SCC File No. 37562

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JENNIFER HOLLEY

APPLICANT

-and-

NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INC. AND OTHER U.S. DEBTORS, ERNST & YOUNG INC. IN ITS CAPACITY AS MONITOR, OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF NORTEL NETWORKS INC. ET AL., AD HOC GROUP OF BONDHOLDERS, THE EMEA DEBTORS, CANADIAN FORMER EMPLOYEES AND DISABLED EMPLOYEES COURT APPOINTED REPRESENTATIVES, NORTEL CANADIAN CONTINUING EMPLOYEES COURT APPOINTED REPRESENTATIVES

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RESPONSE OF THE MONITOR AND CANADIAN DEBTORS TO APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

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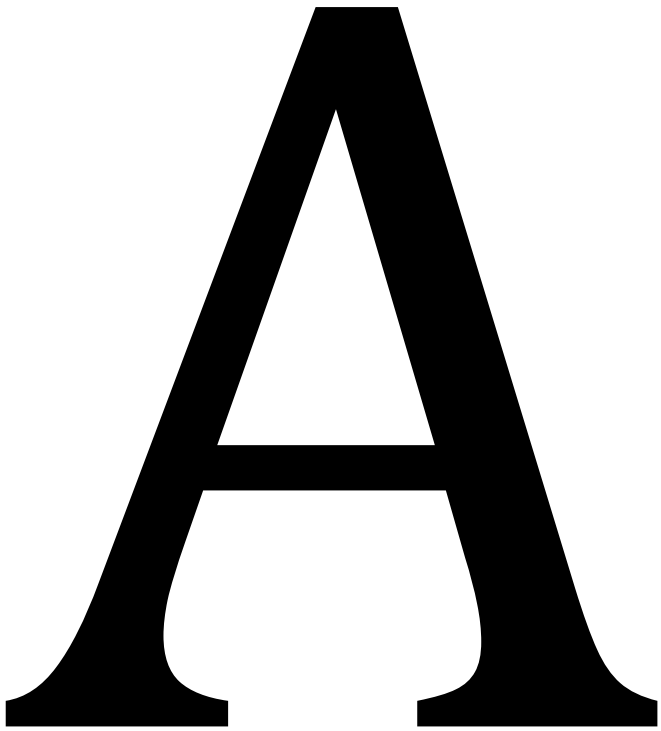

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RESPONDENTS

MEMORANDUM OF ARGUMENT OF THE RESPONDENTS, THE MONITOR AND CANADIAN DEBTORS

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PART I CONCISE OVERVIEW AND STATEMENT OF THE FACTS

A. Overview

1. The Canadian Debtors filed for insolvency protection in January 2009 under the *Companies' Creditors Arrangement Act* ("CCAA").[1] They have over 16,000 creditors. One creditor, Jennifer Holley, seeks leave to appeal from the effect of orders made by the Ontario Superior Court of Justice (the "CCAA Court") in January 2017 which:

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

(b) approved a Plan of Compromise and Arrangement (the "Plan"), supported by over 99% of the creditors, pursuant to which those funds will be distributed on a *pro rata* or *pari passu* basis – that is, rateably and equally based on entitlement – to all unsecured creditors, including employees and pensioners who have been waiting since 2009 for payment; and

(c) provided Ms. Holley with exactly the same *pro rata* or *pari passu* treatment of her claims as all other unsecured creditors receive.

2. The Ontario Court of Appeal denied Ms. Holley's request for leave to appeal to it.

3. By her proposed appeal, Ms. Holley seeks to have herself and a group of creditors, whose entitlements against the Canadian Debtors are based on contractual rights to receive long-term disability (LTD) payments, treated more favourably than all other unsecured creditors.

4. The proposed appeal raises no issue of national or public importance warranting consideration by this Court. Ms. Holley is bound by two prior Court Orders that conclusively

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

resolve these issues. A July 30, 2009 Order appointed a representative on behalf of all persons with LTD entitlements including Ms. Holley (the "LTD Rep Order") and that representative agreed to the settlement and voted in favour of the Plan. Ms. Holley had the ability to opt-out of the LTD Rep Order within a defined time, but did not do so. A March 31, 2010 Settlement Approval Order ("Employee Settlement Approval Order", together with the LTD Rep Order, the "Prior Orders") expressly provided that persons with LTD entitlements, including Ms. Holley, would receive the same *pro rata* treatment of their claims as all other unsecured creditors – exactly the treatment the Plan provides. The binding nature of the Prior Orders cannot be doubted and no important issue arises in respect of them. In the face of these Prior Orders, Ms. Holley has no viable claim to more than the *pro rata* treatment the Plan provides for.

5. Ms. Holley's attempt to rely on the *Canadian Charter of Rights and Freedoms* (the "*Charter*")[2] to attack the CCAA and the *pari passu* principle, does not raise an issue of national or public importance warranting an appeal to this Court. The issue does not arise due to the binding nature of the Prior Orders; even if it did, the failure of Ms. Holley to give a timely Notice of Constitutional Question in either Court below weighs strongly against the issue being raised in this Court. In any event, the proposition that the *Charter* requires priority treatment for the economic interests of one group of unsecured creditors of a private insolvent enterprise does not raise an issue of sufficient importance warranting consideration by this Court.

6. Contrary to Ms. Holley's submission, this case does not require an evaluation of the public importance of disabled persons or a comparison of disabled creditors to other types of creditors. In cases such as *Indalex, Century Services* and *AbitibiBowater*[3] legal issues as to the competing priority of such claims arose (for example in *Indalex*, between provincially created pension rights and federal insolvency priorities). No such legal issue arises here.

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

[3] Referred to in paragraph 5 of Ms. Holley's Memorandum of Argument.

7. After too much litigation, the Canadian Debtors are finally at the point of being able to make distributions to their creditors. Although the extent of prejudice and cost that would result from an appeal is mitigated by the Waiver and Reserve Agreement, this proposed appeal would still impose additional cost and delay on proceedings that have experienced too much of both.[4] Leave to appeal should be denied.

B. Position of the Monitor and Canadian Debtors Regarding Ms. Holley's Recitation of the Facts

8. The Monitor and Canadian Debtors disagree with the facts recited by Ms. Holley. Many are based on materials not in evidence in the Courts below or proven by affidavit. The facts relevant to deal with this request for leave to appeal are set out below.

C. The Facts Relied Upon By the Monitor and Canadian Debtors

i. *The Nortel insolvencies and the Settlement and Plans Support Agreement*

9. Nortel Networks Corporation, the parent of the worldwide Nortel group of companies, and certain of its Canadian affiliates (the "Canadian Debtors") commenced insolvency proceedings under the CCAA on January 14, 2009. Ernst & Young Inc. was appointed monitor (the "Monitor"). Related Nortel companies in the United States (the "US Debtors") and Europe (the "EMEA Debtors") also brought bankruptcy or insolvency proceedings in those jurisdictions.

10. Creditor recoveries were dependent on the sale of the businesses and assets of the various Nortel companies, and on how the proceeds would be allocated among the Canadian, U.S. and EMEA Debtors. Complex steps took place to sell the businesses and assets, and protracted litigation in Canada and the U.S. followed regarding the allocation of US$7.3 billion of sales proceeds. The CCAA Court and the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") issued decisions in May 2015 allocating the proceeds.

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[4] The Monitor and Canadian Debtors have brought a motion to expedite this proceeding, and the Waiver and Reserve Agreement is discussed therein.

As part of the settlement that was reached in October 2016, referred to below, all further appeal proceedings from the allocation decisions have been withdrawn or will be dismissed.

> *Nortel Networks Corporation (Re)*, 2016 ONCA 332 dated May 3, 2016, leave to appeal to SCC discontinued (SCC File No. 37117); Response of the Monitor and Canadian Debtors dated May 19, 2017 ("Response"), Tab 7
>
> *Re Nortel Networks Corporation et al*., 2017 ONSC 700, as corrected, at para. 2 ("Sanction Motion Reasons")[5]; Response, Tab 9, p.223-224

11. The settlement, which followed a mediation and extensive negotiations, saw the Canadian Debtors, Monitor, U.S. Debtors, EMEA Debtors, and certain key stakeholders enter into a Settlement and Plans Support Agreement on October 12, 2016 (the "**SPSA**"). Pursuant to it, 57.1065% of the sale proceeds – or over US$4.1 billion – has or will be paid to the Canadian Debtors for distribution to their creditors. The SPSA provides that all unsecured creditors holding claims against the Canadian Debtors will be paid *pari passu* in accordance with their entitlements pursuant to a plan of arrangement.

> Settlement and Plans Support Agreement dated October 12, 2016 (the "SPSA"), s. 4(b)(i), being Exhibit "A" to the Plan of Compromise and Arrangement dated November 30, 2016 (the "Plan") attached as Appendix A, One Hundred and Thirty Fifth Report of the Monitor dated January 20, 2017 (the "135th Report"); Response, Tab 8, p.189-221
>
> Sanction Motion Reasons, paras. 3, 9(v), 14; Response, Tab 9, p. 224, 228-230

ii. <u>*Plan approved by creditors and the CCAA Court*</u>

12. The Canadian Debtors proposed the Plan to implement the SPSA and provide for distributions to creditors. On January 17, 2017, the Plan received nearly unanimous support of creditors with 99.97% in number and 99.24% in value voting in favour.

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[5] Note that the CCAA Court corrected the Sanction Motion Reasons, although the uncorrected version appears in Ms. Holley's application. The corrected version is included the Monitor and Canadian Debtors' response at Tab 9.

Sanction Motion Reasons, para. 5; Response, Tab 9, p. 226

13. The Plan required sanction of the CCAA Court. The CCAA Court granted that sanction, noting that "[t]he Plan provides for a comprehensive resolution of these CCAA proceedings and implementation of the SPSA and paves the way for distributions to creditors in a timely manner". It held the Plan to be fair and reasonable, and specifically noted that the Plan provides for payment to creditors on a *pari passu* basis, which is the bedrock principle of Canadian insolvency law.

Sanction Motion Reasons, paras. 4-5, 9; Response, Tab 9, p. 225-228

Sanction Order, dated January 24, 2017; Application for Leave to Appeal of Jennifer Holley, Tab 3

iii. *LTD Beneficiaries and The Prior Orders*

14. Of the Canadian Debtors' 16,000 creditors, about 360 individuals are LTD beneficiaries, namely persons whose claims are based on (i) employment contracts providing for long term benefits upon disability, and (ii) disability having occurred (the "LTD Beneficiaries"). The Canadian Debtors self-funded this benefit, including providing some, but insufficient funds to a Health and Welfare Trust (the "HWT"). Accordingly, the LTD Beneficiaries had, upon insolvency, unsecured claims.

Nortel Networks Corporation (Re), 2010 ONSC 5584 at paras. 10, 14 (without schedules); Response, Tab 5, p. 97-98

15. The only persons who purported to oppose approval of the Plan by the CCAA Court were two LTD Beneficiaries, Ms. Holley and one other. The LTD Representative, on behalf of all LTD Beneficiaries supported the Plan and its approval.

135th Report, para. 103-105; Response, Tab 8, p. 178-179

16. The Prior Orders are germane to the ability of an LTD Beneficiary like Ms. Holley to object to the Plan's approval. The July 30, 2009 LTD Rep Order appointed an "LTD Representative" for the purpose, among others, of settling or compromising claims by the

LTD Beneficiaries. Pursuant to the LTD Rep Order, there was an ability to opt-out of representation by the LTD Representative within a defined time, but neither Ms. Holley (or any other LTD Beneficiary) did. Contrary to Ms. Holley's suggestion at paragraph 30(c) of her Memorandum of Argument, her decision not to opt out of the LTD Rep Order could not have been based on a forecast by the Monitor that the HWT would have sufficient funds to always pay LTD benefits. The forecast Ms. Holley refers to was only for the specified period from early January to March 31, 2009.

> Order (Representation Order for Disabled Employees) dated July 30, 2009, paras. 3, 7-9 ("LTD Rep Order"); Response, Tab 2, p. 53-54
>
> Sanction Motion Reasons, para. 12; Response, Tab 9, p. 229
>
> Report of the Monitor dated January 14, 2009, para. 92 and Appendix A; Response, Tab 1, p. 48, 50-51

17. In March 2010, the Canadian Debtors, the Monitor and the LTD Representative (among others) entered into an Employee Settlement Agreement. Under it, certain benefits were provided during the insolvency to former employees and it was agreed, including by the LTD Representative, that claims of LTD Beneficiaries (including Ms. Holley) would rank as ordinary unsecured claims on a *pari passu* basis with the claims of all other ordinary unsecured creditors of the Canadian Debtors including in any CCAA plan of the Canadian Debtors. Any potential claim for more favourable treatment was released.

> Amended and Restated Settlement Agreement dated March 30, 2010 ("Employee Settlement Agreement"), Sections B, G (para. 2), being Schedule "A" Settlement Approval Order dated March 31, 2010 ("Employee Settlement Approval Order"), paras. 10-11, 16, 18; Response, Tab 3, p. 62, 63, 65, 66, 70-72 and 76
>
> 135th Report, para. 109; Response, Tab 8, p. 180-182
>
> Sanction Motion Reasons, para. 14; Response, Tab 9, p. 229-230

18. The CCAA Court approved the Employee Settlement Agreement and declared it fair and reasonable in the Employee Settlement Approval Order dated March 31, 2010.

Employee Settlement Approval Order; Response, Tab 3

Sanction Motion Reasons, paras. 13, 17; Response, Tab 9, p.229-231

Endorsement dated April 8, 2010, at paras. 28-38, 40, leave to appeal refused, 2010 ONCA 402 ("Employee Settlement Leave Denial"); Response, Tab 4

19. Certain LTD Beneficiaries, including Ms. Holley, unsuccessfully sought leave to appeal the Employee Settlement Approval Order to the Court of Appeal for Ontario. The Court of Appeal's decision, made on June 3, 2010, denying leave stated the following:

> The moving parties [which included Ms. Holley] 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.

Employee Settlement Leave Denial, paras. 2-3; Response, Tab 4, p. 94

Sanction Motion Reasons, para. 15; Response, Tab 9, p. 230

20. Following on the Employee Settlement Approval Order, the CCAA Court in 2010 approved the distribution of the HWT, which provided funding of some LTD benefits. Certain LTD Beneficiaries (including Ms. Holley) opposed that distribution and argued that they should receive more favourable treatment than other claimants to the HWT based on need rather than entitlement. That argument was rejected. The CCAA Court at that time said:

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

> *the HWT corpus has to be based on entitlement and not on relative need.* [emphasis added]

Leave to appeal that decision was rejected by both the Court of Appeal and this Court.

> *Nortel Networks Corp., Re*, 2010 ONSC 5584 at para. 110, dated November 9, 2010 (without schedules), leave to appeal refused 2011 ONCA 10, leave to appeal to S.C.C. refused, Judgment dated June 9, 2011; Response, Tab 5, p. 111
>
> HWT Allocation Order dated November 9, 2010, at para. 3; Response, Tab 6, p. 121-123

21. The LTD Beneficiaries, including Ms. Holley, who unsuccessfully sought leave to appeal to the Court of Appeal from the Employee Settlement Approval Order, and who unsuccessfully sought leave to appeal to the Court of Appeal and to this Court from the HWT distribution approval, were represented during those proceedings by counsel. No *Charter* arguments were raised in the course of any of those objections or attempted appeals.

iv. *The Plan is Consistent With The Prior Orders – Ms. Holley's Claim Is Not*

22. In 2017, the Plan and the SPSA were supported by the LTD Representative who has the power to compromise the claims of the LTD Beneficiaries, including Ms. Holley, pursuant to the LTD Rep Order. Moreover, the Plan provides exactly the *pari passu* treatment mandated by the Employee Settlement Approval Order. Ms. Holley's claim that the Plan should treat her and other LTD Beneficiaries more favourably than other unsecured creditors is precisely the type of claim released under the Employee Settlement Agreement.

> LTD Rep Order, paras. 3, 7-9; Response, Tab 2, p.53-54
>
> SPSA, paras. 6(h)(i), 6(h)(iii)(B) and signature page of the LTD Representative, Susan Kennedy; Response, Tab 8, p. 218, 219 and 221
>
> Employee Settlement Approval Order, paras. 10-11, 16, 18, attaching at Schedule "A" Employee Settlement Agreement, Sections C (para. 1) and G (para. 2); Response, Tab 3, p. 62, 63, 65, 66, 72 and 76
>
> Sanction Motion Reasons, paras. 12-18; Response, Tab 9, p. 229-231

v. *The CCAA Court Properly Addressed Ms. Holley's Objection in Approving The Plan*

23. The CCAA Court confirmed, when approving the Plan in 2017, that Ms. Holley was bound to the provisions in the Employee Settlement Agreement and the Employee Settlement Approval Order which provided that her claim was to rank as an unsecured claim that shares *pari passu* with other unsecured claims against the Canadian Debtors and that any claim for priority treatment had been released. The CCAA Court further confirmed that Ms. Holley could not seek a reconsideration of the Employee Settlement Approval Order at this late stage.

Sanction Motion Reasons, paras. 15-18; Response, Tab 9, p. 230-231

24. The CCAA Court held that the Plan was fair and reasonable. It noted that under the SPSA and the Plan, the LTD Beneficiaries (including Ms. Holley) will receive the same *pari passu* treatment as other unsecured creditors: "They are all treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is a fundamental tenet of insolvency law."

Sanction Motion Reasons, para. 19; Response, Tab 9, p. 231

25. Although no Notice of Constitutional Question was given by Ms. Holley, the CCAA Court considered and rejected the *Charter* arguments she raised, holding that her *Charter* rights were not infringed by the Plan or by any exercise of the CCAA Court's discretion in approving the Plan.

Sanction Motion Reasons, paras. 20-35; Response, Tab 9, p. 231-236

vi. *The Court of Appeal denied leave to appeal*

26. Ms. Holley sought leave to appeal the approval of the Plan to the Court of Appeal for Ontario. The CCAA provides for appeals only with leave which is evaluated based on four factors: (a) significance to the practice; (b) significance to the proceeding; (c) whether the

proposed appeal is *prima facie* meritorious or frivolous; and (d) undue hindrance of the progress of the CCAA. The Court of Appeal for Ontario denied leave, holding:

> The proposed appeal is not meritorious. As the supervising judge explained in his reasons, the Leave Applicants did not opt-out of the 2009 Representation Order for Disabled Employees ("LTD Rep Order") and they are bound by the 2010 Employee Settlement Agreement. The supervising judge correctly concluded the Leave Applicants have no right to opt out of the LTD Rep Order at this late stage… And, as this court has already emphasized, further delays in this very protracted litigation are to be avoided[.]
>
> *Nortel Networks Corporation (Re)*, 2017 ONCA 210 at para. 2-4 (citing *Nortel Networks Corporation (Re)*, 2016 ONCA 332 at paras. 34 (in turn citing other Ontario Court of Appeal decisions) and 102-103); Response, Tab 9, p. 238-240

27. The Court of Appeal also noted it was too late to consider a purported Notice of Constitutional Question delivered after filings in the Court of Appeal were to be completed, at which point meaningful input from the Attorneys General would not have been possible.

> *Nortel Networks Corporation (Re)*, 2017 ONCA 210 at para. 5; Response, Tab 9, p. 240

PART II CONCISE STATEMENT OF THE QUESTION IN ISSUE

28. The sole question on this application is whether Ms. Holley has raised an issue of sufficient national importance to warrant the granting of leave to appeal. She has not. The result she contends for – more favourable treatment than all other unsecured creditors – is not open to her in light of the Prior Orders. Nor is there a viable issue that equal treatment according to entitlement of creditors of a private enterprise infringes a *Charter* right. Even if there were, the failure to serve a Notice of Constitutional Question in the CCAA Court renders the issue one that ought not to be considered at this stage.

29. While this Court has the jurisdiction to grant leave to appeal from a denial of leave to appeal by a provincial appellate court, it has noted that this jurisdiction should be exercised most sparingly. This is not a case where that jurisdiction should be exercised.

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460 at 503-4 per Beetz J.; Book of Authorities of the Monitor and Canadian Debtors ("BOA"), Tab A

PART III CONCISE STATEMENT OF ARGUMENT

A. In Light Of The Prior Orders, No Issue Of National Importance Arises

30. The Prior Orders bind Ms. Holley to the very result she sought to challenge before the CCAA Court when it approved the Plan.

Sanction Motion Reasons, paras. 10-18; Response, Tab 9, p. 228-231

31. The Employee Settlement Approval Order supported by the LTD Representative for Ms. Holley and all other LTD Beneficiaries (none having opted-out) provides that any plan of arrangement would provide for *pari passu* treatment of the LTD Beneficiaries' claims in the same manner as all other unsecured creditors.

Employee Settlement Approval Order, paras. 10-11, 18; Response, Tab 3, p. 62, 63 and 65-66

32. Ms. Holley did not attempt to appeal the LTD Rep Order at all before the CCAA Court's approval of the Plan, and her attempt to obtain leave to appeal of the Employee Settlement Approval Order had failed years before the CCAA Court's approval of the Plan. In the Courts below, a collateral attack on these Prior Orders in the context of the Plan sanction motion was impermissible and rightly rejected by the CCAA Court and the Court of Appeal. That is not cured by Ms. Holley now asserting that she is or will be asking this Court to extend the time for her to seek leave to appeal the Prior Orders.[6]

Employee Settlement Leave Denial; Response, Tab 4

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[6] No motion to extend the time to, or to actually, seek leave to appeal the Prior Orders has been brought.

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

33. Ms. Holley's claim that the Prior Orders breached her *Charter* rights is unavailing. There is no exception to the collateral attack doctrine for *Charter* arguments. The *Charter* is founded on the rule of law; the rule of law is what the collateral attack doctrine seeks to uphold.

Carpenter Fishing Corp. v. Canada, 2002 BCSC 324 at para. 36, aff'd 2002 BCCA 611 at para. 8; BOA, Tab C

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

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007), section 58.5 p. 58-11-12 (citing *Re Man. Language Rights*, [1985] 1 S.C.R. 721 at 757 and *Turigan v. Alta.* (1988), 53 D.L.R. (4th) 321 (Alta. C.A.)); BOA, Tab E

34. The CCAA Court correctly found that issue estoppel prevented Ms. Holley from raising a *Charter* challenge to the treatment of her claims in the Plan, as the Plan simply incorporated the provisions of the Settlement Approval Order in respect of which no *Charter* challenge had been raised. Ms. Holley's suggestion in paragraphs 29 to 31 of her Memorandum that this Court should extend the time for allowing her to seek leave to appeal the Prior Orders does not avoid the application of issue estoppel and should not be given effect to for the following reasons:

(a) Whether claims of LTD Beneficiaries under a CCAA Plan would receive *pari passu* treatment was resolved pursuant to the Employee Settlement Approval Order and is the very same issue raised on approval of the Plan.

(b) Ms. Holley was represented at the hearing resulting in the Employee Settlement Approval Order. In addition to the LTD Representative and representative counsel for the LTD Beneficiaries appointed pursuant to the LTD Rep Order, Ms. Holley was represented by her own counsel. She was represented by her own counsel in seeking leave to appeal to the Court of Appeal in respect of the Employee

Settlement Approval Order. She was also represented by her own counsel in opposing the HWT distribution and in the attempts to appeal it. She could have then raised the *Charter* issues she attempts to raise now, but did not.

(c) There is simply no evidence to support Ms. Holley's suggestions that she was somehow prevented from previously raising issues.

(d) The *White* case, cited by Ms. Holley in paragraph 29 of her Memorandum of Argument, deals with extending time to grant leave where new evidence had been discovered so as to prevent a wrongful conviction. That is far different than the case here, where the Employee Settlement Approval Order was sought to be appealed by Ms. Holley, and she now simply wishes to make a new argument she could have made then. The delay is considerable, not adequately explained and the parties who have conducted themselves for years on the basis of the validity of the Prior Orders would be prejudiced by their reopening.

Sanction Motion Reasons, para. 26; Response, Tab 9, p. 233

Henry S. Brown, *Supreme Court of Canada Practice, 2016*, 16th ed. (Toronto: Carswell, 2015) at 253; BOA, Tab F

R. v. Roberge, 2005 SCC 48 at paras. 6-7; BOA, Tab G

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

Ahani v. Canada, [1999] F.C.J. No. 212 at paras. 8-10; BOA, Tab H

M. (L.) v. British Columbia (Director of Child, Family and Community Services), 2016 BCCA 367 at para. 49; BOA, Tab I

36. This is not a case in which there was no other effective remedy, inviting an exercise of discretion not to apply the principles of issue estoppel or collateral attack. To the contrary, Ms. Holley was entitled to opt out of the LTD Rep Order but failed to do so, and she sought to

appeal the Employee Settlement Approval Order and HWT distribution approval unsuccessfully. Accordingly, the application of issue estoppel and the bar against collateral attack do not work an injustice in this case. To the contrary, allowing the reopening of matters previously determined in what has already been a protracted process would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice.

Toronto v. C.U.P.E., supra at para. 37; BOA, Tab B

B. No Timely Notice of Constitutional Question

37. Ms. Holley did not serve a notice of constitutional question before the proceedings in the CCAA Court under s. 109 of the *Courts of Justice Act*, as would be required for a challenge to the constitutional validity or applicability of the CCAA itself or of a common law rule or principle such as *pari passu*, both of which Ms. Holley asserts she is challenging (see her Memorandum, paras. 3 and 6).

38. This is not a case where a broad discretion conferred by statute could be read down so as to avoid a *Charter* breach and where no Notice of Constitutional Question might be required. Here, Ms. Holley seeks to challenge, based on the *Charter*, the validity of s. 6 and 11 of the CCAA to approve a Plan providing for *pari passu* treatment of unsecured creditors, and the common law principle of *pari passu* itself.

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

39. As the CCAA Court correctly recognized, the *pari passu* principle, which as the Court of Appeal for Ontario noted provides that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally" is a fundamental and "bedrock" tenet of insolvency legislation. In the absence of legislated priorities or a negotiated and court-sanctioned agreement to differential treatment, it governs the distribution of assets under a plan of arrangement. An argument that the CCAA is to be interpreted to prevent a

pari passu Plan challenges the constitutional validity of the CCAA and of a common law principle which underlies it. Such a challenge could only have been made before the CCAA Court following notice to the Attorneys General that a constitutional question was raised.

> Sanction Motion Reasons, paras. 9(v), 19, 33; Response, Tab 9, p. 228, 231 and 235
>
> *Nortel Networks Corp., Re*, 2014 ONSC 5274 at paras. 28-31, aff'd 2015 ONCA 681 at paras. 23-24, leave to appeal to S.C.C. refused (2016), 42 C.B.R. (6^{th}) 3; BOA, Tab K

40. The failure to serve a notice of constitutional question is not a mere technicality. This Court has stressed that a Court should not find a statutory provision constitutionally invalid where no notice of constitutional question had been served. Since the function of elected representatives is to enact legislation, the government must be given the fullest opportunity to defend the constitutional validity of the legislation.

> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 48 ("The purpose of s. 109 [the notice requirement] is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity."); BOA, Tab L

41. While this Court may agree to hear a constitutional issue even though a proper notice of the constitutional question was not given until the case reached this Court, one of the significant considerations is the state of the record from the courts below. Where the issue is a constitutional one, the public interest, as well as considerations of fairness, require that the fullest and best evidence be before the court when it is asked to decide the constitutionality of a law. Where due to the absence of a constitutional question notice, the governments have not to date participated, the Court must necessarily be concerned about whether the record is appropriate for the determination of the constitutional issue.

Ernst v. Alberta Energy Regulator, 2017 SCC 1 at para. 99, 102, Abella J. concurring; BOA, Tab M

Guindon v. Canada, 2015 SCC 41 at paras. 19-23; BOA, Tab N

42. That government participation in such an issue would have been important is apparent from the fact that it appears to be a considered choice of Parliament that insolvency legislation not provide a priority to unsecured disability benefit claims. The CCAA, as it stood in January 2009, did not provide any such priority and subsequent amendments have not done so either, notwithstanding that the issue has been considered. In 2010, the Senate committee studying Bill S-216, "An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in order to protect beneficiaries of long term disability benefits plans", recommended that the Bill not proceed further. The Minister of Industry's report to Parliament on the CCAA in 2014, after detailing calls from various groups for priority payment, noted that bankruptcy was a zero-sum game such that changing the ranking of creditors would impact all creditors, and did not recommend any changes to priorities under the insolvency statutes. Accordingly a Court, before imposing such a change by application of the *Charter*, would require the fullest government input and the evidentiary record that would be created with that input, which does not exist here.

CCAA, s. 6, as amended to September 17, 2009

CCAA, ss. 6(5), 6(6), current version

Senate, Standing Senate Committee on Banking Trade and Commerce, Sixth Report (November 25, 2010) (Deputy Chair: Céline Hervieux-Payette, P.C.); Industry Canada, *Fresh Start: A Review of Canada's Insolvency Laws*, 2014 at p. 14; See also the following report that concurred with the findings of the Industry Canada report: House of Commons, Standing Committee on Industry, Science and Technology (INDU), *Report 2 – Review of the Government of Canada Report entitled "Fresh Start: A Review of Canada's Insolvency Laws"* (Chair: Dan Ruimy); House of Commons Debates, 42nd Parl., 1st Session, No. 126 (12 December 2016) at 7959 (Hon. Dan Ruimy); BOA, Tab O

C. In any Event, There is No Question of National Importance About a Violation of Section 7 of the *Charter*

43. There is no merit to the arguments of a violation of Ms. Holley's s. 7 *Charter* rights by approval of the Plan. The CCAA Court correctly found that the request that the claims of the LTD Beneficiaries be paid in full at the expense of other creditors involved economic interests which are not protected by s. 7 of the *Charter*. Indeed, the *Siemens* case cited by Ms. Holley at paragraph 6 of her Memorandum held that "pure economic interests" of individuals were not protected by s. 7.

> Sanction Motion Reasons, para. 28; Response, Tab 9, p. 233-234
>
> *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at paras. 45-46 ("*Siemens*"); BOA, Tab P

44. Ms. Holley's argument that this case may attract s. 7 because it deals with disability insurance which can be fundamental to human life or survival does not change that analysis. The case does not deal with the right to acquire disability insurance nor with any government action expanding or restricting that right, but with economic interests under already acquired contractual entitlements against private debtors who due to insolvency cannot honour all creditor entitlements in full. This economic interest is not a *Charter* protected right to liberty.

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

45. Nor is the right to security of the person under s. 7 of the *Charter* implicated. While the *Baker* case cited in paragraph 7 of Ms. Holley's Memorandum does contain the general proposition that international human rights law is a "critical influence" in the interpretation of the scope of the rights included in the *Charter*, that case does not deal with either s. 7 of the *Charter* or the international conventions on which Ms. Holley relies. Indeed, Ms. Holley submits no authority for the proposition that any provision in international human rights covenants or conventions regarding the rights of persons with disabilities entails recognition of a *Charter* right for one group of creditors to be subsidized by another when their private contractual rights against an insolvent private-sector debtor are being compromised.

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

46. The *Gosselin* case which Ms. Holley cites in paragraph 6 of her Memorandum does not assist her. This Court held that even if s. 7 of the *Charter* could be read to encompass economic rights, "[n]othing in the jurisprudence to date suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these." [emphasis in original.] Subsequent decisions have confirmed that s. 7 does not apply to economic rights and declined to extend the scope of s. 7 to include a positive obligation to ensure life, liberty or security of the person or confer a "freestanding right" to a benefit.

Gosselin v. Québec (Attorney General), 2002 SCC 84 at para. 81 ("*Gosselin*"); BOA, Tab S

Flora v. Ontario (Health Insurance Plan), 2008 ONCA 538 at para. 101-102, 105-108; BOA, Tab T

Tanudjaja v. Canada (Attorney General), 2014 ONCA 852 at paras. 30-31, leave to appeal to S.C.C. refused, 2015 CarswellOnt 9613; BOA, Tab U

47. Ms. Holley characterizes her claim as being about a "deleterious loss of personal economic interests like the loss of disability income from a statutory authorized Court action …" (para. 6). However, the sanctioning of the Plan effects no such loss. To the extent Ms. Holley is deprived of the full benefit of her contractual rights, the cause of that deprivation is the financial inability of the Canadian Debtors to fully meet their contractual obligations, not any government action susceptible of *Charter* review including the CCAA Court's application of the *pari passu* principle. In fact, the application of the *pari passu* principle has already resulted in more being available to the LTD Beneficiaries and other employee creditors than would otherwise have been the case by, for example, preventing the accrual of post-filing interest (which would have disproportionately benefitted certain other unsecured creditors).

Nortel Networks Corp., Re, 2014 ONSC 5274 at para. 3, aff'd 2015 ONCA 681, leave to appeal to S.C.C. refused (2016), 42 C.B.R. (6th) 3; BOA, Tab K

48. The Canadian Debtors cannot pay their creditors, including Ms. Holley, the full amounts they owe to them. The SPSA and Plan, as approved, are not the cause of the diminished recoveries of any creditor. They provide the very funds that will allow some payments to creditors. Diminished recoveries are a function of Nortel's global insolvency – the unfortunate reality being that in "insolvency restructuring proceedings almost everyone loses something."

> *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 117, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 337; BOA, Tab V

D. Also No Issue of National Importance Concerning Section 15 of the *Charter*

49. The CCAA Court correctly rejected the argument that rights under s. 15 of the *Charter* would be violated by approval of the Plan.

50. The right to equal benefit of the law is not infringed by the application of the *pari passu* principle in insolvency. *Eldridge v. British Columbia (Attorney General)* cited in paragraph 6 of Ms. Holley's Memorandum has no application, as there is no parallel between the failure of a provincial government to fund sign language interpretation thus denying the deaf the equal benefit of the government funded health care system, and the situation in the case at bar. The *Eldridge* Court pointed out that the claim there was "only for equal access to services that are available to all."

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

51. Here, Ms. Holley's complaint is not that she has been denied equal access to the funds available to all creditors, but that she ought to receive a larger than equal share of the funds of a private-sector debtor. There is no basis for this in s. 15 of the *Charter*. As the CCAA Court pointed out, LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, all of whom are disadvantaged to varying degrees depending on personal circumstances, and there is no basis for preferring one group above others. LTD Beneficiaries

have not been "marginalized, devalued or ignored" as members of Canadian society by the Plan or its approval, and their rights under s. 15 have not been violated.

Sanction Motion Reasons, paras. 34-35; Response, Tab 9, p. 235-236

Siemens, supra at paras. 48-49; BOA, Tab P

52. Reliance on *Gosselin v. Québec (Attorney General)* and *Granovsky v. Canada (Minister of Employment & Immigration)* referred to in paragraph 6 of Ms. Holley's Memorandum is equally misplaced. Both of those cases concerned situations in which legislation imposed differential treatment under governmental programs, the issue being whether the differential treatment was discriminatory. Here, as the CCAA Court observed, the LTD Beneficiaries are treated the same as all other unsecured creditors of now-insolvent private-sector companies. In any event, in both of those cases, the statutory scheme was found not to infringe the *Charter*.

Gosselin, supra (differential treatment of social assistance recipients based on age); BOA, Tab S

Granovsky v. Canada (Minister of Employment & Immigration), 2000 SCC 28 (CPP differentiated between permanently and temporarily disabled persons based on contribution requirements); BOA, Tab X

Sanction Motion Reasons, paras. 33-34; Response, Tab 9, p. 235-236

PART IV SUBMISSIONS AS TO COSTS REQUESTED

53. The Monitor and Canadian Debtors do not request costs and submit there should be no order for costs whether or not leave to appeal is granted.

PART V ORDER SOUGHT

54. The Monitor and Canadian Debtors request that the application for leave to appeal be dismissed, including the request to extend the time for seeking leave to appeal the Employee Settlement Approval Order and the LTD Rep Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of May, 2017.

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Canada

CONSTITUTION ACT, 1982 [(80)](page-18.html#f80)

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

DEMOCRATIC RIGHTS

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (81) (page-18.html#f81)

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. (82) (page-18.html#f82)

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months. (83) (page-18.html#f83)

MOBILITY RIGHTS

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

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.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

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

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. (84) (page-18.html#f84)

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. (85) (page-18.html#f85)

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. (86) (page-18.html#f86)

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. (87) (page-18.html#f87)

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. (88) (page-18.html#f88)

New Brunswick statutes and records

Canada

LOI CONSTITUTIONNELLE DE 1982 [(80)](page-18.html#f80)

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

GARANTIE DES DROITS ET LIBERTÉS

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

LIBERTÉS FONDAMENTALES

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

DROITS DÉMOCRATIQUES

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes. (81) (page-18.html#f81)

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative. (82) (page-18.html#f82)

Séance annuelle

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois. (83) (page-18.html#f83)

LIBERTÉ DE CIRCULATION ET D'ÉTABLISSEMENT

Liberté de circulation

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

Liberté d'établissement

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province.

Restriction

(3) Les droits mentionnés au paragraphe (2) sont subordonnés :

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

Programmes de promotion sociale

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

GARANTIES JURIDIQUES

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Détention ou emprisonnement

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

Arrestation ou détention

10. Chacun a le droit, en cas d'arrestation ou de détention :

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Affaires criminelles et pénales

11. Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Témoignage incriminant

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interprète

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

Droits à l'égalité

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques. (84) (page-18.html#f84)

Langues officielles du Canada

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Langues officielles du Nouveau-Brunswick

(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

Progression vers l'égalité

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

Communautés linguistiques française et anglaise du Nouveau-Brunswick

16.1 (1) La communauté linguistique française et la communauté linguistique anglaise du Nouveau-Brunswick ont un statut et des droits et privilèges égaux, notamment le droit à des institutions d'enseignement distinctes et aux institutions culturelles distinctes nécessaires à leur protection et à leur promotion.

Rôle de la législature et du gouvernement du Nouveau-Brunswick

(2) Le rôle de la législature et du gouvernement du Nouveau-Brunswick de protéger et de promouvoir le statut, les droits et les privilèges visés au paragraphe (1) est confirmé. (85) (page-18.html#f85)

Travaux du Parlement

17. (1) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement. (86) (page-18.html#f86)

Travaux de la Législature du Nouveau-Brunswick

(2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick. (87) (page-18.html#f87)

Documents parlementaires

(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.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to 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 (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

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

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

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

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

Restriction — pension plan

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

d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale a institué un régime provincial de pensions au sens de ce paragraphe.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)d) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

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

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

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

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

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

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

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

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

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

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

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

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(C) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) les sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa a).

Companies' Creditors Arrangement Act

R.S.C. (Revised Statutes of Canada), 1985, c. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act (/eng/acts/C-36)*.

R.S., c. C-25, s. 1.

Interpretation

Definitions

2 In this Act,

aircraft objects has the same meaning as in subsection 2(1) of the *International Interests in Mobile Equipment (aircraft equipment) Act (/eng/acts/I-19.6)*; (*biens aéronautiques*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the *Bank Act (/eng/acts/B-1.01)*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act (/eng/acts/T-19.8)* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Newfoundland, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Prince Edward Island, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act (/eng/acts/B-3)* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act (/eng/acts/W-11)*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act (/eng/acts/B-3)*, or

1997, c. 12, s. 122.

Compromises to be sanctioned by court

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 (/eng/acts/B-3)* or is in the course of being wound up under the *Winding-up and Restructuring Act (/eng/acts/W-11)*, on the trustee in bankruptcy or liquidator and contributories of the company.

R.S., 1985, c. C-36, s. 6; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 123; 2004, c. 25, s. 194.

Court may give directions

7 Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

R.S., c. C-25, s. 7.

Scope of Act

8 This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

R.S., c. C-25, s. 8.

PART II

Jurisdiction of Courts

Jurisdiction of court to receive applications

9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Form of applications

10 Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

R.S., c. C-25, s. 10.

Powers of court

11 (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act (/eng/acts/B-3)* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application

Canada

Table des matières

Version du document du 2007-11-17 au 2009-09-17 :

Loi sur les arrangements avec les créanciers des compagnies

L.R.C. (Lois révisées du Canada) (1985), ch. C-36

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies (/fra/lois/C-36)*.

S.R., ch. C-25, art. 1.

Définitions et application

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire Actionnaire ou membre de toute compagnie à laquelle s'applique la présente loi. (*shareholder*)

biens aéronautiques S'entend au sens du paragraphe 2(1) de la *Loi sur les garanties internationales portant sur des matériels d'équipement mobiles (matériels d'équipement aéronautiques) (/fra/lois/I-19.6)*. (*aircraft objects*)

compagnie Toute compagnie ou personne morale constituée par une loi fédérale ou provinciale ou sous son régime, et toute compagnie constituée en personne morale qui possède un actif ou fait affaire au Canada, quel que soit l'endroit où elle a été constituée en personne morale. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques (/fra/lois/B-1.01)*, les compagnies de chemin de fer ou de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt (/fra/lois/T-19.8)*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité (/fra/lois/B-3)* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations (/fra/lois/W-11)*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité (/fra/lois/B-3)*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations (/fra/lois/W-11)* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

1997, ch. 12, art. 122.

Les transactions peuvent être homologuées par le tribunal

6 Si une majorité numérique représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, présents et votant soit en personne, soit par fondé de pouvoirs à l'assemblée ou aux assemblées de créanciers respectivement tenues en conformité avec les articles 4 et 5, ou avec l'un de ces articles, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal, et, s'il est ainsi homologué, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité (/fra/lois/B-3)* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations (/fra/lois/W-11)*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

L.R. (1985), ch. C-36, art. 6; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 123; 2004, ch. 25, art. 194.

Le tribunal peut donner des instructions

7 Si une modification d'une transaction ou d'un arrangement est proposée après que le tribunal a ordonné qu'une ou plusieurs assemblées soient convoquées, cette ou ces assemblées peuvent être ajournées aux conditions que peut prescrire le tribunal quant à l'avis et autrement, et ces instructions peuvent être données tant après qu'avant l'ajournement de toute ou toutes assemblées, et le tribunal peut, à sa discrétion, prescrire qu'il ne sera pas nécessaire d'ajourner quelque assemblée ou de convoquer une nouvelle assemblée de toute catégorie de créanciers ou actionnaires qui, selon l'opinion du tribunal, n'est pas défavorablement atteinte par la modification proposée, et une transaction ou un arrangement ainsi modifié peut être homologué par le tribunal et être exécutoire en vertu de l'article 6.

S.R., ch. C-25, art. 7.

Champ d'application de la loi

8 La présente loi n'a pas pour effet de limiter mais d'étendre les stipulations de tout instrument actuellement ou désormais existant relativement aux droits de créanciers ou de toute catégorie de ces derniers, et elle est pleinement exécutoire et effective nonobstant toute stipulation contraire de cet instrument.

S.R., ch. C-25, art. 8.

PARTIE II

Juridiction des tribunaux

Le tribunal a juridiction pour recevoir des demandes

9 (1) Toute demande prévue par la présente loi peut être faite au tribunal ayant juridiction dans la province où est situé le siège social ou le principal bureau d'affaires de la compagnie au Canada, ou, si la compagnie n'a pas de bureau d'affaires au Canada, dans la province où est situé quelque actif de la compagnie.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Forme des demandes

10 Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

S.R., ch. C-25, art. 10.

Pouvoir du tribunal

Ontario

Français

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From March 22, 2017 to the e-Laws currency date.

Last amendment: 2017, c. 2, Sched. 2, s. 1-19.

Legislative History: [+]

CONTENTS [–]

(6) It is sufficient if five of the jurors agree on the verdict or the answer to a question, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer. R.S.O. 1990, c. C.43, s. 108 (6).

Discharge of juror at trial

(7) The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause. R.S.O. 1990, c. C.43, s. 108 (7).

Continuation with five jurors

(8) Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous. R.S.O. 1990, c. C.43, s. 108 (8).

Specifying negligent acts

(9) Where a proceeding to which subsection 193 (1) of the *Highway Traffic Act* applies is tried with a jury, the judge may direct the jury to specify negligent acts or omissions that caused the damages or injuries in respect of which the proceeding is brought. R.S.O. 1990, c. C.43, s. 108 (9).

Malicious prosecution

(10) In an action for malicious prosecution, the trier of fact shall determine whether or not there was reasonable and probable cause for instituting the prosecution. R.S.O. 1990, c. C.43, s. 108 (10).

Section Amendments with date in force (d/m/y) [+]

Notice of constitutional question

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.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).

Section Amendments with date in force (d/m/y) [+]

Proceeding in wrong forum

110 (1) Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

Continuation of proceeding

(2) A proceeding that is transferred to another court under subsection (1) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court. R.S.O. 1990, c. C.43, s. 110.

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. R.S.O. 1990, c. C.43, s. 111.

Investigation and report of Children's Lawyer

112 (1) In a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act* in which a question concerning custody of or access to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education. R.S.O. 1990, c. C.43, s. 112 (1); 1994, c. 27, s. 43 (2).

Same

(2) The Children's Lawyer may act under subsection (1) on his or her own initiative, at the request of a court or at the request of any person. R.S.O. 1990, c. C.43, s. 112 (2); 1994, c. 27, s. 43 (2).

Report as evidence

(3) An affidavit of the person making the investigation, verifying the report as to facts that are within the person's knowledge and setting out the source of the person's information and belief as to other facts, with the report attached as an exhibit thereto, shall be served on the parties and filed and on being filed shall form part of the evidence at the hearing of the proceeding. R.S.O. 1990, c. C.43, s. 112 (3).

Attendance on report

(4) Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who made the investigation to attend as a witness. R.S.O. 1990, c. C.43, s. 112 (4); 1994, c. 27, s. 43 (2).

Section Amendments with date in force (d/m/y) [+]

Agreement preventing third party claim or crossclaim

Ontario

English

Loi sur les tribunaux judiciaires

L.R.O. 1990, CHAPITRE C.43

Période de codification : du 22 mars 2017 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : 2017, chap. 2, annexe 2, art. 1-19.

Historique législatif : [+]

SOMMAIRE [–]

9. Exécution en nature d'un contrat.

10. Jugement déclaratoire.

11. Autre recours en equity.

12. Mesure de redressement dirigée contre une municipalité. L.R.O. 1990, chap. C.43, par. 108 (2); 1994, chap. 12, art. 41; 2006, chap. 21, annexe A, art. 16.

Idem
(3) Le tribunal peut, à la suite d'une motion, ordonner que les questions de fait soient instruites et que les dommages-intérêts soient évalués sans jury, ou l'un ou l'autre. L.R.O. 1990, chap. C.43, par. 108 (3).

Composition du jury
(4) Si une instance a lieu devant jury, ce dernier se compose de six personnes choisies conformément à la *Loi sur les jurys*. L.R.O. 1990, chap. C.43, par. 108 (4).

Verdicts ou questions
(5) Dans une instance devant jury :

a) le juge peut exiger que le jury rende un verdict général ou réponde à des questions particulières, sous réserve de l'article 15 de la *Loi sur la diffamation*;

b) un jugement peut être rendu conformément au verdict ou aux réponses aux questions. L.R.O. 1990, chap. C.43, par. 108 (5).

Idem
(6) Il suffit que cinq des jurés s'entendent sur le verdict ou sur la réponse à une question. S'il y a plusieurs questions, il n'est pas nécessaire que les cinq mêmes jurés s'entendent sur chaque réponse. L.R.O. 1990, chap. C.43, par. 108 (6).

Libération d'un juré
(7) Le juge qui préside un procès peut libérer un juré en raison de maladie, de préjudice grave, de partialité ou pour toute autre raison suffisante. L.R.O. 1990, chap. C.43, par. 108 (7).

Procès continué avec cinq jurés
(8) Si un juré décède ou est libéré, le juge peut ordonner que le procès continue en présence de cinq jurés, auquel cas le verdict ou les réponses doivent être unanimes. L.R.O. 1990, chap. C.43, par. 108 (8).

Précision des actes de négligence
(9) Si une instance à laquelle s'applique le paragraphe 193 (1) du *Code de la route* est instruite devant jury, le juge peut ordonner au jury de préciser les omissions ou les actes de négligence qui ont entraîné les dommages ou les lésions faisant l'objet de l'instance. L.R.O. 1990, chap. C.43, par. 108 (9).

Poursuite abusive
(10) Dans une action pour poursuite abusive, il appartient au juge des faits de décider s'il existait ou non des motifs raisonnables et probables justifiant l'introduction de l'action. L.R.O. 1990, chap. C.43, par. 108 (10).

Textes modificatifs – date d'entrée en vigueur (j/m/a) [+]

Avis d'une question constitutionnelle
109 (1) Un avis d'une question constitutionnelle est signifié au procureur général du Canada et au procureur général de l'Ontario dans les circonstances suivantes :

1. La constitutionnalité ou l'applicabilité constitutionnelle d'une loi du Parlement du Canada ou de la Législature, d'un règlement ou règlement municipal pris sous son régime ou d'une règle de common law est en cause.

2. Réparation est demandée en vertu du paragraphe 24 (1) de la *Charte canadienne des droits et libertés* à l'égard d'un acte ou d'une omission du gouvernement du Canada ou du gouvernement de l'Ontario.

Absence d'avis
(2) Si une partie ne donne pas un avis conformément au présent article, la Loi, le règlement, le règlement municipal ou la règle de common law ne doit pas être déclaré invalide ou inapplicable, ou la réparation ne doit pas être accordée, selon le cas.

Formule de l'avis
(2.1) L'avis est rédigé selon la formule prévue par les règles de pratique ou, dans le cas d'une instance introduite devant un tribunal administratif ou quasi judiciaire, selon une formule similaire.

Délai de signification
(2.2) L'avis est signifié dès que les circonstances qui le rendent nécessaire sont connues et, quoi qu'il en soit, au moins quinze jours avant le jour où la question doit être débattue, à moins que le tribunal n'en ordonne autrement. 1994, chap. 12, par. 42 (1).

Avis d'appel
(3) Si le procureur général du Canada et le procureur général de l'Ontario ont droit à l'avis prévu au paragraphe (1), ils ont droit à un avis d'appel touchant la question constitutionnelle.

Droit des procureurs généraux d'être entendus
(4) Si le procureur général du Canada ou le procureur général de l'Ontario ont droit à un avis en vertu du présent article, ils ont le droit de présenter une preuve et des observations au tribunal à l'égard de la question constitutionnelle.

Droit d'appel
(5) Si le procureur général du Canada ou le procureur général de l'Ontario présentent des observations aux termes du paragraphe (4), ils sont réputés partie à l'instance aux fins d'un appel portant sur la question constitutionnelle. L.R.O. 1990, chap. C.43, par. 109 (3) à (5).

Tribunaux administratifs et quasi-judiciaires
(6) Le présent article s'applique aux instances introduites devant des tribunaux administratifs et quasi-judiciaires, de même qu'aux instances judiciaires. 1994, chap. 12, par. 42 (2).

Textes modificatifs – date d'entrée en vigueur (j/m/a) [+]

Incompétence du tribunal
110 (1) L'instance qui est introduite, ou la mesure qui est prise dans une instance, devant un tribunal, un juge ou un officier de justice qui n'a pas compétence, peut être renvoyée ou déférée au tribunal, au juge ou à l'officier qui a compétence.

Continuation de l'instance
(2) L'instance renvoyée à un autre tribunal aux termes du paragraphe (1) est intitulée au greffe du tribunal auquel elle est renvoyée et continuée comme si elle avait été introduite devant ce tribunal. L.R.O. 1990, chap. C.43, art. 110.

Compensation
111 (1) Le défendeur dans une action en paiement d'une créance peut opposer au demandeur le droit de compensation d'une créance qu'il a sur le demandeur.

Idem
(2) La compensation peut s'opérer entre deux dettes réciproques, même si elles ne sont pas de même nature.

Jugement en faveur du défendeur
(3) Le défendeur qui oppose le droit de compensation, si le montant que lui doit le demandeur est supérieur au montant qu'il doit à celui-ci, peut obtenir jugement pour la différence. L.R.O. 1990, chap. C.43, art. 111.

B

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Court File No.

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 AND NORTEL NETWORKS TECHNOLOGY CORPORATION (the "Applicants")

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

ERNST & YOUNG INC.
In its capacity as proposed Monitor of the Applicants

REPORT OF ERNST & YOUNG INC.

JANUARY 14, 2009

INTRODUCTION

1. Ernst & Young Inc. ("EYI") understands that Nortel Networks Corporation ("NNC" and collectively with all its subsidiaries, "Nortel" or "Company"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation ("NNTC"), Nortel Networks International Corporation ("NNIC") and Nortel Networks Global Corporation ("NNGC") have applied to this Honourable Court seeking commencement of proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") in order to restructure the business and affairs of the Company.

2. This is the first report of EYI, the proposed Monitor in the Applicants CCAA proceedings. EYI has consented to act as Monitor in these CCAA proceedings.

would further complicate the efforts and length of time necessary to restructure Nortel.

90. In the view of the proposed Monitor, the Non-Filing Entities should be able to maintain operations with adequate funding from the Applicants and other North American Nortel entities without the need for creditor protection.

OVERVIEW OF THE 13-WEEK CASH FLOW FORECAST

91. Nortel, with the assistance of the proposed Monitor, has prepared a 13-week cash flow forecast that estimates the CCAA Applicants financing requirements. A copy of the cash flow forecast is attached as Appendix A.

92. The cash flow forecast estimates that the Applicants for the period of January 11, 2009 to March 31, 2009 will have total receipts of $439 million and total disbursements of $572 million for net cash flow outflow of $133 million. NNL is not forecast to draw upon the NNI Loan (as describe later) during the forecast period.

93. At March 31, 2009, the Applicants are forecast to have available liquidity, consisting of cash on hand and availability under the NNI Loan, of approximately $278 million.

94. The main assumptions of the cash flow forecast are as follows:

a) accounts receivable collections have been estimated by the Applicants' collection group based on revenue forecasts and customer collection experience;

b) all disbursements are made assuming suppliers pre-filing amounts are stayed and post-filing amounts are paid on significantly reduced credit terms in light of the commencement of these CCAA proceedings;

c) inter-company loans are stayed. Inter-company trade accounts including pre-filing amounts, continue to settle on a cash basis in the normal course between

the North America filing entities and the other Nortel entities except for NNUK and the other EMEA filing entities;

d) severance payments are stayed and are unsecured claims;

e) pension funding payments are made for the current service portion for defined benefit plans. Funding for past service is not included;

f) subject to both Canadian and U.S. Court approval of the NNI Loan and Carling Facility Charge, the forecast reflects funding payments to NNL from NNI in the amount of $200 million; and

g) all interest payments relating to the Company's indebtedness are not included.

FLEXTRONICS AMENDING AGREEMENT

95. In preparation for a filing and in recognition of the importance of Flextronics' continuing compliance during the proceedings, Nortel very recently entered into negotiations with Flextronics, which would ensure ongoing supply. On January 14, 2009, NNL and Flextronics entered into an amending agreement (the "Flextronics Amending Agreement") that amends the various Flextronics agreements and provides Nortel with post petition supply of products and services.

96. Key terms of the Flextronics Amending Agreement include:

a) Purchase of certain Flextronics inventory in the total amount of $120 million payable on the following schedule: (i) $25 million on January 14, 2009; (ii) $50 million on January 20, 2009, (iii) $25 million on April 1, 2009 and (iv) $20 million on July 1, 2009; and

b) Payment of post filing products and services on a weekly basis for goods and services supplied during the immediately preceding week.

APPENDIX A

Nortel Networks - (Jan 13 Edition)	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	Forecast	
CCAA Applicants	Jan 2009			Feb 2009				Mar 2009					Total
Forecast Cash Flow	Start of period	11-Jan-09	18-Jan-09	25-Jan-09	01-Feb-09	08-Feb-09	15-Feb-09	22-Feb-09	01-Mar-09	08-Mar-09	15-Mar-09	22-Mar-09	29-Mar-09	11-Jan-09
USD (Millions)	End of period	17-Jan-09	24-Jan-09	31-Jan-09	07-Feb-09	14-Feb-09	21-Feb-09	28-Feb-09	07-Mar-09	14-Mar-09	21-Mar-09	28-Mar-09	31-Mar-09	31-Mar-09
1 . Receipts & Disbursements														
Receipts														
Collection of Accounts Receivable	5.8	18.9	65.6	3.3	4.7	4.0	19.9	4.1	4.1	8.1	18.9	12.1	169.4
Other Receipts	0.0	-	0.4	-	-	-	0.4	-	-	-	0.2	-	1.1
Intercompany Receipts	15.0	67.2	-	-	-	131.5	-	-	-	55.0	-	-	268.8
NNL/NNI Restructuring Loan Advances	-	-	-	-	-	-	-	-	-	-	-	-	-
Total Receipts	20.8	86.1	66.0	3.3	4.7	135.6	20.3	4.1	4.1	63.1	19.1	12.1	439.3
Disbursements													
Payroll (Gross)	24.2	-	23.6	7.1	14.5	7.2	14.3	7.2	13.8	7.2	12.7	-	131.7
Benefits	2.7	-	2.7	1.8	0.7	1.8	0.6	1.8	0.3	1.8	0.0	-	14.2
Pension	-	1.9	-	-	-	-	1.9	-	-	-	1.9	-	5.8
Inventory Purchases	34.7	51.3	4.4	12.5	17.9	-	14.5	6.1	18.3	4.2	5.7	-	169.5
Non-Inventory Purchases	14.2	13.1	13.8	8.5	13.8	13.1	13.9	1.9	17.6	13.1	13.9	-	137.0
Intercompany Disbursements	-	62.3	-	-	-	20.3	-	-	-	16.8	-	-	99.4
Professional Fees	1.4	1.2	1.2	1.5	1.2	1.4	1.2	1.5	1.2	1.4	1.2	-	14.4
NNL/NNI Restructuring Loan Repayments	-	-	-	-	-	-	-	-	-	-	-	-	-
Total Disbursements	77.1	129.8	45.8	31.3	48.1	43.8	46.5	18.4	51.2	44.5	35.5	-	572.0
Net Cash Flow	(56.4)	(43.7)	20.2	(28.0)	(43.4)	91.7	(26.1)	(14.3)	(47.1)	18.6	(16.4)	12.1	(132.7)
Opening Cash Balance	210.3	154.0	110.3	130.5	102.5	59.1	150.8	124.7	110.4	63.3	81.9	65.6	210.3
Closing Cash Balance	154.0	110.3	130.5	102.5	59.1	150.8	124.7	110.4	63.3	81.9	65.6	77.6	77.6
Facility Size	75.0	75.0	75.0	75.0	200.0	200.0	200.0	200.0	200.0	200.0	200.0	200.0	200.0
Less Utilized Facility	-	-	-	-	-	-	-	-	-	-	-	-	-
Available Facility	75.0	75.0	75.0	75.0	200.0	200.0	200.0	200.0	200.0	200.0	200.0	200.0	200.0
Closing Cash + Available Facility	**229.0**	**185.3**	**205.5**	**177.5**	**259.1**	**350.8**	**324.7**	**310.4**	**263.3**	**281.9**	**265.6**	**277.6**	277.6

1/14/2009 12:06 AM

Nortel Networks Corporation
13 Week cash flow forecast assumptions:

Nortel has prepared a 13 week cash flow forecast for the period January 1 – March 31, 2009 ("Forecast Period") that estimates the CCAA Applicants ("Applicants") financing requirements. The following outlines the main assumptions underlying the Applicants cash flow forecast ("Cash Forecast"):

Summary of Assumptions:

1. Collections of Accounts Receivable ("AR") include direct collections from customers and collections from contract manufacturers. Collections of AR have been estimated by the Applicant's collection group based on revenue forecasts and customer collection experience.

2. Other Receipts include real estate sublease income, income from investments, realizations on asset sales and other unusual receipts that may occur from time to time.

3. Intercompany Receipts represent collections on intercompany trade and transfer pricing adjustments from subsidiaries and joint ventures. Intercompany trade accounts and transfer pricing adjustments including pre-filing amounts continue to settle on a cash basis in the normal course with all global intercompany counterparties (filed and non-filed) with the exception of EMEA filing entities.

4. NNL / NNI Advances and Repayment represent the advances and repayment of funds drawn under the Restructuring Loan from NNI pursuant to the proposed post filing loan arrangement.

5. Payroll disbursements consist of wages, vacation pay, source deductions, and sales commissions. Payroll costs have been adjusted to reflect the anticipated workforce reduction during the forecast period.

6. Benefits include Health & Welfare Trust ("HWT") payments, defined benefit plan contribution funding, other benefit premiums and employer's share of Canada Pension Plan, Employment Insurance, Employer Health Taxes and Workers Safety and Insurance Board. Funding payments to HWT account are suspended post-filing as it is forecast that the HWT trust has sufficient surplus assets to sustain itself during the Forecast Period.

7. Pension includes payments to funded defined benefit plans for both current and past service.

8. Inventory Purchases consist of disbursements to third party suppliers for post filing product shipments on reduced credit terms.

9. Non-Inventory Purchases consist of disbursements for employee expenses, rent, taxes, capital expenditures, and all other payments to suppliers unrelated to inventory.

10. Intercompany Disbursements represent payments on intercompany trade and transfer pricing adjustments.

11. Professional fees include Monitor fees, legal, financial advisory and other professional fees related to the restructuring.

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Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE	)	THURSDAY, THE 30TH DAY OF
	)	
MORAWETZ	)	JULY, 2009

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (the "Applicants")

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

ORDER
(Representation Order for Disabled Employees)

THIS MOTION, made by the Applicants (collectively, "Nortel") for an order appointing representative counsel for those employees of Nortel who are currently not working due to an injury, illness or medical condition in respect of which they are receiving or entitled to receive disability income benefits by or through Nortel, and who may assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with Nortel or termination thereof, a pension or benefit plan sponsored by Nortel, including in relation to medical, dental, long-term or short-term disability benefits, life insurance or any other benefit, obligation or payment to which such person (or others who may be entitled to claim under or through such person) may be entitled from or through Nortel (referred to individually as an "LTD Beneficiary" and collectively, as the "LTD Beneficiaries") save and except those LTD Beneficiaries who are currently employed and whose benefit or other payments, as described above, arise directly or inferentially out of a

collective agreement between the Applicants, or any of them, and the CAW-Canada was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Applicants and on hearing the submissions of counsel for the Representative, the CAW-Canada, Nortel, the Monitor and other parties,

1. **THIS COURT ORDERS** that the time for the service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and hereby dispenses of further service thereof.

2. **THIS COURT ORDERS** that further service of the Notice of Motion and Motion Record on any party not already served is hereby dispensed with, such that this motion was properly returnable July 9, 2009.

3. **THIS COURT ORDERS** that, subject to paragraph 9 hereof, Sue Kennedy is hereby appointed as representative of all LTD Beneficiaries in the proceedings under the *Companies' Creditors Arrangement Act (Canada)* ("CCAA"), the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") or in any other proceeding which has been or may be brought before this Honourable Court (the "Proceedings"), including, without limitation, for the purpose of settling or compromising claims by the LTD Beneficiaries in the Proceedings.

4. **THIS COURT ORDERS** that, subject to paragraph 9 hereof, Koskie Minsky LLP is hereby appointed as counsel for all LTD Beneficiaries in the Proceedings for any issues affecting the LTD Beneficiaries in the Proceedings.

5. **THIS COURT ORDERS** that Nortel shall provide to the Representatives and their counsel, without charge:

   (a) the names, last known addresses and last known e-mail addresses (if any) of all the Former Employees, whom they represent, as well as applicable data regarding their entitlements, subject to a confidentiality agreement and to only be used for the purposes of the Proceedings; and

   (b) upon request of the Representatives and their counsel, such documents and data, as may be relevant to matters relating to the issues in the Proceedings,

including documents and data, pertaining to the various long term disability, pension, benefit, supplementary pension, termination allowance plans, severance and termination payments and other arrangements for group health, life insurance, retirement and severance payments, including up to date financial information regarding the funding and investments of any of these arrangements.

6. **THIS COURT ORDERS** that all reasonable legal, actuarial and financial expert and advisory fees and all other incidental fees and disbursements, as may have been or shall be incurred by the Representatives and their counsel, shall be paid by Nortel on a bi-weekly basis, forthwith upon the rendering of accounts to Nortel. In the event of any disagreement regarding such fees, such matters may be remitted to this Court for determination.

7. **THIS COURT ORDERS** that notice of the granting of this Order be provided to the LTD Beneficiaries by regular mail to their last know address under such terms and conditions as to be agreed upon by the Representative, the Applicants and the Monitor.

8. **THIS COURT ORDERS** that the Representative, or her counsel on her behalf, are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body and other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

9. **THIS COURT ORDERS** that any individual LTD Beneficiary who does not wish to be bound by this Order and all other related Orders which may subsequently be made in these proceedings shall, within 30 days of mailing of notice of this Order, notify the Monitor, in writing, by facsimile, mail or delivery, and in the form attached as Schedule "A" hereto and shall thereafter not be bound and shall be represented themselves as an independent individual party to the extent they wish to appear in these Proceedings.

10. **THIS COURT ORDERS** that the Representative and Koskie Minsky LLP shall have no liability as a result of their respective appointment or the fulfilment of their duties in carrying out the provisions of this Order from and after January 14, 2009 save and except for any gross negligence or unlawful misconduct on their part.

11. **THIS COURT ORDERS** that the Representatives shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of theirs powers and duties.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 30 2009

PER / PAR:

SCHEDULE "A"

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 and NORTEL NETWORKS TECHNOLOGY CORPORATION

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

OPT-OUT LETTER

Ernst & Young Inc.
Ernst & Young Tower
222 Bay Street
P.O. Box 251
Toronto, Ontario M5K 1J7

Attention: Lee K. Close
Tel: 1.866.942.7177
Fax: 416.943.3300

I, _____, am an employee of the Nortel companies, and am
[Insert Name]
currently in receipt of or have applied for disability income benefits.

Under Paragraph 9 of the Representation Order for Disabled Employees, LTD Beneficiaries who do not wish Koskie Minsky LLP to act as their representative counsel may opt out.

I hereby notify the Monitor that I do not wish to be bound by the Order and will be represented as an independent individual party to the extent I wish to appear in these proceedings.

_____ _____

Date *Signature*

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

O R D E R

57

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Royal Bank Plaza, South Tower
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Lawyers for the Applicants

3

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 31ST DAY
	)	
JUSTICE MORAWETZ	)	OF MARCH, 2010

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION (the "Applicants")

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

SETTLEMENT APPROVAL ORDER

THIS MOTION, made by the Applicants (collectively, "Nortel") for an order approving the amended and restated settlement agreement made as of the 30th day of March, 2010, attached as Schedule "A" to this Order (the "Amended and Restated Settlement Agreement") and for the other relief set out in the Notice of Motion dated March 30, 2010 was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of Elena King sworn March 30, 2010 and the Forty-Second Report of Ernst & Young Inc. dated March 30, 2010 (the "Forty-Second Report") in its capacity as monitor (the "Monitor"), and on hearing submissions of counsel for the Applicants, the Monitor, The Northern Trust Company, Canada, in its capacity as trustee of the HWT and it is capacity as trustee and custodian for the trust funds maintained in respect of the Pension Plans and the master trust for the Pension Plans, the Northern Telecom Limited Pension Trust Fund, the Opposing LTD Employees and the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited and on the consent of CAW, the Former

Employees Representatives, the LTD Representative and Representative Counsel (as those terms are defined in the Amended and Restated Settlement Agreement); the UCC, the Bondholder Committee (as those terms are defined in the Amended and Restated Settlement Agreement) and the Superintendent of Financial Services of Ontario (the "Superintendent") as the administrator of and on behalf of the Pension Benefits Guarantee Fund (the "PBGF") not opposing, no one else appearing although duly served as appears from the affidavit of service of Katie Legree dated March 30, 2010, filed.

1. **THIS COURT ORDERS** that service of the Notice of Motion, the Forty-Second Report and the Motion Record is hereby validated so that this Motion is properly returnable today and further service thereof is hereby dispensed with.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Affidavit of Elena King dated February 18, 2010 or the Amended and Restated Settlement Agreement.

Amended and Restated Settlement Agreement

3. **THIS COURT ORDERS** that the Amended and Restated Settlement Agreement is hereby approved in its entirety, including all schedules attached thereto, and that the Parties thereto (including by representation) are hereby bound by this Order and the Amended and Restated Settlement Agreement and authorized and directed to comply with their obligations thereunder, including, without limitation, to make the payments provided for therein. The Amended and Restated Settlement Agreement supersedes all prior arrangements and understandings among the Parties thereto (including by representation) with respect to such subject matter, including, without limitation, the Settlement Agreement made as of the 8th day of February, 2010.

Pension Plans

4. **THIS COURT ORDERS AND DECLARES** that any Pension 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 Pension Plans shall, to the extent they are allowed 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, such that no part of any Pension Claims shall be entitled to any preferential treatment or enjoy any priority in any manner over the claims of ordinary unsecured creditors made against Nortel, or rank as a priority claim, as a trust (whether deemed or otherwise) or a lien or charge.

5. **THIS COURT ORDERS AND DECLARES** that no person or entity, including without limitation, (i) the Representatives, (ii) the Superintendent, as administrator of and on behalf of the PBGF, (iii) NNL, as the administrator of the Pension Plans, (iv) all successor administrators of the Pension Plans (whether appointed by the Superintendent or otherwise), and (v) the Pension HWT Claimants, all future members and beneficiaries of the Pension Plans, the trustee and custodian of the Pension Plans, the employees and former employees of Nortel and others who may have or make claims against Nortel or any Nortel Worldwide Entity with respect to employment or post employment or post retirement benefits (collectively, with the Pension HWT Claimants, the "Employee Claimants"), shall directly or indirectly assert, advance, re-assert or re-file any claim or initiate any legal proceedings or actions of any nature or kind 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 such claims are provable) or the Pension Plans except as an ordinary unsecured claim ranking on a *pari passu* basis with the claims of ordinary unsecured creditors of Nortel, and shall not assert or advance any claim, directly or indirectly, that the Pension Claims, or any part thereof, ranks as a priority or preferential claim over the claims of ordinary unsecured creditors or Nortel, including, without limitation, that it is the subject of a trust (whether deemed or otherwise) or a lien or charge, or under other legal or equitable theory, and all such priority, trust, lien or charge claims are hereby forever barred, enjoined, released and extinguished as against Nortel, any Nortel Worldwide Entity, the Pension Plans, the trustee and custodian of the Pension Plans, 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.

6. **THIS COURT ORDERS** that the portion of proofs of claim already or hereafter filed by the Superintendent as the administrator of and on behalf of the PBGF, by Nortel, by any Employee Claimants or by any other person or entity claiming, asserting or advancing priority or preferential treatment of any kind, including, without limitation, trusts (whether deemed or otherwise) liens or charges in respect of any Pension Claims or payments by the PBGF with respect to the Pension Plans be and they hereby are disallowed, but only to the extent that they claim such priority or preferential treatment, without prejudice to the ordinary unsecured claims included in such proofs of claim. For greater certainty, such disallowance shall not otherwise affect the quantum or validity of such claims, which shall rank as ordinary unsecured creditors on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel, in each case, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings.

7. THIS COURT ORDERS that with respect to claims by the Superintendent on behalf of the PBGF, and any administrator appointed by the Superintendent, paragraphs 4, 5 and 6 shall only apply if: (i) the Pension Payments are made in accordance with the Amended and Restated Settlement Agreement; and (ii) no bankruptcy order is made with respect to Nortel on or before September 30, 2010.

8. **THIS COURT ORDERS** that as long as NNL continues to administer the Pension Plans, there shall be no change whatsoever to the plan terms of the Pension Plans without the approval of the Court, and no change to the current asset mix or investment policies with respect to the Pension Plans other than at the request, and with the consent, of the Representative Counsel and the approval of the Court.

9. **THIS COURT ORDERS** that Nortel shall make all current service payments and special payments to the Pension Plans in respect of defined benefit entitlements thereunder in the same manner as it has been doing over the course of the proceedings under the CCAA, through to March 31, 2010 in accordance with the last actuarial valuation for the Pension Plans filed with the Financial Services Commission of Ontario ("FSCO") in the aggregate amount of $2,216,254.00 per month. Thereafter and through to September 30, 2010, Nortel shall make only current service payments to the Pension Plans (in accordance with the last

actuarial valuation for the Pension Plans filed with FSCO) in the aggregate amount of $379,837.00 per month. For greater certainty, Nortel shall not be required to make any special payment contributions to the Pension Plans after March 31, 2010. Nortel shall also make current service contributions in respect of defined contribution entitlements under the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan (Registration No. 0342048) in accordance with the terms thereof, through to September 30, 2010 and shall not be precluded from doing so by the terms of the Amended and Restated Settlement Agreement. Nortel shall not be required to make any payments to the Pension Plans after September 30, 2010, except in respect of any claims in respect of the Pension Plans allowed against Nortel (which claims shall rank on a *pari passu* basis with the unsecured claims of the ordinary unsecured creditors of Nortel) pursuant to any claims adjudication procedure established in these proceedings. Neither Nortel, nor any Nortel Worldwide Entity shall have any liability regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans that occurs after September 30, 2010. For greater certainty, nothing in this paragraph affects any obligation or liability of Nortel regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans that occurs before 11:59 p.m. on September 30, 2010.

Health and Welfare Trust

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.

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.

12. **THIS COURT ORDERS AND DECLARES THAT** nothing in this Order, including, without limiting the generality of the foregoing, the provisions of paragraphs 10 and 11, affects the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT.

Release and Charge

13. **THIS COURT ORDERS** that the M&D Beneficiaries and former employees entitled to payment from the Termination Fund shall be entitled to the benefit of a charge on Nortel's Property (as defined in the Initial Order) to secure payment of the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments (the "Payments Charge"), which Payments Charge shall: (i) not exceed an aggregate amount of FIFTY-SEVEN MILLION DOLLARS ($57,000,000.00); (ii) rank subordinate in priority to the Inter-company Charge and the Shortfall Charge (as both terms are defined in the Initial Order); (iii) apply in these proceedings and in any subsequent bankruptcy or receivership; (iv) be reduced in amount as the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments are paid by an amount equal to each such payment made; and (v) automatically terminate and be extinguished on the filing with this Honourable Court

by the Monitor of a certificate certifying that the terms of the Amended and Restated Settlement Agreement have been complied with by Nortel.

14. **THIS COURT ORDERS** that the Payments Charge shall constitute a "Charge" pursuant to the Initial Order, and shall be subject to the provisions relating to Charges including, without limitation, paragraphs 42 through 47 thereof and that the creation of the Payments Charge shall not preclude this Court from creating additional charges under the Initial Order that rank in priority to or *pari passu* with the Payments Charge.

15. **THIS COURT ORDERS AND DECLARES** that the Releasees, the trustee and custodian of the Pension Plans, the CAW, the Representatives, and if and only if paragraphs 4, 5 and 6 apply as provided in paragraph 7, the Superintendent in his capacity as administrator of and on behalf of the PBGF, and their respective officers, directors, employees, agents, members, legal counsel and financial advisors and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing, 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) related to (i) the Pension Plans, including without limitation, the administration of the Pension Plans, any obligation to assert or advance in these proceedings, or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans, any claim ranking in preference or priority to claims of unsecured creditors, as a trust (whether deemed or otherwise) or a lien or charge, the funding of the Pension Plans (including any obligation to contribute to the Pension Plans, except as required by paragraph 9 of this Order) and the investment of the Pension Plan assets, and (ii) the HWT, including without limitation, the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

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. For greater certainty, notwithstanding the foregoing, nothing in this Order shall release or discharge the Nortel Releasees from any Pension Claims and HWT Claims to the extent such claims are allowed as ordinary unsecured claims (which claims shall rank as on a *pari passu* basis with the unsecured claims of the ordinary unsecured creditors of Nortel) against the Nortel Releasees pursuant to any claims adjudication procedure established in these proceedings.

17. **THIS COURT ORDERS** that the Employee Claimants shall not assert, advance or make any claims of any nature whatsoever against any person or entity whatsoever that could reasonably be expected to result in a claim over (including, without limitation, a claim for contribution or indemnity) being made against any of the Releasees or Nortel Releasees with respect to the subject matter of the release provisions hereof.

CCAA Plan or Subsequent Bankruptcy

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.

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ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 0 1 2010

PER / PAR:

SCHEDULE "A"

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AMENDED AND RESTATED SETTLEMENT AGREEMENT

THIS AGREEMENT made as of the 30th day of March, 2010

AMONG :

NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS GLOBAL CORPORATION

(collectively, "**Nortel**" and individually a **"Nortel Entity"**)

- and –

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

(the **"Monitor"**)

- and -

DONALD SPROULE, DAVID ARCHIBALD and MICHAEL CAMPBELL, court appointed representatives of the Nortel Former Employees (as hereinafter defined)

(the **"Former Employees Representatives"**)

- and -

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries (as hereinafter defined)

(the **"LTD Representative"**)

- and -

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

("Representative Counsel")

- and -

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

("CAW")

A. RECITALS

WHEREAS Nortel filed for and obtained protection under the *Companies' Creditors Arrangement Act* (**"CCAA"**) by order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated January 14, 2009, as amended and restated (the "**Initial Order**");

AND WHEREAS by Order of the Court dated May 27, 2009, the Former Employees Representatives were appointed representatives of all former employees, including pensioners, of Nortel or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them, other than (a) those represented by counsel to the CAW, and (b) those who elected pursuant to the requirements of such Order not to be bound by such Order (the individuals in respect of whom the Former Employees Representatives were appointed pursuant to such Order, are referred to herein as the "**Nortel Former Employees**");

AND WHEREAS certain employees and former employees of Nortel are represented by counsel to the CAW;

AND WHEREAS by Order of the Court dated July 30, 2009, the LTD Representative was appointed representative of those employees of Nortel who are currently not working due to an injury, illness or medical condition in respect of which they are receiving or entitled to receive disability income benefits by or through Nortel, and who may assert an existing or future claim for payment, reimbursement or coverage arising in connection with their employment with Nortel or termination thereof, a pension or benefit plan sponsored by Nortel, including in relation to medical, dental, long-term or short-term disability benefits, life insurance or any other benefit, obligation or payment to which such person (or others who may be entitled to claim under or through such person) may be entitled from or through Nortel , other than (a) those individuals who are currently employed and whose benefit or other payments, as described above, arise directly or inferentially out of a collective agreement between any Nortel Entity and the CAW, and (b) those individuals who elected pursuant to the requirements of such Order not to be bound by such Order (the individuals in respect of whom the LTD Representative was appointed pursuant to such Order are referred to herein as the **"Represented LTD Beneficiaries"**);

AND WHEREAS Representative Counsel was appointed as counsel to the Nortel Former Employees and the Represented LTD Beneficiaries by Court orders dated May 27, 2009 and dated July 30, 2009, respectively, for the purpose of, among other things, settling or compromising the claims of the individuals they represent;

AND WHEREAS the parties to this Settlement Agreement (the **"Parties"**) have reached an agreement for the benefit of Nortel and all of its stakeholders, as well as the Official Committee of Unsecured Creditors of Nortel Networks Inc. and certain of its affiliates in the chapter 11 proceedings before the U.S. Bankruptcy Court for the District of Delaware (the **"UCC"**) and the Informal Nortel Noteholder Group (the **"Bondholder Committee"**) regarding certain issues related to, among other things, Nortel's Pension Plans, HWT (both as defined below) and certain employment related issues (collectively, the **"Settlement"**); and

NOW THEREFORE for value received (the receipt and sufficiency of which are hereby acknowledged), the Parties agree as follows:

B. BENEFITS AND EMPLOYEES

1. For the remainder of 2010, Nortel shall continue in accordance with current practice to pay medical and dental benefits and life insurance benefits to Nortel pensioners and their beneficiaries and survivors, whether or not represented by Representative Counsel, and for greater certainty, including without limitation all of the individuals referenced in paragraphs (a) and (b) of the second recital above (collectively, the "**Pensioners**") and the Nortel employees receiving or who become entitled during 2010 to receive long term disability benefits, whether or not represented by Representative Counsel, and for greater certainty, including without limitation all of the individuals referenced in paragraphs (a) and (b) of the fourth recital above (collectively, the **"LTD Beneficiaries"**) in accordance with the current benefit plan terms and conditions. The Pensioners and the LTD Beneficiaries shall be referred to collectively as the **"M&D Beneficiaries"**. Medical and dental benefits to be paid to the M&D Beneficiaries shall be funded solely from Nortel's funds on a "pay as you go basis" in respect of benefits for the coverage period ending December 31, 2010 (the "**Medical and Dental Payments**"), provided that no Medical and Dental Payments claims submitted after February 28, 2011 shall be accepted, honoured or paid. Life insurance benefits to the M&D Beneficiaries shall continue unchanged until December 31, 2010 and shall be funded in the same manner as for 2009 (the **"Life Insurance Benefits"**). For greater certainty, no Medical and Dental Payments or Life Insurance Benefits shall be paid by Nortel for any benefit coverage period following December 31, 2010.

2. Nortel shall pay income benefits to the LTD Beneficiaries and to those people receiving or who become entitled during 2010 to receive survivor income benefits and survivor transition benefits under Nortel benefit plans (as such plans exist at the date of this Settlement Agreement) solely from Nortel funds on a "pay as you

go basis" for benefits in respect of the coverage period from January 1, 2010 to December 31, 2010 (the "**Income Payments**"). For greater certainty, no Income Payments shall be paid by Nortel for the benefit coverage period following December 31, 2010.

3. Upon the satisfaction of all of the conditions in paragraph I.1 of this Settlement Agreement, Nortel shall create a pool of $4.3 million (inclusive of Representative Counsel's costs in respect of the motion for leave to appeal referred to in paragraph B.4 below to a maximum of $100,000.00, based on documented and reasonable fees and disbursements) (the "**Termination Fund**") to be set aside for employees and former employees of Nortel whose employment has been terminated or is terminated prior to or on June 30, 2010 to whom amounts are or may become owing for termination or severance payments, who have not been offered employment with a purchaser of Nortel's assets and who have not received or are not entitled to receive (i) gross cumulative Annual Incentive Plan payments from and after October 1, 2009 of $3,000.00 or more; or (ii) a Key Employee Incentive Plan or Key Employee Retention Plan payment in 2009; or (iii) payment from any Court approved equivalent 2010 plan. Each such individual shall be paid a maximum of $3,000.00 (subject to applicable withholding taxes) from the Termination Fund (the "**Termination Payments**"). Any Termination Payments paid to such individuals shall be credited against allowed claims of such individuals and such claims shall be correspondingly reduced. To the extent that funds are unused in respect of terminations prior to or on June 30, 2010, or payment of Representative Counsel's costs referred to above, the Termination Fund may be used to make payments on account of terminations after June 30, 2010. If such unused funds are to be used for another purpose, such purpose shall be approved by the Court, on such basis as is agreed to between Representative Counsel and the Monitor.

4. Upon the issuance of an order by the Court approving this Settlement Agreement in its entirety, including all schedules thereto, and upon the expiry of all appeals and rights of appeal in respect thereof (the "**Final Approval Order**"), Representative Counsel shall promptly withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada (the **"Leave Application"**) on a with prejudice basis. No claim for costs in respect of the Leave Application shall be made by or against Nortel, or any creditor participants (including the UCC and the Bondholder Committee).

5. The employment of the LTD Beneficiaries shall terminate on December 31, 2010. However, such termination shall not affect in any manner any rights the LTD Beneficiaries or anyone claiming through them may have, either under a collective agreement, at common law or pursuant to any statute in relation to ordinary unsecured claims against Nortel arising out of their employment or termination thereof, 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, nor should affect in any manner their ability to participate in any program of benefits for which they are eligible that is established as a successor to the plans in which they currently participate. For greater certainty, such claims, to the extent they are allowed as claims 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. Nothing in this paragraph will affect the rights of the LTD Beneficiaries to make claims in respect of the HWT (as defined below).

C. *HEALTH AND WELFARE TRUST*

1. Resolution: The Parties will work towards a Court approved distribution of the Health and Welfare Trust ("**HWT**") corpus in 2010 to its beneficiaries entitled thereto and the resolution of any issues necessarily incident thereto. For greater certainty, nothing in this Settlement Agreement affects the determination on any basis whatsoever of the entitlement of any beneficiary to a distribution from the corpus of the HWT. Any fees or expenses incurred in connection with any dispute or litigation among the beneficiaries of the HWT concerning entitlement (including without limitation all legal, actuarial and other fees and expenses of the trustee of the HWT and other service providers of the HWT) shall not be paid by Nortel, but shall be paid by the HWT corpus. For greater certainty, such fees or expenses shall not include those of the Monitor and incurred by Nortel in connection with any motion for termination of the HWT or for directions with respect to the HWT, which shall be paid by Nortel.

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

claims on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel.

D. REGISTERED PENSION PLANS

1. Administration: Nortel shall continue to administer the Nortel Networks Negotiated Pension Plan (Registration No. 08587766) and the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan (Registration No. 0342048) (collectively, the "**Pension Plans**") until 11:59 p.m. on September 30, 2010. For greater certainty, Nortel Networks Limited shall remain the administrator (as defined in the *Pension Benefits Act*) of the Pension Plans until 11:59 p.m. on September 30, 2010. Neither Nortel nor the Monitor will take any steps to initiate a wind up, in whole or in part, of the Pension Plans with an effective date prior to September 30, 2010 at 11:59 p.m. Nortel shall cease to administer the Pension Plans on September 30, 2010 at 11:59 p.m. and thereafter shall have no further responsibility or liability for administration thereof (including any windup). So long as Nortel continues to administer the Pension Plans, there shall be no change whatsoever to the plan terms of the Pension Plans without the approval of the Court, and no change to the current asset mix or investment policies with respect to the Pension Plans other than at the request, and with the consent, of the Representative Counsel and the approval of the Court.

2. Payments: Nortel shall continue to make contributions to the Pension Plans in the same manner as it has been doing over the course of the proceedings, under the CCAA, through to March 31, 2010, and for greater certainty, shall continue to make all current service payments and special payments related to the Pension Plans through that date in accordance with the last actuarial valuation for the Pension Plans filed with the Financial Services Commission of Ontario in the aggregate amount of $2,216,254.00 per month (the "**March Pension Payments**"). Thereafter and through to September 30, 2010, Nortel shall make only current service payments to the Pension Plans in the aggregate amount of $379,837.00 per month (the "**September Pension Payments**"). For greater certainty, Nortel shall not make any special payment contributions to the Pension Plans after March 31, 2010. The March Pension Payments and the September Pension Payments shall be referred to collectively as the "**Pension Payments**". Nortel shall not make any payments or contributions whatsoever to the Pension Plans after September 30, 2010, except in respect of any claims in respect of the Pension Plans allowed against Nortel (which claims shall rank on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel) pursuant to any claims adjudication procedure established in these proceedings. Neither Nortel, nor any Nortel Worldwide Entity shall have any obligation or liability regarding any contributions, fees, indemnities, charges or costs of any kind in respect of the administration of the Pension Plans after September 30, 2010. For greater certainty, nothing in this paragraph affects any obligation or liability of Nortel regarding any contributions, fees, indemnities, charges or costs of any kind in

respect of the administration of the Pension Plans before 11:59 p.m. on September 30, 2010.

3. Transition: With the assistance of the Monitor, Nortel shall use reasonable efforts to cause all books, records, data and other information relating to the Pension Plans or beneficial to the administration or winding-up of the Pension Plans in the possession or control of Nortel to be consolidated in Toronto, Ontario, Canada by no later than March 31, 2010. The Monitor and Nortel shall take all reasonable steps, at the sole cost and expense of Nortel, to complete the orderly transfer of the records of administration of the Pension Plans to a new administrator appointed by the Superintendent of Financial Services (the "**Superintendent**'), on September 30, 2010 (the "**New Administrator**"). Any non-compliance or allegation of non-compliance by Nortel or the Monitor under this paragraph D.3 shall have no effect on the enforceability or effectiveness of any other provision of this Agreement.

E. RANKING OF PENSION CLAIMS

1. The Representatives agree on behalf of the members of the Pension Plans their and beneficiaries and surviving spouses who are entitled to benefits from the Pension Plans and whom they represent and on their own behalf (collectively, the "**Pension Claimants**") that in respect of any claim for payment of or damages related to any solvency or wind up deficiencies, unfunded liabilities, or unpaid or accrued contributions (including, for greater certainty, any special payments whatsoever), any liability regarding the Pension Benefits Guarantee Fund (the "**PBGF**") or any obligation of or claim arising against any person with respect to the Pension Plans or the administration thereof (the "**Pension Claims**"): (a) no Pension Claims shall enjoy any priority in any manner over the claims of ordinary unsecured creditors made against Nortel; (b) the Pension Claimants hereby waive, and shall not directly or indirectly assert, advance, re-assert or re-file any claims or initiate any legal proceedings or actions of any nature or kind 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 any Nortel Worldwide Entity or the Pension Plans, that the Pension Claims or any part thereof rank as a priority claim over the claims of ordinary unsecured creditors, as a trust (whether deemed or otherwise) or a lien or charge (hereinafter referred to as a "**lien**"), or under any other legal or equitable theory; and (c) the Pension Claimants shall not support, directly or indirectly, any application, claim or action by Nortel, in its capacity as administrator of the Pension Plans, the New Administrator, any successor administrator howsoever appointed, the Superintendent, as the administrator of and on behalf of the PBGF, or any other person or entity, to directly or indirectly assert, advance, re-assert or re-file any claims or initiate any legal proceedings or actions of any nature or kind 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 any

Nortel Worldwide Entity or the Pension Plans, that the Pension Claims or any part thereof rank as a priority claim over the claims of ordinary unsecured creditors, as a trust (whether deemed or otherwise) or a lien, or under any other legal or equitable theory, and such claims shall be treated as ordinary unsecured claims, and for greater certainty, any such claims, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings, shall rank on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel.

2. That portion of any proofs of claim already or hereafter filed by the Superintendent as the administrator of and on behalf of the PBGF, by Nortel or by any person claiming that any payments by the PBGF or that the Pension Claims or any part thereof rank as a priority or preferential 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 shall be disallowed, but only to the extent that they claim such priority or preference, and such disallowance shall not be opposed or appealed, directly or indirectly, by such claimants. For greater certainty, such disallowance shall not otherwise affect the quantum or validity of such claims, which shall rank as ordinary unsecured creditors on a *pari passu* basis with the claims of the ordinary unsecured creditors of Nortel, in each case, to the extent allowed against Nortel pursuant to any claims adjudication procedure established in these proceedings.

F. NON-OPPOSITION

1. The Representatives agree, on their own behalf and on behalf of those they represent, that they shall not oppose, directly or indirectly, any employee incentive program, including any charge therefor, that is determined by the Monitor to be reasonable and necessary for the continued operation of Nortel. They further agree that they shall not oppose, directly or indirectly, the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring, provided that: (i) such trust is approved and recommended by the Monitor; (ii) no part of the corpus of the trust may be used to pay bonuses or any other compensation to the directors; and (iii) any corpus of the trust remaining on the termination of the trust reverts to Nortel.

G. RELEASE AND CHARGE

1. The CAW, the LTD Representative and the Former Employees Representatives agree on their own behalf and on behalf of the Pension Claimants and the beneficiaries of the HWT who they represent (collectively, the "**Pension HWT Claimants**") that each of the trustee of the HWT, the Monitor, and all members of Pension Plans' committees, (in their personal capacity), and their respective officers, directors, employees, agents, members, legal counsel, financial advisors,

and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing and the officers, directors, employees, agents, members, legal counsel, financial advisors of Nortel and the Nortel Worldwide Entities and each of the heirs, executors, administrators, legal representatives, successors and assigns of each of the foregoing (collectively, the **"Releasees"**), are hereby released, discharged and remised from any and all direct and indirect claims (contingent, liquidated or unliquidated, proven or unproven, known or unknown, in the nature of damages or otherwise, whether or not asserted and whether arising by contract, agreement (whether written or oral), under statute, civil law, common law, or in equity, or otherwise in any jurisdiction) related to (i) the Pension Plans, including without limitation, the administration of the Pension Plans, any obligation to assert or advance in these proceedings, or in any subsequent receivership or bankruptcy proceedings or in any other proceedings or in any other forum whatsoever concerning Nortel, any Nortel Worldwide Entity or the Pension Plans, any priority claim, as a trust (whether deemed or otherwise) or a lien, the funding of the Pension Plans (including any obligation to contribute to the Pension Plans except as required by this Settlement Agreement) and the investment of the Pension Plan assets; and (ii) the HWT, including without limitation, the administration of the HWT, the funding of the HWT, any obligation to contribute to the HWT and the investment of the HWT assets, provided that nothing herein shall release a director of Nortel from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only.

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

3. In furtherance of the foregoing and in order to ensure that this constitutes a true settlement of the subject matter hereof, the Pension HWT Claimants agree that they shall not assert, advance or make any claims of any nature whatsoever

against any person or entity whatsoever that could reasonably be expected to result in a claim over (including, without limitation, a claim for contribution or indemnity) being made against any of the Releasees or the Nortel Releasees with respect to the subject matter of the release provisions of this Settlement Agreement.

4. The M&D Beneficiaries and former employees entitled to payment from the Termination Fund shall be entitled to the benefit of a charge on Nortel's Property (as defined in the Initial Order) to secure payment of the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments (the "**Payments Charge**"), which Payments Charge shall not exceed an aggregate amount of FIFTY-SEVEN MILLION DOLLARS ($57,000,000.00) and which Payments Charge shall rank subordinate in priority to the Inter-company Charge (as defined in the Initial Order). The Payments Charge shall apply in these proceedings and in any subsequent bankruptcy or receivership. The maximum amount secured by the Payments Charge shall be reduced as the Medical and Dental Payments, Income Payments, Termination Payments and Pension Payments are paid by an amount equal to each such payment made. Once the last payment is made, the Monitor shall file a certificate (the **"Monitor's Certificate"**) with the Court certifying that the terms of the Settlement have been complied with by Nortel, and the Payments Charge shall automatically terminate and be extinguished by the filing of the Monitor's Certificate.

H. CCAA PLAN OR SUBSEQUENT BANKRUPTCY

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

I. CONDITIONS

1. This Settlement Agreement is conditional upon (i) Nortel obtaining the Final Approval Order substantially in the form attached as Schedule "B" with such changes as the parties may agree to, acting reasonably; (ii) the Superintendent in his capacity as administrator of the PBGF, Nortel and the Monitor executing the letter attached as Schedule "C"; and (iii) the Leave Application having been withdrawn on a with prejudice basis.

2. It is the intention of the Parties that these terms be binding upon, and enure to the benefit of the Pension HWT Claimants, the Releasees and the Nortel Releasees, and that: (i) as beneficiaries hereof, the Relcasees and the Nortel Releasees shall

be entitled to rely upon and to seek the enforcement of these terms, which cannot be varied without further order of the Court on full and proper notice to them; and (ii) the ordinary unsecured creditors of Nortel shall be entitled to rely upon and benefit from the provisions and agreements herein and to seek their enforcement, which provisions and agreements cannot be varied without further order of the Court on full and proper notice to them.

J. GENERAL

1. The Monitor shall post the motion record for approval of the Settlement, including the Settlement Agreement and the proposed Final Approval Order on the Monitor's website at www.ey.com/ca/Nortel and on the website of Representative Counsel at www.kmlaw.ca.

2. The Representatives, the Representative Counsel and the CAW shall co-operate with Nortel and the Monitor on all communications related to this settlement, as required.

3. This Settlement Agreement will be governed by and interpreted and enforced in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The Parties hereby irrevocably consent and submit to the non-exclusive jurisdiction of the Ontario Superior Court of Justice and waive any objection based on venue or forum non conveniens with respect to any action commenced in connection with this Settlement Agreement.

4. This Settlement Agreement may be executed in any number of counterparts (including by way of facsimile and PDF) and all of such counterparts taken together will be deemed to constitute one and the same instrument.

[Signature pages to follow]

IN WITNESS WHEREOF the Parties have duly executed this Agreement as of the date first written above:

NORTEL NETWORKS CORPORATION

Per: _____
Name: John Doolittle
Title: Senior Vice-President, Corporate Services and Chief Financial Officer

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS LIMITED

Per: _____
Name: John Doolittle
Title: Senior Vice-President, Corporate Services and Chief Financial Officer

Per: _____
Name: Clarke Glaspell
Title: Controller

NORTEL NETWORKS TECHNOLOGY CORPORATION

Per: _____
Name: Clarke Glaspell
Title: President and Controller

NORTEL NETWORKS INTERNATIONAL CORPORATION

Per: _____
Name: John Doolittle
Title: President

Per: _____
Name: Clarke Glaspell
Title: Treasurer

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name: John Doolittle
Title: President

Per: _____
Name: Clarke Glaspell
Title: Controller

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

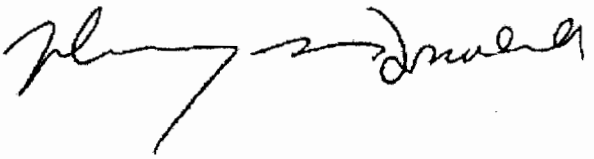
DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity



Per: _____
Name: Murray A. McDonald
Title: President

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: D E K Sproule
Name:
Title: NRPC National Chair

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

MICHAEL CAMPBELL, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name: DAVID D. ARCHIBALD
Title: RETIREE

MICHAEL CAMPBELL, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

NORTEL NETWORKS GLOBAL CORPORATION

Per: _____
Name:
Title:

ERNST & YOUNG INC., solely in its capacity as monitor in the CCAA proceedings of Nortel and not in its personal capacity

Per: _____
Name:
Title:

DONALD SPROULE, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

DAVID ARCHIBALD, court appointed representative of the Nortel Former Employees

Per: _____
Name:
Title:

MICHAEL CAMPBELL, court appointed representative of the Nortel Former Employees

Per: Michael Campbell I.auth.
Name: MICHAEL CAMPBELL.
Title: C.A.R.

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries

Per: Sue Kennedy
Name:
Title:

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

Per: _____
Name:
Title:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

Per: _____
Name:
Title:

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries

Per: _____
Name:
Title:

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

Per: _____
Name: Susan Philpott
Title: Representative Counsel

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

Per: _____
Name:
Title:

SUE KENNEDY, court appointed representative of the Represented LTD Beneficiaries

Per: _____
Name:
Title:

KOSKIE MINSKY LLP, court appointed counsel to the Former Employees of Nortel and the Represented LTD Beneficiaries

Per: _____
Name:
Title:

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-Canada) and its Locals 27, 1525, 1530, 1837, 1839, 1905 and/or 1915 and George Borosh et al.

Per: _____
Name:
Title:

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I.I.C. Ct. Filing 350507273063

Nortel — Court File No. 09-CL-7950
563. **— Endorsement, April 8, 2010**

Re Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Court File No. 09-CL-7950 (Superior Court of Justice, Commercial List, Toronto, Ontario)

SUPERIOR COURT OF JUSTICE — ONTARIO (COMMERCIAL LIST)

RE :	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
—	
	AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants
—	
BEFORE :	MORAWETZ J.
—	
COUNSEL :	Derrick Tay and Jennifer Stam, for the Applicants
—	
	J. A. Carfagnini, G. Rubenstein, M. Wagner and C. Armstrong, for Ernst & Young Inc., Monitor
—	
	Susan Philpott, for the Former Employees and Disabled Employees
—	
	Kevin Zych, for the Informal Nortel Noteholder Group
—	
	Arthur Jacques, for the Nortel Canada Current Employees
—	
	Deborah McPhail, for the Superintendent of Financial Services (non-PBGF)
—	
	Alex MacFarlane, for the Official Unsecured Creditors' Committee of Nortel Networks Inc.
—	
	Ken Rosenberg and Lily Harmer, for the Superintendent of Financial Services of the Pension Benefit Guarantee Fund (PBGF)
—	
	Rupert Chartrand and Adam Hirsh, for the Nortel Board of Directors
—	
	Robin Schwill, for Nortel Networks UK Limited (In Administration)
—	
	Pamela Huff, for Northern Trust Company, Canada
—	
	Barry Wadsworth, for the CAW-Canada
—	
	Joel P. Rochon and Sakie Tambakos, for the Opposing Long-Term Disability Employees
—	
	Guy Martin, In Person, on behalf of Marie Josee Perrault
—	
HEARD & DECIDED:	MARCH 31, 2010
—	
REASONS	APRIL 8, 2010

RELEASED:

Endorsement

[1] At the conclusion of argument, the record was endorsed:

> Motion granted. Settlement Agreement approved. Reasons will follow. Order to go in the form presented, as amended.

[2] These are those reasons.

[3] The motion was brought by the Applicants to approve the Amended and Restated Settlement Agreement, dated as of March 30, 2010 (the "Amended and Restated Settlement Agreement"), entered into by the Settlement Parties.

[4] The Amended and Restated Settlement Agreement was entered into following the release of my decision on March 26, 2010, in which I did not approve the original Settlement Agreement, which included the "No Preclusion Clause" found in Clause H.2.

[5] The Amended and Restated Settlement Agreement is identical to the Settlement Agreement, except that Clause H.2 has been deleted and the schedules to the Settlement Agreement have been updated to account for the deletion of Clause H.2.

[6] The court was advised that in connection with the Amended and Restated Settlement Agreement, the Applicants and the Superintendent, in his capacity as Administrator of the PBGF, also entered into a letter agreement with respect to certain matters pertaining to the Pension Plans.

[7] In view of obvious overlap between the Settlement Agreement and the Amended and Restated Settlement Agreement, it is appropriate to incorporate, by reference, the March 26, 2010 reasons (the "March 26 Reasons") into this endorsement. The March 26 Reasons are reported at 2010 ONSC 1708.

[8] The defined terms in this endorsement have the same meaning as set out in the March 26 Reasons.

[9] In addition to the motion to approve the Amended and Restated Settlement Agreement, ancillary issues were raised, including issues of sufficiency of notice, an adjournment request and certain alternatives to the Amended and Restated Settlement Agreement.

Sufficiency of Notice

[10] Concerns have been raised with respect to the short service of this motion. Counsel to the Monitor supports the expedited approval of the Amended and Restated Settlement Agreement and urges that the abridged notice be approved for two reasons. First, the pending cessation of benefits on March 31, 2010, in the absence of approval of the Amended and Restated Settlement Agreement, necessitated hearing on an urgent basis, and second, the March 26 Reasons found that the Monitor (i) undertook a comprehensive notice process, (ii) gave the opportunity for any affected person to file a notice of appearance and appear before the court and, (iii) properly implemented the notice process.

[11] In my view, this motion did not raise any new issues in respect of Clause H.2. Arguments with respect to Clause H.2 were detailed at the hearings from March 3-5, 2010 and were referenced in the March 26 Reasons commencing at [83]. Furthermore, all parties were represented in court and counsel were in a position to argue the matter on March 31, 2010. I accept that there was a degree of urgency to hear the motion.

[12] In addition, there was a comprehensive notice process for the March 3, 2010 settlement approval motion properly implemented by the Monitor. Given that the only change from the Settlement Agreement, that was the subject of the March 3, 2010 settlement approval motion, and the Amended and Restated Settlement Agreement, is the removal of Clause H.2, notice and service with respect to the March 3, 2010 settlement approval motion is, in my view, sufficient for all purposes including, validating service of this motion.

[13] In my view, it was both necessary and appropriate to hear the motion on short notice. Short service is validated.

Motion to Adjourn

[14] Counsel for the Opposing LTD Employees requested an adjournment of this motion. The adjournment request was denied, with reasons to follow. The reasons for the denial are the same reasons which I rely upon to approve short service: urgency, full representation of employees in court and counsel were in a position to argue the motion on the merits.

Alternative Relief

[15] Counsel for the Opposing LTD Employees also requested that the benefits in place at the time of the hearing be continued for another 60 days while the parties, including representatives from the Opposing LTD Employees, participate in court-ordered negotiations with Campbell J. This alternative requested relief is addressed in these reasons.

The Amended and Restated Settlement Agreement

[16] Counsel to the Applicants makes four points:

1. Unless the Amended and Restated Settlement Agreement was approved, the Applicants had no authority to continue making preferred payments to the employees.

2. Without the settlement, the Applicants would wind up or terminate the Pension Plan and medical, dental and other benefits in the near future.

3. The approval of the Amended and Restated Settlement Agreement provides clarity and certainty to the parties who depend on receiving benefits on a daily basis.

4. The Amended and Restated Settlement Agreement is not only the best deal available, it is the only deal.

[17] Counsel to the Applicants also submits that the concerns expressed by the court in the March 26 Reasons have been addressed in die Amended and Restated Settlement Agreement, and that this motion does not provide for an opportunity to re-argue the settlement approval motion heard on March 3, 4, and 5, 2010. Effectively, counsel submits that there is nothing new to consider in this motion.

[18] The Applicants' position is supported by the Former and LTD Employees, the CAW, the Superintendent, in all capacities, the Nortel Canada Continuing Employees, the Nortel Board of Directors, the Noteholders, the Unsecured Creditors' Committee, and the Monitor.

[19] The record in support of the motion includes the affidavit of Ms. Elena King, the Forty-Second Report of the Monitor, affidavits from Mr. Donald Sproule and Mr, Michael Campbell, two of the three court-appointed Former Employees' Representatives who were appointed on behalf of all Former Employees, including pensioners of Nortel, and the affidavit of Ms. Susan Kennedy, the court-appointed LTD Representative.

[20] The affidavits stressed the importance of the continuation of the members' medical benefits and pension plans for a further period of time, as well as the anxiety of employees concerned with the imminent cessation or reduction in payments. The affidavits establish that the certainty associated with the preservation and continuation of benefits negotiated in the Settlement Agreement outweigh the limited concession associated with the deletion of Clause H.2.

[21] In its recommendation in support of the requested relief, the Monitor states that it believes the Amended and Restated Settlement Agreement and the Settlement Approval Order take into account the March 26 Reasons, and represents a fair balancing of the interests of the Applicants' stakeholders. The Monitor is of the view that the Amended and Restated Settlement Agreement represents an important step in the implementation of the Applicants' restructuring, which was arrived at after extensive negotiations.

[22] The Opposing LTD Employees request the continuation of benefits for another 60 days, and court-ordered mediation with Campbell J., or alternatively that the Amended and Restated Settlement Agreement not be approved. The motion record of the Opposing LTD Employees consists of the affidavit of Ms. Urquhart and various exhibits. Ms. Urquhart also swore an affidavit March 1, 2010 in support of the Opposing LTD Employees in respect of the hearing for the approval of the

Settlement Agreement.

[23] Counsel to the Opposing LTD Employees submits that the stated urgency of the March 31, 2010 "cutting off" of benefits was exaggerated and that the reality is that while the income replacement benefits for the disabled may cease to be funded from Nortel's operations, the HWT remains in place as a source of funding for income replacement benefits for the LTD Employees.

[24] Counsel also submits that, in terms of extending the payment of benefits from Nortel's operations, the evidence demonstrates that there are sufficient assets to do this. No specifies were provided in support of this statement.

[25] Further, counsel submitted that there are additional facts to justify rejection of the deal and he summarizes from Ms. Urquhart's affidavit that there are legislative initiatives regarding the status of LTD Employee creditor claims that may be addressed by way of amendments to both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

[26] Mr. Rochon also stated that the Opposing LTD Employees rely upon and incorporate by reference the submissions made in their factum submitted in opposition to the Settlement Agreement. These submissions primarily relate to the issue of Third Party Releases.

[27] Submissions were also made in person by Mr. Guy Martin on behalf of Ms. Marie Josee Perrault. Mr. Martin also made submissions on the settlement approval motion. He remains passionate in his opposition to the Amended and Restated Settlement Agreement, for similar reasons to those expressed on the earlier settlement approval motion.

[28] I cannot accept the Opposing LTD Employees' proposal to extend benefits for 60 days while court-ordered negotiations transpire as being an acceptable outcome. There is no evidence to suggest the March 31, 2010 deadline is not genuine. Further, ordering payments out of the HWT corpus will deplete the corpus of the trust, to the potential detriment of the LTD Employees. In addition, the payment by the Applicants of any benefits to the LTD Employees outside of the Amended and Restated Settlement Agreement would be preferential in nature and ignores the fact that there is no statutory priority for the Former and LTD Employees.

[29] Circumstances require that the position of the Former and LTD Employees be considered in light of the current reality. The current reality is that Nortel is insolvent and the benefits and payments promised by Nortel cannot continue indefinitely. Absent approval of the Amended and Restated Settlement Agreement, benefits can cease as at March 31, 2010

[30] There is uncertainty as to what would occur if the Amended and Restated Settlement Agreement was not approved.

[31] Counsel to the Opposing LTD Employees was specifically asked whether he had any assurances that the Amended and Restated Settlement Agreement, supported by a $57 million charge, would be on the table at the end of a 60-day extension period. Counsel could provide no such assurances.

[32] In contrast counsel to the Noteholders was emphatic in stating that either the Amended and Restated Settlement Agreement be approved or benefits should cease. This position was supported by counsel to the Unsecured Creditors' Committee. These two groups are significant creditors of the Applicants.

[33] The reality is that, absent approval of the Amended and Restated Settlement Agreement, the Former and LTD Employees face cessation of benefits, or at best uncertainty, a position that was consistently stated by Representative Counsel to be unacceptable.

[34] It seems to me that the Former Employees' Representatives and the LTD Representative fully considered the impact of the March 26 Reasons and, after consultations with Representative Counsel and communications with a significant number of Former and LTD Employees, came to the conclusion that the Amended and Restated Settlement Agreement represented an acceptable compromise. The Amended and Restated Settlement Agreement does provide the Former and LTD Employees with preferential treatment, at the expense of the remaining unsecured creditors of the Applicants, in exchange for certain concessions.

[35] The Opposing LTD Employees constitute between 37 and 39 people, all of whom, with one or two possible exceptions,

are represented by Representative Counsel or the CAW, the latter of who particularly asserts exclusive representation rights for its members. The total number of former employees is approximately 20,000 and the total number of LTD Employees is about 350. The Opposing LTD Employees consist of approximately 10% of all LTD Employees. I have not been persuaded by the arguments of counsel to the Opposing LTD Employees that the matters in issue be deferred or that approval of the Amended and Restated Settlement Agreement be denied. In my view, it is not appropriate for the objections of a 10% minority override the views of 90% of the LTD Employees, who support the settlement through their court-appointed representative.

[36] The Settlement Agreement and the Amended and Restated Settlement Agreement are products of extensive negotiations between the parties. The Settlement Parties participated in “best efforts” negotiations that resulted in these agreements. In my view, the very existence of the Amended and Restated Settlement Agreement indicates that effective mediation has occurred.

[37] In the March 26 Reasons, I recognized that the Settlement Agreement was arrived at after hard-fought and lengthy negotiations and that the parties to the Settlement Agreement considered it to be the best agreement achievable under the circumstances. In my view, the same can be said with respect to the Amended and Restated Settlement Agreement.

[38] In particular, I note that Representative Counsel consulted with the representatives immediately after the March 26 Reasons were released and there was significant communication with a number of the members of the group. There is strong evidence of support from the employees to the Amended and Restated Settlement Agreement. On the other hand, there are approximately 37 to 39 employees opposing court approval.

[39] Finally, I note that this endorsement does not directly address the third party releases in the Amended and Restated Settlement Agreement, which the Opposing LTD Employees referenced in their submissions. The issue of third party releases was fully argued in the earlier motion and the March 26 Reasons reflect my findings. Nothing in the Amended and Restated Settlement Agreement alters these findings or conclusions.

Disposition

[40] The Amended and Restated Settlement Agreement is not perfect but, in my view, under the circumstances, it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same.

[41] A formal order giving effect to the foregoing was prepared by counsel to the Applicants. Nothing in the order granted, including in particular paragraphs 5 and 11, is intended to prevent the Northern Trust Company, Canada, from claiming and recovering its fees and expenses from the trust funds, as it may be entitled pursuant to law and the trust agreements. All rights of the Northern Trust Company, Canada to recover its fees and expenses and any right of indemnification from the HWT and Pension Plan trust assets that it may have under the terms of the HWT trust or the Pension Plan trusts or under applicable law are not it affected or prejudiced by the order.

[42] I would again like to express my appreciation to all counsel for the quality of their written and oral submissions. The efforts of the Former Employees’ Representatives, the LTD Representative and Representative Counsel are specifically recognized for the dignified manner in which they have discharged their responsibilities.

MORAWETZ J.

Date: April 8, 2010

CITATION: Nortel Networks Limited (Re) , 2010 ONCA 402
DATE: 20100603
DOCKET: M38748

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Goudge and MacPherson JJ.A.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

Joel Rochon, John Archibald, and Sakie Tambakos, for the Objecting LTD Beneficiaries

Alan B. Merskey, and Suzanne M. Wood, for the Applicants

Mark Zigler, Susan Philpott, and Andrea McKinnon, for the Former Employees and Disabled Employees of Nortel

Barry E. Wadsworth, for the CAW-Canada, and George Borosh et al

Lyndon Barnes and Adam Hirsh, for the Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited

Richard B. Swan, for the Informal Nortel Noteholder Group

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Fred Myers, Gale Rubenstein, and Melaney Wagner for the Monitor, Ernst & Young Inc.

Considered in writing on : May 31, 2010

On leave to appeal from the order of the Honourable Justice Geoffrey P. Morawetz of the Superior Court of Justice, dated March 31, 2010

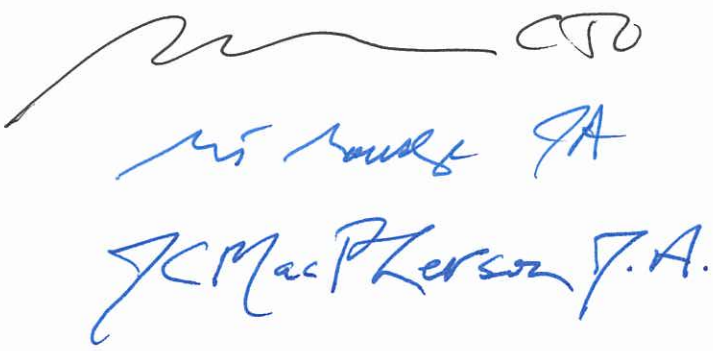
ENDORSEMENT

[1] Leave to appeal is denied.

[2] 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.

[3] 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.

[4] The motion is dismissed. No costs are sought by the respondent and none are ordered.



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CITATION: Nortel Networks Corporation (Re), 2010 ONSC 5584
COURT FILE NO.: 09-CL-7950
DATE: 20101109

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Fred Myers, Gale Rubenstein and Melaney Wagner, for Ernst & Young Inc., Monitor

Derrick Tay, Alan Merskey and Jennifer Stam for Nortel Networks Corporation et al.

W. E. Pepall, for the Former Employees

Thomas McRae, for Nortel Canadian Continuing Employees

G. Finlayson, for the Noteholders

Ken Rosenberg, for the Superintendent of Financial Services

Alex MacFarlane, for the Chapter 11 Unsecured Creditors' Committee

Lyndon Barnes and Geoffrey Grove, for the Board of Directors

Linc Rogers, for Northern Trust Company

Kyla Maher, for Flextronics (Canada) Inc.

Barry Wadsworth, for the CAW

Peter Engelmann and Fiona Campbell, for Susan Kennedy, Court Appointed LTD Beneficiaries' Representative

Joel Rochon and Sakie Tambakos, for the Dissenting LTD Beneficiaries

HEARD: September 29, 30 and October 1, 2010

ENDORSEMENT

Overview

[1] Ernst & Young Inc. (the "Monitor"), in its capacity as Monitor of Nortel Networks Corporation, Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, the "Applicants" or "Nortel") applies for approval of a proposed methodology for allocation (the "Proposed Allocation Methodology") of the funds held in the Applicants' Health and Welfare Trust (the "HWT") among certain beneficiaries participating in the HWT.

[2] The Monitor also requests (i) an order declaring December 31, 2010 as the deemed Notice of Termination date under the Trust Agreement (defined below) and dispensing with delivery of a Notice of Termination; (ii) authorization for the HWT Trustee (the "Trustee") to make distributions from the HWT to beneficiaries under participating benefits based on the Proposed Allocation Methodology and as directed by the Monitor or the Applicants; (iii) authorization for payment from the corpus of the HWT of the costs of the Trustee or other service providers retained by it in accordance with the Trust Agreement and of any payment agent appointed by it or by the Applicants incurred in carrying out the provisions of the order; and (iv) approval of the retention of Independent Counsel (defined below) for the purpose of the Retainer (defined below).

[3] The Monitor has filed its 51st Report and a Supplement to the 51st Report in support of the requested relief.

Background

[4] Nortel filed for and obtained protection under the *Companies' Creditors Arrangement Act* ("CCAA") on January 14, 2009.

[5] Although Nortel is insolvent, it continued for more than a year to fund its pre-filing obligations for medical, dental, and certain other benefits to its pensioners, their survivors, and disabled employees; however, it could not continue to do so indefinitely. In the absence of special arrangements, Nortel's benefits payments would have ceased on March 31, 2010.

[6] The Applicants, the Monitor, court-appointed employees' representatives and representative counsel and the CAW-Canada ("CAW") reached an agreement regarding outstanding employment issues, including the payment of benefits during 2010 to, among others, Pensioners and LTD Beneficiaries (both defined below). The agreement was amended and restated on March 30, 2010 (as amended and restated, the "Settlement Agreement") and was approved by this court by Order dated March 31, 2010, and subsequently affirmed by the Court of Appeal for Ontario by Order dated June 3, 2010.

[7] The Settlement Agreement provides that the parties to it "will work towards a Court approved distribution of the HWT corpus in 2010 to its beneficiaries entitled thereto ... and the resolution of any issue necessarily incident thereto." This provision recognizes the importance

and significance of achieving an allocation of the HWT corpus, if possible, before the end of 2010 (when payment of benefits will cease) in order for distributions to be made to individuals based on such an allocation.

[8] Nortel established the HWT on January 1, 1980 as a tax-efficient vehicle through which Nortel would continue to provide employee benefits by agreement between Northern Telecom Limited (a predecessor company to NNL) and Montreal Trust Company (as trustee), and amended by subsequent agreements (collectively, the "Trust Agreement").

[9] The Trust Agreement provides, among other things, that:

(a) all contributions (from both Nortel and employees) will be held in a single fund (the "Trust Fund"), including all profits, increments, and earnings thereon;

(b) Nortel may designate as the "Health and Welfare Plan" certain of the following health and welfare plans (and such other similar plan or plans as Nortel may from time to time place in effect): health care; management long term disability; union long term disability; a management survivor income benefit; management short term disability; and a group life insurance; and

(c) the Trust Fund is created for the purpose of providing the Health and Welfare Plan benefits for the benefit of the Applicants' active and retired employees.

[10] Obligations of the HWT were owed to various beneficiaries with respect to various benefits, including the following:

- post-retirement medical and dental benefits ("Pensioner M&D") and life insurance benefits ("Pensioner Life") to pensioners of Nortel or their eligible dependants ("Pensioners") (approximately 11,000 pensioners and 6,000 spouses);
- long-term disability benefits to active employees with long-term disabilities and their eligible dependants ("LTD Beneficiaries") (approximately 360 individuals and 318 dependants);
- survivor income benefits ("SIBs") to survivors of certain non-unionized Nortel employees ("SIB Beneficiaries") (approximately 80 survivors); and,
- survivor transition benefits ("STBs") to survivors of certain unionized former Nortel employees ("STB Beneficiaries"), payable for a five-year period (approximately 305 survivors currently receiving STBs and 3,000 Pensioners and LTD Beneficiaries on whose deaths their survivors would be eligible for STBs).

[11] This motion concerns the determination of which beneficiaries are entitled to share in the HWT corpus in respect of the following benefits (the "Potential Participating Benefits") on the termination of the HWT:

(a) Pensioner Life;

(b) Pensioner M&D;

(c) life insurance benefits for LTD employees ("LTD Life");

(d) optional life insurance for active employees, where employees pay their own premiums ("Optional Life");

(e) optional life insurance for LTD Beneficiaries, where premiums are waived ("LTD Optional Life Benefit");

(f) medical and dental benefits for LTD employees ("LTD M&D");

(g) income replacement benefits for Nortel employees on LTD ("LTD Income");

(h) SIBs

(i) income benefits currently being paid to survivors of certain unionized former Nortel employees ("STBs – in pay"); and

(j) income benefits being accrued for pensioners and LTD Beneficiaries on whose death their survivors would be eligible for STBs ("STBs – accrued").

[12] The total liabilities of the HWT are estimated to be approximately $542.9 million as at December 31, 2010. However, the value of investments held for the HWT at June 30, 2010 is approximately $77.2 million, although the actual amount of cash available at the date of termination of the HWT is subject to change. For the purpose of the illustrative scenarios in the Monitor's materials, the balance available for distribution at December 31, 2010 is assumed to be in the amount of $80 million (including a Pensioner Life insurance premium paid by Nortel for 2010 of $7.8 million).

[13] It is clear that an allocation and distribution of the corpus of the HWT has a serious and significant impact on employee and pensioner claims against the Applicants.

[14] The assets in the HWT are clearly inadequate to address its liabilities. The claimants have an unsecured claim against Nortel for any shortfall, but sadly, any distribution from the Nortel estate is not expected to fully address the claims or to even come close to fully addressing such claims.

[15] Mercer has prepared a report providing a preliminary valuation of certain non-pension post-retirement benefit plans and post-employment plans, estimated as at December 31, 2010 (the "Mercer 2010 HWT Preliminary Valuation") to assist with the analysis with the Proposed Allocation Methodology. It is the basis for distribution of the HWT corpus.

[16] A number of outcomes relating to an allocation of the HWT corpus is possible given:

(a) the Trust Agreement does not provide clear guidance on which individuals are entitled to participate in a distribution on termination of the HWT, and there are a number of possible interpretations and

(b) the evolution of Nortel's practices, business, benefits and recordkeeping over the 30 years of the HWT's existence.

[17] The Monitor recommends the Proposed Allocation Methodology based on the advice of counsel with respect to the interpretation of the Trust Agreement. The termination provision of the Trust Agreement (the "Termination Provision") provides:

> Upon receipt of the Notice of Termination the Trustee shall within one hundred twenty (120) days determine and satisfy all expenses, claims and obligations arising under the terms of the Trust Agreement and Health and Welfare Plan up to the date of the Notice Termination. The Trustee shall also determine upon a sound actuarial basis, the amount of money necessary to pay and satisfy all future benefits and claims to be made under the Plan in respect to benefits and clams up to the date of the Notice of Termination. The Corporation and the designated affiliated or subsidiary corporations shall be responsible to pay to the Trustee sufficient funds to satisfy all such expenses, claims and obligations, and such future benefits and claims. The final accounts of the Trustee shall be examined and the correctness thereof ascertained and certified by the auditors appointed by the Trustee. Any funds remaining in the Trust Fund after the satisfaction of all expenses, claims and obligations and future benefits and claims, arising under the terms of the Trust Agreement and the Health and Welfare Plan shall revert to the corporation.

[18] The Proposed Allocation Methodology, in brief, provides that those beneficiaries whose claims are in pay (that is, those with income claims presently being paid) and those whose claims are certain to be payable at some future date will share in the distribution.

[19] The Proposed Allocation Methodology is as follows:

(a) the HWT is to be treated as one trust;

(b) on termination, the following Potential Participating Benefits share *pro rata* in the HWT corpus (based on each such Potential Participating Benefit's respective share of the present value of all such Potential Participating Benefits):

(i) Pensioner Life;

(ii) LTD Income;

(iii) LTD Life;

(iv) LTD Optional Life Benefit;

(v) STBs – in pay; and

(vi) SIBs;

(collectively, the "Proposed Participating Benefits");

(c) the following beneficiaries will receive distributions from the Proposed Participating Benefits' *pro rata* share of the HWT corpus:

(i) Pensioners (including those active employees who will vest by the valuation date and LTD Beneficiaries) for Pensioner Life;

(ii) LTD Beneficiaries for LTD Income and LTD Life;

(iii) LTD Beneficiaries participating under Optional Life for LTD Optional Life Benefit;

(iv) STB Beneficiaries currently in pay for STBs; and

(v) SIB Beneficiaries currently in pay for SIBs;

(collectively, the "Proposed Participating Beneficiaries")

(d) the amount of the distribution to each Proposed Participating Beneficiary from the Proposed Participating Benefits' *pro rata* share of the HWT corpus will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010, and the Pensioner Life premiums paid for the HWT during 2010 will be treated as a reduction only to the allocation otherwise made to Pensioner Life;

(e) the present value of the Proposed Participating Benefits will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010; and

(f) there will be payment from the HWT on account of any conversion privilege, if any, relating to the Pensioner Life or Optional Life that is exercised by any holder of such right.

[20] The Monitor submits that its recommendation is based on its conclusions regarding four legal issues:

(a) the HWT constitutes one trust;

(b) beneficiaries with income claims presently being paid and whose claims are certain to be paid in the future should share in the distribution;

(c) the assets in the reserve account referred to as Group Life – Part II (related to optional life insurance) should be distributed among HWT beneficiaries eligible to participate upon termination; and

(d) beneficiaries should participate *pro rata* in the HWT funds.

[21] Counsel to the Monitor prepared a Memorandum of Law (the "Memorandum"), which analyzed how the funds in the HWT were to be distributed pursuant to its interpretation of the Trust Agreement. This Memorandum is attached as Schedule A.

[22] The Monitor also prepared a chart illustrating various allocation scenarios (the "Allocation Chart"). The Allocation Chart is attached as Schedule B.

[23] The Proposed Allocation Methodology is reflected in Scenario 2.

[24] The Monitor is of the view that deeming December 31, 2010 as the date of Notice of Termination of the HWT for the purposes of the Trust Agreement and dispensing with Nortel sending a Notice of Termination to the Trustee will create consistency and avoid confusion between the date of termination of benefits and the LTD Beneficiary termination date of December 31, 2010 pursuant to the Settlement Agreement, the valuation date and the Mercer 2010 HWT Preliminary Valuation and the expected date of termination of the HWT.

[25] Scenario 2 has attracted widespread support. Consents to the proposed allocation have been provided by counsel to the Nortel Canadian Continuing Employees ("NCCE"), to the court-appointed employee representative, counsel to the Former Employees ("Former Employees") and the LTD Beneficiaries representative, and the CAW.

[26] Counsel to the Bondholders and to the Unsecured Creditors' Committee in the Chapter 11 proceedings do not oppose the allocation proposed in Scenario 2. However, to the extent that Scenario 2 is not approved, both the Bondholders and the Unsecured Creditors' Committee reserve their rights.

[27] The Scenario 2 allocation is opposed by the Dissenting LTD Beneficiaries (defined below). While the Dissenting LTD Beneficiaries largely agree with the structure of the analysis provided by counsel to the Monitor as set out in the Memorandum, they disagree with the conclusion that future Pensioner Life benefits, which they characterize as the payment of annual premiums on one year term life insurance policies, are entitled to participate in an distribution of the HWT.

[28] The Dissenting LTD Beneficiaries brought a cross-motion seeking approval of the distribution of the HWT in accordance with Scenario 3 of Schedule B, or other alternative relief as set out in their Notice of Motion.

[29] The differences between Scenario 2 and Scenario 3 are significant. The total of all benefit liabilities under the HWT is $548.2 million. The HWT has assets of $80 million. Scenarios 2 and 3 provide for a charge of $7.8 million for Pensioner Life Premiums for 2010 leaving $72.2 million for distribution. Under Scenario 2, the proposed amount payable to Pensioner Life claims is $35.05 million and $26.98 million to LTD Insurance, with smaller amounts paid for other benefits as indicated. Under Scenario 3, there would be no distribution on account of Pensioner Life claims and there would be an increase of $30.59 million for LTD claims to $57.57 million.

[30] The motion of the Dissenting LTD Beneficiaries was served the day before the hearing. A number of parties expressed concern over late service and reserved their rights, in the event

Scenario 2 was not approved, to submit further evidence and to present further argument. This concern was acknowledged by counsel to the Dissenting LTD Beneficiaries.

[31] As stated above, the Monitor's recommendation is based on its conclusions regarding legal issues as set out at [20].

[32] The Dissenting LTD Beneficiaries take no issue with [20] (a) and (c).

[33] For the reasons set forth in the Memorandum, I accept the conclusions set out at [20] (a) and (c): the HWT constitutes one trust, and Group Life – Part II reserved assets should be included in HWT distribution.

Legal Counsel

[34] All but a very few individuals are represented by court-appointed representatives and Representative Counsel for the Former Employees, LTD Beneficiaries and the NCCE, or by CAW counsel.

[35] The court orders appointing the employee representatives provide that they may represent their constituents for the purpose of settling or compromising their claims in insolvency proceedings or in any other proceeding that has been or may be brought before this court.

[36] The Former Employees' representatives and the LTD Beneficiaries' representative each retained independent counsel (collectively, "Independent Counsel") to advise them with respect to the Proposed Allocation Methodology and to take all steps necessary or desirable with respect to thereto (the "Retainer"). Independent Counsel appear on their behalf on this motion. Nortel has agreed to provide funding for the retention of Independent Counsel for these purposes, subject to a fee cap.

[37] Although only three individuals formally opted out of being represented by Representative Counsel, approximately 40 individuals (the "Dissenting LTD Beneficiaries") have retained Mr. Rochon.

[38] The Dissenting LTD Beneficiaries raised an issue of conflict of interest of Representative Counsel. A motion was brought to address the issue, but subsequent to the retention of Independent Counsel, the Dissenting LTD Beneficiaries decided not to proceed with their motion.

[39] I am satisfied that any issues relating to conflict in this area have been addressed in a satisfactory manner.

Position of Parties Supporting Scenario 2

[40] The Monitor recommends the Proposed Allocation Methodology, submitting that it represents a fair and reasonable balancing of various interests in a trust fund that is clearly inadequate to fully meet all claims and that it is a practical methodology that can be implemented without undue cost and delay. The parties supporting the Monitor adopted the submissions of the Monitor.

[41] The Monitor submits that distribution of the HWT should extend not only to beneficiaries with income claims presently being paid (*i.e.,* LTD Income) but also to those whose claims are certain to be paid in the future (*i.e.,* Pensioner Life).

[42] The Monitor submits that this interpretation best gives meaning to the Termination Provision and would distribute the HWT to holders of benefits that have been vested so that an employee or former employee receives what is promised to him or her. It submits that the Proposed Allocation Methodology provides that those beneficiaries whose claims are in pay (that is, those with income claims presently being paid) and those beneficiaries whose claims are certain to be payable at some future date will share in the distribution. The Monitor emphasizes that this interpretation is consistent with the Termination Provision in terms of both the requirement to pay all claims and future claims, as well as the limiting words "up to the date of the Notice of Termination".

[43] It is uncontroversial that any claims actually made and obligations actually incurred up to the date of the Notice of Termination should participate. On the issue of what future benefits and claims should be paid (given that the phrase "future benefits and claims" is not defined and given that the Termination Provision sets a cut-off date of "up to the date of the Notice of Termination"), the Monitor submits that not all potential contingent future unvested beneficiaries of the HWT are entitled to participate. In this respect, the Monitor argues that the effect of the phrase, "up to the date of the Notice of Termination," is to restrict distribution to "future benefits and claims" that can be considered to have been made or incurred prior to the date of termination.

[44] The Monitor further submits that "future benefits and claims" should be interpreted to also include claims that have not been made at the date of termination but that, without termination, would *certainly* be made in the future. The Monitor contends that such benefits can be said to have vested and, therefore, belong among the Proposed Participating Benefits.

[45] The NCCE supports the Scenario 2 allocation but does not necessarily agree with any or all of the submissions of the Monitor.

[46] The Former Employees representative submits that the outcome proposed by the Monitor is reasonable and warrants court approval. Their support is conditional upon the continued support and agreement of other beneficiary classes and, ultimately, the approval of the court.

[47] In this connection, the Former Employees submit that all represented interests have equal status as beneficiaries of the HWT. The Termination Provision does not establish priorities as between beneficiaries, nor does it make specific allocation of trust assets to any particular beneficiary class on trust termination. In absence of any express terms in this regard, a trustee is under a duty of "even-handedness" to administer the trust impartially as between beneficiaries and classes of beneficiaries.

[48] On the issue of what future benefits and claims should be paid, the Former Employees submit that the specific use by the Termination Provision of the term "benefits" in the phrase "benefits and claims" is significant and that the term has, and must, be given a meaning that is

distinct from "claims". The Former Employees submit that the settlor intended to provide for future benefits, as well as future claims at the point of termination.

[49] The Former Employees reject the argument that vested retiree life benefits are subordinate to LTD Beneficiaries on trust termination. They submit that very clear language would be required to exclude a beneficiary class having a vested, non-contingent benefit from sharing on termination and that no such language exists in the Trust Agreement.

[50] The Former Employees submit that the Monitor's recommendation that Pensioner Life share or participate *pro rata* with the other beneficiary classes represents a reasonable interpretation of the Trust Agreement in light of surrounding circumstances. These include the fact that, *at its creation*, the HWT was funded by $11 million transferred from a Mutual Life Assurance Account representing the surplus in a prior retirement life insurance plan; that each annual HWT financial statement after its formation reported a "Pension Insurance Fund Reserve"; and that Pensioner Life premium were historically paid from HWT assets up to and throughout the CCAA proceedings.

[51] The Former Employees disagree with the Dissenting LTD Beneficiaries' characterization of the Pensioner Life benefit as contingent. They submit that it is a permanent life insurance benefit such that - provided premiums were paid - insurance would continue throughout the retiree's life time without subsequent application or examination. *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at p. 305. They submit that Pensioner Life benefits vested when a Nortel employee retired, and, as such, Nortel or the HWT assumed an unconditional, binding obligation to make Pensioner Life insurance premium payments for the balance of the retiree's life.

[52] The Former Employees submit that, in respect of Pensioner Life, the vesting event is retirement, not death. The ultimate Pensioner Life benefit – payment on death – is not a contingent or speculative event. Consequently, they submit that Pensioner Life is a vested future benefit and certain future claim and plainly within the scope of the Termination Provision.

[53] CAW supports the submission of the Monitor and emphasizes that, in accordance with accepted labour law principles, all of the benefits that have accrued to unionized retirees at the time of their retirement under a collective agreement must be seen as having "vested." As such, a retiree who has been subject to a collective agreement has the right to seek through their union the enforcement of those rights that had vested at the time of their retirement, even though the collective agreement in effect at the time of such retirement has, in fact, expired.

[54] In a submission unique to its interests, the CAW argues that the Dissenting LTD Beneficiaries who are members of the CAW, and the counsel that purports to represent them, have no standing to oppose that which the union has determined to support. As a result, the submissions of the Dissenting LTD Beneficiaries is incompatible with the union's role as exclusive bargaining agent, which provides it with the authority to resolve disputes arising out of the interpretation, application, or administration of the collective agreement and is subject only to the duty of fair representation.

Dissenting LTD Beneficiaries

[55] The Dissenting LTD Beneficiaries submit that a plain reading of the Termination Provision demonstrates that only claims of the HWT actually incurred prior to the Notice of Termination can participate in the wind-up distribution. Such claims would include the ongoing future income payments that flow from claims incurred up to the date of the Notice of Termination.

[56] They submit that the foregoing interpretation is consistent with tax, actuarial, and insurance rules, principles and practices that apply to health and welfare trusts, in general, as well as the publicly available documentation related to the HWT.

[57] The Dissenting LTD Beneficiaries reject as unreasonable an interpretation of the Termination Agreement such that future premium payments owing to a third party insurer in respect of coverage beyond the date of termination should be paid from the HWT. They submit that, in recommending the inclusion of future claims, the Monitor ventures beyond the plain wording of the Termination Provision and advocates for an overly expansive interpretation of these provisions in order to capture future claims, which are contingent, and is contrary to the taxation rules that govern HWTs.

[58] They contend that this interpretation fails to give any meaning to the "up to the Notice of Termination" cut-off date set out in the Termination Provision and runs afoul of the basic tenet of contractual interpretation that meaning should be given to provisions in their entirety. They argue that giving meaning to the expression "future benefits" and to the stipulated cut-off date necessarily leads to the conclusion that only "future benefits and claims" incurred prior to the Notice of Termination are payable on wind-up of the HWT.

[59] The Dissenting LTD Beneficiaries also challenge the Monitor's characterization of Pensioner Life benefits as relating to permanent insurance. Rather, they submit that these benefits relate to one year renewable term life insurance policies paid monthly by Nortel to Sun Life.

[60] The Dissenting LTD Beneficiaries also reject the notion that Pensioner Life benefits are certain to be paid in the future. They submit that their position is supported by the termination provisions of the Sun Life Group Term Life Insurance Policies. These indicate that coverage is automatically terminated upon the receivership or bankruptcy of the policyholder, NNL, and that "the insurance of all members stops on the termination date of this policy and claims incurred after that date are not eligible for payment." They add that it is clear that Nortel is effectively bankrupt and that, therefore, Pensioner Life and other life insurance coverage will terminate. Benefits pursuant to this coverage will not, then, "certainly be made in the future".

[61] They further cite as problematic the reading in of an obligation to pay "claims that have not been made but would certainly have been made in the future" because the certainty of the claim being relied upon by the Monitor relates to the certainty of death. They submit that the payment of the death claim is the obligation of Sun Life, a third party insurer, and not of Nortel or the HWT. The benefit provided by Nortel is restricted to the payment of premiums only,

which cannot give rise to a claim in the future that would be captured by the Termination Provision.

[62] The Dissenting LTD Beneficiaries suggest that the wind-up liabilities should be interpreted in accordance with a funding basis consistent with the tax considerations that apply to the HWT, particularly when such a result best reflects the plain meaning of the Termination Provision and the evidence before the Court regarding actuarial practice.

[63] In this respect, they submit that tax rules permit only group term life insurance policies, and not permanent policies, to be held in an HWT. To accede to an interpretation in which Pensioner Life benefits participate on termination would offend the tax rules governing health and welfare trusts and potentially throw into question the tax treatment of the HWT.

[64] They submit that tax rules are relevant, in this respect, because the proper interpretation of the Termination Provision should be one that is compliant with tax law and applicable actuarial and insurance standards and principles. This follows from the accepted principle of contractual interpretation that, when faced with two plausible interpretations, one of which will lead to a construction of a contract that is unlawful, courts will prefer the interpretation that is consistent with the law.

[65] The Dissenting LTD Beneficiaries submit that, given that Nortel established the HWT in order to secure tax benefits of such trust arrangements, the tax purpose and motivation of the HWT, as well as Nortel's subsequent actions in relation to the HWT, should strongly inform the interpretation of the Termination Provision and any prospective allocation methodology. The fact that Nortel was taking tax deductions equal to its contributions encourages the inference that its contributions were in respect of claims that had occurred or were currently occurring, such as disability income payment.

[66] They contend that an interpretation allowing Pensioner Life benefits to share in the distribution of HWT assets would imply that Nortel HWT was not tax compliant and would suggest that Nortel had been claiming deductions to which it was not entitled because of the *Income Tax Act*'s prohibition of deducting prepaid insurance considerations.

[67] The Dissenting LTD Beneficiaries also reject the Monitor's emphasis on the fact that Pensioner Life benefits were part of a reserved plan. They submit that but for an $11 million initial contribution at the HWT's inception from a Mutual Life Assurance Account, the nature of the Pensioner Life benefit suggests that benefits pursuant to it would be treated as pay-as-you-go claims for which no pre-funding was permitted and which would not have required a book-keeping reserve.

[68] They argue that the $11 million transfer does not constitute evidence that the pensioners are beneficiaries of the HWT today on its wind-up and should have no bearing on the interpretation of the Termination Provision.

[69] The Dissenting LTD Beneficiaries urge the conclusion that the notional reserve for the Pensioners' Life Insurance Plan is distinguishable from the reserve for the LTD and Survivor Income Plans for which Nortel recognized an obligation to accumulate funds. This reserve ought not to have any significance on the interpretation of the Termination Provision.

[70] Moreover, the Dissenting LTD Beneficiaries urge that *pro rata* distribution of funds is not appropriate in this case. In this respect, they submit that the Termination Provision does not specify how the Trust Fund is to be shared on the dissolution of the Nortel HWT. They reject the Monitor's proposal that the Court apply the maxim "equality is equity" on the grounds that it is a principle of last resort and not a *prima facie* presumption. The Dissenting LTD Beneficiaries submit that "equality is equity" can apply only if there is not some good reason in law and equity why it ought not to apply.

[71] They submit that a determination of the appropriate allocation should reflect the intention of the parties at the time the transactions were entered into and the necessity for fairness in the ultimate result.

[72] The Dissenting LTD Beneficiaries suggest that equal treatment of incurred claims of the LTD Beneficiaries and survivors and the contingent claims of pensioners in respect of future Pensioner Life benefits is inconsistent with the purpose for which Nortel established the Nortel HWT. They submit that such equal treatment would be patently unfair to the LTD Beneficiaries, who have a profound interest in the HWT and who were the ones most harshly impacted by the Settlement Agreement, which, among other things, prevents them from seeking legal redress the funding shortfall.

[73] They submit that an equitable distribution of the Nortel HWT is one that will take into account the compelling reasons why this court should not apply the "equality is equity" principle in this case, such as the disproportionate impact of the distribution on LTD Beneficiaries.

Analysis

Preliminary Issue – Expert Evidence

[74] Scenario 3 provides for an enhanced recovery for the Dissenting LTD Beneficiaries – at the expense of the of the Pensioner Life claimants. The situation facing the Dissenting LTD Beneficiaries and the Pensioner Life claimants is that of a "zero sum game". Increased allocation for one group corresponds with a diminished allocation and recovery for another group.

[75] There is no doubt that the position of the Dissenting LTD Beneficiaries has been severely compromised by Nortel's insolvency. However, the Dissenting LTD Beneficiaries are not alone in this respect. All of the parties claiming entitlement to the HWT have been adversely impacted by Nortel's insolvency.

[76] Counsel to the Dissenting LTD Beneficiaries submits that the proper distribution of the assets of the HWT upon wind-up depends on the Termination Provision, read in the context of the Trust Agreement as a whole, and with a view to the intention of Nortel as the settlor *at the time it entered into the Trust Agreement.*

[77] Counsel further submits that evidence of such intention may be gleaned from various sources, *including the factual matrix at the time* and other documents relating to the HWT, employee benefits and employee communications (see *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at p. 670).

[78] Counsel further submits that a trust document should be construed using rules of contractual interpretation and rules of statutory interpretation. The goal of contractual interpretation is to discover, objectively, the parties' intentions *at the time the contract was made* (see *Gilchrist v. Western Star Trucks Inc.*, [2000] B.C.J. No. 164 at para. 17 (C.A.). Second, the agreement must be construed as a whole with meaning given to all its provisions (see *Pass Creek Enterprises Limited v. Kootenay Custom Log Sort Ltd.*, [2003] B.C.J. No. 2508 at para. 17 (C.A.). Third, the court should interpret the agreement having regard to *the business context in which the agreement was concluded* (see *Ventas Inc. v. Sun Rise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083 at para. 24 (C.A.).

[79] However, the submissions at [77-79] have to be contrasted with the position put forth by the Dissenting LTD Beneficiaries, who contend that, as a result of the changes to the *Income Tax Act* from 1986 onward, no deductible contributions could have been made for life insurance unless they were in the form of premiums actually paid to an insurer during the year. Counsel to the Dissenting LTD Beneficiaries then concludes that wind-up liabilities should be interpreted in accordance with a funding basis consistent with the tax considerations that apply to HWTs of this type – particularly when the result best reflects the plain meaning of the Termination Provision – rather than the evidence before the court regarding actual practice.

[80] If the submissions at [77-79] are accepted, it brings into question the Dissenting LTD Beneficiaries' reliance upon the 1986 amendments to the *Income Tax Act,* concerning the deduction of prepaid insurance consideration, and upon Interpretation Bulletin IT-428 on this subject. It also puts into issue the admissibility of the affidavits of Joann Williams, sworn August 9, 2010 (the "Williams Affidavit") and September 24, 2010 (the "Supplementary Williams Affidavit"); of Jeremy Bell, sworn September 3, 2010 (the "Bell Affidavit") and September 23, 2010 (the "Supplementary Bell Affidavit"); and of Diane A. Urquhart, sworn September 26, 2010 (the "Urquhart Affidavit").

[81] In my view, the position put forth by the Dissenting LTD Beneficiaries that the 1980 Trust Agreement should be interpreted in light of post-1986 tax regime is flawed.

[82] First, it ignores that Nortel has certain obligations as set out in the Plans, as there is clear language that establishes its obligations.

[83] Second, it ignores the fact that Pensioner Life obligations vest on retirement.

[84] Third, there is an absence of any contractual provision that could be interpreted as disentitling certain claimants, such as Pensioner Life claimants, from receiving their vested entitlement to a share of the trust.

[85] Fourth, although the Dissenting LTD Beneficiaries submit that the distribution of the HWT is to be governed by legal interpretation of the Trust Agreement, the evidence put forth by the Dissenting LTD Beneficiaries by and large ignores the obligation of Nortel in the Trust Agreement and focuses on funding issues affected by subsequent events.

[86] In my view, the position at [80] is inconsistent with the argument put forth at [77-79].

[87] The Trust Agreement dates from 1980. According to the submissions of the Dissenting LTD Beneficiaries, it follows that questions of interpretation of the Trust Agreement must be based on the situation as it existed at the time the Trust Agreement was executed. I agree with this submission.

[88] The contractual obligations of Nortel are set out in the various benefit plans that form part of the Record (the "Plans"). It is clear that retirement is the point at which certain obligations result in benefits for the claimants. The HWT, therefore, should be seen as the funding vehicle that delivers the benefit provided by Nortel to the claimants.

[89] The Trust Agreement establishes the basis upon which the HWT was established and is to be funded, as well as the basis upon which benefits are to be paid to claimants. Nortel has contractual obligations to the claimants. It may be that certain obligations may be amended from time to time; nevertheless, once certain promises and obligations of Nortel give rise to vested benefits in favour of certain beneficiaries, they cannot be unilaterally withdrawn or eliminated.

[90] Counsel to the Monitor and parties supporting the Monitor identified numerous concerns with the evidence submitted by the Dissenting LTD Beneficiaries.

[91] With respect to the Williams and Bell Affidavits, the Monitor submits that neither should be given any consideration, as both affidavits fail to meet the required criteria to overcome their presumptive inadmissibility, being based on arguments and theories irrelevant to the HWT, and neither affidavit deals with the Termination Provision. Counsel also submits that issues of both admissibility and weight arise with respect to the Williams and Bell Affidavits. They argue that the evidence is not relevant because both expert witnesses purport to express opinions and opine on the ultimate issue before the Court, insofar as they express views on the terminal distribution of the HWT.

[92] Specifically, counsel submits that the affidavits speak to matters of tax and insurance law that are beyond the expertise of Williams and are, in any event, irrelevant; that their opinions in respect of other trusts or benefit administrators reserved for LTD claims are irrelevant; that how the HWT could have been funded is irrelevant; that Williams uses undefined terms that are not referred to in the Termination Provision; and that the tax deductibility of contributions by Nortel is unreferenced in the trust document as a factor in allocation or termination.

[93] It is further submitted that the affidavits do not pass the test for necessity, either, because Williams and Bell have no qualifications or experience in the construction of trust documents and their evidence does not inform or assist in any meaningful way how the trust instrument is to be interpreted on termination.

[94] There is no evidence that Canada Revenue Agency has challenged or disallowed any tax deductions relating to the HWT taken by Nortel post-1986. There is no evidence that the 1986 changes to the *Income Tax Act* resulted in any alteration of the obligations of Nortel in the Plans and, specifically, to the Pensioner Life claimants. There is no evidence that the changes to the *Income Tax Act* somehow invalidate the HWT, in whole or in part.

[95] In this context, I have concluded that evidence relating to the 1986 tax changes and evidence relating to current actuarial practice that reflects the 1986 tax changes is not relevant to

the issue to be determined, namely an interpretation of the Trust Agreement. Simply put, legal developments in 1986 do not affect or alter the factual matrix as it was in 1980, and the Trust Agreement has to be interpreted on the basis of facts existing in 1980.

[96] The Williams Affidavit expresses a "belief" that the LTD Beneficiaries' Income Replacement Benefits is required to be paid in priority to Pensioner Life benefits on the distribution of assets from the HWT on its wind-up. In my view, in the Williams Affidavit and the Supplementary Williams Affidavit, Ms. Williams attempts to introduce current standards based on contemporary tax practice to change the facts as they were in 1980. It seems to me that her conclusions are derived from evidence that is not relevant to the interpretation of the 1980 Trust Agreement. Further, her conclusions are tantamount to her opining on questions of law.

[97] The Bell Affidavit is submitted to provide Mr. Bell's opinion on the generally accepted actuarial principles and practices used to determine sufficient contributions to fund long-term disability wage replacement benefits. Mr. Bell also asserts, as a "belief", that "claims not incurred at the time of the bankruptcy of a company should be funded from health and welfare trust *after* incurred claims are provided for" (emphasis in original). It seems to me that, in the Bell Affidavit and the Supplementary Bell Affidavit, Mr. Bell, like Ms. Williams, has drawn conclusions from evidence that is not relevant to the interpretation of the 1980 Trust Agreement. His conclusion also results in Mr. Bell opining on questions of law.

[98] The criteria for admissibility of expert opinion evidence has been, in my view, accurately summarized at Schedule C of the factum submitted by counsel to the Monitor, in particular, at paragraphs 3 - 6. Schedule C is attached.

[99] Schedule C was composed before the filing of the Williams Supplementary Affidavit and Bell Supplementary Affidavit, the Urquhart Affidavit, and the affidavit of Michael McCorkle (the "McCorkle Affidavit"). In my view, these affidavits add no relevant evidence to the issue to be determined: the interpretation of the Trust Agreement. In fact, the second Bell affidavit comments on a different and unrelated healthcare benefit trust and the McCorkle Affidavit relates to events in 2005 and 2006.

[100] The Williams Supplementary Affidavit again relies on facts from 1986 to buttress her opinion on the question of law that is before the court.

[101] In substance, I am in agreement with the content of Schedule C insofar as it relates to the law and, particularly, to both affidavits of Ms. Williams and Mr. Bell, as well as those of Ms. Urquhart and Mr. McCorkle.

[102] With respect to the Urquhart Affidavit, it is included in the responding Motion Record of the Dissenting LTD Beneficiaries, a document dated September 27, 2010 and filed in court September 28, 2010, the day before the hearing commenced.

[103] The Urquhart Affidavit proffers an opinion that there cannot be claims or benefits prior to the HWT wind-up that enable the pensioners to qualify for participation in the HWT distribution, other than to receive the Pensioner Life insurance premiums for 2010 provided for the Settlement Agreement. There are two difficulties with this affidavit. It attempts to recast the facts at the time the Trust Agreement was executed to a post-1986 era. Secondly, the opinion goes to the

legal issue to be determined in this motion. The affidavit does not meet the required criteria to overcome the presumptive inadmissibility as a matter of law. In addition, I seriously question whether this affidavit can be considered "fair, objective, and non-partisan" as required by rule 4 of the *Rules of Civil Procedure*.

[104] The Urquhart Affidavit, to the extent that it is intended to support the conclusions of Ms. Williams and Mr. Bell, is inadmissible for the same reasons provided relating to the affidavits of Williams and Bell.

[105] Furthermore, I question the appropriateness of Ms. Urquhart providing her opinion that new evidence in the 51st Report of the Monitor establishes a misappropriation of assets on the part of Nortel. There is evidence that trust monies were used to pay benefits. There may have been inadequate contributions by Nortel and a shortfall, but this does not necessarily result in the conclusion that there has been a misappropriation of assets. To suggest misappropriation of assets, without referencing an evidentiary foundation is, at best, a questionable use of the word "misappropriation" and, at worst, reckless.

[106] Additional concerns were also raised as a result of comments in [13] of the Urquhart Affidavit. Ms. Urquhart states that Nortel had a right to *terminate* Pensioner Life insurance coverage. This statement is not accurate: the information booklet excerpt that forms the basis of this conclusion – and which is reproduced in her affidavit at [13] – clearly states that Nortel had only a right to *amend* the coverage.

[107] While I can appreciate there may have been a degree of haste in preparing this affidavit, concerns are raised when such inaccurate statements are made.

[108] The Urquhart Affidavit is for the most part irrelevant to the determination of the issues at hand. It does not provide any assistance to the court, and it is not, in my view, necessary or appropriate to consider it.

[109] Counsel to the Dissenting LTD Beneficiaries submits that, given the seriousness of the issues, this is not the time to invoke technical arguments or make unfounded attacks on well-regarded and suitably qualified experts so as to avoid an honest debate of the issues on their merits. The issues on this motion are clearly serious, but it centres on the interpretation of the 1980 Trust Agreement. The deponents may very well be regarded as experts in their field, but that does not necessarily result in their evidence having to be considered when it is not, in my view, relevant. Accordingly, I decline to give any consideration to their affidavits.

Disposition

[110] 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.

[111] All parties are in agreement that the HWT corpus must be distributed having regard to those benefits and claims that can be considered to have been made or incurred before the date of termination. The parties disagree as to whether that distribution of the HWT corpus should also include claims that, without termination, would certainly have been made in the future, including Pensioner Life benefits. The Monitor and supporting parties submit that the latter category should share in the distribution while the Dissenting LTD Beneficiaries argue that it should not.

[112] It seems to me that the phrase "all future benefits and claims" in the Termination Provision allows for the possibility that claims otherwise certain to be made in the future are to be satisfied upon termination. The use of "all future benefits and claims" reveals that the HWT is not absolved of its responsibility to settle valid expenses, claims or obligations for reason only that they are future claims. It is permissive of Pensioner Life benefits but not determinative of the issue.

[113] Ultimately, what is needed is a determination of what constitutes a valid claim against the HWT at the date of termination of the trust. In this respect, I agree with the Applicants that any claim that can be said to have vested at the date of termination can share on the wind-up distribution; therefore, it must be considered whether Pensioner Life benefits can be said to have vested at the relevant point in time.

[114] It is settled that a permanent pensioner life benefit becomes vested on the date of an employee's retirement notwithstanding any uncertainty as to date on which the life insurance claim will be realized, *i.e.*, death: *Dayco (Canada) Ltd. v. CAW-Canada, supra.* The Dissenting LTD Beneficiaries urge me to make the finding that Pensioner Life benefits under the HWT are not permanent life benefits but rather term life benefits, conceptualized as the payment of annual premiums on one year term life insurance policies.

[115] I decline to do so. Any such interpretation of the agreement requires the assistance of tax, actuarial and insurance principles and practices developed in a time period subsequent to 1980. The proper interpretation of the Trust Agreement must have regard to the intentions and reasonable expectations of the parties that signed it, which cannot be ascertained from practices and regulations introduced years after the Agreement was concluded. There is no indication or evidence, either in the Agreement itself or elsewhere, that the Trust Agreement should incorporate subsequent developments in tax, actuarial, or insurance principles and practices. It would be inappropriate to interpret the Termination Agreement with reference to considerations that could not possibly have been contemplated by the parties when the Agreement was drafted in 1980.

[116] I find that the parties to the Trust Agreement had both the intention and reasonable expectation that Pensioner Life benefits would manifest as permanent life benefits. Permanent pensioner life benefits vest on retirement. These Pensioner Life benefits must, therefore, be considered vested future benefits and, thus, certain future claims that are within the scope of the Termination Provision and subject to distribution upon wind-up.

[117] It is necessary to focus on the obligations of Nortel, as opposed to the funding challenges faced by it. The obligation of Nortel to provide Pensioner Life benefits remains constant: claimants have a contractual right to certain entitlements and Nortel has a corresponding

contractual liability. The argument of the Dissenting LTD Beneficiaries at [61-62] is misguided because it takes Nortel's contemporary funding shortfall to alter a contractual relationship that was determined and fixed by the Trust Agreement in 1980. In the words of counsel to the Former Employees, the obligations of Nortel cannot be decoupled from the Trust Agreement.

[118] There is no basis to disentitle Pensioner Life claimants from sharing in the distribution of the HWT. In particular, the language of the Trust Agreement in no way provides for the ousting of their rights. I have concluded that their vested ownership rights cannot be abrogated in the manner suggested by the Dissenting LTD Beneficiaries. It is one thing for changing circumstances to result in a diminished recovery for all entitled parties; it is something entirely different to conclude that Pensioner Life claimants should receive no distribution from the HWT Trust. I see no grounds in law, equity, contract, or otherwise to conclude that one unfortunate party – Pensioner Life claimants – should be required to subsidize the misfortunes of another – the LTD Beneficiaries. I view *pro rata* distribution to be the only principled and fair manner of resolving this unfortunate scenario.

[119] In the result, the Monitor's motion is granted, approving Scenario 2, being the proposed methodology for the allocation of the corpus of the HWT. The consequential relief requested in the Notice of Motion as set out at [2] is also granted.

[120] In light of this disposition, in my view, it is not necessary to address standing issues in respect to certain dissenting LTD Beneficiaries.

[121] It follows that the cross-motion of the Dissenting LTD Beneficiaries is dismissed.

[122] An order shall issue to give effect to the foregoing.

[123] I wish to express my appreciation to all court-appointed representatives who have worked diligently in fulfilling their mandate in what is clearly a very difficult situation.

MORAWETZ J.

Date: November 9, 2010

CITATION: Nortel Networks Corporation (Re), 2011 ONCA 10
DATE: 20110107
DOCKET: M39469

COURT OF APPEAL FOR ONTARIO

Weiler J.A. (in chambers)

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

And in the matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Joel P. Rochon, Sakie Tambakos and John Archibald, for the moving party, the Dissenting LTD Beneficiaries

Derrick Tay and Jennifer Stam, for Nortel Networks Corporation et al.

Fred Myers and Gale Rubenstein, for Ernst & Young Inc., Monitor

William E. Pepall, for the Former Employees' Representatives

Fiona Campbell and Peter Engelmann, for LTD Beneficiaries' Representative

Janice Payne, Steven Levitt, Arthur O. Jacques and Thomas McRae, for Nortel Canadian Continuing Employees

Barry E. Wadsworth, for the CAW-Canada et al.

Heard in-writing

On a motion for leave to appeal from the order of the Honourable Justice Geoffrey P. Morawetz of the Superior Court of Justice, dated November 9, 2010, with reasons reported at 2010 ONSC 5584.

ENDORSEMENT

[1] The moving party has brought a motion in writing seeking leave to appeal the order of the motion judge sanctioning the monitor's application for approval of the methodology for distributing funds in Nortel's Health and Welfare Trust (HWT), scenario 2 of the "Illustrative Allocation Scenarios" (see: Schedule "B" of the motion judge's decision).

[2] The test for leave to appeal in proceedings ongoing under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended, is that there be a serious and arguable issue of real and significant interest with reference to the following four factors:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is prima facie meritorious; and

(d) whether the appeal will unduly hinder the progress of the action.

[3] The moving party has not satisfied me in relation to factors a, c, and d that the test is met.

[4] The interpretation of the specific termination clause in issue in the HWT, especially when viewed in the context of the unique factual matrix giving rise to the dispute, is not of significance to the practice.

[5] Nor is the appeal *prima facie* meritorious. The judge at first instance did not read words into the termination clause. He correctly applied principles of construction of documents and did not reverse the onus of proof. His reasons for rejecting the proffered "expert" evidence do not disclose any error in principle.

[6] In addition, granting leave to appeal would unduly hinder the progress of the action. In the event that leave to appeal were granted and the appeal were to be allowed, the motion judge's approval of the distribution in accordance with scenario 2 would be overturned. A number of outcomes relating to the allocation of the HWT corpus would then be possible. The bondholders and the unsecured creditors' committee reserved their rights if the distribution was not made in accordance with scenario 2. The responding parties all requested an opportunity to make submissions respecting the moving party's preferred option, scenario 3, as that scenario was not before the motion judge and it was acknowledged that a further hearing would be required if scenario 2 was not approved. Any subsequent order for distribution of the corpus of the HWT could, in turn, become the subject of a further application for leave to appeal. The restructuring of Nortel would be unduly delayed.

[7] For these reasons, the motion for leave to appeal is dismissed with costs to the Monitor, the only party requesting costs. Subject to the Monitor and the moving party wishing to make further submissions in writing respecting the amount of costs, I would fix those costs in the amount of $2500.

Supreme Court of Canada | Cour suprême du Canada

No. 34171

June 9, 2011

Coram: LeBel, Fish and Cromwell JJ.

BETWEEN:

Dissenting Nortel LTD Beneficiaries

Applicants

- and -

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Monitor, Ernst & Young Inc., Former Employees' Representatives, Nortel Canadian Continuing Employees, Informal Nortel Noteholder Group, CAW-Canada and George Borosh, et al. and LTD Beneficiaries' Representative

Respondents

Le 9 juin 2011

Coram : Les juges LeBel, Fish et Cromwell

ENTRE :

Dissenting Nortel LTD Beneficiaries

Demanderesses

- et -

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation et Nortel Networks Technology Corporation, Monitor, Ernst & Young Inc., Former Employees' Representatives, Nortel Canadian Continuing Employees, Informal Nortel Noteholder Group, CAW-Canada et George Borosh, et al. et LTD Beneficiaries' Representative

Intimés

No. 34171

JUDGMENT

The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M39469, 2011 ONCA 10, dated January 7, 2011, is dismissed with costs to all respondents except for Nortel Canadian Continuing Employees and the Informal Nortel Noteholder Group.

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Ontario, numéro M39469, 2011 ONCA 10, daté du 7 janvier 2011, est rejetée avec dépens en faveur des intimés à l'exception de Nortel Canadian Continuing Employees et de Informal Nortel Noteholder Group.

J.S.C.C.
J.C.S.C.

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File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR. JUSTICE MORAWETZ	)	TUESDAY, THE 9TH DAY OF NOVEMBER, 2010

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

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

HWT ALLOCATION ORDER

THIS MOTION made by Ernst & Young Inc. in its capacity as the monitor (the "**Monitor**") of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "**Applicants**") was heard this day at 361 University Avenue, Toronto, Ontario.

ON READING the Fifty-First Report of the Monitor dated August 27, 2010 and the Appendices thereto (the "**Fifty-First Report**"), the Affidavit of Elena King sworn September 1, 2010 (the "**King Affidavit**"), on notice to the Service List attached to the Notice of Motion and the supplementary parties listed in the Notice of Motion, and on hearing the submissions of

counsel for the Monitor, the Applicants, independent counsel for the LTD Beneficiaries' Representative, independent counsel for the Former Employees' Representatives, CAW Counsel, the Continuing Employees' Representative Counsel, counsel for the Bondholder Group, the Committee, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, The Northern Trust Company, Canada, in its capacity as trustee of the HWT, Flextronics (Canada) Inc., the Superintendent of Financial Services of Ontario and the Opposing LTD Beneficiaries, and on the consent of the LTD Beneficiaries' Representative, the Former Employees' Representatives and the CAW, and with the support of the Continuing Employees' Representatives, no one else from the Service List and list of supplementary parties attached to the Notice of Motion appearing although duly served as appears from the affidavits of service, filed:

1. **THIS COURT ORDERS** that service of the Motion Record and the King Affidavit is hereby validated so that this Motion is properly returnable today and further service thereof is hereby dispensed with.

2. **THIS COURT ORDERS** that all capitalized terms used but not otherwise defined herein shall have the meaning given to them in the Fifty-First Report.

3. **THIS COURT ORDERS** that the methodology for allocation of the corpus of the HWT described in the Fifty-First Report, applied in the illustrative scenario attached as Appendix D-1, Column 2 to the Fifty-First Report and set out below is approved (the "**Approved HWT Allocation Methodology**"):

   (a) the HWT is to be treated as one trust;

(b) on termination, the following benefits share *pro rata* in the HWT corpus (based on each such benefit's respective share of the present value of all such benefits):

(i) Pensioner Life;

(ii) LTD Income;

(iii) LTD Life;

(iv) LTD Optional Life Benefit;

(v) STBs – in pay; and

(vi) SIBs – in pay,

(collectively, the "**Approved Participating Benefits**");

(c) the following beneficiaries will receive distributions from the Approved Participating Benefits' *pro rata* share of the HWT corpus:

(i) Pensioners (including those active employees who will vest on or before December 31, 2010 and LTD Beneficiaries) for Pensioner Life;

(ii) LTD Beneficiaries for LTD Income and LTD Life;

(iii) LTD Beneficiaries participating under Optional Life for the LTD Optional Life Benefit;

(iv) STB Beneficiaries in pay on or before December 31, 2010 for STBs; and

(v) SIB Beneficiaries in pay on or before December 31, 2010 for SIBs,

(collectively, the "**Approved Participating Beneficiaries**");

(d) the amount of the distribution to each Approved Participating Beneficiary from the Approved Participating Benefits' *pro rata* share of the HWT corpus will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010, and the Pensioner Life premiums paid from the HWT during 2010 will be treated as a reduction only to the allocation otherwise made to Pensioner Life;

(e) the present value of the Approved Participating Benefits will be calculated pursuant to the assumptions in the Mercer 2010 HWT Preliminary Valuation, with data as of December 31, 2010; and

(f) there will be no payment from the HWT on account of any conversion privilege, if any, relating to the Pensioner Life or Optional Life that is exercised by any holder of such right.

4. **THIS COURT ORDERS AND DECLARES** that the date of Notice of Termination for all purposes under and pursuant to the Trust Agreement is hereby deemed to be December 31, 2010 and the requirement for and delivery of a Notice of Termination to the Trustee pursuant to Article VI, section 2 of the Trust Agreement is hereby dispensed with for all purposes.

5. **THIS COURT ORDERS** that the Trustee shall make distributions to the Approved Participating Beneficiaries in accordance with the Approved HWT Allocation Methodology and this Order all on the direction of the Monitor or the Applicants and the

Trustee may engage a payment agent to assist it in making some or all of the distributions.

6. **THIS COURT ORDERS** that the Trustee and any payment agent it may appoint or any paying agent the Applicants may appoint shall incur no liability or obligation in carrying out the provisions of this Order and making the payments it is instructed to make and shall be released from any and all liability in making each such payment as instructed, and no action or other proceedings shall be commenced against the Trustee, any payment agent it appoints and any payment agent the Applicants' appoint as a result of or relating in any way to their making each such payment as instructed.

7. **THIS COURT ORDERS** that the reasonable costs of the Trustee, of its legal counsel or other service providers retained by it in accordance with the Trust Agreement and of any paying agent it or the Applicants may appoint incurred in carrying out the provisions of this Order shall be paid from the corpus of the HWT in priority to the payment of other distributions, expenses or disbursements from the corpus of the HWT.

8. **THIS COURT ORDERS** that the retention of Lerners LLP by the Former Employees' Representatives and of Sack Goldblatt Mitchell LLP by the LTD Beneficiaries' Representative, in each case as independent counsel (collectively, "**Independent Counsel**") for the purpose of advising the respective representatives with respect to the Proposed Allocation Methodology, appearing on their behalf on this motion and taking all steps necessary or desirable with respect thereto (the "**Retainer**"), is approved.

9. **THIS COURT ORDERS** that Independent Counsel shall have no liability as a result of the Retainer, save and except for any gross negligence or unlawful misconduct on their part.

10. **THIS COURT ORDERS** that Independent Counsel shall be at liberty and are authorized at any time to apply to this Court for advice and directions in the discharge of the Retainer.

11. **THIS COURT ORDERS** that the Monitor may, from time to time, apply to this Court for such further or other relief as it may advise, including for advice and directions in respect of the proper execution of this Order.

12. **THIS COURT ORDERS AND REQUESTS** the aid and recognition of any court of any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and any court or any judicial, regulatory or administrative body of the United States of America, the United Kingdom and of any other nation or state, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

NOV 15 2010

PER / PAR: NB

Court File No: 09-CL-7950

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

126

Proceeding commenced at Toronto

HWT ALLOCATION ORDER

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COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2016 ONCA 332
DATE: 20160503
DOCKET: M45307, M45309, M45310
M45311, M45312, M45313

Hoy A.C.J.O, and Blair and Pepall JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Sheila Block, Scott A. Bomhof, Andrew Gray, Adam M. Slavens and Jeremy Opolsky, for the moving parties, the U.S. Debtors[1]

Richard B. Swan, S. Richard Orzy and Gavin H. Finlayson, for the moving party, the Ad Hoc Group of Bondholders

David R. Byers and Daniel S. Murdoch, for the moving party, the Conflicts Administrator of Nortel Networks S.A.

Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw and Jane Dietrich, for the moving party, the Official Committee of Unsecured Creditors of Nortel Networks Inc. *et al.*

Andrew Kent, Brett Harrison and Laura Brazil, for the moving party, The Bank of New York Mellon as Indenture Trustee

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[1] The U.S. Debtors are Nortel Networks Inc. (formerly Northern Telecom International), Nortel Networks Capital Corporation, Nortel Altsystems Inc., Nortel Altsystems International Inc., Xros, Inc., Sonoma Systems, Qtera Corporation, CoreTek, Inc., Nortel Networks Applications Management Solutions Inc., Nortel Networks Optical Components Inc., Nortel Networks HPOCS Inc., Architel Systems (U.S.) Corporation, Nortel Networks International Inc., Northern Telecom International Inc., Nortel Networks Cable Solutions Inc. and Nortel Networks (CALA) Inc.

Steven L. Graff, Ian Aversa and Miranda Spence, for the moving party, the Nortel Trade Claims Consortium

Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra and Andrea McEwan, for the responding parties, the Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.

Benjamin Zarnett, Jessica Kimmel, Peter Ruby and Peter Kolla, for the responding party, the Monitor, Ernst & Young Inc.

Kenneth Kraft and John Salmas, for the responding party, Wilmington Trust, National Association

Derrick Tay and Jennifer Stam, for the responding parties, the Canadian Debtors[2]

Kenneth Rosenberg, Lily Harmer and Massimo Starnino, for the responding party, the Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Mark Zigler and Ari Kaplan, for the responding parties, the Former Employees of Nortel and LTD Beneficiaries

Arthur O. Jacques, Paul Steep and Byron Shaw, for the responding party, the Canadian Creditors' Committee

Barry E. Wadsworth, for the responding party, CAW-Canada

Matthew P. Gottlieb and Matthew Milne-Smith, for the responding parties, the Joint Administrators of the EMEA Debtors[3] other than Nortel Networks S.A.

Heard: In Writing

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[2] The Canadian Debtors are Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks Global Corporation, and Nortel Networks International Corporation.

[3] The EMEA Debtors are Nortel Networks UK Limited, Nortel Networks S.A., Nortel Networks (Ireland) Limited, Nortel GmbH, Nortel Networks (Austria) GmbH, Nortel Networks AB, Nortel Networks BV, Nortel Networks Engineering Service Kft, Nortel Networks France S.A.S., Nortel Networks Hispania, S.A., Nortel Networks International Finance & Holding BV, Nortel Networks NV, Nortel Networks OY, Nortel Networks Polska Sp. z.o.o., Nortel Networks Portugal SA, Nortel Networks Romania SRL, Nortel Networks SpA, Nortel Networks Slovensko, s.r.o., and Nortel Networks, s.r.o.

Motions for leave to appeal from the judgment of Justice Frank J.C. Newbould of the Superior Court of Justice, dated May 12, 2015 and July 6, 2015, with reasons reported at 2015 ONSC 2987, 27 C.B.R. (6th) 175, and 2015 ONSC 4170, 27 C.B.R. (6th) 51.

BY THE COURT:

A. INTRODUCTION

[1] January 14, 2009 was not a good day. At that time, Nortel Networks Corp. ("NNC") and the other Nortel Canadian Debtors filed for insolvency protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). That same day, Nortel Networks Inc. ("NNI") and other U.S. Debtors filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§1101 – 1174, and other Nortel entities incorporated in Europe, the Middle East and Africa ("EMEA") were placed under administration in England by the High Court of England and Wales under the U.K. *Insolvency Act 1986*, c. 45. Shortly afterwards, courts in Canada and the United States approved a cross-border, court-to-court protocol that established procedures for the co-ordination of cross-border proceedings in Canada and the U.S.

[2] More than seven years later, many Januarys have come and gone and these insolvency proceedings continue. During that time:

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of $1 billion has been incurred in costs; and

- Nortel's assets have been sold and some $7.3 billion[4] in sale proceeds have been placed in escrow (the "Lockbox Funds").

[3] The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge) of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial.[5] It was held over the course of six weeks. Each judge rendered separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

[4] Appeal proceedings were initiated in Canada and the U.S. The moving parties were authorized to file their leave materials in the absence of an issued judgment on the basis that counsel would subsequently file the formal judgment. The formal judgment was issued on April 26, 2016 and filed with this court on April 27, 2016.

[5] Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal

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[4] All references to dollars are to U.S. dollars, unless otherwise specified.
[5] Judge Gross's reasons are reported at 532 B.R. 494 (2015).

is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

[6] The responding parties, led by the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited ("UKPC"), submit that the record supports the trial judge's factual findings, which were integral to his analysis, including his findings that Nortel's assets were jointly created, that the Nortel group of companies operated on a fully-integrated global basis and that Nortel did not operate separate businesses in separate countries. In their submission, the proposed appeal is not *prima facie* meritorious. In addition, the remaining elements of the test for leave to appeal under the *CCAA* have not all been met.

[7] After consideration of each of the factums[6] and other materials filed on the leave motions, we agree with the responding parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

B. GENESIS OF DISPUTE

[8] NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect

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[6] In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.

parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the "Nortel Group" or "Nortel".

[9] NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary was Nortel Networks Limited ("NNL"), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel's operating company in the United States; Nortel Networks UK Ltd. ("NNUK"), Nortel's operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. ("NN Ireland"), Nortel's operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. ("NNSA"), Nortel's operating company in France.

[10] Following the insolvency filings, Nortel's initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel's assets.

[11] On June 29, 2009, an Interim Funding and Settlement Agreement ("IFSA") was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel's business lines and residual intellectual property ("IP"). The parties, consisting of

the Canadian Debtors, the U.S. Debtors[7], and the EMEA Debtors[8], agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

[12] Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors[9] or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

[13] Meanwhile, over $7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of $3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, $2.85 billion is available for allocation. In June 2011, proceeds of approximately $4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and

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[7] With the exception of Nortel Networks (CALA) Inc.
[8] The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).
[9] A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party..."

patent applications, to the Rockstar consortium. In total, approximately $7.3 billion is currently held in escrow.

[14] By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a $2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

[15] The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors"[10]. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court.[11] Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

[16] The issue of allocation of the Lockbox Funds then proceeded to trial.

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[10] Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."

[11] The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.

C. TRIAL JUDGE'S DECISION

(1) Trial Decision

[17] The trial judge's reasons may be summarized. He commenced by reviewing the history of the Nortel Group. He described the operations and the four main product groups or lines of business. Before turning to his analysis of the legal issues, he made a number of important findings about the Nortel Group's structure. He found, and repeatedly reiterated, that the Nortel Group operated as a highly-integrated multinational enterprise. For instance, he stated:

> [16] 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. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.
>
> [17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding

> corporate governance, no corporate entity carried on business on its own.

[18] The trial judge also found that R&D, which was performed at labs around the world, was the primary driver of Nortel's value and profit.

[19] After reviewing the necessary background, the trial judge turned to the legal issues before him, starting with the interpretation of the Master Research and Development Agreement ("MRDA"). The MRDA dealt with transfer-pricing arrangements, effective from 2001 onwards, among NNL, NNI, NNUK, NNSA and NN Ireland, who were parties to the agreement.[12]

[20] The parties took differing and competing positions on the meaning and application of the MRDA:

- The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.
- The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.
- The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all

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[12] Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.

> should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.
>
> - The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

[21] The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent authority from the Supreme Court of Canada on contractual interpretation, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

[22] He concluded that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profits or losses were occurring. Rather, he found that the MRDA was developed for, and driven by, transfer-pricing concepts for tax purposes and did not govern allocation after Nortel ceased operations:

> [177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.
>
> ...
>
> [185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

[23] Thus, he rejected the primary positions of the Monitor, the CCC, the U.S. Debtors and other U.S. interests, as well as the EMEA Debtors' joint ownership theory.

[24] Having found that the MRDA did not govern allocation on Nortel's insolvency and having rejected the joint ownership theory, the trial judge turned to the metric to be used to allocate the Lockbox Funds. He found that the intangible assets that were sold were not separately located or owned in any one jurisdiction. Rather, they were created by all of the so-called "Residual Profit Entities" or "RPEs" (namely, NNL, NNI, NNUK, NNSA and NN Ireland), which were located in different jurisdictions. In addition, the matrix structure allowed

Nortel to draw on employees from different functional disciplines worldwide, regardless of region or country, according to need.

[25] He held that NNL was not entitled to the proceeds of sale simply because the patents were in its name:

> [197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

[26] He determined that he had wide powers under the *CCAA* to do what was just in the circumstances. Section 11 of the *CCAA*, which reflected prior jurisprudence, expressly provides that a court may make any order it considers appropriate in the circumstances, subject to the provisions of the Act. He wrote:

> [208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded $1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction. [Footnote omitted.]

[27] He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

[28] In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation in this case: *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Re PSINet Ltd.* (2002), 33 C.B.R. 4th 284 (Ont. S.C.J.); *Re Northland Properties Ltd.* (1988), 29 B.C.L.R. (2d) 257 (S.C.).

[29] Ultimately, he concluded that the Lockbox Funds were to be allocated on a *pro rata* basis in accordance with certain governing principles, which are outlined below.

[30] After his reasons were released, the U.S. Debtors supported by the Official Committee, the Ad Hoc Group of Bondholders and the Law Debenture Trust Company of New York filed motions for clarification, reconsideration or amendment in Canada and the U.S. and a number of points were clarified.

[31] In the end result, the judgment that was signed, issued and entered on April 26, 2016 provided that the allocation proceed on a *pro rata* basis in accordance with the following principles:

> (a) Each Debtor Estate[13] is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.
>
> (b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.
>
> (c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.
>
> i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.
>
> ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed

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[13] The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

Entities, the claim against NNUK will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

(d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.

(e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:

i. the US$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;

ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and

iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.

(f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

D. ANALYSIS

[32] Six moving parties now seek leave to appeal from the trial judge's allocation decision: the U.S. Debtors, the Ad Hoc Group of Bondholders, the

Conflicts Administrator of Nortel Networks S.A., the Official Committee of Unsecured Creditors of NNI and others, the Bank of New York Mellon as Indenture Trustee, and the Nortel Trade Claims Consortium.

[33] We will commence our analysis by discussing the test for leave to appeal under the *CCAA* and then address the moving parties' positions in relation to that test.

(1) Test for Leave to Appeal

[34] Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

> (a) the proposed appeal is *prima facie* meritorious or frivolous;
>
> (b) the points on the proposed appeal are of significance to the practice;
>
> (c) the points on the proposed appeal are of significance to the action; and
>
> (d) whether the proposed appeal will unduly hinder the progress of the action.

See, for e.g.: *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24; *Re Timminco Ltd.*, 2012 ONCA 552, 2 C.B.R. (6th) 332, at para. 2; and *Re Nortel Networks Corp.*, 2013 ONCA 427, 5 C.B.R. (6th) 254, at para. 3.

(a) Whether Appeal is *Prima Facie* Meritorious

[35] The moving parties take the position that leave should be granted because the appeal is *prima facie* meritorious. In making that argument, they raise three main issues – substantive consolidation, the interpretation of the MRDA, and questions of fairness. We will deal with each issue in turn.

(i) Substantive consolidation

Position of the Moving Parties

[36] First, the moving parties submit that the trial judge erred in not recognizing that the allocation ordered departed from "corporate separateness" and was a form of substantive consolidation.

[37] Secondly, it is alleged that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation.

[38] In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA*

scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

[39] Finally, the Ad Hoc Group of Bondholders makes a related argument. It submits that the allocation decision takes property interests that belong to certain debtor estates and gives them to others. They argue that, even though the authority provided under s. 11 is broad, the *CCAA* does not permit a court to redistribute property in this way.

Analysis

[40] The moving parties' arguments on substantive consolidation are not *prima facie* meritorious.

[41] Professor Janis Sarra, a leading expert on insolvency law in Canada, describes substantive consolidation in her article "Corporate Group Insolvencies: Seeing the Forest and the Trees" (2008) 24 B.F.L.R. 63, at pp. 80 - 81:

> Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity for creditors to share in the future upside potential of a restructured entity or entities by centralizing and negotiating an arrangement in respect of their claims. Canadian courts have recognized substantive consolidation under both the *BIA* and the *CCAA* where there is evidence of intertwined assets and liabilities; integrated administrative functioning and operations; a perception by creditors that they are dealing with an integrated entity; common control and governance structures;

> where it would be impracticable to separate the affairs of related entities; where it is more cost effective and beneficial to creditors to have the proceedings administered as a single estate; and where it would result in an expeditious and administratively efficient administration of the proceeding.

[42] As we have noted, the trial judge concluded that *pro rata* allocation was appropriate, that it did not amount to substantive consolidation, and that even if it could be said that a *pro rata* allocation involved substantive consolidation, it was not precluded by law in the unique circumstances of the case.

[43] In reaching those conclusions, he made numerous factual findings, in addition to those already mentioned, including the following:

- "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": para. 223.
- "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.
- "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide ... regardless of region or country according to need": para. 203.
- "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.
- "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in

which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.

- "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.

- The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.

- There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para 224.

- "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

[44] In addition to his factual findings supporting the *pro rata* order, the trial judge explained why the allocation in this case did not constitute substantive consolidation, either actual or deemed:

- The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.

- The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.

- Each entity would maintain its own cash on hand and would be administered separately.

- The inter-company claims would not be eliminated.

[45] Similarly, Judge Gross explained at p. 554 of his reasons that the *pro rata* allocation, which was not a distribution, "both recognizes the integrity of the corporate separateness and the integrated synergistic operations of Nortel." Furthermore, he noted that a "pro rata allocation does not merge the Nortel Debtors into a single survivor and does not erase intercompany claims": p. 554.

[46] In our view, there is no *prima facie* merit to the argument that we should interfere with the trial judge's conclusion that the allocation decision did not amount to substantive consolidation. His conclusion was based on the nature and effect of his allocation decision and his factual findings. He made the findings having heard from 36 witnesses and having received and reviewed thousands of exhibits and dozens of deposition transcripts over the course of a six-week trial. Those factual findings were central to the result. Absent palpable and overriding error, those factual findings are afforded deference by this court: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10.

[47] The moving parties also allege that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation in finding that, even if the allocation did constitute substantive consolidation, it was permissible. They point to *Northland* as the leading authority on substantive consolidation but say that it is time to revisit that decision in Canada.

[48] The trial judge correctly observed that while the *CCAA* does not expressly address the issue of substantive consolidation, jurisprudence in Canada has recognized substantive consolidation as being appropriate in certain exceptional circumstances: see, for e.g., *Re Lehndorff General Partner Ltd.*, *Re PSINet Ltd.*, and *Re Northland Properties Ltd.*

[49] He also correctly observed that the court has jurisdiction to make any order that it considers appropriate in the circumstances under s. 11 of the *CCAA*. Although that section came into effect after the Nortel filing under the *CCAA*, it reflects past jurisprudence: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 68. Specifically, s. 11 states:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[50] That said, since there is no *prima facie* merit to the argument that the *pro rata* allocation constitutes substantive consolidation, there is no need to re-visit the jurisprudence governing substantive consolidation in Canada or to consider whether the threshold for substantive consolidation should be changed.

[51] Furthermore, we see no merit in the argument raised by the Bank of New York Mellon that the trial judge erred by failing to allocate the Lockbox Funds in a

manner consistent with the *BIA* scheme, which contemplates distribution on an entity-by-entity basis. Under the *CCAA* allocation decision, distribution to creditors will be done on an entity-by-entity basis.

[52] Finally, the argument raised by the Ad Hoc Group of Bondholders and the Official Committee also lacks merit. It presumes that the various Nortel companies had distinct and separable property rights in Nortel's IP. The trial judge repeatedly rejected that proposition. As we explain in the following sections, we see no merit in the argument that the trial judge erred in failing to recognize such distinct property rights. As such, we see no merit in the argument that he exercised his authority in a way that ignored such rights.

[53] This ground of appeal is not *prima facie* meritorious.

(ii) The Interpretation of the MRDA

Position of Moving Parties

[54] The moving parties take the position that the trial judge erred in concluding that the MRDA has no application to the allocation of the Lockbox Funds. On their reading, the MRDA provides NNI and other "Integrated Entities" with valuable rights to Nortel's IP in their respective exclusive jurisdictions. They note that the trial judge and Judge Gross diverged on the issue of IP rights under the MRDA.

[55] The thrust of their contractual argument is two-fold: (1) the trial judge misinterpreted the MRDA by disregarding the words of the agreement; and (2) he failed to apply the Supreme Court of Canada's decision in *Sattva* by taking an impermissibly narrow view of the scope of factual matrix evidence. In particular, they submit that the trial judge failed to take into account evidence relating to, and explaining, the tax-driven nature of the MRDA and the purposes the parties were trying to achieve through the agreement.

Analysis

[56] We reject the moving parties' submissions on the interpretation of the MRDA.

[57] On August 1, 2014, the Supreme Court of Canada released *Sattva*. The essence of that decision is best captured by excerpts from the reasons of the court written by Rothstein J.:

- "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.
- "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.
- "[T]his Court in *Housen* [*v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number,

> length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings .... These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.
>
> - "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law .... Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": para. 53.
>
> - "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.
>
> - "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

[58] Justice Rothstein also discussed the need to consider the surrounding circumstances, or factual matrix of a contract, when interpreting a written agreement. The goal of contractual interpretation is to ascertain the objective intentions of the parties. In doing so, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of

formation of the contract": para. 47. Recognizing that words do not have an immutable meaning, the court should consider the contract's commercial purpose, taking into account its genesis, background, context, and the market in which the parties are operating.

[59] In this case, the moving parties suggest that the trial judge erred in his interpretation of the MRDA and failed to pay heed to *Sattva*. In our view, the moving parties' arguments are not *prima facie* meritorious.

[60] We are not persuaded that there is any reason to interfere with the trial judge's interpretation of the agreement on the basis of palpable and overriding error. Nor, in our view, have the moving parties pointed to any extricable legal error warranting intervention by this court.

[61] As mentioned, although *Sattva* was released during the course of the allocation trial, the trial judge nonetheless considered and applied *Sattva* in interpreting the MRDA. In over 40 paragraphs, he addressed the relevant law on, and evidence of, factual matrix: see paras. 55 – 57, 117 – 157. He properly rejected evidence of subjective intention as being inadmissible.

[62] We would also observe that, as noted by the Monitor and the Canadian Debtors, to be fully successful on their appeal, the U.S. Debtors would have to persuade the court that the trial judge should have: (i) concluded that the MRDA controlled allocation of Nortel's assets in the event of insolvency; (ii) adopted the

interpretation of the MRDA advanced by the U.S. Debtors; and (iii) accepted the expert valuation evidence tendered by the U.S. Debtors.

[63] The trial judge did none of these things. All of his conclusions to the contrary engage questions of fact or mixed fact and law that are well within his province.

[64] For instance, the trial judge rejected the U.S. Debtors' valuation evidence as unreliable and the moving parties' factums are silent on how this finding could be overcome. The acceptance or rejection of the evidence of a witness is squarely within the fact-finding arena of the trial judge. The moving parties have suggested no reason why the trial judge's findings on valuation would be reversed.

[65] In conclusion, this ground of appeal does not warrant granting leave to appeal.

(iii) Fairness to the Parties and Related Arguments

Position of Moving Parties

[66] Next, the moving parties submit that they were denied procedural fairness in various respects and that the allocation decision is, among other things, arbitrary, and inequitable. In this regard, we do not propose to address every argument in the multitude of factums filed. The principal submissions on fairness and related arguments that merit comment are as follows.

[67] The moving parties say they were given no notice or opportunity to make submissions on the remedy granted. Moreover, there was no record before the court on the full spectrum of claims asserted against the Selling Debtors and no one proposed the specific remedy granted.

[68] The U.S. Debtors also submit that the remedy did not respond to the question before the court, which they say was the allocation of the Sale Proceeds (i.e. the proceeds from a particular Sale Transaction) among the Selling Debtors (i.e. the Nortel parties to a particular Sale Transaction). In their view, the trial judge did not answer that question but instead allocated the Sale Proceeds to Nortel entities that did not transfer assets in a particular Sale Transaction and were, thus, not entitled to any Sale Proceeds.

[69] The Ad Hoc Group of Bondholders similarly submits that the trial judge answered the wrong question. For instance, it says that the only question properly before the court was to determine the relative value of the assets, rights and interests that each Selling Debtor sold or relinquished, which generated the Sale Proceeds. Moreover, they say that the decision disregards their legitimate expectations.

[70] The U.S. Debtors further submit that the allocation is arbitrary since there is no logical connection between what will be or will not be counted for allocation purposes. In particular, they point to the fact the allocation excludes $4 billion in

bondholder guarantee claims from the U.S. Debtors' allocation. They say that, as a result, the U.S. Debtors will receive no allocation of funds on account of approximately two-thirds of their claims.

[71] Similarly, the Ad Hoc Group of Bondholders submits the allocation is arbitrary as it produces a redistribution of assets among debtors that violates the rule that equity holders get paid after creditors.

[72] The Conflicts Administrator of NNSA also takes issue with the fairness of the allocation decision. It says that NNSA is prejudiced by the decision because of the relatively small quantum of its creditors' claims in comparison with those of other debtor estates.

[73] Finally, the Official Committee, which represents all general unsecured creditors of the U.S. Debtors, complains that the trial judge exercised his discretion in an unprincipled way and strayed into improper "commercial judicial moralism".

Analysis

[74] We are not satisfied that there is *prima facie* merit to the moving parties' submissions.

[75] As explained, the trial judge was required to "determine the allocation of the Sale Proceeds among the Selling Debtors" under the Allocation Protocol.

[76] Given the trial judge's conclusion that the MRDA did not govern allocation and his rejection of the EMEA Debtors' joint ownership theory, the trial judge had to determine what other metric should be used to allocate the Lockbox Funds among the U.S., Canadian and EMEA Debtor Estates.

[77] The Allocation Protocol permitted submissions on "any theory of allocation". At trial, the UKPC and the CCC, in the alternative, sought a *pro rata* distribution of the funds held in escrow and each submitted expert reports that supported a *pro rata* result. Moreover, the U.S. Debtors, the Official Committee and the Ad Hoc Group of Bondholders all made submissions before the trial judge opposing a *pro rata* allocation and had an opportunity to test the evidence. They submitted a motion to strike the *pro rata* allocation evidence, attacked the reliability of the expert reports and cross-examined the experts.

[78] Thus, all parties knew that a *pro rata* allocation was in play. The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties. This is not a situation where the trial judge addressed an issue that was not before him, failed to grapple with the arguments or evidence, or came up with a new theory of the case.

[79] The two judges were not required to determine value but allocation. The IFSA provided for a right to receive an allocation of the Sale Proceeds without

restricting the basis upon which that allocation might be determined by the two courts. In particular, we note that the trial judges were given authority to decide the issue of allocation. In addition to the terms of the Allocation Protocol, we note s.10(a) of the IFSA:

> [T]his Agreement is not, and shall not be deemed to be, an acknowledgement by any Party of the assumption, ratification, adoption or rejection of the Transfer Pricing Agreements or any other Transfer Pricing methodology employed by the Nortel Group or its individual members for any purpose nor shall it be determinative of, or have any impact whatsoever on, the allocation of proceeds to any Debtor from any sale of assets of the Nortel Group; [Emphasis added.]

[80] We also observe that the trial judge turned his mind to expectations and found that there was no evidence to support the Bondholders' argument that their legitimate expectations would be disregarded by a *pro rata* allocation.

[81] Furthermore, we see no basis for the assertion that the allocation framework is arbitrary and unfair since it excludes $4 billion in Bondholder guarantee claims from the U.S. Debtors' allocation. Under the allocation decision, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once for allocation purposes. This principle is applicable to all claims. The allocation decision also specifies that claims on bonds are to be made on the Debtor Estate of the issuer. Claims on those bonds may also be made on the Debtor Estate of the guarantor but those claims will not

be taken into account in determining the claims against the Debtor Estates for allocation purposes.

[82] On the reconsideration motion, it was argued that the trial judge's decision should be changed to provide that the claims by the bondholders on the guaranteed bonds against the issuer and guarantor Debtor Estates should be included in the claims for allocation purposes. It was contended that, without such a change, there would be a manifest injustice, especially to the creditors of the U.S. Debtors other than the bondholders.

[83] The trial judge rejected that argument, noting that the $2 billion admitted claim against NNL endures. Further, cash on hand in the U.S. Debtors' Estates would be available to their creditors. He also noted that the issue of the treatment of the guaranteed bonds, and whether they should be counted once or twice in a *pro rata* allocation, was a live issue in evidence at trial, which was open to the U.S. Debtors to explore. He found, at para. 16, that "any lack of briefing by the U.S. Debtors and the [Official Committee] was a deliberate tactic taken by them in attacking the pro rata allocation method proposed at trial". He concluded that, even if he were to reconsider the double-counting issue, he would not change his mind:

> I see no injustice in the result.... There must also be considered other claims that could be made against more than one Debtor Estate, including the pension claim by the UKPC against NNUK that could be made

> against other EMEA Debtors and claims that could be made on bonds issued by NNL and guaranteed by NNC. The allocation decision precludes the double counting of any such claims for allocation purposes. The U.S. Debtors and [Official Committee] do not suggest that any of these other claims should be permitted to be claimed twice for allocation purposes. I see no basis to treat the guaranteed bonds any differently for allocation purposes. The principles that govern allocation should be applied consistently to each debtor.

[84] We are not persuaded that there is *prima facie* merit to the argument that the allocation is arbitrary. The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial.

[85] We would also observe that there was no other clear answer to the question of who was entitled to receive the sale proceeds. As Judge Gross noted at p. 500 of his reasons, the parties "submitted widely varying approaches for deciding the issue leaving virtually no middle ground." The U.S. Debtors and Bondholders argued that in excess of $5 billion belonged to the U.S. Estate and that the Canadian Estate should receive only $0.77 billion. The Canadian Debtors and the Monitor, in sharp contrast, argued that in excess of $6 billion belonged to the Canadian Estate and that the U.S. Estate should receive just over $1 billion. The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome.

[86] Judge Gross's comments in his reasons on the allocation trial, at pp. 532-533, accurately sum up the context in which the two courts came to adopt the *pro rata* allocation approach:

> The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a pro rata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.
>
> There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

[87] Nor are we satisfied that there is *prima facie* merit to the Official Committee's argument that the trial judge exercised his discretion in an unprincipled way by straying into improper "commercial judicial moralism". To the extent the Official Committee is suggesting that it amounts to judicial moralism when a judge takes into account fairness concerns, we reject that argument. The trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his conclusion.

[88] Finally, we are not persuaded that there is any merit to the argument that the allocation violates the rule that equity holders get paid after creditors. The Ad Hoc Group of Bondholders submits that the trial judge's decision results in NNL (NNI's parent company) receiving allocation proceeds from the sale of NNI's assets and rights that ought to have been allocated to the NNI estate for the benefit of NNI's creditors. This argument is premised on NNI having a right to the particular proceeds as a result of the MRDA interpretation advanced by the U.S. Debtors and Bondholders. As we have discussed above, the trial judge rejected that argument.

[89] For these reasons, we conclude that none of the fairness and related arguments put forward by the moving parties are *prima facie* meritorious.

(b) Significance of Issues to the Practice

Position of Moving Parties

[90] The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders, including creditors. In their submission, an appeal would permit this court to

clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva* on commercial agreements.

Analysis

[91] As discussed above, the moving parties have raised three main issues they say warrant leave – namely, substantive consolidation, the interpretation of the MRDA, and fairness. Of the three issues, the moving parties submit that the first two raise issues of significant interest to the practice.

[92] We disagree.

[93] The facts of this case are unique and exceptional. As we have already discussed, substantive consolidation is not engaged and so this case would not provide an opportunity for this court to provide guidance on that question. Nor does this case engage any issues that require any clarification on the application of *Sattva*. In short, granting leave would not provide an opportunity for this court to provide guidance on legal issues of significance to the practice.

(c) Significance of Issues to the Action

Position of Moving Parties

[94] The moving parties state that the allocation of the Lockbox Funds is the overriding issue in the *CCAA* proceedings.

Analysis

[95] We accept that the allocation of the Lockbox Funds is a significant issue in this *CCAA* proceeding. That said, we are of the view that, standing alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

(d) Progress of Proceedings

Position of Moving Parties

[96] The moving parties submit that the proposed appeal will not unduly hinder the progress of Nortel's *CCAA* proceeding. They state that many steps and issues remain before creditor distributions can be made, including the determination of claims. In addition, the allocation decisions of the Canadian court and the U.S. court must both be final orders in their respective jurisdictions before funds can be released from escrow. It is argued that this court should grant leave to ensure that it maintains the ability to address any issues should Judge Gross's decision be varied or overturned on appeal.

[97] The moving parties also make the point that there are no operating businesses that are in the process of restructuring because the Nortel businesses and assets have been liquidated and the joint trial was a "stand-alone component" of the *CCAA* proceeding. Thus, it is argued that the traditional

concerns leading courts to "sparingly" grant leave to appeal in *CCAA* proceedings are not applicable here. In fact, the Official Committee submits that where an appeal would have existed as of right under the *BIA*, it is nonsensical to deny leave here simply because Nortel's liquidation proceeded under the *CCAA*.

Analysis

[98] This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *In re Nortel Networks, Inc.*, 669 F.3d 128, the Third Circuit Court of Appeals admonished the parties at p. 143:

> We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.
>
> Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

[99] Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.

[100] Numerous mediations have been ordered but have failed.

[101] In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become "an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency", noting that it has "eclipsed all previous Canadian cases in both duration and expense": 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.

[102] Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

[103] Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.

E. STANDING ISSUE

[104] There is the additional issue of the standing of the Nortel Trade Claims Consortium that needs to be addressed. It represents a group of creditors that collectively holds over $130 million in unsecured claims against NNI and certain of its U.S. affiliates. It includes institutional investors and former Nortel employees. Unlike other U.S. creditors, the Consortium's sole recourse is against the U.S. Debtors' estates.

[105] At trial, the Consortium was represented by the Official Committee. It says that, given the trial decision, its interests may diverge from those of the rest of the Official Committee. It submits that the Consortium should have standing to seek leave to appeal. It relies on the court's jurisdiction to grant leave to appeal, pursuant to s. 13 of the *CCAA*, to "any person dissatisfied with an order or a decision made under [the] Act". It argues that the trial judge exceeded his jurisdiction by deciding matters that are properly for the U.S. court to decide.

[106] It is unnecessary to decide the standing issue. Even if the Consortium had standing, we would dismiss its leave motion for the same reasons we have dismissed the other leave motions. In any event, we see no merit in its argument that the trial judge exceeded his jurisdiction.

F. DISPOSITION

[107] In conclusion, we are not persuaded that the test for leave to appeal has been met. For these reasons, we dismiss all of the motions for leave to appeal.

Released: "MAY - 3 2016"

"Alexandra Wilson A.C.J.O."

"R.A. Blair J.A."

"E.A. Repell J.A."

8

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

ONE HUNDRED AND THIRTY FIFTH REPORT OF THE MONITOR DATED JANUARY 20, 2017

INTRODUCTION

1. On January 14, 2009 (the "**Filing Date**"), Nortel Networks Corporation ("**NNC**" and collectively with all its subsidiaries "**Nortel**" or the "**Company**"), Nortel Networks Limited ("**NNL**"), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, with the New Applicants (as defined below), the "**Canadian Debtors**") filed for and obtained protection under the *Companies' Creditors Arrangement Act* ("**CCAA**"). Pursuant to the Order of this Court dated January 14, 2009, as amended and restated (the "**Initial Order**"), Ernst & Young Inc. was appointed as the Monitor of the Canadian Debtors (the "**Monitor**") in the CCAA proceedings (the "**CCAA Proceedings**"). The stay of proceedings was extended to March 31, 2017, by this Court in its Order dated September 29, 2016.

2. Nortel Networks Inc. ("**NNI**") and certain of its U.S. subsidiaries and affiliates concurrently filed voluntary petitions under Chapter 11 of the U.S. Bankruptcy Code (the "**Code**") in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") on January 14, 2009 (the "**Chapter 11 Proceedings**"). As required by U.S. law,

an official committee of unsecured creditors (the "**Committee**") was established in January, 2009.

3. An ad hoc group of holders of bonds issued by NNL, NNC and Nortel Networks Capital Corporation has been organized and is participating in these proceedings as well as the Chapter 11 Proceedings (the "**Bondholder Group**"). In addition, pursuant to Orders of this Court, representative counsel was appointed on behalf of the former employees of the Canadian Debtors, the continuing employees of the Canadian Debtors and the LTD Beneficiaries (collectively, "**Representative Counsel**") and each of these groups is participating in the CCAA Proceedings.

4. Nortel Networks (CALA) Inc. ("**NN CALA**" and together with NNI and certain of its subsidiaries and affiliates that filed on January 14, 2009, the "**U.S. Debtors**") filed a voluntary petition under Chapter 11 of the Code in the U.S. Court on July 14, 2009.

5. Nortel Networks UK Limited ("**NNUK**") and certain of its affiliates located in EMEA were granted administration orders (the "**U.K. Administration Orders**") by the High Court of England and Wales on January 14, 2009 (collectively the "**EMEA Debtors**" and with the Canadian Debtors and the U.S. Debtors, the "**Estates**" and each an "**Estate**"). The UK Administration Orders appointed Alan Bloom, Stephen Harris, Alan Hudson and Chris Hill of Ernst & Young LLP as administrators of the various EMEA Debtors, except for Nortel Networks (Ireland) Limited, to which David Hughes (Ernst & Young LLP Ireland) and Alan Bloom were appointed (collectively, the "**Joint Administrators**").

6. Subsequent to the filing date, Nortel Networks S.A. ("**NNSA**") commenced secondary insolvency proceedings within the meaning of Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France pursuant to which a liquidator (the "**French Liquidator**") and an administrator were appointed by the Versailles Commercial Court.

7. The CCAA Proceedings and the U.K. Administration proceedings of NNUK and the other EMEA Debtors have been recognized by the U.S. Court as foreign main proceedings under Chapter 15 of the Code.

8. Subsequent to the Filing Date, certain other Nortel subsidiaries have filed for creditor protection or bankruptcy proceedings in the local jurisdiction in which they are located.

9. On March 18, 2016, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the "**New Applicants**") sought and were granted an Order (New Applicants) of this Court pursuant to the CCAA (the "**New Applicants Order**"). Pursuant to the New Applicants Order, each of the New Applicants was deemed to be an "Applicant" (as defined in the Initial Order) in the CCAA Proceedings, entitled to all of the rights, benefits and protections granted by, and otherwise subject to, among other Orders of this Court entered in the CCAA Proceedings, the Initial Order as if it were an Applicant thereunder. The New Applicants Order also procedurally consolidated the CCAA proceedings of the New Applicants with the CCAA Proceedings.

PURPOSE

10. The purpose of this One Hundred and Thirty Fifth Report of the Monitor ("**One Hundred and Thirty Fifth Report**") is to provide this Court and stakeholders with information regarding the results of the Meeting held on January 17, 2017, and the Monitor and Canadian Debtors' motion seeking approval of the Sanction Order (defined below), and to provide the Monitor's recommendation that the Court sanction the Plan.

TERMS OF REFERENCE

11. In preparing this One Hundred and Thirty Fifth Report, the Monitor has relied upon unaudited financial information, the Company's books and records, financial information prepared by the Company and discussions with the Company. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of this information. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. dollars.

12. Capitalized terms used herein and not otherwise defined in this One Hundred and Thirty Fifth Report are as defined in the Plan, the Settlement and Support Agreement, Meeting Order (as each such term is defined below) or previous Reports of the Monitor.

13. The Monitor has made various materials relating to the CCAA Proceedings available on its website at www.ey.com/ca/nortel (the "**Website**"). The Website also contains a dynamic link to Epiq Bankruptcy LLC's website where materials relating to the Chapter 11 Proceedings are posted.

THE STATUS OF THE CCAA PROCEEDINGS

14. The background of the CCAA Proceedings and the events that have occurred over the last eight years during the pendency of these CCAA Proceedings have been extensively reported to this Court and are not reported herein.

Settlement and Support Agreement

15. As previously reported, 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, Committee, Representatives, Unifor, U.K. Pension Trustee, PPF, Joint Liquidators and NNCC Bondholder Signatories entered into a certain Settlement and Plans Support Agreement (the "**Settlement and Support Agreement**") which, among other things, contains the terms of settlement of the Allocation Dispute (as defined therein) among the estates and certain other significant claims and matters. A copy of the Settlement and Support Agreement is Exhibit "A" to the Plan.

16. In summary, the Settlement and Support Agreement will resolve the Allocation Dispute by allocating the escrowed sale proceeds among the three Estates as follows:

    a) payment of the Iceberg Amendment Fee in the amount of $2.8 million to NNI and $2.2 million to NNUK and, in settlement of the M&A Cost Reimbursement, payments in the amount of $20 million to NNI and $35 million to the Canadian Debtors; then,

    b) to the Canadian Debtors: 57.1065% (being $4,142,665,131 as at July 31, 2016) (the "**Canadian Allocation**");

    c) to the U.S. Debtors: 24.350% (being $1,766,417,002 as at July 31, 2016);

d) to the EMEA Debtors (excluding NNUK and NNSA): 1.4859% (being $107,788,879 as at July 31, 2016);

e) to NNUK: 14.0249% (being $1,017,408,257 as at July 31, 2016); and

f) to NNSA: $220,000,000.[1]

17. Other key aspects of the Settlement and Support Agreement as they relate to the Canadian Debtors include as follows:

a) it is contemplated the Canadian Debtors will be substantively consolidated into one Canadian Estate;

b) the Canadian Estate will make priority payments to NNI in the amounts of $62.7 million (in payment of the Remaining Revolver Claim under the CFSA) and $77.5 million (resolving obligations under the Side Letters and the T&T Claim), and upon receipt by NNI of the $77.5 million payment, NNI will have a 27% interest and the Canadian Estate will have a 73% interest in the Cascade Trust;

c) 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 of proceeds from the Canada Only Sales plus further amounts in respect of the sale of the IP Addresses currently held as Unavailable Cash for the benefit of the Canadian Estate;

d) the following claims will be allowed as Proven Affected Unsecured Claims against the Canadian Estate:

i. in accordance with the CFSA and as previously approved by this Court, the Canadian Debtors will allow an unsecured claim by NNI in the amount of $2.0 billion;

[1] The allocation amounts set forth above are subject to certain potential adjustments as further specified in the Settlement and Support Agreement.

ii. in accordance with the EMEA Claims Settlement Agreement and as previously approved by this Court, the Canadian Debtors will allow an unsecured claim by NNUK in the amount of $97,655,094, which may increase to $122,655,094 under conditions set out in that agreement, and an unsecured claim by Nortel Networks SpA in the amount of $2,344,906; and

iii. in accordance with this Court's decision, UKPI will be allowed a single unsecured claim against the Canadian Estate in the amount of £339.75 million (being $494,879,850 when converted to U.S. dollars in accordance with the Plan) in settlement of any and all of the UKPI Claims;

iv. the Canadian Pension Claims will be allowed in the amount of CA$1,889,479,000;

v. the Crossover Bondholder Claims will be $3,940,750,260 in the aggregate; and

vi. the NNCC Bondholder Claims will be $150,951,562 in the aggregate;

e) the U.S. Debtors and Canadian Debtors will treat all unsecured claims against them rateably;

f) once a holder of a Crossover Claim has received aggregate distributions equal to 100% of its claim, the guarantor Estate will be entitled to subrogate to any subsequent distributions by the principal Estate in respect of that creditor's claim on a *pari passu* basis with other creditors of the same priority, to the extent of the amount paid by the guarantor Estate, and subject to certain additional restrictions in certain instances;

g) no post-petition interest will be included on any creditor claims or paid by any Estate (with certain limited exceptions required by Applicable Law with respect to the EMEA Debtors);

h) solely for determining *pari passu* distributions in respect of unsecured claims against the Canadian Estate, all non-U.S. dollar denominated claims against the Canadian Estate will be converted to U.S. Dollars at the prevailing exchange rate reported by Reuters on January 14, 2009 (as reflected at Appendix "A" to the Claims Procedure Order);

i) distributions on claims against the Canadian Estate predominantly denominated in Canadian dollars will be paid from the Canadian Estate in Canadian dollars, and distributions on all other claims will be paid in U.S. dollars;

j) the Canadian Debtors and the U.S. Debtors will both propose Plans implementing the terms of the Settlement and Support Agreement as relates to their respective Estates for approval by vote of affected unsecured creditors and approval of their respective Courts;

k) the Settlement Parties will dismiss all litigation and release all other claims among them, subject to the terms and conditions contained in the Settlement and Support Agreement; and

l) the Settlement Parties will not take any action that interferes with the implementation of the Settlement and Support Agreement or the Canadian or U.S. Plans.

18. The effectiveness of the Settlement and Support Agreement is subject to a number of conditions. Certain conditions have been satisfied, including the execution and delivery of Crossover Bondholder Joinders and NNCC Bondholder Joinders at threshold amounts, the granting of Orders regarding currency conversion by this Court and the U.S. Court and the entry of orders by the U.K. Court, U.K. Court for the French Main Proceeding, French Court and Beddoes Court as contemplated by the Settlement and Support Agreement.

19. Remaining outstanding conditions to the Settlement and Support Agreement include:

a) confirmation of the U.S. Plans by the U.S. Court and the Confirmation Order becoming a Final Order;

b) sanction of the Plan by this Court and the Sanction Order becoming a Final Order;

c) the execution and delivery of appropriate notices and other documents dismissing certain outstanding litigation among the parties to the Settlement and Support Agreement, including the appeals relating to the Allocation and Claims Litigation and the PPI Settlement (as defined in the Settlement and Support Agreement); and

d) the effectiveness of the Plan and the U.S. Plans shall have occurred by no later than August 31, 2017.

THE PLAN

20. On November 4, 2016, the Monitor served and filed its One Hundred and Thirty First report which contained the Canadian Debtors' proposed Plan of Compromise and Arrangement dated November 4, 2016 (the "**November 4 Plan**") and related information circular dated November 4, 2016 (the "**November 4 Information Circular**"). The November 4 Plan and November 4 Information Circular were subsequently updated and on November 30, 2016, the Monitor served on the Service List an updated proposed Plan of Compromise and Arrangement dated November 30, 2016 (the "**Plan**") and related information circular dated November 30, 2016 (the "**Information Circular**"), the forms of which were authorized for filing pursuant to the Meeting Order. A summary overview of the Plan is provided in the paragraphs that follow.[2] Copies of the Plan and Information Circular are attached as Appendices "A" and "B" hereto.

21. The Plan provides for, among other things, the following:

a) 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

[2] The following is intended as a summary overview of the Plan and is qualified entirely by the actual terms of the Plan. Reference should be made directly to the Plan for a complete understanding of its terms.

to Affected Unsecured Creditors, and the full and final release and discharge of all Affected Claims which consist of all Claims against the Canadian Debtors and their former Directors and Officers other than Unaffected Claims;

b) substantive consolidation of the Canadian Debtors into the Canadian Estate;

c) authorization of the Canadian Debtors and Monitor to direct the Escrow Agents to effect the allocation and distribution of the Sale Proceeds as 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;

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

e) the establishment of a single class of voting creditors, being the Affected Unsecured Creditors Class;

f) the mechanics for making *pro rata* distributions to holders of Proven Affected Unsecured Claims;

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

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

i) 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.

Substantive Consolidation

22. The Plan requires and will result in the substantive consolidation of all assets of, and Claims (excluding Canadian Intercompany Claims) against, the Canadian Debtors. All assets and rights of the Canadian Debtors (excluding Canadian Intercompany Claims)

Affected Unsecured Claim is denominated in Canadian dollars) (a "**CAD Claim**"), in which case creditors will receive distributions in Canadian dollars.

102. With respect to Proven Affected Unsecured Claims, the Monitor currently estimates the range of recovery (per U.S. dollar) of Proven Affected Unsecured Claims will be approximately 41.5 cents to 45 cents. Given currency conversion matters as described in the Plan and the Information Circular, the Monitor estimates the range of recovery (per CA dollar) for CAD Claims will be approximately CA 45 cents to CA 49 cents (assuming an Applicable F/X Rate of $1.00 = CA $1.337650).

Objection by Certain LTD Beneficiaries

103. On January 12, 2017, Joseph Greg McAvoy and Jennifer Holley, 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…".

104. The request would appear to seek to treat the LTD Claimants as priority claimants pursuant to the Plan who will have their claims paid in full. Pursuant to the Settlement and Support Agreement, the Canadian Estate, Monitor and Court appointed representatives of the Former Employees (including the LTD representative) (the "**Representatives**" and the "**LTD Rep**", respectively) have agreed that all unsecured creditors holding claims against the Canadian Estate will be paid *pari passu* by the Canadian Estate with all other general unsecured creditor distributions without discrimination of any kind. Accordingly, the request is contrary to the Canadian Estate's, Monitor's and Representatives' agreement under the Settlement and Support Agreement and cannot be agreed by those Parties. Moreover, were the Court to grant the relief requested, the other parties to the Settlement and Support Agreement could take the position such relief is contrary to the Settlement and Support Agreement, putting the settlement contemplated thereby and the implementation of the Plan and Settlement and Support Agreement at risk.

105. By way of background, LTD benefits were funded through the Nortel Health and Welfare Trust (the "**HWT**"). The HWT has previously been described in detail in prior reports to this Court, including the Fifty First Report of the Monitor dated August 27, 2010, a copy of which (excluding the voluminous appendices) is attached as Appendix "I" hereto. Pursuant to various prior Orders of this Court, substantially all of the assets of the HWT have been distributed to beneficiaries thereof. In the case of LTD Beneficiaries, distributions from the HWT have satisfied approximately 38% of the LTD obligations owing to them pursuant to the HWT Allocation Order.

106. The LTD Beneficiaries, including the two individuals filing the request, are subject to the terms of the Order (Representation Order for Disabled Employees) of this Court dated July 30, 2009 (the "**LTD Rep Order**"), a copy of which is attached as Appendix "J" hereto. 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; and

b) LTD Beneficiaries had the option to "opt-out" from the LTD Rep Order in accordance with its terms. Neither of the individuals filing the request (nor any other LTD Beneficiary) elected to opt-out of representation pursuant to the terms of the LTD Rep Order.

107. As noted above, the LTD Rep is a party to the Settlement and Support Agreement and has bound the LTD Beneficiaries to support the Settlement and Support Agreement pursuant to the terms of the LTD Rep Order.

108. This Court has previously acknowledged the adverse impact of the Canadian Debtors' insolvency on the LTD Beneficiaries.[5] The LTD Rep, with the assistance of Representative Counsel and a financial advisor, has advocated on behalf of the LTD Beneficiaries throughout these CCAA Proceedings, including seeking to mitigate the

[5] See *Nortel Networks Corporation (Re)*, 2010 ONSC 5584 at para. 75.

difficulties faced by the LTD Beneficiaries. These activities, which the Monitor has also been involved in and assisted in as appropriate, have included: (i) assisting in the development of the Hardship Process which has provided advance distributions to LTD Beneficiaries suffering hardship to a maximum of CA$24,200; (ii) urging the administrator of the Canadian Registered Pension Plans to seek FSCO approval for interim transfers of up to 50% of the estimated commuted value of pensions for LTD Beneficiaries with service in Ontario, Alberta and Nova Scotia who were suffering financial hardship; (iii) lobbying the provincial and federal governments to provide assistance to LTD Beneficiaries which resulted in automatic acceptance to the Trillium Drug Program for all LTD Beneficiaries who are Ontario residents and a request made to the Minister to have case workers designated to assist LTD Beneficiaries in obtaining information about Trillium and gaining access to specific drugs they require; and (iv) obtaining an advance tax ruling providing that lump sum distributions relating to disability income from the HWT are not taxable (LTD Basic Life and LTD Optional Life were held to be taxable, which Representative Counsel is appealing);

109. On March 30, 2010, certain of the Canadian Debtors, Monitor, the Representatives (including the LTD Rep) and Representative Counsel entered into an Amended and Restated Settlement Agreement (the "**Employee Settlement Agreement**", as approved by this Court in its Settlement Approval Order dated March 31, 2010 (the "**Settlement Approval Order**"), a copy of which (including the Employee Settlement Agreement) is attached as Appendix "K" hereto. Pursuant to the Employee Settlement Agreement and the Settlement Approval Order:

a) the Canadian Debtors agreed to continue paying LTD benefits for the remainder of 2010;

b) 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 individual LTD Beneficiaries making the request;

c) 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;

d) 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;

e) 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;

f) the Settlement Approval Order approved the Employee Settlement Agreement, including specifically ordering and declaring that: (i) the HWT Claims rank as ordinary unsecured claims on a *pari passu* basis, 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 or any nature or kind; (ii) no person shall assert or make any claim that any HWT Claims are entitled to any priority or preferential treatment over ordinary unsecured claims; and (iii) under no circumstances shall any CCAA plan be proposed or approved by the Court if, among other things, employee claimants and the other ordinary unsecured creditors do not receive the same *pari passu* treatment of their allowed claims against the Canadian Debtors pursuant to a CCAA plan; and

g) certain LTD Beneficiaries, including the individual LTD beneficiaries making the request, sought leave to appeal the Settlement Approval Order, which leave to appeal was denied by the Ontario Court of Appeal and subsequently

by the Supreme Court of Canada such that the Settlement Approval Order is no longer subject to or capable of appeal.

110. In light of the potential risk to the implementation of the Plan and the Settlement and Support Agreement as well as based on the terms of the LTD Rep Order, the Employee Settlement Agreement and the Settlement Approval Order, the Monitor does not endorse the request of the individual LTD beneficiaries.

CONCLUSION

111. The Plan follows on and implements the Settlement and Support Agreement that provides for a comprehensive resolution of all significant outstanding matters in dispute in these CCAA Proceedings and paves the way for distribution of the lockbox funds to the Canadian and other Nortel Estates, and subsequently to their respective creditors. Each of the Settlement and Support Agreement and the Plan are the result of difficult but good faith negotiations among the Estates and their key creditor constituents following on extensive litigation and other attempts at settlement. Importantly, the Plan and the Settlement and Support Agreement are supported by all major stakeholders of the Canadian Estate and have also been approved by the overwhelming majority of all Affected Unsecured Creditors, both as to number and quantum.

112. The Monitor is of the view the Settlement and Support Agreement represents a fair and reasonable resolution of the Allocation Dispute and the other matters resolved therein and that, collectively, the Settlement and Support Agreement and the Plan represent the best option available to creditors of the Canadian Debtors to finally resolve the major issues in this case and achieve a fair and reasonable distribution of the Canadian Debtors' distributable assets to them.

113. For these and the other reasons outlined in this One Hundred and Thirty Fifth Report, the Monitor supports the granting of the Sanction Order and the Canadian Escrow Release Order.

All of which is respectfully submitted this 20th day of January, 2017.

ERNST & YOUNG INC.
in its capacity as Monitor of Nortel Networks Corporation *et al.*
and not its personal capacity

Per:

Murray A. McDonald
President

6654304

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

PLAN OF COMPROMISE AND ARRANGEMENT

pursuant to the *Companies' Creditors Arrangement Act*
concerning, affecting and involving the Canadian Debtors

November 30, 2016

TABLE OF CONTENTS

SCHEDULES AND EXHIBITS

EXHIBIT “A”

SETTLEMENT AND SUPPORT AGREEMENT

[ATTACHED]

CONFIDENTIAL
FOR SETTLEMENT PURPOSES ONLY
SUBJECT TO FRE 408 AND ANALOGS IN ALL RELEVANT JURISDICTIONS
(EXECUTION VERSION)

SETTLEMENT AND PLANS SUPPORT AGREEMENT

This **SETTLEMENT AND PLANS SUPPORT AGREEMENT** (together with all Annexes hereto, in each case as amended, supplemented or otherwise modified from time to time in accordance with the terms hereof, this "**Settlement and Support Agreement**") is dated as of October 12, 2016 and entered into by and among: (i) the Canadian Debtors;[1] (ii) the Monitor; (iii) the U.S. Debtors; (iv) the EMEA Debtors; (v) the EMEA Non-Filed Entities; (vi) the Joint Administrators; (vii) NNSA; (viii) the NNSA Conflicts Administrator; (ix) the French Liquidator; (x) the Bondholder Group; (xi) the members of the CCC; (xii) the UCC; (xiii) the U.K. Pension Trustee; (xiv) the PPF; (xv) the Joint Liquidators and (xvi) the NNCC Bondholder Signatories (collectively, the "**Parties**" and each a "**Party**").

WHEREAS, NNC, NNL, NNI, NNSA and NNUK and various other members of the Nortel Group commenced insolvency proceedings as early as January 14, 2009 (collectively, the "**Nortel Insolvency Proceedings**");

WHEREAS, during the course of the Nortel Insolvency Proceedings various assets were sold and certain Sale Proceeds are held in the Existing Escrow Accounts pending either the agreement of the relevant parties or final CCAA Court and Bankruptcy Court decisions regarding the allocation of said proceeds;

WHEREAS, various of the Parties have or may have claims as against other Parties which are to be resolved in the context of the Nortel Insolvency Proceedings;

WHEREAS, certain of the Parties are parties to certain litigation before the Canadian Court and U.S. Court in which the allocation of the Sale Proceeds is at issue (the "**Allocation Dispute**");

WHEREAS, the CCAA Court and the Bankruptcy Court each issued separate decisions on or about May 12, 2015 and July 6, 2015 regarding the Allocation Dispute and such decisions remain subject to appeal in both jurisdictions (the "**Allocation Decisions**");

WHEREAS, the Parties acknowledge and agree that the ultimate outcome of continued litigation in relation to the Allocation Dispute and the potential claim matters among them is uncertain, that further appeals are likely, that the cost of such litigation is substantial and burdensome to each of the Parties and their respective constituencies and that settlement of such

[1] Capitalized terms not otherwise defined in the main body of this Settlement and Support Agreement shall have the meaning ascribed to them in Section 1 hereof.

matters is key to advancing the Nortel Insolvency Proceedings to facilitate distributions to creditors of the various Debtors' estates;

WHEREAS, the Parties desire to settle fully and finally the Allocation Dispute and key potential claims matters among them and each Party has concluded it is appropriate and in the best interest of each to enter into this Settlement and Support Agreement;

WHEREAS, the Parties wish to effectuate a full and final settlement of the Allocation Dispute and certain other matters in accordance with terms and conditions set forth herein (the "**Settlement**"); and

WHEREAS, to effect the Settlement, the Parties have agreed to enter into this Settlement and Support Agreement.

NOW, THEREFORE, in consideration of the foregoing and the promises, mutual covenants, and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each Party, intending to be legally bound, agrees as follows:

Section 1. Definitions

"**Allocation Decisions**" has the meaning set forth in the recitals hereto.

"**Allocation Dispute**" has the meaning set forth in the recitals hereto.

"**Applicable FX Rate**" has the meaning set forth in Section 7(g) hereof.

"**Bankruptcy Code**" means title 11 of the United States Code, as amended.

"**Bankruptcy Court**" means the United States Bankruptcy Court for the District of Delaware.

"**Bankruptcy Rules**" means the Federal Rules of Bankruptcy Procedure as promulgated by the United States Supreme Court under section 2075 of title 28 of the United States Code, 28 U.S.C. § 2075, as applicable to the Chapter 11 Cases and the general, local and chambers rules of the Bankruptcy Court.

"**Beddoes Court**" means the High Court of Justice of England and Wales that has the power to provide directions to the U.K. Pension Trustee authorizing the U.K. Pension Trustee to execute and implement this Settlement and Support Agreement.

"**Bondholder Group**" means the ad hoc group of bondholders that hold notes issued and/or guaranteed by NNC, NNL, NNI, and NNCC, which on June 15, 2016, filed with the Bankruptcy Court a disclosure form under Bankruptcy Rule 2019, as such group may be constituted from time to time.

"**Business Day**" means any day (other than a Saturday, Sunday or legal holiday, as such term is defined in Bankruptcy Rule 9006(a)) on which banks are open for general business in all of New York City, New York, U.S.A.; Toronto, Ontario, Canada; London, England; and Paris France.

"**Buyer Escrow Accounts**" means the escrow accounts established pursuant to certain escrow agreements among certain Nortel Group entities, certain purchasers of Nortel assets and escrow agents governing the holding and release of certain amounts held in escrow in connection with such transactions as set forth on Annex B under the heading "Buyer Escrow Accounts."

"**Buyer Escrow Amount**" has the meaning set forth in Section 2(g) hereof.

"**CAD Claims**" has the meaning set forth in Section 4(n)(i) hereof.

"**Canadian Allocation**" has the meaning set forth in Section 2(c)(ii) hereof.

"**Canadian Court**" means any and all of the CCAA Court, the Ontario Court of Appeal, the Supreme Court of Canada or any other court of competent jurisdiction overseeing the Canadian Proceedings (including any appeals) from time to time.

"**Canadian Debtors**" means, collectively, NNC, NNL, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited.

"**Canadian Escrow Account**" means the account with the Canadian Escrow Agent established pursuant to the Canadian Escrow Agreement to hold that portion of the Sale Proceeds to be converted into Canadian Dollars.

"**Canadian Escrow Agent**" means Royal Trust Corporation of Canada.

"**Canadian Escrow Agreement**" means that certain distribution escrow agreement, substantially in the form attached hereto as Annex K to be entered into among NNC, NNL, NNI, NNUK, the other existing Depositors under the relevant Existing Escrow Agreements, NNSA, the Monitor and the UCC to hold that portion of the Sale Proceeds to be converted into Canadian Dollars.

"**Canadian Escrow Release Order**" means an order issued by the CCAA Court authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated hereby.

"**Canadian Estate**" means the Canadian Debtors as substantively consolidated as contemplated herein.

"**Canadian Information Circular**" means the information circular to be provided to the Canadian Voting Creditors relating to the Canadian Plan as approved by the CCAA Court.

"**Canadian Meeting Order**" means an order of the CCAA Court granted pursuant to Section 4 and/or 5 of the CCAA that, among other things, authorizes the holding of a meeting or meetings of the Canadian Debtors' creditors for purposes of considering and voting upon the Canadian Plan and approves the Canadian Information Circular.

"**Canadian Pension Claim**" has the meaning set forth in Section 4(g)(i) hereof.

"**Canadian Plan**" means the CCAA plan of compromise or arrangement (including any exhibits, annexes and schedules thereto) for the Canadian Debtors that effectuates the Settlement, consistent with the terms of this Settlement and Support Agreement, as it may be modified or supplemented in accordance with its terms.

"**Canadian Proceedings**" means, collectively, those Nortel Insolvency Proceedings that were commenced before the CCAA Court pursuant to the CCAA on or after January 14, 2009 in respect of the Canadian Debtors.

"**Canadian Surplus Amount**" has the meaning set forth in Section 7(j)(i)(B).

"**Canadian Voting Creditors**" means creditors holding Proven Claims against the Canadian Debtors and such other creditors that are permitted to vote on the Canadian Plan.

"**Cascade Trust**" means the trust established pursuant to that certain Trust Indenture dated April 5, 2010 among NNL and NNI, as settlors, and John T. Evans, as trustee.

"**Cascade Trust Side Letter**" means the Trust Indenture Side Agreement, dated April 5, 2010, between NNL and NNI relating to the Cascade Trust.

"**CCAA**" means the Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36.

"**CCAA Court**" means the Ontario Superior Court of Justice (Commercial List).

"**CCC**" means the ad hoc committee of creditors having claims only against the Canadian Debtors comprised of the former and disabled Canadian employees of the Canadian Debtors through their court-appointed representatives, Unifor, Morneau Shepell Ltd. as Administrator of Nortel's Canadian registered pension plans, the Superintendent of Financial Services of Ontario as Administrator of the Pension Benefits Guarantee Fund and the court-appointed representatives of the current and transferred employees of the Canadian Debtors.

"**CFSA**" means the Final Canadian Funding and Settlement Agreement among, inter alia, certain of the Canadian Debtors, the Monitor and certain of the U.S. Debtors, dated December 23, 2009.

"**Chapter 11 Cases**" means the cases filed by the U.S. Debtors pursuant to Chapter 11 of the Bankruptcy Code.

"**Claims Procedure Order**" means the Claims Procedure Order entered by the CCAA Court dated July 30, 2009, as amended and restated on October 7, 2009.

"**Confirmation Order**" means an order of the Bankruptcy Court entered on the docket in the Chapter 11 Cases confirming the U.S. Plans.

"**Conversion Elections**" has the meaning set forth in Section 7(c)(i)(A) hereof.

"**Conversion Election Request**" has the meaning set forth in Section 7(c)(iii) hereof.

"**Converting Debtor**" has the meaning set forth in Section 7(i)(i) hereof.

"**Creditor Joinder**" means a joinder to this Settlement and Support Agreement, substantially in the form annexed hereto as Annex D.

"**Creditor's Maximum**" has the meaning set forth in Section 4(c)(i)(B) hereof.

"**Cross-Border Protocol**" means the Cross-Border Protocol originally approved by the Bankruptcy Court on or about January 14, 2009 and by the CCAA Court on January 14, 2009, as the same has been amended, as approved by both the Bankruptcy Court and the CCAA Court, from time to time.

"**Crossover Bondholder Fee Letter**" has the meaning set forth in Section 4(k) hereof.

"**Crossover Bondholders**" means beneficial owners of Crossover Bonds as of the earlier of (a) the date each such holder executes a Creditor Joinder or a Transferee Joinder; and (b) the record date that will be established under the U.S. Plans and the Canadian Meeting Order.

"**Crossover Bonds**" means those bonds issued pursuant to the indentures listed on Annex G hereto, but excluding the NNCC Bonds.

"**Crossover Bonds Claims**" means those Crossover Claims relating to the Crossover Bonds.

"**Crossover Claims**" has the meaning set forth in Section 4(c)(i) hereof.

"**Debtors**" means, collectively, the U.S. Debtors, the Canadian Debtors, the EMEA Debtors and NNSA.

"**Depositors**" has the meaning given to such term in the Escrow Agreements.

"**Disclosure Statements**" means, collectively, the U.S. Disclosure Statement and the Canadian Information Circular.

"**EDC**" means Export Development Canada.

"**EMEA Allocation**" has the meaning set forth in Section 2(c)(v) hereof.

"**EMEA Canada Settlement Agreement**" has the meaning set forth in Section 4(b)(i) hereof.

"**EMEA Canadian Claim**" has the meaning set forth in Section 4(b)(i) hereof.

"**EMEA Debtors**" means, collectively, NNUK, Nortel Networks (Ireland) Limited (in administration), Nortel Networks NV (in administration), Nortel Networks SpA (in administration), Nortel Networks BV (in administration), Nortel Networks Polska Sp z.o.o. (in administration), Nortel Networks Hispania SA (in administration), Nortel Networks (Austria) GmbH (in administration), Nortel Networks s.r.o. (in administration), Nortel Networks Engineering Service Kft (in administration), Nortel Networks Portugal SA (in administration), Nortel Networks Slovensko s.r.o. (in administration), Nortel Networks Romania SRL (in administration), Nortel GmbH (in administration), Nortel Networks OY (in administration), Nortel Networks AB (in administration), NNIF, and Nortel Networks France S.A.S. (in

administration), but does not include, for purposes of this Settlement and Support Agreement, NNSA.

"**EMEA Escrow Accounts**" means, collectively, the EMEA Sterling Escrow Account and the EMEA Euro Escrow Account.

"**EMEA Escrow Agreements**" means, collectively, the EMEA Sterling Escrow Agreement and the EMEA Euro Escrow Agreement.

"**EMEA Euro Escrow Account**" means the account with the EMEA Euro Escrow Agent that will be established pursuant to the EMEA Euro Escrow Agreement to hold that portion of the Sale Proceeds to be converted into Euros, in the event that the Euro Conversion Election is requested.

"**EMEA Euro Escrow Agent**" means the escrow agent named in the EMEA Euro Escrow Agreement, which escrow agent shall be reasonably acceptable to NNL, NNI, NNUK, NNSA, the other existing Depositors under the relevant Existing Escrow Agreements, the Monitor and the UCC.

"**EMEA Euro Escrow Agreement**" means the distribution escrow agreement, to be entered into among NNC, NNL, NNI, NNUK, NNSA the other existing Depositors under the relevant Existing Escrow Agreements, the Monitor and the UCC, to hold that portion of the Sale Proceeds to be converted into Euros in the event that the Euro Conversion Election is requested, which agreement shall be in a form reasonably acceptable to NNL, NNI, NNUK, NNSA, the other existing Depositors under the relevant Existing Escrow Agreements, the Monitor and the UCC.

"**EMEA Non-Filed Entities**" means, collectively, Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, NNNI, and NNOCL.

"**EMEA (Non-NNSA/Non-NNUK) Allocation**" has the meaning set forth in Section 2(c)(iii) hereof.

"**EMEA (Non-NNSA/Non-NNUK) Debtors**" means, collectively, Nortel Networks (Ireland) Limited (in administration), Nortel Networks NV (in administration), Nortel Networks SpA (in administration), Nortel Networks BV (in administration), Nortel Networks Polska Sp z.o.o. (in administration), Nortel Networks Hispania SA (in administration), Nortel Networks (Austria) GmbH (in administration), Nortel Networks s.r.o. (in administration), Nortel Networks Engineering Service Kft (in administration), Nortel Networks Portugal SA (in administration), Nortel Networks Slovensko s.r.o. (in administration), Nortel Networks Romania SRL (in administration), Nortel GmbH (in administration), Nortel Networks OY (in administration), Nortel Networks AB (in administration), NNIF and Nortel Networks France S.A.S. (in administration), but does not include NNSA or NNUK.

"**EMEA Proceedings**" means, collectively, those Nortel Insolvency Proceedings that were commenced before the U.K. Court on or about January 14, 2009 in respect of the EMEA Debtors and NNSA, which, for the avoidance of doubt, excludes the French Secondary Proceeding.

"**EMEA Sterling Escrow Account**" means the account with the EMEA Sterling Escrow Agent that will be established pursuant to the EMEA Sterling Escrow Agreement to hold that portion of the Sale Proceeds to be converted into U.K. pounds Sterling, in the event that the Sterling Conversion Election is requested.

"**EMEA Sterling Escrow Agent**" means the escrow agent named in the EMEA Sterling Escrow Account, which agent shall be reasonably acceptable to NNL, NNI, NNUK, NNSA, the other existing Depositors under the relevant Existing Escrow Agreements, the Monitor and the UCC.

"**EMEA Sterling Escrow Agreement**" means the distribution escrow agreement to be entered into among NNC, NNL, NNI, NNUK, the other existing Depositors under the relevant Existing Escrow Agreements, the Monitor and the UCC, to hold that portion of the Sale Proceeds to be converted into U.K. pounds Sterling in the event the Sterling Conversion Election is requested, which agreement shall be in a form reasonably acceptable to NNL, NNI, NNUK, NNSA, the other existing Depositors under the relevant Existing Escrow Agreements, the Monitor and the UCC.

"**EMEA Surplus Amount**" has the meaning set forth at Section 7(k)(i)(B) hereof.

"**Escrow Accounts**" means, collectively, the Existing Escrow Accounts and the New Escrow Accounts.

"**Escrow Agents**" means the Existing Escrow Agents, the Canadian Escrow Agent, the EMEA Euro Escrow Agent and the EMEA Sterling Escrow Agent, as applicable.

"**Escrow Agreements**" means, collectively, the Existing Escrow Agreements and the New Escrow Agreements governing the Escrow Accounts.

"**Escrow Release Orders**" means, collectively, the Canadian Escrow Release Order and the U.S. Escrow Release Order.

"**Estate Fiduciaries**" has the meaning given to such term in the Escrow Agreements.

"**Euro Conversion Election**" has the meaning set forth in Section 7(c)(i)(A) hereof.

"**Existing Escrow Accounts**" means the escrow accounts established to hold the Sale Proceeds, as set forth on Annex B under the heading "Distribution Escrow Accounts."

"**Existing Escrow Agents**" means JPMorgan Chase Bank, N.A. and Citibank, N.A., as applicable, as escrow agents in respect of the Existing Escrow Accounts.

"**Existing Escrow Agreements**" means the agreements among the various Depositors, Estate Fiduciaries and the Escrow Agents governing the Existing Escrow Accounts, as set forth on Annex B under the heading "Distribution Escrow Accounts."

"**Final Allocation Amount**" has the meaning set forth in Section 7(h) hereof.

"**Final Allocation Determination**" has the meaning set forth in Section 7(h) hereof.

"**Final Order**" means (a) with respect to an order of a Canadian Court, an order: (i) as to which no appeal, leave to appeal, notice of appeal, motion to amend or make additional findings of fact, motion to alter or amend judgment, motion for rehearing or motion for new trial has been timely filed (in cases in which there is a date by which such filing is required to occur, it being understood that with respect to an order issued by the CCAA Court, the time period for seeking leave to appeal shall be deemed to have elapsed on the date that is 22 days after the rendering of such order unless a motion has been made to extend such time period) or, if any of the foregoing has been timely filed, it has been disposed of in a manner that upholds and affirms the subject order in all material respects without the possibility for further appeal thereon; (ii) in respect of which the time period for instituting or filing an appeal, leave to appeal, motion for rehearing or motion for new trial shall have expired (in cases in which such time period is capable of expiring, it being understood that with respect to an order issued by the CCAA Court, the time period for seeking leave to appeal shall be deemed to have elapsed on the date that is 22 days after the rendering of such order unless a motion has been made to extend such time period); and (iii) as to which no stay is in effect; or (b) with respect to an order of a U.S. Court, an order that has not been reversed, stayed, superseded or vacated or, to the extent it has been stayed such stay shall have expired.

"**First French Order**" has the meaning set forth in Section 15(p) hereof.

"**Flextronics**" means Flextronics Telecom Systems Ltd. or any affiliate thereof.

"**French Court**" means the judge appointed in the French Secondary Proceeding, the Versailles Commercial Court, any court hearing appeals therefrom and any other court of competent jurisdiction overseeing the French Secondary Proceeding from time to time.

"**French Liquidator**" means Maître Cosme Rogeau in his capacity as Liquidator for NNSA under the French Secondary Proceeding.

"**French Main Proceeding**" means the U.K. administration of NNSA commencing on January 14, 2009.

"**French Secondary Proceeding**" means the Nortel Insolvency Proceeding that was commenced before the French Court on May 28, 2009 in respect of NNSA.

"**French Supervisory Judge**" has the meaning set forth in Section 15(p) hereof.

"**HOC**" means Nortel Networks Pénzügyi Szolgáltató Korlátolt Felelősségű Társaság.

"**Iceberg**" means the residual intellectual property remaining following the Nortel Group business line sales, which intellectual property was sold to a consortium in July 2011.

"**Iceberg Amendment Fee**" means the U.S.$5 million[2] cumulative fee previously agreed by the Canadian Debtors, U.S. Debtors, EMEA Debtors and NNSA to be funded directly as follows: U.S.$2.8 million to NNI, and U.S.$2.2 million to NNUK, all from the Iceberg Sale Proceeds prior to any other agreed upon allocation of the Sale Proceeds.

[2] All amounts in this Settlement and Support Agreement are expressed in U.S. Dollars unless expressly noted otherwise.

"**Iceberg Escrow Account**" means the escrow account established to hold the Iceberg Sale Proceeds and the Iceberg Amendment Fee, as set forth on Annex B.

"**Iceberg Sale**" means the sale of the Iceberg assets.

"**Iceberg Sale Proceeds**" means that portion of the Sale Proceeds generated from the Iceberg Sale.

"**IFSA**" means the Interim Funding and Settlement Agreement, dated as of June 9, 2009, entered into among various of the Parties, as approved by the CCAA Court on June 29, 2009 and by the Bankruptcy Court on June 29, 2009.

"**IP Addresses**" means internet protocol addresses registered in the name of a Canadian Debtor or a corporate predecessor thereto.

"**Joint Administrators**" means Alan Robert Bloom, Christopher John Wilkinson Hill, Alan Michael Hudson and Stephen John Harris, as the administrators of all EMEA Debtors and NNSA except Nortel Networks (Ireland) Limited (in administration), and Alan Robert Bloom and David Martin Hughes as Administrators of Nortel Networks (Ireland) Limited (in administration). To the extent that this Settlement and Support Agreement refers to the "Joint Administrators of NNSA" this means Alan Robert Bloom, Christopher John Wilkinson Hill, Alan Michael Hudson, Stephen John Harris and the NNSA Conflicts Administrator.

"**Joint Liquidators**" means Richard Barker and Joseph Luke Charleton as joint liquidators of NNNI and Richard Barker and Samantha Keen as joint liquidators of NNOCL.

"**LG-N**" means LG-Nortel Co. Ltd., a Korean joint venture between NNL and LG Electronics.

"**M&A Cost Reimbursement**" means the reimbursement of certain costs related to fees and expenses incurred in connection with the sale of assets which generated the Sale Proceeds.

"**MEN**" means the Nortel Group business line known as Metro Ethernet Networks.

"**Monitor**" means Ernst & Young Inc. in its capacity as the court-appointed monitor in the proceedings commenced under the CCAA in respect of the Canadian Debtors.

"**Negative Converting Debtor**" has the meaning set forth at Section 7(i)(iv) hereof.

"**New Escrow Accounts**" means, collectively, the Canadian Escrow Account and the EMEA Escrow Accounts.

"**New Escrow Agreements**" means, collectively, the Canadian Escrow Agreement and the EMEA Escrow Agreements.

"**NNC**" means Nortel Networks Corporation, a Canadian Debtor.

"**NNCC**" means Nortel Networks Capital Corporation, a U.S. Debtor.

"**NNCC Bondholder Signatories**" means the holders of NNCC Bonds that execute this Settlement and Support Agreement.

"**NNCC Bondholders**" means holders of NNCC Bonds as of the record date that will be established under the U.S. Plans.

"**NNCC Bonds**" means those bonds issued by NNCC and guaranteed by NNL.

"**NNCC Bonds Claims**" means those Crossover Claims relating to the NNCC Bonds.

"**NNCC Bonds Trustee**" means Law Debenture Trust Company of New York, as indenture trustee for the NNCC Bonds.

"**NNI**" means Nortel Networks Inc., a U.S. Debtor.

"**NNIF**" means Nortel Networks International Finance & Holding B.V. (in administration), an EMEA Debtor.

"**NNL**" means Nortel Networks Limited, a Canadian Debtor.

"**NNNI**" means Nortel Networks (Northern Ireland) Limited (in liquidation), an EMEA Non-Filed Entity.

"**NNOCL**" means Nortel Networks Optical Components Limited (in liquidation), an EMEA Non-Filed Entity.

"**NNSA**" means Nortel Networks S.A. (in administration and in *liquidation judiciaire*).

"**NNSA Allocation**" has the meaning set forth in Section 2(c)(v) hereof.

"**NNSA Conflicts Administrator**" means Stephen Jonathan Taylor of Isonomy Limited as Conflicts Administrator solely in relation to NNSA.

"**NNSA Surplus Amount**" has the meaning set forth at Section 7(k)(iii)(B) hereof.

"**NNUK**" means Nortel Networks U.K. Limited (in administration), an EMEA Debtor.

"**NNUK Allocation**" has the meaning set forth in Section 2(c)(iv) hereof.

"**Non-Converting Debtor**" has the meaning set forth in Section 7(i)(ii) hereof.

"**Non-Released Matters**" has the meaning set forth in Section 8(i) hereof.

"**Nortel Group**" means, collectively, NNC and all of its direct and indirect subsidiaries, whether current or former.

"**Nortel Insolvency Proceedings**" has the meaning set forth in the recitals hereto.

"**Nortel U.S. Trade Claims Consortium**" means a group of creditors holding over U.S.$125 million in unsecured (non-funded debt) claims, including but not limited to trade

(supplier) claims, employee severance and pension claims against one or more of the U.S. Debtors.

"**Other Currencies**" has the meaning set forth in Section 7(a) hereof.

"**Participating Creditor**" means a creditor of any of the Debtors that (i) is a Party to this Settlement and Support Agreement; or (ii) delivers a Creditor Joinder or a Transferee Joinder.

"**Party**" and "**Parties**" have the meanings set forth in the recitals hereto.

"**PBGC**" means the Pension Benefit Guaranty Corporation, a United States government corporation.

"**Petition Date**" means January 14, 2009.

"**Person**" means a "person" as defined in Section 101(41) of the Bankruptcy Code.

"**Plans**" means, collectively, the U.S. Plans and the Canadian Plan.

"**Plans Effective Date**" means the first date that (i) all of the U.S. Plans, and (ii) the Canadian Plan are effective in accordance with their respective terms.

"**Positive Converting Debtor**" has the meaning set forth in Section 7(i)(iii) hereof.

"**PPF**" means the Board of the Pension Protection Fund, a statutory corporation established under the provisions of the Pensions Act 2004, whose principal place of business is Renaissance, 12 Dingwall Road, Croydon, United Kingdom, CRO 2NA.

"**PPI Settlement**" means that certain Settlement Agreement entered into between NNI and certain of the Crossover Bondholders dated July 24, 2014 as approved by the Bankruptcy Court on December 18, 2014.

"**Proceeding**" has the meaning set forth in Section 5(e).

"**Proven Claim**" shall, with respect to a claim against one or more of the Canadian Debtors, have the meaning ascribed to such term in the Claims Procedure Order, the Claims Resolution Order of the CCAA Court, dated September 16, 2010, the Compensation Claims Procedure Order of the CCAA Court, dated October 6, 2011, and the Intercompany Claims Procedure Order of the CCAA Court, dated July 27, 2012 and shall include the U.S. Canadian Claim, the Crossover Bondholders' Proven Claim, the NNCC Bondholders' Proven Claim, the EMEA Canadian Claim, the Canadian Pension Claim and the UKPI Canadian Claim.

"**Qualified Marketmaker**" has the meaning set forth in Section 6(j)(ii) hereof.

"**Relay**" means the June 2010 sale of NNL's and NNTC's assets related to the wireless backhaul and multi-hop digital repeater/relay research development program.

"**Released Claims**" has the meaning set forth in Section 8(b)(i) hereof.

"**Releases**" has the meaning set forth in Section 8(b)(ii) hereof.

"**Releasee**" has the meaning set forth in Section 8(b)(i) hereof.

"**Releasor**" has the meaning set forth in Section 8(b) hereof.

"**Remaining HOC Claim**" has the meaning set forth in Section 4(h) hereof.

"**Sale Proceeds**" means the remaining proceeds generated by the sales of various Nortel Group business lines and the Iceberg Sale between 2009 and 2011 plus interest accrued thereon such amounts being as currently set forth in Annex A hereto,[3] less (i) US$55 million of M&A Cost Reimbursement; and (ii) the Iceberg Amendment Fee.

"**Sanction Hearing**" means the hearing before the CCAA Court to consider sanction of the Canadian Plan.

"**Sanction Order**" means the order of the CCAA Court sanctioning the Canadian Plan and shall include, for the avoidance of doubt, any order of a Canadian Court affirming such order.

"**Settlement**" has the meaning set forth in the recitals hereto.

"**Settlement and Support Agreement**" has the meaning set forth in the recitals hereto.

"**Side Letters**" has the meaning set forth in Section 4(e) hereof.

"**SNMP**" has the meaning set forth in Section 4(f) hereof.

"**Sterling Conversion Election**" has the meaning set forth in Section 7(c)(i)(A) hereof.

"**Strandherd Lands**" means certain vacant lands of the Canadian Debtors in Ottawa, Ontario, sold in November 2009.

"**Surplus Amount**" has the meaning set forth at Section 7(i)(v) hereof.

"**T&T Claim**" means any and all claims made by Nortel Networks (CALA) Inc. in respect of customer receipts from Telecommunications Services of Trinidad and Tobago deposited into Nortel Networks International Corporation's bank account related to invoices issued to Telecommunications Services of Trinidad and Tobago by Nortel Networks (CALA) Inc.

"**Tax Disputes**" has the meaning set forth in Section 4(a)(v) hereof.

"**Third Circuit**" means the United States Court of Appeals for the Third Circuit.

"**Third Party Claims**" has the meaning set forth in Section 8(c) hereof.

"**Timetable**" has the meaning set forth in Section 9(b) hereof.

[3] The total Sale Proceeds available for allocation and distribution may differ from the amounts detailed in Annex A, as described in Section 2(d) hereto.

"**Termination Event**" has the meaning set forth in Section 10(a) hereof.

"**Transfer**" has the meaning set forth in Section 6(j)(i) hereof.

"**Transferee Joinder**" has the meaning set forth in Section 6(j)(i) hereof.

"**Transferor**" has the meaning set forth in Section 6(j)(i) hereof.

"**UCC**" means the Official Committee of Unsecured Creditors appointed pursuant to an order entered by the Bankruptcy Court on January 26, 2009, as the same may be constituted from time to time.

"**UKPI**" means, collectively, the U.K. Pension Trustee and the PPF.

"**UKPI Canadian Claim**" has the meaning set forth in Section 4(b)(i) hereof.

"**U.K. Court**" means the High Court of Justice of England and Wales in London, any court hearing appeals therefrom and any other court of competent jurisdiction overseeing the EMEA Proceedings (including appeals) from time to time.

"**U.K. Pension Trustee**" means Nortel Networks U.K. Pension Trust Limited as trustee of the Nortel Networks Pension Plan.

"**U.S. Allocation**" has the meaning set forth in Section 2(c)(i) hereof.

"**U.S. Canadian Claim**" has the meaning set forth in Section 4(b)(i) hereof.

"**U.S. Canadian Priority Claim**" has the meaning set forth in Section 4(b)(i) hereof.

"**U.S. Court**" means any and all of the Bankruptcy Court, the United States District Court for the District of Delaware, the Third Circuit, the United States Supreme Court or any other court of competent jurisdiction overseeing the U.S. Proceedings (including appeals) from time to time.

"**U.S. Debtors**" means, collectively, NNI, NNCC, Nortel Altsystems Inc., Nortel Altsystems International Inc., Xros, Inc., Sonoma Systems, Qtera Corporation, CoreTek, Inc., Nortel Networks Applications Management Solutions Inc., Nortel Networks Optical Components Inc., Nortel Networks HPOCS Inc., Architel Systems (U.S.) Corporation, Nortel Networks International Inc., Northern Telecom International Inc., Nortel Networks Cable Solutions Inc., Nortel Networks (CALA) Inc., and Nortel Networks India International Inc.

"**U.S. Disclosure Statement**" means a disclosure statement to be provided to the U.S. Voting Creditors relating to the U.S. Plans that complies with sections 1125 and 1126(b) of the Bankruptcy Code.

"**U.S. Escrow Release Order**" means an order issued by the Bankruptcy Court authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated hereby.

"**U.S. Plans**" means the chapter 11 plans of reorganization (including any exhibits, annexes and schedules thereto) for the U.S. Debtors that effectuate the Settlement, consistent with the terms of this Settlement and Support Agreement, as they may be modified or supplemented in accordance with their respective terms.

"**U.S. Principal Officer**" means John J. Ray III, who was appointed Principal Officer of each of the U.S. Debtors pursuant to an order entered by the Bankruptcy Court on January 6, 2010.

"**U.S. Proceedings**" means, collectively, those Nortel Insolvency Proceedings that were commenced before the Bankruptcy Court on or after January 14, 2009 in respect of the U.S. Debtors pursuant to chapter 11 of the Bankruptcy Code.

"**U.S. Voting Creditors**" means unsecured creditors of the U.S. Debtors that are entitled to vote on one or more of the U.S. Plans and whose votes will count toward acceptance of such plans.

"**Worldwide Ds&Os**" has the meaning set forth in Section 8(b)(i) hereof.

The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include," "includes" and "including" shall be deemed to be followed by the phrase "without limitation." The word "will" shall be construed to have the same meaning and effect as the word "shall." Unless the context requires otherwise (a) any reference herein to any Person shall be construed to include such Person's successors and assigns, (b) the words "herein," "hereof" and "hereunder," and words of similar import, shall be construed to refer to this Settlement and Support Agreement in its entirety and not to any particular provision hereof, and (c) all references herein to Sections and Annexes shall be construed to refer to Sections of, and Annexes to, this Settlement and Support Agreement. The division of this Settlement and Support Agreement into Sections and the insertion of headings are for convenience only and are not to affect or be used in the construction or interpretation of this Settlement and Support Agreement.

Section 2. Settlement of Allocation Dispute

(a) For the avoidance of doubt, this Section 2 is subject to the satisfaction of the conditions contained in Section 9(a) hereof, except to the extent expressly indicated in Section 9(c) hereof.

(b) The Parties hereby agree to settle the Allocation Dispute on the terms set forth herein and enter into coordinated processes which shall include, among other things, (i) the drafting of the Canadian Plan and its submission to Canadian Voting Creditors for voting under the CCAA and to the CCAA Court for sanction, (ii) the drafting of the U.S. Plans and their submission to U.S. Voting Creditors for voting and to the Bankruptcy Court for confirmation, each on the schedule set forth in the Timetable, (iii) the submission of the Settlement and Support Agreement to the U.K. Court and the French Court, and (iv) submission to the Beddoes Court for authorization of the U.K. Pension Trustee to implement the Settlement and Support Agreement, as contemplated by Section 6 hereof.

(c) The Parties hereto agree to allocate the Sale Proceeds as follows:

(i) U.S. Debtors: 24.350%, U.S.$1,766,417,002 (the "**U.S. Allocation**")[4];

(ii) Canadian Debtors: 57.1065%, U.S.$4,142,665,131 (the "**Canadian Allocation**");

(iii) EMEA (Non-NNSA/Non-NNUK) Debtors: 1.4859%, U.S.$ 107,788,879 (the "**EMEA (Non-NNSA/Non-NNUK) Allocation**")[5];

(iv) NNUK: 14.0249%, U.S.$1,017,408,257 (the "**NNUK Allocation**"); and

(v) NNSA: U.S.$220,000,000 (the "**NNSA Allocation**," and collectively with the EMEA (Non-NNSA/Non-NNUK) Allocation and the NNUK Allocation, the "**EMEA Allocation**"). The EMEA Allocation shall be 18.5435%, provided, however, within the EMEA Allocation, the NNSA Allocation is fixed at U.S.$220,000,000 and NNSA shall not share proportionally with any increase or decrease in the Sale Proceeds as the result of the matters contemplated in Section 2(d) hereof, and any such increase or decrease in the Sale Proceeds that would but for this Section 2(c)(v) have been allocated to NNSA shall be allocated to NNUK.

(d) The Sale Proceeds to be allocated in accordance with Section 2(c) hereof include the Buyer Escrow Amount. To the extent that the amount of Sale Proceeds ultimately released from the Buyer Escrow Accounts to the Debtors is less than the Buyer Escrow Amount, any such shortfall shall be allocated among the Debtors in the percentages set forth in Section 2(c), subject to Section 2(c)(v) hereof, so that the amount of Sale Proceeds to be allocated in accordance with Section 2(c), subject to Section 2(c)(v) hereof, shall be reduced by the amount of such shortfall.

(i) Any fees and costs of the Escrow Agents for the Existing Escrow Agreements (other than costs and fees relating to any currency conversion that occurs pursuant to Section 7) shall be borne and allocated among the Debtors in the percentages set forth in Section 2(c), subject to Section 2(c)(v) hereof.

(ii) Any further amounts credited to the Escrow Accounts following the date of this Agreement, including any accrued interest not otherwise reflected in Annex A earned on the Sale Proceeds, shall be allocated among the Debtors in the percentages set forth in Section 2(c), subject

[4] Such allocation is to be distributed among the U.S. Debtors in the amounts and proportions set forth in Annex F.

[5] Such allocation is to be distributed among the EMEA Debtors (other than NNUK) in the amounts and proportions set forth in Annex E.

to the provisions of Sections 2(c)(v) and 7(b)(vi), 7(c)(x) and 7(e) hereof.

(e) The Parties hereto further agree first to distribute the following amounts from the Iceberg Escrow Account, which amounts shall not be subject to the Section 2(c) allocation percentages or be deemed to constitute Sale Proceeds:

(i) U.S.$2.8 million of the Iceberg Amendment Fee to NNI and U.S.$2.2 million of the Iceberg Amendment Fee to NNUK, and

(ii) U.S.$20 million to NNI and U.S.$35 million to the Canadian Debtors on account of the M&A Cost Reimbursement.

(f) Distributions of the Sale Proceeds will next be made as follows:

(i) all amounts in the Canadian Escrow Account shall be released to the Canadian Estate, with the funds received by the Canadian Estate being credited against the Canadian Allocation set forth in Section 2(c)(ii) in the manner set forth in Section 7(g);

(ii) all amounts (if any) in the EMEA Euro Escrow Account shall be released to NNSA with the funds received by NNSA being credited against the NNSA Allocation as set forth in Section 2(c)(v), in the manner set forth in Section 7(g);

(iii) all amounts (if any) in the EMEA Sterling Escrow Account shall be released to the EMEA Debtors who are Converting Debtors in proportion to their allocation set out at Annex E, with the funds received by such Converting Debtors being credited against the allocation of such Converting Debtors in the manner set forth in Section 7(g);

(iv) remaining amounts in the Existing Escrow Accounts shall be released (A) in accordance with the allocations set forth in Section 2(c) hereof, and (B) taking into account the funds to be released from the New Escrow Accounts under Sections 2(f)(i), (ii) and (iii) hereof; and

(v) for the avoidance of doubt, total distributions under Sections 2(f)(i)(ii)(iii) and (iv) hereof, will be strictly in accordance with the allocations set forth in Section 2(c) hereof.

(g) NNC, NNL, NNI and NNUK shall use reasonable best efforts to obtain the release of the remaining amounts held in the Buyer Escrow Accounts, totaling approximately U.S.$21.8 million (the "**Buyer Escrow Amount**"), into the Escrow Account holding that portion of the Sale Proceeds attributable to the particular sale (or such other accounts as jointly agreed to and directed by NNC, NNL, NNI, and NNUK for their respective shares). Any amount so obtained shall be allocated in accordance with the percentages set forth in Section 2(c).

(h) In connection with the distribution of Sale Proceeds contemplated pursuant to Section 2(f), NNIF shall pay U.S. $3 million to the Canadian Estate within 30 days of the conditions in Section 9(a) being satisfied and such payment obligation shall rank as an administration expense of NNIF. Subject to receipt by the Canadian Estate of such amount, such payment shall be in full satisfaction of the Remaining HOC Claim.

Section 3. Release of Sale Proceeds

(a) For the avoidance of doubt, this Section 3 is subject to the satisfaction of the conditions contained in Section 9(a) hereof, except to the extent expressly indicated in Section 9(c) hereof.

(b) As set forth in Section 6(b) hereof, the Canadian Debtors and Monitor shall seek entry of the Canadian Escrow Release Order, which order shall be entered with, or promptly following entry of, the Sanction Order and will be conditioned on the occurrence of the Plans Effective Date.

(c) As set forth in Section 6(c) hereof, the U.S. Debtors shall seek entry of the U.S. Escrow Release Order, which order shall be entered with, or promptly following entry of, the Confirmation Order and will be conditioned on the occurrence of the Plans Effective Date.

(d) The Escrow Release Orders shall: (i) constitute the order required under Section 12(b) of the IFSA to permit and authorize the distribution of the Sale Proceeds in accordance with the allocation set forth in Section 2(c) hereof; (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; and (iii) be in form and substance reasonably satisfactory to the Parties.

(e) In addition to any Escrow Release Orders, the parties to the Escrow Agreements may also provide joint instructions to the Escrow Agents, as permitted by the Escrow Agreements, directing the release of the Sale Proceeds in accordance with this Settlement and Support Agreement, the form and substance of such joint instructions being reasonably satisfactory to the Parties.

(f) Immediately following the occurrence of the Plans Effective Date, the Canadian Debtors, the Monitor, the EMEA Debtors, NNSA, the EMEA Non-Filed Entities, the U.S. Debtors and the UCC shall jointly provide copies of the Escrow Release Orders to the Escrow Agents and the parties to the Escrow Agreements shall take such other and further steps as are reasonably necessary, including but not limited to the provision of joint instructions or other notices to the Escrow Agents under Section 3(e) above, in order to cause the Escrow Agents to release the Sale Proceeds in accordance with the terms of this Settlement and Support Agreement.

(g) It is understood and agreed that the Canadian Debtors, the Monitor, the U.S. Debtors, the UCC, the EMEA Debtors, NNSA, and the EMEA Non-Filed Entities, to the extent necessary, may provide more specific instructions to the Escrow Agents in connection with the Escrow Release Orders or any instruction

provided pursuant to Section 3(e) hereof, to direct payment to specific Debtor estates subject always to the collective maximum allocation and distribution of Sale Proceeds allocated to each of the U.S. Debtors, Canadian Debtors, EMEA Debtors and NNSA, respectively, as set forth in Section 2(c) hereof (and, in the case of the U.S. Debtors and the EMEA Debtors subject to the agreed allocations set forth in Annexes F and E, respectively) and each of the U.S. Debtors, the Canadian Debtors, the EMEA Debtors, NNSA, and the EMEA Non-Filed Entities in their capacity as Depositors under the Escrow Agreements (to the extent they are Depositors under any specific Escrow Agreement), and the Monitor and the UCC in their capacity as Estate Fiduciaries under the Escrow Agreements, shall give such instructions or consents as may be reasonably required in connection with the foregoing. In relation to NNSA, any such instructions shall be given conjointly by the NNSA Conflicts Administrator and the French Liquidator following agreement with the Joint Administrators. The Bondholder Group and the UCC shall provide any consent as may be reasonably necessary under the IFSA in connection with any such instruction. If, following the Plans Effective Date, all or any portion of the remaining Buyer Escrow Amount is to be released in accordance with this Settlement and Support Agreement then the parties to such escrows shall give the necessary instructions to the relevant Escrow Agent to apportion and release those proceeds to the Debtors in the respective allocation percentages set forth in Section 2(c).

Section 4. Additional Settlement Provisions

The following provisions are also essential terms of the Settlement, which provisions, in respect of the U.S. Debtors, shall be incorporated into the U.S. Plans and, in respect of the Canadian Debtors, shall be incorporated into the Canadian Plan, as applicable. For the avoidance of doubt, this Section 4 is subject to the satisfaction of the conditions contained in Section 9(a) hereof, except to the extent expressly indicated in Section 9(c) hereof.

(a) Estate Administration

(i) The Canadian Debtor estates will be administered by the Monitor.

(ii) The EMEA Debtor and NNSA (in the French Main Proceeding) estates will be administered by their respective representatives being the Joint Administrators in respect of each EMEA Debtor and being the Joint Administrators and the NNSA Conflicts Administrator in respect of NNSA in the French Main Proceeding.

(iii) The French Secondary Proceeding will be administered by its representative, being the French Liquidator.

(iv) The U.S. Debtor estates will be administered by the U.S. Principal Officer.

(v) Notwithstanding the separate administration of the estates of the Canadian Debtors, the EMEA Debtors, NNSA, the U.S. Debtors and of the EMEA Non-Filed Entities, the Parties shall work cooperatively and

use reasonable efforts to implement this Settlement and Support Agreement and the Plans in a tax efficient manner. In addition, the Debtors shall, upon the written request of a Debtor to another Debtor and to the extent permitted by applicable local law and not inconsistent with the statutory duties of the Debtor, or the Debtor's representatives and fiduciaries, to which a request is made, reasonably cooperate with each other, including providing such documents, other information, access to current personnel and/or permission to communicate with former personnel as may reasonably be requested by the requesting Debtor, in connection with the preparation and filing of tax returns and responding to or contesting any challenges, inquiries, audits or other disputes by tax authorities in relation thereto (collectively, "**Tax Disputes**"); provided, however, that no Debtor shall be obligated to cooperate to the extent such requested cooperation would prejudice the interests of such Debtor. The Debtor requesting cooperation shall bear all costs and expenses, including reasonable attorney fees, of the Debtor providing such cooperation, including the reasonable costs of accessing, processing, reviewing and making available any documents, other information and/or personnel requested. For the avoidance of doubt, each Debtor shall be solely responsible for preparing and filing its own tax returns and contesting or challenging any Tax Disputes in relation thereto, and no other Debtor shall have any obligation to respond to, contest, challenge, dispute or appear in any other Debtor's Tax Disputes. It is acknowledged that the Debtors intend to progress the wind-up of their respective estates, including the continuing disposal of records and decommissioning of their electronic data infrastructure (such as servers), and that the cooperation contemplated pursuant to this Section 4(a)(v) shall in no way preclude any of the Debtors from taking any steps in connection with such wind-up. To the extent that any Debtor receiving a request under this Section 4(a)(v) takes the position that it is unable to provide the assistance requested, such Debtor shall confer with the Debtor making the request as to the basis for such position.

(vi) No Party will interfere with or oppose any Debtor regarding such Debtor's asset monetization, subsidiary wind-downs, tax positions, distributions, or marshalling, to the extent such actions are not inconsistent with this Settlement and Support Agreement, provided however, that the foregoing shall not compromise (x) the right, if any, of a creditor to (A) object, if such creditor has a claim that remains outstanding and unpaid against the relevant Debtor or Debtors against which the claim is to be allowed, after the date of this Settlement and Support Agreement, in the U.S. Court allowing a claim against the U.S. Debtors or in the Canadian Court allowing a claim as a Proven Claim against the Canadian Estate, in each case, other than claims expressly referred to in this Settlement and Support Agreement, and/or (B) exercise any right it may have as a creditor in respect of its claim including in respect of a Debtor's asset monetization, except in a

manner that directly contradicts any term of this Settlement and Support Agreement, or (y) the Parties' rights and obligations, if any, under the Cross-Border Protocol, the Cross-Border Protocol on the Resolution of Claims approved by the CCAA Court by Order dated September 16, 2010 and by the Bankruptcy Court by order dated September 16, 2010, or the Claims Resolution Order of the CCAA Court, dated September 16, 2010 .

(b) Estate Consolidation

(i) Canadian Debtors – The Canadian Debtors shall be substantively consolidated pursuant to the Canadian Plan on the Plans Effective Date with all intercompany claims between and among the Canadian Debtors being thereby eliminated for purposes of the Canadian Plan and no distributions or payments will be made by the Canadian Debtors on account of such claims under the Canadian Plan or otherwise, and all unsecured creditors holding claims against the Canadian Estate (including the U.S. Debtors' $2.0 billion Proven Claim (the "**U.S. Canadian Claim**"), the Crossover Bondholders' Proven Claims of U.S.$3,940,750,260 in the aggregate, the NNCC Bondholders' Proven Claim of U.S.$150,951,562, the Proven Claims held by certain of the EMEA Debtors in an aggregate amount not to exceed U.S.$125,000,000 (subject to the contractually agreed upon conditions in clause 2.2 of the Agreement Settling EMEA Canadian Claims and Related Claims among, *inter alia*, the Canadian Debtors, the Monitor, the EMEA Debtors and NNSA, dated July 9, 2014) (respectively, the "**EMEA Canadian Claim**" and the "**EMEA Canada Settlement Agreement**") and the UKPI's Proven Claim of £339.75 million[6] (the "**UKPI Canadian Claim**") and the Canadian Pension Claim) will be paid *pari passu* by the Canadian Estate with all other general unsecured creditor distributions without discrimination of any kind. The U.S. Debtors' allowed U.S.$62.7 million secured claim (defined as the "Remaining Revolver Claim" in the CFSA) (the "**U.S. Canadian Priority Claim**") will retain its priority status granted by the CCAA Court in the order dated January 21, 2010.

(ii) U.S. Debtors – The U.S. Debtors' estates shall not be substantively consolidated, provided, however, that NNCC shall be substantively consolidated with and into NNI on the Plans Effective Date.

(iii) EMEA Debtors – The EMEA Debtors' estates and NNSA (or any of them) shall not be substantively consolidated.

(c) Coordination of Crossover Claims (Issuer Pays First)

[6] Being U.S.$494,879,850 when converted from £339.75 million in accordance with Appendix "A" to the Claims Procedure Order.

(i) The U.S. Plans and the Canadian Plan shall contain the following provisions with respect to claims arising out of a debt or other obligation of one or more of the U.S. Debtors that is guaranteed or indemnified by one or more of the Canadian Debtors, or a debt or other obligation of one or more of the Canadian Debtors that is guaranteed or indemnified by one or more of the U.S. Debtors (such claims, including, without limitation, the Crossover Bonds Claims, NNCC Bonds Claims and EDC claims, but excluding, in relation to the Canadian Debtors, any obligation of a Canadian Debtor guaranteed by another Canadian Debtor, being the "**Crossover Claims**"):

(A) In the event that the creditor shall have a Proven Claim against the Canadian Estate and an allowed claim against the relevant U.S. Debtor, then, subject to Section 4(c)(i)(B) and 4(g)(vi), the issuer (or primary) Debtor estate and any guarantor (or secondary) Debtor estate shall pay distributions on the full amount of the allowed claim, if a claim against a U.S. Debtor estate, or the full amount of the Proven Claim, if a claim against the Canadian Estate, on a *pari passu* basis with all other creditors holding allowed claims (in the case of the U.S. Debtors) or Proven Claims (in the case of the Canadian Debtors) with the same priority without discrimination of any kind.

(B) In no case shall a creditor holding a Crossover Claim be entitled to receive (i) any further distributions from the U.S. Debtors where the aggregate distributions made by the U.S. Debtors and the Canadian Estate in respect of such Crossover Claim equal the total allowed amount of such Crossover Claim against the U.S. Debtors, or (ii) any further distributions from the Canadian Estate where the aggregate distributions made by the U.S. Debtors and the Canadian Estate in respect of such Crossover Claim equal the total Proven Claim amount of such Crossover Claim against the Canadian Estate. For the avoidance of doubt, in no event shall a holder of a Crossover Claim be entitled to receive aggregated distributions in respect of its allowed Crossover Claim of more than 100% of the greater of (i) its pre-filing allowed claim (U.S.), and (ii) Proven Claim (Canada) when taking into account distributions received from both the issuer (or primary) Debtor estate and guarantor (or secondary) Debtor estate (such greater amount, the "**Creditor's Maximum**"). For the further avoidance of doubt, in relation to a specific Crossover Claim, if the amount in U.S. Dollars of the allowed claim (U.S.) for such Crossover Claim is not the same as the amount of the Proven Claim (Canada) for such Crossover Claim, the Creditor's Maximum shall not be reached until the greater of the two amounts has been distributed to the creditor. Any amounts paid pursuant to Section 4(m) shall not be included in calculating the Creditor's Maximum as it pertains to the NNCC Bonds.

(C) Notwithstanding Section 4(c)(i)(B) above, if the relevant creditor receives an aggregate amount of distributions equal to the Creditor's Maximum on account of its Crossover Claim, then the guarantor (or secondary) Debtor estate shall subrogate into the Crossover Claim against the issuer (or primary) Debtor estate (for the NNCC Bonds, the issuer Debtor estate is NNCC as of the date hereof, but shall be deemed to be NNI on the Plans Effective Date when NNCC is consolidated into NNI) and will be entitled to receive any and all subsequent distributions from the issuer (or primary) Debtor estate on account of such Crossover Claim on a *pari passu* basis with all other creditors holding allowed claims (U.S.) or Proven Claims (Canada) with the same priority from the issuer (or primary) Debtor estate without discrimination of any kind, provided that (i) the guarantor (or secondary) Debtor estate shall not receive any distributions on such claim in excess of payments the guarantor (or secondary) Debtor estate has made to the underlying holder of such Crossover Claim and (ii) in the case of the Crossover Bonds Claims, NNI shall receive distributions from the Canadian Estate as a result of such subrogation for distributions NNI has made on the allowed Crossover Bonds Claims only to the extent that NNI makes distributions in respect of the allowed Crossover Bonds Claims in excess of U.S.$1.25 billion and such subrogation shall be only in respect of amounts distributed in excess of U.S.$1.25 billion, it being understood that NNI's right of subrogation pursuant to this Section 4(c)(i)(C), if any, against the Canadian Estate in respect of the Crossover Bonds Claims remains subject to distributions equal to the Creditor's Maximum first being received by holders of the Crossover Bonds Claims on account of such claims.

(ii) For the avoidance of doubt, no right of subrogation or indemnity (however described) will arise in favour of any Canadian Debtor or any U.S. Debtor against any EMEA Debtor, NNSA, or any EMEA Non-Filed Entity in respect of any amount paid by a Canadian Debtor or any U.S. Debtor pursuant to any guarantee or indemnity in respect of a liability of any EMEA Debtor, NNSA or EMEA Non-Filed Entity, and no Canadian Debtor nor any U.S. Debtor shall pursue or file any such claims or assert any right of subrogation against any EMEA Debtor, NNSA or EMEA Non-Filed Entity.

(iii) The issuer Debtor estate and the guarantor Debtor estate shall reasonably cooperate to give effect to the provisions of this Section 4(c), including sharing information regarding the Crossover Claims and intended and actual distributions thereon.

(d) Post-Petition Date Interest — No post-Petition Date interest (or make whole premium or similar claim accruing post-Petition Date) shall be included in any creditor claims, nor be paid on creditor claims in any Debtor estate, save and

except with respect to any EMEA Debtor estate, and then only to the extent payment is required under applicable law (and, if interest is payable by an EMEA Debtor, nothing herein shall restrict the right of the EMEA Debtor to compromise in whole or in part the amount of interest due and payable), provided, however, that the Canadian Debtors agree that they shall not receive post-Petition Date interest on the Remaining HOC Claim.

(e) Side Letters, IFSA, CFSA and T&T Claims – In full and final resolution of (i) all entitlements and obligations arising under side letters to which any of the U.S. Debtors and Canadian Debtors are party (as further specified on Annex C hereto and which, for purposes of this Section 4(e) and Annex C shall include the IFSA and CFSA, collectively, the "**Side Letters**"), and (ii) the T&T Claim, NNI shall receive payment from the Canadian Estate in the amount of U.S.$77.5 million. After receipt of such payment by NNI, NNI shall have a 27% interest in the remaining assets of the Cascade Trust and the Canadian Estate shall have a 73% interest in the remaining assets of the Cascade Trust. The Parties agree that except in relation to the Iceberg Amendment Fee, in respect of which NNUK will be entitled to a payment of U.S.$2.2 million from the Iceberg Sale Proceeds, neither the EMEA Debtors (nor NNSA) nor the EMEA Non-Filed Entities shall have any other entitlements or obligations under the Side Letters.

(f) SNMP – There shall be no holdback of Sale Proceeds with respect to any liability that may be due or become due to one or both of SNMP Research International Inc. or SNMP Research Inc. (either or together, "**SNMP**"). No Debtor has or shall have any claim (whether by way of contribution, indemnity or otherwise) against any other Debtor in respect of any liability due or which may become due to SNMP and no Debtor or any other Party will assist SNMP in bringing any claim against any other Debtor.

(g) Resolution of Certain Claims – The Parties have agreed to the following treatment for the following claims:

(i) the Canadian registered pension plans deficit claims against each of the Canadian Debtors shall be allowed as unsecured Proven Claims against the Canadian Estate in the aggregate amount of CAD$1,889,479,000 (the "**Canadian Pension Claim**");

(ii) the PBGC claim against each of the U.S. Debtors (and against any non-debtor U.S. Nortel Group entity) shall be a maximum of U.S.$708,000,000 and all rights of the U.S. Debtors and other U.S. based parties-in-interest in the U.S. Proceedings to contest such PBGC claims are expressly reserved and the allocation percentages provided for in Section 2(c) shall not change if the PBGC claims are admitted or allowed for a different amount;

(iii) the Parties (other than NNUK and the UKPI) agree that they will not challenge the adjudication by the Joint Administrators of NNUK of the UKPI's claim arising under section 75 of the U.K. Pension Act 1995 (presently filed in the amount of £2,147,000,000) against NNUK and

the allocation percentages provided for in Section 2(c) shall not change if the UKPI claim is admitted or allowed for a different amount;

(iv) the Crossover Bonds Claims (a) against NNL and NNC shall be allowed as unsecured Proven Claims against the Canadian Estate in the aggregate amount of U.S.$3,940,750,260, as specified in Annex G hereto, and (b) against NNI shall be allowed as a general unsecured claim in the aggregate amount of U.S.$3,934,521,442, as specified in Schedule A to the Agreement Settling The NNI Post-Petition Interest Dispute And Related Matters dated July 24, 2014;

(v) the NNCC Bonds Claims (a) against NNI (into which NNCC shall be substantively consolidated on the Plans Effective Date) shall be allowed as a general unsecured claim in the amount of U.S.$150,951,562, and (b) against NNL shall be allowed as an unsecured Proven Claim against the Canadian Estate in the amount of U.S.$150,951,562;

(vi) the U.S. Plans shall provide that NNI shall reserve U.S.$7.5 million from cash otherwise available for distributions to NNI unsecured creditors, to be made available to be paid in respect of the NNCC Bonds Claims in the event that distributions (including deemed distributions related to the Crossover Bondholder Fee Letter) in respect of the NNCC Bonds Claims will be less than U.S.$150,951,562 (exclusive of any amount paid pursuant to Section 4(m)) upon the completion of distributions in respect of the NNCC Bonds Claims on the allowed claim against NNI (which claim against NNI results from the consolidation of NNCC with and into NNI) and the Proven Claim against the Canadian Estate, provided, however, that NNI shall use such reserves to make distributions in respect of the NNCC Bond Claims only in the amount of the lesser of (A) U.S.$150,951,562 less total distributions from NNI and the Canadian Estate (exclusive of any amount paid pursuant to Section 4(m)), and (B) U.S.$7.5 million;

(vii) The Bondholder Group agrees that it will negotiate in good faith with the Nortel U.S. Trade Claims Consortium regarding additional terms that would cause such group to support the Settlement and the U.S. Plans; and

(viii) the UKPI Canadian Claim and the EMEA Canadian Claim shall be allowed as unsecured Proven Claims against the Canadian Estate.

(h) Book Intercompany Claims – Pre-filing intercompany claims in the amounts recorded in the books and records of companies comprising the Nortel Group as set out in Annex L shall be included in the determination of the allowed unsecured claims against a Debtor (except to the extent such claims are between Canadian Debtors, where no distributions or payments will be made by the Canadian Debtors on account of such claims under the Canadian Plan or otherwise). Annex L shall be treated as the definitive position for all pre-filing intercompany claims between the Nortel Group entities specified thereon. Any

and all other pre-filing books and records claims between (A) any of the Canadian Debtors, on the one hand, and (B) any of the U.S. Debtors and their other subsidiaries as specified on Annex L, on the other hand, which are not preserved specifically herein (including, without limitation the claims referenced in Sections 4(b)(i) and 4(g)), are forever released and barred. Other than the EMEA Canadian Claim, the Remaining HOC Claim and any other pre-filing intercompany claims set forth on Annex L, all pre-filing books and records claims, including any claims that a Debtor now holds as a consequence of an assignment (excluding claims against an EMEA Debtor assigned to NNUK in connection with the EMEA Canada Settlement Agreement), between (G) any of the EMEA Debtors, NNSA or the EMEA Non-Filed Entities, on the one hand, and (H) any of the Canadian Debtors or the U.S. Debtors, on the other hand, are forever released and barred. The EMEA Debtors and the Canadian Debtors agree that in full and final settlement of: (Q) the Tranche 2 Payment (as such term is defined in the Q1 2010 Transfer Pricing Settlement Agreement among, *inter alia*, certain of the Canadian Debtors, the Joint Administrators and the EMEA Debtors, dated September 8, 2011); and (R) the U.S.$7,621,249 claim of certain of the Canadian Debtors against NNIF related to HOC, the Canadian Estate shall have an accepted post-Petition Date claim against NNIF in the amount of U.S.$3 million (the "**Remaining HOC Claim**"). The Remaining HOC Claim shall rank as an administration expense of NNIF payable in full in accordance with Section 2(h) and not subject to compromise or reduction. For the avoidance of doubt, the Tranche 2 Payment (being the remaining amount of the Shortfall Payments (as defined in the IFSA)) is forever released and barred. The Parties agree and acknowledge that, as at the date hereof, there are no post-filing books and records claims owing between (Y) any of the Canadian Debtors, on the one hand, and any of the U.S. Debtors, the EMEA Debtors, NNSA and the EMEA Non-Filed Entities, on the other, and (Z) any of the U.S. Debtors, on the one hand, and any of the EMEA Debtors, NNSA and the EMEA Non-Filed Entities, on the other.

(i) Intra-EMEA Claims – Nothing in this Settlement and Support Agreement affects claims as between or among any of the EMEA Debtors and/or NNSA and/or the EMEA Non-Filed Entities, which shall be dealt with separately between the EMEA Debtors, NNSA and the EMEA Non-Filed Entities. Nothing in this Settlement and Support Agreement affects claims between or among the UKPI, any EMEA Debtor, NNSA, or the EMEA Non-Filed Entities, the Joint Administrators, the NNSA Conflicts Administrator or the French Liquidator, which shall be dealt with separately between and among the EMEA Debtors, NNSA, the EMEA Non-Filed Entities, the Joint Administrators, the NNSA Conflicts Administrator, the French Liquidator and the UKPI.

(j) Remaining Assets and Other Proceeds – Each Debtor estate has the right to retain the value of its respective remaining assets, if any, and shall not be subject to any claims thereto by any other Debtor save and except those acknowledged herein. Other than those claims acknowledged herein to receive distributions from the proceeds of such assets, the U.S. Debtors, the EMEA Debtors, NNSA, the UKPI and the EMEA Non-Filed Entities release any claims they have asserted or may assert or have as against (i) those proceeds held by the Canadian Debtors as

"Restricted Cash" or "Unavailable Cash" (as noted in Monitor's Reports to the CCAA Court), including in respect of the realization of the interests in LG-N, the Strandherd Lands, Relay and IP Addresses, and (ii) the remaining IP Addresses, including any proceeds arising therefrom. For the avoidance of doubt, nothing in this subsection shall (i) prohibit the assertion of claims to enforce this Settlement and Support Agreement and claims that are reserved in this Settlement and Support Agreement (including without limitation, the claims referenced in Section 4(b)(i) hereof) or (ii) affect the Parties' rights to receive distributions as creditors of the various Debtors' estates.

(k) Bondholder Group Fees – The aggregate amount of fees under the existing fee letter dated June 23, 2011 between various advisors to the Bondholder Group and NNC and NNL (the "**Crossover Bondholder Fee Letter**") to be deducted from distributions to Crossover Bondholders and NNCC Bondholders in respect of their Proven Claims against the Canadian Estate shall be U.S.$47 million (which includes U.S.$3.0 million in respect of the deferred compensation fee payable to FTI Consulting). An additional U.S.$7.0 million may be deducted from Canadian Estate distributions to Crossover Bondholders and NNCC Bondholders in further payment of the deferred compensation fee payable to FTI Consulting. All such deductions shall be borne by the Crossover Bondholders and the NNCC Bondholders on a pro rata basis based on the amount of the Proven Claims of the Crossover Bondholders and the NNCC Bondholders as set forth on Annex G hereto.

(l) Canadian Fees – The Canadian Debtors and Monitor agree that the Canadian Debtors will not pay voluntarily, or seek permission to pay, legal or advisor fees of any stakeholder that the Canadian Debtors are not paying as of the date hereof. Payment of any such further legal or advisor fees will be done only pursuant to an order of the CCAA Court.

(m) NNCC Fees – The U.S. Plans shall provide that NNI shall pay the reasonable and documented fees of (a) the NNCC Bonds Trustee, in an amount not to exceed U.S.$4.25 million, and (b) counsel to Solus Alternative Asset Management LP and PointState Capital LP in an amount not to exceed U.S.$750,000. Notwithstanding any other term in this Settlement and Support Agreement, if any amount remains in the cash reserve established pursuant to Section 4(g)(vi) hereof after the making of payments required thereunder, the U.S. Plans shall provide that, out of such funds, NNI shall pay or reimburse reasonable and documented fees (up to an additional U.S.$2.0 million) incurred by professionals in connection with the assertion of rights related to the NNCC Bonds. Any amount payable by NNI under this Section 4(m) shall include an amount equal to, and be in addition to, any fees paid by the Canadian Debtors under the Crossover Bondholder Fee Letter allocated to the NNCC Bondholders that are deducted from distributions made by the Canadian Estate to the NNCC Bondholders as described in Section 4(k).

(n) Canadian Debtor Claim Distributions – Solely for determining *pari passu* distributions in respect of unsecured claims against the Canadian Estate, claims

will be valued in U.S. Dollars and all non-U.S. Dollar denominated Proven Claims against the Canadian Estate will be converted to U.S. Dollars at the prevailing exchange rate reported by Reuters on January 14, 2009 (as reflected at Appendix "A" to the Claims Procedure Order).

(i) Proven Claims against the Canadian Estate predominantly denominated in Canadian Dollars ("**CAD Claims**") will be paid from Canadian Estate assets in Canadian Dollars.

(ii) All other Proven Claims against the Canadian Estate will be paid in U.S. Dollars.

(iii) For purposes of determining the amount of Canadian Dollars to be paid by the Canadian Estate on distributions on CAD Claims, the amount of such distribution in U.S. Dollars (as calculated in accordance with this Section 4(n)), shall be converted to Canadian Dollars at the Applicable FX Rate at which Sale Proceeds are converted from U.S. Dollars to Canadian Dollars as contemplated by Section 7 hereof.

(o) Plans Effective Date – Each of the Plans shall contain a term to the effect that the U.S. Plans and the Canadian Plan shall become effective at the same time.

Section 5. Litigation Resolution

(a) For the avoidance of doubt, this Section 5 is subject to the satisfaction of the conditions set forth in Section 9(a) hereof, except to the extent expressly indicated in Section 9(c) hereof.

(b) Promptly following the Plans Effective Date, the Parties shall dismiss with prejudice and with no order as to costs all appeals, leave to appeal applications and other litigations among any of the Parties (including the pending appeals and cross-appeals in respect of the Allocation Dispute, the pending appeal of the PPI Settlement by the Canadian Debtors, the pending appeal of the SNMP impleader action and related denial of a chapter 15 stay to which the U.S. Debtors and the EMEA Debtors and SNMP are parties, and the pending appeal and cross-appeal in respect of the claims of the UKPI against the Canadian Debtors), save and except for the Non-Released Matters and provided that rights are reserved to enforce this Settlement and Support Agreement. Such dismissals will be effected by the filing of the appropriate documents with the appropriate courts in each jurisdiction, the form of which documents must be reasonably acceptable to the Parties party to such litigation.

(c) The Parties hereby agree that immediately upon this Settlement and Support Agreement being executed by all Parties, in a coordinated fashion the Parties shall contact the CCAA Court, the Bankruptcy Court, the Ontario Court of Appeal, the Supreme Court of Canada, the U.S. District Court for the District of Delaware, the Third Circuit, the U.K. Court, the French Court, and such other courts as may be necessary, and notify them that the Settlement and Support Agreement has been executed. Counsel to the Monitor shall coordinate contacting the Canadian

Courts (except with respect to contacting the Supreme Court of Canada in connection with the leave application filed therewith, which shall be coordinated by counsel to the U.S. Debtors in consultation with counsel to the Monitor), counsel to the U.S. Debtors shall coordinate contacting the U.S. Courts, counsel to the Joint Administrators shall coordinate contacting the U.K. Court and counsel to each of the French Liquidator and NNSA Conflicts Administrator shall coordinate contacting the French Court.

(d) Subject to Section 5(e), the Parties hereby agree that immediately upon this Settlement and Support Agreement being executed by all Parties, in a coordinated fashion the Parties shall request that the Canadian Courts and the U.S. Courts stay any and all matters pending before those courts between any of the Parties to, or that are otherwise related to, this Settlement and Support Agreement, including, without limitation, the litigation described in Section 5(b) hereof, pending satisfaction of the conditions set forth in Section 9(a) hereof.

(e) The Parties hereby agree not to commence or take any step to advance any action, claim, appeal, objection or other similar proceeding (a "**Proceeding**") seeking relief that is the subject of the matters addressed in this Settlement and Support Agreement; provided, however, that (i) to the extent that a stay contemplated by subsection 5(d) above is not granted or ceases to exist in respect of any Proceeding, the Parties shall be entitled to take all reasonably necessary steps to preserve their rights in all relevant jurisdictions in respect of such Proceeding prior to the Plans Effective Date, provided, further, however, in accordance with Section 10 hereof, in the event of a termination of this Settlement and Support Agreement, upon the occurrence of such termination, the Parties agree to notify the relevant courts of such termination and immediately thereafter recommence, or continue, as applicable, litigation. For the avoidance of doubt, the Parties rights to propose or oppose expedition of any Proceeding in the event of such termination are preserved as set forth in Section 10(c) herein.

Section 6. Support of Settlement, Disclosure Statements and Plans

(a) For the avoidance of doubt, this Section 6 is subject to the satisfaction of the conditions set forth in Section 9(a) hereof, except to the extent expressly indicated in Section 9(c) hereof.

(b) The Canadian Debtors and Monitor hereby agree to take any and all reasonably necessary and appropriate actions (including, without limitation, obtaining requisite corporate approvals, if any) to (i) file the Canadian Plan and Canadian Information Circular with the CCAA Court (each of which shall be in a form and substance that contains, implements and accurately reflects the terms and conditions of this Settlement and Support Agreement), seek approval of the Canadian Meeting Order and solicit votes from Canadian Voting Creditors to accept the Canadian Plan, and (ii) seek entry of the Sanction Order and the Canadian Escrow Release Order. The sanction of the Canadian Plan will be conditioned on, among other things, confirmation of the U.S. Plans.

Consideration of the Canadian Plan and the U.S. Plans will take place in joint hearings conducted in accordance with the Cross-Border Protocol.

(c) The U.S. Debtors hereby agree to take any and all reasonably necessary and appropriate actions (including, without limitation, obtaining requisite corporate approvals, if any) to (A) file the U.S. Plans and Disclosure Statement with the U.S. Court (each of which shall be in a form and substance that contains, implements and accurately reflects the terms and conditions of this Settlement and Support Agreement) and seek approval of the Disclosure Statement by the Bankruptcy Court, (B) solicit votes from U.S. Voting Creditors to accept the U.S. Plans, and (C) seek entry of the Confirmation Order and the U.S. Escrow Release Order. Confirmation of the U.S. Plans will be conditioned on, among other things, sanction of the Canadian Plan. Consideration of the Canadian Plan and the U.S. Plans will take place in joint hearings conducted in accordance with the Cross-Border Protocol.

(d) The EMEA Debtors hereby agree to take any and all reasonably necessary and appropriate actions (including, without limitation, obtaining requisite corporate approvals, if any) to (A) file with the U.K. Court materials (which shall be, *inter alia*, in a form and substance that accurately reflects the terms and conditions of this Settlement and Support Agreement) as contemplated by Section 9(a)(iv) hereof, and (B) seek entry of the order or orders from the U.K. Court as contemplated by Section 9(a)(iv) hereof.

(e) The French Liquidator hereby agrees to take any and all reasonably necessary and appropriate actions (including, without limitation, obtaining requisite corporate approvals, if any) to (A) file with the French Court materials (which shall be, *inter alia,* in a form and substance that accurately reflects the terms and conditions of this Settlement and Support Agreement) seeking the approval required by Section 9(a)(vi) hereof, and (B) seek entry of an order or orders from the French Court granting such approval.

(f) The NNSA Conflicts Administrator hereby agrees to take any and all reasonably necessary and appropriate actions (including, without limitation, obtaining requisite corporate approvals, if any) to (A) file with the U.K. Court materials (which shall be, *inter alia,* in a form and substance that accurately reflects the terms and conditions of this Settlement and Support Agreement) as contemplated by Section 9(a)(v) hereof, and (B) seek entry of the order or orders from the U.K. Court as contemplated by 9(a)(v) hereof.

(g) The U.K. Pension Trustee hereby agrees to take any and all reasonably necessary and appropriate actions (including, without limitation, obtaining requisite corporate approvals, if any) to (A) file with the Beddoes Court materials (which shall be in a form and substance that accurately reflects the terms and conditions of this Settlement and Support Agreement) seeking the approval required by Section 9(a)(vii) hereof, and (B) seek entry of an order or orders from the Beddoes Court authorizing the U.K. Pension Trustee to implement this Settlement and Support Agreement.

(h) Subject to the Plans and the Disclosure Statements (A) accurately incorporating the terms and conditions of this Settlement and Support Agreement, and (B) being in form and substance reasonably satisfactory to the respective Parties (including in respect of any material amendments to the Plans), each of the Parties and each of the Participating Creditors hereby agrees to:

(i) support the Settlement and all of the transactions and actions contemplated hereby (including the Plans) and take any and all reasonably necessary and appropriate actions in furtherance of consummation of the Settlement, the Plans and this Settlement and Support Agreement;

(ii) support approval of the Disclosure Statements, the granting of the Canadian Meeting Order (and not object to approval of the Disclosure Statements or the granting of the Canadian Meeting Order, or support the efforts of any other Person to oppose or object to, approval of the Disclosure Statements or the granting of the Canadian Meeting Order) and the granting of the approvals from the U.K. Court, the French Court and the Beddoes Court;

(iii) subject to receipt of the Disclosure Statements and solicitation in accordance with (as applicable) Sections 1125 and 1126 of the Bankruptcy Code and/or the Canadian Meeting Order,

(A) (1) as necessary given its creditor status, deliver its duly-completed ballot(s) and/or proxy(ies) for receipt (at the address specified therein) by the required date (or to attend at the meeting of creditors to be held pursuant to the Canadian Meeting Order) in order to vote its claims to accept the Plans, (2) with respect to voting of any claim held by a Participating Creditor for trades not settled (but which claims will be bound by the terms hereof upon the closing of such trade), to direct the delivery of duly-completed ballot(s) and/or proxy(ies) for receipt (at the address specified therein) by the required date in order to vote such claims to accept the Plans, and (3) not change or withdraw (or cause to be changed or withdrawn) any such vote, unless the Plan related thereto is modified to be inconsistent with this Settlement and Support Agreement or is otherwise modified in a manner not permitted by such Plan;

(B) (1) support the granting of the Confirmation Order, the Sanction Order and the Escrow Release Orders (and not object to approval of the granting of such orders, or support the efforts of any other Person to oppose or object to, the granting of such orders), unless the Plan related thereto is modified to be inconsistent with this Settlement and Support Agreement or is otherwise modified in a manner not permitted by such Plan, and (2) refrain from taking any action not required by law that is inconsistent with, or that would delay or impede sanction, confirmation or consummation of the

Plans or that is otherwise inconsistent with the express terms of this Settlement and Support Agreement; and

(C) not, directly or indirectly, propose, support, solicit, encourage, or participate in the formulation of any alternative plan or plans of compromise, arrangement, reorganization or liquidation in the Chapter 11 Cases or the Canadian Proceedings other than the Plans.

(iv) in the case of Participating Creditors who are Crossover Bondholders, issue directions to the trustees under the indentures governing the Crossover Bonds to support this Settlement and Support Agreement and the Plans and to act in a manner as contemplated pursuant to this Section 6(h); and

(v) in the case of Participating Creditors who are NNCC Bondholders, issue directions to the NNCC Bonds Trustee to cause the NNCC Bonds Trustee to support this Settlement and Support Agreement and the Plans and to act in a manner as contemplated pursuant to this Section 6(h).

(i) For the avoidance of doubt, each of the Parties and each Participating Creditor also agrees that it will not take any action (or refrain from taking an action) that, directly or indirectly, would interfere with, delay, impede, or postpone or take any other action that interferes with, the implementation of the Settlement, the confirmation and consummation of the U.S. Plans, the sanction and consummation of the Canadian Plan and/or the granting of the approvals by the U.K. Court, the French Court and the Beddoes Court.

(j) Transfers of Claims and Interests.

(i) No Participating Creditor shall (i) sell, transfer, assign, pledge, grant a participation interest in, or otherwise dispose of, directly or indirectly, its right, title, or interest in respect of any of such Participating Creditor's claims against any Debtor in whole or in part, or (ii) deposit any of such Participating Creditor's claims against any Debtor, as applicable, into a voting trust, or grant any proxies, or enter into a voting agreement with respect to any such claims or interests (the actions described in clauses (i) and (ii) are collectively referred to herein as a "**Transfer**" and the Participating Creditor making such Transfer is referred to herein as the "**Transferor**"), unless such Transfer is to another Party or Participating Creditor or any other Person that first agrees in writing to be bound by the terms of this Settlement and Support Agreement by executing and delivering a Transferee Joinder substantially in the form attached hereto as Annex H (the "**Transferee Joinder**") to the Debtors or, if to a Party or Participating Creditor, which Party or Participating Creditor has already executed this Settlement and Support Agreement, in which case, the Party or Participating Creditor receiving such Transferee Joinder shall deliver same to the Debtors. With respect to claims against or interests in a

Debtor held by the relevant transferee upon consummation of a Transfer in accordance herewith, such transferee is deemed to make all of the representations, warranties, and covenants of a Participating Creditor, as applicable, set forth in this Agreement. Upon compliance with the foregoing, the Transferor shall be deemed to relinquish its rights (and be released from its obligations, except for any claim for breach of this Settlement and Support Agreement or any related non-disclosure agreement that occurs prior to such Transfer) under this Agreement to the extent of such transferred rights and obligations. Any Transfer made in violation of this Sub-Clause (i) of this Section 6(j) shall be deemed null and void *ab initio* and of no force or effect, regardless of any prior notice provided to the Debtors, and shall not create any obligation or liability of any Debtor or any other Party to the purported transferee.

(ii) Notwithstanding Sub-Clause (i) of this Section 6(j), an entity that is acting in its capacity as a Qualified Marketmaker shall not be required to execute and deliver a Transferee Joinder on its own behalf to effect any transfer (by purchase, sale, assignment, participation, or otherwise) of any claim against any Debtor, by a Participating Creditor to a transferee; *provided that* (A) such transfer by a Participating Creditor to a transferee shall be in all other respects in accordance with and subject to Section 6(j)(i), including in that the ultimate transferee shall execute a Transferee Joinder, and (B) to the extent that a Participating Creditor, acting in its capacity as a Qualified Marketmaker, acquires any claim against, or interest in, any Debtor from a holder of such claim who is not a Participating Creditor, it may transfer (by purchase, sale, assignment, participation, or otherwise) such claim or interest without the requirement that the transferee be or become a Party in accordance with this Section 6(j). For purposes of this Section 6(j)(ii), a "**Qualified Marketmaker**" means an entity that (Y) holds itself out to the market as standing ready in the ordinary course of its business to purchase from customers and sell to customers claims against any of the Debtors (including debt securities or other debt) or enter with customers into long and short positions in claims against the Debtors (including debt securities or other debt), in its capacity as a dealer or market maker in such claims against the Debtors, and (Z) is in fact regularly in the business of making a market in claims against issuers or borrowers (including debt securities or other debt). For the avoidance of doubt, if a Qualified Marketmaker purchases a claim against a Debtor from a Participating Creditor for its own account or otherwise has a beneficial ownership interest in a claim being acquired from a Participating Creditor, it shall be required to execute and deliver a Transferee Joinder to the Debtors.

Section 7. <u>Currency Conversion</u>

(a) The Parties hereby agree to cooperate and coordinate efforts to convert portions of the Sale Proceeds from U.S. Dollars to, as the case may be, Canadian Dollars, Sterling and Euros (collectively, the "**<u>Other Currencies</u>**").

Ad hoc committee of creditors having claims only against the Canadian Debtors comprised of: the former and disabled Canadian employees of the Canadian Debtors through their court-appointed representatives, Unifor, Morneau Shepell Ltd. as Administrator of Nortel's Canadian registered pension plans, Superintendent of Financial Services of Ontario as Administrator of the Pension Benefits Guarantee Fund and the court-appointed representatives of the current and transferred employees of the Canadian Debtors.

By: Susan Kennedy
Name: Susan Kennedy
Title: Court-Appointed Representative for Disabled Employees

By:_____
Name:
Title:

By:_____
Name:
Title:

The Official Committee of Unsecured Creditors of Nortel Networks Inc., et al. appointed pursuant to an order entered by the Bankruptcy Court on January 26, 2009, as the same may be constituted from time to time.

By:_____
Name:
Title:

Nortel Networks U.K. Pension Trust Limited as trustee of the Nortel Networks U.K. Pension Plan

By:_____
Name:
Title:

9

CITATION: Re Nortel Networks Corporation et al, 2017 ONSC 700
COURT FILE NO.: 09-CL-7950
DATE: 20170130

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

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

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett, Jay A. Carfagnini, Joseph Pasquariello and Christopher G. Armstrong*, for the Monitor

Jennifer Stam, for the Canadian Debtors

R. Paul Steep, for Morneau Sheppell and the Canadian Creditors Committee

Mark Ziegler and Barbara Walancik, representative counsel for the Canadian former employees and LTD beneficiaries

Barry E. Wadsworth, for active, retired and disabled employees represented by Unifor

Max Starnino, for the Pension Benefit Guarantee Fund

Matthew Urback, for the Canadian continuing employees

Scott Bomhof and Adam Slavens, for the U.S Debtors

R. Shayne Kukulowicz and M. Wunder, for the U.S. Unsecured Creditors' Committee

Michael E. Barrack and D.J. Miller, for the UKPC

Gavin H. Finlayson, for the Ad Hoc Bondholders Group

John Salmas, for Wilmington Trust, National Association, Trustee

Joseph Greg McAvoy, in person

Jennifer Holley, in person

HEARD: January 24, 2017

ENDORSEMENT

[1] On January 24, 2017, a joint hearing of this Court and the U.S. Bankruptcy Court for the District of Delaware was held to deal with motions for the sanctioning of plans of arrangement effecting a settlement by all major parties of the allocation dispute regarding the $7.3 billion held in escrow since the sale of the Nortel assets. At the conclusion of the hearing, I granted the motion of the Monitor to sanction the Canadian Debtors' Plan of Compromise and Arrangement (the "Plan") and to release the escrowed sale proceeds in accordance with the settlement, for reasons to follow[1]. These are my reasons.

Background

[2] The Canadian Nortel Debtors, along with the U.S. Nortel Debtors, EMEA Nortel Debtors, and certain of their respective key stakeholder groups were party to protracted litigation in the Canada and U.S. regarding the allocation of the $7.3 billion in sale proceeds (the "Sale Proceeds"). Following a 21-day cross-border trial, this Court and the U.S. Bankruptcy Court issued decisions with respect to the allocation of the sale proceeds in May 2015. The decision of this Court later became final when the Ontario Court of Appeal refused leave to appeal. The

[1] Judge Gross also sanctioned the U.S. plan of arrangement and signed at the hearing the necessary orders to effect the plan.

decision of Judge Gross in the U.S. Bankruptcy Court was appealed by the U.S. interests to the 3rd Circuit District Court. Mediation was directed by that Court.

[3] Following extensive negotiations, 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.

[4] 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;

(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.

[5] On December 1, 2016, a meeting order was made which authorized the Monitor to call and hold a meeting of Affected Unsecured Creditors to consider and vote on the Plan. The Creditors' Meeting was held on January 17, 2017. 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.

Analysis

[6] Section 6 of the CCAA provides for a plan to be sanctioned by a court if approved by a vote of creditor as required by that section. It provides, in part:

> 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
>
> (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; …

[7] 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.

See *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; *Olympia & York Developments Ltd. (Re),*(1993), 17 C.B.R. (3d) 1; *Cline Mining Corp., Re*, 2015 ONSC 622 at para. 19.

[8] It is clear that there has been compliance with all statutory requirements and that nothing has been done or purported to be done which is not authorized by the CCAA. The meeting of creditors was properly called and held, a sufficient vote of creditors as required by section 6 of the CCAA was obtained and equity interests do not receive any payment under the Plan.

[9] Whether a plan is fair and reasonable is necessarily shaped by the unique circumstances of each case within the context of the CCAA. See *Canadian Airlines* at para. 94. I am satisfied that the Plan in this case is fair and reasonable for the following reasons:

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

(ii) The Plan received approval from 99.7% of the creditors. This overwhelming number of creditors cannot be ignored as they are the only persons affected by the Plan. There is no equity participation as there is no equity in Nortel. I agree with what Blair. J. (as he then was) said in *Olympia & York Developments Ltd. (Re)*;

> 36 One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.
>
> 37 As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

(iii) If the Plan is not sanctioned, the likely result will be further delays from litigation in the U.S. on the appeals from the allocation decision. Delays in payments to persons, whom Mr. Wadsworth aptly described as desperately needing the payments, would be very unfair.

(iv) Further litigation would add to the costs of the Nortel insolvency, costs which are already enormous, and take away amounts to be paid to the creditors, all of whom have approved the Plan.

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

(vi) The Plan calls for the substantive consolidation of the Canadian Debtors into a single estate. In this case, the consolidation is fair and reasonable. The Canadian Debtors were highly integrated and intertwined. Many obligations of a Canadian Debtor, including nearly $4 billion of bond debt, are guaranteed by another Canadian Debtor and the vast majority of claims filed against the Canadian Debtors by quantum have been asserted against two or more of the Canadian Debtors. Substantive consolidation eliminates the possibility of any further litigation regarding the specific dollar amount that could be allocated to each Canadian Debtor.

(vii) The releases in 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 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. These releases have been approved by the relevant parties.

Objecting long term disability claimants

[10] There are two LTD objectors being Mr. Greg McAvoy and Ms. Jennifer Holley. They are self-represented persons in this proceeding. They filed thoughtful submissions and made thoughtful oral presentations. They state that the Plan is unfair and unreasonable for the LTD Beneficiaries and have requested that $44 million be set aside and paid to the LTD Beneficiaries in full satisfaction of amounts owing to them.They raise *Charter* issues.

[11] While I have every sympathy for these objectors, as do all of the parties who appeared and spoke at the hearing, I am afraid that they have no basis to make the request that they are making.

[12] On July 30, 2009 a representation order ("LTD Rep Order") for disabled employees was made. Pursuant to the order an LTD representative, Ms. Susan Kennedy, 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. 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. 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.

[13] 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.

[14] Pursuant to the Employee Settlement Agreement and the Settlement Approval Order:

(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 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.

[15] Certain LTD Beneficiaries, including the individual LTD Objectors, unsuccessfully sought leave to appeal the Settlement Approval Order to the Ontario Court of Appeal. The Settlement Approval Order is no longer capable of appeal. Accordingly, the LTD Objectors are bound to the provision that their claims are to rank as unsecured claims that share *pari passu* with other unsecured claims against the Canadian Debtors, that any claim for priority treatment has been released, and that no plan could be proposed or approved if the LTD Beneficiaries and other unsecured creditors did not receive the same *pari passu* treatment of their allowed claims pursuant to such plan.

[16] The LTD Objectors in their brief stated that they exercise their option to opt out of the LTD Rep Order. Unfortunately, they have no right to do so at this late stage.

[17] In making the Settlement Approval Order, Morawetz J. (as he then was) came to the conclusion that the settlement was fair and reasonable. He stated in *Nortel Networks Corp. (Re)* (2010), 66 C.B.R. (5th) 77:

> 40 The Amended and Restated Settlement Agreement is not perfect but, in my view, under the circumstances, it balances competing interests of all stakeholders and represents a fair and reasonable compromise, and accordingly, it is appropriate to approve same.

[18] That finding is binding of the LTD Objectors. However, they say that the adjustment that they request in order to make changes to the Plan requires a reconsideration of the Employee Settlement Agreement and the Settlement Approval Order. There is simply no legal basis seven years later to reconsider the matter. The grounds for reconsideration of a decision are narrow even when no order has been signed and taken out. See *Nortel Networks Corp., Re*, 2015 ONSC 4170 at paras. 3 – 6.

[19] In any event, I agree with the finding of Morawetz J. that the settlement was reasonable. The LTD Beneficiaries will receive the same *pari passu* treatment under the Plan as all other creditors. They are all treated equally, with each receiving exactly the same proportion of their entitlements. In insolvency, equal treatment premised on underlying legal entitlements is not unfair or unreasonable. To the contrary, it is a fundamental tenet of insolvency law.

[20] The LTD Objectors say that the Plan as it pertains to them is contrary to sections 7 and 15 of the *Charter*.

[21] It is argued by the LTD Rep that the *Charter* does not apply to the courts, reliance being placed on *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 at paras. 34 and 36. In that case, the SCC declined to set aside an injunction on the basis that a court order does not constitute governmental action for the purposes of the *Charter* and stated that the judicial branch is not an element of governmental action for the purposes of the *Charter*. It said that the word "government" in section 32 of the *Charter* referred to the legislative, executive, and administrative branches of government.

[22] However, there are other cases in the SCC that say otherwise. In *R. v. Rahey*, [1987] 1 S.C.R. 588, the SCC held that an unreasonable delay by the trial judge in deciding on an application for a directed verdict by the accused at the close of the Crown's case had denied to the accused the section 11(b) right to be tried within a reasonable time, and stayed the

proceedings. In *Rahey*, of the four judges who wrote opinions, only La Forest J. averted to the point of the *Charter* applying to a court. He stated:

> 95 ...it seems obvious to me that the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general.

[23] In *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, the SCC refused to set aside an injunction ordered by the Chief Justice of British Columbia against picketing outside the court that had been made without notice to the union because although the injunction contravened the section 2(b) right to freedom of expression, it was justified by section 1. Chief Justice Dickson distinguished *Dolphin* as follows:

> 56 As a preliminary matter, one must consider whether the order issued by McEachern C.J.S.C. is, or is not, subject to *Charter* scrutiny. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573, holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.

[24] In dealing with these three decisions, Professor Hogg has stated that while it is impossible to reconcile the definition of "government" in *Dolphin* with the decisions in *Rahey* and *BCGEU*, the cases can be accommodated. See Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. supplemented Thomson: Carswell, 2007 at § 37-22. He states:

> The *ratio decidendi* of Dolphin Delivery must be that a court order, when issued as a resolution of a dispute between private parties, and when based on the common law, is not governmental action to which the *Charter* applies. And the reason for the decision is that a contrary decision would have the effect of applying the *Charter* to the relationships of private parties that s. 32 intends to exclude from *Charter* coverage. Where, however a court order is issued on the

> court's own motion for a public purpose (as in *BCGEU*), or in a proceeding to which government is a party (as in any criminal case, such as *Rahey*), or in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order.

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

[26] There is another issue, however, regarding the right of the LTD Objectors to raise a *Charter* challenge. They were represented by competent counsel in 2010 on the motion to approve the Employee Settlement Agreement. They did not raise any *Charter* challenge to that agreement before Morawetz J. or in the Court of Appeal on their application to appeal from the Settlement Approval Order made by Morawetz J. So far as the LTD benefits are concerned, the Plan merely contains the provisions for them in the Employee Settlement Agreement. Issue estoppel prevents the LTD Objectors from now raising a *Charter* challenge to those provisions.

[27] Section 7 of the *Charter* provides:

> 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.

[28] What the LTD Objectors seek is to have the allocation proceeds re-allocated by providing that 100% of the claims of the LTD Beneficiaries will be paid from the Sale Proceeds at the expense of all other claimants. This involves their economic interests which are not protected by section 7 of the *Charter*. In *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R 6 Justice Major for the Court stated:

> 45 The appellants also submitted that s. 16 of the VLT Act violates their right under s. 7 of the Charter to pursue a lawful occupation. Additionally, they submitted that it restricts their freedom of movement by preventing them from pursuing their chosen profession in a certain location, namely, the Town of Winkler. However, as a brief review of this Court's Charter jurisprudence makes

clear, the rights asserted by the appellants do not fall within the meaning of s. 7. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests. As La Forest J. explained in *Godbout v. Longueuil (City),* [1997] 3 S.C.R. 844, at para. 66:

> ... the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

More recently, *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, 2000 SCC 44, concluded that the stigma suffered by Mr. Blencoe while awaiting trial of a human rights complaint against him, which hindered him from pursuing his chosen profession as a politician, did not implicate the rights under s. 7. See Bastarache J., at para. 86:

> The prejudice to the respondent in this case ... is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.

[29] Professor Hogg in *Constitutional Law of Canada* at §47.9 makes clear that purely economic interests are not protected by section 7. He states:

> Section 7 protects "life, liberty and security of the person". The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7. …
>
> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with no power over the purely economic interests of individuals or corporations. It also requires, as have noticed in the earlier discussion of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise property, having been shut out of the front door, would enter by the back.

[30] What is in play in this case are pure economic rights among the creditors of Nortel and the request of the LTD Objectors to be compensated by the other Nortel creditors. There is

authority that a plan of compromise or arrangement is simply a contract between the debtor and its creditors. See *Olympia & York Developments Ltd. (Re)* at para. 74.

[31] Section 7 does not assist the LTD Objectors in their request for unequal treatment for unequal treatment.

[32] Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

[34] LTD Beneficiaries have been treated in the same manner as all similarly situated creditors, without discrimination. Pensioners, their beneficiaries, surviving spouses of deceased employees, Former Employees and LTD Beneficiaries are all unsecured creditors who are experiencing hardship due to lost income and benefits in the Nortel insolvency. All are disadvantaged to varying degrees, depending on personal circumstances and there is no basis for preferring one group above others. All have suffered losses in the Nortel insolvency. This was recognized by Justice Morawetz in 2010 when the Monitor applied for an order for distribution of the assets of the HWT (from which benefits were paid to beneficiaries, including the LTD Beneficiaries), on a *pari passu* basis. That was opposed by the LTD Objectors. In his decision of

November 9, 2010 accepting the position of the Monitor at *Nortel Networks Corp., Re*, 2010 ONSC 5584, Justice Morawetz said:

> 110 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.[2]

[35] In the circumstances, I cannot find any breach of section 15 of the *Charter*.

Conclusion

[36] For the foregoing reasons, I have sanctioned the Plan and made an order authorizing and directing the release of the Sale Proceeds from the Escrow Accounts in the manner contemplated by the Settlement and Support Agreement.

"F.J.C. Newbould J."
Newbould J.

Date: January 30, 2017

[2] Leave to appeal to the C of A denied 2011 ONCA 10; leave to appeal to the SCC [2011] S.C.C.A. No. 124.

COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2017 ONCA 210
DATE: 20170313
DOCKET: M47511

Hoy A.C.J.O., Pepall and Brown JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited

Application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Jennifer Holley and Joseph Greg McAvoy, the moving parties, acting in person

Benjamin Zarnett, Jessica A. Kimmel and Peter B. Kolla, for the responding party, the Monitor, Ernst & Young Inc.

Derrick C. A. Tay and Jennifer Stam, for the responding parties, the Canadian Debtors

Mark Zigler, Susan L. Philpott and Barbara A. Walancik, for the responding parties, the Canadian Former Employees and Disabled Employees through their court appointed Representatives

Janice B. Payne and Thomas J. McRae, for the responding party, the Nortel Canadian Continuing Employees

Paul Mitchell, for the responding party, the EMEA Debtors (other than Nortel Networks S.A.)

Sheila R. Block, Scott A. Bomhof, Andrew D. Gray, Adam M. Slavens and Jeremy R. Opolsky, for the responding parties, Nortel Networks Inc. and the other U.S. Debtors

R. Shayne Kukulowicz, Michael J. Wunder, Ryan C. Jacobs and Geoff B. Shaw, for the responding party, the Official Committee of Unsecured Creditors of Nortel Networks Inc., et al

S. Richard Orzy, Gavin H. Finlayson and Richard B. Swan, for the responding parties, the Ad Hoc Group of Bondholders

Heard: In Writing

Motion for leave to appeal from the order of Justice Frank J. C. Newbould of the Superior Court of Justice, dated January 24, 2017.

ENDORSEMENT

[1] The self-represented moving parties, Joseph McAvoy and Jennifer Holley (the "Leave Applicants"), seek leave to appeal the Sanction Order of Newbould J. dated January 24, 2017. The Monitor, the Canadian and US Debtors, Nortel Networks Inc., the Official Committee of Unsecured Creditors, the Ad Hoc Committee of Bondholders, the Nortel Continuing Employees, and the Court-Appointed Representatives of the Former and Disabled Employees of Nortel all oppose the motion.

[2] Leave to appeal is granted sparingly in *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*") proceedings and only where there are serious and arguable grounds that are of real and significant interest to

the parties. In addressing whether leave should be granted, the court will consider whether:

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

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

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

d) whether the proposed appeal will unduly hinder the progress of the action.

See, *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

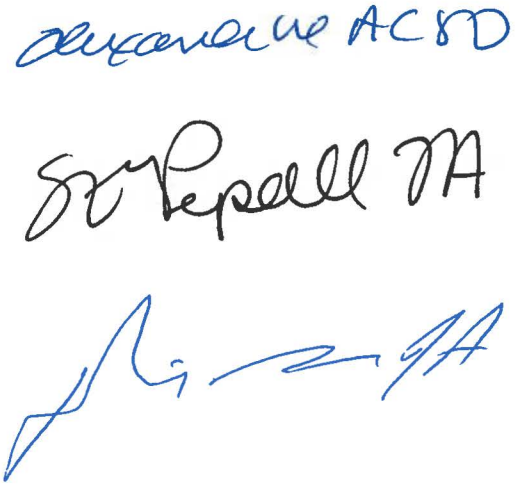
[3] We are satisfied that the stringent test for leave is not met in this case. The proposed appeal is not meritorious. As the supervising judge explained in his reasons, the Leave Applicants did not opt-out of the 2009 Representation Order for Disabled Employees ("LTD Rep Order") and they are bound by the 2010 Employee Settlement Agreement. The supervising judge correctly concluded the Leave Applicants have no right to opt out of the LTD Rep Order at this late stage: at para. 16.

[4] The Leave Applicants are the only long-term disability beneficiaries to oppose the Plan, which has the support of over 99% of Nortel's unsecured creditors based both on value and on number. This belies the importance of the proposed appeal to the practice or to the action. And, as this court has already

emphasized, further delays in this very protracted litigation are to be avoided: *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at paras. 102-103; *Nortel Networks Corporation (Re)*, 2016 ONCA 749, 41 C.B.R. (6th) 174, at para. 11.

[5] Finally, by order dated February 17, 2017, MacPherson J.A. required all materials on this leave motion to be filed by February 24, 2017, on which date the motion would be submitted to the panel for consideration. On February 27, 2017, the Leave Applicants filed a notice of constitutional question challenging the constitutionality of ss. 6(1) and 11 of the *CCAA*. Counsel for the Monitor submits the notice should not be considered. We agree. The notice was filed far too late in these proceedings and, as noted, the Leave Applicants are bound by the 2010 Employee Settlement Agreement.

[6] The motion for leave to appeal is dismissed.



S.C.C. File No. 37562

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

JENNIFER HOLLEY

APPLICANT

-and-

NORTEL NETWORKS CORPORATION ET AL.

RESPONDENTS

RESPONSE OF THE MONITOR AND CANADIAN DEBTORS TO THE APPLICANT'S APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada)*

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