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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

GREG JOSEPH MCAVOY, JENNIFER HOLLEY

APPELLANTS

-and-

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

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

RESPONDENTS

NOTICE OF MOTION FOR LEAVE TO APPEAL

THE MOVING PARTIES, Greg McAvoy and Jennifer Holley, Nortel long term disabled former employees, will make a motion to a judge of the Court of Appeal for Ontario, on a date to be fixed by the Registrar, at the Osgoode Hall, 130 Queen Street West, Toronto , Ontario.

PROPOSED METHOD OF HEARING: The motion will be heard in writing.
THE MOTION IS FOR AN ORDER:

1. granting Greg McAvoy and Jennifer Holley leave to appeal to the Court of Appeal the Canadian Escrow Release Order of Honourable Mr. Justice Newbould made January 24, 2017, pursuant to the *Companies' Creditors Arrangement Act* CCAA`);

2. expediting the hearing of this leave motion and the hearing of the appeal if leave is granted;

3. such further and other relief as this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. Errors in law pertaining to no S. 7 and S. 15(1) Charter violations.

2. The "void ab initio doctrine" applies to an unconstitutional law.

3. The preconditions of issue estoppel are not met at the standard of correctness.

4. No weight given to the injustice and special circumstances for not applying issue estoppel to the Charter violations.

5. Courts have held that technical amendments may be made.

6. No standing back and taking into account the entirety of the circumstances to correct injustice and to avoid bringing disrepute to the court.

A. ERRORS IN LAW PERTAINING TO NO S. 7 AND S. 15(1) CHARTER VIOLATIONS

J. Newbould has made an error in his **Nortel Certification Endorsement January 30 2017**[1] Pt[28] on his use of ***Siemens v. Manitoba (Attorney General)***[2] to support that the Nortel disabled do not have a violation of S. 7 of the Charter because their economic rights are not protected by the Charter.

> [28] What the LTD Objectors seek is to have the allocation proceeds re-allocated by providing that 100% of the claims of the LTD Beneficiaries will be paid from the Sale Proceeds at the expense of all other claimants. This involves their economic interests which are not protected by section 7 of the *Charter*. In *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R 6 Justice Major for the Court stated:
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> > 45 The appellants also submitted thats. 16 of the VL T Act vio lates their right under s. 7 of the Charter to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's Charter jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66:
> > ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

The **Greg McAvoy and Jennifer Holley submission** (the appellant's submission to the OSCJ) at Pt 24 refers to the1989 *Irwin Toy* SCC case that distinguishes between commercial economic rights not protected by the Charter and personal economic rights, where the SCC is open to a case on the loss of economic rights for persons as a violation of 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.

[1] *Re Nortel Networks Corporation et al*, 2017 ONSC 700
[2] *Siemens v. Manitoba (Attorney General)*, [2003] 1 SCR 6, 2003 SCC 3

Irwin Toy[3]

> 282 …What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in **that section.**

The appellants in ***Siemens v. Manitoba (Attorney General*** owned a commercial entity that lost purely economic rights and so this decision was consistent with the Irwin Toy case that commercial economic rights do not have the protection of the Charter, but it is not determinative of persons losing economic rights not having a violation of S. 7.

Siemens v. Manitoba (Attorney General):

> **4.** The appellants, David and Eloisa Siemens, are the sole shareholders of Sie-Cor Properties Inc., which purchased The Winkler Inn in 1993. They invested a considerable amount of money in the renovation and expansion of the Inn, and submitted that VLTs were an important consideration when making their investment.
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> 45. The appellants also submitted that s. 16 of the *VLT Act* violates their right under s. 7 of the *Charter* to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's *Charter* jurisprudence makes clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil(City)*, [1997] 3 S.C.R. 844, at para. 66:
>
> . . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence…
>
> In the present case, the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.
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> 48. … Viewed in the context of that plebiscite, I am not convinced that any reasonable resident of Winkler would feel that he or she has been marginalized, devalued or ignored as a member of Canadian society (see *Law*, *supra*, at para. 53). There is no harm to dignity, and no violation of s. 15(1).

[3] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, CanLII 87 (SCC) P. 282

Greg McAvoy and Jennifer Holley's deep compromise of their disability insurance contract entered into with Nortel, is not purely a deprivation of their "economic interests," as the contract can properly be characterized as fundamentally or inherently personal such that, by its very nature, it implicates basic choices going to the core of what it means to enjoy individual dignity and independence." When Greg McAvoy and Jennifer Holley took the step of buying additional disability insurance from Nortel to raise their coverage from 50% to 70% of their working income prior to disability, this decision was a "fundamental life choice," so the two parameters for a Charter S. 7 violation set out in ***Siemens v. Manitoba (Attorney General)*** are met. Both Greg McAvoy and Jennifer Holley knew that if they did not personally choose to buy additional disability insurance from Nortel, their loss of working income upon disability would mean they could not enjoy individual dignity and independence and that they would be marginalized, devalued or ignored as a member of Canadian society and would have harm to their dignity.

Furthermore, J. Newbould did not refute any of the cases and expert reports presented in Pts 24, 25, 27, 33 and 34 in Greg McAvoy and Jennifer Holley's submission that support the premise that a violation of S. 7 has occurred in the circumstances of this case.

- ***Baker***[4]
- ***Slaight***[5]
- **International Covenant on Economic, Social and Cultural Rights**(ICESC)
- **United Nations Convention on the Rights of Persons with Disabilities** (UNRPD)
- ***Irwin Toy***
- ***Gosselin***[6]**.**
- **Law Commission of Ontario - Charter of Rights and Freedoms, 2016**
- ***Vriend***[7]
- ***Rodriquez***[8]

The deep compromise of Nortel's disability income in the Nortel Plan has caused S. 7 deprivation of life, liberty and security, as noted in Pts 23 and 24 of the appellants' submission to the lower court:

> 23. The Supreme Court has also already decided in ***Baker*** and ***Slaight*** that its interpretation of S. 7 deprivation of rights to life, liberty and security needs to be consistent with international human rights documents ratified by the Federal Government, such as the **International Covenant on Economic, Social and Cultural Rights** and **United Nations Convention on the Rights of Persons with Disabilities.** Both of these international human rights documents ratified by Canada state that States Parties must recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing.

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[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, CanLII 699 (SCC) P. 69, 70
[5] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, 1989 CanLII 92 (SCC)
[6] *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429, CanLII 84 (SCC) P. 18, 81
7 *Vriend v. Alberta*, [1998] 1 SCR 493, [1998] CanLII 816 (SCC) P. 146, 176
[8] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, CanLII 75 (SCC)

24. The LTD having their S. 7 Charter rights violated is not founded on the Charter imposing a positive obligation on the government to provide for a minimum standard of living to enable life, liberty and security. It is based on the government not making laws (or judges not using discretion enabled within laws) that result in the deprivation of life, liberty and security, as distinguished in Gosselin.

J. Newbould made an error in Pts 32, 33 and 35 by not having any SCC cases to support his decision that pari passu treatment of creditors in insolvency law does not violate S. 15(1) of the Charter.

> [32] Section 15 of the *Charter* provides:
> 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.
> [33] In this case, it cannot be said that the LTD Objectors are being deprived of these section 15 rights because of discrimination based on physical disability. They are being treated like all creditors of Nortel. All unsecured creditors, be they bondholders, trade creditors, pensioners or LTD Beneficiaries, will receive the same *pari passu* treatment under the Plan. They are treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is the fundamental tenet of insolvency law. Except for the two LTD Objectors, all other LTD Beneficiaries, in excess of 300 in number, accept this equal treatment.
> [35] In the circumstances, I cannot find any breach of section 15 of the *Charter*.

Furthermore, he did not refute any of the cases and expert reports presented in Pts 20, 21, 22 and 23 in Greg McAvoy and Jennifer Holley's submission that support the premise that a violation of S. 15(1) has occurred because equal treatment does provide for substantive equality for an expressly protected group in the Charter, persons with mental or physical disability.

- ***Eldridge***[9].
- **Law Commission of Ontario - Charter of Rights and Freedoms, 2016**
- ***Gosselin***[10]**.**
- ***Granovsky***[11]**,**
- **Bruce Porter, 20 Years of Equality Rights- Reclaiming Expectations, 2002**

J. Newbould did not address Greg McAvoy and Jennifer Holley's submission Pts 28, 29, 30, 31 and 32 that there is failure of the SCC ***Oaks***[12] and ***Big M Drug Mart***[13] tests for a S. 1 limitation of Charter rights demonstrably justified in a free and democratic society to further the purpose of the CCAA.

The Factum of the Court Monitor and Canadian debtors is simply incorrect at Pt 86 saying "the very purpose of the statute whose constitutionality is not challenged – the pari passu treatment of creditors." 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. Furthermore, Pt 30 of the appellant's submission shows that "pari passu" is not

[9] Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624, 1997 CanLII 327 (SCC) P. 61
[10] Gosselin v. Québec (Attorney General), [2002] 4 SCR 429, CanLII 84 (SCC) P. 18, 81
[11] Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703,CanLII 28 (SCC) P. 30
[12] *R. v. Oakes*, [1986] 1 SCR 103, [1986] CanLII 46 (SCC) P. 64, 69, 70, 71
[13] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) P. 139, 163

included in the SCC ***Century***[14] decision that provides a comprehensive description of the CCAA purpose.

> 30. The CCAA judge's use of discretion under the CCAA to approve the Nortel Plan does not meet the tests in the SCC *Oakes* decision. The first central criteria of the Oakes test passes as the SCC ***Century*** decision confirms there are important objectives for the CCAA to avoid the social and economic costs of liquidating a debtor's assets and paying its debts from the proceeds according to the BIA's priority rules. Restructuring or reorganization of the corporation with a court bound compromise of creditor claims is considered a way to avoid the social and economic costs of liquidation. This 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.

B. THE "VOID AB INITIO DOCTRINE" APPLIES TO AN UNCONSTITUTIONAL LAW

J. Newbould's decision accepts that his sanctioning of the Nortel Plan may be subject to the Charter in Pt 25. This means that if the judge's use of discretion enabled in the CCAA is found by the Court of Appeal to be unconstitutional under S. 52 due to persons of mental or physical disability having violations of their S. 7 and/or S. 15(1) rights without a demonstrably justified S. 1 limitation of Charter rights to serve the purpose of the CCAA, then this use of discretion is of no force or effect.

> [25] In this case, the proceedings are being taken under the CCAA and the discretionary power of a court to sanction a plan is contained in section 6 of that statute. While it is not strictly necessary for me to decide whether the Charter applies to such an order in light of the view that I take of the section 7 and 15 rights asserted by the LTD Objectors, I accept that any order I make to sanction the Plan may be subject to the Charter.

Section 52 of the Charter is clear about an unconstitutional law having no force or effect.

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

In Pt 26 of J. Newbould's decision, he uses his discretion under common law to apply issue estoppel. This circumvents his obligation as a judge not to use his discretion under the CCAA to violate disabled Charter rights because this aspect of the CCAA is unconstitutional.

> [26] There is another issue, however, regarding the right of the LTD Objectors to raise a *Charter* challenge. They were represented by competent counsel in 20 I 0 on the motion to approve the Employee Settlement Agreement. They did not raise any *Charter* challenge to that agreement before Morawetz J. or in the Court of Appeal on their application to appeal from the Settlement Approval Order made by Morawetz J. So far as the LTD benefits are concerned, the Plan merely contains the provisions for them in the Employee Settlement Agreement. Issue estoppel prevents the LTD Objectors from now raising a *Charter* challenge to those provisions.

The "void ab initio doctrine" applies to any law inconsistent with a country's Constitution. The unconstitutional law is deemed to be void from the later of the date of the law's enactment and the date of the enactment of the Constitution. The Charter of Rights and Freedoms is the supreme law of Canada and it should supersede the use of discretion to apply issue estoppel

[14] Century Services Inc. v. Canada (Attorney General), [2010] 3 SCR 379, CanLII 60 (SC C) P. 12, 17, 18

under common law. We have found no case precedents in Canada on Charter violations and the application of issue estoppel in contravention of the "void ab initio doctrine" for unconstitutional law.

Minott v. O'Shanter Development Company[15] specifically says "If the decision of a court on a Pt of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings." If this appeal is granted because J. Newbould erred in not finding disabled Charter violations in the Nortel Plan, then this point of law was also wrong in the earlier proceeding on the Revised Interim Settlement Agreement in March 2010.

> … my view the court has always retained discretion to refuse to apply issue estoppel when to do so would cause unfairness or work an injustice. As Lord Upjohn observed in Carl Zeiss Stiftung v. Rayner Keeler Ltd., [1967] 1 A.C. 853 at p. 947, [1966] 2 All E.R. 536, "[a]ll estoppels are not odious but must be applied so as to work justice and not injustice.
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> That the courts have always exercised this discretion is apparent from the authorities... If the decision of a court on a Pt of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings.

C. THE PRECONDITIONS OF ISSUE ESTOPPEL ARE NOT MET AT THE STANDARD OF CORRECTNESS

J. Newbould's use of his discretion to apply issue estoppel in the circumstances of this case fails to meet the preconditions of issue estoppel on the standard of correctness as defined in ***Ratnasingam v. Canada (Public Safety and Emergency Preparedness)***[16]

> [13] Accordingly, in the case at bar, the issue of whether the IAD erred in concluding that the preconditions of issue estoppel were not met will be reviewed on a standard of correctness. However, the question of whether the IAD erred in exercising its discretion to find that there was no abuse of process is entitled to greater deference and will be reviewed on a standard of patent unreasonableness.

The preconditions (1) and (3) for issue estoppel defined in ***Angle v. M.N.R.***[17] are not met and so the standard of correctness for application of issue estoppel is not met.

> Lord Guest in Carl Zeiss Stiftung v. Rayner & Keeler Ltd (N o. 2) , at p . 935 , defined the requirements of issue estoppel as:
> . . . (1) that the same question has been decided ; (2) that the judicial decision which is said to create the estoppel was final ; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . .

In respect to requirement (1), t**he March 30, 2010 Revised Interim Settlement Agreement court order**[18] did not adjudicate and decide the issue of whether the judge's use of discretion under the CCAA is constitutional or not.

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[15] *Minott v. O'Shanter Development Company Ltd., 1999 CanLII 3686 (ON CA)*
[16] *Ratnasingam v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1096
[17] *Angle v. M.N.R.*, [1975] 2 SCR 248, 1974 CanLII 168 (SCC)
[18] *Nortel Networks Corporation (Re)*, [2010] ONSC, March 31, 2010 P. C2

This is not a claim that the debtor, other creditors or Sue Kennedy, as private players, are violating the Charter and must pay damages for doing so under S. 24 (1) to the disabled creditors. A S. 52 Charter violation does not call for an individual remedy from private parties like S. 24(1) does. The S. 52 violation assertion simply means that the judge's use of discretion under the CCAA to sanction the Plan is unconstitutional and therefore is of no force or effect.

Schachter v. Canada[19] says:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.

The conundrum for the private players in a CCAA proceeding can only be resolved by the Nortel debtors and creditors presenting a Plan without disabled Charter violations so that the CCAA judge can use his discretion to sanction it because his use of discretion under the CCAA would then be constitutional.

The Revised Interim Settlement Agreement and the Nortel Plan are private agreements between Nortel and the court-appointed representative, Sue Kennedy, whose representation order authorizes her to make decisions on behalf of the disabled group. However, a representation order that gives Sue Kennedy the right to impose Charter violations for one, two, many or all of the members of the disabled group cannot be sustained by the CCAA judge, whose decisions must always be in compliance with the Charter. Surely, the CCAA judge's making of a representation order inherently presumes that Sue Kennedy's authority to bind individual disabled persons to a settlement, is limited by his own obligation to only use his discretion to approve CCAA settlements that do not violate disabled Charter rights for even just one member of the disabled group Sue Kennedy was court appointed to represent.

No vote was held on the Revised Interim Settlement Agreement, and no vote of individual disabled persons was held on the Nortel Plan, but in any case, the CCAA's majority voting rules cannot supersede the Charter protection for expressed minorities, like the persons with mental or physical disability, who are expressly identified in the Charter because of their vulnerability and history of abuse.

In respect to the requirement (3), the parties to the March 30, 2010 revised interim settlement are the debtors and creditor groups. The parties in respect to the current claim of unconstitutional law under S. 52(1) are Greg McAvoy and Jennifer Holley and the CCAA judge, who is a government actor subject to the Charter (J. Newbould agreed he was subject to the Charter in Pt 26.)

[19] *Schachter v. Canada*, [1992] 2 S.C.R. 679

D. NO WEIGHT GIVEN TO THE INJUSTICE AND SPECIAL CIRCUMSTANCES FOR NOT APPLYING ISSUE ESTOPPEL TO THE CHARTER VIOLATIONS

Even had the three requirements of issue estoppel been met, the court always retains discretion to refuse to apply issue estoppel when to do so would cause an injustice. The courts have often refused to apply issue estoppel in "special circumstances." J. Newbould did not give any weight to the arguments of injustice and special circumstances provided in the appellants' submission Pt 41. The following three authorities describe the need for case-by-case review of special circumstances that warrant the judge not using his discretion to apply issue estoppel.

Penner v. Niagara (Regional Police Services Board)[20]

> The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met.
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> The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings.

Danyluk v. Ainsworth Technologies Inc.[21]

> The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier decision was final; and (3) that the parties to or their privies are the same in both proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.
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> .

Apotex Inc. v. Merck & Co.[22]

> [30] The jurisprudence is unclear as to what factors will, in principle, constitute special circumstances. Recent jurisprudence from the Supreme Court of Canada, however, has affirmed that a discretion is vested in the Court as to the application of issue estoppel. This discretion is restricted where the estoppel arises from a final decision of a competent Court (*Danyluk, supra*, at paragraph 62; *General Motors of Canada Ltd. v. Naken et al.*, 1983 CanLII 19 (SCC), [1983] 1 S.C.R. 72, at pages 100-101). In determining whether justice will be done between the parties, the Court must as a final and most important factor, stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice (*Danyluk, supra*, at paragraph 80). It follows that any special circumstances which would give rise to an injustice would, at the least, make the Court reluctant to apply the estoppel.

The prior proceeding for the approval of the Revised Interim Settlement Agreement was an injustice for the reasons presented in Pt 41 of Greg McAvoy and Jennifer Holley's submissions, and particularly for the reasons of the Monitor and Court denying evidence disclosure for proper

[20] *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, 2013 SCC 19
[21] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44 (CanLII)
[22] *Apotex Inc. v. Merck & Co., [2003] 1 FCR 243, 2002 FCA 210*

assessment of the Revised Interim Settlement Agreement discussed in Pt 40 iv) b); and, the court discerning between constructive fraud said to be covered in the Revised Interim Settlement Agreement legal release, and actual fraud having no prospects for success without any evidence before it as discussed in Pt 41 iv) c).

E. COURTS HAVE HELD THAT TECHNICAL AMENDMENTS MAY BE MADE

The Court Representative's Factum at Pt 37 says:

> Section 6(2) of the *CCAA* provides that the court may order amendments to a Plan of Compromise and Arrangement to reflect any changes that may lawfully be made under federal or provincial law.
>
> Courts have held that technical amendments to a plan may be made but not changes of substance.

The appellants' submission Pts 2 and 3 support the premise that what is needed for the CCAA judge to use his discretion to approve the Plan without him violating disabled Charter rights is a technical amendment due to the de minimis amount of money involved in the necessary adjustment to the Plan.

> 2. The requested adjustment is Cdn$44 million more for full payment of the Nortel LTD income and medical and dental claims (assuming the CCAA cash ratio is 45%). This is just 0.8% of the expected Nortel Canada estate of Cdn$5.7 billion.
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> 3. The incremental Cdn$44 million requested for the LTD could be placed in a reserve account, in order to allow the Nortel Plan's allocation and distribution of cash, less the Cdn$44 million reserve account, be paid to all creditors by April 2017 as currently intended. The court would then, if necessary, have greater time to consider the grounds for the order to make an adjustment and reconsideration as requested in this submission.

F. NO STANDING BACK AND TAKING INTO ACCOUNT THE ENTIRETY OF THE CIRCUMSTANCES

J. Morawetz deciding that the Revised Interim Settlement Agreement was fair and reasonable, and the Court of Appeal's general procedure to refuse a Leave to Appeal on CCAA orders to give deference to the CCAA judge's need to be expeditious to avoid a liquidation, do not validate there was no injustice to individual disabled persons, who are deprived of substantive equality in Canadian society and deprived of adequate income for housing, food and clothing and essential medicines. Equal treatment of creditors, consultations with many but not all mentally and physically disabled persons, a vote from just one court-appointed representative, and silence or acquiescence from weak and ill-informed persons with mental or physical disability should not be the court's deemed criteria for fairness in the face of unmitigated facts on severely reduced disability income for the Nortel disabled provided by financial expert Diane Urquhart.

The Charter's express protection of Canadians with mental or physical disability, **Rule 7.08(4) of the Rules of Civil Procedure for the Ontario Courts,** trust law, and evidence based decision-making are all safeguards within the legal system to protect vulnerable disabled persons. We urge the Court of Appeal of Ontario to make a statement in this decision on the Nortel Plan that all the judges of Ontario and all the lawyers in Ontario representing disabled persons exhibit greater knowledge and due diligence on the Charter, Rule 7.08(4) and trust law applicable to

disabled persons and that they vigorously apply the protections provided in these laws for this vulnerable minority group in Canadian society.

New laws were not required to serve the best interests of the Nortel disabled in this case. This is a case where Koskie Minksy LLP, the lawyers court appointed to represent disabled persons negligently did not exert the rights of persons with mental or physical disabilities in the Charter, Rule 7.08(4) and trust law right from the beginning. The court representative, Sue Kennedy, was unfortunately not in a position of expertise, emotional strength or good health to question the advice given to her by court appointed counsel. Koskie Minsky LLP had plenty of self-interest to not oppose the positions of the Court Monitor and the Canadian debtors who paid it an undisclosed amount as part of the $51 million paid to the group of professional firms hired to work for the pensioners, severed and LTD employees.

The opposing law firm Rochon Genova LLP, representing the dissenting LTD at the March 3 to 5, 2010 hearing of the Revised Interim Settlement Agreement, was retained on February 25, 2010, just 5 business days after the Monitor released incomplete HWT disclosures on Feb. 18, 2010 and with only three business days to prepare for the hearing. The Monitor denied evidence on the material facts prior to this hearing and the CCAA judge denied a request for discovery of evidence to properly prepare its case. Later after evidence was finally released by the CCAA Monitor, J. Perell decided there was a tenable case of constructive fraud, but litigation of it was summarily dismissed on his view that J. Morawetz knew there was constructive fraud, when he approved 9 months of benefits as compensation for the release of constructive fraud and other explicitly provided causes of action in the legal release. J. Morawetz was said to know about constructive fraud despite the Monitor denying evidence on the material facts and he denying an adjournment for discovery of evidence at the time.

The entirety of the circumstances brings disrepute to the court system and this is possibly the most important reason why the Court of Appeal of Ontario should approve this appeal and refuse the application of issue estoppel to the appellants' claim of Charter violations.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Notice of Intention to Appear and Submission for Anticipated January 24, 2017 Fairness Hearing to Sanction the Nortel CCAA Plan from Greg McAvoy and Jennifer Holley.
2. The affidavit of financial expert, Diane Urquhart, filed by Greg McAvoy and Jennifer Holley on the motion before Justice Newbould on January 24, 2017.
3. Factum of the Court Appointed Representatives and Book of Authorities of the Court Appointed Representatives, January 22, 2017,
4. Factum of the Monitor and Canadian Debtors and Book of Authorities of the Monitor and Canadian Debtors, January 22, 2017.
5. Nortel Certification Endorsement January 30, 2017.

Date: February 14, 2017

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

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

Self-Represented

To: Service List

COURT OF APPEAL OF ONTARIO
Proceeding commenced at Toronto

NOTICE OF MOTION
(Leave to Appeal of J. Newbould Decision January 24, 2017)

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