Court of Appeal File No. M47571
Court File No. 09-CL-7950

COURT OF APPEAL FOR ONTARIO

BETWEEN:

GREG JOSEPH MCAVOY, JENNIFER HOLLEY

APPELLANTS

-and-

NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS, AD HOC GROUP OF BONDHOLDERS, ERNST & YOUNG INC. in its capacity as MONITOR, JOINT ADMINISTRATORS OF THE EMEA DEBTORS

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

RESPONDENTS

REPLY FACTUM OF GREG MCAVOY AND JENNIFER HOLLEY
(Reply to Motion for Leave to Appeal)

Date: February 24, 2017

Joseph Greg McAvoy
Nortel CCAA LTD Creditor
Kingsland Terrace Supportive Living Facility
Suite 1, Room 2, 835 68 Ave SW
Calgary AB, T2V ON5
(587) 582-8804
dignum.mcavoy@gmail.com

Jennifer Holley
Nortel CCAA LTD Creditor
2034 River Road
Ompah, ON, K0H 2J0
(613) 479-2653
jholley@xplornet.com

Self-Represented

To: Service List

MATERIAL FACTS ON ABSOLUTE AND RELATIVE POSITION OF LTD

The Monitor and Debtors and Representatives have not refuted the Material Facts on the absolute and relative position of the LTD under the Final Nortel Plan. The LTD are the worst impacted creditor group amongst all the creditors in the three geographic estates.

- Nortel disability income is reduced to 66% to 68% of what it was before Nortel's insolvency filing, which is 33% to 48% of pre-disability income.
- Medical and dental expenses have only 45% to 49% recovery, on an average of Cdn$7,291 per year for the LTD at 2010.
- LTD unable to preserve capital from both the HWT and CCAA settlements, due to the six year delay of the CCAA settlement. The deeply compromised 38% HWT and 45% to 49% CCAA settlements' capital is already used up by 2018 to cover the deficiencies in CPP disability income relative to reasonable basic housing, food and clothing expenses and the high medical and dental expenses during 2011 to 2017.
- Due to settlement capital depletion by 2018, the LTD receives only CPP disability income, at a maximum of Cdn$15,763 in 2017 only rising by CPI for the balance of their lives.
- Junk bond holders are paid 98 cents to full payment per $1 of claim.
- Nortel Canadian bankruptcy professionals are paid Cdn$698 million in fees and disbursements. Nortel global bankruptcy professionals are paid Cdn$2,580 million.

THIS IS A S. 52(1) UNCONSTITUTIONAL LAW CLAIM

This is a Charter S. 52 (1) claim that both S. 6(1) and S. 11 of the CCAA is unconstitutional to rights, without this being demonstrably justified under S. 1 to serve the purpose of the CCAA.

Companies' Creditors Arrangement Act, RSC 1985

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

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

We disagree with Pt. 13 of the Representatives Factum and agree with Pt. 25 of the J. Newbould's Nortel Certification Endorsement that says "I accept that any order I make to sanction the Plan may be subject to the Charter." The Honourable judge correctly distinguishes between ***Dolphin Delivery Ltd. v. R. WD.S. U., Local 580,*** **[1986] 2 S.C.R. 573 (**Monitor and Debtors BOA Tab 3) being a resolution of a dispute between private parties based on common law where the judge's order is not a governmental action to which the Charter applies, and "a

purely private proceeding that is governed by statute law, then the Charter will apply to the court order."

Representatives' Factum Pt. 17 says "It is a fundamental tenet of insolvency law that all debts shall be paid pari passu and all unsecured creditors receive equal treatment," and Monitor and Debtors' Factum Pt. 10 (f) says "The Plan provides for payment to creditors on a pari passu basis, which is the bedrock principle of Canadian insolvency law." Fundamental tenets and bedrock principles of insolvency laws are being challenged here so that the court can ascertain whether or not S. 6(1) and S. 11 are unconstitutional in respect to their authorization of judge's discretion to make orders that violate the Charter rights of expressly protected persons with mental or physical disabilities, without a demonstrably justified S. 1 limitation to serve the purpose of the CCAA. The following cases supporting the so-called tenets and bedrocks of insolvency law are interesting from a historical perspective, but do not answer the specific question of whether or not S. 6(1) and S. 11 are unconstitutional in respect to their treatment of disabled creditors who are expressly protected under the Charter.

***Shoppers Trust Corp. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652** (Representatives BOA Tab 7 & Factum Pt. 15)

***Indalex Ltd. (Re)* , [2009] OJ. No. 3165** (Representatives BOA Tab 8 & Factum Pt. 15)

***ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (**Monitor and Debtors BOA Tab 28 & Factum Pt. 52)

***Olympia & York Developments Ltd. (Re),* [1993] OJ. No. 545** (Representatives BOA Tab 4 & Factum Pt. 13)

***Air Canada (Re),* [2004] OJ. No. 1909** (Representatives BOA Tab 5 & Factum Pt. 13 & Factum Pt. 13)

***Metcalfe & Mansfield Alternative Investments II Corp. (Re),* 92 O.R. (3d) 513** (Representatives BOA Tab 6 & Factum Pt. 13)

DELAY IS NOT AN ARGUMENT FOR SQUASHING DISABLED CHARTER RIGHTS

The requested reserve and unconstitutional law adjudication procedure deals with Pt. 65 of the Monitor and Debtors' Factum of: "A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries." This also addresses the argument in Pt. 12 of the Representatives' Factum of: "the appeal will delay distributions to creditors, including all other LTD Beneficiaries." There is a saying of "Fool me once, shame on you, fool me twice shame on me." Concerns about delay, expense and erosion of creditor recoveries have been the crying of wolf since the Revised Interim Settlement Agreement at February/March 2010. These concerns did not stop the Cdn$2.6 billion of bankruptcy professional fees to date in this 8 year proceeding, including Cdn$163 million paid to Ernst & Young for its CCAA Court Monitor duties, Cdn$130 million paid to Goodmans LLP for its CCAA Court Monitor legal counsel duties and Cdn$51 million paid to Koskie Minsky LLP and other bankruptcy professionals providing various services to the pensioners, LTD and severed employees.

This is not a question of entitlements rather than needs as the appropriate measure for concluding that the Revised Interim Settlement Agreement (or the Nortel Final Plan) are fair and reasonable as set out in Monitor and Debtors' Factum Pt. 13 and 47. This is a question of expressed Charter rights of Canadian persons with mental or physical disabilities and whether CCAA S. 6(1) and S. 11 are unconstitutional in respect to their granting of a CCAA's judge's use of discretion to make an order that violates S. 7 or S. 15(1) of the Charter without the existence of a S. 1 limitation to serve the purpose of the CCAA, as measured by the Supreme Court's Oakes Test.

PERSONAL ECONOMIC RIGHTS ARE NOT PROHIBITED UNDER S. 7 AND ARE SPECIFICALLY PROTECTED UNDER S. 15 (1)

Monitor and Debtors' Factum Pts. 44 and 45, Representatives' Factum Pts. 9d) and 15 and J. Newbould's Endorsement Pt. 28 are all simply wrong in the argument that "economic interests" are not protected by the Charter, whether they relate to S. 7 or S. 15(1). As said in our Leave to Appeal, the SCC ***Irwin*** 1998 case (Appellants BOA Vol I Tab 4) says the SCC "does not pronounce that economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights," and this case also says, "a plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights."

The Monitor and Debtors Factum Pt. 50 saying that subsequent SCC decisions after ***Irwin*** confirm S. 7 does not apply to any economic rights is wrong. None of the subsequent cases decide this. As explained more fully below, the cases provided by the Monitor and Debtors either did not make a decision in regards to economic rights at all, or were based on certain narrow aspects of economic rights that have been determined to be prohibitive for S. 7, including commercial purely economic rights, and a positive obligation to provide a minimum social security or a specific health care service.

The ***Siemens*** 2003 case does not support the Monitor and Debtors' Factum Pts. 44 and 45 claim that all economic interests or rights are prohibited within S. 7 of the Charter. This case adds to the jurisprudence that commercial purely economic interests, including pursuit of a lawful occupation within a business owned by persons, are not protected by S. 7.

We can add the ***Siemens*** case to our Leave to Appeal cases that support the premise that a violation of S. 15(1) has occurred because equal treatment does not provide for substantive equality for an expressly protected group in the Charter, persons with mental or physical disability. ***Siemens*** speaks to the judge not finding that Mr. and Mrs. Siemens were historically disadvantaged, suffering any sort of prejudice, were marginalized, devalued or ignored as a member of society. Our S. 15(1) claim is particularly well supported by the SCC case law.

***Siemens v. Manitoba (Attorney General)*, 2003 SCC 3** (Monitor and Debtors BOA Tab 22 and Factum Pts. 44-47)

- Mr. and Mrs. Siemens lost commercial purely economic interests as shareowners of the Winkler Inn, which was prohibited from operating video lottery terminals under the Manitoba Gaming Control Local Option Act and these are not protected by the Charter.
- Mr. and Mrs. Siemens' lost right to pursue a lawful occupation (with its correspondent right to employment income) is a purely economic interest because the ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the Charter.
- Mr. and Mrs. Siemens and other residents of Winkler: are not historically disadvantaged or suffer from any sort of prejudice; have no discrimination in any substantive sense; cannot reasonably feel that he or she has been marginalized, devalued or ignored as a member of Canadian society; and, have suffered no harm to dignity. Therefore, there is not a violation of S. 15(1).

The ***Gosselin*** 2002 majority decision did not address the claimed S. 7 and S. 15(1) Charter violations, moving instead to the conclusion that any such Charter violations were justified to serve the purpose of the Regulation to encourage younger welfare recipients into work and training programs. In ***Gosselin***, Arbour J. (dissenting) says after detailed legal analysis provided, "In my view, this tells decisively against any argument that relies upon a supposed economic rights prohibition within s. 7 of the Charter."

***Gosselin v. Québec (Attorney General)*, 2002 SCC 84** (Monitor and Debtors BOA Tab 25 and Factum Pt. 49)

- The appellant, a welfare recipient, brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989. The appellant argued that the 1984 social assistance regime violated ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and s. 45 of the Quebec *Charter of Human Rights and Freedoms*.
- It was decided that the Quebec Section 29(*a*) Regulation respecting social aid was constitutional because the purpose of the Regulation was served.
    - An examination of the four contextual factors set out in *Law* does not support a finding of discrimination and denial of human dignity. First, this is not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatisation on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.
    - The government's short-term purpose in adopting the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills to get permanent jobs. The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order to integrate into the workforce and become self-sufficient.

- Arbour J. (dissenting) says, "Simply put, the rights at issue here are so intimately intertwined with considerations related to one's basic health (and hence "security of the person") — and, at the limit, even of one's survival (and hence "life") — that they can readily be accommodated under the s. 7 rights of "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests."
  Indeed, the rights at issue in this case are so connected to the sorts of interests that fall under s. 7 that it is a gross mischaracterization to attach to them the label of "economic rights". Their only kin-ship to the economic "property" rights that are ipso facto excluded from s. 7 is that they involve some economic value. But if this is sufficient to attract the label "economic right", there are few rights that would not be economic rights. It is in the very nature of rights that they crystallize certain benefits, which can often be quantified in economic terms. What is truly significant, from the standpoint of inclusion under the rubric of s. 7 rights, is not therefore whether a right can be expressed in terms of its economic value, but as Dickson C.J. suggests, whether it "fall[s] within 'security of the person'" or one of the other enumerated rights in that section. It is principally because corporate-commercial "property" rights fail to do so, and not because they contain an economic component per se, that they are excluded from s. 7. Conversely, it is because the right to a minimum level of social assistance is clearly connected to "security of the person" and "life" that it distinguishes itself from corporate-commercial rights in being a candidate for s. 7 inclusion.
  In my view, this tells decisively against any argument that relies upon a supposed economic rights prohibition within s. 7 of the *Charter.*

The ***Godbout*** 1997 case does not support the Monitor and Debtors' Factum Pt. 46. This case decides that Ms. Godbout was dismissed because she exercised a Quebec constitutionally protected right to privacy that includes choosing her place of residence. The judge interpreted her claim not to implicate any notion of a constitutional "right to employment" or any other "economic right", and so he did not have to make a decision on this matter.

Godbout v. Longueuil (City), **[1997] 3 S.C.R. 844** (Monitor and Debtors BOA Tab 23 and Factum Pt. 46)

- Ms. Godbout was terminated from a job in the City of Longueuil because she violated a condition of employment for her to live within the City boundary.
- "..the residence requirement imposed by the appellant [City of Longueuil] infringes the respondent's right to privacy under S. 5 of the Quebec *Charter of Human Rights and Freedoms* ... and is not justified under s. 9.1.
- The respondent [Ms. Godbout] took the position that the right to "liberty" enshrined in s. 7 [of the *Charter*] includes within it a right to make fundamentally personal choices free from state interference and that choosing where to establish one's home falls within the scope of that right.
- … inasmuch as the respondent [Ms. Godbout] does not challenge the very fact of her termination as being contrary to her s. 7 liberty interest; rather, she seeks to impugn the basis upon which that termination was purportedly justified; viz., the residence restriction itself. Put another way, the respondent's real complaint is not simply that she was dismissed from the appellant's employ, but rather that she was dismissed because she exercised (what she claims is) a constitutionally protected right to choose her place

of residence as she sees fit. In light of these considerations, I am satisfied that the respondent's Charter claim does not implicate any notion of a constitutional" right to employment" or any other "economic right", and I would reject the appellant's submission to the contrary.

- The appellant, [Longueuil (City)] whose submissions were echoed by the mis en cause Attorney General of Quebec, … contended that the right actually asserted by the respondent was not a right to choose where to establish her home at all, but rather an economic right in the nature of a" right to work", and that such a right did not fall within the ambit of s. 7 liberty guarantee.

Monitor and Debtors' Factum Pt. 50 suggestion that the later ***Flora*** case says S. 7 does not apply to all economic rights is mischaracterized. The latter part of Pt. 50 is correct in that this decision confirms that S. 7 does not present a positive obligation for the government to supply a specific type of health service or to provide a minimum level of social security.

***Flora v. Ontario (Health Insurance Plan),* 2008 ONCA 538** (Monitor and Debtors BOA Tab 23 and Factum Pt. 50)

- Mr. Flora was not successful getting reimbursement from OHIP for a liver transplant surgery he had in England, since the *Health Insurance Act*, S. 11.2(1) and 12(1) and *Health Insurance Act Regulation* s. 28.4(2) were decided not to be unconstitutional under the Charter because:
  "On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature."
- "…there was no law restricting Mr. Flora's ability to spend his own money to obtain a LRLT at a private hospital in England," while knowing that OHIP would not reimburse him.
- "As this court stated in *Wynberg*, *supra* at para. 220, s. 7 of the *Charter* has been interpreted "only as restricting the state's ability to *deprive* individuals of life, liberty or security of the person".

Similarly, the Monitor and Debtors' Factum Pt. 50 suggestion that the later 2014 ***Tanudjaja*** case says S. 7 does not apply to all economic rights is mischaracterized. The ***Tanudjaja*** case was dismissed because the four homeless applicants did not point to any law in purpose or effect that was unconstitutional. This case does reiterate that the Charter does not confer a freestanding right to health care like the ***Flora*** case, and that the Charter does not provide for a minimum level of social assistance like the ***Gosselin*** case**.**

Tanudjaja v. Canada (Attorney General), 2014 ONCA 852, 2014 (Monitor and Debtors BOA Tab 23 and Factum Pt. 50)

- The four individual applicants suffer from homelessness and inadequate housing
- "They do not point to a particular law which they say "in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)""
- "They do not identify any particular law which violates the s. 7 right to life, liberty and security of the person."

- "The *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*."
- "[I]n *Gosselin*, *supra*, the Supreme Court of Canada rejected an argument that s. 7 of the Charter requires the provision of a minimum level of social assistance adequate to meet basic needs."

We agree with the Monitor and Debtors' Factum Pt. 49 that the *Gosselin* case confirms S. 7 does not present a positive obligation for the government to adequate income and services for life, liberty and security. Our submission and leave to appeal also rejects that S. 7 provides a positive obligation to provide for a minimum amount of income. We rightfully focussed on the CCAA being unconstitutional to the extent it allows the judge to use discretion to deprive Greg McAvoy and Jennifer Holley of their S. 7 right not to be deprived of life, liberty and security. The judge does so when he agrees to a CCAA Final Plan that results in Greg McAvoy and Jennifer Holley being deprived of the disability insurance they bought for themselves from Nortel in violation of S. 7 and S. 15(1), when to do so did not meet the SCC *Oakes* test.

The Supreme Court has also already decided in the *Baker* (Appellants BOA Vol 1 Tab 5) and ***Slaight*** (Appellant BOA Vol 1 Tb 6) cases that its interpretation of S. 7 deprivation of rights to life, liberty and security needs to be consistent with international human rights documents ratified by the Federal Government, such as the International Covenant on Economic, Social and Cultural Rights and United Nations Convention on the Rights of Persons with Disabilities. Both of these international human rights documents ratified by Canada state that States Parties must recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing.

From all the reasons provided in respect to our Charter cases and the Monitor and Debtors and Representatives Charter cases, S. 7's interpretation is not limited to what is described in the Monitor and Debtors' Factum as fundamental life choices that are in the irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.

S. 109 OF THE *COURTS OF JUSTICE* ACT AND CARVING OUT A RESERVE FOR AN EXPEDITED CONSTITUTIONAL HEARING

Based on ***Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241** (Monitor and Debtors BOA Tab 15 and Factum Pt. 36), we acknowledge that our Charter claim in respect to the constitutionality of S. 6(1) and S. 11 of the CCAA, has not served an official S. 109 of the *Courts of Justice* Act notice to the Minister of Justice and Attorney General of Canada Jody Wilson-Raybould. We have, however, on Nov. 8, 2016 advised the Minister of Innovation, Science and Economic Development Navdeep Bains, who is the Federal Minister responsible for the CCAA, that we challenge the constitutionality of the CCAA law and bankruptcy court processes involving persons with mental or physical disabilities, who are an expressly protected minority group within S. 15(1) of the Charter. Minister Navdeep Bains and experts in his Ministry were given a comprehensive report on that date on that date called, "Compromise of Long Term Disability

Claims in Bankruptcy Violate the Charter." The Minister and Ministry staff have not refuted our Charter claim and were aware of our appearance before the Fairness Hearing on Jan. 24, 2017.

***Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241** (Monitor and Debtors BOA Tab 15)

> 48 The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.
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> 49 While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is *ipso facto* invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.

As this is a private proceeding governed by statute law, the CCAA, the Charter will apply to the Court of Appeal's order also. We disagree with the Monitor and Debtors' Factum Pt. 36 that the absence of the S. 109 of the *Courts of Justice* Act notice obliges the Court of Appeal to ignore our S. 52(1) Charter claim in respect to S. 6(1) and S. 11 of the CCAA. We respectfully suggest that the Court of Appeal cannot ignore the serious consequences of our unconstitutional law claim as it is a viable cause of action and it should not be found to have no reasonable prospect of success at the Supreme Court of Canada. The Court of Appeal should either (1) make a decision on constitutionality of the noted CCAA sections in respect to disabled persons and have this decision in the normal course be subject to appeal to the Supreme Court of Canada where S. 109 notice would be given to the Minister of Justice and Attorney General; or, (2) make an amendment to the Nortel Final Plan to create a Cdn$44 million reserve account for the LTD, as requested in Pt. 3 of our Submission to the Fairness Hearing and as authorized in S. 6(2) of the CCAA, and send our unconstitutional law claim back to the lower court for adjudication, with instructions for us to file a S. 109 of the *Courts of Justice* Act to the Minister of Justice and Attorney General so that the Federal Government has the fullest opportunity to support the CCCA's validity in respect to the Charter rights of persons with mental or physical disabilities.

The establishment of the requested reserve allows all creditors, including the LTD to receive their pro rata stake in the residual of the Canada estate. The requested adjustment is Cdn$44 million (assuming the CCAA cash ratio is 45%) is just 0.8% of the expected Nortel Canada estate of Cdn$5.7 billion. US and UK/EMEA creditors have an even more de minimis impact on their cash recovery ratios, due to their cross-border claims against the Canada estate and bond guaranties from the US estate. If our unconstitutional law challenge proves to be over-ruled by the court, then the reserve will be released and paid pro-rata to all creditors in the Canada estate.

COLLATERAL ATTACK CONDITIONS ARE NOT MET

We now agree with Monitor and Debtors' Factum Pt. 28 that Charter claims are not an exception to consideration of collateral attack. However, the conditions for a collateral attack are not met.

Toronto (City) referred to in the Monitor and Debtors' Factum Pt. 31, says a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. The appellants request on Charter and other grounds for an adjustment to the Nortel Final Plan, and for consequent reconsideration of the Representative Order and the Revised Interim Settlement Agreement order, has been submitted within the same Nortel CCAA Proceeding, in the same Superior Court of Justice, on the same Commercial List in Bankruptcy and Insolvency. The request is made within the forum of a judicial review, which is standard procedure in CCAA proceedings and that is called the Fairness Hearing or the Sanction Hearing. The purpose of the Fairness Hearing is to hear from any minority creditors who claim that while the majority of creditors have voted for the Final Plan of Arrangement, the Final Plan is unfair and unreasonable for them, and unfairly disregards their interests. A Final Plan that cannot be approved by a judge using unconstitutional discretion under an unconstitutional law provision, cannot be considered fair and reasonable to the adversely impacted disabled persons.

Toronto (City) v. C.U.P.E., Local 79, **[2003] 3 S.C.R. 77** (Monitor and Debtors BOA Tab 9)

> From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole ...
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> 33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Carpenter Fishing Corp. in the Monitors' Factum Pt. 28 was a new action in a different court by persons lacking standing to make the action.

Carpenter Fishing Corp. v. Canada**, 2002 BCSC 324** (Monitor and Debtors BOA Tab 10)

> [1] This is an appeal from the order of a Supreme Court judge dismissing the appellants' petition for a declaration that sections 5(6) and 7(1) of the ***Federal Court Act***, R.S.C. 1985, c. F-7 violate ss. 6(2)(a), 7 and 15 of the ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act, 1982*** and s. 2(e) of the ***Canadian Bill of Rights***, R.S.C. 1985, App. III, and are null and void.
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> [2] The learned chambers judge dismissed the petition on the grounds that:
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> 1) the appellants lacked standing to seek declaratory relief;
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> 2) the petition was a collateral attack on the 1997 decision of the Federal Court of Appeal; and
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> 3) the issues raised were barred by the doctrine of *res judicata* or cause of action estoppel.

Peter W. Hogg, Constitutional Law of Canada in Monitor and Debtors' Factum Pt. 33 says the Supreme Court can extend the time for an appeal of an order made under unconstitutional law, even eight years out, where it finds "special reasons" to do so.

Peter W. Hogg, *Constitutional Law of Canada,* 5th ed., looseleaf (Toronto: Carswell, 2007) ("Hogg"), section 58.5 p. 58-11(Monitor and Debtors BOA Tab 14 and Factum)

> In *R. v. Thomas* (1990),[42] this question was raised by an accused who had been convicted of felony-murder in 1984 - three years before the Court's ruling in *Vaillancourt* -and who had unsuccessfully appealed to the British Columbia Court of Appeal (where he had not raised any constitutional issue). After the Supreme Court of Canada's ruling in *Vaillancourt,* Mr. Thomas applied to the Supreme Court of Canada for leave to appeal from the affirmation of his conviction by the British Columbia Court of Appeal. The time limit for such an application was 21 days, and Mr. Thomas was three years out of time. However, the Supreme Court of Canada had power to extend the time where there were "special reasons' ' to do so. A three-judge bench of the Supreme Court of Canada refused to extend the time and grant leave to appeal. Sopinka J. held that relief was precluded, because the accused was no longer ''in the judicial system". An accused would be in the judicial system if there was still time to appeal, but an application for an extension of time should be granted only on "the criteria that normally apply in such cases". These criteria required that an intention to appeal be formed within the stipulated time, and that there be an adequate explanation for the delay. The fact that the accused had been convicted under a law subsequently held to be unconstitutional was not a sufficient reason to bring him "artificially" into the system.

GROUNDS FOR RARE RECONSIDERATION OF PREVIOUS CCAA COURT ORDERS ARE MET

While the grounds for reconsidering the Rep Order and Revised Interim Settlement Agreement Order are extremely rare, it is not impossible to do so as described in **Re Nortel Networks Corporation et al, 2015 ONSC 4170:**

> [1] On May 12, 2015, I released my reasons for judgment in the joint trial held with Judge Kevin Gross of the U.S. Bankruptcy Court for the District of Delaware to determine how to allocate the $7.3 billion held in escrow (the "lockbox funds"). On the same day Judge Gross released his opinion. We came to the same conclusion as to how the lockbox funds were to be allocated. No signed judgment has been signed in this Court. Judge Gross signed an order making his ruling final.
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> [4] In *Schmuck v. Reynolds-Schmuck* (2000), 46 O.R. (3d) 702, Himel J. referred to the confines of the jurisdiction to reopen a case as follows:
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> > 22 . . . It is extremely rare for there to be a request to re-open a trial on the grounds of a reconsideration of the case.
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> > 25 It is my view that a party who wishes reconsideration alone would have to establish that the integrity of the litigation process is at risk unless it occurs, or that there is some principle of justice at stake that would override the value of finality in litigation, or that some miscarriage of justice would occur if such a reconsideration did not take place.
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> [5] In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2009), 70 C.P.C. (6th) 390 at para. 55 (Div. Ct), Gray J. stated:
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> > 35... Litigation by instalments is not to be encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions.

The asserted unconstitutional S. 6(1) and S. 11 of the CCAA in respect to disabled persons and all the considerations of our Submission Pt. 41 (Appellants Vol I Tab 1) establishes that this is a rare situation where reconsideration of the Rep Order and the Revised Interim Settlement

Agreement should be reconsidered. The settled expectations of money to be received by the other creditors in the Final Plan and the money paid to the disabled creditors in the Revised Interim Settlement Agreement is de minimis at less than 1% of the Canada estate. On the other hand, the reconsiderations fix a miscarriage of justice and bring integrity to the litigation process for disabled persons, which unfortunately did not apply to the Revised Interim Settlement Agreement at March 2010.

We highlight the main deep flaws in the CCAA rep order and interim settlement process below:

1. The Court Monitor denied pre-hearing disclosure of evidence and J. Morawetz denied a brief adjournment for discovery of evidence needed to make a proper assessment of the Revised Interim Settlement Agreement discussed in Pt 40 iv) b).

(a) Letter from the Monitor dated November 5, 2009 re Non-Disclosure of Information Concerning the Health & Welfare Trust (Appellants BOA Vol III Tab 34) says:

> 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 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 wil provide an update on disclosure and timing of matters related to the Health and Welfare Trust at that time.

(a) The Transcript (Appellants BOA Vol III Tab 34) is evidence that the CCAA judge denied an adjournment for discovery of evidence and thus it was not possible to prepare viable causes of action in respect to the wrongdoings causing the shortfall of HWT funding or constitutionality.

> 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
> THE COURT:… The adjournment is not going to be granted.

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.

2. Transcript (Appellants BOA Vol III Tab 34) is evidence that Mark Zigler, a lawyer from the court appointed legal counsel Koskie Minsky did not make a proper assessment of Nortel and the trustees legal liability for wrongdoings at the HWT.

Mr. Zigler: 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.

3. Sue Kennedy Affidavit, Feb. 23, 2010 (Appellants BOA Vol III Tab 31 and Pt. 41 i)) shows that she made decisions that accepted Koskie Minsky LLP's incorrect legal opinion that there were no obligations for Nortel to fund in full the HWT benefits. Then J. Paul Perell decided that Jennifer Holley had made a tenable constructive fraud claim, and there certainly could be no tenable fraud claim if there were no legal obligations.

40 i) "..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." Point 41

b) **Justice Perell Decision on Holley v. Northern Trust and Royal Trust Feb. 11, 2014** (Appellants BOA Vol II Tab 32 and Pt. 41 a))

[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.

[148] … 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.

4. In a Summary Dismissal, J. Perell discerned between constructive fraud said to be covered in the Revised Interim Settlement Agreement legal release, and actual fraud having no prospects for success without any evidence before it as discussed in Pt 41 iv) c).

5. Rule 7.08(4) of the Rules of Civil Procedure for the Ontario Courts applicable to settlements for disabled persons was not followed. In Pt 41 iv) b)

6. The Representation Order for Disabled Employees protects Koskie Minsky LLP and Sue Kennedy "from liability as a result for 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 and unlawful misconduct on their part." Greg McAvoy and Jennifer Holley and other LTD have no money to litigate in any case.

REPLY ARGUMENTS FOR NOT APPLYING ISSUE ESTOPPEL

The entirety of the above circumstances of deficient process governing disabled creditors in a CCAA proceeding is a miscarriage of justice and brings disrepute to the court system. These present the "special circumstances" for why the Court of Appeal of Ontario should approve this appeal and not apply issue estoppel to the appellants' claims of Charter violations and miscarriage of justice in prior CCAA orders.

R. v. Domm **(1996), 31 O.R. (3d) 540** (Monitor and Debtors BOA Tab 11 and Factum Pt. 28) is about a lawyer who releases evidence under a publication ban court order, then when he is charged with breaching the publication ban order he makes a defence claim that the order was unconstitutional . The court decided that the publication ban order stood unaffected by the purported Charter violation, because it was not reversed on appeal. Greg McAvoy and Jennifer Holley have not breached the Rep Order or the Revised Interim Settlement Order. They are asking for them to be reconsidered in the proper forum of the Fairness Hearing and with arguments to support the rare and special circumstances for not applying issue estoppel and for reconsidering a prior CCAA court order.

Ahani v. Canada, **[1999] F.C.J. No. 212** (Monitor and Debtors BOA Tab 12 and Factum Pt. 30) IS about two appellants who have brought two consecutive constitutional challenges, rather than putting the two together at the beginning. The appellants have brought only one constitutional challenge.

M. (L.) v. British Columbia (Director of Child, Family and Community Services), **2016 BCCA 367** (Monitor and Debtors BOA Tab 13 and Factum Pt. 30) While the constitutional arguments do not themselves attract an exception to the general approach brought by res judicata, the "special circumstances" discussed above support the Court of Appeal not applying issue estoppel.

GROUNDS FOR LEAVE TO APPEAL ARE MET

The Leave to Appeal and this Reply have the necessary serious and arguable grounds for granting this leave to appeal.

The fact that leave to appeal is granted sparingly in CCAA proceedings is why a CCAA judge, a CCAA Court Monitor, and a court appointed legal counsel can make errors in disclosure and discovery of evidence, assessment of the law governing wrongdoings and constitutional considerations, which creates miscarriages of justice that are not corrected in the appeal process.

We meet the four factors for the granting of this leave to appeal:

a) this appeal is of significance to the practice;

b) this appeal has significance to the action;

c) this appeal is *prima facie* meritorious;

d) this appeal will not unduly hinder the progress of the action.

COURT OF APPEAL OF ONTARIO
Proceeding commenced at Toronto

REPLY
(Leave to Appeal of J. Newbould Decision January 24, 2017)

Joseph Greg McAvoy
Nortel CCAA LTD Creditor
Kingsland Terrace Supportive Living Facility
Suite 1, Room 2
835 68 Ave SW
Calgary AB, T2V ON5
(587) 582-8804
dignum.mcavoy@gmail.com

Jennifer Holley
Nortel CCAA LTD Creditor
2034 River Road
Ompah, ON, K0H 2J0
(613) 479-2653
jholley@xplornet.com

Self-Represented