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

RESPONDING FACTUM OF THE MONITOR AND CANADIAN DEBTORS
(Response to Motion for Leave to Appeal)

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RESPONDING FACTUM OF THE MONITOR[1] AND CANADIAN DEBTORS[2]
(Response to Motion for Leave to Appeal)

OVERVIEW

1. Leave to appeal under the *Companies' Creditors Arrangement Act* ("CCAA") is granted sparingly. Four conditions are considered: whether the proposed appeal is *prima facie* meritorious, of significance to the practice, of significance to the action, and would not unduly hinder the progress of the CCAA proceeding. This motion for leave fails each part of the test.

2. Two creditors of the Canadian Debtors, Joseph Greg McAvoy and Jennifer Holley (the "Leave Applicants"), seek leave to appeal from two Orders[3] of the CCAA judge supervising this proceeding which:

   (a) approved a settlement of protracted litigation under which over US$4 billion will flow to the Canadian Debtors;

   (b) approved a Plan of Compromise and Arrangement (the "Plan") which over 99% of creditors by both number and value had voted in favour of, pursuant to which those funds will be distributed on a pro rata or *pari passu* basis – that is, rateably

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1 Ernst & Young Inc. is the court-appointed Monitor of the Canadian Debtors.

2 On January 14, 2009, Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation filed for and obtained protection under the CCAA (the "Initial Order"). On March 18, 2016, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited were granted an Order pursuant to the CCAA whereby each was deemed to be an "Applicant" (as defined in the Initial Order) in the CCAA proceedings, entitled to all of the rights, benefits and protections granted by, and otherwise subject to, among other Orders of the CCAA court entered in the CCAA proceedings, the Initial Order as if it were an Applicant thereunder. All of the Applicants are referred to herein as the Canadian Debtors.

3 Although the Leave Applicants only state that they are seeking leave to appeal from the Canadian Escrow Release Order dated January 24, 2017, their submissions must be read as also seeking leave to appeal from the Sanction Order dated January 24, 2017, both of which were made further to reasons released Janaury 30, 2017. This factum responds on that basis.

and equally – to all of the over 16,000 unsecured creditors of the Canadian Debtors, including employees and pensioners who have been waiting since 2009 for payment; and

(c) provided to the Leave Applicants exactly the same pro rata or *pari passu* treatment as all other unsecured creditors receive.

3. The Leave Applicants do not have a meritorious appeal. The Plan is supported by their Court-appointed representative and provides exactly the *pari passu* treatment mandated by a prior Order of the Ontario Superior Court of Justice (the "CCAA Court"). The binding nature of the prior Order and the support of the Court-appointed representative cannot now be collaterally attacked. Nor in any event does the *Canadian Charter of Rights and Freedoms* (the "*Charter*")[4] require priority treatment for two creditors of a private enterprise as the proposed appeal suggests.

4. The proposed appeal is not significant to the practice or this proceeding. It will most certainly hinder the progress of the CCAA proceeding, delaying and jeopardizing distributions to over 16,000 creditors of the Canadian Debtors. This Court has previously stressed that creditors have been too long delayed.

5. Accordingly the Monitor and Canadian Debtors respectfully ask that leave to appeal be denied.

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[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Sch. B to the *Canada Act, 1982* (U.K.), 1982, c. 11

PART I - STATEMENT OF FACTS

(A) Background

6. The Canadian Debtors filed for protection under the CCAA in January 2009; related Nortel entities made insolvency filings in the United States and Europe at the same time.

7. The Canadian Debtors, the Nortel debtors in the U.S. and those in Europe, and certain key stakeholder groups were parties to protracted litigation in Canada and the U.S. regarding the allocation of US$7.3 billion of proceeds from post-insolvency sales of Nortel assets (the "Sale Proceeds") occurring in 2009 through 2011. Following a 21-day cross-border trial in 2014, the CCAA Court and the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") issued decisions allocating the Sale Proceeds in May 2015. This Court refused leave to appeal the CCAA Court's allocation trial decision in 2016.[5] The decision of the U.S. Court was appealed by certain parties to the United States District Court of Delaware. Mediation was directed by that Court.[6]

8. Following extensive negotiations, the Canadian Debtors, Monitor, Nortel debtors in the U.S. and Europe, and certain key stakeholders, entered into a Settlement and Plans Support Agreement dated as of October 12, 2016 (the "SPSA").[7] Pursuant to the SPSA, 57.1065% of the Sale Proceeds – or over US$4.1 billion – will be paid to the Canadian Debtors for distribution to their creditors. The SPSA provides that all unsecured creditors

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5 *Nortel Networks Corporation (Re)*, 2016 ONCA 332, Responding Book of Authorities of the Monitor and Canadian Debtors, February 21, 2017 ("Resp BOA"), Tab 1

6 Endorsement dated January 30, 2017 of the CCAA Court (*Re Nortel Networks Corporation et al*., 2017 ONSC 700) (the "Motion Reasons"), at para. 2, Resp Record, Tab 3, p. 36-37

7 Settlement and Plans Support Agreement dated as of October 12, 2016 (the "SPSA"), being Exhibit "A" to the Plan of Compromise and Arrangement dated November 30, 2016 (the "Plan") attached as Appendix A to the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017 (the "135th Report"), Resp Record, Tab 8(A), p. 235

holding claims against the Canadian Debtors will be paid *pari passu* in accordance with their entitlements.[8]

(B) Plan approved by creditors

9. As contemplated by the SPSA, the Canadian Debtors proposed the Plan to implement the SPSA and provide for distributions to creditors. The creditors' meeting was held on January 17, 2017. The Plan received nearly unanimous support with 99.97% in number and 99.24% in value voting to approve the Plan.[9]

10. In approving the Plan and making the Canadian Escrow Release Order dated January 24, 2017 (the "Escrow Release Order")[10] and the Sanction Order dated January 24, 2017 (the "Sanction Order")[11] – the two Orders that the Leave Applicants seek leave to appeal – the CCAA Court noted that "[t]he Plan provides for a comprehensive resolution of these CCAA proceedings and implementation of the SPSA and paves the way for distributions to creditors in a timely manner".[12] The CCAA Court further held that:[13]

(a) The Plan was fair and reasonable.

(b) It was a compromise reached among all of the parties after extensive negotiations led by a very experienced mediator.

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8 Motion Reasons, paras. 3, 12, Resp Record, Tab 3, p. 37-38, 42

9 Motion Reasons, para. 5, Resp Record, Tab 3, p. 39

10 Sanction Order dated January 24, 2017, Responding Motion Record of the Monitor and Canadian Debtors, February 21, 2017 ("Resp Record"), Tab 1

11 Canadian Escrow Release Order dated January 24, 2017, Resp Record, Tab 2

12 Motion Reasons, para. 4, Resp Record, Tab 3, p. 38

13 Motion Reasons, paras. 4-5, 9, Resp Record, Tab 3, p. 38-41

(c) It had received overwhelming approval from 99.97% of creditors, the only persons affected by the Plan.

(d) If the Plan were not sanctioned, the likely result would be further delays from litigation in the U.S. on the appeals from the allocation decision resulting in further unfair delays in payments to creditors who desperately needed them.

(e) Further litigation would add to the already enormous costs of the Nortel insolvency, and reduce amounts to be paid to the creditors.

(f) The Plan provides for payment to creditors on a *pari passu* basis, which is the bedrock principle of Canadian insolvency law.

(C) Prior Orders

11. The Leave Applicants' entitlements from the Canadian Debtors are as former employees entitled to long-term disability ("LTD") benefits. Prior to the insolvency of Nortel, LTD benefits were funded through the Nortel Health and Welfare Trust (the "HWT"). Pursuant to prior Orders of the CCAA Court, substantially all of the assets of the HWT have been distributed post-insolvency to the beneficiaries, including persons receiving LTD benefits (the "LTD Beneficiaries"), and including the Leave Applicants, in amounts equating to approximately 38% of the amounts owing to them.[14]

12. On July 30, 2009, a representation order ("LTD Rep Order") was made by the CCAA Court, pursuant to which Ms. Susan Kennedy (the "LTD Representative") was appointed as the Court-appointed representative of the LTD Beneficiaries (including the Leave

[14] 135th Report, para. 103, 105, Resp Record, Tab 8, p. 167-168

Applicants), including for the purpose of settling or compromising claims by the LTD Beneficiaries. Pursuant to the LTD Rep Order, LTD Beneficiaries (including the Leave Applicants) had the option to opt-out of representation by the LTD Representative within a defined time, but neither of the Leave Applicants (or any other LTD Beneficiary) did.[15]

13. In 2010, the Canadian Debtors, the Monitor and the LTD Representative (among others) entered into an Amended and Restated Settlement Agreement dated March 30, 2010 (the "Employee Settlement Agreement")[16] which was approved by the CCAA Court in a Settlement Approval Order dated March 31, 2010.[17] The CCAA Court rejected the argument that employee needs rather than entitlements were the appropriate measure and concluded the Employee Settlement Agreement was fair and reasonable.[18]

14. Under the Employee Settlement Agreement, certain benefits were provided during the insolvency to former employees[19] and it was agreed, including by the LTD Representative, that claims of LTD Beneficiaries (including the Leave Applicants) would rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary

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15 Order (Representation Order for Disabled Employees) dated July 30, 2009, paras. 3, 7, 9 ("LTD Rep Order"), Resp Record, Tab 4, p. 52-53; Motion Reasons, para. 12, Resp Record, Tab 3, p. 42

16 Amended and Restated Settlement Agreement made as of March 30, 2010 (the "Employee Settlement Agreement"), being Appendix B to the Forty-Second Report of the Monitor dated March 30, 2010, Resp Record, Tab 9, p. 411

17 Settlement Approval Order dated March 31, 2010 ("Settlement Approval Order"), Resp Record, Tab 5

18 Motion Reasons, paras. 13, 17, Resp Record, Tab 3, p. 42, 44; Endorsement dated April 8, 2010 of the CCAA Court at paras. 28-38, 40, Resp Record, Tab 6, p. 113-114

19 135th Report, para. 109, Resp Record, Tab 8, p. 169-171; Employee Settlement Agreement, Section B, Resp Record, Tab 9, p. 413-415

unsecured creditors of the Canadian Debtors in any claim including for any deficit in the HWT *and in any CCAA plan of the Canadian Debtors*.[20]

15. Certain LTD Beneficiaries, including the Leave Applicants, unsuccessfully sought leave to appeal the Settlement Approval Order to this Court.[21] This Court's decision denying leave stated the following:

> The moving parties [which included the Leave Applicants] 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.[22]

16. The Plan is supported by the LTD Representative who has the power to compromise the claims of the Leave Applicants.[23] Moreover, the Plan provides exactly the *pari passu* treatment the Settlement Approval Order mandates.[24] At its core, the Leave Applicants' complaint in this leave to appeal motion is that the Plan should treat them more favourably than other creditors with the same entitlements because their need is greater.

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[20] Employee Settlement Agreement, Section G, para. 2, Resp Record, Tab 9, p. 419; Settlement Approval Order, paras. 10, 11, 16, 18, Resp Record, Tab 5, p. 61-62, 64-65; Motion Reasons, para. 14, Resp Record, Tab 3, p. 42-43

[21] Motion Reasons, para. 15, Resp Record, Tab 3, p. 43-44

[22] *Nortel Networks Limited (Re)*, 2010 ONCA 402 at paras. 2-3, Resp Record, Tab 7, p. 133

[23] LTD Rep Order, paras. 3, 7, 9, Resp Record, Tab 4, p. 52-53; SPSA, paras. 6(h)(i), 6(h)(iii)(B) and signature page of the LTD Representative, Susan Kennedy, Resp Record, Tab 8(A), p. 264-265, 308

[24] Employee Settlement Agreement, Section G, para. 2, Resp Record, Tab 9, p. 419, 426; Settlement Approval Order, paras. 10, 11, 16, 18, Resp Record, Tab 5, p. 61-62, 64-65; Motion Reasons, para. 14, Resp Record, Tab 3, p. 42-43

This is an argument that they have already made and which has been rejected earlier in this proceeding when certain LTD Beneficiaries (including the Leave Applicants) opposed distribution of the HWT corpus[25] in 2010:

> 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][26]

17. Other than the Leave Applicants, all other LTD Beneficiaries support the Plan. The Leave Applicants in effect seek to treat the LTD Beneficiaries as priority claimants pursuant to the Plan; were that to be done not only would it be contrary to the position taken by the LTD Representative and mandated by the Settlement Approval Order, but the other parties to the SPSA could take the position that such relief is contrary to the terms of the SPSA, putting at risk the settlement contemplated by the SPSA and approved by a vast majority of creditors.[27]

(D) The decision of the CCAA Court

18. The CCAA Court confirmed in its endorsement approving the Plan that the Leave Applicants are bound to the provisions in the Employee Settlement Agreement and the Settlement Approval Order, that their claims are to rank as unsecured claims that share *pari passu* with other unsecured claims against the Canadian Debtors, that any claim for

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25 Employee Settlement Agreement, Section C, para. 1, Resp Record, Tab 9, p. 415

26 *Nortel Networks Corp., Re*, 2010 ONSC 5584 at para. 110, leave to appeal denied 2011 ONCA 10, leave to appeal to S.C.C. denied [2011] S.C.C.A. No. 124, Resp BOA, Tab 2

27 135th Report, para. 104-105, Resp Record, Tab 8, p. 167-168

priority treatment has been released, and that no plan could be proposed or approved if the LTD Beneficiaries and other unsecured creditors did not receive the same *pari passu* treatment of their allowed claims pursuant to such plan. The CCAA Court further confirmed that the Leave Applicants could not seek a reconsideration of the Employee Settlement Agreement and the Settlement Approval Order at this late stage.[28]

19. The CCAA Court held that the Plan was fair and reasonable. It noted that under the SPSA and the Plan, the LTD Beneficiaries (including the Leave Applicants) will receive the same *pari passu* treatment as other creditors: "They are all 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 a fundamental tenet of insolvency law."[29]

20. The CCAA Court also rejected the *Charter* arguments raised by the Leave Applicants, holding that their *Charter* rights are not infringed by the Plan or by any exercise of the CCAA Court's discretion in approving the Plan.[30]

(E) The need for finality and intervening delays

21. It was contemplated that the Plan and SPSA would become effective on February 15, 2017, with billions of dollars scheduled to be released on that date and shortly afterwards to the Canadian Debtors, following which distributions to Canadian creditors would be made. This motion for leave prevented that from happening because one condition to the SPSA and the Plan becoming effective, which must occur by no later than August 31,

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[28] Motion Reasons, paras. 15-18, Resp Record, Tab 3, p. 43-44

[29] Motion Reasons, para. 19, Resp Record, Tab 3, p. 44

[30] Motion Reasons, paras. 20-35, Resp Record, Tab 3, p. 44-50

2017, is that the Sanction Order and Escrow Release Order shall have become Final Orders from which no appeal, leave to appeal or motion to alter or amend or for a re-hearing has been filed. This condition is not satisfied if any appeal is outstanding as of August 31, 2017, including any appeal to the Supreme Court of Canada, and if it remains unsatisfied by August 31, 2017, it could put an end to the entire settlement under the SPSA.[31]

PART II - POSITION WITH RESPECT TO LEAVE APPLICANTS' ISSUES

22. Leave to appeal under s. 13 of the CCAA is granted "sparingly … and only when there are serious and arguable grounds that are of real and significant interest to the parties".[32] This stringent test recognizes that decisions made by the judge exercising a supervisory function under the CCAA require careful and delicate balancing of a variety of interests, and that appellate proceedings may frustrate the process under the CCAA.[33] A higher threshold must be met before leave to appeal is granted "in order to justify the delay and other prejudicial effects on the proposed arrangements that would result from the commencement of an appeal."[34]

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[31] 135th Report, paras. 37-38, 100, Resp Record, Tab 8, p. 147, 166; SPSA, s. 1.1 (definitions of "Final Order" and "Plan Effective Date"), 9(a)(ix), 9(a)(xi) and Annex I, Resp Record, Tab 8(A), p. 242, 245, 278-279, 333; Plan, s. 1.1 (definitions of "Final Order" and "Plan Effective Date") and 9.2(b)-(c), Resp Record, Tab 8(A), p. 186, 190, 221

[32] *Re Nortel Networks Corporation*, 2013 ONCA 518 at para. 5, Resp BOA, Tab 3; *Timminco Ltd., Re*, 2012 ONCA 552 at paras. 2-3, Resp BOA, Tab 4; *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 at para. 15 (C.A.), Resp BOA, Tab 5

[33] *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 at para. 8 (Ont. C.A.), Resp BOA, Tab 6

[34] *Houweling Nurseries Ltd. v. Amethyst Greenhouses Ltd.*, 2003 BCCA 347 at para. 12, Resp BOA, Tab 7

23. In addressing whether leave to appeal should be granted, this Court will consider the following four factors – the failure to establish any of them may result in dismissal of the request for leave:

(a) whether the proposed appeal is *prima facie* meritorious or frivolous;

(b) whether the points on the proposed appeal are of significance to the practice;

(c) whether the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the CCAA action.[35]

(A) The proposed appeal is not *prima facie* meritorious

24. The CCAA Court correctly rejected the Leave Applicants' *Charter* arguments. He correctly concluded that the Leave Applicants were estopped from raising a *Charter* challenge at this stage of the proceedings, and that in any event nothing in section 7 or 15 of the *Charter* prevented him from exercising his discretion to approve the Plan.

(i) The leave motion is an impermissible collateral attack on prior Orders, and the issues raised are barred by issue estoppel

25. In Parts B, C, D and F of their submissions, the Leave Applicants argue that (i) the "void ab initio" doctrine precludes the application of issue estoppel in this case; (ii) the preconditions for issue estoppel are not met; and (iii) the CCAA judge should have exercised his discretion to refuse to apply issue estoppel in order not to work an injustice or bring the administration of justice into disrepute. None of these arguments can

[35] *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at para. 34, Resp BOA, Tab 1; *Homburg Invest Inc., Re*, 2012 QCCA 665 at paras. 3-4, Resp BOA, Tab 8

succeed. The CCAA Court was entirely correct when it held the Leave Applicants had no basis to object to the approval of the Plan simply because it provides for precisely the *pari passu* treatment the prior orders and agreements require.[36]

26. The Plan gives effect to matters that were settled and approved by orders of the CCAA Court *six or more years ago*. This includes the provisions in the LTD Rep Order that the LTD Representative was appointed as representative of all LTD Beneficiaries (subject to an opt-out provision which the Leave Applicants did not invoke) for the purpose of settling or compromising claims,[37] and the provisions in the Settlement Approval Order that any plan of arrangement would provide for *pari passu* treatment of the LTD Beneficiaries' claims in the same manner as all other unsecured creditors.[38]

27. The LTD Rep Order and Settlement Approval Order are final, binding and conclusive, and no longer capable of appeal. The Leave Applicants did not attempt to appeal the LTD Rep Order made in 2009 and their attempt to obtain leave to appeal the Settlement Approval Order made in 2010 failed.[39] Those orders were attackable only in proceedings whose specific object was their reversal, variation or nullification. A collateral attack on those orders in the context of the Plan sanction motion (including by this motion for leave to appeal) is impermissible – collateral attacks are an abuse of the court's process.[40]

28. The Leave Applicants' claim that the earlier orders breached their *Charter* rights is unavailing. There is no exception to the collateral attack doctrine for *Charter*

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36 Motion Reasons, para. 11, Resp Record, Tab 3, p. 42

37 LTD Rep Order, paras. 3, 8, 9, Resp Record, Tab 4, p. 52-53

38 Settlement Approval Order, paras. 10, 11, 18, Resp Record, Tab 5, p. 61-62, 64-65

39 *Nortel Networks Limited (Re)*, 2010 ONCA 402, Resp Record, Tab 7

40 *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at paras. 33-34, Resp BOA, Tab 9

arguments.[41] The *Charter* is founded on the rule of law; the rule of law is what the collateral attack doctrine seeks to uphold. An order alleged to be constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose.[42] Here the prior Orders are in full force and effect.

29. The CCAA Court correctly found that issue estoppel prevented the Leave Applicants from raising a *Charter* challenge to the treatment of their claims in the Plan, as the Plan simply incorporated the provisions of the earlier Settlement Approval Order in respect of which no *Charter* challenge had been raised.[43] The Leave Applicants' assertion that the preconditions for issue estoppel are not met is incorrect:

(a) The argument at page 7 of the Leave Applicants' Notice of Motion, that the issue of whether the judge's use of discretion under the CCAA is constitutional differs from the issue on the Settlement Approval Motion, must be rejected. The *pari passu* treatment of claims of LTD Beneficiaries in a CCAA Plan was decided on the motion for approval of the Employee Settlement Agreement in 2010, and is the very treatment the Leave Applicants now object to.

(b) The contention at page 8 of the Leave Applicants' Notice of Motion that the parties to the prior decision were different from those before the Court now is equally unsound. The Leave Applicants were represented on the earlier motion for approval of the Employee Settlement Agreement – in addition to the LTD Representative and her counsel pursuant to the LTD Rep Order, they were

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41 *Carpenter Fishing Corp. v. Canada*, 2002 BCSC 324 at para. 36, aff'd 2002 BCCA 611, Resp BOA, Tab 10

42 *R. v. Domm* (1996), 31 O.R. (3d) 540 at paras. 11, 23-29 (C.A.), Resp BOA, Tab 11

43 Motion Reasons, para. 26, Resp Record, Tab 3, p. 46

represented by counsel retained by the Leave Applicants. The Leave Applicants could have raised the *Charter* issues they raise now.

30. Litigation by instalments is impermissible where *Charter* grounds are raised, just as it is in other cases.[44] *Charter* arguments which could have been raised in an earlier proceeding on the same issue but were not are estopped.[45]

31. This is not a case in which the Leave Applicants did not have another effective remedy, inviting an exercise of discretion not to apply the principles of issue estoppel or collateral attack. To the contrary, they were entitled to opt out of the LTD Rep Order but failed to do so, and sought to appeal the Employee Settlement Agreement. Accordingly, the application of issue estoppel and the bar against collateral attack do not work an injustice in this case. To the contrary, allowing collateral attacks on matters previously determined and the further delay to an already protracted process that would engender would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice.[46]

32. While not entirely clear, it appears that the Leave Applicants invoke the concept that an unconstitutional law is "void ab initio" to argue that the CCAA judge erred in relying on the earlier LTD Rep Order and Settlement Approval Order in dismissing their challenges to the Plan because those orders were, according to the Leave Applicants now, issued under an unconstitutional law.

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[44] *Ahani v. Canada*, [1999] F.C.J. No. 212 at paras. 8-10, Resp BOA, Tab 12

[45] *M. (L.) v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367 at para. 49, Resp BOA, Tab 13

[46] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 37, Resp BOA, Tab 9

33. There is no such doctrine. Even where a law is found to be unconstitutional, *res judicata* precludes the reopening of cases decided by the courts on the basis of the invalid law[47] and is a conclusive answer to a collateral attack on decisions applying that law.[48] Consequently, any purported unconstitutionality in the CCAA would not affect the orders previously issued in these insolvency proceedings. In any event, as noted below, the argument that the CCAA is unconstitutional is without merit.

(ii) Even if the prior Orders were not a complete bar to the Leave Applicants' requests, their Charter arguments must fail by virtue of their failure to give a notice of constitutional question

34. The Leave Applicants, in Parts A and E of their submissions, argue that the CCAA judge infringed their rights under s. 7 and s. 15 of the *Charter* by exercising his discretion to approve the Plan, and could have made a "technical amendment" to bring the Plan into compliance with the *Charter* by providing for payment of 100% of the LTD Beneficiaries' claims.

35. The Leave Applicants also appear to argue, at p. 5 of their Notice of Motion, that their challenge is not only to the CCAA judge's exercise of discretion under the CCAA but to the CCAA itself.[49]

36. The Leave Applicants did not serve a notice of constitutional question under s. 109 of the *Courts of Justice Act*, as would be required if they questioned the constitutional validity

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[47] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007) ("Hogg"), section 58.5 p. 58-11, Resp BOA, Tab 14, citing *Re Man. Language Rights*, [1985] 1 S.C.R. 721 at 757

[48] Hogg, *supra* section 58.5, p. 58-12, Resp BOA, Tab 14, citing *Turigan v. Alta.* (1988), 53 D.L.R. (4th) 321 (Alta. C.A.)

[49] "The CCAA statute to the extent it gives a judge discretion to approve a Plan that violates the Charter is constitutionally challenged in the appellant's submission Pts 13, 14, 15, 16, 17 and 18."

or applicability of the CCAA itself or of any common law rule or principle such as *pari passu*. Consequently, they are limited to asserting that the discretion to sanction a plan of arrangement under s. 6 of the CCAA must be exercised within an interpretation of the CCAA that would be *Charter* compliant, and that such an interpretation would not allow the Plan as proposed to be approved.[50] That is the basis on which the motion below was argued and decided.[51]

37. This is not a case like *Slaight*[52], on which the Leave Applicants rely, where a broad discretion conferred by statute could be read down so as to avoid a *Charter* breach. Here, the Leave Applicants seek to impose *Charter* requirements on the exercise of discretion under s. 6 of the CCAA to prevent the approval of a Plan providing for *pari passu* treatment of creditors.

38. As the CCAA Court correctly recognized,[53] the *pari passu* principle, which provides that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally" is a fundamental and bedrock tenet of insolvency legislation. In the absence of legislated priorities or a negotiated agreement to differential treatment, it governs the distribution of assets under a plan of arrangement.[54] It is not tenable for the Leave Applicants to argue that the discretion given the judge under the CCAA is to be

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50 *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at paras. 48-55, Resp BOA, Tab 15

51 Motion Reasons, para. 25, Resp Record, Tab 3, p. 46; Notice of Intention to Appear and Submission for Anticipate January 24, 2017 Fairness Hearing to Sanction the Nortel CCAA Plan from Greg McAvoy and Jennifer Holley, Documents Referenced in Notice of Motion of the Moving Parties, Volume I, Tab 1

52 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at para. 9 (per Dickson C.J.) and paras. 87-96 (per Lamer J., who dissented on other grounds), Resp BOA, Tab 16

53 Motion Reasons, paras. 9(v), 19, 33, Resp Record, Tab 3, p. 41, 44, 49

54 *Nortel Networks Corp., Re*, 2014 ONSC 5274 at paras. 28-31, aff'd 2015 ONCA 681 at paras. 23-24, leave to appeal to S.C.C. refused 2016 CarswellOnt 7202, Resp BOA, Tab 17

interpreted to prevent a *pari passu* Plan, without challenging the constitutional validity of the CCAA itself. However, such a challenge could only have been made before the CCAA Court following notice to the Attorney General that a constitutional question was raised.

39. The failure to serve a notice of constitutional question is not a mere technicality. The Supreme Court of Canada has stressed, in the context of deciding that a court could not find a statutory provision constitutionally invalid where no notice of constitutional question had been served, that since the function of the elected representatives is to enact legislation, the government must be given the fullest opportunity to defend the constitutional validity of the legislation.[55]

40. The importance of giving the government the fullest opportunity to defend its legislation, as recognized by the Supreme Court, is highlighted in this case, where Parliament has actually considered, and rejected, the idea of giving the very priority the Leave Applicants now assert that the *Charter* requires a judge approving a plan of arrangement to impose in the exercise of his discretion.

41. The CCAA, as it stood in January 2009, did not provide any priority for LTD benefit claims[56] and subsequent amendments have not done so either.[57] Indeed, Parliament deliberately declined to amend the CCAA and the *Bankruptcy and Insolvency Act* to

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[55] *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 48 ("The purpose of s. 109 [the notice requirement] 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."), Resp BOA, Tab 15

[56] CCAA, as amended to September 17, 2009

[57] CCAA, ss. 6(5), 6(6)

provide for the priority the Leave Applicants seek.[58] In 2010, the Senate committee studying Bill S-216, "An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in order to protect beneficiaries of long term disability benefits plans", recommended that the Bill not proceed further.[59] The Minister of Industry's report to Parliament on the CCAA in 2014, after detailing calls from various groups for priority payment, noted that bankruptcy was a zero-sum game such that changing the ranking of creditors would impact all creditors, and did not recommend any changes to priorities under the insolvency statutes.[60]

(iii) In any event, there is no violation of section 7 of the Charter

42. In any event, even aside from the consequences of the failure to give notice, there is no merit to the Leave Applicants' arguments of a violation of their *Charter* rights by the exercise of discretion to approve the Plan.

43. Section 7 of the *Charter* provides that:

> 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.

44. The CCAA Court correctly found that the Leave Applicants' request that the claims of the LTD Beneficiaries be paid in full at the expense of other creditors involved economic

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58 *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 48, Resp BOA, Tab 15

59 Senate, Standing Senate Committee on Banking Trade and Commerce, Sixth Report (November 25, 2010) (Deputy Chair: Céline Hervieux-Payette, P.C.), Resp BOA, Tab 18

60 Industry Canada, *Fresh Start: A Review of Canada's Insolvency Laws*, 2014 at p. 14, Resp BOA, Tab 19. See also the following report which concurred with the findings of the Industry Canada report: House of Commons, Standing Committee on Industry, Science and Technology (INDU), *Report 2 – Review of the Government of Canada Report entitled "Fresh Start: A Review of Canada's Insolvency Laws"* (Chair: Dan Ruimy), Resp BOA, Tab 20; House of Commons Debates, 42nd Parl., 1st Session, No. 126 (12 December 2016) at 7959 (Hon. Dan Ruimy), Resp BOA, Tab 21

interests which are not protected by section 7 of the *Charter*.[61] The Leave Applicants' contention, at page 2 of their Notice of Motion, that the judge improperly relied on *Siemens v. Manitoba (Attorney General)*[62] for this proposition is without merit.

45. Contrary to the Leave Applicants' submission, the *Siemens* case did not address loss of economic rights by a "commercial entity". Rather, two individuals, Mr. and Mrs. Siemens, claimed that legislation banning video lottery terminals ("VLTs") from their town infringed their rights to life, liberty and security of the person under s. 7 of the *Charter* because it violated their right to pursue a lawful occupation and prevented them from working in a certain location.[63] The Supreme Court held that the Siemens' "alleged right to operate VLTs at their place of business" could not be characterized as a "fundamental life choice" but was instead "purely an economic interest"[64] and as such was not protected by the right to liberty. The "pure economic interests" that the Supreme Court held were not protected by s. 7 were clearly those of the individuals themselves, not of the corporation through which they operated an inn with VLTs.

46. The Leave Applicants' argument that the decision to acquire additional disability insurance from Nortel was a "fundamental life choice" that falls within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices

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61 Motion Reasons, para. 28, Resp Record, Tab 3, p. 47

62 *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at paras. 45-46 ("*Siemens*"), Resp BOA, Tab 22

63 *Siemens, supra* at para. 45, Resp BOA, Tab 22

64 *Siemens, supra* at para. 46, Resp BOA, Tab 22

free from state interference"[65] so as to be protected by the s. 7 right to liberty is not persuasive.

47. The approval of the Plan neither restricts the Leave Applicants' freedom to choose whichever insurance products they wish, nor otherwise interferes with their personal autonomy. The Leave Applicants, having acquired disability insurance, have certain entitlements as creditors of the Canadian Debtors. The entitlements are legal and economic. The Plan merely enshrines a compromise of those legal entitlements and economic rights against private entities (the Canadian Debtors) on the basis of the *pari passu* principle whose application the Leave Applicants, by the Settlement Employment Agreement, had already agreed to. This economic interest is not a *Charter* protected right to liberty.

48. The Leave Applicants' attempt to invoke the right to security of the person protected by s. 7 of the *Charter* fares no better. While the *Baker* case on which the Leave Applicants rely does set out the general proposition that international human rights law is a "critical influence" in the interpretation of the scope of the rights included in the *Charter*,[66] neither that case nor *Slaight,* which they also cite, deals with either s. 7 of the *Charter* or the international conventions on which the Leave Applicants rely. Indeed, the Leave Applicants submit no authority for the proposition that any provision in international human rights covenants or conventions regarding the rights of persons with disabilities entails recognition of a *Charter* right for one group of creditors to be subsidized by

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[65] *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844 at para. 66 (on which the Court relied in *Siemens, supra* at para. 45, Resp BOA, Tab 24), Resp BOA, Tab 23

[66] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R 817 at para. 70, Resp BOA, Tab 24

another when their private contractual rights against an insolvent private-sector debtor are being compromised.

49. The *Gosselin* case on which the Leave Applicants rely does address s. 7 of the *Charter*. The Supreme Court of Canada held that even if s. 7 of the *Charter* could be read to encompass economic rights, "[n]othing in the jurisprudence to date suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these."[67] [emphasis in original.]

50. Subsequent decisions have confirmed that s. 7 does not apply to economic rights[68] and declined to extend the scope of s. 7 to include a positive obligation to ensure life, liberty or security of the person or confer a "freestanding right" to a benefit.[69]

51. The Leave Applicants seek to distinguish *Gosselin* by arguing that their claim is not founded on the imposition of a positive obligation on the government to provide for a minimum standard of living, but on "the government not making laws (or judges not using discretion enabled within laws) that result in the deprivation of life, liberty and security".[70] However, they do not explain how the sanctioning of the Plan effects any such deprivation. To the extent the Leave Applicants are deprived of the full benefit of their contractual rights against the Canadian Debtors, the cause of that deprivation is the financial inability to meet contractual obligations, not any government action susceptible

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67 *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 at para. 81, Resp BOA, Tab 25

68 *Flora v. Ontario (Health Insurance Plan)*, 2008 ONCA 538 at para. 106 ("*Flora*"), Resp BOA, Tab 26

69 *Flora, supra* at paras. 101-102, 105-108, Resp BOA, Tab 26; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 at paras. 30-31, leave to appeal to S.C.C. refused, 2015 CanLII 36780, Resp BOA, Tab 27

70 Leave Applicants' Notice of Motion, p. 5, citing para. 24 of their submissions below

of *Charter* review, including the CCAA judge's application of the *pari passu* principle. In fact, the application of the *pari passu* principle 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 were affected, for example, by the accrual of post-filing interest.[71]

52. In the *ABCP* case, this Court wrote that, "(i)n insolvency restructuring proceedings almost everyone loses something."[72] The Canadian Debtors cannot pay their creditors, including the Leave Applicants, the full amounts they owe to them. The SPSA and Plan, if implemented by the Sanction Order and Escrow Release Order, are not the cause of the diminished recoveries of the Leave Applicants. They provide the very funds that will allow some payments to creditors. Diminished recoveries are a function of Nortel's global insolvency, and the reality of a shortfall and a compromise have been apparent to all stakeholders from the earliest days of this proceeding.

(iv) Nor is there a violation of section 15 of the Charter

53. The CCAA judge correctly rejected the Leave Applicants' argument that their rights under s. 15 of the *Charter* would be violated by approval of the Plan. Section 15 provides that:

> 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.

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[71] *Nortel Networks Corp., Re,* 2014 ONSC 5274 at para. 3, aff'd 2015 ONCA 681, leave to appeal to S.C.C. refused 2016 CarswellOnt 7202, Resp BOA, Tab 17

[72] *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 117 ("*ABCP*"), Resp BOA, Tab 28

54. The Leave Applicants 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. *Eldridge v. British Columbia (Attorney General)*, the case cited by the Leave Applicants for the principle that identical treatment may produce inequality, has no application here. In that case, the Supreme Court decided that the failure of a provincial government to fund sign language interpretation in hospitals and medical offices denied deaf persons the equal benefit of the government funded health care system in those instances where sign language interpreters were necessary for effective communication in the delivery of medical services. The Court pointed out that: "Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all."[73]

55. Here, the Leave Applicants' complaint is not that they have been denied access to the insolvency regime by being prevented in some way from participating in the insolvency proceedings, but that they ought to receive a larger than *pari passu* share of the assets available for distribution of a private-sector debtor as a result of their disability. There is no basis for this in s. 15 of the *Charter*. As the CCAA judge pointed out, LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, all of whom are disadvantaged to varying degrees depending on personal circumstances, and there is no basis for preferring one group above others.[74] The Leave Applicants have not

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[73] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 92, Resp BOA, Tab 29

[74] Motion Reasons, para. 34, Resp Record, Tab 3, p. 49

been "marginalized, devalued or ignored" as members of Canadian society, and their rights under s. 15 have not been violated.[75]

56. The Leave Applicants' reliance on *Gosselin v. Québec (Attorney General)*[76] and *Granovsky v. Canada (Minister of Employment and Immigration)*[77] is equally misplaced. Both of those cases concerned situations in which legislation imposed differential treatment under governmental programs, and the issue was whether the differential treatment was discriminatory; here, as the CCAA judge observed, the Leave Applicants are being treated the same as all other unsecured creditors of now-insolvent private-sector companies.[78] In any event, in both of those cases, the statutory scheme was found not to infringe the *Charter*.

(v) No need to address section 1 of the Charter

57. There being no grounds for finding a violation of s. 7 or s. 15 of the *Charter*, there was no need for the CCAA judge to address s. 1, and there is no merit to the Leave Applicants' argument that he erred in failing to do so.

(B) The proposed appeal is not of significance to the practice

58. The Leave Applicants do not identify any issues of significance to the practice that would be decided if leave were granted. The facts and circumstance of the Nortel insolvency, as

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75 *Siemens, supra* at paras. 48-49, Resp BOA, Tab 22

76 *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, Resp BOA, Tab 25, which concerned the differential treatment of social assistance recipients based on age.

77 *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, Resp BOA, Tab 30, in which the issue was that the CPP differentiated between permanently disabled and temporarily disabled persons with respect to contribution requirements.

78 Motion Reasons, paras. 33-34, Resp Record, Tab 3, p. 49

recognized by this Court, are "unique and exceptional" and unlikely to occur again.[79] This is especially true because of the existence of two orders (the LTD Rep Order and Settlement Approval Order) already made in this proceeding, which bind the Leave Applicants to the very result they now seek to challenge.

59. This Court has held that significant deference is owed to a discretionary decision of a CCAA judge such as the decision to approve the Sanction Order and Escrow Release Order, especially in the circumstances of the unique Nortel proceedings, given the CCAA Court's knowledge of all the evidence and procedural history in this lengthy proceeding.[80] The CCAA judge also presided over the allocation trial in 2014, and has a complete understanding of the issues, the interests, the strategies and the tactics at play.

60. In these circumstances (as was the case when certain parties sought leave to appeal the Allocation Trial decision of the CCAA Court[81]), granting leave will not provide any opportunity for this Court to provide guidance on legal issues of significance to the practice. This is the very type of case where a discretionary decision going to the heart of the CCAA Court's mandate to manage and supervise the proceeding should be afforded deference.[82]

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79 *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at para. 93, Resp BOA, Tab 1

80 *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 at para. 15 (C.A.), Resp BOA, Tab 5; *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at para. 93, Resp BOA, Tab 1; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 at para. 8 (Ont. C.A.), Resp BOA, Tab 6

81 *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at paras. 98-102, Resp BOA, Tab 1

82 *Doman Industries Ltd. (Re)*, [2004] B.C.J. No. 1402 at para. 7 (B.C. C.A.), Resp BOA, Tab 31

(C) Proposed appeal is not of significance to the proceeding itself

61. While the question of the fairness of the Plan to all creditors is significant to this proceeding, a complaint about its fairness by two out of 16,000 creditors is not.

62. That the issues the Leave Applicants propose to raise on appeal are not significant to this proceeding is evident from the fundamental lack of support the issues have garnered from similarly situated LTD Beneficiaries of the Canadian Debtors, who have not joined with the two Leave Applicants to seek to enhance their own recoveries under the Plan. The LTD Representative is a signatory to the SPSA, which she executed pursuant to the LTD Rep Order for and on behalf of the LTD Beneficiaries, including the Leave Applicants.[83] When the Plan was voted upon by creditors, it received nearly unanimous support.[84]

63. The Alberta Court of Appeal noted 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.[85]

(D) An appeal will unduly hinder the progress of the CCAA proceeding

64. It is manifest that the granting of leave to appeal in this case will hinder the CCAA proceeding.

65. This Court, in its May 2016 decision denying leave to appeal from the CCAA Court's allocation decision, stressed the need to finally resolve these CCAA proceedings and

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83 SPSA, paras. 6(h)(i), 6(h)(iii)(B) and signature page of the LTD Representative, Susan Kennedy, Resp Record, Tab 8(A), p. 264-265, 308

84 Motion Reasons, para. 5, Resp Record, Tab 3, p. 39

85 *Canadian Airlines Corp., Re*, 2000 ABQB 442 at para. 97, leave to appeal refused 2000 ABCA 238, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 60, Resp BOA, Tab 32

expressed concern about the failure of the parties to reach a consensual resolution: "A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries."[86] These same considerations apply with even more force now that the parties have reached a global settlement in the SPSA and creditors worldwide are on the cusp of finally receiving distributions.

66. That was not the first time that a Court had expressed concern for the passage of time and the prejudice being suffered by Nortel creditors such as retirees and former employees. In ordering the parties to mediate in June 2011 (almost six years ago), the CCAA Court wrote:

> For many of [the employee and former employee unsecured creditors of Nortel in Canada, the U.S. and Europe, including pensioners], the delay in receiving a meaningful distribution can be significant. It is not just a question of calculating the time value of money. For this group of creditors, time is not on their side.
>
> This issue is international in scope. It is also a public-interest issue. A protracted delay in resolving the impasse surrounding allocation is highly prejudicial to this group. […]
>
> A protracted delay in the progress of the cases will only exacerbate an already unfortunate situation for the many individual creditors. With extended delay comes uncertainty. For many, uncertainty brings considerable stress and a bad situation becomes even worse. Clearly, the consequences of extended litigation are not desirable.[87]

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[86] *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at paras. 98-102 (quote to para. 102), Resp BOA, Tab 1

[87] *Nortel Networks Corp., Re*, 2011 ONSC 4012 paras. 12-13, 17, Resp BOA, Tab 33. See also *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at paras. 98-99, Resp BOA, Tab 1

67. Eight years after the insolvency filing and after a series of failed mediations and extensive litigation, the parties have finally reached a comprehensive settlement in the SPSA. The parties achieved a significant result in the SPSA which provided a path to permit proceeds to be distributed to the Canadian Debtors and ultimately to creditors of the Canadian Debtors. There is simply no basis to assert there is any better or more viable option available to the Canadian Debtors and their creditors, including the Leave Applicants. The Plan and the related Sanction Order and the Escrow Release Order are the vehicles through which those distributions will happen.[88]

68. An appeal will only further contribute to uncertainty when the parties' focus should be paying money to creditors who have been waiting over eight years.

PART III - ADDITIONAL ISSUES

69. The Monitor and the Canadian Debtors raise no additional issues.

PART IV - ORDER REQUESTED

70. The Monitor and the Canadian Debtors respectfully request that this motion for leave to appeal be dismissed.

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[88] 135th Report, paras. 69-70, Resp Record, Tab 8, p. 156

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2017.

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SCHEDULE "A"
LIST OF AUTHORITIES

A. *Ahani v. Canada*, [1999] F.C.J. No. 212

B. *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.)

C. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

D. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R 817

E. *Canadian Airlines Corp., Re*, 2000 ABQB 442 leave to appeal refused 2000 ABCA 238, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 607

F. *Carpenter Fishing Corp. v. Canada*, 2002 BCSC 324, aff'd 2002 BCCA 611

G. *Doman Industries Ltd., Re*, 2004 BCCA 382

H. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241

I. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

J. *Flora v. Ontario (Health Insurance Plan)*, 2008 ONCA 538

K. *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844

L. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84

M. *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703

N. Hogg, Peter W., *Constitutional Law of Canada*, 5th ed., loose-leaf (Toronto: Carswell, 2007) (excerpt)

O. *Homburg Invest Inc., Re*, 2012 QCCA 665

P. House of Commons Debates, 42nd Parl., 1st Session, No. 126 (12 December 2016) (Hon. Dan Ruimy)

Q. House of Commons, Standing Committee on Industry, Science and Technology (INDU), Report 2 – Review of the Government of Canada Report entitled "Fresh Start: A Review of Canada's Insolvency Laws" (Chair: Dan Ruimy)

R. *Houweling Nurseries Ltd. v. Amethyst Greenhouses Ltd.*, 2003 BCCA 347

S. Industry Canada, Fresh Start: A Review of Canada's Insolvency Laws, 2014

T. *M. (L.) v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367

U. *Nortel Networks Corp., Re*, 2010 ONSC 5584, leave to appeal refused 2011 ONCA 10, leave to appeal to S.C.C. refused [2011] S.C.C.A. No. 124

V. *Nortel Networks Corp., Re*, 2011 ONSC 4012

W. *Nortel Networks Corp., Re*, 2013 ONCA 518

X. *Nortel Networks Corp., Re*, 2014 ONSC 5274, aff'd 2015 ONCA 681, leave to appeal to S.C.C. refused 2016 CarswellOnt 7202

Y. *Nortel Networks Corp., Re*, 2016 ONCA 332

Z. *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.)

AA. Senate, Standing Senate Committee on Banking Trade and Commerce, Sixth Report (November 25, 2010) (Deputy Chair: Céline Hervieux-Payette, P.C.)

BB. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3

CC. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

DD. *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (C.A.)

EE. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to S.C.C. refused, 2015 CanLII 36780

FF. *Timminco Limited, Re*, 2012 ONCA 552

GG. *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77

SCHEDULE "B"
RELEVANT STATUTES

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
version in force between November 17, 2007 and September 17, 2009

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.

***COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**
currently in force

Restriction — employees, etc.

s. 6(5)

The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

s. 6(6)

If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

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.

COURTS OF JUSTICE ACT, R.S.O. 1990. c. C.43, AS AMENDED

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

COURT OF APPEAL FOR ONTARIO

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