ROCHON: I would like to invite my assistant to join me, and perhaps we could have a spot at counsel table.

THE COURT: Your motion, motion to adjourn or the alternative to object?

MR. ROCHON: Correct, Your Honour.

THE COURT: You were retained when?

MR. ROCHON: Last Thursday.

THE COURT: This material came late yesterday.

MR. ROCHON: Correct. The timelines are thin, especially in light of the fact we were just retained on Thursday. I apologize.

THE COURT: Well, there is a big problem with that. This hearing was set a number of weeks ago, and you can see that there is a lot of preparation that has gone into this.

MR. ROCHON: We certainly recognize that many, many counsel and individuals in the court have done a lot of work to get things to this stage and had matters. We would have made this

request sooner.

As it turned out, we were retained last Thursday, and we were retained by approximately 30 individuals who are on long-term disability, who --

THE COURT: These individuals, are they part of what I will refer to as the representative group?

MR. ROCHON: They are.

THE COURT: Have any opted out of that group?

MR. ROCHON: Only one, to my knowledge. I believe the opt out date was sometime ...

MR. ZIGLER: Your Honour, nobody has opted out.

THE COURT: Nobody has opted out? Okay. All 30 of this group are technically under representation of counsel?

MR. ROCHON: They are at this point, and seeking an adjournment and opportunity to object to the settlement, and the other thing we recognize is that the Canadian proceeding is not the only proceeding. There is the Chapter 11 proceeding in the United States and the administrative proceedings in the UK. So, all of these things are intertwined.

THE COURT: This is a Canadian motion today, so I don't understand the basis of the objection.

MR. ROCHON: Only on the basis, this is a world-wide arrangement process, and there must be a certain amount of coordination with the court, and I understand there will be a session -- a joint session -- this afternoon with the U.S. Court.

THE COURT: Yes, there is. That is not on with respect to the motion that is brought before this court today.

MR. ROCHON: Right. So, I am aware of the fact this is inconvenient, certainly for my friends, and having had an opportunity to bring this motion sooner, we would have done so.

In any event, the basis of our adjournment is this: The settlement agreement is dated February 8, 2010. There was apparently press releases sent out in or about that time. Direct notice to this group of people -- that is the LTD -- and those that are opposing the settlement. That letter was delivered on February 16th. That was a Tuesday.

So, allowing for the Canadian postal system to work it out, it would not be unreasonable to assume that the letters started to come in at the end of the week, and they completed their journey sometime during the week of the 22nd of February.

So, that would lead in a number of situations only two or three business days -- maybe as much as five business days -- to assess the quality of the settlement, to take legal counsel, if necessary, to engage experts to help interpret the agreement.

What we really have here, Your Honour, is a situation where there was no effective notice to the LTD group.

This is not your normal group of sophisticated lawyers. This is a group of highly vulnerable, disabled people, and you have before you two motion records that deal with the extent of their very significant disabilities.

In addition to the aspect of disability, there is also the matter of when disclosure happened, and, in this case, as you know, the February 8 agreement requires LTD disability

beneficiaries to have certain rights extinguished in respect to The Health and Welfare Trust, known in this proceeding as the HWT.

Those signatures were being sought, at least from the representative, Sue Kennedy on behalf of the LTD holders in and around February 28, but it wasn't until February 18, and the 39th Monitor's Report, released February 18, that finally the Mercer's Report was made public, after the deal had been signed by the concerned parties.

Now, why do I mention the Mercer Report? Because when you analyze it --

THE COURT: The difficulty I am still having is that the group has represented counsel. A lot of those issues were dealt with. The fact that they wished to make representations today, they are taking time to make arguments. I am not hearing anything so far, sir, that would cause me to adjourn today's motion. Notice provisions, the representative counsel will include the LTD group was considered many months ago.

I really am having difficulty understanding as

to -- I understand the group has now retained you, and you may wish to make representations on their behalf, and you have that opportunity to do so.

As far as this hearing, I am not convinced so far this matter should be adjourned.

MR. ROCHON: In a nutshell, Your Honour, the notice went out last week or the week before. That is when it was delivered. That is after February 16th, the only meaningful --

THE COURT: The point I am trying to make, counsel, this group has been part of this settlement discussion and has participated in the negotiations, participated in the notice of hearing. All of that, I am not aware of any --

MR. ROCHON: Yes. I am not disputing that, Your Honour. My point relates to the objectors and for them to have meaningful rights, we are here to represent, no notice to those individuals. So the objectors, and we have 30 of them here, their rights, have been extinguished through this process, because they have not had meaningful notice.

The timeline, there was pressure to get this

moving, but to have the notice given, really, takes away any meaningful rights that the objecting parties had. That is the group that we are focussed on, and the right to object is really a pillar of due process in fairness in this country. I have never seen -- I am not someone that appears before Your Honour regularly, but where due process is something that you learned from day one, normally there is 60 or 90 days in order to prepare an objection. Here, there is no time -- or a week. Five business days to prepare an objection, and that, in my respectful submission, is meaningless and their rights have been seriously impacted upon or will be impacted upon unnecessarily so if the adjournment is not granted.

Those are my submissions, Your Honour.

THE COURT: Thank you. Okay?

MR. TAY: Your Honour, I don't think I need to reply. With your permission, I will proceed. Would you like me to reply?

THE COURT: I have to make a determination. It's a formal request.

MR. TAY: Right. We clearly object to it for

the reasons I think you've touched on. One, that this group has been fully represented. That is the whole point. If every time one group of the class, whether it's one person or 30 people, are not happy with a decision or settlement of representative counsel, they can hold a process or stretch it out or request new representative counsel, and it defeats the whole purpose.

You heard Mr. Zigler that this group did not opt out. They are still being represented, and you will hear in my submissions later about the people that are not here, but whose rights would be effected and are okay with this.

The timing of the service that they are complaining about, that is approved by the court, and Your Honour knows that we went out of our way to make sure that people are on notice, even though we knew that virtually everyone was represented by counsel before you.

So, the purpose of this really was to make sure if there was someone we forgot or someone who was not represented or out there that did

not know about this, we made sure they have the right to come and be heard. Similarly, people who are not happy with the decision and counsel recommending the deal, they can come and object, but they need have a valid reason to object other than, I am not happy. I make everyone in this courtroom unhappy. If that was a basis for objection, I mean, we would never get anything done.

So, there is no reason for an adjournment. We have gone through grave trouble, as you can see, to accommodate people. Mr. Rochon's own application says, application for adjournment or to object, and as Your Honour pointed out, there is no impediment for him to object, or even if he doesn't, he can be heard, but to adjourn this, in terms of what will be accomplished by adjournment, you will hear as both through my main submissions and as submissions of other counsel, it will not do anything. That adjournment will not change anything.

It took us a long time to get where we are, and we have to get over the finish line, and we need to keep our eyes focussed on the

settlement that will bring the most good to the most people.

I am sorry that there are people that are not happy, but that is not enough of a reason. A legal reason to interfere with what this court needs to do today.

THE COURT: Yes?

MR. ZARNETT: Thank you. The Monitor does not support the adjournment. Part of the reason is the one that you've raised with Mr. Rochon and Mr. Tay has raised, and that is we are following a process that is court approved with rights of all parties having been considered.

There are two other reasons. One is, there is a reason for doing this now and a prejudice that could occur if it's delayed. Mr. Rochon did not assist on how long he needed, but the impetus for this settlement, as Your Honour will know, was that the court approved cash flow for Nortel only contemplate funding payments -- certain payments to the LTD.

For example, the LTD is until the end of March. It was that concern -- that problem -- raised that led to the impetus of this

arrangement that is now before you. That was preserving those for a longer period of time and various other benefits.

If there is -- if we are unable to do that now, and unable to do that before the end of March, the payments are in trouble and where are we, and that -- the large group that Mr. Zigler represents and those that are not opposed and also to Mr. Rochon. So there is reason for the urgency of dealing with this.

The other point that has not been touched on, Mr. Rochon has done a lot of work in a short period of time, including obtaining an expert to put objectors before you, and nobody is objecting of him doing that, notwithstanding the timing of the delivery of the material. He has not told you what he would do. He has submissions and experts, and Your Honour will consider them. So, in my submission, the request for the adjournment should be refused.

THE COURT: Yes?

MR. ZIGLER: Thank you, Your Honour. A couple of points.

It's really quite serious, in the sense if we don't deal with this matter before March 31,

the types of benefits that get cut off are the health benefits for disabled and retired employees, and there is a concern there, and there are people that depend on these, and if they are cut off, then, they can't get their medication.

So if the settlement deals until the end of the year, and there are programs, but if you immediately shut this down, March 31, we are getting to people's health. I think, second, and my friend went to this, the pension fund gets cut off at the end of March, unless something is done. That effects both the disabled and the retired employees, because they are all on pensions and some disabled are. There would be a crisis in dealing with that. The funding stops and they will tell you, the superintendent has to take action. Things have to happen, and it may happen in an orderly fashion.

The settlement works toward a process for that. So, we anticipate a crisis if we don't deal with this by the end of March. That is prejudicial to the pensioners and creditors because of the crisis that that would create.

So, in the interest of things that I think are much more important than lawyers working quickly to get materials before you, I think the health and pension plan, we should go ahead, and with all due respect with my friend's submission, and I don't want to get into the substance of the request.

Again, in the affidavit of Ms. Kennedy, you will see a letter dated February 16 written by his clients, 16 or 17 individuals. To me, so they were aware, and there was an email February 16th.

He is an officer of the court, and they are aware of what is going on. They may not like the situation.

There are some objectors, and that is all in the material before you, but my friend professes to much to say, well, they didn't no everything until last week. They were aware of this for some time, several weeks, and now we are here and the material is here. I would submit the prejudice to everyone else outweighs having to deal with this matter.

THE COURT: Thank you.

MR. WADSWORTH: If I might?

THE COURT: Yes.

MR. WADSWORTH: Briefly. The CAW Canada is the bargaining unit, and bargaining for long term disability, and we represent 640 retirees who retained our services to act on their behalf in these proceedings. The potential problem to our members is such that as Mr. Zigler pointed out, they may suffer health consequences if at the end of this month there is not a means by which their health benefits are replaced, and that is unlikely to happen in the amount of time that this took just to get the settlement in place. There is insufficient reason, from my perspective, to grant the adjournment. There is more sufficient reason to go forward with it to insure those people that will benefit from the settlement do so as quick as possible. Those are my submissions.

THE COURT: Thank you. Any other counsel that wish to comment before I rule on the adjournment request?

The adjournment is not going to be granted. First counsel have the points to the group that you will be speaking on behalf with

respect to all proceeding to date.
Second, the process for setting up this hearing today, the notice of provisions, I am satisfied there will be prejudice to a variety of groups, long-term disabled, Nortel itself and other creditors if this matter is delayed further. We heard representation that the continuation of certain benefits run at the end of the month, at this point it is uncertain, and above all, in considering the matters, and the sensitivity to people's health and this court will do whatever it can to insure this is heard in a timely basis. The motion record does indicate that you do have arguments prepared, and for what you have to say.
MR. ROCHON: Your Honour, thank you for that. I had a brief reply.
THE COURT: If you wish to reply, I would have thought there can't be anything new, but, please, go ahead.
MR. ROCHON: Well, Mr. Zarnett asked how much time we would be looking for. There was mention to that. I was going to talk about the time. We are looking for 45 days.

THE COURT: Given the remarks, the end of March, that is not persuading me.

MR. ROCHON: The point about the expiry of benefits, under the 39th Report there is evidence to suggest there is funds available in order to implement the settlement agreement, including the security, the security of the benefits and the pension to the end of the year.

In terms of what I would do with the time, that would be for examining officers and directors of Nortel, possibly trustees, conducting cross-examination. We would make use of the time. We would locate further experts dealing with the issue of the trust and trust funds. Those are my submissions in reply.

THE COURT: Thank you. The issue of the 45 days, I am not persuaded that deals with the issue and on that basis alone, this matter will continue.

MR. TAY: Thank you, Your Honour.

You will recall, Your Honour, when I was before you on January 14th, of 2009, that I had said this is I the end of Nortel, this is

the beginning of a new Nortel. I was wrong. As much as we all wanted to restructure this company, and as much as we wanted this iconic company to continue as an ongoing business, it was not to be.

It's very painful reading the affidavits that have been filed to our people's personal situations, and it's hard not to feel for these people. Do I wish we could give them all the benefits for the duration? Absolutely. Do I wish we had more money to spend on all of these things? Absolutely. The difficulty we have is that wishing doesn't make it so.

So, I think it's important to understand -- for everyone to understand -- where we are today. We tried. We came before you in June of last year and said, we have looked at it every way we can, and we cannot say this company will -- we have to sell the business as a growing concern. We have done that. We have realized a good amount of money.

By the end of the second quarter, it's expected that the only thing that will be left, other than the portfolio both within and

without Canada, will be the Nortel business services, which will be 500 people, and their job will be to provide transition services to the purchasers of the business.

There's a smaller number of people who are in the corporate group that will be responsible for sale, and that is what Nortel will be. Compare that to its peak: 95,000 employees. In other words, it's no longer an ongoing business that will be able to sustain all these benefits that everyone wants. The end game now for most of the people in the room is to try and realize the proceeds as quickly as possible, and to distribute the money out of the Canadian estate as quickly as possible. Unlike in restructuring of a company that will continue to exist, there is no scenario here, absolutely no scenario where Nortel can continue to provide benefits.

And as far as the dealing with the time of distribution or making sure we get the money out as quick as possible, the distribution will go to the employees, will go to the pension deficit. Part of that is to create an environment where you can get rid of what I

will call strategic litigation, and that is part of the deal. To clarify some of these issues so they will not be impediments when the time comes for us to look at distributing the proceeds.

I think we have spoke about the fact that the beyond March 31, if there is no deal everything is uncertain, and we don't know where it will go.

So, while we try to establish on the one hand what is needed and the therapy that is needed to insure an expeditious pay out at the end of the day, the other part of what we are trying to do, we recognize that the benefits would cause in -- and even the uncertainty of how long the benefits will be provided will create hardship. People will not be able to organize.

So, a huge part of what this settlement is attempting to achieve is to make sure that there is clarity for the people and benefits, that there is a decent runway, so that people can blend their affairs and know what they can rely on in the near future.

The negotiations. The fact that we are here

today, and there are still issues to deal with shows that the negotiations worked out. Not everyone got what they wanted, but the goal has been to try to balance those two things I'm talking about. Certainty, and by the same time provide for the clarity for the benefits. In fact, if we achieve this settlement, I know of no other litigating CCAA where people have received benefits for two years from the time of filing or any other CCAA where the benefits of this quantum have been made available to employees and pensioners.

I think that I will talk about the employees, and I will touch in part on their representations. As you have already decided the position not to grant an adjournment, one of the reasons was that we had counsel.

So, if you looked at Mr. Zigler and Mr. Wadsworth, what I would like you to see behind them is 12,000 pensioners and about 400 LTD employees. That is who they speak for. Now, the small minority of the people that are not happy with the deal will be more vocal today, and I would suggest, Your Honour, that the good of the many should not sacrificed

because of the discontentment of the few.
Let me touch on the pension plans and the HWT.
Nortel has two registered pension plans.
There is a Nortel Network Limited and non
negotiated pension plan, also known as the
salary plan and the Nortel Network, known as
the Union Plan. Both provide benefit plans.
Now, in terms of medical, dental, life,
long-term disability and survivor income
benefits. Traditionally they have been paid.
Some on a pay-as-you-go basis and some through
the Health and Welfare Trust, which you will
hear referred to as the "HWT".
So, generally medical, dental on a pay as you
go basis. Traditionally, LTD. income and
survivor income benefits are paid on the basis
of the HWT.
Now, whether it's called a trust, and the HWT
was formed as a result of trust agreement that
is almost 30 years old. HWT is a tax
efficient deal and it's not a trust in the
sense of a trust, as it's a statute or trust
governed by statute or regulations or any of
that.
So, although the applicants have funded the

HWT over the years, because it was a tax efficient way of doing it, it's always been underfunded. There is no legal obligations on the applicants to insure that the HWT will also be fully funded.

So, in that context, let's look at the terms of the settlement agreement, and to touch a little bit on the negotiations that led us here. These negotiations started prior to the approval of the final Canadian funding settlement agreement and continued through until the agreement of February 8, 2010.

The settlement accomplishes a lot and provides a whole list of benefits. It results in a longer run down period for those benefits. Provide those impacted with time to make alternative arrangements with counsel, provide certainty to pensioners and long-term disability, and they will continue to receive benefits until the end of the year. It's an advance in cases of certain employees.

What do the other stakeholders get out of this? Well, it addresses the uncertainty, and the fact that these payments have to come to an end at some time. It provides a certain

end date so the applicants can plan according to the cash flows and distribution plans. Importantly, it provides certainty on the plains which may have otherwise resulted in hold up or prolonged litigation. Cause delay to the estate, and, again, it provides certainty on the classification of employees, creditor's claims, which is a benefit as a whole.

So, what we have done is taken away potential litigation. No matter how baseless and whether there is entitlement to trust or not entitled to priority. Taking away arguments. We take all of that away, and that is really important to the other stakeholders and to the applicants.

So, a brief summary, the deal is, medical, dental and life insurance will continue unchanged until December 31, 2010, for pensioners and employees on long-term disability. Long-term disability will also continue until the end of the year. The difference is, previously these payments were made out of HWT Trust and would have depleted the assets in the trust as part of the

settlement. The applicants pay that, and thereby preserving the trust to the same degree.

The settlement provides that the LTD beneficiaries maintain status until December 31 as well, with termination of employment. There is a termination pool or payment of a maximum of 3000 of terminated as advanced against the claims under the CCAA for a total maximum of 4.2 million, and as far as a pension plan, we will continue to make special payments until the end of March, and thereafter a set of funding and continue the administration of the trust until September 30, 2010.

What do the Nortel and other stakeholders get? Well, under the agreement, liability to administer plan seizes September 30, 2010. The agreement makes it clear that the pension claims, and the HWT claims -- and by that I mean the efficiency claims will rank as unsecured claims, and no one will assert any of the claims to the contrary.

As part of the overall settlement, applicants enter a letter of agreement with the

superintendent of bankruptcy in the capacity, as the administrator, which confirms that the superintendent does not oppose the settlement with the terms of the order.

Counsel has also agreed to withdrawal and end the application to Supreme Court of Canada. I informed you of the earlier decision, and there will be no opposition and other matters as long as they are approved by the Monitor.

What should be clearly understood is that none of the releases effect the underlying claims. In other words, nobody is asking for the efficiency claims, whether they are in respect of pensions, what is being released is any argument or any potential claim that these things are anything other than unsecured claims.

There are also parties that will be released from, as part of this agreement, who are administrators, trustees, etcetera, of the various pension plans and HWT. The reason for that, in part, these people would either trustee or director, had clear indemnity, and this is to prevent a back doorway of coming back against the company when this settlement

is intended to be a complete settlement on these issues.

Now, you will hear sometime today or tomorrow, counsel for Northern Trust Company of Canada ask that release them and disclosing of the pension planning.

Our view is the failure to provide for their release in the document is just a drafting, and we support the release, and you will hear from those parties.

Finally, the releases are limited. As far as we can in nature to only what is considered necessary, to achieve these goals. As I have said, the deficiencies are not touched. They are preserved.

There is a particular clause in the settlement. That agreement that you will hear a lot being said of.

That is known as the bankruptcy or change clause, and you have had a taste of that when we dealt with the Nortel motion.

As I said then, and I say again, we have tried to bring the parties as close as we can to an agreement. This particular issue remains the central issue, and this issue, we could not

get a settlement agreement signed if we are not agreed to inclusion of the courts.

So, we drafted this clause to be as innocuous as possible, and this clause basically says that if the law, the Bankruptcy Act at some point is changed in some way that effects the priorities dealt with in this agreement, that the parties reserve their right to argue on applicability or non applicability. It was an attempt to bring the parties as close as we could.

From our perspective, if you decide that that paragraph is not necessary, we are fine with that. We don't need that paragraph as part of the settlement. If you do come to that finding, counsel will put the question of whether they are willing to go ahead with the deal without that clause, and I will leave that for other people to fight about.

The clause, it's there. Having said that, we are indifferent to whether that clause remains, because what is important are the economics of the agreement that provide the continuation of the benefits, and what is important here is the clarity that the rest of

the agreement provides.

Now, I will touch briefly on the law.

The -- I don't think there is any doubt, Your Honour, that counsel has the authority to enter into the settlement agreement.

On May 27, 2009, you will find Koskie Minsky, (inaudible) Michael Campell, July 22, 2009, O' Brian, for former employees were appointed.

On July 30th, 2009, Koskie Minsky was appointed to represent the applicants disabled employees and Susan Kennedy. The representation order provided that as part of the mandate, it was for the purpose of settling the compromising claims.

Although the court recognized there would instances of conflict of interest, this was not one of them.

The LTD employees and other employees opposing the settlement do not have a conflict of interest. They of this agreement. And, frankly, they also don't agree with the majority of their group who do support the settlement.

Now I saw reference in the materials that suggested that there might be conflict of

interest in terms of divvying up the trust. That is not before the court today. As part of the settlement, as part of the HWT trust, they have to work out, and before the end of this year we will be back before you to seek approval of that. That is not before the court. That is not part of what is being asked.

So, I will touch briefly in terms of, it's quite clear we oppose the application of Mr. Rochon to be appointed as special counsel, and I brought -- I make reference to the Canwest decision, paragraph 19. You don't need to turn to it.

> "... and compelling reason such as the existence of an obvious conflict of interest.... (inaudible)."

Needless to say, this court has in other cases recognized the ability of counsel in settlement agreement, and I will refer you to your decision in the Grace matter that we presented to you. And where you said, page 8, paragraph 59. You don't need to turn to it.

> "It seems to me that the wording of the Representation Order is clear.

Representative counsel have the authority to resolve and release all CDN ZAI Claims, including Crown claims for contribution and indemnity."

THE COURT: 2008 Grace or Grace 2010?

MR. TAY: 2008. The test for third party release is clear. There are three tests. They needn't to be connected for the resolution of the.

Debtors claim. They need to benefit creditors and should not be overly broad.

Grace decision makes it clear that such releases may be granted in the context of the approval. The parties receiving third party releases contemplate the settlement agreement and settlement approval order restricted to those related the administration and the HWT, the directors and officers of Nortel.

The third parties releases are directed -- directly related to the compromise related to the pension plans, and HWT set out in the settlement.

The release is provided to the applicants and is restricted to release of the ability of the parties to make claims. As I said, it does

not effect the claims for deficiency under the pension plan, the HWT claims, which will be unsupported and preserved as such.

Now, in terms of the settlement and what we agreed to as the superintendent with respect to the pension plan payments. As you know, they are not mandatory in the initial order. We are omitted to do it, but not ordered to do it. You could approve the discontinue of special payments after March 31, and even in the absence of the settlement agreement, the court has the jurisdiction to suspend the special payments in the CCAA proceeding, which as you know is more often the case than not. You also have the jurisdiction to approve the settlement agreement provisions that make sure the pension claims will rank as ordinary unsecured claims on a pari passu basis of the applicants without any preferred treatment, priority trust and charge. And, as you know, when the trust and under the contributions are not enforced under the bankruptcy, and this court pursuant has jurisdiction if approved settlement, that treats pension claims in the same way as in a bankruptcy, and I will not

turn you to it, but I refer to the Harbert case, which is at tab 11 of our brief.

And in the case of the HWT, while the outcome of protracted litigation is impossible to predict, these are likely to be -

Monitor has advised you that the HWT has never had sufficient assets to pay the value of all plans designated under it, nor is it legally required to have those assets.

Not only does the settlement agreement not disturb the corpus, but as I indicated it actually preserved it, because payments that would have otherwise been made out of the funds will now be made by the company. And these particular provisions of the settlement agreement that create for these claims of the unsecured and for the creditors in the class are extremely important considerations for the people who are the other stakeholders, who are seeing over 44 million dollars of value going to similar ranking creditors as part of this deal and test.

And you have said, in the Grace decision, that a settlement negotiation during the CCAA period should be approved if it's one

consistent with the focus of the CCAA and is fair under all the circumstances, and, three, balances the interest of parties, including any objecting creditors; although not necessarily equal, and if it's beneficial to the debtor and stakeholders generally." Everyone is unhappy with the settlement, because nobody got everything that they wanted, and perhaps that is a best indication of a fair settlement.

Now, if I could just touch on what is an important point, and I touched on it earlier, and that is the reliance that people will have on this order. The committee has filed written submission and have expressed four concerns.

One is the bankruptcy clause issue. The second is the ongoing exposure and potential liability for pension claims and bankruptcy claims made October 1, 2010, and that you may be aware is part of the condition in the Superintendent's letter. That there be no bankruptcy before the end of September, otherwise we lose the benefits of that provision.

We could control the fact that we don't make a whole assignment into bankruptcy prior to that date. So, that aspect is not a concern. What we cannot control is third parties trying to make an application for bankruptcy order prior to that date.

And I think that it's critically important. In fact, essentially, if in your reasons or endorsement you -- if you see fit to grant the order today, you would highlight the fact that any judge of the court that is looking at the lifting of a stay application, because this stay protects us from any such bankruptcy application being made, and, so, it will have to come before this court. And for whatever reason, if it does not come back before you, I think it's important that your decision reflect the fact that any application to let the stay or file bankruptcy for bankruptcy order, should take into account the fact that the impact of that will be to undo all the benefits of the settlement.

To put it into perspective, Your Honour, the benefits that the employees, the Superintendent are getting, they are finite in

time. They will get the full benefit by the end of this year. The Superintendent will get what it wants, which is a runway to provide for the orderly transition of the administration of the pension plan, but one company, the other creditors are relying on, having paid that consideration, what it gets back in return, being the certainty that any deficiency claims are in fact unsecured claims and part of the unsecured funds that be in. So, I think we can deal with the bankruptcy before September 30 issue by your reflecting the importance in your endorsement or decision that any judge looking at this should waive the impact of what granting such a relief would have on the settlement.

Now, they raise the third point, and this is the point where they say that employees claims are on account of as the waiver of the settlement agreement is the claim. They take the position it should be on account of the distribution and the parties argue that point. In my view, we are in your hands as to how you decide that issue, but we are happy to deal with that. The other issue that I hope to

have --

THE COURT: Has that been addressed in the order? The hardship order? Is it a different point?

MR. TAY: No. This is the maximum. Basically the settlement deal is, you know, it's credited against the claim. Against the distribution, so it's a fairly discrete issue. The final point they raise, and I hope that this point could be dealt with today, right now, right here, and that is the lack of clarity as to whether the proposed order is binding on the Superintendent in all capacity and not just as administrator of BBGF, and some concern was raised by the original form, and that has been clarified, but it's my understanding that this order, and we are all relying on this order, that it be binding in all its capacities, and that the Superintendent is not reserving any rights to reopen this issue. And I say that, and I look to the Superintendent as to whether there is any disagreements.

THE COURT: There is no reservation on rights?

MR. TAY: The UCC is disappointed about that.

There is no reservation on rights. So, I think that closes the point on that issue once and for all.

So, what we come down to it is for the most part the bankruptcy clause. I have explained to you why it's in there. Politically, without that clause we did not sign it. I've also explained to you that we don't think it's an essential part of the agreement, so we are in your hands.

I have to point out that I am extremely disappointed of the accusation of UCC in their factum that seems to throw question of doubt about the integrity and the fairness of the Monitor in dealing with this and in dealing with the settlement as a whole.

You may have your own views that you may express about unsubstantiated attacks on the officer of the court.

Personally, I don't know what the standard of practice is in the U.S. or whether this is acceptable in the U.S. Having been involved in the whole process with the Monitor, I find it unfounded and, frankly, I think it's totally inappropriate and unacceptable, and

that is what I will say about that. In conclusion --

THE COURT: Before you leave the H2, in preferences of federal bankruptcy, and are there any provincial elements?

MR. TAY: The Bankruptcy Act has changed. The BIA has changed, and it has to be changed in a way that impacts the priorities that we have spoke about in this settlement agreement. If those two things happen, and then the consequence of that clause is that everyone reserves their right to argue on applicability or non applicability, and you will hear more than ample argument on both sides as to whether that causes uncertainty and everything else.

From our perspectives, it's not an essential part of the deal, as far as we are concerned. It is what we all had to do to get here today. So, in conclusion, I think it's clear that if the settlement agreement is not approved, it could have some potentially very negative and very immediate impact. There will be no opportunity to make alternative arrangements for health and life benefits. The LTD and

survivors will have income cut off without opportunity to plan the income. Terminated employees will be forced to wait for any distributions of the claims process. The immediate and current service funding and special payment contributions to the pension plan. There will be an immediate reduction to reflect the current funded ratio in the pension plans. It would increase chances of litigation related to HWT and increase uncertainty for all stakeholders and jeopardize the distribution of funds to all stakeholders.

But if you approve the settlement, it takes all the uncertainty away of the termination of benefits, the pensions, the LTD beneficiaries, and healthy beneficiaries and who cannot eliminate hardship but we can reduce it by prolonging whether or not the mandatory payments. It eliminates regarding pension claims and HWT claims, which will all lead to reduce recovery for everyone and the potential. Disruption of the process. The benefits of current working employees, and it allows the opportunity to plan.

And it helps with the commitment for existing employees to have their pension benefits not disrupted, because we need to implement, and, as I said, it does not eliminate any deficiency claim under or the pension claims. It simply takes away a priority that (inaudible).

So, subject to any questions you may have, those are my submissions, Your Honour.

THE COURT: Thank you. Before we continue, I will give people a break.

--- Brief adjournment.

--- Upon resuming.

--- Court is resumed.

THE COURT: Before we get going, at the lunch break we will have to coordinate with the law clerk to insure that the documents that are required for the joint hearing this afternoon are circulated and sitting where they need to be.

MR. TAY: He is more reliable than I am.

THE COURT: All right.

MR. ZARNETT: Thank you. The Monitor supports approval of this settlement agreement, and recommends that Your Honour approve it and

asks it does so, not only from its usual standpoint as an observer of the process, but as an active participant in the dialogue that led to the settlement agreement, and, in fact, signaled to it and it participated in that, because of the importance of the objectives that this settlement achieves.

It did not lose, disputes as to whether benefit payments should be continued beyond March, disputes the classification of creditors, which would have an impact on the formulation of the plan, and it even resolves an outstanding application. When it does that, it prevents delay. It preserves value, and reduces the risk to other proceedings, such as bankruptcy and reversing priorities that the stakeholders are a lot happier with the priorities as they are implemented through the process.

The second main theme, Your Honour, is the involvement of court appointed representatives; particularly, representative counsel for the former employees and the LTD beneficiaries. That court appointment and that involvement was pursuant -- as we touched

on this morning -- to a process that authorized involvement and negotiation of disputed claims, representation of interests and the right to opt out, which has not been exercised by anyone objecting to the settlement.

And, Your Honour, in my submission -- I should respect the outcome of a negotiation that involved that court appointed representative seeking as a court officer to achieve goals for those classes of stakeholders. And Your Honour will also -- and this is the third, you may want to look at how the settlement balances interest, because this is a situation where nothing can be given without it being taken away from another.

It's an insolvent estate, and, therefore, we look at balancing interest, which cannot be fully satisfied, and, in this case, Your Honour will note, will want to take into account the involvement of a number of stakeholders, as well representative counsel, and that this was all negotiated, and the fact of liquidating insolvency and the determination of benefits, one of the main

items dealt with in the settlement is inevitable.

The Monitor believes, viewed as a whole, the settlement represents a fair balance of the interest of the applicant stakeholders. The Nortel stakeholders, and I support something that Mr. Tay said, which is especially appropriate here.

The fact that Your Honour will hear objections today, some from bondholders and unsecured creditors committee, who are concerned about any aspect of the transaction by which in their vantage point, their money, is being used to fund priority payments to someone else, and on the other hand, that there are objections from former employees, disabled former employees, based on a statement that is in some ways unargued, and that is that any compromise of full payment to them involves great pain. There is no dispute about that. But those objections go to show that the settlement is not perfect, and it can't be. Instead, they go to show, in my submission, that it's not possible to achieve everything for anyone, and the possibility of that type

of settlement shows, in my submission, it's fair and reasonable judged against the standards that it has to be, and that is what is possible.

Now, as Your Honour knows, the impetus of the settlement needs to make the settlement come from few different sources. The first is the change in Nortel's strategy toward restructuring essentially to liquidating as Mr. Tay pointed out. That involved a significant reduction of the work force. The sale of businesses, and the need to transition benefits, pension plans, and that sort of thing.

Second impetus is that Nortel remain insolvent. As the Monitor points out in paragraph 23, 27.9 billion dollars of claims. Subject to claims, resolution processes, 27.9 billion dollars in claims.

Now, in December 2009, the Canadian Funding and Settlement Agreement was entered into and provided a base of funds to continue the CCAA process as liquidating insolvency continued the business transferred and resolved claims, and all of that especially with the limited

approved funding for the continuation of benefits, Your Honour, to the formulation of certain objectives that had to be achieved in order for the restructuring to continue, and that -- and those are outlined, but I ask Your Honour to look at the 39th report. The paragraph, Your Honour, is paragraph 36 on page 10.

THE COURT: All right.

MR. ZARNETT: These steps that are identified are things that had to be achieved in order for the CCAA process to continue to the benefit of all stakeholders, and anyone that opposes the settlement agreement, you would think, would have to have an alternative way of actually being able to deal with all of these, and keeping the process going for the benefit and they were transitioning benefits for current employees. Second, the termination of unfunded, non pension benefits, which was an inevitability, given the limited resources, but terminating them in a way that was orderly and without due disruption, and as fair as possible to the pensioners, LTD beneficiaries, survivors.

The third was the transition of the pension plan given the fact that funding would not be available for special payments or current service payments.

The Health and Welfare Trust had to be dealt with. There had to be preservation and then a method of distributing it. The ranking of claims required certainty. There was already ongoing litigation with the application for leave to the Supreme Court of Canada with the certain types of claim and there was a recipe that if claims were cut off for litigation over the ranking other kind of claims. The company needed to retain resources to assist in restructuring, and the overall goal was necessary of avoiding costs with litigation. That was the cost.

And that, Your Honour, was the challenge, and that is what gave rise to a settlement process, out of which Your Honour can take great comfort, because a settlement process that involved was detailed, hard bargaining -- as Mr. Tay says -- and wide ranging in terms of involvement of stakeholders. And, as I said, and as the Monitor's Report points out,

the representative counsel were involved, the Monitor was involved, the company was involved. CAW was involved.

As the negotiations went on, the Superintendent became involved on pension issues that were of particular concern and other creditors. Bond holders, UCC, advancing their interest in what the appropriate settlement would look like, and the result is a settlement that has achieved the consensus of the company, the Monitor, the Superintendent and representative counsel of the CAW, and is subject despite objections to only limited objections from the other creditor groups to the UCC and bondholders can address.

And, of course, is subject to the objection of Mr. Rochon, which I will also refer to briefly.

In the Monitor's submission, the process of notice and how we got here today, which we discussed on the adjournment application, is important in that it should give Your Honour confidence that except for the objectors you are hearing, there is broad informed approval

of this settlement from the vast majority of stakeholders.

Now, Mr. Tay has reviewed with you the settlement terms. Each of the terms can be analyzed on their own in terms of their give and take. What the give and take involved, and they can also be viewed as a package, and it's from the second perspective that I essentially ask Your Honour to look at this agreement, which resulted from this process, and that is that it's a package, and as a package, it represents a reasonable and fair result.

Now, Your Honour has heard about the continuation of the non-pension benefits, the benefits that help payments and the medical, dental payments, etcetera, for pensioners, for disabled and how important they are, and those will be continued to September 31, 2010. They are continued on a priority basis from the standpoint of other unsecured creditors. It's a preferred treatment over their claims, which are stayed, but it's a fair result. It's a better result than the alternative of stopping them in March. And it's a better result, in

my respectful submission, than risking uncertain litigation against the backdrop of terminating the payments.

The Health and Welfare Trust is not dealt with in the settlement, other than it is to be wound up to the future pursuant to a court approved plan. In the meantime, to the great extent it's assets are preserved because of the amount of payment funded out of it are minimum. So, it's being preserved.

Your Honour has heard about the continuation of pension benefits, the regular current service of benefits until the end of September and the transfer of administration. That is the benefit to the participants, beneficiaries of the pension plans, avoids having to deal with the winding up or termination at an earlier date.

There is a cost in the eyes of other creditors to doing that, and that is that the payments are priority. They may wish to argue against. But the result is better, in my respectful submission, than the alternative of the cut off payments, and the alternative of the litigation surrounding it.

Your Honour has heard about what essentially is the settlement of the issue going to the Supreme Court of Canada, which is a termination date.

A benefit to the terminated employees who are not receiving that severance. They get some of that paid on a priority basis now. Cost to other creditor groups. Once again, a balance. Your Honour has heard about the releases and the agreements about the ranking claims, which I put into the same category for analytical purposes. Quid quo pro of the deal is to apply certainty to the nature of the claims that can be made. Former employees, pension fund participants, beneficiaries, LTD. And that is they agree not to waive claims, but except to the extent that the settlement allows priority payments for the certain period of time to treat the balance of the claims as ranking without prejudice, which may be the exact result that with the expense and the litigation. What is a negotiation result providing certainty in terms of going forward with the plan. No argument about the classification of creditors or priority of

treatment.

The releases, which implement that, as Mr. Tay pointed out, are permitted. There are exceptions to them. The directors, the CCAA, and there is a part for any beneficiary release for fraud and the releases therefore serve an important purpose of certainty.

So, Your Honour, the overall benefits achieved, as Mr. Tay has said, and as I describe in the course of my submissions when I said the challenges, the settlement meets the challenges that it was face and fairly balances the interest of all stakeholders in achieving. I want to address, Your Honour, briefly what the objections are.

So, that when the objectors rise they have the benefit of the responses. I would boil down the material that Mr. Rochon delivered into three basic areas of objection.

The first is that the economics of the settlement agreement for those LTD beneficiaries who are represented by Mr. Rochon are not satisfactory. It's not enough. He has a pain -- the painful effects, anything less than full payment of all

benefits, and that is true.

The effects are painful.

But, the comparison unfortunately cannot be the full payment. It must be to the realistic alternative, and the Monitor wishes for the other, and that is the reality. The benefits to the end of December 2010 to a cut off at potentially the end of March.

The comparative is preserving the Health and Welfare Trust by having the company fund the benefits, compared to using the Health and Welfare Trust assets for their benefit. The comparator is what alternative was available, and here counsel and they will address you in more detail, but representative counsel and the financial advisors have both concluded that the settlement is the best outcome in the circumstances. It's a judgment call, but it's an informed, reasonable, and professional judgment call that is better than the alternative.

The second objection, the second broad objection area is to the releases.

Once again, the comparator is to the alternatives. Risky, uncertain litigation.

Delay in getting paid.

So, in my submission, the releases the objections to the releases, viewed against the benefits of the settlement as a whole is not an objection that Your Honour should give effect.

The third objection, and you will see in Mr. Rochon's material is about the nature of the representation of the representatives and representative counsel.

The Monitor was engaged in these negotiations as a court officer and had an excellent vantage point on how the interest of all stakeholders were being served, and the Monitor does not agree with the criticism made. The Monitor supports the description of the representative and representative counsel, and it's in their material that shows the governance and strategy, and their desire to fight hard on behalf their behalf to achieve the best possible outcome.

Your Honour, let me turn briefly to the objections that are before you from the bondholders of the UCC.

The first objection is the famous H2. If Your

Honour has the Monitor's report, tab b of the settlement agreement. It's there, and H2 is found on page 10.

When considering that objection, in my submission, it's important to keep in mind the idea of balance. H2 is part of the balance. The other side of that balance, one is H1. Where there is an agreement in the CCAA proceedings, by the representative on behalf of their constituents, that they will not support, ask for, participate in any plan that gives them -- other than pari passu treatment without other unsecured creditors. They didn't have to make that agreement.

As any settlement, there is a quid pro quo. There is a balancing provision, where stakeholders give up something in exchange for getting something. H2 leaves out the both sides. Gives both sides the ability to argue for any future change in the law in a bankruptcy.

So, we are dealing with an uncertain future event, and an even more uncertain future event that is an amendment to law.

THE COURT: There are two that you have

mentioned, and Mr. Rochon spoke about the importance of certainty, and I would like you to expand on that from that standpoint. I read the briefs of the UCC and bondholders where their prime point is that H2 does not provide them with a certainty.

MR. ZARNETT: H2 leaves something open possible further developments. There is no question about that. That was a right that the former employees and the LTD beneficiaries counsel would not give up, and that was, if there is a change in the law, in the event of a bankruptcy, they may want to argue for the applicability -- as anyone else would have the ability to argue against that change. And if the law were to change in the direction of other stakeholders, they would have the same right. There is no assurance which way or in whose favor.

In my submission, this is an acceptable level of reservation of rights, and it is part of a package. Hard to analyze outside of the package. It would change if that provision was not there, and that is the Monitor's main point on that. This is a package.

Representative counsel came to this agreement by securing the agreement of the company and others for this provision.

THE COURT: When you say it's a package, what are you getting at? If I understood Mr. Tay correctly, he says, if you don't like it, you cannot change any portion of the package? He didn't expand on that part, whether it's feasible to consider package "a" or "b", or is it one or the other?

MR. ZARNETT: I think as was pointed out, the client has a decision to make under those circumstances. But the Monitor does not take the position that he is bound to go ahead with that if the provision is not there. The Monitor did not agree on that basis. You will hear from Mr. Zigler as to how important that clause is, but it's the Monitor's view if it's been negotiated as part of the deal, it can be analyzed and approved as part of the package as an accepted --

THE COURT: Is it either, the option is either approve this deal as is or not approve, or is there a third option?

MR. ZARNETT: There are two and a third

practical. The practical party is, if the parties do something, but the transaction is being put to Your Honour in fairness to everyone that has signed as a package. The approved package.

Your Honour made the comments in Grace that the Court not analyze the settlement on a line by line basis if elected to alter the agreement.

This would involve part of the transaction of the Monitor. That is something that is consistent.

The amount of real uncertainty is minimum. Nonetheless, it has to be balanced against the significant certainty that is at present.

I wanted, Your Honour, to bring to your attention as quoted in paragraph 61 of the UCC'S factum. The principle officer of the U.S. endeavors wrote a letter to the Monitor, essentially making the same point about which to otherwise supportive of the agreement. I didn't want to bring that to Your Honour's attention, but, in my submission, it should be dealt with in the same fashion.

One last comment to Your Honour, and that has

to do with the credit and payments, the UCC claims that payments to the employees should be credited against the distributions rather than against claims, and the Monitor says that, we note that observation. And, again, the deal was crediting them against claims. That was part of the quid pro quo and, once again, despite the invitation that take part on the settlement basis. It doesn't introduce any significant interference. Subject to any questions, those are my submissions.

-- Mr. Zarnett's submissions concluded.

THE COURT: Thank you. I don't know if you want to start? How long do you expect to be?

MR. ZIGLER: I will be at least an hour.

THE COURT: We will not start with you now. Mr. Tay, two o'clock is the joint hearing with the United States Court. It was not possible to accommodate in this room, so it's across the street in 393. What exact motions are being heard?

MR. TAY: It's the approval of the special incentive program. Those are the two matters. I don't suspect they will take all that long, subject to what the other's view is.

THE COURT: I have heard that before. Is it possible that this hearing could continue later today?

MR. TAY: We would be happy to do that if you think that is possible. Yes. We understand they still have some objections with the U.S. trustee, so it may take some time. I don't think we should hold people, and then find out we cannot make it. Tomorrow would be better.

THE COURT: All right. Mr. Zigler, Mr. Rochon, with respect to your attendance this afternoon, as far as the clients are concerned, the room we have this afternoon is not in any way capable of accommodating these numbers. The room is limited. There are about two rows of seating in the public gallery. So, we will have to do the best we can.

MR. ROCHON: Maybe we can have a couple of representatives to accommodate the smaller group.

THE COURT: Whatever you can do to coordinate that. It's not what I call "ideal" but it's the best that could be accomplished.

MR. TAY: Tomorrow, is it possible to start at

10:30?

THE COURT: Whatever time you want to start. I just want to make certain that we finish tomorrow. I think with the time estimates the Court has been provided, that is possible.

MR. TAY: We have another small motion tomorrow.

MS. STAM: The motion, we have agreed we received notice of the adjournment. We spoke about that a few days ago. We agreed on materials to adjourn, likely to April 14th date.

THE COURT: All right.

MS. STAM: There is a side agreement motion that was served yesterday with respect to the transaction.

THE COURT: So, that will be tomorrow as well. I did note in a number of the briefs references to previous Nortel decisions and Grace, and what I didn't see what any reference to the reasons and the funding agreement. I don't know whether those have been made publically available.

All right. So, we will break until two, and it's courtroom 708 at 393.

--- Motion adjourned to March 4, 2010.

March 4, 2010

--- Upon resuming on March 4, 2010.

--- CVAS Endorsement.

THE COURT: This is the endorsement relating to the motion heard yesterday afternoon with the CVAS business. The motion was granted with oral reasons to be delivered later. These are the reasons.

This hearing was conducted by way of video conference with parallel motion heard in the U.S. Bankruptcy Court with His Honor Justice Gross presiding over the hearing in the U.S. Court.

This hearing was conducted in accordance with the provision of the Cross-Border Protocol, which had been approved by both this Court and the U.S. court.

The applicants moved for approval of an asset sale agreement, dated December 22, 2009. The sale agreement among NNC, NNL, NNI, and certain other entities identified therein collectively as the "Sellers" and GENBAND Inc., as "Purchaser." GENBAND is also referred to as the "Stalking Horse Purchaser."

The transaction was for certain assets of the Sellers' Carrier Voice Over IP and Application Solutions Business, known as the CVAS Business.

The motion was not opposed. The evidence record consisted of an affidavit sworn by Mr. George Riedel, Chief Strategy Officer of NNC and NNL, and the thirty-fourth report of Ernst & Young Inc. The Monitor filed its 40th report and provided background information with respect to the sale and events leading up to the motion.

On January 6, 2010, this Court granted an order approving the "Bidding Procedure Order", Stalking Horse Agreement, as well as certain bidding procedures for the sale. Upon obtaining the Bidding Procedure Order, Nortel continued its sales, efforts with respect to the CVAS Business and a number of potential interested parties were contacted with respect to the CVAS Business. Two parties expressed interest and were deemed Qualified Bidders. At the Bid Deadline, neither of the bidders submitted a bid and neither Qualified Bidders requested an extension of the Bid Deadline.

The Monitor is of the view that the applicant's efforts to market the CVAS Business have been a comprehensive business and were in accordance with the Bidding Procedure order. The Monitor is of the view that the GENBAND transaction is the best transaction for the sale of the CVAS Business and recommends approval of the applicant's motion.

I am satisfied that the unchallenged record establishes the sale process has been in compliance with the principles set out with Royal Bank v. Sound Air and Crown Trust v. Rosenberg.

All parties are of the view that fair consideration is being obtained for the assets included in the transaction, and I accept these submissions.

In my view, it's appropriate to approve the Sale. An order shall be issued to give effect of the foregoing.

--- Endorsement concluded.

--- Brief recess.

--- Upon resuming.

THE COURT DEPUTY: Could I have your

attention, please. Could you insure phones and PDAs are off. Also, no outside drinks. We have assisted devices for anyone with difficulty in hearing. Anyone that speaks or would like to have French translation, we have headsets, and if all recording devices could be shut off, please.

If you have any concerns, just approach one of us in the blue jackets, and we also have America sign language available if anyone requires it, but if nobody does, we may have him -- if the services are not needed, we may release him once court is up.

THE COURT REGISTRAR: Order, all rise. Court is in session, please, be seated.

THE COURT: Good morning.

MS. RUBENSTEIN: I wanted to address something that was discussed yesterday in submissions. At the conclusion of yesterday's hearing, the Court asked Monitor counsel what the options were with the special H2, and counsel said there are the following: Approve the agreement as is, not approve the agreement. Counsel also pointed out a practical alternative would be if the court expressed

concerns to the parties, including the agreement with paragraph H2, the parties could be given the opportunity to reconsider the matter.

The Monitor wishes to be clear. We support the agreement with paragraph H2. The Monitor would also support paragraph H2. The Monitor's primary concern is that the settlement be approved and implemented as soon as possible.

THE COURT: Yes. Thank you.

Mr. Zigler, good morning.

MR. ZIGLER: Good morning, Your Honour. I will be referring to a number of documents, and I think it's best you know which ones in advance so you can have them before you and the matter could proceed quickly.

My friend provided you a list of all the documents that everyone -- all the material supplied to everyone. I will, of course, be relying on the material that is on the list. I want to make sure you have it, and that would be the responding motion record of the clients. The reply affidavit of Susan Kennedy. That was filed late in the day. I

will provide you with that.
THE COURT: That would be helpful.
MR. ZIGLER: And, of course, the factum and brief of authorities. In addition, I will be relying on one of the authorities that is -- that was passed up by Ms. Stam with this list, and that is Your Honour's own endorsement of May 27, and I would also be referring to the 39th Report of the Monitor, and the second supplement to that, dated March 1.
Thank you.
From the perspective of what is before you, Your Honour, whether this agreement is fair and reasonable, because my clients are client appointed representatives, and court appointed counsel, Mr. Archibald for the former employees and the disabled, Mr. Campbell could not be here today, but we're here today, and as well as the various committees. It is certainly our view that you must look at this as fair and reasonable, not just from the view of all the creditors, but because we are appointed, we take it seriously and my clients take it seriously, that you see this as fair and reasonable from the perspective of us,

perhaps that is just the other side of the same coin.

If something is fair and reasonable for everyone else, it's fair and reasonable for this one party, but it's important because they are representatives, and the dynamics of an insolvency and the negotiations that have to take place to try to reach an agreement to assist the people they represent don't prove for the total disinterest of almost 2000 people willing involved. Not for the disabled people, although Mr. Wadsworth represents 100 of them. The 1200 members. My clients cannot go back to each every one of them.

This proceeding only works sufficiently if it's allowed and allows us to represent them, and it is important for Your Honour to be -- you accept that that is a burden you have to meet. And as well, relative to other creditors, all of the people we represent are in a different position than the usual creditors before the court.

They are not creditors. They are not traded creditors. They are not cross border claimants, and they are not pension funds.

They are not a regular player in the insolvency.

They have to compete with other creditors for what is left, and so we have filed before you material that deals with both processes and the result of the settlement agreement, and although there is serious hardship for everyone, it doesn't matter what situation you are in, they all have to accept, and they should be provided the safety net.

You have material before you with respect to that all the disabled employees suffer.

The ones that are represented by Mr. Rochon and the rest are in the same situation. They lost income they thought they would have for their retirement. They will lose some of it, and who will pay for it, and loose health benefits they were depending on. They are pensioners that live on smaller incomes. That pension will be cut if there is not enough money. Despite the government guaranty.

There are active employees that lost jobs and have not been able to find employment. Many may never find employment. There is regrettably a lot of misery, and we are not

here to deal with whose pain is worse. That is not something the Court could deal with and not something representatives can. It's a regrettable social reality.

What we are here to do and be objective to the clients is to do what is reasonably possible to alleviate some of that, while still allowing some further recovery for these people.

And in that context, no doubt you have read and my friends from the UCC, the client put before you lobbying efforts they have done, they are undertaking government authorities. That is not for here. I don't know why that is before you, but it's a serious social issue that this court cannot deal with. I ask you to only look at what is fair and reasonable in terms of matters of what this court can, and the representatives and their objectives, and they adopted a strategy that is clear, is threefold.

One, try to keep things funded as long as possible and obtain additional funds to do so, because the payments to health benefits and disability and pension continue since the

original order. Something unusual to take home... (inaudible) swears in the affidavit, but our objective is to continue to Monitor, and that is what we are here before you today. It's to continue it out of funds in the estate that are not credited against the ultimate recovery, because we could easily say, let's not negotiate anything, pay something now, and what we recover will be credited against, like a hardship. This is not the exercise of this nature. If it was so, this would be a much more simple matter.

Our clients wanted to without giving up whatever is left for tomorrow, and that was the first and sole objective of this agreement. The issue, of course, is what you give up to obtain, and that is why we are speaking to Your Honour in terms of measuring what is fair and reasonable.

There are other strategic objectives in this proceeding. There are the two pension funds, and the HWT, and Your Honour will hear more about that, but those are not for today.

I think Your Honour has to understand and assist in what we are doing today, and I will

have to take you to some documents, but we are not dividing up the HWT. We are here for the client.

So, going back, in addition to evidence, some piece of mind and trust is important, in addition to the actual and the extent.

And the third objective of the client, the same as everyone else, is to maximize the state in Canada, so that there will be some serious distributions out of the Nortel estate to help compensate for losses.

So, there are three different sources of funds that we just talked about, and in addition to what Your Honour came up with on the standards matter, hardship funds seem to now be a consideration. There are people that have particular economic hardship.

Later in the day, nobody has to do without the possibility of creating more of that, but that too is not before the Court today.

Let's just talk about which is before you.

And in a nutshell, and I think in the affidavits of Kennedy say so, it puts serious money in the pockets of these people in desperate straits where there is no other

immediate source available of which 44.2 million was an additional negotiation matter, and it puts them ahead of everyone else with respect to those amounts.

The amounts are estimates, because what they represent, what they represent are the cost of providing benefits to the end of the year. Some of these are easier to determine. Long-term disability income payments. Health benefits go up and down. There is no flat dollar negotiations here. It's whatever costs are provided for the benefits to the end of the year.

And as I indicated, it allows for the ordinary transition of the pension plan and allows for some protection for the rest of the year for health benefits, disabled, and there is this matter of H2, and I will address that as well. It, too, is a piece of protection that my clients bargained for, made concessions for, whatever it needs, and we are not here to parse the wording. It's something they received in exchange for something else and there are trade offs. This was a negotiation, and the material before Your Honour makes that

clear.

A letter was written by us on January 6 to realize the money was coming from the U.S., and there was additional money coming, and there was no room for continuing these from March 31.

We asked for more than we received. We were offered a lot less in the beginning, negotiations from January 6 to February 8. We were before Your Honour on January 21 to insure we made an agreement, and that it didn't prejudice.

And there were many negotiations. And ultimately, the clients were fully aware, and I intend to take you through some of those so Your Honour understands, because there were significant dollars, and it does come at a price.

Mr. Rochon is not here today to put in factum's. I think not. And, of course, Mr. Rochon's factum says it's giving away the story.

I will take Your Honour through the reasons why. The concessions that my client gave come in two categories. One is giving up

litigation, essentially litigation against the director and the trustees of the trust, except in cases where one and the only types of situations where they in (inaudible) CCAA and situations of fraud, and those claims against directors.

In that respect, that is not a difficult concession to make.

In the sense it's suing directors for the sake of suing directors, doesn't do much, and one of the things I want to impress is that the representatives take this matter of litigation seriously. It doesn't fit our mandate to let everyone else bring litigation in the hope of obtaining settlement. It's brought through court-appointed counsel, and it's a serious issue.

Any suggestion that my client gives up litigation for the sake of the system is contrary to our mandate and would be irresponsible, and I will refer the Court to what --

Litigation against the Health and Welfare Trustee, there may be something there, but it's risky. I will take Your Honour there.

The concern was that it wouldn't amount to the shortfall of these people. The damages would be, and then what one has to weigh is what we receive for giving up that. Mr. Rochon addresses litigation in the factum. He doesn't address trade off for risk, and ultimately in what manner to proceed. There is also the other, the second trade off. It's the recognition of something, we all know what would happen in an insolvency and unsecured creditor, and although we are under the CCAA, and the structure and the affidavit of -- when the restructuring turns into CCAA the being pushed.

Any other creditor would be convinced the Court, and so the priority of the bankruptcy are always moving, and my clients are aware of where that could get them. Yes, there are some charges and pension funds in the pension statute, and protections in the standards of wage, and the standards act but my friend Mr. Tay and Mr. Swan put before you cases, and the Court of Appeal decision, and The Supreme Court of Canada. My colleagues have been involved in cases going up to the Court of

Appeal, and there has been no success. There are other cases in this Court, the Quebec Court, the decision that Mr. Wadsworth is aware of.

So, in assessing the situation, yes, we can try to take it to the Supreme Court of Canada. Again, is it better to receive true consideration, additional pension funding to September, and then order a transition and plan of payments?

We try. There is an argument, but it's one that has not succeeded in so many cases. So is it reasonable to give that up for what was retained? Yes, Your Honour. It is. I don't think Your Honour is called upon -- you are not called upon to assess, I think what you are called on to assess is, is it reasonable to have settled for what we obtained in exchange for?

Then there is H2, it's a key protection. If Parliament changes law, no rights would be released in effect for the exchange. It's a recognition for the Parliament that the release is here, don't give away something my clients have been actively seeking.

It is not an attempt to buy time to change the laws, as Mr. Macfarlane puts it. If that was the case, maybe the clients would be better if they cut off the benefits immediately and say, look what happened. It's an attempt to protect themselves. So they are not seen to be releasing claims where if by some rare possibility, the change in the law were to occur would benefit and it's central to my clients position.

Mr. Zarnett put it well. There is an H2, and there is an H1. You would not need H2 if there was H1 and with negotiations, and that is not the role of the court. The role of the court, and the case law, and I took you to it -- but it would be most unfair to take the position that my friend Mr. Tay put, let's take it out. Sure, we can take out all sorts, take out the payments to the client. We are not here to renegotiate the agreement.

Mr. Rochon says, take out the release against the company. I would like to sue them.

We are not here to renegotiate the agreement in open court.

It's simple: Is this fair and reasonable?

I want to take you to the trade off, and maybe the best way to look at them is to look at the 39th report of the Monitor, and it's in this case set out in that report.

At paragraph 32, it brings the amounts received, and you can read that. It's easy to read the wording.

Now, these are the benefits, and it talks about the estate of the entire year in exchange for the releases and recognition.

And the first item is pension and medical benefits. There are 24.4 million.

Most of that, by my estimate, is the incremented amount, because this was in the budget.

So, 18 million, and then we have 3 million.

The next three items are fully negotiated new items for STB are survivor and people, families of Nortel who died in service, and there is no survivor pension, then there is the self-funded disability.

All of these, survivor disability income, they were self insured. Nortel did not insure.

You may have an interest about when they told them it wasn't insurance. At the end of the

day, those claims are not released.
These payments represent a full year's worth of income paid out without.
Then there are the pension payments of 8.9 million dollars. Some are extended to 3 million and extends into September for current service, and I think I explained that.
Cases don't help us that much. Better to take something away.
The last item, the termination fund, I think the quid pro quo for that is straightforward, and that is, the terminate received under the protection plan and bankruptcy. This is not bankruptcy.
So, again, a few thousands dollars ahead.
It's the first payment against their claim, not against recovery, and they give up applications to the Supreme Court of Canada.
On cases before judges have regrettably, I can think of one of them, that said you are not entitled to get the payments.
It's straightforward. Is it reasonable to get this or shall we take our chances?
My client's view is that it's reasonable to settle, and, again, Your Honour is not being

called upon to decide the merits of that case, although you already have, but to see if it's reasonable or not.

I think what is evident from all of this is that most of the settlement pertains to the types of pensions dealt with in (inaudible), and it does so for a couple of reasons.

Partly because of the hardship.

The pension payments continue and will continue on, whether it's at the current level or whatever the level is. They will pay the level until September, and then there will be no funds for the pensioners and the disabled.

And the termination issues are already dealt with, but it's the health benefits and the disability income payments.

And the exercise here is to try to protect those suffering the consequences. It is not by chance that, for example, the SIB, LTD payments, 16 million dollars plus benefits, almost 20 million dollars, goes to for people, that is 400 -- (inaudible).

It should be slanted that way because of the consequences to the pensioners. Held up.

What comes out of it and the trust?

Of course, the pension fund, but it's hardly a situation where those who have a difficult situation are not receiving a fair amount. The pensioners' health is important. And the pension payments are important. It may be more money in total, but there are 12,000 pension. You have to keep this in mind. All of this is dealing with money here in exchange for some things that don't compromise funds.

The court-appointed representatives have sworn affidavits, and it's clear from their perspective that this is the best they could achieve.

They did so on the advice of counsel and actuaries, and on the advice of a financial advisor whose affidavit is before you in the responding record, and I think it speaks volumes about the dynamics.

Mr. Tertigas says, and he has extensive experience, and his affidavit is tab 3. It's a short affidavit. It makes it clear in paragraph 6, that this is a beneficial result. If not for the settlement, the payments would stop March 31.

The cash flow statements of Nortel and the cash received is the bulk of the assets, being transferred under the CCAA, other than what is necessary to finance Nortel's Canadian operations.

So, basically what the Monitor company has in Canada, the applicants have in Canada. That is not in the lock box for all the assets, is not assets that meet the Canadian assets and having been sold. The cash they have that is available is a big chunk of it, based on their need in the agreements and is going to the benefit of the people they represent. He's not a lawyer.

But as a layperson, in a legal sense, but in experience in insolvency and from the point of view of our clients, litigation, rather than taking the -- it could be risky and uncertain. You don't have to be a lawyer to figure that out; although, for those of us who practice in the litigation field, we know it as court-appointed counsel. We don't really like it, and perhaps as well in this province we work under a loser pays costs system, and it would be risky outside of the scope of the

CCAA for people to be bringing class action lawsuits, leaving aside a stay, facing the possibility of the plaintiffs who are already disadvantaged and cost awards if not successful.

Based on that, Mr. Tertigas concludes at paragraph 14:

> "Based on the above criteria, I firmly believe that both the Former Employees and Disabled Employees are better off under this Agreement."

Sure, in the CCAA there are probably more creditors in the unrepresented group than anyone else. That gives them some power in the plan, but it doesn't give them the ability to impose a plan, because they are not the greatest (inaudible) people.

And so, the stalemate is of no assistance. The ability to block a CCAA plan is not given up in the settlement agreement. If there was something that the CCAA plan felt was inappropriate, clients may exercise rights. What happens if the CCAA plan fails?

In his experience, that is of no assistance in terms of trying.

So you have his opinion, and I think that speaks volumes given what we feel, but it's also the advice of Mr. Tertigas.

I want to talk briefly about the process. My factum deals with that in some degree. Starting at paragraph 15 of Mr. Sproule. It sets out the numbers at paragraph 15.

The pensioners have created an organization called the NRPC. This is not a situation where you just appoint a court representative, and then there is counsel that doesn't deal with the matters that have to be dealt with. Yet it's clear that those concerns are dealt with in the organization.

Similarly, with respect to the disabled employees, they are a small group, and it's in paragraph 21, 22. There is a group called the CNELTD for disabled employees, and they -- although they are disabled, they try to communicate by way of the internet and chat rooms, and so on. They lobby and have their case for medical benefits and the case that I pointed Your Honour to.

In paragraph 25, both groups -- the factum sets out in the next section of the

negotiations, and what I described to Your Honour earlier.

The settlement agreement was executed on February 8, 2010, after many rounds of good faith negotiations, and paragraph 29 sets that out in the affidavit. Again, RTC was apprized.

Your Honour has to be concerned, I think to some degree, with some understanding that there is a con. Some of them swore an affidavit with Mr. Rochon that they were not consulted. One cannot neglect consulting 400 people, especially when there is confidential information and agreements. That defeats the purpose. There is a union negotiation on behalf of its members, nor can they talk to. All they can do is get the best deal they can, and communicate that, and then come before you and suggest that it's a reasonable deal, and that is what they took.

Notice was given. I will not take Your Honour through it.

At the conclusion of our motion record, if you turn it up, there is an affidavit of a gentlemen in our office that sets up hundreds

of people that were contacted either by telephone or email, and it shows 450 inquiries, and I can tell you as an officer of the court, I tried to respond to all of them. Mr. Rochon does. We have a webinar which for the information before you is in the Kennedy affidavit.

We had a webinar on the 23rd of February. It was advertised, in addition to letters going out. Mr. Woo swore, over 1200 people participated by internet, and 250 by phone. Those are the estimates.

The questions are asked. They are answered. And regrettably, some people still oppose the transaction of settlement. I believe based on the Monitor's second supplement, there were some six or seven pensioners who found the notice of opposition.

Seven former employee pensioners, one terminate, but that person, and 30 LTD, most that Mr. Rochon represents here, and certainly the process here today was designed to let them speak.

Once we are done, Mr. Rochon will have an opportunity to speak.

But in all, there are a small minority of people represented, and the small minority of the people that participated in the webinar, and phone calls, and they are entitled to their opinion -- of course.

But, the long and the short of it, in my submission, is that those who oppose, the only alternative to opposing the settlement is to force litigation.

To force litigation against the directors. It's to force litigation against the trustee, and to force litigation in this court to try to argue for things that we will not be successful on already.

It was evidence in the Employment Standards case, pension, and many cases I referred Your Honour to. I think there is in Mr. Rochon's material a request that there is a special class of employees under the plan. Apart from being premature, it would be problematic, and I think Your Honour earlier renounced saying we had a special class for all.

We cannot hold CCAA accountable, but they can approve they are not the biggest. So, to what end would that help? I don't know, other than

to hold up a system.

So, that is really the alternative, and what I want to take Your Honour to. I spoke to you about the pension litigation, and I will not repeat myself.

The Employment Standard speaks to the Supreme Court of Canada's actions against directors, and really the only other person being released, and it's evidence in Mr. Rochon's material, is the trustee, and the order to -- for Your Honour to conclude this is a fair and reasonable settlement. I want to take you through the risk of that litigation against the trust.

And I went on a little longer than I thought I would, but I think it's important.

THE COURT: Yes.

MR. ZIGLER: The argument as I understand it, the trustee, Nortel and that part we all agree to the extent at large. The argument would be that the extent of the other funding is so great the trustee should somehow be responsible for it, because they somehow failed in their duty.

The Monitor discusses the Health and Welfare

Trust, starting at paragraph 45 at the Monitor's 39th report, and they put in the trust agreement, which I will take you to and state at paragraph 48.

This trust has been around since 1980 and provides benefits and funds benefit and puts into effect, such as a health care plan and long-term disability plan, an income plan and short-term disability plan, and it's a trust to give effect to the health and welfare plan. This is not a pension plan.

Same kind of funding requirements that Your Honour had before you last spring on pension funding. It doesn't apply to this.

In fact, the Monitor speaks clear in that paragraph, and says it's a tax-efficient vehicle.

> "The Monitor has been advised by its counsel that Nortel was under no statutory or other legal obligation to establish or to fund a health and welfare trust and there is no regulation applicable to the HWT."

There is some, but it's unclear. Certainly there is no statutory, and certainly the legal

obligations are questionable.

They go on to say:

> "Based on the Monitor's review to date, the HWT has never had sufficient assets in the trust to pay the present value of all the benefits for all the plans that are designated under it, nor was it legally required to do so."

And we certainly agree with that statement. Fully funded is part of the issue. There is a reference in the next paragraph that gave us concern, and I can assure Your Honour, giving up this litigation is not done lightly. There was 37 million dollars on the financial statements that is due from Nortel. Basically what Nortel did is it had tried to set up research for LTD benefits and retirement benefit, and somewhere paid for other health benefits out of the excess assets of the trust.

That troubled us. That troubled us. It's claiming Nortel is no bigger than -- I think Mr. Rochon speaks to that.

The last item in the Monitor's Report is right at the conclusion of the report. It's called

the Nortel Appendix H of the 39th Report. There is a financial statement, and you will see a signature to the document, and you will see at page two, what the assets of the trust look like. All of the assets are in the 130 million dollar range.

One of the items is viewed from a sponsoring company and the last item 37 million, and that is the amount that the Monitor is talking about.

In our view, we might say, where is the trustee in this? The trustee may not be responsible for the funding that the company does not have to fund, but Nortel holds 37 million dollars, and I want to clarify, it's not that they took money out of the fund, our investigation is that the cash flow (inaudible).

But, Nortel didn't pocket the 37 million dollars. It was money they should have put into the fund. Where is the trustee in this?

So, we examined the obligations of the trustee, and there is, regrettably, the Monitor put the original 1980 trust agreement, the original trust agreement 1980 is in this,

and the subsequent amendments were not put in. They are in the second supplement.

So, if Your Honour will bear with me, I will point to the analysis that gave concern to my clients on releasing this claim. And reading it, I can take Your Honour to two or three provisions of this document, Article 4, page 12. It appears in Appendix "E" of the 39th report.

THE COURT: Page?

MR. ZIGLER: 12. And it says that the employer has to contribute. It may be asserted and may otherwise be required from time to time for the purposes of the plan and determine on the basis.

So, that does reference some sort of funding arrangement, but it's unclear. It references the claim. Paragraph two refers to the fact it has to be done every year. Paragraph 3 makes it clear that the company, not the trustee, is responsible to meet and discharge the payments and liabilities.

Now, I contrast that with what Your Honour will deal with later on in this proceeding, when this is determined that article 6,

section 2, on page 40.

Article 6, section 2, indicates that upon 60 days notice, the corporation will determine the plan, because notice of termination must have 120 day and satisfy all. So they make a determination. But it goes on to say:

> Also determine on the sound basis the amount of money necessary to satisfy all future benefits of the trust. And it is only in that in instance (inaudible) liability for future benefit claim and, hence, the statement by the Monitor and may be an obligation on Nortel's part ... they don't all come due.

The shortfall does not come due unless and until the -- and we have not hit that stage yet.

In fact, that is what we are trying to avoid until the end of the year before, so the money keeps go to the trust.

I draw Your Honour's attention to one more provision, page 16, called the Claim Beneficiaries. In fact, cannot claim against the trustee. The trustee is allowed off the

hook, except through the corporation, so must from Nortel. You already have a claim in this case.

And the corporation has to indemnify.

What we have is the trust would be put on, and take it to the prevision because of the amendments. We have another stay possible, because Nortel (inaudible).

There is an amendment to the trust document that the Monitor filed in the second supplement. They both involve the trust. Northern Trust did not become until December 2005. So if you go to last 3 pages of the second supplementary, December 1, 2005.

THE COURT: Which tab is that?

MR. ZIGLER: Mine is not tabbed. Wait, yes. Tab "E".

THE COURT: Okay.

MR. ZIGLER: In fact, there are two documents. One is the December 1, 2005 appointment of successor trustee, and these are the last three pages of the tab different.

THE COURT: I have that.

MR. ZIGLER: It's the second one I want to draw Your Honour's attention to.

It's also dated December 1, 2005, and it's in the form of a letter, but if you look at the last line, it says:

> To the extent necessary, this shall constitute amendment to the HWT.

And you will see in that document, in the second paragraph...

> Anything to the contrary of the trust document, we, Nortel, agrees that Northern Trust has no responsibility to determine and review the Monitor amounts (inaudible) Health and Welfare Plan or administrative.

So, the trustee no longer has the obligation that I pointed you to earlier. They don't have the obligation any more, because Nortel agreed it's not.

The next paragraph is also important. And that is if Nortel agrees that it should be solely responsible for determining the contribution amounts and on a sound basis, and the issue of trust.

And then it repeats the indemnity that the trustee has. So there is direct and indirect. They are identified.

So, again, we have concern about 37 million dollars. However, suing the trustee, as is evidence in this document is difficult. It doesn't mean the trustee doesn't have a common law obligation to the trustee, but to the extent it can be indemnified, it's excused and may have no liability or damages as to what they do wrong.

Perhaps as Mr. Rochon suggests with the (inaudible) it's a relief. That is the loss. Is it the whole 37 million, I doubt it. Is it the full shortfall for all future benefits under article six? Not realistic.

My clients might like that to be the case, but we have to be realistic. We don't want litigation with no chance of success. We have with Nortel. But at the end of the day, what are they receiving to give up the claim? If you look at paragraph 40 and 42, it's in about the range of 38. That is growing for HWT. Either the disabled people or pensioners will benefit from this trust.

So, my clients conclude that it better provide a source of money now rather than litigate. It's real money. It's real debt. It helps

people today and provides relief today. Nothing in the end will provide the relief that is ultimately necessary in suing trustees and director. Nobody will give these people 100 percent, but if you are giving up this claim, it's a lot of money. Rather than rolling dice on litigation.

So, in terms of objections and the record, I think the trade offs are clear, but they are traded off for substantial.

I think Mr. Rochon also in his motion, it is not before you, I think that has to do with -- I won't spend a lot of time on it, but he represents 39 people or perhaps all the LTD. Your Honour has already granted. He opted out. My client, Ms. Kennedy, has done her best, despite being subjected to a lot of abuse. Abuse by sick people. But she does her best. The committee does their best. Some of them don't like the results. The consequences are harsh.

Your Honour, the May 27th endorsement made that clear, where determining employees with their own representation order, and that was dealt with. And, in fact, the active

employees.

THE COURT: Mr. Rochon says there is.

MR. ZIGLER: And I don't see how that is the case. From the evidence in respect of this settlement, there are many claims against the same fund, and the idea is to balance their interest in such away that they all have a claim, and the court-appointed representative, Ms. Kennedy and her committee, in their assessment have concluded they are better off with negotiations together with the pensioners and determine employees to get a result, rather than being left alone.

I think all Mr. Rochon is saying is with respect to speculation, is later on, when we deal with the Health and Welfare Trust there may be some issue, and you -- as Your Honour said -- when we come before you, we have the ability to send Ms. Kennedy to other counsel to acquire legal advice, but they have counsel, and until such time, it's evidence to us that there is an actual conflict or it's evidence to them where they are concerned as our clients.

It doesn't lie in the realm of a group of

individuals to say, I think I can do a better job, or I think I would rather bring this lawsuit. That is what it's about.

No motion was brought before you to say, I think I need a better job. My clients have not had a full opportunity to respond to it, and I don't think that is before you. Nobody opted out.

To the extent benefits are available to different groups, and they try to resolve their claims in an equal way, people have their own lives and commitments.

Again, there is an avenue that you can order, and if it comes to that, we will proceed on that. As far as negotiations are mandated, if you take it to its extreme limit, every individual has a conflict with every other individual, and there is 20,000 people that could argue: "My interest is not the same." It would be unmanageable.

With respect to H2, I am not going to spend a lot of time on the law, but briefly on the concept of H2. The other side. We have Mr. Rochon's client and the other.

THE COURT: Before you do that, the

translators would like a short break. How much longer do you expect?

MR. ZIGLER: 15 minutes.

THE COURT: Mr. Wadsworth?

MR. WADSWORTH: The vast majority I wanted to speak about has been covered. I would assume half an hour.

THE COURT: We will start again at 12 noon.

--- Brief recess.

THE COURT REGISTRAR: Order, all rise. Court has resumed. Please, be seated.

THE COURT: H2?

MR. ZIGLER: H2. I think the difficulty with their submission, apart from the fact this is something that was bargained for between the company, Monitor, and my client, and Mr. Wadsworth's client, is the concern about certainty, and let me address that.

There is certainty in terms of lawsuits. There is no question about that. Lawsuits that have been traded off. There is certainty about status in the CCAA. There is certainty so we have an end to litigation, and we have a predetermined classification in CCAA. The only thing that is -- well, what happens if

Parliament in this country, but they believe to be the right thing.

All of this, my clients want it understood that by agreeing to certain releases, if the law changes, it then knows, they had not prejudiced themselves in terms of getting the benefit of the change in the law.

There is always uncertainty in agreements brought before the Court. You cannot have absolute certainty. Every sale agreement in this matter that has been brought before the court.

Your Honour has the uncertainty of we don't know how much of the proceeds of the sale will end up in the Canadian estate. Is that a reason not to agree?

THE COURT: I will hear that again.

MR. ZIGLER: Every sale agreement that involved international assets, there is uncertainty. That being, how much of the proceeds of that sale end up in the Canadian estate? Should we object to every one of those agreements?

My clients are amongst the largest Canadian only creditors. The bondholders have a

guaranty on both sides of the borders for both sides of the bond. The UCC has claims in the U.S., and inter claim company in Canada. It matters a lot to our clients. Yet we are stuck with that uncertainty, but it's no reason to hold up the sale of the assets and in auction process that has gone up. I think similarly, that is what applies here.

There are no absolutes, but there is no reason why we cannot clear up the process under the current law, and deal with some matters going away in exchange for benefits today, and if these uncertainties occur, change in the law, what would happen?

If priorities get reordered, the result is the same. There would be more money going to my clients. It really doesn't change matters any.

My clients don't want to be prejudiced in terms of a release they gave, and that is all this is about, and, certainly, the position and it is unfair to say, what happens if you take it out?

As I indicated earlier, it's quid pro quo.

The Grace case and other cases make it clear

-- and you don't have to turn them up -- it's either approve or not. It's not really appropriate for parties to renegotiate in front of Your Honour, and it's not really appropriate.

In fact, I think there is one case, maybe if there is a technical error, the Court can correct it, but if it's a substantive issue in negotiations, it would not be appropriate for the Court to rewrite the agreement. Although, in my submission, in this case, it's something of great importance to my clients.

So, yes, well, there is a slim chance that something else might happen one day. If it happens, it happens. It involves an act of Parliament. That is why the company and Monitor agreed. They didn't see it as great prejudice to the estate or process.

I support Mr. Tay and Mr. Zarnett to criticize the Monitor for something that helps 2000 people, and this is going beyond and far reaching is with all due respect incorrect, and I want to speak one minute and about the letter from Mr. Ray to Mr. Binning (phonetic) and to the Monitor, and with all due respect

NNI is now a creditor in the Canadian estate. I don't know why the letter was sent other than to contrive evidence put before you today so say, we don't like it.

The UCC can say that without the letter, it is my submission, a waste of the company's time. A waste of the legal plan to put those kind of letters before the Court. We know the argument. I don't think you should give that letter any credence in terms of what a creditor says. I don't like the agreement. That is all it is. They are entitled not to like it. My clients don't like many agreements that have come before the Court. Excluded them over the lock box issues, while the bondholders are part of that negotiation. That happens.

But the test is: Does this advance the estate, and does it protect my clients, and does it because of the unique nature of the court order, and does it protect the creditors as a whole, and, in my submission, the risk is so small for what is obtained that it's a fair price to have been paid from the company on the Monitor's part, and it's important to my

clients. They would not have signed the document without it.

In terms of the law, Your Honour, I won't spend a great deal of time on this, I take you to the Red Cross case.

THE COURT: Before you move on to that, it's obvious that the H2 issue will be raised by others. You will have the opportunity in reply to respond to whatever concerns they have raised, and whatever concerns I may raise at that time.

Mr. ZIGLER: But as far as the general concept, I liken this to a class action, and it's interesting that in Red Cross, Justice Blair, there they were dealing with the plan of arrangement, but set out the key circumstances that are at paragraph 73, the public interest, the interest of the debtor and the interest of the stakeholder, and, in my submission, those are all met here in terms of giving some additional protection to my clients, but, more important, moving the process forward and avoiding serious public consequences in terms of lining up a pension plan premature or forcing people off of health

benefits premature. The interests of the company were spoken to by Mr. Tay.

In the book of authority and parallel, there was a class action involving the Red Cross, and many of these CCAA create serious public consequence and serious social issues. This is front and centre before you. There are disabled people and pensioners that will face large losses.

And in *Parson and Red Cross*, and if you look at tab one of the book of authorities, the decision of now Chief Justice Winkler, and it's a residential school case, and he was approving a settlement in that class action, and at the bottom of page 4, Justice Winkler discusses the role of the Court. Especially where the subject matter has broader social and political implications.

You are not faced with quite the same, but broad social implications for the people that are pensioners and disabled.

And, quoting Red Cross, and I believe it's Justice Sharp at the time when on the trial bench. This is the Red Cross class action, Parsons.

"It's the recognition that we only have a legal process here, and the Court is constrained by its jurisdiction to determine whether the settlement is fair and reasonable, and that is a class action test as well, and in the best interest of classes as a whole in the context of the legal issues, consequently, may be valid in the social political context remain that."

And I bring that to your attention to say, the social political consequences of people losing their disability income, pension income, health benefits, are not issues that this court can deal with.

What this court can do, in the context of litigation, is say that it's in the best interest of these people to give them some relief for now, based on a reasonable settlement than to leave them without that relief.

The issue of third party release has come up in this case, and I want to address that briefly. I think Your Honour addressed it in

the Grace case. That is Grace number one. You need not turn it up, and it was addressed in the Muscletech case in my book of authorities, and there are - it was addressed in the asset bad commercial paper case, where it was the biggest issue. There are tests, and they don't apply in every case, but I think in the most part met here. That is, there is a direct connection between releases and the CCAA.

I showed you the indemnity given to the trustee. The directors are the subject matter of the directors charge and before the court. Those are the key releases given, the pension claims are also before the court. Based on those releases, that are connected to the uses before you. Not only does the court have jurisdiction, it is important for the process to go forward. Reluctant as my client are to give them, but they pay that price in order to get the settlement. That is what they were faced with.

I see nothing that would preclude this court from going ahead, because if we were to carve them out, we would not have an agreement.

It's sort of the flip side of the H2 argument. I would love to carve out a release or two here, but then the clients don't get 44 million dollars to their benefit and don't get H2. That is the difficulty with that.

I am not going to repeat the law in terms of submissions that have been made about these releases by my friends, but I do refer Your Honour in terms of context of H2 and Grace, at paragraph 99 and onward, and 102 of my factum is a case I will draw to your attention, because Mr. Zarnett raised the matter of what are the alternatives.

In the context of plan of arrangement, but it's no different than settlement. The court concluded, it boils down to two. One is to reject and the other is to sanction, and that is the alternative you have, and, in my submission, dealing with the settlement, it's no different and that is what was done in Grace and York.

In conclusion, Your Honour, because I think I have addressed the H2 issue as much as I can, this is an extremely difficult case in terms of the pain that people suffer.

On the one hand, you have people that want to object to this settlement because of one clause: H2. On the other hand, you have people that would rather engage in litigation than take this.

Mr. Tay told you, maybe it's a good compromise, and I agree with that. But more important, it shows that everybody has to compromise. There is a quote to that effect, and I believe it was the Asset Bad Commercial Paper. Nobody gets what they want, and what is a zero to some, some gain.

And, yes, people will lose. But to the extent that my clients have tried to alleviate that suffering for a period of time at a price that is reasonable, and that is what we ask you to conclude, because that is the test in the class action case I pointed you to.

Both Parsons and others I referred to in my factum, there was the reference to the zone of reasonableness. You are not called upon to adjudicate. You are called upon to rule on whether it's fair and reasonable, and, in that respect, we do a lot of good for a lot of people by approving the settlement.

We put other people at risk. The majority if we go through litigation and for the harm that would result in cutting off the benefits at month end if there agreement were rejected, and those are my submissions.

THE COURT: One case that is referenced is Calpine, and it's been a little while since I read it in detail, but I believe it involved a settlement agreement by a group in the context of a priority issue of secured and unsecured. This situation, potentially today, involved with or without the NN charge on inter company advances, a situation where there are no secured creditors.

Mr. ZIGLER: That is correct, but it's the situation as well, during the course of the CCAA and this is not settling any claims in terms of claims in the CCAA, during the course of the CCAA, pensions have been paid, benefits have been paid, and this is part of continuing the operations of the company that are shrinking for the rest of the year. It's not an attempt to reorder priorities.

THE COURT: The point I just raised, as to whether it will form one of the issues or

points that have to be considered, if everyone is in agreement the test is what is fair and reasonable, is arriving at that conclusion when in effect, without getting into voting issues, you may well have a stalemate coming out of this with neither the employees side with huge numbers, being unable to carry a two-prong test on a vote, and as it stands, the position of the UCC and the bonds, being unable to do the same thing. It's another issue.

Mr. ZIGLER: My answer to that: We have that issue no matter what, and we are not resolving that today. We can't. This only resolves, essentially, continuing benefits for a year and protecting people in exchange for litigation coming to an end that may be there, and a process where we know the status of the claims in the CCAA, whenever it happens. There is an agreement. This agreement makes it clear. Despite the power that my clients may have and the bondholder and the UCC in any ultimate plan, we are all equal. That has been -- that is significant in terms of making it easier in terms of developing a plan. I

grant you that, but it doesn't predetermine the plan in any way, or the negotiations that might surround that plan, and there is no attempt to do that at this stage.

At this stage, we don't know what the assets in Canada will be. I think you have to view this in the context of what it tries to do, and there is too much of the view that it tries to predetermine the future when a lot of that cannot be determined, because there are factors beyond or control to deal with that. Thank you.

THE COURT: Thank you.

Mr. ZIGLER: I want to add one thing, my client reminded me. I took you to the second supplement of the Monitor in the last agreement between Northern Trust and Nortel, and it's clear, in terms of the public disclosure. It didn't happen until March 1. My clients, we have access to these documents through nondisclosure agreements, but the Monitor did not make it public until March 1, and that may cause consternation for people, but it doesn't change the content of the document.

THE COURT: I have this that says the motion record. I have supplementary motion record, factum and brief of authorities. I would like to have them. Thank you.

MR. WADSWORTH: Thank you, Your Honour. I guess I have to start by saying that the following is not in any way -- I have never been involved in a situation where there have been so many corporate lawyers and representatives that have been working hard to insure that continuing survivability for working people that suffer the effects of what is a corporate meltdown.

Even those that oppose the settlement are not opposing it's fundamental goal.

I suspect it's not necessarily out of corporate altruism, but out of self interest, because both parties give up things to get where we are today.

The union is of the position that this is a step in acknowledging the rights that these people have, both moral and legal with respect to their pensions, their incomes, and the benefits that they have worked hard to achieve.

Those rights are, unfortunately, limited in scope by the laws of this country and do not provide the full protection for those that are and will continue to be hit hardest by the economic situation in which this company finds itself.

Part of that, that causes difficulty is the uncertainty as to what will happen to them in their future.

This settlement agreement, to which the CAW canada is a signatory, alleviates for a short period of time some of the uncertainty surrounding the receipt of income and benefits, and the status of their pension plan.

It's not a settlement to the final rights, through the assets of Nortel to which these individuals have entitled, and to a degree to the company and other creditors by providing an assurance that long and distracting litigation on issues relating to priorities will be avoided.

There is also the additional benefit for those in title to the life insurance premiums and those that have been terminated - including

CAW members.

It's also beneficial in that it assures that those who have defrauded or misrepresented to the detriment of the members will be held to account and that right is maintained. We are not happy with the settlement, but we are satisfied with the settlement.

We have given up things that we wish to retain, and in order to receive things that we believe we are entitled to, but in many cases have not obtained before the courts.

Benefit for our people includes the continuation of LTD medical income, and dental and life income to the end of year, continuation to retirees to the end of the year. Survivor income and transition income benefits. The continuation of deficiencies payment and current service payments to the end of September this year.

The funds to make this do not reduce for the benefit of these programs. That fund is maintained and provides a benefit to these individuals when it is distributed.

In terms of our representation rights that arise out of the motion that was brought

before you yesterday for the adjournment, it must be clear that CAW members in receipt of long-term disability benefit and income from Nortel and HWT are subject to the trust agreement between Nortel and the union. A copy of that is in the materials, and by its terms, the agreement applies to facilities that are closed, including those in Kingston, and St. John's.

Pursuant to the terms of the collective agreement and under the legislation, the CAW and is the sole and exclusive bargaining unit in terms to the relationship, whether or not it's specifically provided for in the collective agreement.

Essentially, the union has sole jurisdiction in terms of hiring and determination in terms of collective agreement. That is subject only to the duty to representatives pursuant to the labour legislation, and we do that in this agreement. The test for whether or not we fairly represent is whether or not we have acted in an arbitrary or bad faith manner, and there has been no accusation that we have acted in such a fashion, and we would take

that seriously.

As to those that have retained the CAW, to act on their behalf, and they are primarily former CAW members that are current retirees of Nortel, after the issuance of the order, we sought retainer and received 632 and continue to act on their behalf.

The retainer provides that the instructions relating would come from the union itself, and that is based on the no cost, and the former relationship with the union and rights under the current collective agreement, and the grievance.

All of those that signed those retainers were entitled to discontinue. None have done so. Those that we were in contact with, were kept apprised of the fact that negotiations were occurring in relation to benefit continuation, and the union continues to represent a small and smaller group of active employees of Nortel who, like the LTD members, are subject to the collective agreement and exclusive bargaining agency.

Our representation, as with the pension or retirees continues, even after the termination

of employment, because all of the rights that those persons have approved are in relation to entitlement under the collective agreement, and it's under that they it would be determined.

The union has held meetings and communicated by email, telephone, with all of those that we represent.

With respect to the settlement agreement, the union sent, what is at tab 2 of the motion materials. Those who have retained the union, counsel were provided with a copy of that letter in advance of the issuing of the notice letter of today's proceeding. Certain individuals did not receive a letter, due to a new but incomplete mailing list, and they were primarily long-term disability people.

A new letter was sent to those that did not receive it, and we have not been notified by any of those individuals that they objected to the union signing the agreement.

Union representatives have spoken to hundreds that called our office and spoke to my assistant and certain ly with one of our students, Ms. Johnson, who dealt with the bulk

of the calls and emails that were received. Overwhelming and entirely, our signing of the agreement was endorsed and the agreement itself was endorsed.

It's not to say they are not frightened and angry and frustrated people out there, that are mad about what is happening to them. They build this company and promised what they did would in part be compensated in the future, and now the future is here, and they have to face the fact their past labors have been devalued and certain futures are now uncertain. And that is what we face, and this settlement agreement provides short comfort, and hopefully from a union perspective a belief they have not been abandoned, and they will be properly represented.

There is opposition by a few long-term disability recipients, and from the material, and notice of appearance, there are a number of CAW members that seek long-term disability benefits and subject to the collective agreement that is file those notices. It's certainly our position that these individuals are subject to the collective agreement, and

the exclusive bargaining agency and are not in the position to object to which the union agreed.

It's our position they may not have done so had they received the letter we sent in advance of the notice letter, but unfortunately they did not receive.

In the notices, it appears they are clearly fearful of what happened to them after December 31, 2010. In the settlement agreement, it provides the breathing space to deal with this, including putting in place employment related claims process and dealing with the distribution of the Health and Welfare Trust.

There is an anger that the rights they thought they had, in our case under the collective agreement, disability and pensions are being lost, and we -- the union -- are also angered, and that is why we lobby to change and better protect people in this situation and will continue to do so until that is achieved.

Some want to maintain rights they feel may provide a greater benefit for them or will punish those perceived in wrongdoing, and that

right is maintained in that agreement. If there is a legal obligation that was avoided, or if there was a misrepresentation that resulted in legal rights or entitled being lost, the right to put forward those issues is maintained in this agreement.

More important, this agreement provides for the greater good by avoiding litigation over that which is legally acceptable.

Some feel they are not provided sufficient information about the Health and Welfare Trust or were unaware of the company, that the company was the insurer of the benefit programs. They are provided all documents that was asked for and some is subject to confidentiality, and much that is important has been publically disclosed by the Monitor. The union has not been asked by members or those that are have retained us for greater disclosure.

With respect to those few individuals who have sought representation from Mr. Rochon and his firm, it must be noted that there is nothing that would provide a basis between those individual and those represented by the CAW

who vastly outnumber the particular individuals represented by Mr. Rochon, and in particular, the few represented under our collective agreement.

I want to speak briefly, just simply with respect to our factum, starting at page 9. It's the sections that deal primarily with our jurisdiction under the *Labour Relations Act*, and that the decisions of the union itself are binding on all employees, and the bargaining unit is described to include those that are no longer employees of Nortel, such as long-term disability employees that don't work at the facilities but named in as being active, and my shot at H2.

THE COURT: Everybody gets a shot at H2. Even the budget gets a shot.

MR. WADSWORTH: I noticed that, so someone is listening to us.

The UCC and bonds are asking that H2 not be in there, in order to gain their approval. The inference is that without it, any new legislation would have no effect on the settlement, except nothing in this agreement, when will negate.

Specifically applicable to the ranking of priority in Nortel insolvency. The parties cannot agree, and I would suspect the court cannot approve an order to disallow the application which does not exist at this point.

The agreement is replete with references to pari passu treatment of the pension plan and Health and Welfare Trust and amounts owing in relation to these.

All that H2 does is permit the parties to argue for or against the application of any changes, to the Bankruptcy and Insolvency Act, not that they must or should apply. The legislation will decide that.

The agreement provides for nothing more than what would be ready and apparent in any event from the language of any future legislation with respect to the payment of the termination pay.

The deal that it's that the payments of 3000 dollars are impartial satisfaction of severance pay, and to be on at claim and not distribution. The company is satisfied. We are satisfied, and the Monitor supports the

position.

In terms of the overall agreement, no other payment, LTD income or benefits, or pension benefits, or pension payments, are in account of distribution. It would be inequitable to treat these any differently.

I was going to turn to the factum of the note holders, and specifically to page 9, paragraph 22.

There seems to be an inference we are not giving up much for what we are getting here.

Paragraph 22, it states the CAW in its communication to its member state that all members are giving up under the proposed settlement the possibility of locking up matters in litigation, and I go to what is highlighted.

We have not given up anything but the possibility of locking this up in litigation, or the next line found in our record at page 12 of Exhibit A, and I will read that.

It says that is not and should not be our objective. However, what we have given up is the right to try on an entire new set of facts and circumstances, and to have the court

determine under the current legislation a new view as to the rights of working people and families to get what they are entitled to. Giving this up was not done lightly.

We have also given up the right to use this opportunity to make a better deal, based on the chance that new circumstances would give us greater bargaining power.

Your Honour might have noticed that unions continue to bash their head against the wall in the hope that it will fall.

We have also provided releases to everybody and their sisters, uncle, cousin and dog in this agreement.

And as previously noted, H1 in the agreement provides that we have agreed to the fact that no plan may be approved which provides for a separate class for the pension and HWT and ordinary creditor, and that the claims of those Health and Welfare claims will run part of a term written over and over and over in the settlement agreement. We are not getting a free lunch here.

Finally, in fear of changes to the change of Bankruptcy Law, clearly the loss would provide

a greater strength to our argument, and certainly to our resolve that the Bankruptcy and Insolvency Act must be amended.

In closing, the three tests have been met for determining that this settlement should be approved as being reasonable, equitable and within the best interest of all creditors. The court has the jurisdiction to approve the settlement, and it's our sincere hope it does so, as soon as possible.

Subject to any questions you might have, Your Honour.

THE COURT: Thank you.

MR. ZIGLER: Mr. Jacques would just like a moment.

MR. JACQUES: Good morning, Your Honour. I will be brief in keeping with the overall moving theme and in urging you to accept, we adapt those submissions, and, we had discussion with the Monitor and legal counsel, and we are satisfied with the progress and information received. We take comfort in the draft order to you. Those are my submissions.

THE COURT: Thank you.

LAWYER (UNIDENTIFIED): I act for the recently

served Canadian Nortel employees committee. Your Honour, my submissions will be brief. In light of its duties as administered of the pension plans, in the Board's view the agreement it's a monumental achievement and is a necessary step to assist the applicants to wind down their remaining operation and transition their affairs.

As you have heard at length, no settlement is perfect. It also requires compromise, and, in this case, extremely difficult compromises. The settlement is a culmination of some hard bargaining over a lengthy period of time, where all of the interests were properly represented and the settlement agreement and the board's view represents a fair, reasonable and i emphasize practical resolution to a number of complex and uncertain issues. It is the package. You heard from various counsel as to the trade Offs That Were Given in Order to Obtain Benefits. So you have been presented with a package that is as a result of expensive negotiations and the Board believes that the package that is before you balances the interest of all of the

stakeholders and represents the best deal that is practically achievable, and I think that is something the court should be cognizant of. This is after all a hard bargain and to send people back, you have no expectation that anything other than what is before you will be achieved.

If i could go up to the 30 thousands foot level for a moment. The former employees and long-term disability. The settlement creates security and provides notice and time to plan for the future. For the current employees it provides a smooth transition to a structure that is more appreciate for Nortel work force. For the company, it eliminates the risk of cost and litigation regarding health and welfare trust claims and reduces cost and potential description to a plan and assists to retain employees necessary, from Creditors, It Clarifies the Status of the Pension Claim and Health and Welfare Trust Claims. In contrast, not approving the settlement agreement will result in negative consequences for all parties. There will be increased risk, uncertainty and disruption for the current

employees and increased cost, potentially the plan, which will get everyone out of this pickle.

In the board's view, for all of these reasons, it's of the interest, in their view that the plan be approved, as it benefits all of the stakeholders.

THE COURT: Thank you. By my count, Mr. Rochon is still to address, as well I have been advised there are three individuals. Mr. Burns, Mr. Martin, and sorry? Three individuals.

Any others? If you could identify yourself, please. I am just trying get an idea of timing. We will generally take the lunch break at one. Ten minutes? Ten to 15. Okay, and the third individual?

I do not want to break up your arguments, so we will start at two o'clock to deal with those.

Mr. Rochon, do you have an estimate?

MR. ROCHON: I think an hour.

THE COURT: I really don't know the positions. You may want to consult with them, and if you have a recommendation after lunch.

MR. ROCHON: I am thinking I will go first.

THE COURT: I will see you at 2:00.

--- Lunch recess.

--- Upon resuming at 2:00 p.m.

THE COURT DEPUTY: All phones off, please, and no chewing gum in the courtroom. Thank you.

THE COURT REGISTRAR: Order, all rise. Court is resumed, please be seated.

THE COURT: Just before we get going, some housekeeping. I gather there are two additional parties wishing to make in-person representations. If matters do not conclude today, they can spill over if counsel are available, tomorrow morning. Same place, same time.

I am quite prepared to go beyond 4:30 today, but I don't want that at the cost of some of the parties here not being able to stay beyond 4:30.

We may go to five o'clock, if that is not too onerous. On that basis, are you able to stay until five? We also have the other motion. How many counsel are in that? Mr. Armstrong? And is there anything contentious there?

MR. ARMSTRONG: I don't believe so.

THE COURT: Do you have any information as to whether Judge Gross dealt with that yesterday?

MS. STAM: Yes.

THE COURT: I would propose, I don't think it requires a reporter. We will deal with that at the end. Is that fine?

Is there any problem?

I just don't want to side track what we are into now. So, we will deal with that at the conclusion, and I also have to take a break at 3:30 to have a scheduling issue with Judge Gross coming out of yesterday. All right.

So, it seems that is the material for the end of the day. Okay.

Mr. Rochon?

MR. ROCHON: Your Honour, yesterday you were handed up a copy of the supplementary record.

THE COURT: I have the motion record, the book of authorities, and the factum.

MR. ROCHON: I will hand this up.

THE COURT: I don't think that had the stamp. I don't think there is real stickers, so we will do a one for one trade.

MR. ROCHON: Thank you, give and take.

As you know, I represent a group of the LTD

beneficiaries with co-counsel. In total, there are now some 37 individuals who have retained us to object to the proposed settlement and to pursue litigation, where possible, to the extent -- subject to the court's disposition with respect to the release provisions.

Now, I should emphasize from the outset, the right to object is fundamental to not only the bankruptcy proceedings, but also in class actions or other proceeding where you have representative counsel or class counsel, counsel that has been appointed on behalf of a group of individuals, and although we would not disagree with the fact that --

Mr. Zigler and the others have the right and obligation indeed to negotiate on behalf of the group of people, this obligation, or sorry, it doesn't take away from the fact there are also people out there that can come forward and object and that is the group, sort of the "special" group that I represent today. And those objections, as I know Your Honour realizes, those objections are serious.

In this case in particular, and they -- they

are (inaudible), and we urge upon the court to consider those objections in the spirit in which they are intended.

THE COURT: Of the 37, how many fall under the CAW umbrella?

MR. ROCHON: I was hoping you wouldn't ask that question. I have not done tally. A few.

THE COURT: What is your position in response to Mr. Wadsworth, to the effect if I get his point that it's the CAW that has the exclusive right to represent that group?

MR. ROCHON: I wouldn't dispute that, but that exclusive right does not preclude his own members from exercising their due process rights, and objecting to the settlement as it's proposed. That would be my position. In any event, there are just a few of those individuals that have retained us, and I can get a hold of that number, if that would help. As mentioned yesterday, we have in the courtroom a number of Nortel on long-term disability, and as you appreciate them here, they will be impacted by the settlement agreement if approved in the current form. I agree with my friend's submission yesterday:

The court must assess the relative benefit and burdens on the parties.

In this case, however, contrary to the positions taken by the settling parties, the rights of the disabled being extinguished far outweigh the benefits obtained. There is evidence that any reduction in the level of benefits made current to the LTD will lead to a situation of extreme hardship and suffering for these individuals. It's not overreaching to say what is at issue for the LTD beneficiaries is, in some cases, a matter of life and death. This goes beyond feeling bad or happy about the terms of settlement.

I believe if the court takes a moment of pause, it will be convinced of the necessity of agreement or at least several provisions conflict with the spirit and purpose of the act and are not really required to facilitate an orderly liquidation of Nortel. While the proposed settlement does provide health and income benefits to the end of 2010, I believe on the evidence there was a reasonable prospect that such would have continued well beyond March in all events.

As such, the benefits obtained under this agreement may be overstated.

As a trade off to the benefits provided to the LTD, the disabled Nortel employees are being asked to relinquish legal rights, and the shortfall of the HWT in excess of 100 million dollars. That revelation, as Your Honour knows, comes in the 39th report of the Monitor released February 18 of this year.

As I will discuss later, there are claims against some of the released parties that could eliminate shortfall and attended hardships of the LTD. There is a solution.

Having regard to unique circumstances, the settlement agreement as it stands now is unfair.

In this regard, courts have recognized that in considering what is fair and reasonable and whether an appropriate balance of rights has been achieved, regard must be had to those who are most deeply impacted by the proposed agreement. And there is case law talking about this, and specifically the rights of the objectors, and I will take you to that later in my submissions.

This agreement has not struck the balance, as I will discuss, the important rights of the disabled are wholly unnecessary to an order and offend and purpose of the act.

THE COURT: How do they offend it? Where I direct this is, I have heard from a variety of counsel that there is no -- well, there may be some doubt if you get to the Supreme Court of Canada level, that things as they presently stand, the claims are all that of unsecured creditors.

MR. ROCHON: Well, the first concern we have, there are two. Two major concerns, and one is the extent of release, and the other is the ranking.

THE COURT: You put to me twice now that the settlement agreement is at odds with the objectives of the legislation, and I would like to know how? Because --

MR. ROCHON: Well --

THE COURT: Wait, hear me out.

If one accepts that the claim is -- and not to get into quantum, but if the claims of LTD are unsecured claims, I have to understand the conflict with the objective of the act, which

when you get to a situation of distribution of assets to unsecured creditors is on a pari passu basis.

MR. ROCHON: We heard Mr. Zigler talk about the 37 million dollar loan from the trust. To have a release that extinguishes at this early stage of the proceeding, because this has several more steps to go before it's final, but at this stage to distinguish the rights of the LTD beneficiaries to bring action and make a claim for the 37 million from the trust fund is precipitous and unnecessary to the process. After all, lawsuits, it's our society mechanism to define rights, and taking away the right to pursue a claim to recover some 37 million dollars that was for lack of a better word "alleged" to be taken out as improper, in breach of the obligations or misappropriated at worse, the money was taken out for a purpose that was not the purpose for which the trust was intended.

MR. TAY: Sorry to interrupt. There is no evidence of that.

THE COURT: You are about five seconds ahead of me. You will have to return to the basis

of your argument, because throughout your factum -- not just on this point, but the references that you have and the factual background is at odds with many of the other submissions, the written submissions filed, and if you want me to follow along exactly where you are going, you will have to take me to the references, because I am not just going to accept the colours you put on, because it's at odds from the submissions coming forward from the applicant, and also from the Monitor.

MR. ROCHON: Well, in terms of the submissions of Mr. Zigler this morning, we share --

THE COURT: There is a contractual obligation on the 37 million, but if we get to the suggestion money was taken improperly, you have to take me to the references, sir.

MR. ROCHON: Why not start at the 39th report of the Monitor, Your Honour.

Why not start with that report at Tab H of the report.

And if you go in three or four pages, Your Honour, you will see a page headed up "Nortel Networks Health and Welfare Trust Fund" and it says:

"Statement of net assets for benefits, dated December 31."

And there is two columns, 2008 and 2007, and if you go down three quarters of a way down the chart, there is a heading "due from sponsor company." That is the evidence with respect to the loan taken from the trust. And -- sorry.

THE COURT: It indicates to me that there is an obligation from the sponsoring entity to the trust of 37 million. How it got there is not -- to me -- absolutely apparent from a reference to a figure in a financial statement.

MR. ROCHON: I would agree in terms of it not being absolutely apparent, but, with respect, having absolute certainty at this early stage of the process is not the threshold that should be applied when determining whether or not rights to bring a claim should be extinguished absolutely, and if the agreement goes through in current form, the rights of the LTD beneficiaries to initiate that suit will be barred.

So, in addition to the statement in this

financial statement, if you turn up our main motion record, Your Honour, in tab 6, this is the affidavit of Diane Urquart, and if you turn to page 9 of her affidavit, and at paragraph 22, there is a discussion of the 37 million dollar HWT loan to Nortel, and it's her opinion that that loan is likely to be a loan for cash taken from the HWT in the past to pay for the pay-as-you-go employee benefit plan to pay contribution of funds on the pay-as-you-go benefit plan. That included the pensioners medical and dental benefit, and the LTD medical and life and the survivor transitional benefit.

> "If one takes the Settlement Agreement payments shown in Exhibit G attached hereto as a guide to what one year of claims for Pay As You Go Employee Benefit Plans, the annual amount runs at $39."

Then there is a parenthesis. It appears to be a loan that was effectively made from the assets belonging to the LTD beneficiaries and survivors of Nortel whose proceeds were used for the benefit of one year of pensioners

medical and dental benefits, and other pay-as-you-go benefits.

That is her thinking at this early stage as to what that loan was for, but since these are trust funds, and there are beneficiaries and a specific purpose to the trust funds, which is not the purpose that is for which these funds were used according to her, then we have a problem.

We have a situation of breach of trust, in my respectful submission. And it's a distinct, defined breach, and it relates to a trust that is a real trust. This is not some deemed trust where there is no paperwork. Yes, it's not a trust that's informed through legislation statute, but it was set up January 1, 1980, and there were numerous trust documents that have been released, and we saw more documents related to this March 1st of this year the other day. So we have real trust.

We have professional trustee corporations, Sun Life, Royal Bank and others, and we have a formal trust structure that was represented and accepted in so far as there were the 37

million dollar loan taken out of the trust. It's one thing not to fund a trust. We know for several years they did not fund the trust. That is one breach, but to take money from the corpus of the trust and use it for another purpose is --

MR. TAY: Sorry. There is no evidence of that. Sorry to interrupt.

THE COURT: It's a concern, and I will ask again. Mr. Rochon, if you are going to make those statements, you have to provide evidence. I will not make a disposition on this matter. It's a serious matter, and there has to be a record that you are going to refer me to if you want me to connect the dots in the way you submit it should be. The allegations are serious.

MR. ROCHON: The first bit is tab "H".

THE COURT: That does not prove the point that you are trying to make.

MR. ROCHON: Then the opinion of Diane Urquhart, tab 6, paragraph 22, and it talks about this 37 million being a loan, and that is as high as I can put it right now, Your Honour.

And as I mentioned earlier, these are early days in the proceeding and in my respectful submission.

THE COURT: Okay. We will try to focus here, Mr. Rochon. I have evidence before me that in approximately three weeks time, I have no assurances that these payments are going to continue to this group of deserving people. All right. Now, if that is -- that is what I have seen so far. There is a problem brewing for March 31st.

MR. ROCHON: Your Honour, I would say to that, yes, there is a problem, because March 31 has been laid down as a deadline, if you will, at which time benefits may expire. And I would say this, that we are not here trying to provoke a cessation of benefits to these people, whether it's the 37 I am representing or the 27 nonunion or the 410 when you include union.

We don't want to cause hardship for anyone, but it's my submission on this point, the Canadian finance agreement that was negotiated last year and finalized January of this year, provided a fund of money. I guess taken from

the U.S. operations through the inter jurisdiction transfer.

If memory serves, approximately 198 million dollars, and it's that fund, at paragraph 92 of the 39th report of the Monitor that funds are available and was available and, in fact, that fund is being used to help secure the 57 million dollar security that Nortel is putting up to secure the payments up until the end of the year.

Now, if memory serves, Your Honour had this before you.

THE COURT: That much I remember.

MR. ROCHON: I was not part of the proceeding. I am trying to put the pieces together. Your Honour express and reserved the right to order, if I have this correct, to order the continued benefits beyond March 31, and so as much as some of the stakeholders, including Nortel, would like to get this deal done, because you know, so many people put so much time and effort into it, and I am not belittling that, but it's within your power and jurisdiction to extend the benefits order, so that we can come up with an agreement that

we can all be supportive of.

I think that is kind of -- that is the nexus of the matter, to extend beyond court order, while parties work out their differences, and the differences I suggest with respect to a release carve out of 37 million dollars and to give priority rights or not take away priority and to move down to the lowest common denominator with respect to equality.

As Your Honour knows from your extensive knowledge in this area of the law, the quality does not always mean equity. Equity does not equal equality.

In this case, to drop the LTD beneficiaries down to the same level as an unsecured bondholder and then to bring their claims forward or they will be brought for them, and then to sort of swim in the 26 or 28 billion dollar pool of debt or bondholders, where these people were the beneficiaries of the trust that was formed 40 year ago -- sorry, 30 years ago, in my respectful submission, that would be unfair to these objectors.

So, the two main objections I have relate to what we have just talked about in terms of

that aspect of the release, and the other is release to the third parties in respect of the HWT claims, which interact with one another. Specifically, the trustees of the trust, the HWT, the officers and directors, the committee members, and those sorts of third parties, to enforce or to require that the LTD beneficiaries release these third parties is troublesome for our group, and, in my submission, not necessary for the good function of liquidation.

As Mr. Tay and Mr. Zarnett mentioned yesterday, this company is no longer trying to restructure itself through the positive lens that it set out in this venture. It's now a liquidation and insolvency process.

So to have a lawsuit, or more than one lawsuit involving third parties, who may cross claim against Nortel -- and I emphasize "may". But even if they did, this company is basically in liquidation now.

So, why should we -- why should this agreement and why should the court sanction an agreement of these third parties that are not even part of this process? Because in doing so, you

have to look at the harm that would be caused to the disabled. (Inaudible) has calculated the effect of this deal for the average disabled person brings their income down where they live on $15,000 per year.

I can not think of that situation where you are raising your self and you are well below the poverty line.

You have people with MS, brain tumors, strokes. You will hear from some of these people later today, and the financial impact will be huge on this group. In exchange for giving us an opportunity through an agreement to sue third parties, in relation to the HWT, for instance.

So, the agreement as it stands would be highly prejudicial and completely unnecessary to the process. The bondholders for instance, could, in my respectful submissions, not really care about a 100 million down on the amount that is potentially available in the Nortel estate, which is potentially as high as 6 billion dollars. We are not even talking about half a percent. Whatever the amount is. 16 and a half cents. We are not even talking about a

fraction of a cent. The money in this case doesn't really matter.

The distraction factor is the primary motivator from the perspective of Nortel, and the Monitor and others supporting this. They don't want to be distracted by the potential that there is a third party claim, bringing in someone winding down the company and selling off assets.

THE COURT: This 100 million dollars that the bondholders don't care about, how does that factor into any decision that I make? Am I in a position just to ignore it?

MR. ROCHON: The 100 million dollar shortfall as opposed to the 37, you mean?

THE COURT: 100 million doesn't really matter to them?

MR. ROCHON: To the bondholders, in the context of the 6 and a half billion dollar estate when you look at cash and lock box and funds that come in up until the time of the final liquidation. When you look at the relative impact of this, or the relative prejudice --

MR. TAY: If he could show me where this is, I

would appreciate it.

MR. ROCHON: When we look at this from a relatively speaking, in my submission -- I don't mean to be coy, but the 100 million is a small percent, even if it's lower than 6 and a half billion as Mr. Tay suggests.

So, as Mr. Justice Farley spoke about in the Air Canada case, there is a difference between compromising rights and confiscating rights. The agreement, the way it's worded now, is more of a confiscation than a fair compromise of their right, and it's my further submission there is an opportunity here to you now get it right. Strike the right balance between all the stakeholders, including the LTDs, who are objecting.

THE COURT: Mr. Zigler pointed out that the -- and I don't know if it's a coincidence, but the benefits that flow out is about equal to the $37 million number that is due from the sponsor.

If that submission is accepted, how does that fit into yours that there is a confiscation of rights?

MR. ROCHON: From our calculation, the benefit

-- the fresh money, if you will -- from March 31 to December 31, is in the magnitude of 12 million dollars to the LTDs, and so that is the qualification of fresh money.

MR. ZIGLER: The 37 million is money that would have gone to benefit all LTD and that at this end, same thing.

THE COURT: Thank you. So that clears up that part. Sorry for the interruption.

MR. ROCHON: No problem.

So, coming back to the working out on a solution, we had heard and, Your Honour, I just made submissions with respect to what would happen if we went beyond March 31st without an agreement in place, and I made the point that the continued payment of benefits under settlement agreement can be -- well, it is current from funds Nortel secured prior to the settlement agreement being reached on February 8, and Nortel would have access to these funds, even in the absence of a settlement agreement.

So, in terms of benefits coming from the settlement agreement, through the question of continuing the payments, it's my submissions

that they are not actually adding any benefit that was not already in place prior to the signing off of the settlement agreement. And my friend mentioned in his submissions the affidavit of Gus Tergus, and that is at tab 3 of the responding material, and if you turn up paragraph 9.

THE COURT: Paragraph 9. I have it.

MR. ROCHON: It starts with the CFSA, and indicates:

> "... applicants will receive approximately $190.8 (U.S.) million under that agreement."

I was a bit off.

> "I am familiar with Nortel's cash flow projections for 2010-2011. The Settlement Agreement utilizes approximately $44.2 (Cdn). million of the $190.8 (U.S.) million amount to benefit persons represented by the Representatives and the CAW, which is the bulk of the assets being transferred under the CFSA other than those required to finance Nortel's Canadian operations in 2010-2011."

So, buttressing the point I was making about money being available, and in coupling that with the reservation of making an order. And going back to the 39th report at paragraph 92, it states, that is page 34 of the report. Page 34 of the 39th report. Paragraph 92. The bottom.

> "As discussed below, the Applicants have sufficient funds to meet their payment obligations under the Settlement Agreement. However, in the Monitor's view, it is appropriate in all the circumstances to give those entitled to payments under the Settlement Agreement the additional security provided by the Payments Charge."

THE COURT: I will leave it to others to comment on some of the other uses and demands being made on that. Cash, that is, that you have identified. It is back in one of the previous reports, but my distinct recollection is that it was allocated for various uses, and I think it is reflected in the last endorsement that one of the objectives is to

insure there are sufficient resources to make the CCAA proceedings to what is expected to be a conclusion, and I know for a fact that substantial resources there are required for a tax settlement.

Mr. Tay might -- if I am off on my recollection, he will let me know, but there is that part as well as the day-to-day operations.

MR. ROCHON: But at the minimum, there is the 57 million security, and that is essentially putting up cash. So, they had 57 million to carry benefits through to the next nine months.

MR. TAY: That was just a charge in the assets to make sure to give to the people that get the benefit of the settlement. The assurance that if for whatever reason they run out of money, they are secured by that. That is all that is.

THE COURT: Part of the issue may well be, and I recognize that your retainer is not going back to the beginning or even prior to the filing, but --

MR. ROCHON: Yes. Thank you for that

clarification.

THE COURT: And that is perhaps one of issues with that -- that prompted counsel back last May to make sure where a party is there to represent the group that deserves representation so there would be some institutional knowledge.

MR. ROCHON: Which we don't have all of that knowledge right now. When I read the charge, the form of security, I came to the logical but incorrect conclusion that that security was backed up with cash bonds or investments, but maybe it was just, you know, computers. I am not sure what the form of asset was, but it must have been something identified and represented consideration for it to have made it's way into the agreement in the first place. I assumed it was cash, but if I am mistaken it's not all cash, the people that are familiar with that can educate the court as to what it is exactly.

So, in terms of what the February settlement agreement delivered, it has certainly delivered some benefits, but in terms of -- again speaking relatively, the relative

advantage of the February 8 agreement are not as strong and significant as my friends have made out.

Certainly, those supportive of the agreement cannot harold the fact it was responsible for the ongoing payment of benefits to the end of the year, because as I mentioned before, the CFA arrangement predated the signing of the settlement agreement on February 8.

Now, in terms of the gives and the takes, or the, you know, what the benefits are and what is given up of the February 8 agreement, as it relates to the LTD beneficiaries, the long-term disability income benefits will be continued until December 31, as will the medical dental life insurance. Then, the treatment of the HWT claims related to the funding deficit or any of the HWT related claims in any of these shall not be advanced. This is where we get into the release and ranking language.

These claims will not be asserted to make any claim that the HWT claims are entitled to any priority or treatment over the unsecured claims.

So, this is, at this stage of the agreement -- process and settlement agreement, they are looking to flatten everyone out to the exact same level, and I will come to case law talking about equality and equity.

The business about being "unsecured", that is emphasized throughout the agreement, and it wraps up with the language saying the claims rank as ordinary, and the basis of the ordinary unsecured creditors of Nortel, and then the release language, you are familiar with that. But as Mr. Wadsworth mentioned, the releases are broad and far-wide reaching, and they extinguish all rights that these people would have, other than what is left of the rights to advance claims under the Nortel estate and get what is remaining under the HWT, and then the benefits. The ongoing benefits being paid up until the end of the year.

Another point that we have an issue with relates to the fee and expenses to be paid from the HWT. That is at page 5, section C-1. Maybe we can turn that up Your Honour?

THE COURT: Which document?

MR. ROCHON: It's the settlement agreement. It's in the 39th report, for your ease of reference.

It's page 5, paragraph c-1. Midway down the page, under the resolution paragraph. "Any fees or expenses incurred in connection with any dispute among the beneficiaries of the HWT earning ... of the trustee and other service providers of the HWT, shall not be paid by Nortel, but shall be paid by the HWT corpus."

So, if I understand this correct, all the fees relating to counsel, for instance, who are working towards a distribution and resolution in relation to the HWT, will take their fees out of this trust fund and not -- those fees will not be paid through the -- through Nortel or through the Nortel estate in general.

And, so, the problem that we have with this is that, you know, these are trust funds, and it would have been preferable to have fees of represented counsel come out of the Nortel estate, for instance, or to be paid by Nortel directly.

I am not sure why it's necessary to further deplete these trust funds that are detained

for the group of disabled individuals and others also in a vulnerable state would also benefit from an increased amount of funds. And so, in my submission, there is no logical reason why this paragraph, the lines in this paragraph need to be here, because it unnecessarily burdens a trust fund that is already under strain as a result of the underfunding for the year, and the alleged loan for 37 million dollars as referenced in Ms. Urquart's affidavit, and we have been over that.

So, going to the depletion of the Health and Welfare Trust. Although the settlement agreement does not provide for the distribution of the Health and Welfare Trust, the financial information disclosed by the Monitor shows that the Health and Welfare Trust has been massively depleted, and specifically the financial statement talks about that, attached to the 39th report dated February 18. It disclosed that the net assets of the HWT, available for benefit payments, as at December 31, 2009, were approximately 123 million dollars, and schedule H at the 39th

report is the reference. The pinpoint reference.

In fact, it's the same page that we had the 37 million dollar due from sponsor company. So we are left with 123, and then we have the 37 million dollar loan, and then of the 123 million in assets, approximately 37 million is allocated for the LTD beneficiaries, and you will see this at schedule "H" of the 39th report, which is a few pages in from where we were looking at page 7.

It's the second column from the left, under market value of reserved assets, and then the report for the period ending December 31 prepared by Mercer shows that the liability owed to the LTD beneficiaries is in excess of 134 million dollars.

So, taking the 134 and taking away the 30 million here, and coming up with the shortfall that was identified of 100 million dollars in the HWT.

Now, as a matter of process, Your Honour, why the Mercer report that allows you to see the shortfall and the HWT, and that report is dated January 2009, why that report did not

come to the attention of my LTD beneficiary and the public prior to February 18 -- 10 days after the signing of the agreement -- remains a question mark.

The report was delivered to Nortel. That is the report, and it would have been of some -- not insignificant assistance to the descending Nortel LTD beneficiaries to know that the trust, the trust fund from which they were to receive their benefits on an ongoing basis was massive and underfunded and not to mention the sponsor of the 37 million dollar number in the material.

Now, just while we are talking about the HWT. I wanted to take you to the supplemental motion record I delivered to you. And, specifically tab 2. Sorry, tab -- actually, it's tab one, Your Honour, which is the affidavit of Arlene Borenstein.

And if you go to page 8 of this affidavit, tab one, page 8, paragraph 27, which is the beginning of the discussion surrounding the HWT and says, second line down:

"The first time the HWT was mentioned to this Court is in the

pre-filing report of the Monitor, dated January 14, 2009."

And then next paragraph:

"It's stated that on January 14, 2009, the assets in the HWT were greater than its liabilities, that it was forecast that the HWT had 'sufficient surplus assets to sustain itself during the Forecast Period' and that therefore, would be no need for Nortel to make funding contributions post-filing."

And then it continues at paragraph 29. There is a quote.

MS. RUBENSTEIN: While he is dealing with that report, I think he should put in the full quote. He is dealing with a 13-week full cash forecast, and the forecast says there is sufficient funds to sustain, which is the 13-week cash flow.

THE COURT: Again, it underscores the difficulty previously identified, and one that the appointment of representive counsel last May was intended to address.

Again, it's not a criticism. It's just the

facts. Coming to the brief when you did, you have to accept that your knowledge of the background is not that of your friends.

MR. ROCHON: I accept my friend's interjection, but I --

MS. RUBENSTEIN: I think when he makes his submission, he should look at the entire document.

THE COURT: You will have the right of reply, but, Mr. Rochon, the point is a valid one. It's dealing with a 13-week forecast period.

MR. ROCHON: Well, let me put this in to context. The point that I was making was that the shortfall, that is any shortfall as to the corpus of the fund, was only publically disclosed in the 39th report after the agreement was signed. And then if we turn to the next tab, Your Honour, which is tab "B", in the Borenstein affidavit, and go to page 15.

There is a further description at paragraph 48 of that document that states:

> "The Nortel Networks Health and Welfare Trust, as more fully described in the Doolittle Affidavit, is not

subject to the CCAA proceedings and continues to operate in the ordinary course. The Sun Life Assurance Company of Canada administers various non-pension benefits through the H&WT. The H&WT provides funding for various non-pension benefits on behalf of current and former Canadian employees of the Applicants. The Applicants continue to fund this trust in accordance with past practice."

Leaving the uninitiated to this process with the impression that everything is in good shape with respect to the trust.

It doesn't go on to say that, by the way, Nortel has not funded the trust for the last bit of time. Has not funded in years "X", "Y", "Z".

There are no specifics here. It leaves the clear impression that things are peaceful in the valley, when in fact it couldn't have been further from the truth at that stage.

So, although the LTD beneficiaries would be entitled to a payment of the corpus of the HWT upon determination of a plan for distribution

of the assets, as well as distribution to the estate as part of the future claim under the CCAA or bankruptcy, there is no certainty with respect to the amounts to be recovered for the sources of the individuals I represent. That said, the overall recovery will only be a fraction of the actual value of their disability income and medical benefits. In this regard, a financial as opined that the beneficiaries will likely only recover 39 percent of their actual liabilities from all three sources.

And I would like to take you briefly to Ms. Urquart's affidavit. Tab 6, Your Honour. And the first point I want to draw your attention to is at page 11, while I have this. Paragraph 26, where it begins:

> "Regardless of which of the two figures and reports are used, it is evident that there is a massive shortfall in the HWT of an amount very likely in excess of $100 million, a revelation only recently disclosed to the LTD Beneficiaries."

And he will find the other citation so we can

note that. I found it. It's paragraph 19, Your Honour. Sorry about that. And it begins, paragraph 19, stating:

> "In reaching the conclusion that the Settlement Agreement is grossly unfair and prejudicial as it relates to the LTD Beneficiaries, I have considered the likely recovery of LTD Beneficiaries from the corpus of the HWT and the Canadian Nortel liquidation. As discussed therein, it is my opinion that the anticipated recovery for LTD Beneficiaries through this Agreement and from the contemplated dissolution of the HWT, as well as from the Nortel Estate, is 39 percent of the disclosed actuarial liability. The 39 percent estimated recovery from three anticipated settlement sources are broken down in Exhibit 3 as follows: 11 percent from the Settlement Agreement; 17 from the HWT wind up; and 11 percent from the Nortel Canadian estate."

In terms of extreme hardship that individuals

will suffer, when you consider a typical LTD beneficiary who previously was earning 70,000 a year, and disability benefit pay, and then combine the CPP income and Nortel income of 35,000 with his or her medical benefit paid, and after continuation of benefits cease after December 31, the typical LTD Beneficiary's income would decrease to $15,838 per year on net basis, including the $13,272 of CPP disability, after now paying for his or her own medical and dental costs.

And the quote for that is paragraph 39 of Diane Urquart's affidavit. This is below the poverty line.

In terms of the evidence we have from the individuals who have sworn affidavits, if we could start with the affidavit of Jackie Bodie, in the motion record at paragraphs 15, 35, 36.

THE COURT: Tab 3, and the paragraph reference?

MR. ROCHON: 15, 35 and 36.

She begins at paragraph 15:

> "I am told by the law firm representing Nortel disabled employees

not to expect much - if any - disability income that I am entitled to, because there is simply not enough money in Nortel's estate to pay me what was promised they would. This is a hard pill to swallow for any Nortel employee, but for myself and 400+ other disabled employees who simply can't get another job to replace the loss of income, it may as well be a death sentence."

It talks about her Parkinson's and talks about the health-related expenses and of which was paid by the health care plan. The remaining was paid with the disability income, and she talks about the psychological effect of her illness, and then she is the primary care giver for her boys, aged five and seven. Husband works full time as, I believe, an IT contractor, and if her health is compromised further her husband would have to quit his job and support the children.

It goes through a number of points with respect to her considerable hardship and going down to paragraph 35.

"A year ago, I had no clue that my financial future was in jeopardy. Now, this situation with my LTD income has become a huge source of stress in my life, that I'm constantly worrying, I am not sleeping and my Parkinson's symptoms are worst they've ever been. Stress is particularly bad for people with Parkinson's. It has the effect of worsening a person's symptoms and reducing the effectiveness of medications."

Paragraph 36:

"I am convinced without a doubt that the stress I am enduring due to Nortel is causing my health to deteriorate more quickly. It's bad enough that I have to endure the stress of having a degenerative disease at such a young age, but my situation with Nortel makes me ask the question: how much stress should one person be expected to handle? Why is Nortel allowed to do this to me?"

Moving to the affidavit of Jennifer Holley,

which is at tab 5. Mr. Burns will make a presentation, so I will not deal with his affidavit, but the evidence is there at tab 4. And I am looking at paragraph 7 through 8 in this affidavit, and she has Crohn's disease. The cost of the services were approximately 13,000.

> "If Nortel is allowed to terminate its obligation to me, my income will be less than 12,000 per year. This will place my family's yearly financial situation $1000 in deficit before any bills are paid outside of our health and dental expenses."

Paragraph 8.

> "I don't know how we will make ends meet. Our bills are already cut to the bare bone. This current situation arising from the CCAA proceedings and everything surrounding it also effects my health. I am on medication for my depression and have had to have the dose adjusted three times. Every day, I weep in fear and frustration."

THE COURT: My law clerk has reminded me, I have a scheduling issue with Judge Gross.

--- Brief adjournment.

--- Upon resuming.

THE COURT: Okay. Please, continue.

MR. ROCHON: Good afternoon, Your Honour. I am in the supplemental motion record, tab two, toward the back. Josee Marin. Tab two, page 9. This is a 41 year old woman, single mother, young son with kidney disease. She suffers from an illness that causes skin to harden and eventual mummification and death.

> "If the Settlement Agreement of February 8, 2010 is implemented, there will be tragic consequences. I, for one, will be left homeless since I already live on just 70% of my salary or approximately $35,000. From the numbers provided by Segal actuaries regarding the Health and Welfare Trust, and if I understand them correctly, the proposed distribution seems to be in the 30 percent range."

32:

That would leave me with an

average of $1,300 per month from all combined sources of income without any certainty of receiving anything further before the age of 65. I already have just enough money to get by with $35,000 per year.

When I bought insurance coverage with Nortel, it was presented as being a very secure investment, and so I subscribed because it was my duty as a single mother to protect myself while I was young and healthy, to make sure that if something did happen to me, my son would be secure, at least financially.

If I had known that this insurance was from Nortel alone and not from Clarica/Sun Life and therefore not secured, never would I have jeopardized my family security. I would have bought insurance elsewhere; it's not secure, it is not insurance, it is a lottery."

Paragraph 35 talks about being uninsured and the prejudice is serious, and there is no

remedy possible, et cetera.

Carrying on, I mentioned the Air Canada case, and the comments from Justice Farley.

If you could make a note, I know you are familiar with this case, Your Honour.

Paragraph 59 of the Air Canada case, where Justice Farley talks about the rights of objectors, and objecting creditors.

It states that -- this is found in the factum at the beginning of the law and analysis section. The general principles for interpreting the CCAA and Justice Farley states:

> "I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally."

And then:

> "In considering what is fair and reasonable treatment, one must look at

the creditors as a whole, and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests and have the pain of the compromise equitably shared, as opposed to the confiscation of rights."

And I spoke about the confiscation of rights earlier. Creditors must be treated in terms of the burden caused by the insolvency. It doesn't mean all be completed with complete equality. It is equitable rather than, which is the objective in the CCAA proceedings. Where there are objections or excuses, there is a requirement to show the settlement, so effects their position as to be unfair; although, the court has jurisdiction to approve interim transactions and settlement, pending development of a CCAA plan, the scope of the court jurisdiction is informed by the purpose and objective of the CCAA. And then turning to the ABCP, Justice Blare wrote:

"The remedial purpose of the CCAA, and as its title affirms, is to facilitate compromise between an

insolvent debt company and creditors." And carrying on with the ABCP quote, Justice Blare stated:

> Courts recognize the act has a broader... and that this broad public dimension must be weighed in the balance together with the interests of those most directly effected.

And it's my respectful submission those most directly effected are the disabled in this case.

Further in the ATB Financial case, at paragraph 68, and part of the case, the Court of Appeal stated:

> "Parliament's reliance on the expansive terms 'compromise' or 'arrangement' does not stand alone, however. Effective insolvency restructuring would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to

permit a wide range of proposals to be negotiated and put forward and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite double majority of votes and obtain sanction the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvency without unjustifiably overriding the rights of dissenting creditors."

And it's my submission that the rights of the dissenting creditors are being compromised in this case unnecessarily. Courts have jurisdiction to approve agreements in circumstances. The above passage, as well as the framework generally suggest where there is a lack and significant rights, the plan is the preferred method of proceeding.

With respect to the third party releases, Your Honour, in considering whether third party releases should be approved, the Court of

Appeal referenced the following finding by the application judge as constituting guiding principles in the analysis and goes through "A" through "G", found at paragraphs 71 and 113.

> As I will discuss, the third party releases here do not satisfy these criteria, and, really, the big criteria are what contribution has third party provided.

And, of course, the Grace case Your Honour is familiar with. There was in effect of claims, and that is paragraph 37 of the Grace case. In the ABCP case, the following comments came:

> In keeping up with the scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of compromise or arrangement between, nor do I think the fact that the releases may be necessary in the sense that the third parties of the debtor may refuse to proceed without them of itself advances the argument

in favor of finding jurisdiction.

Skipping down.

> The release of the claim in question must be justified as part of the compromise or arrangement between debt.

In short, there must be a reasonable connection in the plan, and the restructuring achieved by the plan to warrant inclusion of third party releases in the plan.

And, so, there is nothing that in this case were vital to the restructuring of the industry, similar in other cases such as Muscletech (ph.) Research and Grace. The third parties contributed to the restructuring through the funding of benefits, whereas in this case, the third parties are giving nothing.

And, therefore, it's not appropriate to release those third parties, in my respectful submission.

So, in light of the anticipated low recovery to the LTD beneficiaries, the disabled, the inclusion of the broad releases which seek to bar claims for damages in excess of 100

million is highly prejudicial to this group of minority creditors, while the CCAA contemplates the compromise, having regard to the unique circumstances, the settlement agreement effects their right and interest as to be unfair.

Consistent with the overarching framework, this court is obliged to, are most deeply effected by the settlement agreement given the nature of their claims and nature of disability, as well as the shortfall on the HWT.

It's in this factual context that the fairness and reasonableness of the settlement agreement and balance of benefit and burden should be assessed.

We spoke about the benefits of the plan, and we know about the burden and what is being given up by the group of individuals, so I will move beyond that.

In terms of releases being overbroad, and the point they should not be approved, we can go to the actual release. It's in the settlement agreement at page 8, and paragraph G1 and page 9 of G3, for instance.

THE COURT: All right.

MR. ROCHON: So, this is to address the wording of the plan. Starting at page 8. The bottom of the page, the release and charge provisions, and language begins, "the LTD former" and skipping down 3 lines:

> "That each of the trustee of the HWT, the Monitor, all members of pension plan committees and their respective officer, it's broad in its language and purports to carve out nothing. It leaves the LTD beneficiaries completely empty handed, save and except the statutory exemption relating to fraud and misrepresentation, but it's -- the effect of these releases is to insulate all parties, including third parties, from any suits in relation to breach of trust in relation to the HWT, the 100 million dollar shortfall."

All of those items are off the table, and the beneficiaries, the Nortel LTD beneficiaries, and then the language carries on and in

paragraph G-2 and G-3, G-4.

And so the releases are broad and unnecessarily broad, in my submission, and I am not going to pick up all of the reasons we think we have a cause of action, but we believe there is some real cause of action available here, and certainly they would pass the Rule 21 test, and there would be a further opportunity to consider any lawsuit that was wrought in the context of an order to lift the stay.

So, if this wording is maintained, it has the same effect as a stay of any proposed proceeding or anticipated proceedings down the road.

So, in terms of relevant factors, when you are reviewing the release, whether or not a release should apply or not, first I say that the parties to be released are necessary and essential to the restructuring of the debtor, and, in this case, these parties are not essential. There is no restructuring. It's an insolvency liquidation.

THE COURT: Expand upon that in the context of ABCP, where that comes from?

MR. ROCHON: On this?

THE COURT: Yes. If you tell me there has to be a reconstructing or continuation of the business, and in Justice Campbell's remarks of what he was restructuring was the industry itself.

MR. ROCHON: In this case, it's a stand alone, has now declared heading down an insolvency liquidation path.

So, the comments with respect to Mr. Justice Campbell dealing with the restructuring do not apply here.

This is a company that is in wind up mode. So, the same sensitivities do not apply to this case, because it's in liquidation.

Next, the claims to be released related to the purpose of the plan and necessity for it. Here, there is no plan before the court. Regardless of that, the claims being released have no relation to the insolvency and liquidation process and will not impede that process either.

Third, the plan cannot succeed without releases.

Again, no plan before the court. So that is

not really a relevant consideration.
THE COURT: Is it your position there has to be a plan, if you will, to have a third party release as part of the settlement within the context of the CCAA proceeding?
MR. ROCHON: My submission on that?
THE COURT: What I am faced with here, and it's a problem. I have been hearing submissions that a significant amount of money is going to be made available for this settlement agreement, and it's been put to me that it is a package, and as part of the package, it's subject to the H2 issue that I will deal with at some point, but it's "you approve or you do not approve."
MR. ROCHON: Well, there is a third option from Mr. Zarnett, and that is to be practical, and to either release reasons or a letter to the parties which sets out Your Honour's concerns with respect to the way it's drafted. Come back in a couple of weeks after you sort these things out, and I will look at it again to have a process that is more in the spirit of the CCAA than a "yes" or "no", which is under your jurisdiction. That is the extent

of your jurisdiction, but there is a lot of room between those two extremes, and that is the way this court has been functioning in the past, and that's the way the class action court functions and other courts, where approval of where parties are at play like here.

We have counsel, but they are interfacing with the people. We have a large number of objectors, and a lot of moving parties here, and it's the coordination and guidance that the court can give.

It's somewhere in between the "approve or no approve", and that is the -- I echo what Mr. Zarnett said yesterday. Getting to the practicality of it.

So, saying no to the package before you will not end things forever, in terms of stakeholders, and the long-term disability folks, and the other disability or the pensioner, and so forth.

It will be the beginning of dialogue with court and counsel, and counsel will have an opportunity to fix the items that are of concern to the court.

So, yes. It would have been preferred, but rights are being effected and need not be as dramatic, and there is room to be practical and come up with a better solution.

Next is the fact that the parties who are -- who have claims are contributing to the plan in a realistic way.

Well, the officers, directors of Nortel, the trustee, they have not contributed anything to this plan. So, that is another reason not to release them.

The plan will benefit not only debtor companies, but creditor note holders generally. Again, no plan. There are certain analogies to come back to your early comments. There is no plan, but what are the -- what is the scope in dealing with settlement agreement? Some analogies here to be drawn, but in this case there is no plan.

And then, finally, the releases are fair and reasonable and not overbroad or offensive, and given the stakes for the LTD beneficiaries and in absence of compelling reasons, they are overbroad and offensive to public policy.

In terms of the statement by the Monitor, it's

my submission this concern be given no weight in the context of the CCAA proceedings. Where there is a stay in place in favour of the applicants to the extent that any of the releases have a claim for contribution, such claims can be submitted just like all the other creditor claims, and the fact that Nortel may be sued in light of the provisions of the trust agreement is immaterial. It's of no momentum, and the fact that it's a distraction is of no momentum for the company in full liquidation or insolvency.

The question is, the question remains: Why should that part of the trust agreement be given over the rights of trust beneficiaries in with respect of their breaches of the trust?

Although we have not had a full opportunity to analyze the full -- the disclosure to date, evidenced potential breaches of the HWT trust agreement which require Nortel to make employer contributions to the trust in amounts sufficient to pay any claim that may be asserted against the trust fund, as a result of the administration of the Health and

Welfare Plan, and as may be otherwise required from time to time for the purpose of the Health and Welfare Plan as determined on a sound actual basis, and that quote of course comes from the actual trust agreement that is contained in the Urquart affidavit at tab 6, and in the 39th report from the Monitor, and the most recent report as well.

There is more.

We don't have all the trust documents yet, but we have several of them.

In this regard, the statements made by the Monitor and representative counsel that Nortel had no legal obligation to fund the HWT is not true. Well, Nortel may have been under no statutory obligation to fund the trust. This does not diminish the normal trust, and under common law flowing there under.

The fact that the trust is not a statutory trust does not take away from the fact it's a common law trust where you have all the elements, and it's been in existence for 30 plus years. The breach here has occurred under one or more of the trustees' watches, even where the trustees' stated role is more

of a custodian. The authorities have still -- to the beneficiaries.

MR. TAY: I hate to rise again, but there is no evidence of a breach, and we are going back to what we started. I hate to go -- things are being made up.

MR. ROCHON: I should have said "alleged". As stated in the case, there is an overarching over an administrative trust to pay attention to the interest of the beneficiaries, additional -- in addition to its duties provided in the trust indenture, and in the Fraser case, the Court held that within the scope of its duties, the defendant breached it's duty of care to the beneficiaries when it failed to respond to the company contribution. In this regard, the company's failure to make contributions should have been a danger signal. It's difficult to imagine trouble than virtual termination from the principle contributor to the plan. There is no evidence, the defendant noticed this failure, or that it may, or made any inquiries, even though articles first pertain that is the trustee is not -- that should not exonerate

them from making inquiries from the principle to the plan had not been made.

Exactly our case, Your Honour.

In my view, true trustees have obligations of prudence not to just protect the corporation because of the trust, but the interest of the beneficiaries from the ongoing operation of the plan.

And the Forest (ph.) case is at tab one of the authorities, Your Honour.

In terms of the claims against the directors in Air Canada and MNL, held directors liable, constructive trustees for assisting a travel agency in breaching obligations. That case is at tab 2 of the brief of authorities.

Contrary to the position of the settlement parties, therefore, claims are being proposed to be released.

Given the depletion of the HWT, and the prejudice to the beneficiaries, the third party release provisions should not be approved.

Now is not the appropriate time to do this, should this -- given the timing consideration, this deferral is appropriate, and this is

something that could be looked at as part of a plan once we have a vote, and once we become a voting class on the plan, but now is not the time to do that in light of evidence, and the state of the case law that suggests there are potential claims available.

Litigation is a key fundamental tool in our society to help define rights. There are rights that have been effected here, and we have evidence to that effect, and we would like an opportunity to exercise those rights, Your Honour.

In terms of reasoning issues, the ranking provisions are not necessary or vital to the process at this stage. How does this assist Nortel with respect to their insolvency and liquidation? Why not be able to pursue priority claims as part of the claims process in the unique circumstances of this case?

There is no reason to have language in the agreement that makes them unsecured creditors just like all at this stage.

Well, the agreement may have the effect of adding some lack to the process, given what is

--

THE COURT: On what basis would claims be anything but unsecured?

MR. ROCHON: Well, if we are able to establish that they are beneficiaries under a trust and moneys were taken out of the trust, that would lead to arguments that these -- this group of people is or has priority over the unsecured. Now, we know there is case law dealing with pension funds and so forth, but there is no case law in Canada specifically dealing with this issue.

There is no case law in this country dealing with this. If there was a case, we would have seen it, but there are all the elements of trust here. It's a written trust agreement. These people are in a unique circumstance, compared to, say, bondholders.

THE COURT: How does that elevate a claim that they would have against Nortel from unsecured? If there is no money there? Okay.

The trust, there is not a statutory trust here. There is a lack of money.

So, through Nortel, on what basis -- what legal basis can you provide to me to substantiate that they could be anything but

unsecured?

MR. ROCHON: Well, in this case, assuming right now these are allegations, but assuming there has been a breach of trust through the depletion of trust funds, all allegations at this stage, then there is an obligation for the trust funds to come back to the trust so the trust is made whole, and it's full integrity is reinstated before the rest of the money is to the unsecured as part of the rest of the estate, because this money never belonged to Nortel. It belonged to the beneficiaries, not unlike a situation with a law firm where you have a trust account and someone takes from your trust account. That is a breach of trust. It's not a statutory violation, but under common law, it's something that is not permitted. You could think of other examples of trust accounts, but these are special vehicles set up.

The common law acknowledges these are not deemed trust, but actual trust under common law, and there are strong arguments, all of which would be arguments of first impression

that that is the case in situations like this all the time. That these funds would or this trust would be in priority to the other claimants. That is about as high as I put it.

THE COURT: I have your point.

MR. ROCHON: So, while completing the agreement, as is may add some level of clarity to the process, given what is at stake, there is no harm or prejudice if the process takes a few months or even longer to complete. Many claims processed in other cases have taken some time to resolve. As well, what is at stake for these others is monetary, and at the end of the day, given the amounts in issue, relatively nominal in the context of the sizeable estate and whether they receive 16 cents on the dollar, as I mentioned by way of example, or 16 and a half cents or 15 and a half cents. It's not, relatively speaking, a huge issue, and, that is, those -- this is a consideration when you are trying to effect this fine balance amongst all stakeholders and parties to this.

The impact on the LTD beneficiaries for these amounts related to this large shortfall, with

respect to their lives and how they will be effected is severe.

So the standard for approving a CCAA settlement like this should not be: What is the quickest road to resolution by eliminating rights?

The standard is fairness, as measured through a fair and proper balancing of rights. Even if it means a slight delay in terms of the timelines.

There was mention made with respect to the conflict in terms of continuing to represent the pensioners and LTD. I want to make the point that at some point another firm, not necessarily our firm, but another firm has to step in and represent the LTD beneficiaries in the process, because once the agreement -- if this is the agreement that this court approves -- it becomes approved then those rights and the eventuality that these parties will be even further at odds when it comes time to divide up the money, that situation will have crystallized through approval and having separate counsel will, in my respectful submission, be necessary.

Not saying it has to happen now, but if the settlement is approved, that conflict will be only a moment away in having separate counsel representing this particular group. That is, the LTD beneficiaries.

THE COURT: That is not having to be dealt with today.

MR. ROCHON: Further, I am not asking at this stage, I am bestowing that mantel on our firm. We have people that we are representing, the 37 people, to get standing in this process. I have standing.

THE COURT: You are standing, and you are representing.

MR. ROCHON: So, I will not be pursuing that, but later in the process it may be appropriate to come back to that, but we are not pursuing that right now.

I made the point about, hopefully, the costs of Minsky not coming out of the trust, and that is another improvement, and their fees be paid from a different source that would be less impact on this vulnerable group of people.

So, those are the costs relating to disputes

around the HWT. Those, and we went to the paragraph already, so I will not go back on that.

So, in summary, I guess the top level point is that I am asking that the agreement not be approved as is, but that in the interm that Your Honour -- this court makes an order for the continuation of benefits for at least a further interm period, which you reserved the right to do that in a previous session.

It's my submission the agreement as is does not strike the proper balance required by the case law, and that at a minimum, the releases, in terms of looking forward for suggestions, that the releases address the third party issue, that we carve out the -- allow lawsuits to proceed against third parties, the committee, and so forth.

The officers and director and the trustees, and that we have priority with respect to the 37 million dollar breach. At a minimum, that the language emphasizing that we are ordinary creditors like everyone else, that that language not be in the agreement, because it's not necessary for this agreement to -- with

respect to the 37 million. And that the fees I have touched on that with respect to the HWT dispute, and we touched on the point of the separate representation if this is approved and that will crystallize a conflict down the road that would have to be dealt with at a later time.

Your Honour, I would like to thank you for your time. Those are all my submissions.

THE COURT: Thank you.

I gather then there are four or five in person representations to follow? I don't know whether the individuals involved have been able to arrive at a consensus as to who will go first but two gentle men are standing. The reporter does have obligations at five, we have arrangements to continue in the morning, so I do not want anyone to feel they are rushed in their presentations.

UNIDENTIFIED SPEAKER: I am here representing Josee, long term -- Josee is a member of the Canadian office worker union and has been on long-term disability since 2003 and understands the procedure, and she refuses the agreement fully knowing the possible

consequences that may occur to her health condition, and if I might add, she is scheduled for heart surgery in May, and she is currently losing her eye sight due to uncontrolled diabetes.

I don't want to take a legal standpoint. I am not a lawyer. I am raising certain questions that people do not seem to have addressed. Before taking a decision based on the 39th report from the Monitor, basically, if you want to settle an agreement, you have to know what you are dealing on can be trusted.

The first thing I read when I read the 39th report, all the results are unaudited, so this popped up a question for me. I started to lock up, for instance, the 37 million. That seems to be due by Northern, which we don't know if it's a loan or money not put in the trust fund, and the first thing I realize is that the keynotes that would explain if that receivable can be cashed by the trust fund are missing from the report.

And then I looked down at the second element, which is the 4 million dollars of corporation bond and the debentures. If you compare, the

amount goes from 6 to 4 million in a year and, again, the notes explaining, who are the debtors? How can the money be cashed or realized to get back into the trust fund is missing from the financial report.

So, basically, my first intuition would be to, before we get an audited report from the trust fund, since we don't know where the money is on the 37 million, this should be cross referenced with the financial report to figure out where the money went, and if the assets that are in the trust fund are really there to distribute or settle a dispute on.

Secondly, I am reading, I have been studying the Telecom market. I am an entrepreneur. I keep hearing that Northern is fading out, but when I read a press release from Canadian Press dated January 28, 2010, something says that the joint venture between LG and Northern in which Nortel own a majority, is getting ready to operate on America soil.

Now, again, in "The Globe and Mail", on February 11, it was published. Sorry, I have to go back to the notes. It was published in "The Globe and Mail", and there was a comments

three days after the agreement was proposed that said, we still don't know what are -- it was a story I have to rephrase.

It was a command that didn't want to identify itself that was published that the current president didn't chose to comment on, and the quote said:

> We don't know what we will do with the LTE patent portfolio yet.

Those two assets would be enough to get another company started from scratch. Mainly because all of the hardware technologies will become obsolete in three to four years, because it's gone from wire to wireless, and the LTE technology would allow replacing wire technology like you find internet in your home, with something wireless and easier to sustain and deploy, because it's cheaper.

Now, nobody has raised the issue that Northern may not be fading out, and on that account, if it ever happens, it means that nothing should prevent the supervisor from recalling a transaction on those asset that are worth roughly between -- well, it's been estimated between 600 million and 1 billion, and for the

joint venture enterprise, I don't know which. I don't have any evaluation for that. But those are the two major assets that could be transferred and for which the supervisor would have a right to recall if he -- in any case. So, basically, binding the supervisor with the agreement right now would actually do two things, and make sure that, see, there is no use to binding future transactions and making sure the superintendent is bound and the creditors lose part of their rights to the assets as is right now.

So, going back to Josee Morin case, since she is a union employee on disability, her work contract states Northern Trust has the obligation to keep her employee status as is, as long as she is on disability. Meaning, she gets full pension, full years of service, fringe benefits for the next 15 years, until she retires. Part of the agreement say that she has to terminate her work. Her position gets terminated, and, in that account, that is one of the reasons she wanted me to speak out to you. That is the main reason she would not agree to that.

Basically, her medical condition requires a lot of medication. She has several illnesses to take care of, and even though the current situation jeopardizes a way to handle health problems over the next few months, she doesn't wan for future transactions that have not yet been approved or regulated by the Superintendent.

So, in short, it would be her position to ask for audited financial records from Northern and the trust fund before we can even evaluate what the agreement is worth.

And, finally, not restrict her rights as to any future transaction done with the liquidation of Northern's assets or restricted in any way the rights of the Supervisor to take action and recall some transaction like the 37 million missing. That was the first. That if it could be identified as a transaction between linking and commercial, and the supervisor has full right to recall that transaction and get the money back in, but since the financial reports are not audited, there is no way to tell where the money came from, how the transaction was

billed. So, finally, we don't have a choice. So, basically, the settlement would be agreeable until the financial data given is proven accurate. Thank you.

THE COURT: Thank you.

FEMALE UNIDENTIFIED SPEAKER: I am here on behalf of myself, and my husband. We have been here for the last two days, but we cannot get back tomorrow. I want to say on behalf of myself and husband, Mr. Tay said we are unhappy. We are not unhappy. We are sad. That is how we live. Sad because of what has happened.

My husband was 39 years with Northern Trust. He had a stroke after returning from work in San Francisco with Northern Trust. Within 24 hours of his return. The man has never smoked or drank, so it had nothing to do with the stroke.

I don't do this easy.

THE COURT: Take your time.

FEMALE UNIDENTIFIED SPEAKER: He is paralyzed on the left side. He cannot do anything left at all. I have never heard him complain. He still likes Northern, which is wonderful, as

far as I am concerned.

The stroke made him move to a wheelchair. The wheelchair my husband sits in now is $5,000. It has to be made tall, wide.

With the stroke, we had to leave our home on the retirement property. We bought another house, but it had to be made wheelchair accessible. There is no money left.

Stan had a retirement package, that if he stayed he would receive 65,000. We invested over 8 years, and it left last January. So there we have lost 1000 a month, and the mortgage is $1100 a month.

By looking at us, we cannot get a job. There is no way for us to bring in any other income.

On page 3 of our affidavit, it tells you what we have. What comes in and out. More goes out than comes in. Never, ever, did we ever think that Stan would not be able to rely on Northern and Northern pensions. That was not even in our dream.

On a personal note, what we have done to try to compensate for some of this, we had three and a half, no, three hours a month home care that came into help me to keep the place under

control. We had to give it up.

We had the phone cut to save 39 dollars a month. Stan gets his hair cut now every second month, and I have not had mine cut in 40 years. Maybe I should sell it.

Stan cleans the snow and ice, and he cuts the grass and shovels from the wheelchair with the child's shovel, because we cannot afford 60 dollars a month to have the grass looked after. We cancelled the paper. It's only four dollars a month, but it's four dollars we had to get rid of.

We can no longer go for films, attend a holiday. We cannot help our children, grandchildren, and one of our oldest boys is mentally handicapped and the youngest is at Sick Kids twice a month.

Stan's social life is playing cards at the social or senior centre where he volunteers. We volunteer and serve a full meal once a month.

What keeps us going? Our faith. Knowing that the things in life that are important are not things, and that our Lord Christ will be with us no matter what the court decides.

THE COURT: Thank you. You mentioned you had an affidavit?

UNIDENTIFIED WOMAN: Yes.

THE COURT: If we cannot find it, I will get back to you. Thank you. Afternoon, sir.

RADULESCO SORIN GABRIEL: I am French speaker.

THE COURT: I will need assistance.

THE INTERPRETER: I understand this gentlemen may speak for about 20 minutes, and you have to double the time with translation.

THE COURT: Sir, are you able to attend tomorrow morning?

UNIDENTIFIED SPEAKER: It's going to be three days out of my pocket.

THE COURT: Well, we can do what we can for ten minutes.

RADULESCO SORIN GABRIEL: I will come tomorrow morning.

THE COURT: Okay. Thank you.

I don't think it's feasible to fit anyone else in this afternoon.

Is there anyone that thinks they can accomplish ten minutes without being rushed?

UNIDENTIFIED SPEAKER: I would like to deposit articles that I spoke about. Could I give it

to you?

Everything he was supposed to say is in French.

UNIDENTIFIED LAWYER: Your Honour, if the court would prefer, we could assist in preparing a formal affidavit and attach that as an exhibit.

THE COURT: That would be a better way to submit it, and if I could prevail upon you to do that and hand it to me first thing in the morning.

For tomorrow, we have three hours available.

-- Brief scheduling discussion.

THE COURT: Thank you. I will take two minutes and come back, and those that want to remain for the five minute side agreement motion, you may do so. We don't need the reporter for that. Thank you.

-- Court adjourned to March 5, 2010.

March 5, 2010

--- Upon resuming March 5, 2010.

THE COURT: Okay. Good morning, counsel. Good morning, sir, we had two unreps that spoke yesterday, and we have two today. We will continue with representations from those

groups.

RADULESCO SORIN GABRIEL: Good morning, Your Honour. My name is Radulesco Sorin Gabriel, and I am 59 years of age. I am married, and I live with my wife who is unemployed. My language of communication is French.

I immigrated in 1990 from (inaudible) country. I left with my wife and six year old son with two suitcases.

I wanted to start my life over in a free and democratic country. A country where human rights were respected. I started everything up from scratch, and I am proud of what I have achieved. Today I feel as though I am thrown to the trash bin like a society reject.

I was happy to work for Nortel. It was a proud accomplishment of my life.

Today, Nortel has become the cadaver. A warm body, where predators try to get the largest part of the meat available. I can't imagine myself, but as a fly next to them. I started working as a contract employee in 1993 and became permanent in 1999.

In 2001, my health deteriorated considerably, and I started receiving salary replacement

benefits for short-term disability. After six months, this became long-term disability. Presently, my benefits are 53 percent of my salary. In other words, $36,000 a year.

In 2003, following a continued deterioration of health, I was declared to be unable to continue with gainful employment and the medical commission of the government Quebec indicated that, and I receive a pension of approximately $60 a month from the Canadian pension plan, and this amount is not added to the amount from Nortel. It's deducted from that amount.

Please, don't be deceived by my appearance. I am a big person. I am tall.

I have had quadruple bi pass surgery. A heart attack and surgery. I have five stents in my heart, and I also had back surgery.

And this back surgery was because I was unable to walk, and I also have diabetes, and I am also starting to suffer from Alzheimer. I am not trying draw pity but draw the context from which I come.

I also receive benefits from the Nortel medical insurance of the average amount 38,000

for my wife and myself.

I am also, I also receive benefits from the -- sorry.

The 14th of January, 2009, after Nortel was put under the protection of the CCAA, I was surprised to find out that my income replacement was in fact self insured by Nortel, and that my benefits would be reduced because of the lack of funds in the HWT.

In fact, because Sun Life is only the administrator of the Nortel funds, it is indicating that it has no obligations. No contract obligations toward me.

On the 8th of February, 2009, I was startled to find out that an agreement was signed by the controller acting for Nortel, and this signature in fact was done without my name being there, or my approval, by Ms. Susan Kennedy of the firm and the lawyers firm Koskie Minsky. It's unacceptable to me for the following reasons:

With my name, without consulting me prior to signing the agreement, I consider that my right and liberties have been tossed aside.

Actually, the only right open to me is to

oppose this agreement before this court, although this creates a large expense of time and money. The travel between Montreal and Toronto is a stress for me and effects my state of health. Recently, my expenses have tripled because of the length of these hearings.

In line with this behavior, a lack of transparency and communication, my representative has acted in my name and participated in a number of meetings and negotiations without telling me about that, or the extent of its effects.

After having consulted only two members of her board, it doesn't give her a right to state that a decision has been taken in the best interest of all employees receiving long-term disability.

THE COURT: Could you stop a second and ask whether he at any time opted out of the representation provided by Koskie Minsky?

RADULESCO SORIN GABRIEL: No, Your Honour. I did not refuse the services, either of KM or Susan Kennedy. Because from the start, I trusted this lawyer's firm, as well as Susan

Kennedy. I had no other choice, because I did not know them. I gave them the benefit of the doubt, and I trusted them.

However, I believe that these things, these are things that I did not want to bring up today. I don't want to proceed to a trial of my representatives. I have information here, but I don't think it's relevant for the court today.

THE COURT: I agree.

RADULESCO SORIN GABRIEL: Everything that is in red in my document, I am skipping over. To make sure everything is clear, because I feel the French interpretation is a bit lacking. I am sorry.

The steering committee, the legal committee is composed of only two individuals.

Early on, there were five of them. One of these five people was someone that did not have the right to sit on this committee, and two others gave their resignation, and I don't want to get into the details around that.

This is why I want to stress the point that the fact there was consultation with only two members of her board, this doesn't give her

the right to state that a decision has been made in the best interest of the all employees receiving long-term disability.

It would have been better to bring to the attention of the group a memorandum of understanding negotiations by Nortel and controller that could have been modified after in the best interest of the majority of the group.

In fact, I understand that the role of the representation is to communicate with the group and to transmit to the lawyers, the grievances of the members.

I am not confident that all employees receiving long-term disability have received information regarding this settlement, considering it's advantages and disadvantages that are implicit in it.

In the explanations that were given KM, and it's representative focused on the 12.4 million dollars that Nortel will spend of its own money, and they reduced the importance of the concessions that were imposed in exchange for this.

To indicate what is said by the lawyers and

the firms that represent us, we will receive an amount of exactly 12.4 million dollars, which according to what my predecessors have said this would be given to the recipients of long-term disability in order to insure a transition.

But the question is: The transition to what? Because after the 31st of December, 2010, there will be nothingness.

It will be like assisted suicide or palliative care for someone in the process of dying.

Furthermore, the clarifications brought by Koskie Minsky cannot be accepted, because KM is the signatory to the understanding as a whole, the agreement as a whole, together with my representative, and without effecting their competence. In my mind, one has to accept the fact that they cannot be neutral.

The following is based on a statement made by Koskie Minsky.

THE FRENCH INTERPRETER: And the person has asked me to read what is in English here.

> "As you are an adverse interest to the court appointed representative for the purposes of the March 3 motion,

neither she, Susan Kennedy, or our firm has an obligation to assist in preparing an affidavit to oppose our motion."

RADULESCO SORIN GABRIEL: And that is my lawyer's.

I would like to speak briefly of the representative of our legal committee, and, more specifically, I would like to refer to the affidavit of Susan Kennedy in her affidavit dated the 23rd of March, 2010, and this is at page 72 of the responding motion record for former employees and disabled employees, specifically page 10.

THE COURT: Page 72?

RADULESCO SORIN GABRIEL: Yes, indeed, page 72.

That would be of the responding motion, not the affidavit.

THE COURT: The responding motion record from Koskie Minsky from February 24, that one? Page 72?

RADULESCO SORIN GABRIEL: Yes.

THE COURT: In that book, it looks like this.

MR. ZIGLER: Paragraph 10.

THE COURT: Thank you, I have that.

RADULESCO SORIN GABRIEL: Sorry. This paragraph, there is mention of the fact that there were 20 members. At the end of 29, there were 84. Those were the active members in our group; that is, members receiving long-term disability.

In paragraph 10, there is mention of the fact there are now 130 members. In actual fact, only 84 are active. And of this number of 84, 39 are opposed.

The remaining members have neither given approval or disapproval, therefore, we assume in absence of a response they are in agreement.

THE COURT: One of the difficulties I have is a lack of evidence to substantiate what you are telling me right now.

Have you filed an affidavit in these proceedings?

INTERPRETER: Sorry?

THE COURT: Has the gentlemen filed an affidavit with these numbers?

RADULESCO SORIN GABRIEL: No, Your Honour. We didn't do it, but we didn't know the extent of

the ensuing damages, because we had no knowledge of the track of the negotiations that took place, but it's not something I wish to speak about today.

THE COURT: I am prepared to go as far as to accept the fact that there are certain LTD beneficiaries that are opposed to the settlement.

RADULESCO SORIN GABRIEL: That is already obvious.

The lawyers that made submissions before me always referred to statistical groups. Everybody tried to minimize the extent of the opposition. We were characterized as a group of, but we are not involved in politics.

We have also been described as a minority that are opposing the agreement.

I, Your Honour, am living proof that I am not a statistic. I am a real person.

I stand against disagreement, because it makes no sense for me.

I can not use the lawyer's term, saying that I am not happy.

I am disappointed. I can not even find the words to express my state of mind. My state

of mind is something I do not wish on someone else.

I am one of those that took advantage of the opportunity and took up the courage to come before you. I am not represented by the lawyer. I wish to be self represented. I am doing what others might have been -- might have done, except for the fact they did not have the opportunity, the means, or the resources to come before you or the health to do so.

So, I am led to believe there are 406 employees that are not happy. I know three that are. I can not come to an enlightened decision without getting firsthand knowledge of the complete contents of the documents regarding the HWT.

All of the documents given to me are partial and to the annual report produced by Nortel in accordance with the contract signed by the parties.

In order to come to an enlightened decision, I would like to have at my disposal, such as the clear stated amount of $12.4 dollars offered by Nortel, as well as the clear balance that

will be paid to me after the out of the HWT. The actuary in charge of the Nortel bankruptcy was unable to provide these numbers, indicating in summary that these projections are estimates, and that the actual results can differ widely.

Up to this point in time, the dividing up of the funds for HWT has not been done, and as I see things it's an integral part of the understanding of the settlement.

The beneficiaries of the HWT fund are added to those of the initial or original contract. I don't have this in front of me, but I can state, I can affirm that this is the case.

I can indicate to you that the life insurance for the pensioners was not a part of the HWT. This, we don't have information regarding that. We have no documents. We have no information.

THE COURT: Let me stop you for a moment, sir, and try to bring yourself back to what this hearing is about.

It is a motion to approve the settlement agreement. That is what I want to hear.

You have described your background and given

me lots of personal examples and given me some reasons why I believe this settlement agreement not be approved.

Now, I am just trying to focus the remainder of the argument on why the agreement should not be approved. I am not here to -- one of the issues that is not here that you just identified is the life insurance. That is outside of this settlement agreement today.

RADULESCO SORIN GABRIEL: Thank you.

This was done with the purpose of indicating to you that there is a lot of confusion, and I can not get the information.

To be clear: I would like to understand the exact final amounts that I would be entitled to. Guarantees from the parties to the agreement before considering the possibility of waving all of my rights of litigation relative to the HWT.

Thirdly, I can not come to an enlightened decision without being able to read all of the documents in French.

To this point in time, all of the documents before the court are in English, and all requests for translation has led nowhere.

If you wish, Your Honour, I can submit evidence to that effect. I asked for the translation from Ogilvy Renault of 101 pages. I made the request in French, and the answer came to me in English.

MR. TAY: Just to clarify, the settlement agreement and order was translated and provided to all parties.

THE COURT: Settlement agreement and?

MR. TAY: Order. Draft order.

UNIDENTIFIED LAWYER: And the notice letter that was sent in accordance with your order was sent in French. The Monitor also has a (inaudible) that is in French and English and provided answers to questions that were opposed in French as well.

THE COURT: Thank you.

RADULESCO SORIN GABRIEL: I consider myself unable to understand clearly the implication of settlement. After I left on Tuesday, I was sent a text email of the text in French, and that was what was referred to a moment ago. All of the messages that were circulating within the group of pensioners were bilingual messages, and all the documents were in

English.

Only after the signing of this settlement by the Koskie Minsky office and the Monitor for the group of employees receiving long-term disability, and they put some questions in French -- I can not be precise, but to my knowledge, more than 30 people receiving long-term disability are not French speakers. I am not the only person to request the information in the language they understand. I must tell you, Your Honour, to be a French person in the case before you is an extremely difficult thing.

I was subjected to insults and bad language that I never expected to receive when I came here to Canada.

I wish to stop here, but I would like to submit to the court a document indicating the extent of these damages. I sent a letter to your representative regarding the health care. I sent that letter in French. Someone was kind enough to translate it into English. Unfortunately, I had the bad experience of receiving the following reply.

"If you are unhappy with the level

of French, you should file a complaint with the "Office Quebecois de la langue francais" and have them dispatch a language policemen to the Koskie Minsky law officers and the bankruptcy courts in Toronto."

MR. ZIGLER: That is not from our office.

THE FRENCH INTERPRETER: No.

THE COURT: You indicated that you wanted to hand up a copy of a document, and you can hand it, and we will make copies for all counsel that wish to have it.

MR. ZIGLER: All of our correspondence was translated into French. He asked for certain documents to be translated, and we translated them.

THE COURT: I think it would be more appropriate when you are called upon to give response for it.

I am not prepared to just accept this without copies and distributed to all counsel here, but once that has been done, I will take a look at a photocopy of it. You can see how many you have to make.

Thank you.

There are representatives that wish to address the court.

THE FRENCH INTERPRETER: I am asked to finish the comments here.

RADULESCO SORIN GABRIEL: Okay.

> "Perhaps you should also hold a referendum on the separation of the Quebecois LTD people from the LTD people in the rest of Canada."

Signed "B. Grow."

RADULESCO SORIN GABRIEL: I will stop here regarding the French language and the translation of French language documents.

Mr. Zigler's document was given to me, and it's translation came four days later.

So, this document I received in French from the lawyer for Nortel, as well as the agreement and the court's order, that was before I was on my way to Toronto. In other words, the second, fourth day.

I would never be able to accept to be fired from Nortel before Nortel disappears, after a bankruptcy.

First of all, so long as I am an employee of Nortel, Nortel has an obligation to take into

consideration the years I have put in, after the years of my 65.

THE COURT: If you could bring it back to the points at issue before the court and considerable latitude is provided to all individual parties wishing to address the court, but I am concerned we are drifting away from what was before the court, which is a motion to approve the settlement agreement. There is no doubt that there is considerable evidence about the suffering that many employees and former employees have suffered at the hand of this insolvency, but the issue today is whether to approve the settlement agreement. That is what I want to hear argument on.

RADULESCO SORIN GABRIEL: With all due respect, the fourth point touches that point. This indicates that I should wave my rights to Nortel, that I accept being fired as of the 31st of December.

And the reasons I can read to you, if you wish not to hear that information, simply bear in mind that I am opposed.

The reasons I wish to present to you, I am not

speaking of millions or billions of dollars, I am speaking of hundreds of dollars.

The fact is, after 65 years of age, I would be entitled to $900 from Nortel. It's not even $1000 dollars. We are talking about $900. That is what I was entitled to.

If I were to wave this right, if I accepted being fired, all of these amounts would be dropped to $400. And if I apply the calculation for the reduction of payment, that is a figure of 63 percent, then it would be reduced to $250 dollars.

Secondly, if this company should turn into one that is an administrator of patent and royalties, I have to be taken on with those that are in my situation.

We have contributed to the creation of this company's value. Sometimes at the cost of our health, and it would be right for us to benefit from this as well.

Last point, Your Honour.

I refuse to accept this settlement, because I don't want to wave my rights to oppose myself to an order for all incentive payments, financial incentive payments to management and

directors to the Nortel corporation and affiliates.

I consider that these payments by the courts are indecent, because they do not benefit those that created the value.

This 92 million dollar in bonus and incentive asked by the court are much greater than that which we would be getting. That which we would recover.

If this 92 million dollars were put in the health and welfare fund or trust, there would be no one here before you.

I have to admit to you that without this coverage that I am now receiving from the health and welfare trust, I would have to live on $600 dollars per month.

In conclusion, I ask the court that this agreement be rejected as proposed.

In the alternative, I ask this court to grant the intervenors a supplementary period of time to amend the terms in the best interest of the employees receiving long-term disability, of which I am one.

I am asking the court -- I don't know if I have a right to do so or not -- I also ask the

court to order the parties to put at my disposal all of the documents I have mentioned. More specifically with regard to the HWT and the actuary evaluations presented to date regarding the HWT with the proposal for the final divide of funds between the beneficiaries and all of that in French, please.

I have the feeling we are part of a group, including the pensioners, but in effect, in fact, I have the feeling that we are trees lost for the forest.

There are 17,900 pensioners that have total different demands from the 409 employees on long-term disability.

With all due respect to the court, I find myself in the position of asking a stupid question. Everybody seems to be in agreement that the health and welfare trust is not a part of the Nortel assets, and, therefore, will not be shared by the creditors.

The consequences that it was not covered by the CCAA. Meaning that the court has no jurisdiction over that.

So, I am wondering why an inclusion from the

-- in the settlement agreement, proposed settlement agreement, should make reference to this health and welfare trust?

I am not asking for an immediate answer. I am sure Your Honour will be able to provide that in due course. With Your Honour's permission, I would like to go on for a couple more minutes?

THE COURT: Two more.

RADULESCO SORIN GABRIEL: One more. I would like to speak to you of what I have achieved and am proud of. One of them being that I helped my son in preparing for his own future. He is now a lawyer. He has attended and had studied in English and now working for a large firm in Montreal. I don't want to indicate what field he is working in. It happens to be bankruptcy.

Would you like to know what my son asked of me? He told me: "As regard to the state of your health, I am advising you not to go. But for you to be at ease with your conscience. If you go, what I can tell you is that I know of Mr. Morawetz. I studied his books, and they are referenced in the field. He is

considered one of the best. If he cannot bring justice to your case, nobody else in Canada will be able to do so."

I do trust in your good judgment, Your Honour, and I thank you.

THE COURT: Thank you.

Good morning, sir.

SYLVAIN DE MARGARIE: I am Sylvain De Margarie. My aim is to communicate to you in English. I am a resident of Ottawa, and I representing my wife Doris, who is on long-term disability. For a while, I was on the steering committee.

So, that was pulled together by Susan Kennedy, so I know of the functioning of that organization and talking to many of the members, and I know of their plight.

I am not an accountant, lawyer, or actuary. So, my reasoning in this matter will be based on common sense.

Not being cognizant of the procedure to fill out an affidavit, because I didn't know that was part of the procedure. I have a statement I will read to you. Available here. I wonder if it would be possible to receive that as an

affidavit? Maybe after the proceedings or time you want ever?

THE COURT: I think we established this morning that if you do have something, the court services will copy it and make it available to all counsel and reps in the courtroom, and it will be considered on that basis.

Depending on what is in the document, sir, I can not tell you right now how it will be considered, because it's important in something like this to at least establish a record. If there are contentious factual statements in the document, that will cause me some concern.

If it's just a general summary of the point and argument you want to make, that is another story and that document will be considered.

SYLVAIN DE MARGARIE: Thank you. We will see, I am not sure.

I think I will be brief. The first point I want to make is the result of the settlement agreement is inequitable. Simply in question, the results of the agreement and ensuing distribution of the Health and Welfare Trust

that the information we have, we are in a situation, for example, where the pensioners are guarantied 69 percent of their income from the get go from their pension funds. LTD may get as little as 29 percent, so there is an inequity there.

Another factor in the agreement is that in the release provided for the Health and Welfare trustees, the pensioners are abandoning perhaps 3 percent. But, you know, a possibility of litigation for perhaps something that is 3 percent of what they are due.

For LTD, we abandon litigation for an amount that is around 61 percent of our due. So, there is a vast difference of what the agreement is between the pensioners which are the majority players and the minority, who are the LTD.

My second point is that I believe, and my understanding is, the settlement agreement was negotiated in a conflict of interest. The pensioners have a different interest in this, coming from the position of having 69 percent of their revenue assured, are coming into this

agreement with a different outlook on things. And, in particular, the release. The impact of the release on them is minuscule. It's probably less than 1 percent in their final return, while it's large for the LTD.

So there is a divergence of interest there. Yet, we are represented in negotiations by counsel, Koskie Minsky, and there is from my point of view, and I think others, concern by many LTDs that that representation has not been to our best interest.

I know maybe -- well, stop me if you feel you need to, but I would like to give or speak to the conflict of the interest and reasons we have to doubt that we have been properly represented.

Two examples. One of them regards, well, we will start with the release on the 32nd Report of the Health and Welfare Trust agreements, as soon as I read -- I read the information I get. As soon as I read that document, I developed my own opinion. I am not a lawyer, but I can read and make conclusions, and I had doubt as to Koskie Minsky's earlier opinion to us that there was nothing to go after.

I mean, there was no case against the trustee. So, reading the document, I had different opinions on that.

The first thing I realized is there was a clause for amendment later, and, two, they were included in the package.

Well, my first question is, is what I have here complete, or are there amendments not released to me and kept me from making an educated judgment? And, also, if I don't have a complete document, I am in a bad position to seek counsel for someone else. An opinion from someone else.

So, days after the release of the report, I asked the court appointed representative to obtain confirmation, whether or not the agreement in the 32nd report was whole.

The word "whole" we couldn't make it for conclusions.

Insisting (sic) on getting that answer, which seems would be easy, and it seems that the counsel at Koskie Minsky, if they had looked at it, it would be simple: Yes or no. I didn't get it. I asked repeatedly, and it was actually in the official records of the CNELTD

list of questions as recorded that they asked the questions and didn't get the answer. It took more than two months to get the answer, and the answer was given to me by Mr. Zigler three days after the agreement was signed. So, I was refused access to information that would have allowed me to make a better judgment, and it seemed to be a self protecting tactic. So, I couldn't go and do my own due diligence on the counsel that represents me.

THE COURT: I take it that you did not opt out of, or your wife did not opt out of the representation?

SYLVAIN DE MARGARIE: No. We gave the benefit of the doubt to Koskie Minsky.

THE COURT: I will then just emphasize the same to the previous presenters, that the motion today is one to approve the settlement. It is not a motion to deal with the actions or the advice or representation provided by Koskie Minsky.

SYLVAIN DE MARGARIE: Agreed, sir. What I am trying point out is the behavior that we have seen from Koskie Minsky.

THE COURT: I take it that the point you are trying make is that you did not have complete information or adequate time to consider the implications of settlement agreement that is being put before the court today?

SYLVAIN DE MARGARIE: With all due respect, that is not what I intended. What I intended is to show that we asked that we have an answer that would be available within days or minutes from Koskie Minsky, and they did not provide us the information we asked for, and in a prejudicial way that kept us from doing our due diligence.

Yes. I will go to my third point.

The settlement agreement and the Health and Welfare Trust distributions, in my opinion, cannot be considered separately.

The parties to the settlement agreement are also parties claiming interest in the Health and Welfare Trust. These include LTD beneficiaries, survivor income beneficiaries, retirees through a life insurance claim, and current employees through a group of life insurance.

So, what happens is, what is given, and in one

agreement can be taken from the other, and vice versa. So, it's hard to consider both separately.

For LTD, agreeing on a settlement agreement forfeits any leverage we would have in negotiations of a favorable distribution of the Health and Welfare Trust, and, therefore, to me, and it's common sense that the settlement agreement as it sits today ought to include terms for distribution of the Health and Welfare Trust. It cannot separate the two, because one will have implications on the other.

The fourth point: There has been talk about quid pro quo. I recognize the importance of quid pro quo. We are in insolvency, and people have to put water in their wine, but I think here we have a case of unbalanced quid pro quo.

Overall, I think what Nortel gives is 57 million dollars that is distributed among parties, and what they get out of this is a release for, and this is just one number. This is pulled out of the Health and Welfare Trust financial statements. They get a

release for liability to the trustee, which amounts to about 192 million dollars.

If you now take the quid pro quo and bring it to the LTD, of that 57 million, Nortel gives us 14 million dollars, and that includes income benefits and medical benefits, and I have added the two and the value of the release that we get.

So the quo Nortel gets is 80 million. Making the ratio of these -- you will find that the quid and the quo do not balance, that LTD realize is not the same as the quid, and the pro quo that the pensioners realize.

So, there is the bias in the agreement, and in the balance of give and take in this agreement, and that is in favor of the LTD.

My fifth point is equity is a nice thing to have, but admitted in some cases impossible to give.

For example, a blind person cannot drive a car. It's unfortunate for the blind person, but so be it. I believe in the present context, a solution is possible.

First, removal of the health -- of the release from the Health and Welfare Trust trustee

would potentially allow to recoup some of what is due to the LTD, and not only to the LTD but other folks too, but it would help to balance the quid pro quo.

I don't think the Health and Welfare Trust can be completely separate from the agreement. The Health and Welfare Trust, the people identified in the Health and Welfare Trust income statement that it has dibs on those assets, including LTD, and the survivors who both have income claims with respect to the Health and Welfare Trust as set, and there are two other groups that have supposed claims based on life insurance.

My friend spoke about that, and there are two groups. I mean, the Health and Welfare Trust for LTD is equivalent to the pension. This is basic revenue from which we survive, and we have two groups that are relative. That go into that or pretend to have rights to that fund based on claims for life insurance. The LTD life insurance does not come from the assets of the Health and Welfare Trust. So, I think there would be room there to equalize things, and perhaps let some of the people

that claim those amounts on the -- for the purpose of achieving equity and could abandon those claims.

Simply stated, the settlement agreement offers little in exchange for giving up almost everything.

The implication of the settlement agreement as it is now would be that it would be an inequitable solution.

In terms of human rights, the capital difference between retirement pension and LTD income benefits is the criteria of qualifying event under which a future pension is agreed to be paid. And they are both pensions under the common definition, the difference is the criteria between the -- for retirees the criteria is reaching age 65, which most of us will reach. It applies to everyone. For the LTD, it's becoming disabled. By default, an agreement or that agreement that results in unequal treatment to a minority of disabled people is according to my understanding of human right legislation constitutes constructive discrimination.

So, I believe behind this, we could see that

spectrum.

My third point is that settling this agreement, and specifically allowing the release for the Health and Welfare Trustee, it blocks the possibility of establishing a precedent that could protect LTD beneficiaries in the future for a similar case to court, and perhaps establishing a precedent that could protect LTD not only for Nortel, but beneficiaries in the future.

I read the trust agreement, and in that it says that the trustee agrees, at least yearly, to do actuary analysis, and Nortel is obligated to fund the trust according to that. The fund is underfunded by over 60 percent. So, something happened there. Either the trustee did not do the analysis correctly or Nortel did not pay.

The responsibility of the trustee could be looked at. Has the trustee done everything he could and taken all the steps he could to force Nortel to respect the agreement and have it paid.

So the question, in general cases, is whether a trustee in his fiduciary duty to

beneficiaries must exercise all feasible resources to compel the settlor to make payments as per a trust agreement.

I am not an expert in law, and I looked to find something on that, but I couldn't but there are people here that could.

Allowing this court to establish this precedent would once and for all resolve this uncertainty regarding the responsibility of Trustees through their participation in constructs such as Nortel Health and Welfare Trust, which are to the detriment of the Beneficiaries.

That closes my statement. Thank you for your time.

THE COURT: Thank you, and thank you for providing the statement that the court finds helpful and the other lawyers and in persons will find helpful as a good summary of your position. Thank you.

PETER BURNS: Thank you for seeing me today, Your Honour. I am here as one of the active of the LTD group.

THE COURT: If you could identify yourself?

PETER BURNS: Burns. I call myself a typical

individual of those active representatives of those active people. I am Peter Burns, and I am 54 years old. I left my parents in 1976. I was 18 years old, and I have lived independent ever since. I wish to make a statement that I oppose the settlement agreement absolutely.

Furthermore, I ask that the court enforce Nortel's obligations to me, and furthermore I ask the court to level the financial playing field so that the disabled can recover the travel like the others in this court do.

I proudly live in beautiful Ottawa.

I have two Masters thesis with my name on them. One Physics from Waterloo, and another from Queen's, and I have science publications in my name in astro physics and quantum mechanics. There are machines around the world that I designed for GE, and some of the lights above your head, because they were in the nuclear station and for Nortel.

I once developed a math theory that helped Nortel avoid $1 billion in penalties in a product they were nearly late completing. I later extended that, and it developed into

material from a patent that was awarded to me from Nortel in 2007.

I have also published papers in the "British Journal" and the "Journal of the Royal Society".

Others know me from my children's stories and unusual painting in pen and ink. I once made a mark in the world like many of the lawyers around me today. But, in 2004, while working at Nortel, a tumor was found on my spinal cord, and after surgery, I was left paralyzed below the T9, and surgery partial corrected it, but some damage was permanent, and I suffered a post stroke, and I cope with memory loss, extreme hypersensitivity and chronic pain, too.

I was earning 90,000 a year working at Nortel, and I was glad I topped up long-term disability up to 70 percent. I did this to insure the support of my three daughters: 17, 19 and 15.

In 1990, I nearly went bankrupt before working with Nortel, because I didn't have coverage, and I wasn't going to do that again.

After physio therapy and high doses of

painkillers, I have recovered enough to walk and function as you see me today. Working legs come with a high price. If my pain is not properly managed, it interferes with my instincts of self, and I do not have the option of stop taking the drugs or to stop paying for them.

My drugs and other medical needs cost me approximately $3000 a month, and the court should know, like many others on LTD, my living and medical expenses compete with my paycheck each month.

I hear in this court that I am unhappy with the settlement agreement. Anyone that thinks so must have no understanding of the moral danger I would endure.

The court needs to understand my issues cannot be managed by the types of compromise in the agreement. Nortel does not wish to live up to its benefit obligation, and my situation is the nightmare of every disabled person in Canada. Past, present, and future.

I am unable to work. Worse, my means of survival terminate on December 31. Even though Nortel tells us there is no cash, they

somehow provide cash for ever larger bonuses and paid as a retention award in a sold out company as a gift to the management that killed my company.

Today, I am ashamed to say I worked for Nortel. Clearly, the directors belong to a lost Canadian company that pays its executive bonuses for losing money and customers and hurting disabled and sick employees. This deal forced us, the disabled -- physically and financially -- to make our way to this courtroom alone at our own pain and expense. Many could not afford to do it.

On Wednesday, it seemed we could only lose further by enduring the smiles of our own CCAA lawyers and reps. The deal forced us to defend ourselves within a few weeks of notice. That Mr. Rochon could appear at all is a miracle.

This legal defence was by a group of sick and disabled people at our own expense. The agreement is cruel and has exhausted us. Yesterday, we saw financial information was available to us one year ago. It seems to me, the intention to force the disabled into an

agreement without the proper information to do so. We continue to ask for disclosure, which should have occurred -- to be fair -- one year ago. At least.

I heard Mr. Tay tell me we are merely unhappy. The court should know, if I were merely unhappy, I would have stayed home, because I am in too much pain to take this trip.

We are not unhappy. We are scared to death, because the agreement proposes to take away our lives.

I can insure the court I am carrying in my cane drugs that criminals would slit my throat for. The settlement agreement could not be placed for poor people who are trying to survive with their own untreated addictions.

I do not speak without knowledge here. I have lived with and assisted a few of these kinds but disadvantaged people, when not confronting Nortel. The grinding poor have good reason for their street behavior, but I find them more trustworthy and honorable than Nortel. That does not mean I can live an among those souls with my drugs.

This deal tells Canadians that even when you

buy from Sun Life and Nortel, for instance, it may not be insurance. It may be a special joke by the company on the disabled.

Self insurance is a special kind of insult whose deficits were protected until two weeks ago.

I personally have no confidence in any party or legal committee that could allow the end of my drug plan and source of income. This is a death sentence for several of us. I know of at least two others with a similar concern to me.

My 86 year old father on Vancouver Island has names for this. He calls them Hopson's (ph) choice.

The committee and lawyers at Koskie Minsky give me Hopson's choice as to when to be poor or dead. March 31, otherwise December 31.

My income once 90,000 a year will drop to 18,000. Hardly enough to buy one half of my medical needs.

A year ago, I thought that a Health and Welfare Trust with a financial vehicle with rules. I don't know what rules apply to be a flagrant breach of trust.

In summary, I oppose the agreement absolutely. Further, I ask the court to enforce Nortel's obligations to me.

Furthermore, I ask that the lawyers stop their mocking smiles, since life and death is not a laughing matter. I thank the Court for listening to me today. It's important to me.

THE COURT: Thank you. I have one question, and I think I know the answer, but for the record, I assume that you did not opt out of the Koskie Minsky representations?

PETER BURNS: I did not opt out.

THE COURT: Thank you for coming.

MR. ZIGLER: Mr. Burns has filed an affidavit.

THE COURT: Any other in-person parties that wish to make representation? So after the break, I expect Mr. Macfarlane and Mr. Swan and Ms. Huff as well.

Is there anyone else then that will make submissions prior to reply then? Just those two.

MR. MACFARLANE: There is a lawyer who is going to be reading in a letter from the principle officer of NNI, and I understand there has been an agreement made with Monitor

counsel to read that letter into the record with Your Honour's permission.

THE COURT: Any estimate, as to the length of your submission?

MR. MACFARLANE: I was going to be an hour or more, perhaps. Bu I have to accommodate the situation. I understand.

THE COURT: Mr. Swan?

Mr. Swan: Half hour or less.

THE COURT: Mr. Swan, if I could also see you just outside for a moment. For everyone in the room, the reason I want to see Mr. Swan is because he is scheduled on another matter to appear before me this afternoon, and we will have to make arrangements to deal with that. We will take a ten minute recess.

-- Brief adjournment.

-- Upon resuming.

THE COURT DEPUTY: All phones must be off, please.

THE COURT REGISTRAR: Order all rise. Court is resumed, please be seated.

THE COURT: Good afternoon.

UNIDENTIFIED LAWYER: I am here on behalf of Nortel or NNI, one of the U.S. debtors of

Chapter 11 in the U.S.
Jim wishes he could be here today. We thank you for the opportunity to make a statement today, which will be brief. NNI's position is set forth in a letter from John Ray, NNI principle, and referred in the material submitted by the U.S. to this court.
Let me emphasize, NNI recognizes the significant suffering from employees on both sides of the border.
NNI is supportive of the economics of the agreement before you. We have concern with the finality of the agreement.
In particular, we have and has concluded H2 under cut it is certainty that should be provided by the agreement. As a result, NNI agrees that the agreement is prejudicial, other than those other than direct beneficiaries of the settlement agreement.
NNI also believes it's also important no party to able to or be bound by the settlement agreement. We thank you for the time, and opportunity to be heard today.
THE COURT: Thank you.
MR. MACFARLANE: Before I start, I will give

you housekeeping of the materials I will be referring to. You have the list that has been provided, which is the affidavit and the supplementary record.

THE COURT: Start again.

MR. MACFARLANE: I will refer to the affidavit of Jarvis, and not to the supplementary motion record. I will refer to the factum, and I will not be referring to our brief of authorities, but I will refer to the Monitor's 39th report.

The responding record of Koskie Minsky, and the Monitor's brief of authorities, and the Monitor's factum.

THE COURT: Factum and brief. Okay.

MR. MACFARLANE: First off, Your Honour, I would like to address or take a moment to address an issue raised near the end of Mr. Tay's submission at the opening on Wednesday, and it was his comments concerning statements made in our factum and in the capacity of Monitor to the Canadian debtors. I want to advise the court that over the course of the evening, I reviewed the factum, and in hindsight there may have been comments

or words that caused the Monitor some discomfort, and I wish to state on the record, before this court, having also spoken with Mr. MacDonald, no disrespect was intended or with respect to it's independence or objectivity. If Your Honour wishes further explanation, I am prepared to put more on the record.

That said, the committee for whom I act is saying in its materials that the Monitor and Canadian debtor did not take the interest of NNI and the committee as one of Nortel's largest creditors into consideration in recommending that the court approve the settlement agreement in its current form, or if they did take it into consideration, they did not give it adequate weight or deference with respect to this case and the settlement.

As Your Honour may also recall from the last time we attended on this before you, on the notice motion, the issues with respect to the settlement agreement and the sole contested provision from NNI and the committee's perspective, H2 is highly charged.

In my submissions today, on behalf of the

committee, I will take issue of the analysis or lack thereof, and the conclusions and recommendations made by the Canadian debtors or Monitor with respect to H2 as set out in the materials of 39th report.

That is the scope of my submissions in respect to our objections with respect to H2.

Your Honour, we act for the appointed in the U.S. debtors, pursuant to Chapter 11, by the office of the U.S. trustee for the district of Delaware.

We are a creature of statute and appointed to represent the interest of all general unsecured creditors of the U.S. debtors, in which includes, former Nortel U.S. employees pensioners, who have unsecured claims, and all unsecured generally, including the pension benefits guaranty corporation in the U.S.

As part of that mandate, the committee seeks to maximize for all general and protect and promote their interest of general unsecured creditor and that effectively means being charged with the responsibility to minimize risk and to insure certainty, where applicable.

Charged with that mandate, the committee, of course, understands and is sensitive to the hardship that has fallen on the employees former and pensioners of Nortel Canada and is saddened by what they have experienced in these proceedings on account of the failure of Nortel, and I hope that what is before, Your Honour with tweaking will bring a measure of comfort to the employee stakeholder group and provide assistance and provide continue medical health and pension benefits for a period of time, and thereby eliminating risk and responding costs.

Just to frame my argument, before we move into the provision, I want to take Your Honour, if I may, and I will be referring to two principle documents, which is our factum in the green and the 39th report of the Monitor. And I ask that you really turn to our factum and paragraphs 39, 30, and to Monitor's Report, page 18, and it's really paragraphs 42 to 43, 54 and 55.

And the benefit of what is before you is, and it's essentially a mirror, but it's a chart which allows Your Honour to understand exactly

what the give is by Nortel to the employee stakeholders, and it's summarized there, but amounts to 57 million of real money of which 44.2 million is a new unplanned expenditure,
And I will not take you to this necessary low, but it's in the Monitor's report at 91 to 29, and it's section G4 of the settlement agreement, which we will go to. Which is at tab B.
In order to give the employee stakeholders comfort, they are afforded the benefit of the payments charge, which will give them in the event of any un bankruptcy. That is the economic package for the employees, money, including new money and a charge going forward.
What the employees gave up or asked to give up was a release of priority claim. They are not releasing claims against Nortel or any entities on unsecured basis or ability to share in any future distribution, but they are giving up certain priority claims, and they are captured in C2 of the settlement agreement, which is tab 2. That is the ranking of the HWT claims. And the essence

means it's a waiver to advance or a certificate or to make any claim that any HWT claims are entitled to any special treatment over ordinary unsecured claim, and as such shall rank with the claims of ordinary unsecured creditors. That is the give. Again, with respect to the pension claims, it's found at E1 of the settlement agreement, essentially the same concept, and I will summarize. Unsecured creditors --

THE COURT: The reporter has signaled that if you could slow down a bit.

MR. MACFARLANE: I am conscious of time, and I can be a fast talker.

THE COURT: You may want to talk fast, but with the translation, the reporter wants to make sure we have a record that is understood at the end. Cutting through it, as I read your factum and having heard what the Superintendent's position as confirmed the other day, is it fair to say that the UCC is supportive of the settlement agreement with the exception of H2?

MR. MACFARLANE: That is precise.

THE COURT: So, really, that is where I think

your time could be best spent.

MR. MACFARLANE: Okay. I will move to that then. So let's before --

THE COURT: Not to say anything other than the arguments with respect to the settlement have been heard.

Anything that is new with respect to why the settlement should be approved, other than what I have heard from the applicants or from the Monitor. Feel free to zero in on that, otherwise I take it you support their position.

MR. MACFARLANE: I am. I wanted to give you the give and get on the agreement.

So, then the other give by the employees is found at the releases of G1 and G2 of the settlement agreement, and the last give by the employees found at B4 of the settlement is the agreement to withdrawal the leave to appeal from Your Honour's decision on the respect of the severance and termination.

Now, I am going to take you next to the --

THE COURT: I think it's the leave to from the Court of Appeal.

MR. MACFARLANE: Yes, correct. To the

respondent's record. I want to draw to your attention, that everyone in this agreement with respect are striving for certain things, which is certainty and minimization of risk, except when it comes to H2.

And the affidavit evidence, and I am going to take you to selected paragraphs and the affidavit of Mr. Sproule and Susan Kennedy are mirrors in the parts that I want to refer to. So I will not refer to all of them, but I will start if I may, and I may move through this. I will try to as quick as possible.

On page 16 of Mr. Koskie Minsky record, the affidavit of Mr. Sproule, and it's under heading of the settlement.

The first reference is to paragraph 66 the last line. Mr. Sproule states the fact that the company's payment of the medical benefits and transfer of the administration is inevitable. Flipping over, he states:

> "The Settlement Agreement provides certainty and security for Former Employees for the next year."

Dropping down to paragraph 71:

> "Our success in achieving

additional nine months of payments not only provides our constituency with an additional nine months of coverage, it also provides us with additional time to seek an alternative for basic replacement benefit coverage going forward, perhaps funded by distributions from the Nortel estate."

So, it increases and lessens risk.

Again, paragraph 72. I will not read it, but the theme of that paragraph is, again, for the retiree life benefit and creates certainty with the benefits going forward.

Paragraph 73, starting on the second line, this is under pension plan as the heading. Page 18 of the record.

"...and special payments will continue to be paid until March 31, 2010. More importantly, the Settlement Agreement provides certainty that Nortel will continue to administer the Pension Plans until September 30, 2010, and that neither Nortel nor the Monitor will take steps to initiate a wind up of the Pension

Plans before that date."

Paragraph 74:

"These are major benefits for our group. It provides our group with certainty that their pensions will continue until at least September 30, 2010."

And dropping down in the paragraph with a sentence that starts:

"In addition, the extra time that we have been guaranteed before a potential plan wind-up, that is until September 30, 2010, allows more time for market recovery, which could minimize our pension reductions and losses in the future."

I.e., reduce risk.

Paragraph 76, the same theme is priority, and certainty and lessens risk.

Paragraph 77:

"In exchange for the payments from the Termination Fund, the Former Employees will be required to release the application for leave to appeal to the Supreme Court of Canada. I have

been advised by my legal counsel that in order to appeal to the Supreme Court of Canada, we are required to seek permission from the Court, and that leave is difficult to obtain. Thus, by releasing the leave application to the Supreme Court, we are avoiding uncertain, risky and costly litigation in favour of a payment of funds that is certain and payable in a reasonable period of time."

Paragraph 80 speaks for itself about certainty.

The paragraph under section quid pro quo, Mr. Sproule summarizes, and Susan Kennedy in a similar paragraph in her affidavit, but Mr. Sproule indicates:

"Based on everything I have seen, it is my understanding that the Settlement Agreement can essentially be distilled down to this: in exchange for security and certainty of our benefits through 2010, we were required to give up rights to future,

risky and uncertain litigation."

And he goes through in more detail on paragraph 82 of what the give was by the employees in respect of the settlement agreement.

Most of the paragraphs that follow as the gives by employees represent that they understand what they are giving up is not that much in respect of immediate rights and benefits, and I refer you to paragraph 84, which I just did, to paragraph 87. Paragraph 88, paragraph 89, paragraph 94.

Lastly, in the conclusion, at page 23:

> "To put it simply, the settlement agreement provides the former employees and Nortel's disabled employees with an interim benefit funding solution that provides short-term security and certainty for the next year. While we are releasing certain litigation claims, we are exchanging this risk and uncertainty with real benefits, more time to find alternative solutions and real cash, in the range of $44.2 million."

As I say, Susan Kennedy affidavit, I will not take you that that affidavit, but it's the same theme: Minimization of risk.

Now, in the context of certainty and minimization of risk, which this is to provide to all parties, including non employee stakeholders, and I will now refer to the Monitor's 39th report.

We come to H2 or, in our view, what we have termed "the take back provision". The Monitor calls it the no preclusion, but that is a neutral term. It's meant to benefit one group. So H2, tab b. Page 10.

THE COURT: For some reason it already has a yellow sticky.

MR. MACFARLANE: If you want to read it one more time.

THE COURT: I don't have to read H2. I think I get it.

MR. MACFARLANE: Okay. Now, the employee stakeholders have been candid in materials before Your Honour, and in the press reports that are amended to the affidavit, and we see with the strategic aims with respect to H2.

And we can find reference, again, I will take

you to the responding record to Mr. Sproule's affidavit. Paragraph 85 of his affidavit. Page 21 of the record.

> Clause H2 of the agreement caused concern for the NRPC. It was very important to the Representatives and NRPC to limit this clause to provide that in the event there is ever an amendment to the BIA giving former employees preferred status under the BIA, and that Nortel at the time of the distribution has moved into proceedings under the BIA, we maintained our right to argue that any amendment providing priority should apply to us. We were successful at achieving the inclusion of Clause H2 in the Settlement Agreement."

There is a similar paragraph I will not take you to, but in paragraph 59 of Susan Kennedy affidavit.

In Mr. (Inaudible) affidavit, we appended copies of three articles: Exhibits G, H, and I.

Those articles are articles found in the

"Globe and Mail" and "Ottawa Citizen", and dated February 8, February 9, and there is a third article dated February 19th.

But if we go to Exhibit G of the affidavit, this is the "Globe and Mail" article.

The ultimate paragraph provides:

> "Susan Kennedy an employee on long-term disability .... said the deal buys workers almost a year to adjust to potential loss of income they face."

It goes on to say:

> The deal gives Nortel employees time to find solutions for workers, including providing a new benefit plan and get (inaudible)."

On page 2 of that article, 101 of the record, I am quoting Susan Kennedy:

> "The extension provides more time to ...."

So Nortel gets a greater piece of Nortel assets.

Now, in most cases I am sure you would say, legislation changes, that is remote, but it's not fancy in this case, because it's also

appended at exhibits K and J. Copies of what we dub the Nortel bills, which were two bills, private member bills pending before parliament, which was to give priority status and HWT. And reading the bill and speaking with the pension people, Nortel bills insert the deficit and LTD into the Bankruptcy and Insolvency Act that give supper priority -- {reading too fast - inaudible).

So, these bills are active, granted, but given the fact that we are in a minority government situation, and these bills have been before the House, there is a risk that this legislation can come to pass and be implemented and elevate the claims which the Nortel employees have agreed will be ranked and including the $1.1 deficit that is over hanging could rank on a priority basis of all ordinary unsecured creditors, leaves out the option to argue that that would reverse the priorities.

So, let's from the UCC perspective, what does it say?

THE COURT: Let me ask a question, and any party is more than welcome to respond.

In a quick review of what was in the throne speech and the budget bill, I am not aware that this issue has been addressed.

MR. MACFARLANE: No, but I am aware that the NDP did.

MR. ZIGLER: There is one line in the speech. It says our government will explore ways to better protect ways to protect when go bankrupt.

MR. MACFARLANE: But we have heard they're willing and certainly able to form a minority government, should the chance availed itself. That pension priority legislation is indeed a priority.

So, what does the committee and NNI say about H2?

Well, you have heard from Ms. Weaver and Mr. Ray's letter. The letter is found at tab -- or Exhibit l to Mr. Hotu's (ph.) affidavit.

But in the committee's view, its position is that the take back provision is designed to reserve rights of the employee stakeholders to compromise what is contained in the settlement agreement.

After substantial consideration would have

been paid to them and that by reserving the rights stakeholders have reserved that the releases they provided in accordance with G1 and G2 will no longer apply.

The committee is of the view that undercuts the certainty and imposes an unfair and unaccepted risk on the creditors of Nortel. Specifically, the take back provision if successful, there could be a pension claim. In particular, the 1.1 billion, unfair prejudice Nortel non creditors.

Now, as I mentioned to you at the outset, the UCC supports the economics. It was to the UCC and it was provided, however, that its stakeholders, i.e., the committee stakeholders, agreed to consideration provided for in the settlement agreement, and that the settlement agreement resulted in finality and certainty. That is all we ask for, finality and certainty of the claim settled, and as part of our duty, we are obligated to strive to have that where possible.

Now, it's the view of the committee, and I think the support of Mr. Tay, that H2 is not an essential component of the settlement

agreement, and this I will take you to. There was no quid pro quo pro. H2 stands on its own and put in the agreement after the impetus of one group negotiating, and it can be removed or ordered to be removed, and it would not effect the economics of settlement agreement. I have Mr. Ray's letter available, Your Honour. I will take it to you, because he probably says or phrases the objection better than I can, but the operative section of the letter I would like to take you to is on page 127. It sorts of third of the way down on the first paragraph, starting with:

"In reviewing the settlement agreement."

MR. MACFARLANE: Both the Monitor and Nortel have downplayed the risk associated with H2, and in both the materials of the company and the Monitor is a passing reference to H2, and it's found in paragraph 19 of Ms. King's affidavit, and you will find a verbatim recital. Same in the paragraph 97.

Yes, which is page 38. It's a reference to the H2 clause. Verbatim reference, no comments.

"As far as the Monitor provides..."

The next paragraph:

"The Monitor states: It's the Monitor's view ... including the provisions of the HWT claim and pension claims ... and the various releases represent an important state and potential claims which will assist in the development of the plan."

There are no comments on H2.

Now, yesterday, everyone that went before Your Honour, except Mr. Rochon, had something to say about H2, and I wanted to review their comments, and Mr. Tay was candid. He said, we tried everything to bring parties together for settlement, and H2 remains the central issue. And to his credit, Mr. Tay in submissions stated Nortel is content if H2 comes out. What is important is the economics of the benefit package. H2 is not an essential part of the settlement.

Now, we heard from Mr. Zarnett on behalf of the Monitor.

A couple of different submission. One

clarified by Ms. Rubenstein, and the first submission Mr. Zarnett made was that H2 was linked to H1 of the settlement agreement, and that is the first time I have ever heard that. It took me by surprise, and when I went back and reviewed the entire record, there is no evidence before the court from any stakeholder that there is any linkage between H1 and H2. It stands alone.

There is a trade off in H1, but no linkage between H1 and H2. There is no give/get. That is a new theory of the case, and a submission made by Mr. Zarnett that is not supported by the record.

Now, Mr. Zarnett also stated that H2 leaves the door open to both parties in the event that there is a change of law. I was surprised by this. We only know one party that is the employee stakeholder, because the bonds at NNI don't want to change the law, and they would minimization of risk.

And then Mr. Zarnett went on to state further that it changes the law in the other direction of the stakeholders. That will not happen. If the law changes, it's one direction to

benefit the certain group of that with a priority that would not otherwise be afforded in bankruptcy, which is prejudicial to the group of unsecured creditors.

Mr. Zarnett also made a submission that it's an accepted reservation of rights and part of a package.

Again, in my submission, Your Honour, it's a submission that is not supported by the record before Your Honour. There is no analysis or evidence before Your Honour that that is in fact the case.

Mr. Zarnett also went on to state that the amount of uncertainty associated is minor.

Again, Your Honour, there is no evidence on the record to support that statement.

Mr. Zarnett went on to cite the Grace case, in which Your Honour provided a statement that that was not appropriate in the court to do a line by line settlement agreement entered by, and that this is not a line by line analysis of the settlement agreement that we ask for NNI. It's the removal.

THE COURT: You are asking for?

MR. MACFARLANE: I am asking for the removal

of a tumor, and, in your view, a tumor.
THE COURT: The question I have for you is whether or not it's your position that H2 can be removed, or whether it results in a declaration or settlement agreement that cannot be approved if I am not favorable to H2?
MR. MACFARLANE: Mr. Zarnett provided a helpful solution, as did Mr. Rochon and Ms. Rubenstein, and although I don't agree with the timing, it will not stop today if it's not approved in the form.
There is a practical solution the court has used in the past, is to allow the parties to further negotiate if there is a view that certain issues may or may not be accepted, and what Mr. Zarnett throughout, and I found helpful, and I agree with him in the approach, is there is the practical -- as there is always in these cases. A practical solution to this particular profession is that it should not be in the agreement, and, in my respectful submission, Your Honour should not be approving the agreement within a dangerous precedent in cases such as this.

I have never in my years and consulting, I have never seen an agreement that contains a similar clause, and as we know in these cases, there is always one up. The next case that comes before you will have a similar clause with more breathe, and it will be that you approved it in this case.

It doesn't have a place here and should not be approved by the court, and parties should be given time to work out a practical solution with respect to that paragraph.

I am not saying Mr. Tay has not tried to do it, but sometimes it takes the effect of a courtroom and officer ruling from the bench or giving his or her views with respect to matters that motivate parties to do something one way or the other, and I think the parties, the committee were hopeful that that might break the log jam and cause some movement.

Now, I will not go through all of Mr. Zigler's submission on page 2, but I want to jump to a submission made by Mr. Barns, because I found that to be incongruent and what the Monitor was saying.

And I also want to state, or it's my

submission that Mr. Barns's submission should be given less weight than the other of the economic players. Particularly, the effected creditors.

Mr. Barns acts for directors who sit from a position of comfort in regard of having a directors charge, and they don't, in my view, have any necessary skin in the game as to NNI and the other creditors.

So his submissions, I would submit, although eloquent and good, be given less weight in no weight with respect to this issue.

What I note as interesting is that Mr. Rochon made no reference to H2. He focussed on the economics of the agreement.

Mr. Zigler did make the comments with respect to H2. It's a key provision, because if Parliament changes the law, they want to make sure no rights have been released.

Opposite of what, minimizing risk and maximizing certainty for our client group.

Went on to say H2 was bargained for, in the event there is a change in law.

They tried to make the argument that there is no certainty in life, and Your Honour is

approving settlement agreements or purchase and sale agreements that have an element of risk, and I distinguish that this is a settlement agreement and is meant to bring finality to disputes and bring certainty to the parties. It's not an agreement negotiated and incorporating remedies and resources.

I don't think this is an issue, but I will clarify it so that I have satisfied myself. Mr. Zigler took the position that this letter from Mr. Ray should not be accepted by the court and that there was a contrived way we put it before Your Honour, and I think, one, my understanding of evidence 101, the evidence attached was a copy to a member of my firm and addressed to the Monitor and to the company -- the company itself -- as proper evidence before the court, and even if not presented in the proper form, it's a letter from the principal officer of Nortel approved by the U.S. Bankruptcy Court.

Essentially, Mr. MacDonald's equivalent with respect to being wind-up with the U.S. estate. So, if Your Honour has concerns with that letter, I think on the basis --

MR. TAY: The letter has not been approved by the U.S. Court.

MR. MACFARLANE: Sorry, the --

THE COURT: Let's move on. I am aware of the letter, and I will consider the letter. I have heard on that subject and from others.

MR. MACFARLANE: Next is with respect to -- we have dealt with certainty, and we will deal with risk. Who bears the risk of H2?

NNI is the largest secure creditor. It's one of the most significant of the Canadian debtors. And it's claims arise by certain pre filing amounts, post filing amounts.

On account of the recent approval of the Canadian funding agreement, it now has a confirmed 2 billion U.S. dollars unsecured claim against NNL.

In accordance with the CFA, it also has 6.27 unsecured claims with respect to the remaining amounts owing. So, a claim of $62.7 million, and also advanced 75 U.S. million to NNI, through the NNI loan agreement at the outset of the case.

Moreover, NNI has acted as a dip financier from the outset. One, it paid under the

interm fund and settlement agreement, U.S. 57 million in funds from the period January through to September 13, 2009, and it's recently paid another 190.8 million, subject to certain adjustments for the period October 1, 2009 to the end of the case.

And, in fact, as confirmed in the affidavit of Mr. Tertigas, financial advisor to stakeholders, part of the money is being used to fund the settlement from NNI.

The sale of the business is a growing concern, and by the end of second quarter, Nortel will probably not be in existence, and there will be two other companies set up to help transition agreements to purchaser, and with respect to other matters relating to assets, and that is set out in detail in the 39th report.

We have also just for your assistance, Your Honour, set out in our factum, paragraphs 23 to 24, the summary of the sales that have occurred to date.

Those are the business lines. Paragraph 24 of the factum states there is approximately $2 billion of proceeds.

I think we expect upwards to be shared by 3 principle estates, the U.S., Canadian, the EMEA estate, and we have now, essentially, by March -- this month -- all the principle business lines will have been sold off. What remains are some assets. The IP assets and the cash proceeds, which will be distributed amongst the various estates. Against those proceeds, the Monitor has reported there is U.S. 27.9 billion dollars of claims, and those do not include claims by directors and officers, or employees. And that is summarized in paragraph 25 of the factum.

What this means, at this stage, is that there is no continuing Nortel. The business and assets have been sold, and the cash proceeds, which one claim, one claim is the potential claim of 1.1 billion of a pension deficit, which in a nonbankruptcy situation, will be treated on a basis of the general unsecured creditors.

That means that if the take back provision were to be implemented in the event of change in law, and the sole bearer of the risk of

that clause are the creditor, the non employed holding 27.9 against the global proceeds up toward the 3 million of which NNI and the bonds happen to be $2 of the larger creditors groups.

It's our submission, as Nortel moves along this restructures, the views of it's creditors, the economic stakeholders of this should be given more weight and relevance, and it's our submission with respect to this settlement agreement, two of the largest stakeholders, and I can only speak for NNI, Mr. Swan will speak to them, and the funder of this settlement.

It's view should be taken into consideration and be given significant weight.

Now, Mr. Zigler made the comments yesterday. We are not here to renegotiate the deal. Fine.

The problem with that is that the committee on behalf of NNI was negotiating a deal up until the time the agreement would go forward without H2 in. It's easy when the parties objecting are not at the table, but that is unfair. Two to two principle stakeholders and

it's unfair to NNI, its committee and to the bondholders.

Settlement agreement is not entered into with the intention to -- it's intention to bring finality.

As a settlement agreement, it's meant to bring certainty and eliminate risk as stated by the responding employee stakeholders. That is all we ask for. We want the same things out of the agreement.

Regrettably, from the UCC perspective, the stakeholders, requested negotiated optionally through H2.

Optionally to actually pursue a change in the law and preserve the right to argue that the responding release and waivers that they provided under, relating only to the priority claims, not to giving up any claims, in respect of the HWT and pension claims will no longer and apply, and, in my view, that is not fair.

Now, Mr. Swan was kind enough to provide Your Honour with a case. The data case, and I will let him speak to it. It's the Data General Case, and it provides a good definition of the

dictionary meaning of settlement, and it's a decision of the Ontario Court of Appeal. And I will just read what I have taken out of the case, but basically, the Associate Chief Justice states, and it's part of their written authority, and I am sure Mr. Swan will bring it up. He states:

> "As for the dictionary meaning of settle, the word means to bring a dispute to an end by an arrangement of the parties, as opposed to a judgment of the court."

And I would say, i.e, to bring finality to the dispute.

Your Honour, the next is just to review the test to be applied by Your Honour.

THE COURT: 46 in your factum?

MR. MACFARLANE: That's correct.

THE COURT: Again, in this area, I assume that with the exception with the points related to H2 that you will see no need to repeat what has been provided by counsel before.

MR. MACFARLANE: I will not. Just a couple of different perspectives, Your Honour, with respect to the test.

The test is set out in paragraph 46 of the factum, and further on in paragraph 50. We refer you to what we think Your Honour should examine when conducting the analysis. The four points, A through D.

We see the test should be the more expansive test. The test of: Is this settlement agreement fair, reasonable and beneficial to the creditors as a whole, taking into consideration the views of the objecting creditors?

And I will refer, Your Honour, I know you have knowledge of the cases, but I refer you to the Calpine case, paragraph 62, 75 and 82. I also refer to you the decision of Justice Farley, as in Air Canada, found at tab 7 of the Monitor's brief of authorities. He sets out the test, and I refer to paragraph 10, where he conducted a detail analysis between the parties, Air Canada, and his conclusion in paragraph 15.

It's my submission that that particular form of test has been applied in complex settlement negotiated in respect of CCAA cases, where the terms are contentious, and there were serious

objections by significant stakeholders.
It's our submission that that test should be applied in respect of analyzing the settlement agreement in its entirety and inclusive of H2.
If Your Honour can determine if it's fair and reasonable and taking into consideration the objections of the creditors in respect of H2.
Now, a variant of this test has been applied by Your Honour in two cases I am aware of.
One is in this case, and the other is in the Grace case.
It's my submission, the test applied in the Grace case and Nortel case, essentially, the fair and reasonable test is limited upon the facts of those particular cases.
In the Grace case, as I understand it from reading the case, and if I am wrong Mr. Tay will correct me, or Your Honour will, but as I understand the Grace case, and I am dealing with Grace one, that it was really a limited objection by a third party release. Dealing with the terms of an order, it's not an objection to the entire or provisions or an objection by a major stakeholder. In that case, it was appropriate to apply a less

onerous test.

Again, in respect of the case found at tab 1, when the approval of the Canadian funding agreement was approved by Your Honour, earlier this year, the test of fair and reasonable was applied, and, again, in that case, there was no opposition except for a creditor that had a contingent claim, and Your Honour did a detailed analysis of the settlement agreement, and, in my view, the more limited test was applicable to that case, because of the limited form of the -- well, the objection didn't really stand the test based upon which was at stake, and the fact that almost every party had agreed to the terms of the settlement agreement and had been involved in the extensive negotiations, and including the committee, NNI, NNL, the Monitor, and in this case Your Honour applied the less and onerous test, but in the facts of this case, the wider test should be applied, and by the positions of the stakeholders as a whole.

Just quickly, the Monitor in paragraph 77 applies a hybrid test.

It's my respectful view, Your Honour, that

that test is not applicable to this case. It's somewhat different, but I don't think it's been applied to Your Honour or any other court, and I would take you back to the Calpine decision, and the Air Canada decision. In the Calpine decision, Your Honour considered when you approved the Canadian funding agreement.

Your Honour, in this case, when Your Honour looked at the settlement agreement, including H2, and conducts the analysis, we asked Your Honour to undertake it's your view the settlement agreement does not provide a full and final release of the agreement settled and, on the contrary, leaves open all issues relating to one quantification of the claims, which is fine, as long as the settlement goes ahead, and, three, through the preservation of H2 and preserves the right to assert priority for the treatment of H2, HWT claims, and pension claims, in the event of a change in the law.

And it also goes through the take back provision provides the right of the stakeholders to take back their releases, and

those -- that analysis is provided as part of paragraph 52, 53, through 54 of our factum. Based on the record that is before Your Honour, neither the Monitor nor Nortel has provided this court or non stakeholders to make a determination, including H2 is fair and beneficial to them.

There is analysis on the sections but not with respect to H2. There is a statement in the 39th report, and there is a statement in the affidavit evidence. There is no analysis. There is no evidence that has been preferred to give any analysis of how that clause effects the economic interest of the stakeholders.

And again, to cut time off here, I will take Your Honour to paragraph 59 of our factum where we summarize at the top:

> "Neither the Monitor nor Nortel have provided with the inclusion of the take back provision ... "

Points A through F. Three more points.

In the affidavit evidence put before the court by the Canadian debtors, there is a simple conclusion. The settlement represents a fair

and reasonable conclusion for the benefits to a large group of individuals, who for the most part do not have any other source of income ready to replace the benefits that they would have received from the applicant and exclusion of H2. That is a fair and accurate statement, and that is what the goal of the settlement is. Minimization of risk.

The Monitor in its report at paragraph 43 states that the settlement agreement represents a fair and reasonable conclusion among the set and parties and counsel to the committee and bondholders. Yes, excluding H2. Again, in paragraph 109, the Monitor states:

> The Monitor believes that, overall, the Settlement Agreement and Settlement Approval Order represents a fair balancing of the interests of the Applicants' stakeholders."

Again, although the statements stress that there is a fair balancing, the statements and the record before Your Honour do not provide Your Honour with the proper evidence basis to conduct the analysis that is necessary in accordance with the test that are annunciated

by Justice Romaine in Calpine, and Farley in Air Canada to reach the conclusion that the settlement agreement, as a whole, including H2, is fair, reasonable and beneficial as a whole taking into account the views of the objecting creditors.

The specter of H2 -- the HWT and pension claims, especially on account of the $1.1 billion. It unfairly prejudices all Nortel employees.

Your Honour, I will just refer you to a last part of the factum and having read paragraph 63 and 64. 64, in particular, our view of the take back provision. It's the committee's view that it would terminate potential for litigation.

> "While the total amount of claims would not be known, other creditors would be insured there was no..."

Except to the extent they have a payment of which $12 million was budgeted.

Our request is that you decline to approve the settlement agreement in its current form on account of the unacceptability of H2 to the descending creditors, unnecessary risk and

prejudice, and that Your Honour take up Mr. Zarnett on its practical resolution and allow the parties to report before Your Honour on a short timetable. Those are my submissions.

THE COURT: Thank you. Mr. Swan, we will start with you after lunch. I do want to get this matter completed today.

So, our lunch facilities is right down stairs, and I can not say they are that good. We will start as close to two as possible. If counsel are not back, we will wait.

-- Lunch adjournment.

-- Upon resuming.

THE COURT REGISTRAR: Court has resumed.

THE COURT: Okay.

MR. MACFARLANE: I just have one last --

THE COURT: There is more? You did not reserve your rights.

MR. MACFARLANE: I forgot to mention this, and it's quite important. It's the affidavit of Gus Tertigas. I would encourage Your Honour to read Gus Tertigas's affidavit. It's at tab 3 of the Respondent's motion record. He is the financial advisor. He provides a

comprehensive, detailed, and balanced view of the settlement agreement, and in the 17 paragraphs in his affidavit, without exhibits, there is no mention of the importance -- the necessity, the criticalness of H2. It's a balanced view of the economics, and there is no reference of the necessity of H2 being part of that. Those are my submissions.

THE COURT: Thank you. Mr. Swan?

MR. SWAN: I will be referring to my factum, and I will also hand it up now. I have given it to other counsel. A copy of Your Honour's hardship order made 30th of July, 2009.

Your Honour, as you know, I act for the informal Nortel Noteholder Group, and let me begin by making four preliminary observations. The first is, there is little real disagreement, and certainly -- I will wait. So, I will begin by making four preliminary observations, and the first is this: There is little real disagreement and certainly no disagreement that all of the potential claims addressed in the settlement agreement are ordinary, unsecured claims.

The second is this: That absent the proposed

settlement agreement, and given the initial order made in this case, the company has and had no continuing legal obligation to make all or almost all payments in issue.

Your order, of course, provides that the company is entitled to but has no obligation to make the payments.

The third is this: The effect of the proposed settlement agreement is to elevate the claims, those that are to be paid over the course of the year 2010 into preference claims to the extent of approximately 57 million dollars, with near term distribution over the next 10 months.

The fourth observation is this: That it is important to note that the claims of the employees beyond this approximate $57 million amount, those claims are not released at all. They remain as they were before. Ordinary, unsecured claims.

The Noteholders are not opposed to a settlement in principle of these matters, provided that the settlement agreement, and the order implementing it definitively resolves the matters addressed in that

settlement agreement, and it's in that respect that the Noteholders submit that the proposed settlement fall short in one important respect, and that relates to clause H2, and paragraph 19 of the proposed order, which would implement clause H2.

I have two ancillary concerns that I will take up a bit litter, but dealing first with the issue of H2.

There are really two fundamental touchstones of any settlement. The first is that there be an element of real compromise on the part of both or various sides.

The second element is that the settlement brings about a resolution of the matters in issue -- to use Justice Romaine's words. Or in other words, brings about a definitive conclusion to the dispute over those subject issues, and everyone who has stood before you over the last three days has referred to certainty.

The objective is indeed to bring about certainty in terms of resolution of the issues, and you need not turn it up, but at paragraph 17 of my factum, I have summarized

some of the evidence of various employee representatives, and the thrust of the evidence is that the agreement is favorable for the employees, because it provides certainty for them. And it does.

It locks in their floor, but it does not lock in their ceiling, because of the inclusion of H2.

H2 preserves the possibility of a much higher ceiling and in converse and responding, H2 therefore does not lock in the floor for the other unsecured creditors.

Indeed, if the BIA were amended, it is likely that the floor for the other unsecured would be different.

So, from that perspective, the proposed settlement fails to provide certainty for the other unsecured creditors.

A release of the preference or priority claims is given under the settlement, but it is potentially taken away.

Mr. Tay noted that in the circumstances of this case, the employees will have received approximately two years of benefits in a liquidating CCAA proceeding.

Now, there is no question that that is far less than they may have expected before a bankruptcy was on the horizon.

However, that is, as he noted, essentially unprecedented in a liquidating CCAA proceeding, to a continuing benefit for that period of time.

I think it's also important to note that what is being released, the preference or priority claims are by the employees own admission, claims with a limited chance of success.

And that's paragraph 22 of my written submissions. I noted what was said at Exhibit A of Laura Johnson's affidavit, which provides, we have not really given up anything except for the possibilities of locking up this matter in litigation.

And if the releases -- the release of the priority or preference claims are overridden by a future amendment to the BIA, and those preference claims are revived or potentially revived, then the other unsecured creditors have lost all of the consideration that they were to have received under this agreement.

It is also important to note that both the

applicant and the Monitor have said that they support the proposed settlement with or without H2.

They have both said, and I think this is particularly significant in respect of the Monitor -- who is an independent court appointed officer -- they have both said they support the settlement agreement, even if H2 is not included.

So, in summary, regarding this clause, the Noteholders have two fundamental problems with clause H2 in paragraph 19 of the order. First, it leaves open the possibility that the entire consideration obtained by the non employees under the settlement could be lost. And the second concern, and this concern goes beyond its impact of unsecured creditors, but to the proceeding as a whole. The second concern is that the inclusion of that cause leaves open the prospect of future litigation over the claims that are supposedly settled by this settlement agreement.

If there were an amendment to the BIA, which as we know, some of the employee groups are active for, if there were such an amendment,

we may well have complex litigation that would examine not only the impact of that statutory or those statutory provisions, but examine the impact of that with the overlay of the importance of this settlement agreement. What does H2 mean, measured against some future amendment to the BIA?

What of the releases in that event, because H2 is arguably a bit ambiguous in terms of just what it is that is preserved.

But, quite apart from that, there is no doubt that if there were such an amendment to the BIA, there would be extensive litigation in this court over the interplay between H2 and those amendments. How it effected other creditors. How it effected the releases, and how it effected the releasees. And we would all be back before you again, and it would go up another level and potentially for another level at some point down the road, and it would threaten to bog down this process and hold up the closure of this entire estate.

That outcome is avoided by providing certainty.

That the settlement definitively resolves the

issues, in the event that H2 were not part of that.

So I ask you on behalf of the Notelholders, that any approval of this proposed settlement be conditional upon clause H2 and paragraph 19 of the order being removed.

And how might you do that practically? I think the answer has been suggested, that in an endorsement you could indicate that Your Honour was prepared to approve the settlement if H2 were not part of the settlement.

Leave the party as period of time to come back to you, and we would then know the outcome.

Let me turn to the second issue that is raised in my written submission, and that is a concern about paragraph 7(2) of the order itself.

And I would ask Your Honour to turn up schedule 2 to my factum.

THE COURT: All right.

MR. SWAN: Schedule 2, paragraph 7, provides that the releases on behalf of the Superintendent or administrator in paragraphs 4, 5, 6 shall only apply if no bankruptcy

order is made with respect to Nortel on or before September 30, 2010.

And the releases are releases of a preference or priority status claim in relation to the pension claim in this proceeding or in any subsequent proceeding, but those would disappear. Those four paragraphs of the releases, if the bankruptcy order were made before September 30.

The applicants and do not wish to seek an order before that time. However, 7(2) in current form creates an incentive for another person, perhaps a disaffected person, wanting to upset the apple cart as it were from seeking a bankruptcy order before that day. The court has a discretion to refuse a bankruptcy order, but there is no certainty that that would be done.

And the risk of such a bankruptcy order after most of the settlement payments have been made is not a reasonable outcome.

So, on behalf of the Notelholders, I ask that either paragraph 7(2) be deleted from the order, or I seek a direction that as a condition of the approval of the settlement,

that the court direct that no bankruptcy order be made before September 30, 2010.

In the least, I would ask that Your Honour in your endorsement indicate the particular undesired order before that date.

THE COURT: I don't suppose you could point to precedent where any type of binding order appears that would -- I am questioning whether the jurisdiction is there to make such an order?

MR. SWAN: That is why I propose in the first instance that the settlement agreement be approved, subject to that condition, that there be no bankruptcy order prior to that date, which I think you do have jurisdiction to make.

The third issue that the Notelholders wish to draw to the court's attention is the crediting of payments made pursuant to the settlement order in the event that it is approved and the settlement agreement and order are almost silent on the question of the credit of payments.

We noted only one reference, and that appears in Schedule 3 to my written submissions,

paragraph "B" 3 of the settlement agreement, and it relates only to the $4.3 million termination fund.

In the highlighted language, any payments made shall be credited against allowed claims.

Not as against distributions, but against allowed claim, and aside from that reference, the agreement and order appear to be silent on the subject of crediting.

The Notelholders submit that these are actual payments that will be made, and they should be treated as distributions and credited as such.

In the hardship order that Your Honour made last July, that I handed up a moment ago, Your Honour will see in the notice that is attached under the fifth paragraph. Turn through the order to notice, the second page of the notice, paragraph 5:

> Miscellaneous, hardship payments are advances against distributions on, are advances on claims.

According to the Monitor's most recent report in the order of $100 million will have been made in payments from the commencement of the CCAA proceeding to December 31, 2010.

Those are preferences on claims, and they should be treated as distribution and your order, it is submitted, should provide that all such payments be credited against ultimate distributions.

If Your Honour does not accept that argument, I would at least ask that that matter be left open for future argument and not foreclose.

THE COURT: How would it be left open for further argument? Is it not part of the settlement agreement now?

MR. SWAN: It's silent.

MR. ZIGLER: There is no agreement if these are.

THE COURT: My understanding is it's a definite term of the agreement that the payments -- it does not have that credit language of payments.

MR. SWAN: It's silent on that.

MR. TAY: It was never contemplated, and for the 4.3 it be credited. That was the deal.

THE COURT: Okay. So, from your standpoint the deal is as set out in paragraph 3 of the draft?

MR. TAY: Yes. Paragraph 3 of the agreement.

THE COURT: Of Mr. Swan's material?
MR. SWAN: But that is restricted. The other is left silent. So, subject to any questions, Your Honour, those were my submissions.
THE COURT: Thank you. Yes.
UNIDENTIFIED LAWYER: Yes. Your Honour, I represent the Superintendent in its capacity of the administrator of the guarantee fund. I wasn't going to say anything, but in light of Mr. Swan's submission, I wanted to point out that the Superintendent is not opposing the relief that is sought here today, and we don't have any submissions to make on the various issues one way or the other that have been consuming the court's time, but I would point out with respect to Mr. Swan's issue he raised on 7.2, the Superintendent is supporting this order or not opposing the relief sought on the basis of the order as presented.
In the comfort level at tab b of the Monitor's 39th report, you don't have to go to it. You have to dig a bit, but referred to this order.
THE COURT: So there is no opposition from the Superintendent provided the order goes as it is?

UNIDENTIFIED LAWYER: As long as it is. If there were a change, that comfort level obviously, well, it speaks for itself. It would not be binding.

So, I think it's important to appreciate the positions of the parties. If the deal changes, that is a matter for negotiations, and I don't know what my client's position would be.

THE COURT: Your position is that if this deal is approved, it has to be approved as is, with no exception, and we will leave it at that. I understand.

MR. MACFARLANE: If I could ask him to clarify. Does that apply with respect to H2 with respect to the order?

UNIDENTIFIED LAWYER: Again, as I said, I think I was clear. I have instructions to approve "this" order.

THE COURT: I will give my take to have guidance. In the hypothetical world, if the settlement is approved, and I don't like H2, the settlement will not be approved, and then you are into other combinations and that is how I take it. Okay.

The Superintendent'S position of no opposition is on approving the deal and order as submitted.

Ms. Huff?

MS. HUFF: Your Honour, it was somewhat unclear when I should speak in the order.

THE COURT: Sometime between now and 4:30.

MS. HUFF: My objective is sooner rather than later. I represent the Northern Trust company Canada, that took over in December 2005. Northern Trust was also appointed trustee of the two pension plans in December 2005, as well, and in its capacity of the trustee of HWT and the pension plans, Northern Trust takes instruction and has as mentioned in earlier submissions from Nortel in all of those capacities, Northern Trust was not involved in the negotiations of settlement agreement. It received a copy of the agreement when it was publically disclosed and takes no position on the approval of it. It would not be its role to do so.

The parties represented had beneficiaries by representative counsel, and Nortel was at the table, and the trustee would have no role in

that, and takes no position on the approval of the settlement agreement. However, you have in the submissions earlier and on this hearing, particularly from Mr. Zigler, you have been taken through the terms of Northern Trust's agreement with respect to the HWT. Mr. Zigler has indicated that in negotiations it assesses the cause of action against Northern Trust as trustee of HWT and determined risk and problematic.

So to the extent it is not obvious, Your Honour, I will make the statement that Nortel Trust disputes any alleged breach of duty or any alleged liability for unfunded benefits, and if any such cause of action brought against it, I would rely on its indemnities from Nortel.

My comments today were intended to be directed to the form of order, if granted. The form of draft order is directed to Northern Trust. It directs it to do and not to do certain things, and we reviewed when circulated. We noted drafting that we raised with counsel for Nortel and with the Monitor, and we sent a letter to the service list indicating the

small changes we proposed to the form of order.

But we also noted that the release in the draft order included the trustee of the HWT, but not the trustees of the pension plans; although, Northern Trust of the trustee of both HWT has indemnities for Nortel.

So, we raised what we assumed were drafting glitches, and they agreed it was inadvertent of the trustee of the pension plans from the release and Nortel and the Monitor have agreed to the changes we have proposed to order. At the right stage, I understand they will take you through the draft order and the requested changes proposed by Northern Trust and agreed by Nortel and the Monitor.

Mr. Tay said in opening submission that one of the objectives is certainty, and these releases were intended to cover the parties that had indemnities so that there was no back door litigation.

So, while the releases were intended and do cover the trustee of HWT, members of pension committees and directors, it was apparent there was a gap. That the release did not

include the trustee of the pension plans that also holds the indemnities.

Mr. Zigler has advised that while the exclusion of this was not deliberate or intended, he cannot agree to the changes. We propose the changes are reasonable to include the trustees of the pension plan, and counsel has an obligation in settling the form of order as contemplated by the settlement agreement.

Your Honour, it doesn't appear to us that there is any substantive change to the deal as a result of the changes that we propose to the order.

Again, my friends will take you through it at the time, and I add it's consistent with the material filed by representative counsel. I will, if I can give you the cite, or if you wish to call it up. In the responding motion record filed by Koskie Minsky, there is an affidavit of Susan Kennedy, Exhibit G to that affidavit summarizes the various rights of the employees that were examined by representative counsel.

You will see down, second from the bottom, on

the third page. Counsel considered the right to sue the trustees of the pension plan and determined that if the agreement was rejected it would be available. If the agreement is court approved, they understand the claim is not available, and not a viable claim.

And so, Your Honour, it is the submission of Northern Trust that the expressed inclusion of Northern Trust as a trustee of the pension plan in the release, in the draft order, is a reasonable request and not a substantive change. Rather clarification.

There is a paragraph of the order that prevents of a claim over Nortel, and it would appear that the trustees of the pension plan would fall under that as well, but the trustees of HWT are provided for in the release, and it's the submission that if this court were disposed to grant the order approving the settlement, that the trustees of the pension plan for certainty and clarity also be included in the paragraph of the order providing releases.

So, Your Honour, I will leave it to my friends at that time, as you wish to review the terms

of the order with you, and the proposed changes. Unless there are questions, those are my submissions.

THE COURT: Thank you. I believe that concludes, subject to reply. Going once, twice. Three times? Okay. Reply.

MR. TAY: Thank you, Your Honour. If I could just start with replying to Mr. Rochon's submission.

Let me start with things we agree with. Settlement is not a perfect solution. The settlement will not give the LTDs what they had when Nortel was solvent. Even if you bless the settlement, in light of the LTD, it will be harsh. You've heard the stories. We understand the pain, and we understand that is the reality these people live with, and we sympathize. But the comparer here is not whether you should approve this settlement versus maintaining the benefits forever.

As much as we all from a human level would like to be able to maintain benefits forever, we cannot do it.

There are legal realities and practical realities that face us.

Now, Mr. Rochon has repeated numerous times, somewhat bold statements and statements which I have to put under the category of repeating something doesn't make it so. He has said, there is no prejudice if you don't approve the settlement.

He said settlement is not in keeping with the purpose of the CCAA. He said, there is more than enough money to continue the benefits without the settlement agreement.

He said the court can simply order that the benefits continue. He said you don't need releases. He said the releases are too broad.

He said there are sound basis for litigation, that should not be waived, and he said you don't need to waive priority of the deficiency claims.

What is common with respect to all of these statements is that there is no evidence supporting the truth of any of them.

In fact, all the evidence points to the contrary. As you yourself noted up front when you saw that the evidence has been presented by the company, the Monitor, representative counsel, representative counsel 's financial

advisors. All speak of this in the same way. And I am not talking H2, but in terms of settlement. It's clear where the facts are.

Now, the affidavit of Ms. Urquart is not evidence. It's opinion. It's guess work, designed to support Mr. Rochon's argument, and I honestly have to question the utility or wisdom of putting out numbers about possible distributions and about possible fraud, possible claims without any factual basis, and the effect that that has on the people that have to live this, and whether or not it really helps or hurts that cause, and that is all I will say about that.

As emotional and personal as these issues may be, as I have said, we are bound by legal constraints, and the practical realities that we find ourselves in.

Now, Mr. Rochon spoke about, well, you are taking the rights of the LTD members.

No, it's a settlement.

But what he is suggesting to you, however, what he says, just order that the payments continue.

Let's think about that. What does that mean?

In order to do that, the court is being asked to grant unilateral priority to these payments at the expense of all the other unsecured creditors, including the employees themselves for severance and everything else.

In other words, what he is asking you to do by saying keep continuing, he is asking you to take the rights of the other creditors, because it won't be as a result of negotiations. It will not be as a result of give and take. It will not be the result of quid pro quo. It's a declaration of making these payments, but not respecting or seeing the reality that in order to do that, you have to take it from somebody else.

That is what I mean by, we have legal realities that we have to live with.

We also have practical realities that we have to live with, and that is why when you have heard in the affidavit, "Of course, you have lots of money to pay this. You have $2.3 billion in the Nortel estate." It's ignoring or choosing not to see the practical realities. If she has been following these proceedings that she says she has, we all know

that Canada has spent the last year and a little bit just trying to survive getting the funding.

You know the travels we have had tried to get the other Nortel estate to pay their share so we have enough money to fund this.

There is no question we have had to question dipping into the pot, and no question about the 800 million sitting in Nortel U.K.

They are saying, my pensioners have a $4 billion deficiency, and we want you -- Canada -- to pay for it, and that was the subject of a whole day motion in terms of support direction you heard.

These are realities, and as much as we would like to help people, we are bound by law and we are bound by practical and commercial realities.

This is why you saw the wisdom of appointing a rep counsel earlier on in the case, because the other reality, Your Honour, is that when you are dealing with 12,000 pensioners, and 400 LTD, there is no way you can negotiate with every one of them. There is no practical way of getting every one happy. That is the

reality as well.

It's not a process whereby every member needs to be satisfied. That is impossible. It's not a process whereby every member is entitled to see every piece of paper and come to a conclusion they are agreed with representative counsel.

It's not part of the process, nor is it possible for every member to have full access to all books and records and documents of the company, and another practical reality, whether we like it or not, and that is why you have representative counsel, and that is why rep counsel has financial advisors, that is why rep counsel was given full access to the documents, the book and the records, and that it's why you charge with a duty and obligation.

After looking at all that, and having all that support to come to reason, decisions, opinions, views, not based on speculation, not based on what we would like the world to be, but based on actual facts. Based on fully analysis and full financial analysis. That conclusion is clear.

This is a balance. This is A fair settlement. It's not perfect. It will not help to the extent that we would like to help everyone. It will not do that, but it's the best we can do in these circumstances.

They have been clear that the alternative, if we don't do this deal, the results will be harsher, and the hardship greater.

Now, we have heard from the 37 people, either through Mr. Rochon or individually, and, again, as I say, we all feel and sympathize. But let me ask you, what about the other 12,000 pensioners not here? What about the 360 LTD's that are not here?

Do we ignore their wishes, because they didn't show up and tell their hardship stories? Do we ignore their wishes because they are counting on representative counsel to deliver a settlement agreement that helps them to buy the time and runway that will allow them the certainty knowing they will have benefits for the rest of the year and give them time to organize their life?

How can that be fair?

How can that be right?

Even if this was a CCAA plan, and you had a class of 400 people and 360 that vote in favor of the plan and 37 against the plan, how would the CCAA function?

It would approve the plan, and the plan would be binding upon those who were not satisfied with it, because the nature of the process is that there will be people that will not be satisfied and for understandable reasons. But that is the nature of the process, and that is another reality that we have to live with.

Let me just touch in conclusion in dealing with Mr. Rochon's points. His interpretation of the Grace case, in terms of who should be released, and basically he used it for the proposition that unless someone provides value, they should not be released. And, again, Mr. Rochon was not involved in the case and may not appreciate some of what actually happened there, but you may recall, Your Honour, that in Grace, we argued before you. We were trying to get as part of the Canadian settlement, a release of sealed Canada. And they did not contribute a single cent to the Canadian release.

It had participated in the U.S. release, but the reason we needed that released was because Sealed Air had an indemnity from Grace. So, paragraph 36 of Grace one. I will read it to you.

> "With respect to relief in favour of Sealed Air, Grace has agreed to indemnify Sealed Air Canada for certain liabilities in connection with ZAI."

The release of the claim includes the benefit of Sealed Air Canada, and he went on. We, as counsel, submitted such release is not only necessary and essential, but also fair given they had contributed money in the U.S., but that was just another reason.

That was not the sole reason for why they get the release.

Our submission was that the principle reason for giving them the release was because Grace had indemnification, and if you don't give the release, you allow the claim to come back through the back door.

Then if you go on, you talk about the minutes and claims for against Grace are release.

"Counsel submits that such a release of the Crown is necessary."

But then in paragraph 49, counsel to Grace submits that such release of the Crown is necessary, otherwise Grace could be compellable.

So that comes back again and again and again, and that goes to Ms. Huff's client. It was an inadvertent but necessary to clean all this up, that we include them in the release, otherwise they will just rely on the indemnities, and this would come back to the company.

It's not only about the bother and time of litigation, but it's about double dipping. You make a claim and sue someone else, and they seek, and now you have two sources for the same debt, and that is the objection part as to why you want to close them off. That is all I will say about the releases there, and that is all I need to say about Mr. Rochon's submission.

Let me come to the bondholder, and let me deal with it in reverse order that Mr. Swan raised. On his third point, it's simple. That is the

deal, that is part of the economics of the deal, that the 4.3 million is on account of the claims that were negotiated. They asked for it to be part of the distribution, and Mr. Zigler held his ground, and we ended up, no, it would be counted against the claim. No contribution or accounting for the other benefits given.

So, that is three. It's just part of the deal. That is the third.

On the second argument that Mr. Swan made, and this is about the bankruptcy before September 30, don't get me wrong, I am all for -- as I said from the start -- certainty, so that people get what they bargain for in this deal, and I will suggest to you an approach that will deal with certainty both in this issue and with the H2 issue. Because there is a danger, Your Honour, when lawyers start to take positions and taking legal analysis. We fall in love with our own arguments and lose sight of the practical. The reality. What is important, and it's more than important. What is critical is that we need to get the financial blessing.

I am indifferent as to whether H2 is or is not there. You heard how you can get to the point where you can put people to the test and say, I am willing to bless this other than H2, and if you want to go that route, I am content. If you are inclined to take the approach of, I can only bless this or not, so I will bless this because the deal is too important, then I have a suggestion for you.

The attack or potential attack can come in only one of two ways. The first is that someone comes along and tries to vary the order down the road. It may not be Mr. Rochon, because he know the context of this now, but someone like Mr. Rochon that comes late in the day be told by someone to look at the order and says, "This looks weird. Let's get it changed and varied." And I would suggest to Your Honour, it would be important that either as part of your endorsement or reasons, that you state that this order should not be varied without taking into account the interest of the parties who have bargained for and continue to rely on the terms of this order.

You had difficulty from a legal perspective with Mr. Swan's suggestion, and I understand that in terms of, you cannot say -- you cannot issue a bankruptcy order, or you cannot bind the hands of court in the future.

But I think it's perfectly within your ability to state the importance of this order and how people are relying on this, and how this order should not be varied or changed without taking into serious account the interest of the parties that have bargained for and continue to rely on the terms of the order.

So, someone coming down the road and trying to vary, and it turns out you are not around, and there is another judge listening, and I am not around, it gives context of the importance.

The second potential avenue of uncertainty is bankruptcy.

Bankruptcy will effect this in one of two ways if it happens before September 30. It will do serious damage to this deal. No question about that. Nobody wants that. Nobody is expecting that.

But there is only two ways bankruptcy can happen.

I can make a voluntary assignment, and I am willing to commit right now and to have the court order it, if it be necessary that we will not make an assignment in bankruptcy without first seeking the position of this CCAA court. And that puts it into the second way that people can try to bring bankruptcy proceedings. They have to lift the stay. Right now, nobody can do anything until you decide to lift the stay.

I have subjected myself to the same condition in what I suggest would be highly important if your reasons or endorsement would again say that the stay should not be lifted to allow a filing of the bankruptcy or application of bankruptcy order.

Again, I would say, without taking into account the interest of the parties that bargain for and continue to rely on the terms of this order, and borrowing some circumstances, I can not even imagine. There is no judge in the world, in this court at least, that would look at that and not take it seriously, and it would set the stage for someone to say, "No, should not be lifted

because here are the consequences of what would happen."

I make no distinction in those submissions between a bankruptcy order filed before September 30 or after September 30, because all of these evils that we have been killing a lot of trees and brain cells on about changes, etcetera, what ever may happen to the BIA does not touch the case, unless we go into bankruptcy.

H2 has no effect unless we -- either we are put into formal bankruptcy proceedings under the BIA.

And so my suggestion is, if you are intending to go down the route of just blessing as is, have a safe guard of making this court the gate keeper so that before anyone can put -- before anyone can put this company into bankruptcy, the fight first has to be about whether or not it's appropriate for the stay to be lifted and that avoided all the huge litigation that Mr. Swan is talking about where it's in bankruptcy and now we fight about whether H2 applies or not.

You at least have an initial step, a hurdle

before it comes to play and in all likelihood, Your Honour, there will not be a change in the Bankruptcy Act that will be retro active or that will undo the world as we know it in a significant way, and, hopefully, we will not have to have this argument again, but other than jeopardize a deal that we need now about something that may or may never happen.

I suggest if you put these safe guards in there, that would at least now allow all of us to derive comfort from the fact that nobody can interfere unknowingly, unthinking and without due consideration to the huge reliance that we are all putting on what this order says.

I have nothing to add.

THE COURT: Anybody else?

MR. MACFARLANE: With respect to Mr. Tay's last proposal, I am not sure with respect to H2 if that works. You still have the provision and order, which is offensive and as Mr. Swan said, you have the other layer of litigation of people trying to interpret the agreement, and then with your endorsement.

So, my respectful submission is that it's

either in or out with respect to H2.
THE COURT: I think that submission was already made.
MR. SWAN: I wanted to clarify. The submission I made with respect to credit of payment is not restricted to the termination fund. It's at larger issue.
I think Mr. Tay's response that it's in the deal was with respect to the termination of the fund, but there is nothing else in the deal on crediting one way or the other.
So, in that respect, that is not part of the deal.
MR. TAY: My understanding of the deal is that the other payments are just payments.
THE COURT: The 4.3, my understanding of the proposed settlement is the 4.3 is credited against the allowed claims, and everything is else is not. It's just a payment.
MR. SWAN: Therefore it's an open question.
MR. ZIGLER: It's no difficult from any pension payment ever made.
THE COURT: Or the payments made in the past year. That is how I am taking it.
MR. ZIGLER: He can argue otherwise, I will

tell you it's no deal.

THE COURT: I take it from paragraph 4, or paragraph 9.4(c) of the factum. I think that is where you listed out the four things, as I made a note, and take it from there, but my understanding of the proposal is that with the exception of 4.3 they be treated like all payments that have been made since January 10. January 14, how could I forget the date? January 14, '09, but I have your point.

MR. SWAN: You do, and we may wish to make a submission to you on whether, and how that be credited, and I think I will have to say as well, and I support what Mr. MacFarlane said on the gatekeeper step. I don't think that adds anything in terms of what H2 does. It's there, and it adds a further layer of uncertainty that there is another step. Thank you.

THE COURT: If anyone else has anything to say, I have a point for Mr. Zigler to clarify, and that is the issue regarding the Northern Trust, and what Ms. Huff thinks is inadvertently, and what is the position of your group?

MR. ZIGLER: If I find that to be an inadvertent omission, Mr. Zigler, it's open for you to find, and it's our position they are a third party of an agreement and the company among others, if I am not asked to give something in order to get the benefits of agreement after signed, inadvertent or advertent, I can not say I will give somebody something for nothing, and that is my client's position.

If Your Honour wishes to release them, fine, but I can not agree to release somebody who, a third party where the release was not signed. My clients can't.

UNIDENTIFIED LAWYER: I must rise on that point. He said a trustee, which is not the case. If you look at the defined term of who is a third party beneficiary, the trustee of the pension plan does not fall within the definition of "release". My view is that these are issues with the defined terms used, so I am not sure that Mr. Zigler's answer is the complete answer.

MR. WADSWORTH: I just had two brief comments, Your Honour. The first had to do with the

submissions of Mr. Rochon, and he said he didn't disagree with the CAW exclusive bargaining rights, but didn't preclude the due process right to representation; that is, I have no idea based upon what, but certainly through these proceeding we have given notice. We have not yet formally objected to the representation of the members in these proceeding, but we will do so if necessary, and the last is simply, he asked you to look at the harm to his clients from the settlement, and the last thing we can say is, the effect of not having this agreement is going to be even more harmful to the vast majority of our members that are needed and who want the continuation of the benefits. Thank you.

MR. ZIGLER: I was answering the question earlier. I do intend to reply. I don't know the order.

THE COURT: I have no idea. It's an unusual. The one thing I am hesitant to do is cut people off. So, if you have something to say, I rather you say it than wait until after I put time into rendering a decision.

MR. ZIGLER: I think in keeping to the practice of rely, I think maybe the Monitor would go last. Is that the intention? I don't want to upset the procedure.

THE COURT: Being a "Z", you usually go last.

MR. ZIGLER: All right. And, Your Honour, with respect to the individuals who spoke and Mr. Rochon, and I think one of the affidavits was one of the witnesses that says she weeps every day.

THE COURT: One thing I note from yesterday, the reporter was having difficulty with the acoustics. You tend to talk to the side.

MR. ZIGLER: I will speak right into the microphone.

One said she weeps every day. My clients are disabled, and they were weeping yesterday, and I think all of them were on some level, not just with respect to the disabled, and there are pensioners, and one can feel that way as well. And Mr. Tay said, we all feel that way, and that is why this issue is broader than the court, and that is why the matter of lobbying at the political level, the court should be aware of, although the court cannot do

anything about it. The one concern I have with --

MR. MACFARLANE: If I may rise. I think we are both respondents to the motion.

THE COURT: I want to make sure everyone has the right. Let's give Mr. Zigler that, and if there is a problem we will.

MR. ZIGLER: It would be unfair if I could not.

THE COURT: I don't want to see a series of rolling --

MR. ZIGLER: Okay. But the ability to try to influence legislation is important, that is why my client asked for H2, and what Mr. MacFarlane asks you to do is, in fact, join them from exercising the right every citizen has to speak to their political leader and try to get a change in law.

If it never come to pass, as what Mr. Tay said, I have no difficulty with respect to the suggestion of the endorsement, but it would be contrary to public policy to effect an endorsement. They made it a critical provision of their negotiations, and you need not turn up Susan Kennedy's affidavit, but you

were taken to it.

They indicated H2 was critical, and they would not have signed the agreement without it, and there is good reason.

It's important to them, and I think you saw that as to why it's important, and that is why it's part of the agreement.

Now, I would love to have an agreement without H1 or H2, or without releases, but we are not here to do that. It's all or nothing. Unlike Mr. Rochon, you can order -- if you look at your January 21st order, you can say, we can continue with these for any reason, but with all due respect, we came before you on January 21 to say we were bargaining on good faith to reach an agreement, and that January 21st order was predicated on that.

It's a package, as Mr. Barns said, and it's a carefully calibrated package. Every part of that agreement. And it cannot be tampered with, without effecting or creating all sorts of impact on other people, which is what you say from the various objectors. Mr. Rochon or the UCC in the bond, and that is where we come from.

With respect to what Mr. Rochon had to say, I don't want to spend a lot of time on the allegation that my clients interface with only a few. I think you heard about that this morning. Susan Kennedy's affidavit, and I think you were taken to it.

She speaks to people that are not here. There is 100 of them that she has email contact with. They are disabled. It's not for people making an agreement.

Even though there are other opposed for, it's not people making an agreement, and we communicate with all of them, and you have evidence from Mr. Rue (ph.) about that before you.

I think at the end of the day, the reply to Mr. Rochon comes to this: The alternative to this agreement is litigation, and, in some respect, for many of these people, litigation creates hope.

But it is in my respectful submission, and we went through all of the reasons, we think a false hope or certainly a hope they receive sufficient compensation for in the settlement, and that is why this is not about taking away

the rights. It's a compromise where consideration is being received in exchange from releasing litigation.

I want to correct one matter raised by some of the disabled people. One particularly.

The first is this: That their employment terminates at the end of the year, and that that somehow effects their rights.

You need not turn up article 5, but you can make note of the settlement agreement. It actually specifies that although the company can terminate any of the people under the initial order and the job would be gone.

If a disabled person becomes healthy, the practical reality and the real reality is that there is no job to go back to.

The company that employs 6000, and they work themselves out of a job shortly thereafter.

So, if any of the disabled become healthy again, there is no job to go back to, and that is the reason they are kept on employment status, but the document makes it clear that none of their rights with respect to collective agreement or common law against Nortel arising out of their employment or

termination of it or any claims for lost long-term disability. Pension benefits are not effected in anyway as a result of a termination of their employment.

So, all their rights, with respect to the Health and Welfare Trust remain.

The other point I want to address is the concern that some individuals raised that without knowing what they get out of the Health and Welfare Trust and without knowing the Northern Estate distribution they have difficulty dealing with this agreement.

I appreciate the concern that we all -- these people live with great uncertainty, but this agreement is for the former employees and is really another form of interm funding agreement. This is for them.

It allows funding in the interim, so that we can figure out the uncertainty of what they get out of the HWT. Otherwise, they would be eroding that trust by being paid today.

The alternative to not granting the order before you for them would mean payments continue out of that trust and erode it's asset.

The objective is to put money in their pocket from Northern so the money is not eroded. So, that should be clearly understood as to the way we are dealing with that uncertainty. I wish I could tell them how much on the Northern Estate.

It seems many like to speculate and put it before you in evidence, but our financial advisor cannot put that forward. Our actuary based on presumptions could deal with matters, but he too cannot give a definite answer. That has to be approved by Your Honour. That is all I can say about that.

I want to say a few things about what Mr. MacFarlane and Swan put before you. The UCC and bondholders are in effect third party beneficiaries of this contract. It's only before Your Honour because the CCAA requires you to approve contracts to which the company enters.

The company has entered into a contract with former employees and disabled and that is the contract before you.

Other times the company enters into with the UCC and bondholders about assets or interm

funding, but they are not parties to the agreement and would not be, but were given a seat at the table.

So, any provisions in this agreement in terms of what is before Your Honour is approving an agreement between the company and its former employees, as well as the Monitor and directors, and that has to be in the best interest of the creditors as a whole and of my client, and it is in the best interest of the creditors as a whole in terms of release of litigation.

If you look at H2, and maybe Mr. Swan said there was confusion, but there is not in my mind, and certainly it would be dealt with in your endorsement. They are all part of H1. In the paragraph sharing on a CCAA distribution, and then there is if there is a change in the bankruptcy, and we are in bankruptcy, and a change of priorities in the Bankruptcy Act, we are free to argue that we rely on that status change.

The two are connected and not about litigation of third parties. All beneficiaries benefit from the release of litigation against third

parties, and that includes the people.
Mr. Swan and Mr. Tay made it clear that the benefit of such a release, the claims for indemnities or against the directors charge, third parties like the trustee has. That is for the benefit of everyone and also for everyone, because it allows things to move forward in terms of obligations for pension and benefits that have to be dealt with, and it provides a method for dealing it so the estate is not hung up on how we deal with this and matters of deemed trust on pension cases. That is for the benefit of everyone.
It doesn't give certainty on every area, no agreement does, but there is enough benefit for everyone here that we would submit Your Honour should approve this agreement.
The alternative what was put to you: Send everyone back to negotiations.
With all due respect, I think that will cause more trouble than worth. It will cause more trouble, because everyone before you today will have something to say about a renegotiation agreement. Everyone was -- even people not before you today.

It will cause more trouble, because if H2 was critical for my clients as sworn, and it's not about pro quo. It's a critical provision, and that is what Susan Kennedy says, and you can see why.

THE COURT: The position of your clients and the integral part of H2 has been made clear.

MR. ZIGLER: It would be futile to send people back. Either we have an agreement or we don't. Thank you, Your Honour.

MR. MACFARLANE: I don't want to take your time.

THE COURT: But you will.

MR. MACFARLANE: Two minutes. One thing I want to clarify. What Mr. Zigler said about the lobby and public policy argument. I am sure you took the same view as we did. We are not stopping them to create legislation that would help them. We would welcome that, if they were successful in that regard, and as long as it doesn't effect the certainty. Also, once again, the link between H1 and 2. Mr. Zigler never mentioned in the argument, and it's not in the material, there is no linkage. I have dealt with that before.

Those are my only points.

MR. ROCHON: I don't want to interrupt, but I heard my name several times, and I do want to make a brief reply.

THE COURT: Mr. Barns, and then you will get your couple of minutes.

MR. BARNS: I want to make a point, and it's more of an observation, and it's okay that I go in front of Mr. Rochon, because it's when Mr. Rochon was putting his position to you yesterday, and his first position was that you shouldn't approve the settlement agreement, and then he said, well, if you are inclined then you should strike certain paragraphs, and he spoke at length about the pari passu, and second about releases.

Now, I adopt what has been said by my friend with respect to the benefits that the stakeholders achieve from receiving both of those. The uncertainty that was not clarified with respect to the priorities and, second, the releases provide no call on the indemnity, but the only observation I make is that one of the reasons that you cannot pull something out it is because even though they are recognized

as benefits, it's those benefits that drive the consideration that is being paid to Mr. Zigler's clients.

So, if you pull something out that he recognizes as a trade off, yes, the company has benefitted from the trade off, and that has effected how much they were prepared to contribute.

So, once you pull one part out, you pull from the other side. That is all I wanted to say.

THE COURT: Thank you. Mr. Rochon?

MR. ROCHON: Thank you, Your Honour. I just wanted to mention a couple of things in reply if I can, and that is the overwhelming theme that we hear, that if the plan is not approved or if the settlement is not approved, the sky will fall.

Just on that point, and Mr. Tay made the submission. There is just no evidence here, but in my respectful submission, Your Honour, there is evidence. There is evidence from our expert who was the manager director at --

THE COURT: I think you went through this already.

MR. ROCHON: I didn't touch on her

credentials, but she was also appointed by Justice Campbell in the ABC case on behalf of the ad hoc retail committee. So, she is qualified to review financial statements.

In fact, that is what she has done for the past 30 years of her life, and in her conclusion made analysis about the loan.

Second, evidence on this point with respect to cash available and the loan and so forth. Of course, there is the -- and I have not been part of these proceedings, and so I am coming at this with a slight disadvantage, but there are cash flow projections in the material, including the 35th report. So adding to what I said earlier and replying to Mr. Tay's evidence that there is no evidence, there is evidence. There is 134 to cash flow to the company on an ongoing basis.

And the time that I was suggesting to have the parties reflect on what is going on, reflect on perhaps a letter or direction from Your Honour, was not up to the end of the year. It was for a short breather period of time for approximately two months so parties reconvene and come up with something. That is not as

Mr. Tay suggested something that is designed to -- well, he says what is critical is to get the financial elements in place. A deal on these points. Economics rather.

I would say to that, what is important here, as Mr. Justice Farley has said and Justice Campbell and the leading judges in this area, in addition to your self.

What is important is to get a proper balance and do what is fair for the parties, and special emphasis on those directly effected; namely, the objectors. Those are my submissions. Thank you.

THE COURT: Thank you.

UNIDENTIFIED LAWYER: We will not repeat the submissions of Mr. Tay that we support and including the possible approach to deal with the concerns raised by Notelholders and UCC, and also to point out so there is no confusion of any of the people here, that the cash flows have been approved to March 31. There is no certainty about the use of the cash post March 31, or the continuation of the benefits, which would be a matter brought back to the court in the presence of all stakeholders here today,

and those are our submissions.

THE COURT: Thank you.

UNIDENTIFIED LAWYER: Good afternoon. This is just a housekeeping matter in the event all replies are complete. If you recall, there was an objector yesterday relating to a media article and that one of the previous objectors was referring to, and I do have that here and showed it to the Monitor, and she accepted the paragraph of the affidavit in introducing that material.

THE COURT: Thank you. There will be no disposition of this matter today. I am aware of the serious issues that have been raised and argued over the past three days and some of the timelines in place.

So, this is not a question that there is going to be a lengthy reserve on this matter.

Having said that, I am not in Toronto next week, and I have not made the great determination as to whether the computer is going with me or not, but I will do my best to deal with this.

It may come in a form that is abbreviated with more detailed reasons to follow, but I will

endeavor to get something out as soon as possible.

With respect to the carry over motion of the incentive fees or the incentive plans, I gather Judge Gross ruled on that yesterday. He sent me a copy of the ruling, which I have not seen, but that one also will be dealt with sooner as opposed to later.

Ms. Huff?

MS. HUFF: Just a question of the proposed disposition. Will there be an opportunity for counsel to agree, if you were disposed to grant an order?

THE COURT: There will be some order that flows from it, and I think it's premature to comment on as to what will happen, but the form of order has to reflect what the endorsement says.

MS. HUFF: On that point, a draft order had been proposed, and I had some noncontroversial changes, and as well, a form of endorsement to one of paragraphs. I am in your hands as to when you would like to deal with that.

THE COURT: If those are on consent, email them through to the commercial list office,

and they will know where to find me. The rest of you will not know where to find me, but I do thank all of the counsel, and those who provided their in-person representations. Have a nice weekend.

-- Matter adjourned.

REPORTER'S CERTIFICATE

I, Marlene Finnegan, Court Reporter, certify:

That the foregoing proceedings were taken before me at the time and place therein set forth;

That the above said was taken down by me stenographically and thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken.

Dated this 20th day of January, 2011.

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Marlene Finnegan, Court Reporter

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 *et al.*

Court of Appeal File No. M47511
Court File No. 09-CL-7950

COURT OF APPEAL FOR ONTARIO

DOCUMENTS REFERENCED IN THE NOTICE OF MOTION (MOTION SEEKING LEAVE TO APPEAL) DATED FEBRUARY 14, 2017 OF THE MOVING PARTIES GREG MCAVOY AND JENNIFER HOLLEY

Volume III