

**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 AND 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 COURT APPOINTED REPRESENTATIVES OF  
THE FORMER AND DISABLED EMPLOYEES OF NORTEL  
(Motion for Leave to Appeal by the LTD Objectors)**

February 21, 2017

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**PART I - OVERVIEW**

1. After more than eight years of litigation, including three unsuccessful mediations, a twenty-one day cross-border trial and various appeals and related litigation over the allocation of \$7.3 billion in sale proceeds, the parties in the Nortel CCAA proceedings<sup>1</sup> reached a Settlement and Support Agreement (the "**Settlement Agreement**") that was approved by over 99% of creditors voting on a Plan of Compromise and Arrangement (the "**Plan**") and sanctioned by the Superior Court of Justice (Commercial List) (the "**CCAA Court**") on January 24, 2017, with reasons that followed on January 30, 2017 (together the "**Sanction Decision**").<sup>2</sup>

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<sup>1</sup> Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Plan of Compromise and Arrangement, Responding Motion Record of the Monitor and Canadian Debtors (the "**Monitor's Motion Record**") at Tab 8A or the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017, Monitor's Motion Record at Tab 8.

<sup>2</sup> *Nortel Networks Corp. (Re)*, 2017 ONSC 700, Monitor's Motion Record at Tab 1.

2. At the sanction hearing, two LTD Beneficiaries (the "**LTD Objectors**") objected unsuccessfully to the sanction of the Plan, alleging violations under the *Charter of Rights and Freedoms* (the "**Charter**"). They now seek leave to appeal the Sanction Decision despite the overwhelming support of the Plan by all other creditors, including 351 other LTD Beneficiaries and approximately sixteen thousand former employees, pensioners, surviving spouses, their beneficiaries, and their court appointed Representatives (the "**Representatives**") on whose behalf this factum is filed.
3. At its core, the challenge by the LTD Objectors is an attempt to relitigate the Employee Agreement and Settlement Approval Order – a March 31, 2010 court order from which all LTD Beneficiaries and other former Nortel employees benefited greatly - in order to gain an advantage over similarly situated creditors in the Nortel *CCAA* proceedings. The Employee Agreement and Settlement Approval Order was also the subject of an unsuccessful leave to appeal application by a group of LTD Beneficiaries which included the LTD Objectors. The LTD Objectors cannot now, seven years later, relitigate their discontent with that agreement and their failure to persuade the Court then of their views.
4. The proposed appeal is not *prima facie* meritorious. It borders on frivolous, is not significant to the practice and only leads to further depletion of the Canadian Estate and delays distributions to Nortel's many creditors.
5. The Plan was sanctioned by the CCAA Court, which had supervised the proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended) (the "*CCAA*") for more than eight years. The CCAA Court carefully considered section 6 of the *CCAA* and various well established general principles.<sup>3</sup> No error in law was made by the CCAA Court in sanctioning the Plan and the test for leave to appeal has not been met by the LTD Objectors.
6. The Representatives urge this court to dismiss the proposed appeal as it is not *prima facie* meritorious and will only result in further and unnecessary delay and costs at the expense

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<sup>3</sup> Sanction Decision at paras. 6-9, Monitor's Motion Record at Tab 1.

of thousands of creditors who have waited for more than eight years to receive partial payment on their claims. The Representatives are eager to have finality in this insolvency that has had devastating effects on the thousands of former employees, pensioners and LTD Beneficiaries they represent.

## **PART II – THE FACTS**

### **A. Background**

7. The Representatives rely on the facts as set out in the decision of the Newbould J. (the "CCAA Judge") in the Sanction Decision as well as the background and Allocation Litigation facts as set out in the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017, the Plan and the Responding Factum of the Monitor dated February 21, 2017.

### **B. The Decision Below**

8. After hearing the submissions of the various parties, including the LTD Objectors, the CCAA Court approved the Sanction Order on January 24, 2017, with reasons to follow.
9. The Sanction Decision was released on January 30, 2017. In his reasons, the CCAA Judge sympathized with the LTD Objectors, however, held that:
  - (a) Neither of the LTD Objectors elected to opt out of representation by the LTD Representative pursuant to the terms of the LTD Representation Order and are therefore bound by it and the actions of the LTD Representatives;<sup>4</sup>
  - (b) There is no legal basis to reconsider the Employee Agreement and Settlement Approval Order seven years later, and in any event the CCAA Judge agreed with the findings in the reasons of Morawetz J. (as he then was) that the settlement was

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<sup>4</sup> Sanction Decision at paras. 12 and 16, Monitor's Motion Record at Tab 1.

reasonable as the LTD Beneficiaries will receive the same *pari passu* treatment under the Plan as all other creditors;<sup>5</sup>

- (c) Issue estoppel prevents the LTD Objectors from now raising a *Charter* challenge to the 2010 motion to approve the Employee Agreement and Settlement Approval Order, as they were represented by competent counsel;<sup>6</sup>
- (d) Even if the *Charter* had any application, the request by the LTD Objectors to prioritize allocation proceeds to pay for 100% of the claims of LTD Beneficiaries at the expense of all other claimants involves economic interests which are not protected under section 7 of the *Charter*;<sup>7</sup>
- (e) Even if the *Charter* had any application, there is no basis to find a violation of section 15 of the *Charter* as the LTD Objectors are not being discriminated against; rather, they are being treated the same as all creditors of Nortel, including other similarly situated creditors who are experiencing hardship due to lost income, severance pay and benefits as a result of the Nortel insolvency.<sup>8</sup>

### PART III – LAW AND ARGUMENT

#### A. The Test for Leave to Appeal

10. The test for leave to appeal in a *CCAA* proceeding is stringent.<sup>9</sup> Leave to appeal is to be granted "sparingly...and only when there are serious and arguable grounds that are of real and significant interest to the parties."<sup>10</sup> The factors to consider are whether:

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

<sup>5</sup> *Ibid* at paras. 18-19, Monitor's Motion Record at Tab 1.

<sup>6</sup> *Ibid* at para. 26, Monitor's Motion Record at Tab 1.

<sup>7</sup> *Ibid* at para. 28-31, Monitor's Motion Record at Tab 1.

<sup>8</sup> *Ibid* at para. 33-35, Monitor's Motion Record at Tab 1.

<sup>9</sup> *Nortel Networks Corp. (Re)*, 2013 ONCA 518 at para. 5, Responding Book of Authorities of the Monitor and Canadian Debtors (the "**Monitor's Book of Authorities**") at Tab 3, *Timminco Limited (Re)*, 2012 ONCA 552 at para. 3 ("**Timminco**"), Monitor's Book of Authorities at Tab 4.

<sup>10</sup> *ROI Fund Inc. v. Gandi Innovations Ltd.*, 2012 ONCA 10 at para 6 ("**ROI**"), Responding Book of Authorities of the Court Appointed Representatives of Former and Disabled Employees of Nortel ("**Representatives Book of Authorities**") at Tab 1.

- (b) the point under appeal is of significance to the practice;
  - (c) the appeal will unduly hinder the progress of the action; and
  - (d) the point is of significance to the action or the parties.<sup>11</sup>
11. A failure to establish any one of these four threshold criteria will result in a dismissal of the leave application.<sup>12</sup>
  12. The proposed appeal does not fall into the exceptional category of cases in which leave to appeal ought to be granted. It is not *prima facie* meritorious (and in fact has no merit) and is of no significance to the practice. Moreover, the appeal will delay distributions to creditors, including all other LTD Beneficiaries, who accept the Plan and are eager to receive their distributions and move on with their lives after enduring more than eight years of Nortel's *CCAA* proceedings.
  13. As noted by the *CCAA* Judge, it is questionable whether the *Charter* has any application to a *CCAA* Plan of Compromise and Arrangement and a sanction hearing. The *Charter* governs relations between individuals and government actors representing the state. It does not intrude upon private relationships.<sup>13</sup> At its core, a *CCAA* Plan of Compromise and Arrangement is an agreement between a debtor and its creditors to compromise claims.<sup>14</sup>
  14. The Representatives agree with the responding factum of the Monitor and Canadian Debtors that the test for leave is not satisfied and that the leave to appeal motions should be dismissed. The Representatives make the additional submissions set out below.

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<sup>11</sup> *Hemosol Corp. (Re)*, 2007 ONCA 124 at para. 5 ("*Hemosol*"), Representatives Book of Authorities at Tab 2.

<sup>12</sup> *Homburg Invest Inc. (Re)*, 2012 QCCA 665 at paras. 3-4, Monitor's Book of Authorities at Tab 8.

<sup>13</sup> *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 at paras. 41 and 43, Representatives Book of Authorities at Tab 3.

<sup>14</sup> *Olympia & York Developments Ltd. (Re)*, [1993] O.J. No. 545 at para. 74 ("*Olympia*"), Representatives Book of Authorities at Tab 4; See also *Air Canada (Re)*, [2004] O.J. No. 1909 at para. 6, Representatives Book of Authorities at Tab 5; *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 92 O.R. (3d) 513 at para. 62, Representatives Book of Authorities at Tab 6.

**B. The proposed appeal is not *prima facie* meritorious**

15. There is no sound basis upon which to assert a violation of the *Charter*. Section 7 of the Charter does not protect economic interests. There can be no violation of section 7 when the only assertion relied upon by the LTD Objectors is a failure of the Plan to provide them with a greater share of the Canadian Estate than their fellow creditors.
16. Similarly, section 15 of the *Charter* protects the right to equal treatment and the right not to be discriminated against. Even if the *Charter* were to apply in this case, it is extremely unlikely that a violation of section 15 could ever be made out. The LTD Beneficiaries, including the LTD Objectors, will receive the same proportionate share of the Canadian Estate as every other creditor, many of whom are similarly vulnerable. The LTD Beneficiaries will receive a significant dividend from the Canadian Estate, and when combined with previous recoveries from the Nortel Health and Welfare Trust, the LTD Beneficiaries will receive a recovery of approximately 66-70 percent on their losses.
17. It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment.<sup>15</sup>
18. Further, the CCAA Judge was correct in holding that issue estoppel prevented the reconsideration of the Employee Agreement and Settlement Approval Order seven years after it was unsuccessfully appealed by a group which included the same two LTD Objectors. Issue estoppel is a sound legal principle the application of which is important in ensuring that matters that have been determined, implemented and acted upon are not later subject to revision. The Employee Agreement and Settlement Approval Order has been relied upon, actions taken and amounts paid out in accordance with its terms. It is simply not possible nor should it be permissible to revisit or revise its effect.

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<sup>15</sup> *Nortel Networks Corp. (Re)*, 2014 ONSC 5274 at para. 12, aff'd 2015 ONCA 681, leave to appeal to SCC refused 2016 CarswellOnt 7202, Monitor's Book of Authorities at Tab 17; See also *Shoppers Trust Corp. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 at para. 25, Representatives Book of Authorities at Tab 7, *Indalex Ltd. (Re)*, [2009] O.J. No. 3165 at para. 16, Representatives Book of Authorities at Tab 8.

19. The merit of the proposed appeal is an appropriate focus of leave to appeal applications and where, as here, there is no merit at all to the claims of the applicant, the leave application must fail. As this Court recognized:

[i]f the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many other factors might support the granting of leave to appeal ... The court need address the other matters relevant to the exercise of its discretion on a leave to appeal application only if the applicant demonstrates that the appeal has *prima facie* merit.<sup>16</sup>

20. The Representatives submit that the proposed appeal must be denied as there is no possibility of success. Representative Counsel has raised all tenable arguments on behalf of LTD Beneficiaries throughout the *CCAA* proceedings, and it is inappropriate for the LTD Objectors to require Representative Counsel to raise frivolous arguments that have no application here.
21. Further, specific measures were taken throughout the *CCAA* proceedings to address some of the hardship imposed by the cuts and loss of benefits to LTD Beneficiaries and other former employees, surviving spouses and their beneficiaries. The Representatives and Representative Counsel have worked with the Monitor and the Canadian Debtors to devise and implement those measures, and communicate with former employees, LTD Beneficiaries, pensioners, surviving spouses and their beneficiaries, providing them with benefits, advice and information, and assisting them in a variety of ways.<sup>17</sup>
22. The LTD Objectors are subject to the LTD Representation Order, cannot opt out at this late stage, and should not be permitted to do so in order to pursue frivolous arguments that will only deplete the Canadian Estate and delay distributions.

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<sup>16</sup> *Ravelston Corp. (Re)*, 2007 ONCA 268 at para. 12, Representatives Book of Authorities at Tab 9; See e.g. *Hemosol, supra*, at para. 9, Representatives Book of Authorities at Tab 2; *ROI, supra*, 2012 ONCA 10, at paras. 8, 12, Representatives Book of Authorities at Tab 1; *Timminco, supra*, Monitor's Book of Authorities at Tab 4; *CanaSea PetroGas Group Holdings Limited (Re)*, 2014 ONCA 824 at para. 19, Representatives Book of Authorities at Tab 10; *Sino-Forest Corporation (Re)*, 2013 ONCA 456 at para. 13, Representatives Book of Authorities at Tab 11.

<sup>17</sup> One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017 at para. 108, Monitor's Motion Record at Tab 8.

**C. The issue on appeal is not significant to the insolvency practice**

23. While the LTD Objectors have raised arguments which, in a sense, can be seen as both novel and controversial, those arguments are specious and have no reasonable chance of success. Further, the *Charter* has no application to this dispute and the resolution of this appeal cannot be said in any reasonable way to have any significance to the practice of insolvency law.

**D. The appeal will hinder the progress of the CCAA proceedings**

24. It is incontrovertible that the proposed appeal will hinder the final resolution of the CCAA proceedings and delay distributions to creditors.
25. The Nortel CCAA proceedings are now in their eighth year. As this court has recognized in previously denying leave to appeal in these proceedings, the parties have been encouraged to resolve their differences time and time again, including by the Third Circuit Court of Appeals and Former Chief Justice Winkler.<sup>18</sup> Having achieved a resolution after years of effort, no statement rings truer than that "a further appeal proceeding in Canada would achieve nothing but more delay, greater expense and an erosion of creditor recoveries."<sup>19</sup>
26. The Nortel CCAA proceedings are now in their eighth year. As recognized by the CCAA Judge in sanctioning the Plan "except for the two LTD Objectors, all other LTD Beneficiaries, in excess of 300 in number, accept [the] equal treatment [under the Plan]".<sup>20</sup> Additionally, more than 99% of creditors voted in favour of the Plan and "this overwhelming number of creditors cannot be ignored as they are the only persons affected by the Plan."<sup>21</sup>

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<sup>18</sup> *Nortel Networks Corp. (Re)*, 2016 ONCA 332 at para. 98-99, Monitor's Book of Authorities at Tab 1.

<sup>19</sup> *Ibid* at para. 102.

<sup>20</sup> Sanction Decision at para. 33, Monitor's Motion Record at Tab 1.

<sup>21</sup> Sanction Decision at para. 33, Monitor's Motion Record at Tab 1; See also *Olympia, supra*, at paras. 36-37, Representatives Book of Authorities at Tab 4.

27. While the Representatives sympathize with the financial hardship suffered by all of the LTD Beneficiaries, the Representatives and those who they represent have all suffered losses in the Nortel CCAA proceedings to varying degrees and are on the cusp of finally receiving a significant distribution. Only this motion stands in the way. The Representatives respectfully submit that the proposed appeal should be dismissed as it is frivolous, has no significance to the practice and depletes the assets of the Canadian Estate further and causes unwarranted delay.

**PART IV – ADDITIONAL ISSUES**

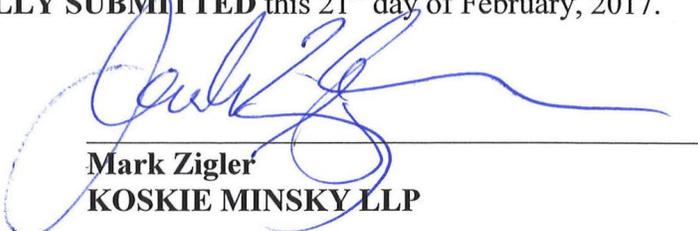
28. The Representatives raise no additional issues.

**PART V – ORDERS REQUESTED**

29. The Representatives respectfully request that this motion for leave to appeal be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of February, 2017.

February 21, 2017



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**Mark Zigler**  
**KOSKIE MINSKY LLP**

Lawyers for the Canadian Former Employees and  
Disabled Employees through their court appointed  
Representatives

**SCHEDULE 'A'**  
**LIST OF AUTHORITIES**

1. *Air Canada (Re)*, [2004] O.J. No. 1909.
2. *CanaSea PetroGas Group Holdings Limited (Re)*, 2014 ONCA 824.
3. *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573.
4. *Hemosol Corp. (Re)*, 2007 ONCA 124.
5. *Homburg Invest Inc. (Re)*, 2012 QCCA 665.
6. *Indalex Ltd. (Re)*, [2009] O.J. No. 3165.
7. *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 92 O.R. (3d) 513.
8. *Nortel Networks Corp. (Re)*, 2013 ONCA 518.
9. *Nortel Networks Corp. (Re)*, 2014 ONSC 5274.
10. *Nortel Networks Corp. (Re)*, 2016 ONCA 332.
11. *Nortel Networks Corp. (Re)*, 2017 ONSC 700.
12. *Olympia & York Developments Ltd. (Re)*, [1993] O.J. No. 545.
13. *Ravelston Corp. (Re)*, 2007 ONCA 268.
14. *ROI Fund Inc. v. Gandi Innovations Ltd.*, 2012 ONCA 10.
15. *Shoppers Trust Corp. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652.
16. *Sino-Forest Corporation (Re)*, 2013 ONCA 456.
17. *Timminco Limited (Re)*, 2012 ONCA 552.

**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.

*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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
NORTEL NETWORKS CORPORATION, et. al.

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**RESPONDING FACTUM OF THE COURT  
APPOINTED REPRESENTATIVES OF THE  
FORMER AND DISABLED EMPLOYEES OF  
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(MOTION FOR LEAVE TO APPEAL BY THE  
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