Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

FACTUM OF THE MONITOR AND CANADIAN DEBTORS

(Motion for Plan Sanction and Canadian Escrow Release Order)

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PART I – INTRODUCTION

1. This factum is filed in support of the Monitor[1] and Canadian Debtors' motion for an Order (the "**Plan Sanction Order**") sanctioning the Canadian Debtors' Plan of Compromise and Arrangement dated November 30, 2016 (the "**Plan**") and an order authorizing and directing the release of the escrowed Sale Proceeds to the Canadian Debtors, U.S. Debtors and EMEA Debtors in the manner contemplated by the Settlement and Support Agreement.

2. The Plan is consistent with, and gives effect to, the Settlement and Support Agreement entered into in October 2016 among the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors and the major stakeholder groups involved in the Nortel insolvency proceedings,

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan or the One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017 (the "**One Hundred and Thirty Fifth Report**"). Unless otherwise specified, monetary amounts contained herein are expressed in U.S. dollars.

and, together with the concurrently filed U.S. Plans also contemplated by the Settlement and Support Agreement, achieves the substantive resolution of the global Nortel insolvency proceedings, including the release of more than $4.1 billion to the Canadian Estate for distribution to its creditors and the resolution of most significant unresolved claims against the Canadian Debtors.

3. At the Creditors' Meeting held on January 17, 2017, Affected Unsecured Creditors voting in person or by proxy voted overwhelmingly – indeed almost unanimously – to approve the Plan, both by number and value.

4. At a high level, the Plan: (i) effectuates the Settlement and Support Agreement, including the resolution of the Allocation Dispute and various claims set forth therein; (ii) substantively consolidates the assets and liabilities of the Canadian Debtors into a single Canadian Estate; (iii) provides for payment of certain established priority claims; (iv) provides for *pro rata* distributions to Affected Unsecured Creditors from Available Cash of the Canadian Estate; and (v) releases and discharges the Canadian Debtors, their former Directors and Officers, and the Monitor from all claims. These features are all appropriate in the circumstances, consistent with applicable law (including prior Orders made in these CCAA Proceedings) and necessary to the successful implementation of the Plan and the Settlement and Support Agreement.

5. The sanction of the Plan is also required as a condition to the Settlement and Support Agreement, which, among other things, sets out a timeline for the development and approval of coordinated Canadian and U.S. plans of arrangement and implementation of the Settlement and Support Agreement, including a joint hearing on January 24, 2017, for the

purpose of sanctioning and confirming the Canadian and U.S. Plans under the applicable tests in each jurisdiction.

6. In addition to sanctioning the Plan, the Sanction Order and the related Canadian Escrow Release Order sought by the Monitor and Canadian Debtors on this motion also approves the Settlement and Support Agreement, authorizes and directs the release of Sale Proceeds in the manner contemplated by the Settlement and Support Agreement, extends the stay of proceedings under the CCAA indefinitely, and provides for certain relief in respect of the reserves to be established in respect of certain Unresolved Affected Unsecured Claims that have been asserted on an unliquidated basis or in an otherwise uncertain amount. The Monitor and Canadian Debtors submit that all of these heads of relief are fair, reasonable and necessary in the circumstances, will allow the Plan to be implemented in accordance with its terms in an expeditious and efficient manner, and will allow for maximum distributions to be made to holders of Proven Affected Unsecured Claims as soon as possible.

7. In presenting the Plan for sanction, the Monitor and Canadian Debtors are cognizant that the outcomes achieved through the Plan and the Settlement and Support Agreement, while significantly better than what could otherwise have been the case, will still leave Affected Unsecured Creditors, including certain vulnerable stakeholder groups, with significantly less than full recovery on their claims.

8. The reality of a shortfall and a compromise have been apparent to all stakeholders from the earliest days of this case and are a function of Nortel's global insolvency. Implementation of the Plan and the Settlement and Support Agreement and the prompt distribution of money to creditors is the best means of ameliorating the hardship that has been felt by many of the Canadian Debtors creditors over the past eight years.

9. For these and the other reasons that follow, the Monitor and Canadian Debtors respectfully submit that this Court should exercise its discretion to sanction the Plan, thus allowing for the coordinated implementation of the Canadian and U.S. Plans and the Settlement and Support Agreement to proceed for the benefit of all stakeholders.

PART II – FACTS

10. The facts relevant to this motion, including the procedural history of this case, are more fully set out in the One Hundred and Thirty Fifth Report and the One Hundred and Thirty Third Report of the Monitor dated November 23, 2016 (the "**One Hundred and Thirty Third Report**").

(A) The Settlement and Support Agreement

11. As this Court is aware, the Canadian Debtors, along with the U.S. Debtors, EMEA Debtors, and certain of their respective key stakeholder groups are party to protracted litigation in the Canadian and U.S. Courts regarding the allocation of Sale Proceeds. Following a 21-day cross-border trial, this Court and the U.S. Bankruptcy Court issued their respective decisions with respect to the Allocation Dispute in May 2015 (as defined in the Settlement and Support Agreement, the "**Allocation Decisions**"). The Allocation Decisions remain subject to appeal in both the U.S. and Canada.

12. Following extensive negotiation, on October 12, 2016, the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors, EMEA Non-filed Entities, Joint Administrators, NNSA Conflicts Administrator, French Liquidator, Bondholder Group, the members of the CCC, the UCC, the U.K. Pension Trustee, the PPF, the Joint Liquidators and the NNCC Bondholder

Signatories executed the Settlement and Support Agreement. The Settlement and Support Agreement, among other things:

(a) contains the terms of settlement of the Allocation Dispute, including the payment of 57.1065% of the Sale Proceeds to the Canadian Debtors (being in excess of $4.1 billion), plus an additional amount of $35 million on account of the M&A Cost Reimbursement;

(b) resolves a number of significant claims against the Canadian Debtors, including the claims of the Crossover Bondholders, the UKPI and the Canadian Pension Claims;

(c) contemplates the substantive consolidation of the Canadian Debtors into the Canadian Estate;

(d) provides that the Canadian Estate will retain the value of its remaining assets, which means, among other things, the release to the Canadian Estate of approximately $237 million from the Canada Only Sales and additional amounts held on account of IP address sales;

(e) provides for the exchange of comprehensive releases among the Estates and the other parties to the Settlement and Support Agreement; and

(f) contains the framework for the development and implementation of coordinated plans of arrangement in Canada and the U.S., and a timeline for the approval and implementation thereof. [2]

13. Should the Plan and U.S. Plans be sanctioned, pending the satisfaction of applicable conditions precedent, the Settlement and Support Agreement will become fully effective on February 15, 2017.[3]

(B) Overview of Plan

14. The Plan provides for a comprehensive resolution of these CCAA Proceedings and implementation of the Settlement and Support Agreement and paves the way for distributions to creditors in a timely manner. The Plan provides for, among other things, the following:

(a) substantive consolidation of the Canadian Debtors into the Canadian Estate;

(b) the payment in full of certain Proven Priority Claims and other payments contemplated by the Plan;

(c) a compromise of all Affected Unsecured Claims in exchange for a *pro rata* distribution of the cash assets of the Canadian Estate available for distribution to Affected Unsecured Creditors, and the full and final release and discharge of all Affected Claims;

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[2] One Hundred and Thirty Fifth Report at paras. 15 - 19 (Motion Record, Tab 2, p. 15 - 19).

[3] One Hundred and Thirty Third Report at para. 18 (Motion Record, Tab 3, p. 519).

(d) the subordination of Equity Claims such that Equity Claimants and holders of Equity Interests will not receive a distribution or other recovery under the Plan;

(e) authorization for the Canadian Debtors and Monitor to direct the Escrow Agents to effect the allocation and distribution of the Sale Proceeds contemplated by the Settlement and Support Agreement and to otherwise implement the Settlement and Support Agreement, including the giving and receiving of the Settlement and Support Agreement Releases;

(f) release of all amounts held by NNL pursuant to the Canadian Only Sale Proceeds Orders or held as Unavailable Cash to the Canadian Estate;

(g) the establishment of certain reserves for the ongoing administration of the Canadian Estate and in respect of Unresolved Claims; and

(h) the release and discharge of all Affected Claims and Released Claims as against, among others, the Canadian Debtors, the Directors and Officers and the Monitor.[4]

15. The Plan is consistent with a prior order of this Court in that it provides that no Post-Filing Date Interest will be included in any claims provable under the Plan and no distributions will be made on account of Post-Filing Date Interest.[5]

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[4] One Hundred and Thirty Fifth Report at para. 21 (Motion Record, Tab 2, p. 19 - 20).

[5] One Hundred and Thirty Fifth Report at para. 30 (Motion Record, Tab 2, p. 23).

(C) Meeting of Creditors

16. On December 1, 2016, this Court issued the Meeting Order which, among other things, accepted the filing of the Plan and authorized the Monitor to call and hold a meeting of Affected Unsecured Creditors to consider and vote on the Plan.

17. Notification of the meeting was given in the manner prescribed by the Meeting Order.[6]

18. The Creditors' Meeting was held on January 17, 2017.

19. The Plan was approved by an overwhelming majority of Affected Unsecured Creditors voting at the meeting in person or by proxy, with 99.97% in number and 99.24% in value voting to approve the Plan.[7]

(D) Substantive Consolidation

20. The consolidation of the Canadian Debtors into a single estate is fundamental to the implementation of the Settlement and Support Agreement and the Plan, both of which are prefaced on the substantive consolidation of the Canadian Debtors into the Canadian Estate.

21. This Court has previously made findings of fact regarding the highly integrated nature of the Nortel group of companies and their business operations, including as set forth in its Reasons for Judgment in respect of the Allocation Dispute dated May 12, 2015:

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6 One Hundred and Thirty Fifth Report at paras. 48 - 50 (Motion Record, Tab 2, p. 28 - 30).

7 One Hundred and Thirty Fifth Report at paras. 55 - 63 (Motion Record, Tab 2, p. 31 - 33).

(a) "The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world";[8]

(b) "Nortel was organized along global product lines and global R&D projects pursuant to a horizontally integrated matrix structure and no one entity or region was able to provide the full line of Nortel products and services. R&D took place in various labs around the world in a collaborative fashion";[9]

(c) "[…] it is clear beyond peradventure that Nortel has had significant difficulty in determining the ownership of its principle assets. […] It is clear that these assets are in the language of Dr. Janis S[a]rra 'so intertwined that it is difficult to separate them for purposes of dealing with different entities'";[10] and

(d) "Moreover, the evidence in this case is clear and uncontested that Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope."[11]

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8 *Nortel Networks Corp., Re*, 2015 ONSC 2987 at para. 16 [*Allocation Decision*], leave to appeal refused 2016 ONCA 332 (Book of Authorities, Tab 1).

9 *Allocation Decision* at para. 202 (Book of Authorities, Tab 1).

10 *Allocation Decision* at para. 222 (Book of Authorities, Tab 1).

11 *Allocation Decision* at para. 223 (Book of Authorities, Tab 1).

22. The highly integrated nature of Nortel's business led to competing positions regarding the ownership of Nortel's assets (in particular its valuable intellectual property) and the proceeds derived therefrom by the individual Nortel legal entities and their respective creditors, and ultimately to years of contested litigation in respect of that issue, which disputes have now been resolved pursuant to the Settlement and Support Agreement.

23. With respect to the Canadian Debtors specifically, many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor. Moreover, many claims filed against the Canadian Debtors were filed against two or more of the Canadian Debtors on the basis of some form of alleged joint and several liability, including approximately $3 billion of former employee and pension related claims. Indeed, the vast majority of claims filed against the Canadian Debtors by quantum were asserted against two or more of the Canadian Debtors. The substantive consolidation of the Canadian Debtors into the Canadian Estate and the elimination of Duplicative Claims obviates the need for the determination of (and potentially litigation in respect of) whether these types of claims are provable against more than one Canadian Debtor.[12]

24. Substantive consolidation is supported by all major creditor constituencies of the Canadian Debtors pursuant to the Settlement and Support Agreement and by the overwhelming majority of creditors who have voted to approve the Plan.

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[12] One Hundred and Thirty Fifth Report at para. 73 (Motion Record, Tab 2, p. 35 - 36).

(E) The Canadian Debtors Have Complied with the CCAA and the Monitor Supports Approval of the Plan

25. The Monitor has been extensively involved in these CCAA Proceedings since they were commenced and has issued 135 reports to this Court outlining the various activities of the Canadian Debtors and the Monitor throughout these CCAA Proceedings.

26. To the best of the knowledge of the Monitor, the Canadian Debtors have complied with all statutory requirements for the sanctioning of a Plan and the prior Orders of this Court and nothing has been done that is not authorized by the CCAA. The Canadian Debtors have also acted in good faith and with due diligence.[13]

27. The Monitor supports the granting of the Sanction Order and the Canadian Escrow Release Order.[14]

(F) Unresolved Claims Reserve

28. The Plan provides for the establishment of an Unresolved Claims Reserve. In the case of Unresolved Affected Unsecured Claims, the amount to be reserved is an amount equal to the amount that would have been paid if the full amount of all Unresolved Affected Unsecured Claims had been Proven Affected Unsecured Claims as of such date, or such lesser amount as may be ordered by the CCAA Court.[15]

29. Certain holders of Unresolved Affected Unsecured Claims have asserted unliquidated claims, and, in certain instances, Creditors have purported to assert liabilities (in,

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[13] One Hundred and Thirty Fifth Report at para. 66 (Motion Record, Tab 2, p. 33).

[14] One Hundred and Thirty Fifth Report at para. 113 (Motion Record, Tab 2, p. 49).

[15] One Hundred and Thirty Fifth Report at para. 78 (Motion Record, Tab 2, p. 37). See also Plan at s. 1.1 "Unresolved Claims Reserve" (Motion Record, Tab 2(a), p. 73).

for instance, pleadings delivered in the context of Claim disputes) against the Canadian Debtors in excess of the amounts set forth in their Proof of Claim or dispute notice (which documents form the basis for the Monitor's reserve calculation and pursuant to which a Creditor was required to specify the amount of its claim or disputed claim, as the case may be).[16]

30. In light of the uncertainty caused by the foregoing with respect to establishing reserve amounts, the proposed form of Sanction Order sought will cap the maximum Proven Affected Unsecured Claim that could be proven in respect of an Unresolved Affected Unsecured Claims specified on Appendix "H" to the One Hundred and Thirty Fifth Report at the corresponding Claim Reserve Amount specified on Appendix "H".

(G) The LTD Rep Order and the Employee Settlement Agreement

31. On January 12, 2017, Joseph Greg McAvoy and Jennifer Holley (collectively, the "**LTD Objectors**"), two former LTD recipients, filed a "Notice of Intention to Appear and Submission for Anticipated January 24, 2017 Fairness Hearing to Sanction the Nortel CCAA Plan". The submission requests that CA$44 million be set aside and paid to the Canadian Debtors' former LTD recipients (the "**LTD Beneficiaries**") in "…full payment of the Nortel LTD income and medical and dental claims…"[17]

32. LTD benefits were funded through the Nortel Health and Welfare Trust (the "**HWT**"). Pursuant to various prior Orders of the Court, substantially all of the assets of the HWT have been distributed to beneficiaries thereof. In the case of LTD Beneficiaries,

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[16] One Hundred and Thirty Fifth Report at para. 80 (Motion Record, Tab 2, p. 37 - 38).

[17] One Hundred and Thirty Fifth Report at para. 103 (Motion Record, Tab 2, p. 45).

distributions from the HWT have satisfied approximately 38% of the LTD obligations owing to them pursuant to the HWT Allocation Order.[18]

33. The LTD Beneficiaries, including the LTD Objectors, are subject to the terms of the Order (Representation Order for Disabled Employees) of this Court dated July 30, 2009 (the "**LTD Rep Order**"). Pursuant to the LTD Rep Order:

(a) The LTD Rep was appointed as representative of the LTD Beneficiaries in the CCAA Proceedings, including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the CCAA Proceedings;

(b) LTD Beneficiaries had the option to "opt-out" from the LTD Rep Order in accordance with its terms. Neither of the LTD Objectors (or any other LTD Beneficiary) elected to opt-out in accordance with the terms of the LTD Rep Order;

(c) In 2010, certain of the Canadian Debtors, the Monitor, the Representatives (including the LTD Rep) and Representative Counsel entered into an Amended and Restated Settlement Agreement dated March 30, 2010 (the "**Employee Settlement Agreement**") which was approved by this Court in its Settlement Approval Order dated March 31, 2010 (the "**Settlement Approval Order**");

(d) Pursuant to the Employee Settlement Agreement and the Settlement Approval Order:

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[18] One Hundred and Thirty Fifth Report at para. 105 (Motion Record, Tab 2, p. 46).

(i) the Canadian Debtors agreed to continue paying LTD benefits to LTD Beneficiaries for the remainder of 2010;

(ii) the Canadian Debtors agreed to establish a CA$4.3 million fund pursuant to which CA$3,000 termination payments were made to former employees, including the LTD Objectors;

(iii) claims of LTD Beneficiaries were agreed to rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(iv) the Representatives (including the LTD Rep) agreed, 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 in these CCAA Proceedings or in any subsequent receivership or bankruptcy proceedings (among other situations) they would not advance, assert or make any claim that any HWT claims are entitled to any priority or preferential treatment over ordinary unsecured claims and that to the extent allowed against the Canadian Debtors, such HWT claims would rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors;

(v) the Representatives (including the LTD Rep) agreed on their own behalf and on behalf of the Pension HWT Claimants (as defined in the Employee Settlement Agreement) that under no circumstances shall any CCAA plan be proposed or approved if, among other things, the Pension HWT

Claimants and the other ordinary unsecured creditors of the Canadian Debtors do not receive the same *pari passu* treatment of their allowed ordinary unsecured claims against the Canadian Debtors pursuant to the Plan; and

(vi) certain LTD Beneficiaries, including the individual LTD Objectors, sought leave to appeal the Settlement Approval Order, which leave to appeal was denied by the Ontario Court of Appeal such that the Settlement Approval Order is no longer subject to or capable of appeal.[19]

PART III – ISSUES AND LAW

34. The main issue for this motion is whether this Court should approve the Plan as fair and reasonable in the circumstances.

35. Section 6 of the applicable version of the CCAA provides that the Court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double-majority vote. The effect of the Court's approval is to bind the debtor companies and their creditors:

> 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 or 5, or either of those sections, agree to any compromise or arrangement either as proposed or altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

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[19] One Hundred and Thirty Fifth Report at para. 109 (Motion Record, Tab 2, p. 47 - 49). See also: (i) LTD Rep Order at paras. 3 and 9 (Motion Record, Tab 2(j), p. 473 - 474); (ii) Settlement Approval Order at paras. 10, 11 and 18 (Motion Record, Tab 2(k), p. 483 - 484, 486 - 487); and (iii) Settlement Approval Order, Schedule "A" – Employee Settlement Agreement at paras. B. 5., C. 2. and H. 1. (Motion Record, Tab 2(k), p 492 - 494 and 497).

> (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.

36. The general requirements for Court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.[20]

(A) Compliance with all Statutory Requirements

37. *Canadian Airlines Corp., Re*, provides that in assessing whether a debtor company has complied with statutory requirements, the court will enquire as to whether:

(a) the applicant comes within the definition of a "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of CA$5 million;

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[20] *Canadian Airlines Corp., Re*, 2000 ABQB 442 at para. 60, leave to appeal refused 2000 ABCA 238, leave to appeal refused [2001] S.C.C.A. No. 60 (SCC) [*Canadian Airlines*] (Book of Authorities, Tab 2); *Cline Mining Corp., Re*, 2015 ONSC 622 at para. 19 (Book of Authorities, Tab 3).

(c) the notice calling the meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double-majority of creditors.[21]

38. The Monitor and Canadian Debtors submit that each of these requirements has been satisfied in this case:

(a) In granting the Initial Order dated January 14, 2009 (as amended and restated from time to time), this Court found that each of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation is a "debtor company" to which the CCAA applies;[22]

(b) In granting the New Applicants Order dated March 18, 2016, this Court declared that each of Nortel Communications Inc., Architel Systems Corporation, and Northern Telecom Canada Limited were companies to which the CCAA applies;[23]

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[21] *Canadian Airlines, supra* at para. 62 (Book of Authorities, Tab 2).

[22] *Nortel Networks Corp., Re*, [2009] O.J. No. 154 (ONSC [Commercial List]) at para. 36 (Book of Authorities, Tab 4).

[23] *Nortel Communications Inc., Re*, 2016 CarswellOnt 4213 (ONSC [Commercial List]) at para. 4 (Book of Authorities, Tab 5).

(c) The extensive notification requirements contemplated by the Meeting Order in connection with the Meeting were duly completed;[24]

(d) In granting the Meeting Order, this Court approved the classification of Affected Unsecured Creditors into a single class, being the Affected Unsecured Creditors Class.[25] There was no opposition to this classification raised at the Meeting Order motion, and the Meeting Order was not appealed;

(e) The Meeting was properly constituted, and voting was carried out in accordance with the Meeting Order;[26] and

(f) 99.97% in number representing 99.24% in value of the Affected Unsecured Creditors that were present and voting in person or by proxy at the Meeting voted in favour of the Plan, which exceeds the double majority required by section 6 of the CCAA.[27]

(i) No Distribution for Equity Claims under Plan

39. Although the pre-amendment version of the CCAA applicable to these proceedings does not contain the statutory requirement in section 6(8) of the current CCAA which prohibits any payment in respect of equity claims until all non-equity claims are paid in full, the Plan conforms to this standard, which is consistent with the pre-amendment common law applicable to these proceedings. Specifically, section 2.5 of the Plan provides that Equity

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[24] One Hundred and Thirty Fifth Report at paras. 48 - 50 (Motion Record, Tab 2, p. 28 - 30).

[25] Meeting Order at para. 10 (Motion Record, Tab 2(c), p. 348).

[26] One Hundred and Thirty Fifth Report at paras. 55 - 63 (Motion Record, Tab 2, p. 31 - 33).

[27] One Hundred and Thirty Fifth Report at para. 59 (Motion Record, Tab 2, p. 32).

Claimants and holders of Equity Interests shall not receive a distribution or other consideration under the Plan.

40. The 2009 amendments to the CCAA codified the treatment of equity claims,[28] incorporating and clarifying their historical subordinated treatment.[29] Even prior to being explicitly subordinated by section 6(8), courts treated equity claims as ranking below the claims of creditors,[30] and the policy of pre-amendment federal insolvency law was clear that shareholders did not have the right to look to the assets of the corporation until creditors had been paid in full.[31]

41. The subordination of Equity Claimants under the Plan is consistent with the pre-amendment common law treatment of equity claims, and also meets the requirements under section 6(8) of the current CCAA.

(ii) Section 18.2 Not Applicable and Required Crown Payments Satisfied in any Event

42. This Court has not made an order under CCAA subsection 11.4(1) in these proceedings, and therefore the requirements relating to certain Crown claims under section 18.2 of the pre-amendment CCAA do not apply. In any event, there are no amounts owing of the type

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[28] *Sino-Forest Corp., Re,* 2012 ONCA 816 at para. 30 [*Sino-Forest*] (Book of Authorities, Tab 6).

[29] *Nelson Financial Group Ltd.*, 2010 ONSC 6229 at paras. 25 and 27 [*Nelson Financial*] (Book of Authorities, Tab 7); see also *Return on Innovation Capital Ltd. v Gandi Innovations Ltd.*, 2011 ONSC 5018 (Ont SCJ [Commercial List]) at para. 55, leave to appeal refused 2012 ONCA 10 (Book of Authorities, Tab 8).

[30] *U.S. Steel Canada, Re,* 2016 ONCA 662 at para. 96 (Book of Authorities, Tab 9) and *Sino-Forest, supra* at para. 30 (Book of Authorities, Tab 6); see also *Nelson Financial, supra* at para. 25 (Book of Authorities, Tab 7) and *Central Capital Corp., Re,* [1996] O.J. No. 359 (ONCA) at paras. 67 and 90 [*Central Capital*] (Book of Authorities, Tab 10).

[31] *Central Capital, supra* at para. 90 (Book of Authorities, Tab 10).

contemplated under subsections 18.2(a), (b), or (c) of the CCAA, all of which (as applicable) were required to be paid pursuant to the Initial Order.[32]

43. Accordingly, the Monitor and Canadian Debtors submit that the statutory and common law prerequisites to the sanctioning of the Plan are satisfied.

(B) No Unauthorized Steps taken by Canadian Debtors

44. In determining whether anything has been done (or is purported to have been done) that is not authorized by the CCAA, *Re Canadian Airlines Corp*. provides that the court "must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan."[33]

45. These CCAA Proceedings, as well as the related insolvency proceedings in the U.S. and United Kingdom, have been highly publicized and highly scrutinized throughout, with active stakeholder participation and Court oversight. To date, the Monitor has submitted 135 reports and this Court has issued some 273 orders throughout the course of the proceedings. There has been no suggestion anything has been done that is contrary to the CCAA, and the Monitor (who has acted with expanded powers since very early in the case) has stated that, to the best of its knowledge, the Canadian Debtors have complied with all statutory requirements for the sanctioning of a Plan and the prior orders of this Court and nothing has been done that is not authorized by the CCAA.[34]

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[32] See Initial Order, para. 8.

[33] *Canadian Airlines, supra* at para. 64 (Book of Authorities, Tab 2).

[34] One Hundred and Thirty Fifth Report at para. 66 (Motion Record, Tab 2, p. 33).

46. The Settlement and Support Agreement and the Plan, which follow on extensive cross-border litigation and numerous prior attempts at settlement, represent a major milestone in these proceedings by resolving the Allocation Dispute and a number of contentious claims and other matters, and providing a framework for the resolution of these prolonged insolvency proceedings.

47. The fact that the Settlement and Support Agreement and the Plan are supported by all key stakeholders (including those who have found little common ground in these proceedings to date) and by virtually all other creditors of the Canadian Debtors is further proof that the Plan is consistent with the spirit (and letter) of the CCAA.

(C) The Plan is Fair and Reasonable in the Circumstances

48. *Re Canadian Airlines Corp.* posits that "fairness" and "reasonableness" are "necessarily shaped by the unique circumstances of each case, within the context of the CCAA."[35] When considering whether a plan of arrangement is fair and reasonable, a CCAA court will consider the relative degrees of prejudice that would flow from granting or denying the sanction request, and whether the proposed plan represents a fair balancing of interests, in light of other available commercial alternatives (if any).[36]

49. Other factors commonly considered by a CCAA court on a plan sanction motion include:

(a) whether the claims were properly classified, and whether the requisite double majority of creditors approved the proposed plan;

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[35] *Canadian Airlines, supra* at para. 94 (Book of Authorities, Tab 2).

[36] *Canadian Airlines, supra* at paras. 3 and 145 (Book of Authorities, Tab 2).

(b) what creditors would likely receive on bankruptcy or liquidation as compared to the proposed plan;

(c) any commercially viable alternatives to the proposed plan;

(d) whether there is any oppression of the rights of creditors;

(e) whether there is any unfairness to shareholders; and

(f) the public interest.[37]

50. The Monitor and Canadian Debtors submit that each of these factors supports the Court's approval of the Plan as fair and reasonable in the circumstances of this case.

(i) Classification and Creditor Approval

51. As set out above, a single class of Affected Unsecured Creditors voted on the Plan at the Meeting. The creditors comprising the Affected Unsecured Creditors Class share a commonality of interest with respect to the Canadian Debtors because they each hold an unsecured claim against one or more of the Canadian Debtors. The Plan was approved by the requisite double-majority of creditors by an overwhelming margin. *Re Canadian Airlines Corp.* notes that creditor approval creates an inference that a plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the proposed plan.[38] The Settlement and Support Agreement shows that the Plan is the result of negotiation and dialogue among the major stakeholder groups.

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[37] *Canadian Airlines, supra* at para. 96 (Book of Authorities, Tab 2).

[38] *Canadian Airlines, supra* at para. 97 (Book of Authorities, Tab 2).

(ii) Recovery on Bankruptcy

52. The case is a liquidating CCAA and the Plan is consistent with the priorities established under the *Bankruptcy and Insolvency Act*[39] in that it provides for payment in full of Proven Priority Claims, and *pro rata* distributions to holders of Proven Affected Unsecured Claims. No better outcome could be obtained by any Affected Creditor pursuant to a BIA liquidation.

(iii) No Viable Alternatives to Plan

53. The Plan and the Settlement and Support Agreement are the result of extensive negotiations among the major stakeholder groups in these CCAA Proceedings, following on years of litigation and failed settlement efforts. In the absence of the Plan and the Settlement and Support Agreement being implemented, the most likely result is that parties will resume the Allocation Dispute and other outstanding litigation. There will be no monies released from the lock box accounts and no distributions will be made to any Canadian creditors in the foreseeable future.[40] In the circumstances, there is simply no basis to assert there is any better or more viable option available to the Canadian Debtors and their creditors.

(iv) No Oppression of Creditors

54. The Plan respects the rights and priorities of Affected Creditors, and does not oppress any creditor rights.

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[39] R.S.C. 1985, c. B-3, as amended [*BIA*].

[40] One Hundred and Thirty Fifth Report at paras. 69 - 70 (Motion Record, Tab 2, p. 34).

55. Here, the Plan provides for the payment in full of a relatively small class of Proven Priority Claims ($62.7 million to NNI and CA$3,000 to a limited number of former employees) that have already been established as secured or priority claims pursuant to prior Orders of this Court. In addition, the Plan contemplates a $77.5 million payment to NNI pursuant to the Settlement and Support Agreement in settlement of (among others things) any obligations arising under a host of side letters entered into between the Canadian Debtors and U.S. Debtors after the Filing Date relating to the sharing of transaction costs and related liabilities and as part of the comprehensive and integrated settlement contemplated by the Settlement and Support Agreement.

56. Each of these claims is appropriately afforded a priority at law and, in the case of the $77.5 million payment to NNI, also represents a component of the Settlement and Support Agreement.

57. Beyond these few priority payments based on priority legal entitlement, all Affected Unsecured Creditors of the Canadian Debtors – which represents virtually all of the Canadian Debtors' creditors – will share rateably in distributions under the Plan consistent with the bedrock *pari passu* principle of insolvency law.[41]

58. Further submissions regarding the request of the LTD Objectors and the relative fairness of the Plan to them are set forth beginning at paragraph 61.

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[41] *Nortel Networks Corp., Re*, 2014 ONSC 5274 at paras. 12 – 14 [*Nortel Post-Filing Interest Decision*], affirmed 2015 ONCA 681, leave to appeal refused 2016 CarswellOnt 7202 (SCC) (Book of Authorities, Tab 11), citing *Indalex Ltd., Re*, [2009] O.J. No. 3165 (ONSC [Commercial List]) at para. 16 (Book of Authorities, Tab 12) and *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.*, [2005] O.J. No. 1081 (ONCA) at para. 25 [*Shoppers Trust Co.*] (Book of Authorities, Tab 13).

(v) No Unfairness to Shareholders

59. Given that Affected Unsecured Creditors are not being paid in full, there is no unfairness in shareholders receiving no recoveries under the Plan.[42]

(vi) Public Interest Favours Approval of Plan

60. It is in the public interest for these long running insolvency proceeding to be resolved and distributions made to Affected Unsecured Creditors, including LTD Beneficiaries, former employees, pensioners and financial and trade creditors, all of whom have been waiting for more than eight years to be paid. Approval of the Plan creates a path for that to occur promptly.

(D) Response to Submissions of the LTD Objectors

(i) The Plan is Fair and Reasonable to LTD Beneficiaries

61. The LTD Objectors have stated that the Plan is unfair and unreasonable for LTD Beneficiaries and have requested that CA$44 million be set aside and paid to the LTD Beneficiaries in full satisfaction of amounts owing to them.

62. While the Monitor and Canadian Debtors are sympathetic to the circumstances of the LTD Beneficiaries – and have supported various initiatives, such as the Hardship Fund, that have sought to ameliorate the significant impacts Nortel's insolvency has had on them and other vulnerable stakeholders – they respectfully submit that the Plan is fair and reasonable and the request of the LTD Objectors should be denied.

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[42] See the discussion and cases cited at paragraphs 39 to 41 hereof.

63. At its core, the LTD Objectors' complaint is that their need is greater than other creditors. But as stated by Morawetz J. (as he then was) in addressing the wind-up and distribution of the HWT to its various beneficiaries, including LTD Beneficiaries, former employees and pensioners, allocation of funds in an insolvency is a function of entitlements, not needs:

> As I have indicated above, there is no question that the impact of the shortfall in the HWT is significant. This was made clear in the written Record, as well as in the statements made by certain Dissenting LTD Beneficiaries at the hearing. However, the effects of the shortfall are not limited to the Dissenting LTD Beneficiaries and affect all LTD Beneficiaries and Pensioner Life claimants. ***The relative hardship for each claimant may differ, but, in my view, the allocation of the HWT corpus has to be based on entitlement and not on relative need.***[43] [emphasis added]

64. The Plan is consistent with fundamental principles of insolvency law and prior orders of this Court (discussed below) in confirming that 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.

(ii) The LTD Objectors are Precluded from Seeking Priority Treatment

65. The treatment of the LTD Beneficiaries pursuant to the Plan is also fair and reasonable as: (i) the LTD Beneficiaries, including the LTD Objectors, are bound to support the Plan and Settlement and Support Agreement; and (ii) the LTD Beneficiaries, including the LTD

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[43] *Nortel Networks Corp., Re*, 2010 ONSC 5584 at para. 110, leave to appeal denied 2011 ONCA 10, leave to appeal denied [2011] S.C.C.A. No. 124 (SCC) (Book of Authorities, Tab 14).

Objectors, are bound by the prior court approved Employee Settlement Agreement and the related Settlement Approval Order which have already established that the claims of LTD Beneficiaries will rank as unsecured claims under any plan in these proceedings. The treatment of the LTD Objectors under the Plan is consistent with these prior contractual agreements and Court approvals, which are accepted measures of fairness and reasonableness.

(iii) LTD Objectors Bound by LTD Rep Order and Settlement and Support Agreement

66. In 2009, the LTD Rep was appointed as representative of the LTD Beneficiaries pursuant to the LTD Rep Order, "…including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the Proceedings."[44] Pursuant to the LTD Rep Order, LTD Beneficiaries had the option to opt-out of representation by the LTD Rep within 30 days of mailing of notice of the LTD Rep Order to them in mid-2009.[45] Neither of the LTD Objectors (or any other LTD Beneficiary) elected to opt out of representation by the LTD Rep pursuant to the terms of the LTD Rep Order and thus are bound by it and the actions of the LTD Rep.[46] An attempt to opt out now, some 7.5 years after the fact, is not permissible.[47]

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[44] One Hundred and Thirty Fifth Report at para. 106 (Motion Record, Tab 2, p. 46). See also LTD Rep Order at para. 3 (Motion Record, Tab 2(j), p. 473).

[45] LTD Rep Order at para. 9 (Motion Record, Tab 2(j), p. 474).

[46] One Hundred and Thirty Fifth Report at para. 106(b) (Motion Record, Tab 2, p. 46). In his Endorsement regarding the Employee Settlement Agreement, Morawetz J. (as he then was) confirmed "It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf": *Re Nortel Networks Corp.*, 2010 ONSC 1708 at para. 59 (Book of Authorities, Tab 15) [*Employee Settlement Motion 1*]. Note that Morawetz J. originally declined to approve a prior version of the Employee Settlement Agreement based on a provision relating to future legislative amendment to the BIA (the so-called "Clause H.2") that he found created uncertainty which potentially undermined the finality of the settlement. Morawetz J. subsequently approved the Employee Settlement Agreement as amended to remove that provision. See: *Nortel Networks Corp., Re*, 2010 ONSC 1977 at paras. 5, 7 and 40 [*Employee Settlement Motion 2*], leave to appeal denied 2010 ONCA 402 (Book of Authorities, Tab 16).

[47] *Urlin Rent a Car Ltd. v. Furukawa Electric Co.*, 2016 ONSC 7965 at para. 22 (Book of Authorities, Tab 17).

67. The LTD Rep is a signatory to the Settlement and Support Agreement, which she executed pursuant to the LTD Rep Order for and on behalf of the LTD Beneficiaries.[48] As such, pursuant to the LTD Rep Order, the LTD Beneficiaries, including the LTD Objectors, are bound to support and not oppose the Plan which was arrived at with substantial input from all of the Representatives.[49]

(iv) The Employee Settlement Agreement and Settlement Approval Order Conclusively Resolved the Ranking of the Claims of the LTD Beneficiaries

68. Moreover, the Plan and the *pari passu* treatment of the LTD Beneficiaries thereunder merely gives effect to matters that were settled and approved by order of this Court *nearly seven years ago*.

69. On March 31, 2010, Morawetz J. (as he then was) granted the Settlement Approval Order approving the Employee Settlement Agreement. The Employee Settlement Agreement (including the Settlement Approval Order) is a comprehensive settlement negotiated among Representative Counsel (in consultation with the Representatives, including the LTD Rep), the Monitor and numerous other stakeholders that addressed a host of employee-related issues, including the period of time during which the Canadian Debtors would continue to fund pension and other employee and former employee benefits and pursuant to which a CA$4.3

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[48] Plan, Exhibit "A" - Settlement and Support Agreement, signature page of Susan Kennedy (Motion Record, Tab 2(a), p. 187).

[49] See, for instance: Plan, Exhibit "A" - Settlement and Support Agreement at paras. 6(h)(i) and 6(h)(iii)(B) (Motion Record, Tab 2(a), p. 143 - 144).

million fund used to pay CA$3,000 priority termination payments to former employees was established.[50]

70. In exchange, the Representatives, including the LTD Rep, provided (among other things) definitive confirmation on behalf of those they represent that the employee, benefit and pension related obligations of the Canadian Debtors, including LTD benefits funded through the HWT, would rank as ordinary unsecured claims that would share *pari passu* with the claims of the Canadian Debtors other unsecured creditors, including pursuant to any plan. In addition, it was agreed that any priority claim for such benefits was released.

71. Specifically, pursuant to the Employee Settlement Agreement:

> C. 2. 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 […] 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*** […] ***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***. [emphasis added][51]
>
> H. 1. ***The Representatives agree on their own behalf and on behalf of the Pension HWT Claimants that under no circumstances shall any***

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[50] One Hundred and Thirty Fifth Report at para. 109 (Motion Record, Tab 2, p. 47). See also Settlement Approval Order, Schedule "A" – Employee Settlement Agreement, at para. B (Motion Record, Tab 2(k), p. 491 - 493).

[51] Settlement Approval Order, Schedule "A" – Employee Settlement Agreement, at para. C. 2. (Motion Record, Tab 2(k), p. 493 - 494). See also Settlement Approval Order, Schedule "A" – Employee Settlement Agreement at para. B. 5. where it was confirmed that, for greater certainty, the claims of LTD Beneficiaries (including but not limited to claims for future lost long term disability or income continuation benefits, pension benefits or pension benefit accruals, and medical, dental and life insurance benefits) shall rank as ordinary unsecured claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of the Canadian Debtors (Motion Record, Tab 2(k), p. 492 - 493).

> ***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***. [emphasis added][52]
>
> G. 2. The CAW, ***the LTD Representative*** and the Former Employees Representatives ***agree on their own behalf and on behalf of the Pension HWT Claimants 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 law, or in equity, or otherwise in any jurisdiction) ***that the Pension Claims and the HWT Claims, or any part thereof, rank as 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***. […] [emphasis added] [53]

72. Pursuant to the Settlement Approval Order, this Court granted certain relief confirming the foregoing covenants:

> 10. ***THIS COURT ORDERS AND DECLARES that any HWT Claims made 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 HWT ***shall***, to the extent they are allowed against Nortel pursuant to any claims adjudication procedure established in such proceedings, ***rank as ordinary unsecured claims on a pari passu basis with the claims of ordinary unsecured creditors of Nortel, and no part of any such HWT Claims shall rank as a preferential or priority claim*** or shall be the subject of a constructive trust or trust of any nature or kind.[54] [emphasis added]

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[52] Settlement Approval Order, Schedule "A" – Employee Settlement Agreement at para. H. 1. (Motion Record, Tab 2(k), p. 497).

[53] Forty Second Report of the Monitor dated March 30, 2010, Appendix "B" – Employee Settlement Agreement at para. G.2.

[54] Settlement Approval Order at para. 10 (Motion Record, Tab 2(k), p. 483).

11. ***THIS COURT ORDERS AND DECLARES that no person or entity, including without limitation, the trustee of the HWT, the Employee Claimants and the Representatives, shall***, directly or indirectly (i) advance, assert, re-assert, re-file or ***make any HWT Claim 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 (to the extent that such claims are provable) or the HWT ***except as an ordinary unsecured claim ranking on a pari passu basis with the claims of ordinary unsecured creditors of Nortel, or (ii) advance, assert, re-assert, re-file 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 preferential or priority claims against Nortel*** or any Nortel Worldwide Entity, or are the subject of a constructive trust or trust of any nature or kind, ***and all such claims are hereby forever barred, enjoined, released and extinguished as against Nortel***, any Nortel Worldwide Entity, the HWT and the trustee of the HWT, 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.[55] [emphasis added]

16. ***THIS COURT ORDERS AND DECLARES that the Nortel Releasees be and they 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) ***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 charge, or under any other legal or equitable theory***. […].[56]

18. ***THIS COURT ORDERS AND DECLARES that under no circumstances shall any CCAA Plan of Arrangement in the Nortel proceedings (the "Plan") be proposed or approved by the Court if:*** (i) the Plan provides for separate classification of any Employee Claimants from ordinary unsecured creditors of Nortel, including, without limitation, bondholders and Nortel Networks Inc.; or (ii) ***the Employee Claimants and the other ordinary unsecured creditors do not receive the same pari passu treatment of their allowed claims against Nortel pursuant to the Plan***.[57] [emphasis added]

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55 Settlement Approval Order at para. 11 (Motion Record, Tab 2(k), p. 483 - 484).

56 Settlement Approval Order at para. 16 (Motion Record, Tab 2(k), p. 486).

57 Settlement Approval Order at para. 18 (Motion Record, Tab 2(k), p. 486 - 487).

73. The foregoing agreement and order comprehensively establish that the claims of LTD Beneficiaries are to rank as unsecured claims that share *pari passu* with other unsecured claims against the Canadian Debtors, that any claim for priority treatment was released, and that no plan could be proposed or approved if "Employee Claimants" (including the LTD Beneficiaries) and other unsecured creditors did not receive the same *pari passu* treatment of their allowed claims pursuant to such plan.

74. The Plan prescribes precisely the *pari passu* treatment that the agreement and order require for the LTD Beneficiaries. The LTD Objectors seek an amendment to the Plan that is contrary to the existing agreement and order.

75. The Employee Settlement Agreement was approved after considering the objections of a group of dissenting LTD Beneficiaries (which included the LTD Objectors).[58] This group sought leave to the Ontario Court of Appeal, who in denying leave to appeal found that:

> The moving parties have not demonstrated that they have been subjected to any procedural unfairness. They have been represented throughout in a case that has been carefully judicially managed from the beginning. Their counsel accepts the settlement. No other LTD beneficiaries assert any unfair process, and the applicants can show none that they have been exposed to.
>
> ***Nor have they been able to show any substantive unfairness in the settlement. The motion judge exercised his discretion to carefully balance the various interests at stake in approving the settlement. In our view he made no demonstrable error in doing so. The settlement cannot be said to be unreasonable***.[59] [emphasis added]

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[58] *Employee Settlement Approval Motion 1*, *supra* at para. 49 (Book of Authorities, Tab 15).

[59] *Nortel Networks Corp., Re*, 2010 ONCA 402 at paras. 2 - 3 (Book of Authorities, Tab 16).

76. The Employee Settlement Agreement and the Settlement Approval Order prescribe a treatment for LTD Beneficiaries as unsecured claimants sharing rateably with other unsecured claimants pursuant to any plan in these proceedings. The Plan complies with this. The objection and request of the LTD Objectors cannot be accepted in the face of this.

(v) Reconsideration of the Settlement Approval Order is Unavailable

77. Nor is there any basis, as the LTD Objectors suggest, for the Court to somehow reconsider the Employee Settlement Agreement and the Settlement Approval Order nearly seven years after the fact.

78. This Court recently canvassed the applicable Canadian law regarding a court's narrow jurisdiction to change or amend a judgment before it has been formally drawn up and signed in its Ruling on Reconsideration/Clarification Motion dated July 6, 2015.[60]

79. In the circumstances here, "reconsideration" is sought not only following taking out of the order, but after an unsuccessful attempt to appeal it, and the passage of almost seven years. The Monitor and Canadian Debtors respectfully submit that there is simply no ability for the Court to reconsider the Settlement and Approval Order.

80. Even if there were an ability for the Court to reconsider, the supposed grounds for reconsideration, being the "final" and "certain" realization that the LTD Beneficiaries will suffer a shortfall on their claims, cannot reasonably constitute a ground for reconsideration. The main Canadian Debtors were declared insolvent in 2009, at which point it was readily apparent they may not be able to honour their obligations in full. Indeed, the very fact that the LTD Objectors

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[60] *Nortel Networks Corp., Re*, 2015 ONSC 4170 at paras. 3 - 6 (Book of Authorities, Tab 18).

opposed the Employee Settlement Agreement can only have been motivated by a concern that the treatment of LTD claims as unsecured claims left them exposed to a compromise in the future. With respect to the balance of the grounds asserted for reconsideration, they are simply a repeat of arguments that were raised and rejected at the time.

81. In the circumstances, there is no basis for the Court to reconsider the Settlement Approval Order.

(vi) The LTD Objectors Charter Argument

82. In light of the foregoing it may not be necessary for the Court to consider the *Canadian Charter of Rights and Freedoms* (the "***Charter***") argument of the LTD Objectors.[61] But even if it were considered it leads to no different result.

83. The LTD Objectors claim that this Court in exercising its discretion to sanction the Plan would violate the LTD Beneficiaries' rights under sections 7 and 15 of the *Charter*.

84. The LTD Objectors do not appear to question the constitutional validity or applicability of the CCAA itself or of any common law rule or principle, and have not served a notice of constitutional question under s. 109 of the *Courts of Justice Act*[62], which would be required if they did. This is fundamental. As a general rule, the CCAA – the constitutional validity of which the LTD Objectors must accept – anticipates, as does all of Canada's insolvency legislation, the *pari passu* treatment of creditors based on entitlements. The *pari passu* principle, that "the assets of the insolvent debtor are to be distributed amongst classes of

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[61] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[62] R.S.O. 1990. c. C.43.

creditors rateably and equally, as those assets are found at the date of insolvency" is one of the governing principles of insolvency law.[63]

85. While creditors in a CCAA proceeding maintain the ability to bargain for and agree to different treatment, in the absence of such agreement the *pari passu* principle, prefaced on the BIA, appropriately governs.[64] There is no agreement by creditors to differential treatment in this case. To the contrary, the Employee Settlement Agreement and the Settlement Approval Order mandate equal treatment for all unsecured creditors. The LTD Objectors' proposition that approving a plan under the constitutional CCAA providing for the very *pari passu* treatment that serves as the foundation of Canadian insolvency law would be an unconstitutional exercise of discretion under the CCAA is a contradiction in terms.

86. This is not a case where a broad discretion conferred by statute must be read down to avoid a *Charter* breach; it is a case where the Court's discretion to approve the Plan is being exercised to fulfill the very purpose of the statute whose constitutionality is not challenged – the *pari passu* treatment of creditors.

87. In any event, the additional payment that the LTD Objectors seek relates to their economic rights, which are not protected under the *Charter*. The cases the LTD Objectors cite, such as *Gosselin*[65] and *Eldridge*[66], concern the government's use of public funds, not the

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63 *Nortel Networks Corp., Re*, 2015 ONCA 681 at para. 23 [*Nortel Post-Filing Interest OCA Decision*] (Book of Authorities, Tab 11), citing *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 at para. 20 (S.C.J.) (Book of Authorities, Tab 19); *Shoppers Trust Co., supra* at para. 25 (Book of Authorities, Tab 13).

64 *Nortel Post-Filing Interest OCA Decision, supra* at paras. 23 – 24 (Book of Authorities, Tab 11); *Nortel Post-Filing Interest Decision, supra* at paras. 28 - 31 (Book of Authorities, Tab 11), citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 at paras 23, 24, 47, 54, and 78 (Book of Authorities, Tab 20).

65 *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (Book of Authorities, Tab 21) [*Gosselin*].

66 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (Book of Authorities, Tab 22).

division of a limited pool of assets of insolvent corporate debtors based on the claimants' private contractual or other rights against those debtors. Arguments that the right to security of the person under section 7 create a responsibility for the government to ensure that survival needs are met[67] or that section 15 requires benefits provided by government to be extended in such a way as to enable equal participation by disadvantaged groups, apply to the use of public funds by the government, not to the administration of the insolvent estate of private enterprises. Nor do the cases the LTD Objectors cite, or sections 7 or 15 themselves, imply a *Charter* right for one group of creditors with a set of private contractual rights to be subsidized by another.

88. The LTD Objectors cite no authority for the proposition that the right to equal benefit of the law guaranteed by s. 15 of the *Charter* is infringed by the application of the *pari passu* principle which is fundamental to insolvency legislation. The application of the *pari passu* principle (and its corollary, the interest stops rule) has already resulted in more being available to unsecured creditors such as the LTD Beneficiaries than would have been the case if those principles were not applied and the relative entitlements of creditors affected by, for example, the accrual of post-filing interest.[68]

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[67] The argument has not yet been accepted in any event. In *Gosselin*, *supra*, at para. 80 (Book of Authorities, Tab 21), McLachlin J. (for the majority) held that section 7 of the *Charter* did not create the positive economic right to sufficient social assistance funding to meet basic needs or adequate living standards: "Nothing in the jurisprudence thus far suggests that section 7 [of the *Charter*] places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to *deprive* people of these." See also *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at paras. 45 - 46 (Book of Authorities, Tab 23).

[68] *Nortel Post-Filing Interest Decision*, *supra*, at para. 3 (Book of Authorities, Tab 11).

(E) Substantive Consolidation of the Canadian Estate is Necessary and Appropriate in the Circumstances

89. The consolidation of the Canadian Debtors into a single estate is fundamental to the implementation of the Settlement and Support Agreement and the Plan, both of which are prefaced on the substantive consolidation of the Canadian Debtors into the Canadian Estate.

90. Consolidated plans of arrangement are a common feature of CCAA proceedings.[69] For example, in *Re PSINet Ltd.* a CCAA court approved a consolidated plan because consolidation (i) avoided complex allocation litigation, and (ii) reflected the intertwined nature of the debtor companies' operations:

> The consolidated plan avoids the complex and likely litigious issues surrounding the allocation of the proceeds from the sale of substantially all of the assets of the applicants […] The consolidated plan also reflected the intertwined nature of the applicants and their business operations, which businesses in essence operated as a single business […][70]

91. The court in *PSINet* also considered that a significant majority of voting creditors had voted in favour of a consolidated plan in that case.[71]

92. Several other factors have been recognized as supporting substantial consolidation in prior cases. These factors include: the existence of inter-company debt,[72] the existence of cross-guarantees (i.e. a guarantee by one debtor company of the liabilities of another debtor

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[69] See, generally, Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 527 – 529 (Book of Authorities, Tab 24) and *Allocation Decision*, *supra*, at paras. 213 and 215 - 223 (Book of Authorities, Tab 1).

[70] *PSINet Ltd., Re*, [2002] O.J. No. 1156 (ONSC [Commercial List]) at para. 2 [*PSINet*] (Book of Authorities, Tab 25).

[71] Ibid. at para. 8.

[72] Ibid. at para. 2. See also *Lehndorff General Partner Ltd., Re* (1993), 17 CBR (3d) 24 (Ont Gen Div [Commercial List] at paras. 2 and 4 [*Lehndorff*] (Book of Authorities, Tab 26).

company),[73] and the existence of cross-default provisions.[74] All of these factors are present in these CCAA Proceedings.[75]

93. The Monitor and Canadian Debtors submit that all of the factors identified in the cases are present in the within CCAA Proceedings and support the approval of a consolidated plan.

(i) The Canadian Debtors Were Highly Integrated and Intertwined and Substantive Consolidation Avoids Further Potential Litigation and is Supported by Creditors

94. This Court has already made a number of factual findings, outlined above at paragraph 21, that establish the Nortel Group was a highly integrated and intertwined business.

95. Although made in the context of the Nortel Group as a whole, these findings are equally applicable to the Canadian Debtors, a fact recognized by this Court in its recent endorsement regarding the "Calgary Employee" claim dispute when it adopted its "matrix structure" findings in respect of the Nortel Group as being applicable to the Canadian Debtors.[76]

96. With respect to the Court's prior observation of the presence of intercompany guarantees throughout the Nortel Group, the same is true when considering the Canadian Debtors in isolation. Many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor. Moreover, many claims filed against the Canadian Debtors were filed against two or more of the Canadian Debtors on the basis of some form of

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[73] See *Atlantic Yarns Inc., Re*, 2008 NBQB 144 at paras. 32 and 34 [*Atlantic Yarns*] (Book of Authorities, Tab 27); *Lehndorff, supra*, at para. 2 (Book of Authorities, Tab 26).

[74] *Atlantic Yarns, supra*, at para. 32 (Book of Authorities, Tab 27); *Lehndorff, supra*, at paras. 2 and 4 (Book of Authorities, Tab 26).

[75] See, for instance, *Allocation Decision, supra*, at para. 223 (Book of Authorities, Tab 1).

[76] *Nortel Networks Corp., Re*, 2016 ONSC 6030 at paras. 38 - 40 (Book of Authorities, Tab 28), citing *Allocation Decision, supra* (Book of Authorities, Tab 1).

alleged joint and several liability, including approximately $3 billion of former employee and pension related claims. Indeed, the vast majority of claims filed against the Canadian Debtors by quantum have been asserted against two or more of the Canadian Debtors.[77]

97. The substantive consolidation of the Canadian Debtors into the Canadian Estate and the elimination of Duplicative Claims obviates the need for the determination of (and potentially litigation in respect of) whether these types of claims are provable against more than one Canadian Debtor. Substantive consolidation also eliminates the possibility of any further litigation regarding the specific dollar amount that could be allocated to each Canadian Debtor pursuant to the Allocation Decisions, a distinct possibility in the absence of a consolidated Plan given creditors would be motivated to ring fence allocation entitlements in specific Canadian Debtors.

98. Finally, the appropriateness of substantive consolidation is supported by the virtually unanimous approval of the Plan by Affected Unsecured Creditors.

(ii) Any Prejudice Arising as a Result of Substantive Consolidation is Far Outweighed by the Benefits of the Plan

99. In considering the appropriateness of substantive consolidation, the Court will also consider any prejudice that may arise to individual creditors. In making this assessment, the Court must bear in mind the overall impact of a sanctioned and implemented Plan in this case. As stated in *PSINet*: "While consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect."[78]

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[77] One Hundred and Thirty Fifth Report at para. 73(c) (Motion Record, Tab 2, p. 35).

[78] *PSINet, supra*, at para. 11 (Book of Authorities, Tab 25).

100. The general effect of a sanctioned and implemented Plan in the context of the CCAA Proceedings is the negotiated resolution of the most significant impasse in these proceedings – the Allocation Dispute – and a path forward to distributions to creditors in respect of their proven claims.

101. The Monitor and Canadian Debtors submit that any prejudice to individual creditors arising from substantive consolidation is far outweighed by the positive outcomes generated by the Plan and the Settlement and Support Agreement.

(F) The Capping of the Claims Reserve for Specified Unresolved Affected Unsecured Claims is Fair and Reasonable

102. The Monitor proposes to establish reserves for Unresolved Affected Unsecured Claim consistent with the maximum amount contemplated by the Plan, i.e. the amount that would be required to be paid if the Unresolved Affected Unsecured Claim were subsequently proven in full. This approach is consistent with standard practice in CCAA cases as well as the BIA and cases thereunder.[79] The Monitor has adopted this approach notwithstanding its view that many Unresolved Affected Unsecured Claims are duplicative and have been asserted for amounts far in excess of which they can be proven.

103. However, to avoid any ambiguity regarding the specific reserve amount to be set aside in respect of the Unresolved Affected Unsecured Claims specified on Appendix "H" to the One Hundred and Thirty Fifth Report, the Monitor seeks to "cap" the maximum Proven Affected

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[79] See *Bankruptcy and Insolvency Act*, s. 148(2) and *Re Mohawk Sports Entertainment Ltd.* (1971), 15 C.B.R. (N.S.) 63 (Ont. H.C.) at paras. 9 - 12 (Book of Authorities, Tab 29).

Unsecured Claim that could be proven in respect of such a claim at the corresponding Claim Reserve Amount specified on Appendix "H".[80]

104. In addition to avoiding any ambiguity generally by providing holders of Unresolved Affected Unsecured Claims with notice of their specific Claim Reserve Amount, the relief is required given that, notwithstanding this Court's prior Claims Orders approving forms requiring creditors to specify the specific amount claimed or disputed, certain creditors have asserted unliquidated claims or otherwise evidenced an intention to seek to establish a claim for greater than the amount set forth in their Proof of Claim or dispute notice, as applicable.[81]

105. By granting the relief sought, this Court is merely giving effect to its prior orders and assisting in establishing certainty regarding reserve and claim amounts so that maximum distributions can be made to holders of Proven Affected Unsecured Claims without unnecessary or inappropriate holdbacks. In the respectful submission of the Monitor, the relief sought is fair and reasonable in the circumstances and should be granted.

(G) Plan Releases are Appropriate

106. It is common practice that the debtor company, its directors and officers, and the Monitor and its counsel are released by a plan of arrangement.[82] Further, section 5.1 of the

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[80] Being the liquidated claim amount asserted by the Creditor in its Proof of Claim or dispute notice, as applicable.

[81] See Claims Procedure Order dated July 30, 2009, requiring a Creditor to file a Proof of Claim substantially in the form prescribed, which form specifies the Creditor is to *state the amount* the Canadian Debtor was/were and still is/are indebted to the Creditor (*see* s. 9, s. 3 "Proof of Claim" and Schedule "B"). See also the "Guide to Completing the Proof of Claim Form" (Schedule "C") directing the Creditor to indicate *the amount* the relevant Canadian Debtor was indebted to the Creditor for. Note the Claims Procedure Order was subsequently amended and restated with respect to unrelated points. Similarly, pursuant to the Claims Resolution Order dated September 16, 2010, in response to a Notice of Disallowance (as defined therein) issued by the Monitor, Creditors are obligated to deliver a Dispute Notice (as defined therein) substantially in the form prescribed which requires the Creditor to specify the amount claimed in the dispute (*see* s. 17 and s. 6 "Dispute Notice").

[82] *Canadian Airlines, supra,* at paras. 85 - 93 (Book of Authorities, Tab 2).

applicable CCAA specifically contemplates the release of directors of the debtor company by a plan of arrangement.[83] Accordingly, the releases set out in Section 7 of the Plan in favour of each of the Canadian Debtors, the Directors and Officers, the Monitor and the Monitor's legal counsel, each of whom are (or have been) integrally involved in the CCAA Proceedings, are fair and reasonable, are directly connected to the objectives of the Plan, and assist in bringing finality to these long running proceedings.

107. In addition, the Settlement and Support Agreement Releases and the releases provided for in section 7.4 of the Plan have been agreed to by the relevant parties giving and receiving such releases and are appropriate in the circumstances.

(H) Extension of CCAA Stay is Appropriate

108. The proposed Sanction Order also provides that the stay of proceedings in favour of the Canadian Debtors shall be extended indefinitely, subject to further Order of this Court. Although an initial distribution to creditors is expected in the April 2017 timeframe, as alluded to in Section 10.1 of the Plan, there remains many activities to be completed, including the resolution of Unresolved Claims, the realization of remaining residual assets, the decommissioning of the remaining IT infrastructure, the wind-down and repatriation of funds from the Canadian Debtors' foreign controlled subsidiaries and a further distribution or distributions.

109. The extension of the CCAA stay on an indefinite basis will facilitate the implementation of the Plan, the continuation of these and other restructuring activities and the

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[83] The releases set forth in section 7 of the Plan in favour of the Directors appropriately reflect the limitation on such releases prescribed by Section 5.1(2) of the CCAA. See Plan at s. 7.1(b) (Motion Record, Tab 2(a), p. 95).

making of distributions, and will avoid the cost incurred by the Canadian Estate having to return to the Court to seek periodic stay extensions post-Plan implementation. Pursuant to the Sanction Order, reporting to the Court and stakeholders by the Monitor will occur on no less than an annual basis. Moreover, it will always be open to stakeholders to contact the Monitor with any questions or requests, and to move to the Court on appropriate notice for a modification of the CCAA stay or any other relief which may be appropriately sought. In the circumstances, the Monitor submits that an indefinite extension of the CCAA stay is fair and reasonable and no Creditor will be harmed by such relief.

(I) Canadian Escrow Release Order

110. The Settlement and Support Agreement contemplates each of the U.S. Debtors and Canadian Debtors obtaining Escrow Release Orders from the U.S. Bankruptcy Court and this Court, respectively, authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated by the Settlement and Support Agreement.

111. The Escrow Release Orders: (i) constitute the order required under Section 12(b) of the Interim Funding and Settlement Agreement dated June 9, 2009; and (ii) constitute the orders of the "dispute resolvers" contemplated by the Escrow Agreements to permit and authorize the Escrow Agents to distribute the Sale Proceeds.

112. The Monitor and Canadian Debtors respectfully submit that the granting of the Canadian Escrow Release Order will assist in implementing the Settlement and Support Agreement and the distribution of Sale Proceeds to the Estates contemplated thereby and is appropriate in the circumstances.

PART IV– RELIEF REQUESTED

113. For the reasons set out herein, the Monitor and Canadian Debtors respectfully request that this Court grant the proposed form of Sanction Order and Canadian Escrow Release Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF JANUARY, 2017.

Per: Goodmans LLP

GOODMANS LLP

Lawyers for the Monitor, Ernst & Young Inc.

Per:

GOWLING WLG (CANADA) LLP

Lawyers for the Canadian Debtors

SCHEDULE A - LIST OF AUTHORITIES

1. *Nortel Networks Corporation, Re*, 2015 ONSC 2987, leave to appeal refused 2016 ONCA 332
2. *Canadian Airlines Corp., Re*, 2000 ABQB 442, leave to appeal refused 2000 ABCA 238, leave to appeal refused [2001] S.C.C.A. No. 60 (SCC)
3. *Cline Mining Corp., Re*, 2015 ONSC 622
4. *Nortel Networks Corp., Re*, [2009] O.J. No. 154 (ONSC [Commercial List])
5. *Nortel Communications Inc., Re*, 2016 CarswellOnt 4213 (ONSC [Commercial List])
6. *Sino-Forest Corp., Re*, 2012 ONCA 816
7. *Nelson Financial Group Ltd.*, 2010 ONSC 6229
8. *Return on Innovation Capital Ltd. v Gandi Innovations Ltd.*, 2011 ONSC 5018 (Ont SCJ [Commercial List]), leave to appeal refused 2012 ONCA 10
9. *U.S. Steel Canada, Re*, 2016 ONCA 662
10. *Central Capital Corp., Re*, [1996] O.J. No. 359 (ONCA)
11. *Nortel Networks Corp., Re*, 2014 ONSC 5274, affirmed 2015 ONCA 681, leave to appeal refused 2016 CarswellOnt 7202 (SCC)
12. *Indalex Ltd., Re*, [2009] O.J. No. 3165 (ONSC [Commercial List])
13. *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.*, [2005] O.J. No. 1081 (ONCA)
14. *Nortel Networks Corp., Re*, 2010 ONSC 5584, leave to appeal denied 2011 ONCA 10, leave to appeal denied [2011] S.C.C.A. No. 124 (SCC)
15. *Nortel Networks Corp., Re*, 2010 ONSC 1708
16. *Nortel Networks Corp., Re*, 2010 ONSC 1977, leave to appeal denied 2010 ONCA 402
17. *Urlin Rent a Car Ltd. v. Furukawa Electric Co.*, 2016 ONSC 7965
18. *Nortel Networks Corp., Re*, 2015 ONSC 4170
19. *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.T.C. 486 (S.C.J.)
20. *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60
21. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84
22. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
23. *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6
24. Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013)
25. *PSINet Ltd., Re*, [2002] O.J. No. 1156 (ONSC [Commercial List])
26. *Lehndorff General Partner Ltd., Re* (1993), 17 CBR (3d) 24 (Ont Gen Div [Commercial List])

27. *Atlantic Yarns Inc., Re*, 2008 NBQB 144

28. *Nortel Networks Corp., Re*, 2016 ONSC 6030

29. *Re Mohawk Sports Entertainment Ltd.* (1971), 15 C.B.R. (N.S.) 63 (Ont. H.C.)

SCHEDULE B – STATUTORY REFERENCES

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

Claims against directors — compromise

s. 5.1

(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

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.

Her Majesty affected

s. 11.4 (1)

An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

> (i) the expiration of the order,
>
> (ii) the refusal of a proposed compromise by the creditors or the court,
>
> (iii) six months following the court sanction of a compromise or arrangement,
>
> (iv) the default by the company on any term of a compromise or arrangement, or
>
> (v) the performance of a compromise or arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

> (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

Admission of claims

s. 12(3)

Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

Certain Crown claims

s. 18.2

(1) If an order contains a provision authorized by subsection 11.4(1), unless Her Majesty consents, no compromise or arrangement shall be sanctioned by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a “province providing a comprehensive pension plan” as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

Default of remittance to Crown

(2) Where an order contains a provision authorized by subsection 11.4(1), no compromise or arrangement shall be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (1) that became due after the time of the application for an order under section 11.

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

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.

***BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., 1985, c. B-3**

Trustee to pay dividends as required

s.148

(1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, from time to time as required by the inspectors, declare and distribute dividends among the unsecured creditors entitled thereto.

Disputed claims

(2) Where the validity of any claim has not been determined, the trustee shall retain sufficient funds to provide for payment thereof in the event that the claim is admitted.

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

Notice of constitutional question

s.109

(1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24(1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

THE CONSTITUTION ACT, 1982, being SCHEDULE B TO THE CANADA ACT 1982
(UK), 1982, c 11

Life, liberty and security of person

s.7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality before and under law and equal protection and benefit of law

s.15

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION ET AL.

Court File No.: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE MONITOR AND CANADIAN DEBTORS
(Motion for Plan Sanction and Canadian Escrow Release Order)

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