Urquhart

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Subject: Retroactivity in Change of CCAA Legislation or Regulations - Case Where Justice, Humanity and Compassion Overrides the Normal Administration of Justice

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The proposal for re-introduction of Bill C-624 or self-insured group long term disability benefit plans being prescribed as an Eligible Financial Contract in the CCAA Regulations has to be retroactive in order to benefit the Nortel long term disabled ("LTD") former employees. Retroactivity of legislation and regulatory changes is legal according to the Supreme Court of Canada, and we propose a clear retroactive clause drafting that eliminates the risk of litigation by Nortel or Nortel creditors and ensures full payment of the Nortel long term disability benefits plan actuarial liabilities in the Nortel CCAA Final Plan of Arrangement and Compromise.

The Government of Canada Privy Council Office Guide To Making Federal Acts And Regulations provides procedures for the approval of retroactive legislation and regulations. There are strong reasons for the Minister of Innovation, Science and Economic Development to request the authority to have the new legislation or regulation apply retroactively, which are provided in this communication.

We understand that the independence of the judiciary is to be respected by the Federal Government. However, we are asking for an exceptional remedy, under exceptional circumstances, to a deserving case. This is one of those rare cases in which consideration of justice, humanity and compassion override the normal administration of justice. The attributes of this rare and deserving case are described here under the following five headings:

- **Clear And Strong Evidence Of Errors In Law**
- **Inequity**
- **Humanity And Compassion**
- **Recourse To Other Remedies Would Result In Greater Hardship**
- **Benefits of Retroactivity Far Outweigh the Potential for Disruption or Unfairness**

RETROACTIVITY IS LEGAL ACCORDING TO THE SUPREME COURT OF CANADA

In ***British Columbia v. Imperial Tobacco Canada Ltd., S.C.C 49, [2005],*** the Supreme Court of Canada definitively determines it is legal for a government to make legislative changes retroactive to dates prior to the Royal Assent date, provided "the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms." A clearly expressed retroactive clause, shows that the government has turned its mind to its intended retroactive effect and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness" The case says retroactive statutes are in fact common.

Excerpts from this SCC case and other case law on retroactivity and retrospectivity of statutes and regulations are provided under Appendix 1 below.

WORDING OF THE RETROACTIVE CLAUSE

For the Nortel LTD former employees to receive any benefit from re-introduction of Bill C-624 or from self-insured long term disability benefit plans being prescribed as an Eligible Financial Contract, both changes require a clearly drafted retroactive clause.

There are three relevant dates to be addressed in the retroactive clause, to make the legislative or regulatory change clearly expressed to be of benefit to Nortel LTD employees. We suggest that the retroactive clause say the following:

This legislative or regulatory change [S. xx of the Companies' Creditors Arrangement Act and S. yy of the Bankruptcy and Insolvency Act, or S. zz of the Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)] applies to self-insured group long term disability benefit plans anywhere in Canada meeting the following criteria:

(i) exists on or after January 13, 2009;

(ii) applies notwithstanding the plan being established by a debtor in respect of whom proceedings under the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act have commenced, but not yet closed before the coming to force of this section; and

(iii) for greater certainty, applies notwithstanding and with intent to supersede the Nortel March 30, 2010 interim settlement agreement with the court-appointed representative of the Nortel self-insured group long term disability benefits plan and its court approvals on the March 31, 2010 at the Ontario Superior Court of Justice and on June 10, 2010 at the Court of Appeal of Ontario. See Appendix 2 for more details on this interim settlement agreement.

The above recommended retroactive clause is more clearly expressed than the ones in Federal Bill C-624 and Federal Bill S-216. Federal Bill S-216 was voted down by the former Conservative majority in the Senate on the premise of its retrospectivity in relation to the March 30, 2010 interim settlement agreement. Our recommended retroactive clause's direct specification without ambiguity would eliminate the risk of litigation by Nortel or other Nortel creditors, or the risk of a CCAA Final Plan of Arrangement and Compromise that does not include full payment of the Nortel self-insured long term disability benefit plan's actuarial liabilities owed to its beneficiaries.

Bill C-624

TRANSITIONAL PROVISION

8. For greater certainty and despite any agreement or court decision or order to the contrary, this Act applies to a debtor in respect of whom proceedings under the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act have commenced before the coming into force of this section.

Bill S-216

TRANSITIONAL PROVISION

8. For greater certainty, this Act applies to a debtor in respect of whom proceedings under the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act have commenced before the coming into force of this section.

EXCEPTIONAL RETROACTIVE REMEDY, UNDER EXCEPTIONAL CIRCUMSTANCES, TO A DESERVING CASE

The Government Of Canada Privy Council Office Guide To Making Federal Acts And Regulations: Part 3 - Making Regulation says "A new regulation requires Cabinet approval when it applies retroactively. The Memorandum to Cabinet seeking approval must provide reasons for requesting the authority to have the new regulation apply retroactively."

The arguments for the Nortel self-insured group long term disability benefit plan being given higher priority in the CCAA and BIA or being prescribed an EFC in the CCAA Regulations on a retroactive basis even meet the onerous principles set out in the Royal Prerogative of Mercy for the Federal Government providing clemency to Canadian citizens incarcerated for criminal convictions.

Royal Prerogative of Mercy
http://pbc-clcc.gc.ca/prdons/rpmm-eng.shtml

> The Independence of the Judiciary Shall Be Respected
> The exercise of the Royal Prerogative of Mercy will not interfere with a court's decision when to do so would result in the mere substitution of the discretion of the Governor General, or the Governor in Council, for that of the courts**. There must exist clear and strong evidence of an error in law, of excessive hardship and/or inequity,** beyond that which could have been foreseen at the time of the conviction and sentencing.
>
> **The Royal Prerogative of Mercy Should Be Applied in Exceptional Circumstances Only**
> The Royal Prerogative of Mercy is intended **only for rare cases in which consideration of justice, humanity and compassion override the normal administration of justice. It should be applied only where there exist no other remedies, where remedies are not lawfully available in a particular case, or where recourse to them would result in greater hardship.**

THE SPECIFIC REASONS FOR RETROACTIVELY IN THE NORTEL DISABLED CASE

The specific reasons for new regulation to apply retroactively in the Nortel self-insured group long term disability benefit plan are as follows:

Clear And Strong Evidence of Errors In Law

A. Unnecessary Denials Of Justice In The Context Of These Actions Not Defeating the Purpose Of The CCAA

Multiple court decisions defeated any and every attempt by the Nortel LTD to have discovery and a court hearing and remedy of wrongdoings, from breach of trust, to fraudulent breach of trust and fraud, within the Nortel Health and Welfare Trust ("HWT"). These were errors of law because they were unnecessary denials of justice in the context of these actions not having the propensity to defeat the purpose of the CCAA by causing delay or frustrating the process under the CCAA to restructure the corporation.

1. These actions could not be defeating the purpose of the CCAA by causing delay or frustrating the process under the CCAA to restructure the corporation because Nortel decided by June of 2009 to conduct a liquidation through business and property sales.

2. Accepting that liquidations do occur under CCAA proceedings, these actions could also not be affecting the timing or valuation received in business sales, since Nortel already had a long history of accounting irregularities and there was a criminal fraud process already underway against top officers for creating and releasing accounting reserves for the purpose of increasing their turn-around bonuses.

3. These actions could not be upsetting the careful and delicate balancing of creditor interests, given this group's small % of total claims and assets expected to be in the Canadian estate. The future allocation of business sales' proceeds to the Canada estate would be in the billions out of the global estate assets of US$6.5 billion expected at the time of the interim settlement agreement. Nortel's global assets actually became US$10.5 billion at their peak in 2011 due to the very successful sale of intellectual patents for US$4.5 billion.

4. Allowing an exception for a discovery, court hearing and remedy of HWT wrongdoings, from breach of trust, to fraudulent breach of trust and fraud, within the HWT would not have created the opportunity for pensioners and severed former employees to claim the court was giving them unfair treatment compared to the LTD. The pensioners and severed employees had no evidence of wrongdoings. These group were of such large numbers and claim dollar amounts, they surely could be stopped by the CCAA court due to the CCAA's paramountcy and the CCAA judge using his authority to make orders appropriate in the circumstances because of these groups' claims having a high impact on the delicate balance of creditor interests and causing delay or frustration of the process under the CCAA to restructure the company, including impacting the timing and amount of business sales' proceeds.

5. The arguments for speed and efficiency in the CCAA process creating urgency for the interim settlement agreement's broad legal release without evidence disclosure and the denial of discovery, court hearing and remedies for the wrongdoings in the HWT were not realistic, especially since it was inevitable that the Nortel CCAA proceeding would be protracted over many years. There was no plan for substantial consolidation of the assets and creditor claims for the Canada, US, and UK/EMEA estates at the outset and disputes about allocation of assets amongst the regions were inevitable. This Nortel proceeding is now in its eighth year, with five failed mediations on allocation, an allocation trial and multiple appeals on allocation putting Nortel on the path of the most expensive bankruptcy in global history. To date, disclosed **global bankruptcy professionals fees** are Cdn$2,423 million or 22% of the estimated global estate today. There was no speed and efficiency arguments applied after the business sales were completed in 2011.

The purpose of the CCAA and the courts' handling of CCAA applications are described by jurisprudence, of which the following four are the most cited.
Century Services Inc. v. Canada (Attorney General), [2010] 3 SCR 379, 2010 SCC 60 (CanLII), ***Elan Corp. v. Comiskey (C.A.), 1990 CanLII 6979 (ON CA)***, ***Timminco Limited (Re), 2012 ONCA 552 (CanLII)*** ***and Pacific National Lease Holding Corporation, 1992 CanLII 427 (BC CA)*****.** We provide the key points from these cases under Appendix 3 below.

The purpose and powers of the court in CCAA can be summarized as follows:

- The purpose of the CCAA is to have a court administered process that permits the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. This purpose implies the need for speed, efficiency and effectiveness in the restructuring of the company in order to avoid its liquidation. Hence, the CCAA judge is empowered to make orders he or she considers appropriate in the circumstances. He or she may deny access to usual civil process on the premise that it would delay or frustrate the restructuring process under CCAA. Also, the CCAA judge may invoke the doctrine of federal paramountcy within the CCAA to deny access to rights under provincial legislation, such as pension, trust and consumer protection acts.

  J. Geoffrey Morawetz approved the interim settlement agreement on March 31, 2010 for 9 months of benefits in exchange for a legal release of future litigation on any causes of action, except fraud and allegations of misrepresentations made by directors to creditors or of wrongful or oppressive

conduct by directors. This removed the protections available in current legislation and common law governing trusts and consumer services, such as unregulated insurance.

J. Morawetz knew that the court monitor had intentionally not disclosed the historical HWT financial statements and actuarial reports on the LTD benefits at the time of the interim settlement agreement. He also refused to grant a two month moratorium for discovery requested by the opposing LTD.

- In an effort to create efficiency in the CCAA procedures, the court appoints legal counsel to advise the groups of pensioners, severed and LTD former employees and then this legal counsel selects representatives to make decisions on behalf of these groups, who are approved by the court. While there is an opportunity for individuals or groups of individuals to oppose the decisions made by their court appointed representatives, the opposition process rarely achieves reversal of their decisions by the court on the same premise of not wanting to defeat the purpose of the CCAA by causing delay or frustrating the process under the CCAA to restructure the corporation.

  In the Nortel CCAA case, there was one court appointed legal counsel for the three groups, a representative committee of three persons for the pensioners and severed former employees and one person for the LTD former employees.

  LTD opposing the interim settlement agreement were given short shrift consideration because they were considered a small minority while the representatives made decisions on behalf of the majority of 12,883 pensioners and pensioners' survivors, 9,295 deferred pension plan beneficiaries, severed former employees and 350 LTD former employees as a combined group.

- Provincial Courts of Appeal and the Supreme Court of Canada rarely grant leaves to appeal CCAA court decisions, These appeal courts are unwilling to overturn CCAA court orders, which they perceive to have been determined after a careful and delicate balancing of a variety of interests and problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

  None of the requests for leave to appeal to the Court of Appeal of Ontario or the Supreme Court of Canada made by the opposing LTD were granted.

- The CCAA does give the authority to deny the compromise of creditor claims arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity.

  The Nortel HWT fraud class action was summarily dismissed before trial at the Ontario Superior Court of Justice and the Court of Appeal of Ontario due to the legal release in the interim settlement agreement and failure to meet the two year limitation period for filing the claim. This was despite fraud specifically being excluded in the legal release of the interim settlement agreement and despite J. Paul Perell at the Ontario Superior Court of Justice determining that constructive fraud had occurred within the HWT. These courts were bent on not interfering with the CCAA court judge's orders, and particularly the interim settlement agreement, which was court approved on March 31, 2010.

  Fraud within the HWT would mean that the Nortel LTD suffered a loss, while Nortel received a benefit, such that other creditors received an unjust enrichment of funds that did not belong to them. Fraudulently received funds in the Nortel estate should not be subject to equal treatment amongst all creditors.

B. Interim Settlement Agreement, Court Approved On March 31, 2010, Had Multiple Errors In Law

1. Withholding of Key Evidence on Fraud

   Broad legal release within the interim settlement agreement agreed to by the court appointed representative legal counsel, Koskie Minsky LLP ("KM"), the court representative, Sue Kennedy, and Justice Geoffrey Morawetz was despite the court monitor, Ernst & Young, intentionally withholding key evidence of fraud in the Nortel Health and Welfare Trust ("HWT")

   Ernst & Young refused to release the historical financial statements and actuarial reports of the Health and Welfare Trust at the time of the interim settlement agreement, waiting until six months after this settlement was approved.

   J. Morawetz refuses request for 2 month adjournment for discovery from LTD opposed to the interim settlement agreement.

   Interim Settlement Court Transcript March 3, 4, 5, 2010.

   Court transcripts and decisions have J. Morawetz not finding any wrongdoings at the time of the interim settlement agreement and HWT distribution approvals in 2010.

   Interim Settlement Court Transcript March 3, 4, 5, 2010

   Endorsement HWT Distribution J. Morawetz Nov. 9, 2010

2. Court Monitor and Legal Counsel Made Errors on Law Applicable to HWT

   Court Monitor, Ernst & Young, and its legal counsel, Goodmans LLP, made errors on applicable law to the HWT within the Monitor's Statement in paragraph 48 of the 39th Monitor's Report dated Feb. 18, 2010:

   "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."

   If there was no legal obligation, then constructive fraud could not have been determined by J. Paul Perell.

3. Court Appointed Legal Counsel to the LTD Made Errors in Law Applicable to HWT

   In the March 3-5, 2010 hearing transcript, Mr. Zigler says we certainly agree with the above Monitor's Statement. Plus, KM made the error of not demanding discovery on the HWT financial statements and actuarial reports and looking carefully for wrongdoings before recommending to the court representative the interim settlement agreement with only 9 months of benefits paid.

4. CAW Lawyer Got The Legal Release Description Wrong And So Must Have Misunderstood It

   CAW Important Update Feb. 8, 2010

   "The quid pro quo for the continuation of benefits
   - This agreement releases Nortel from liability regarding the Pension Plan or the Health and Welfare Trust EXCEPT for claims based on fraud, gross negligence, contractual rights and/or misrepresentation by the directors or wrongful or oppressive conduct by the directors."

5. LTD Court Appointed Representative Lacked Competency To Assess KM Legal Advice And Did Not Seek Any Second Legal Opinions

C. Summary Dismissal of Nortel HWT Fraud Class Action Had Errors in Law

As noted above, the Nortel HWT fraud class action received summary dismissal before trial at the Ontario Superior Court of Justice due to the legal release in the interim settlement agreement and failure to meet the two year limitation period for filing the claim. **Court of Appeal Decision on Holley v. Northern Trust and Royal Trust Oct. 21, 2014** concurred with the summary dismissal due to the failure to meet the two year limitation period for filing the claim. These decisions contained errors of law on the following matters.

1. Interim Settlement Agreement Legal Release Did Not Have A Definition Of Fraud

J. Paul Perell had no basis to distinguish constructive fraud and actual fraud from within the English reading of the legal release in the interim settlement agreement.

2. J. Geoffrey Morawetz Could Not Know About the Constructive Fraud
J. Paul Perell determined constructive fraud in his **Justice Perell Decision on Holley v. Northern Trust and Royal Trust Feb. 11, 2014**, but he made an error when he said J. Geoffrey Morawetz Morawetz knew there was constructive fraud when he approved the interim settlement agreement, as this was not possible without evidence.
J. Morawetz expressed no wrongdoings within **Interim Settlement Court Transcripts March 3, 4, 5, 2010** of the hearing on the interim settlement agreement.
J. Morawetz said there was no evidentiary basis for misappropriation in **Endorsement HWT Distribution J. Morawetz Nov. 9, 2010**

There is an unacceptable inconsistency between the J. Morawetz saying there were no wrongdoings or misappropriations in the HWT and J. Perell finding J. Morawetz knew there was constructive fraud in the HWT when he approved the interim settlement agreement. J. Morawetz rejected the affidavits of financial expert, Diane Urquhart, expressing breach of trust claim at the interim settlement agreement and of four experts at the HWT distribution trial: Diane Urquhart; Jeremy Bell, Chief Actuary at the BC Health Care Trust; consulting actuary Joanne Williams, former Acting Superintendent of Pensions at the Nova Scotia Department of Finance; and, Mike McCorkle, former Treasurer of Nortel, who was responsible for the HWT during 2005 to 2008 when money belonging to the Nortel LTD was taken from the HWT for the benefit of Nortel. The four experts were said to be not relevant or necessary to his decision on the HWT distribution and that Diane Urquhart's allegation of misappropriation in her affidavit was without an evidentiary basis.

3. Financial Expert, Diane Urquhart, and Lead Plaintiff, Jennifer Holley, Did Not Have Evidence of Fraud as of February 18, 2010.
Ernst & Young's six month delay in the release of key evidence on HWT fraud created ambiguity on the date for the discovery of fraud and for the starting of the limitation period for the class action on HWT fraud. Was the start of the limitation period February 18, 2010 when the one 2008 HWT financial statement released by the court monitor showed a large deficiency in the HWT assets relative to its legal liabilities, or was it August 27, 2010 when the 1982 to 2009 HWT financial statements were released by the court monitor, which contained the evidence of fraud as the cause of the deficiency of HWT assets? The Appeal Court of Ontario said financial expert, Diane Urquhart, and lead plaintiff, Jennifer Holley knew about the fraud at the earlier date and concurred with the summary dismissal of the Nortel HWT fraud class action due to failure to meet limitation period.

4. The Nortel LTD live in poverty because Rochon Genova LLP filed the Nortel HWT fraud class within two years of the limitation period premise starting at August 27, 2010 when the court monitor released the relevant body of evidence from which HWT fraud was discovered. Being six months too late on an arguably different start for the limitation period is a harsh penalty to be applied to the the Nortel LTD, when compared to the eight years to date of Nortel CCAA proceeding, with five failed mediations on allocation, an allocation trial and multiple appeals on allocation putting Nortel on the path of the most expensive bankruptcy in global history.

5. J. Paul Perell decided to summary dismiss the fraud claim because there was no dishonesty in the Nortel HWT fraud class action claim. However, dishonesty is a well-accepted tenet of a fraud claim and the evidence on the dishonesty component of actual fraud had not yet been filed as this was a summary dismissal request. It would be filed later at the class action certification trial. The Nortel LTD had a right to a trial, and how could J. Perell summary dismiss this right on his view of no dishonesty when the evidence proving dishonesty was not before him and was not procedurally entitled to be there at the

time of summary dismissal? Summary dismissal is only on procedural issues and not on evidence supporting the claim.

Inequity

1. The Federal and Ontario governments have already recognized the problem of self-insured group long term disability benefit plans due to the experience of the Nortel LTD. The leaving out of currently LTD persons covered by self-insured group long term disability benefit plans is unfair compared to employees not yet disabled who are now covered by mandatory insured long term disability benefit plans for employers registered in Ontario and Federally. See Appendix 4 for more details on the Federal and Ontario governments' new requirements of mandatory insurance for group long term disability benefit plans.

2. Nortel Canadian LTD are the worst impacted creditor group from the Nortel bankruptcy because of their low Canadian HWT settlement and the Canada estate getting the lowest cash settlement ratio of the three regional estates, Canada, US and UK/EMEA.

- The HWT settlement ratio was 38% compared to the pension plan settlement ratios as follows:

Ontario- First $12,000 pension 100% (Due to Ontario Pension Benefit Guaranty Fund Payment)
Pension above $12,000 80%
No CPI indexing
Nova Scotia- Pension 69%
No CPI Indexing
Other Provinces- 57%

Ontario Nortel pensioners received an estimated $340 million from the Ontario Pension Benefit Guaranty Fund, which guaranteed the first $1000 of pension income per month for pensioners who worked in Ontario.

- U.S. claims are estimated by Diane Urquhart to recover about 85 cents on the dollar, U.K./EMEA claims about 65 cents and Canadian claims about 45 cents.

3. The Nortel LTD benefit plan had an option for employees to purchase additional insurance of up to 70% of their pre-disability income, above the 50% of their pre-disability income which was non-contributory, which means Nortel paid all of the contributions for the first 50% coverage. Of note is that the HWT settlement of 38% of the LTD actuarial liabilities came close to paying back just the employee contributions, which were 38% to 42% of the total employer and employee contributions costs for the LTD benefit plan as shown in employee Nortel FLEX benefits confirmation statements for 2000 to 2003. The employees paid more than their fair share of the disability insurance coverage considering their costs were 38% to 42% of the combined employer and employee cost, whereas the incremental coverage bought was just 29% of the total coverage amount.

4. Global bankruptcy professional fees of Cdn$2,423 million are 22% of the estimated global estate today. While lawyers received the majority of the fees, Ernst & Young's US$500 million of fees for its roles as an officer of both the Canada and UK bankruptcy courts and tax advisor to the US Unsecured Creditor Committee are shockingly high.

Humanity And Compassion

The Nortel LTD are forced to live on the current CPP disability income of $15,490 per year, which is impossible to do with dignity.
Nortel LTD medical and dental costs were about $7,588 per person per annum in 2010.

The 350 Nortel LTD former employees had 120 dependent children at Dec. 31, 2010.

This group has to sell their homes to meet daily living expenses.

Recourse To Other Remedies Would Result In Greater Hardship

Nortel LTD will have greater hardship from taking on any other litigation, such as further legal actions on inequitable or negligent conduct by bankruptcy professionals or judges relating to: excessive professional bankruptcy fees; making decisions without having access to relevant evidence before them; not showing knowledge or providing advice on wrongdoings that are protected by current legislation and common law governing fraud, trusts and consumer services, such as unregulated insurance; or, failing to support the requested actions when they had no propensity to defeat the purpose of the CCAA by causing delay or frustrating the process under the CCAA to restructure the corporation

Benefits of Retroactivity Far Outweigh the Potential for Disruption or Unfairness

In the case of the Nortel disabled it is easy to "determine that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness. "

Total LTD CCAA claims are $80 million, $50 million for lost income and $30 million for lost medical and dental benefits. While details of the court's Nortel allocation decision for the US$7.3 billion in the lock-box have not been disclosed, we estimate that the Nortel Canada estate has approximately US$3.4 billion or Cdn$4.4 billion. The total Nortel global estate has US8.5 billion or Cdn$10.9 billion.

Assuming that the Canadian CCAA cash settlement ratio is 45% the incremental cost of the Nortel LTD benefit plan being prescribed as an EFC is Cdn$44 million. This is 1.0% of the Canada estate estimated to be It is 0.4% of the Nortel global estate.

Sincerely

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ADDITIONAL INFORMATION
APPENDIX 1
CASE LAW ON RETROACTIVITY OF LEGISLATION AND REGULATORY CHANGES

British Columbia v. Imperial Tobacco Canada Ltd., S.C.C 49, [2005]

69. Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(*g*) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law

or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately *(in Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 48-29*):

> Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

71. The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 U.B.C. L. Rev. 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that Landgraf v. USI Film Products, 511 US 244 (1994), at p. 268.

Benner v. Canada (Secretary of State), [1997] 1 SCR 358, 1997 CanLII 376 (SCC)

B. *Retroactivity and/or Retrospectivity*

39 The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69, has offered these concise definitions which I find helpful:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

42 …As Driedger has written in *Construction of Statutes* (2nd ed. 1983), at p. 192:

> These past facts may describe a status or characteristic, or they may describe an event. It is submitted that where the fact-situation is a status or characteristic (the being something), the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact-situation is an event (the happening of or the becoming something), then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment.

Smith Estate v. National Money Mart Company, 2008 CanLII 27479 (ON S.C.)

[101] For the reasons that follow, it is my conclusion that s.7 and s. 8 of the *Consumer Protection Act, 2002*, which came into force on July 30, 2005, apply retroactively, in the sense of having an affect on things done prior to enactment… It is my opinion that as a matter of statutory interpretation, the Ontario legislature made it clear that the s. 7 and s. 8 should apply retroactively, even if this would take away the substantive contract right to have the right to arbitrate and even if an arbitration was actually underway.

[106] I do not believe that the legislature could have intended such an untidy and unfair solution to the problem of the tension between the public policies supporting arbitration and class proceedings. Indeed, to get to the heart of the matter, it is my conclusion that as a matter of statutory interpretation, the legislature made it clear that the s. 7 and s. 8 should apply retroactively, even if this would take away the substantive contract right to have the right to arbitrate and even if the arbitration was actually underway. I mention

the last point because it was submitted by the Defendants that the Legislature could not have meant to go so far as to interfere with an existing right to arbitration by retroactive legislation. My response is that the Legislature may have had good reason to do precisely that.

[109] In any event, retroactive consequences are only one factor in the interpretation of a statute, and the problem remains one of determining whether the legislator used language that was intended to yield retroactive consequences or whether a retroactive application of the legislation arises by necessary implication.

[110] It is a fundamental rule of statutory interpretation that substantive legislation, that is, legislation that is not merely about procedural rights, is not to be construed to operate retroactively to affect substantive rights and obligations, unless the statute clearly provides or such retroactive operation is required by clear implication having regard to the language of the Act and the achievement of its purposes: Angus v. Sun Alliance Insurance Co., 1988 CanLII 5 (SCC), [1988] 2 S.C.R. 256; Acme (Village) School District No. 2296 v. Steele Smith, 1932 CanLII 40 (SCC), [1933] S.C.R. 47.

Angus v. Sun Alliance Insurance Co., 1988 CanLII 5 (S.C.C.), [1988] 2 S.C.R. 256

6. An application (pursuant to s. 124 of the *Rules of Practice*; see now Rule 21 of the *Rules of Civil Procedure*) was brought before Galligan J. of the Supreme Court of Ontario ((1984), 1984 CanLII 1924 (ON SC), 45 O.R. (2d) 667) for a determination as to whether or not the provisions just quoted operated retrospectively so as to eliminate defences based on s. 7 of *The Married Woman's Property Act* and s. 214 of *The Insurance Act*. The motion also sought an order that the statement of claim disclosed no reasonable cause of action against the husband, the father or the insurance company.

...

To permit a spouse to be sued in tort by his or her spouse and to maintain an exemption of insurance against such liability would appear to me to be an injustice that the Legislature cannot have intended

Held: The appeal should be allowed.

A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but according to whether or not it affects substantive rights. Here, procedure was not being affected at all. The provision in question provided a complete defence to an action and as such is a substantive matter just as much as the creation of a cause of action itself. In any case, whether the provision is deemed to be substantive or procedural, it is not one to which a presumption of retrospectivity can be applied. This would amount to a serious deprivation of an acquired right of the husband, and it should not lightly be assumed that this was the intention of the legislature.

Section 214 of *The Insurance Act* operated as a bar to recovery against the father's insurance company. This section, too, was a substantive provision to which the ordinary principle against retrospective operation applied.

Acme (Village) School District No. 2296 v. Steele Smith, [1933] S.C.R. 47

The question involves the construction of section 157. In the *Sussex Peerage* case[3], Lord Chief Justice Tindal, in delivering the opinion of the judges, said:—

[Page 50]

My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.

If, however, any doubt as to the legislative intention exists after a perusal of the language of the Act, then, as Lord Hatherly, L.C., said in *Pardo* v. *Bingham*[4]:—

We must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated.

In this Court in the case of *Upper Canada College* v. [5], Mr. Justice Duff, at page 419, pointed out various ways in which the legislative intention might be expressed. He said:—

That intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation.

In my opinion section 157 was passed to remedy an evil which had been found to exist. It should, therefore, be construed in conformity with the well established rule that all cases within the mischief aimed at by that statutory provision are, if the language permits, to be held to fall within its remedial influence.

[Page 53]

In Craies on Statute Law, 3rd ed., at page 336, the author says:—

If a statute is passed for the purpose of protecting the public against some evil or abuse, it will be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right.

APPENDIX 2
AMENDED AND RESTATED SETTLEMENT AGREEMENT, THIS AGREEMENT MADE AS OF THE 30TH DAY OF MARCH, 2010

Endorsement Interim Settlement Justice Morawetz March 31, 2010

C. HEALTH AND WELFARE TRUST

2. Ranking: The CAW, Representative Counsel, the LTD Representative and the Former Employee Representatives (the "Representatives") agree, on behalf of those they represent and on their own behalf, that in respect of any funding deficit in the HWT or any HWT related claims (the "HWT Claims"), in these proceedings or in any subsequent receivership or bankruptcy proceedings, or in any other proceedings, or in any other forum whatsoever concerning Nortel, any of the entities listed in Schedule "A" (collectively the "Nortel Worldwide Entities" and individually, a "Nortel Worldwide Entity") or the HWT, they shall not advance, assert or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims, including without limitation that they rank as priority claims against Nortel or any Nortel Worldwide Entity, or are the subject of a constructive trust or trust of any nature or kind in respect of the property and assets of Nortel or any Nortel Worldwide Entity, nor shall they take any action or support any party, person or entity, directly or indirectly, who advances, asserts or makes such claims, and such claims, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings, shall rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel.

G. RELEASE AND CHARGE

1. The CAW, the LTD Representative and the Former Employees Representatives agree on their own behalf and on behalf of the Pension Claimants and the beneficiaries of the HWT who they represent (collectively, the "Pension HWT Claimants") that each of the trustee of the HWT, the Monitor, and all members of Pension Plans' committees, (in their personal capacity), and their respective officers, directors, employees, agents, members, legal counsel, financial advisors, and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing and the officers, directors, employees, agents, members, legal counsel, financial advisors of Nortel and the Nortel Worldwide Entities and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing (collectively, the "Releasees"), are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to the Pension Plans, including without limitation, the administration of the Pension Plans, any obligation to assert or advance in these proceedings, or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans, **any priority claim**, as a trust (whether deemed or otherwise) or a lien, the funding of the Pension Plans (including any obligation to contribute to the Pension Plans except as required by this Settlement Agreement) and the investment of the Pension Plan assets; and (ii) the HWT, including without limitation, the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT

and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

2. The CAW, the LTD Representative and the Former Employees Representatives agree on their own behalf and on behalf of the Pension HWT Claimaints that Nortel and the Nortel Worldwide Entities and their respective successors and assigns (collectively, the 'Nortel Releasees") are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common Jaw, or in equity, or otherwise in any jurisdiction) that the Pension Claims and the HWT Claims, or any part thereof, **rank as a preferential or priority claim over the claims of ordinary unsecured creditors of Nortel**, as a trust (whether deemed or otherwise) or a lien, or under any other legal or equitable theory. For greater certainty, notwithstanding the foregoing, nothing in this Settlement Agreement shall release or discharge the Nortel Releasees from any Pension Claims and HWT Claims to the extent **such claims are allowed as ordinary unsecured claims against the Nortel Releasees** pursuant to any claims adjudication procedure established in these proceedings.

H. CCAA PLAN OR SUBSEQUENT BANKRUPTCY

I . The Representatives agree on their own behalf and on behalf of the Pension HWT Claimants that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "Plan") be proposed or approved if: (i) the Plan provides for separate classification of any Pension HWT Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) the Pension HWT Claimants and the other ordinary unsecured creditors of Nortel do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against Nortel pursuant to the Plan.

The following H2 clause was removed from the February 8, 2010 agreement because it was rejected by J. Morawetz in his March 26, 2010 decision.

2. Notwithstanding anything else in this Settlement Agreement, including for greater certainty paragraph G.2 hereof, in the event of a bankruptcy of Nortel, if there is an amendment to any provision of the *Bankruptcy and Insolvency Act* that changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability or non applicability of any such amendment in relation to any such claim.

Endorsement Interim Settlement Justice Morawetz March 26, 2010

Clause H.2

[83] The second aspect of the Settlement Agreement that is opposed is the provision kn
Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applican
notwithstanding any provision of the Settlement Agreement, if there are any amendments
BIA that change the current, relative priorities of the claims against the Applicants, no p
precluded from arguing the applicability or non-applicability of any such amendment in r
to any such claim.

[84] The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement
be a "settlement" in the true and proper sense of that term due to a lack of certainty and f
They emphasize that Clause H.2 has the effect of undercutting the essential compromises
Settlement Agreement in imposing an unfair risk on the non-employee creditors of
including NNI, after substantial consideration has been paid to the employees.

[85] This position is, in my view, well founded. The inclusion of the Clause H.2 creates, than eliminates, uncertainty. It creates the potential for a fundamental alteration Settlement Agreement.

[86] The effect of the Settlement Agreement is to give the Former and LTD Empl preferred treatment for certain claims, notwithstanding that priority is not provided for statute nor has it been recognized in case law. In exchange for this enhanced treatmer Former Employees and LTD Beneficiaries have made certain concessions.

[87] The Former and LTD Employees recognize that substantially all of these conces could be clawed back through Clause H.2. Specifically, they acknowledge that future Pe and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditor then go on to say that should the BIA be amended, they may assert once again a priority clai

[88] Clause H.2 results in an agreement that does not provide certainty and does not pr finality of a fundamental priority issue.

[89] The Settlement Parties, as well as the Noteholders and the UCC, recognize that the benefits associated with resolving a number of employee-related issues, but the practical eff Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is some inequitable from the standpoint of the other unsecured creditors of the Applicants. I creditors are to be bound by the Settlement Agreement, they are entitled to know, with cert and finality, the effect of the Settlement Agreement.

[90] It is not, in my view, reasonable to require creditors to, in effect, make concessio favour of the Former and LTD Employees today, and be subject to the uncertainty of unkr legislation in the future.

[91] One of the fundamental purposes of the CCAA is to facilitate a process for a compro of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish objective. The inclusion of Clause H.2 does not recognize that at some point settle negotiations cease and parties bound by the settlement have to accept the outcome. comprehensive settlement of claims in the magnitude and complexity contemplated by Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

[92] The Settlement Agreement should be fair and reasonable in all the circumstances should balance the interests of the Settlement Parties and other affected constituencies equit and should be beneficial to the Applicants and their stakeholders generally.

[93] It seems to me that Clause H.2 fails to recognize the interests of the other creditors o Applicants. These creditors have claims that rank equally with the claims of the For Employees and LTD Employees. Each have unsecured claims against the Applicants. Settlement Agreement provides for a transfer of funds to the benefit of the Former Emplo and LTD Employees at the expense of the remaining creditors. The establishment of Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of providing any certainty of outcome to the remaining creditors.

[94] I do not consider Clause H.2 to be fair and reasonable in the circumstances

Endorsement Leave to Appeal Interim Settlement J. Winkler, J. Goudge, J. MacPherson June 3, 2010

APPENDIX 3
CASE LAW ON THE PURPOSE AND POWERS OF THE COURT IN CCAA PROCEEDINGS

Century Services Inc. v. Canada (Attorney General), [2010] 3 SCR 379, 2010 SCC 60 (CanLII)

[15] As I will discuss at greater length below, the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

Elan Corp. v. Comiskey (C.A.), 1990 CanLII 6979 (ON CA)

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

Timminco Limited (Re), 2012 ONCA 552 (CanLII)

[4] …a CCAA court may invoke the doctrine of paramountcy to override conflicting provisions of provincial statutes where the application of provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

Companies' Creditors Arrangement Act, RSC 1985, c C-36

General power of court

11 …, 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.

Pacific National Lease Holding Corporation, 1992 CanLII 427 (BC CA),

"… I am of the view of this Court [Court of Appeal] should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA … in supervising a proceeding under the CCAA orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of

interests and problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

APPENDIX 4
MANADATORY LTD INSURANCE LEGISLATION AND REGULATIONS

Bill C-38 S. 434-440
Canada Labour Code
DIVISION XIII.2 Long-term Disability Plans
Employer's obligation

239.2 (1) Every employer that provides benefits to its employees under a long-term disability plan must insure the plan with an entity that is licensed to provide insurance under the laws of a province.

Exception

(2) However, an employer may provide those benefits under a long-term disability plan that is not insured, in the circumstances and subject to the conditions provided for in the regulations.

2012, c. 19, s. 434.

Regulations

239.3 The Governor in Council may make regulations respecting long-term disability plans, including regulations

(a) specifying what constitutes a long-term disability plan; and

(b) specifying the circumstances and conditions referred to in subsection 239.2(2).

Ontario Bill 14
Insurance Act, R.S.O. 1990, CHAPTER I.8
Necessity for licence, long-term disability benefits

115.1 (1) Except as provided in the regulations, no person shall provide long-term disability benefits in Ontario unless the benefits are payable under a contract of insurance undertaken by a licensed insurer. 2014, c. 7, Sched. 14, s. 1.

Exception

(2) Subsection (1) does not apply in respect of any benefit provided under a registered pension plan within the meaning of subsection 248 (1) of the *Income Tax Act* (Canada). 2014, c. 7, Sched. 14, s. 1.

Definition

(3) In this section,

"long-term disability benefits" means benefits under a benefit plan under which payments or benefits are payable to an individual for a period of not less than 52 weeks or until recovery, retirement or death, whichever period is shorter. 2014, c. 7, Sched. 14, s. 1.