Court of Appeal File No. M37813
Superior Court File No CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

MOTION RECORD
(Motion by Retirees for Extension of Time to File Further Materials Returnable October 22, 2009)

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TAB 1

Court of Appeal File No. M37813
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COURT OF APPEAL FOR ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

NOTICE OF MOTION
(To Extend Time for Filing of the Moving Parties' Motion Record and Factum for Leave to Appeal)

Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie and Neil Fraser (members of the Indalex supplemental executive retirement plan or "SERP", referred to collectively herein as the "SERP Group") will make a motion to extend the time for the filing of their motion record and factum for leave to appeal to the Court of Appeal for Ontario, pursuant to Rule 3.02 (3) of the *Rules of Civil Procedure* and pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act* R.S.C. c. C-36 ("CCAA") on October 22, 2009 to a single Judge in Chambers at 10:00 a.m. or at such date or time and in such manner as may be directed by the Court, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order extending the time by which the moving parties may file their motion record and factum for leave to appeal from the decision of the Honourable Justice Morawetz of

(the "CCAA judge") July 2, 2009 until 30 days after this Honourable Court releases its decision in the *Nortel Networks Corp.* matter which was heard on October 1, 2009 bearing Court of Appeal file numbers M37770 and M37771;

2. If this motion is opposed, costs from the opposing parties; and

3. Such further and other relief as to this Honourable Court seems just.

THE GROUNDS FOR THE MOTION ARE:

1. The moving parties are retirees of the CCAA Applicants (the "company") and are contractually entitled to receive supplemental pension benefits from the Applicants.

2. On April 3, 2009, the company applied for and obtained protection from its creditors under the CCAA.

3. Immediately after obtaining CCAA protection and without prior notice, the company informed the moving parties that they would stop paying their supplemental pension benefits.

4. On July 2, 2009, the moving parties moved before the motions judge for an order requiring the Applicants to reinstate payment of their supplemental pension benefits. At the conclusion of argument, the motions judge took a brief recess and then reconvened court and orally ruled that the moving parties' motion was dismissed, with reasons to follow.

5. The Notice of Motion for the within leave to appeal was filed with this Court on Friday, July 17, 2009.

6. The CCAA judge released his Endorsement on July 24, 2009. The Endorsement relies heavily on the CCAA judge's recent decision in the CCAA matter of *Nortel Networks Corp.* Re 2009 CarswellOnt. 35830 ("*Nortel*") and which was appealed and argued before this Court on October 1, 2009.

7. In *Nortel*, the Former Employees sought an order of the Court to require Nortel to make payment of termination pay, severance pay, vacation pay and other amounts in accordance with the Ontario *Employment Standards Act, 2000,* R.S.O. 2000, c. 41 and other applicable employment legislation of other provinces. The Union sought an Order requiring Nortel to recommence certain periodic and lump-sum payment which Nortel is obligated to make pursuant to their Collective Agreement. The CCAA judge ruled against the former employees of Nortel and the CAW-Canada et al.

8. The Former Employees of Nortel and the Union were granted leave to appeal from that decision to this Court on August 26, 2009.

9. The Court of Appeal heard the appeal in *Nortel* on October 1, 2009.

10. The Court of Appeal's upcoming decision in *Nortel* will largely affect the within leave to appeal motion and the proposed appeal.

11. The proposed appeal of the SERP Group has merit and satisfies the four point test for granting leave to appeal in CCAA matters:

    a) *The point on appeal is of significance to the practice*: The point on appeal deals with the authority of a CCAA judge to issue a wide ranging order that authorizes a company to terminate contracts by a company while it is under CCAA

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protection and where creditors are stayed from pursuing traditional remedies against the breaching company. The point on appeal deals with the analysis for a CCAA judge to apply, and how a CCAA judge should exercise his or her discretion in such cases;

b) *Whether the point raised is of significance to the action itself*: The point is of significance to the action itself as it determines whether the moving parties (who are retirees) who have been turned into creditors post-CCAA filing will be paid their retirement benefits that are vital to their livelihood in their retirement years.

c) *The appeal is prima facie meritorious and is not frivolous*: The proposed appeal raises serious and arguable grounds that a CCAA judge should only order the termination of contracts post-CCAA filing where such terminations are necessary or justified for the company to be able to restructure, and not allow a company to be free to terminate contracts that do not meet such conditions. This approach is consistent with CCAA case law from the British Columbia courts. The purpose of the CCAA is to allow companies to restructure. It is not to allow liquidating companies to breach contracts, particularly pension benefit contracts, and to stay remedies by impacted creditors who are captives in a CCAA proceeding.

d) *Whether the appeal will unduly hinder the progress of the action*: The Applicants are liquidating. There is no restructuring. The appeal will not hinder the liquidation of the Applicants' assets.

12. It is fair and just to grant the extension of time for delivery of the motion record and factum.

13. The Appellants have demonstrated an intention to pursue an appeal of the decision of the CCAA judge and filed their Notice of Motion for Leave to Appeal within time.

14. The company has been sold. There is no CCAA restructuring. There is no prejudice to any party to extend the time for delivery of the Motion Record and Factum.

15. Sections 11, 13 and 14 of the CCAA.

16. Rules 3.02 (3), 61.03.1, and 61.13 (7) of the *Rules of Civil Procedure.*

17. The jurisdiction of a single judge to hear the within motion and grant the relief requested is found in Rule 3.02 (3) of the *Rules of Civil Procedure.*

18. The estimated length of time for this motion is 15 minutes.

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

1. The Endorsement of the CCAA judge being appealed in the within matter dated July 24, 2009;

2. The Decision of Justice Morawetz appealed in the *Nortel* matter, dated June 18, 2009;

3. The Court of Appeal Scheduling Order in the *Nortel* matter, dated August 26, 2009;

4. The Notice of Appeal filed by the Former Employees in the *Nortel* matter, dated September 3, 2009;

5. The Notice of Appeal filed by the Union in the *Nortel* matter, dated September 3, 2009;

6. Such further and other material as counsel may advise and this Honourable Court permits.

October 2, 2009

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TAB 2

COURT FILE NO.: CV-09-8122-00CL
DATE: 20090724

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADIAN INC. AND NOVAR INC.

Applicants

BEFORE: MORAWETZ J.

COUNSEL: Linc Rogers, Katherine McEachern and Jackie Moher, for the Applicants

Ashley Taylor and Lesley Mercer, for FTI Consulting Canada ULC, Monitor

Paul Macdonald and Jeff Levine, for JPMorgan (DIP Lender)

Kenneth D. Kraft, for SAPA Holding AB

Andrew Hatnay and Demetrios Yiokaris and Andrew Mckinnon, for Keith Carruthers and SERP Retirees

B. Empey, for Sun Indalex Finance LLC

John D. Leslie, for the U.S. Unsecured Creditors' Committee

G. Finlayson, for U.S. Bank as Trustee for the Noteholders

HEARD & DECIDED: JULY 2, 2009

ENDORSEMENT

[1] I heard argument in this matter on July 2, 2009 at the conclusion of which I dismissed the motion with reasons to follow. These are those reasons.

[2] Members of the Indalex Supplemental Executive Retirement Plan or "SERP", (referred to collectively as the "SERP Group") brought this motion for an order requiring the Indalex Applicants to reinstate payment of supplemental pension benefits retroactive to April 2009.

[3] The motion is opposed by the Indalex Applicants, the Noteholders and by the DIP Lender. Counsel to the DIP Lender submits that if these payments are made, they would constitute an event of default under the DIP Agreement. Such payments would need the consent or waiver from the DIP Lender which counsel submits, is not forthcoming.

[4] The SERP Group have a contractual entitlement to pension benefits under the Supplemental Retirement Plan for executive employees of Indalex Limited and associated companies (the "Supplemental Plan").

[5] The Supplemental Plan is an unfunded and non-registered supplemental pension plan. Benefits under the Supplemental Plan are paid out of the general revenues of the Indalex Applicants.

[6] Immediately after filing for CCAA protection on April 3, 2009, the Indalex Applicants informed the SERP Group that their supplemental pension benefits were being stopped.

[7] The situation confronting members of the SERP Group is very similar to that faced by certain former employees of Nortel Networks ("Former Nortel Employees") who recently brought a motion requesting an order requiring the Applicants in Nortel's CCAA proceedings (the "Nortel Applicants") to make payments which the Nortel Applicants were contractually obligated to pay to Former Nortel Employees, relating to the Transitional Retirement Allowance and any pension benefit payments Former Nortel Employees were entitled to receive in excess of the pension plan. The motion was dismissed. (See *Nortel Networks Corp., Re 2009* CarswellOnt. 3583).

[8] The reasons provided for the dismissal of the motion of the Former Nortel Employees are applicable to this case.

[9] SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.

[10] The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently than any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.

[11] The Amended and Restated Order authorizes the Indalex Applicants to pay all reasonable expenses incurred by the Indalex Applicants in carrying on their business in the ordinary course. SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized to pay the monthly SERP payments.

[12] In certain CCAA proceedings, the court has granted relief to permit payment of pre-filing unsecured debt. However, in these cases, such payments have for the most part, been considered to be crucial to the ongoing business of the debtor company. In this case, the Indalex Applicants are seeking a going concern solution for the benefit of all stakeholders and their resources should be used for such purposes. I have not been persuaded that the SERP payments are crucial to the ongoing business of the Indalex Applicants and such payments offer no apparent benefit to the Indalex Applicants. (*Re Nortel, supra,* at paragraphs 80 and 86.)

[13] The SERP Group submits that there are hardship issues that should be taken into account. In Nortel, a hardship exception was made. However, the Nortel exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the Former Nortel Employees. The Nortel hardship exception recognizes that any distribution would represent an advance on the general distribution. The situation facing the Indalex Applicants is different. The Indalex Applicants have significant secured creditors and unlike the situation in Nortel, it is premature to comment on the prospects of any meaningful distribution to unsecured creditors.

[14] Counsel to SERP Group also submitted that CCAA protection in this case had been obtained for a company that was liquidating its assets. Counsel for the SERP Group submitted that Indalex had put itself up for sale and commenced a "marketing process" and as such it was not restructuring, rather, it was selling itself. This led to the submission that the cutting of benefits payable to the SERP Group was not necessary or justified for the sale of the company under the CCAA.

[15] I fail to see the relevance of this submission. At the present time, the Applicants are properly under CCAA protection. No motion has been brought to challenge the appropriateness of the CCAA proceedings and, in my view, nothing in the CCAA precludes the ability of a debtor applicant to sell its assets. See *Re Nortel Networks Corporation* – endorsement released July 23, 2009 on this point.

[16] Finally, counsel to SERP Group placed emphasis on the fact that the amount required to satisfy the obligations to SERP Group is not significant. While this submission may be attractive on the surface, to give effect to this argument would violate a fundamental tenet of insolvency law, namely, that all unsecured creditors receive equal treatment. In my view, there is no basis to prefer the SERP Group or, indeed, any retired executive who is entitled to SERP payments in priority to other unsecured creditors.

[17] Counsel to SERP Group also relied upon *Doman Industries et al* (2004) B.C.S.C. 7333 for the proposition that, the fact that a company can reduce its costs if it can terminate contracts, is not sufficient for a CCAA court to authorize the termination of the contract. In *Doman, supra*, the point at issue concerned licences under the *Forest Act* which created the concept of

replaceable contracts. Doman held certain licences. As noted by Tysoe J. (as he then was), at paragraph 7, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the licence holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. That is not the situation in this case. The contractual situation in *Doman, supra,* is not, in my view, comparable to this case. *Doman* is clearly distinguishable on the facts.

[18] For the forgoing reasons, the motion of SERP Group for reinstatement of SERP benefits is dismissed.

MORAWETZ J.

Heard and Decided: **July 2, 2009**

Typed Version Released: **July 24, 2009**

TAB 3

COURT FILE NO.: 09-CL-7950
DATE: 20090618

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

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

BEFORE: MORAWETZ J.

COUNSEL: Barry Wadsworth for the CAW and George Borosh et al

Susan Philpott and Mark Zigler for the Nortel Networks Former Employees

Lyndon Barnes and Adam Hirsh for the Nortel Networks Board of Directors

Alan Mersky and Mario Forte for Nortel Networks et al

Gavin H. Finlayson for the Informal Nortel Noteholders Group

Leanne Williams for Flextronics Inc.

Joseph Pasquariello and Chris Armstrong for Ernst & Young Inc., Monitor

Janice Payne for Recently Severed Canadian Nortel Employees ("RSCNE")

Gail Misra for the CEP Union

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Henry Juroviesky for the Nortel Terminated Canadian Employees Steering Committee

Alex MacFarlane for the Official Unsecured Creditors Committee

M. Starnino for the Superintendent of Financial Services

HEARD: **April 21, 2009**

ENDORSEMENT

[1] The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process – which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

[2] In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

[3] The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

[4] The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

[5] The Union seeks continued payment of certain of these benefits including:

(a) retirement allowance payments ("RAP");

(b) voluntary retirement options ("VRO"); and

(c) termination and severance payments.

[6] The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

[7] There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately $2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

[8] There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately $202,000.

[9] There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

[10] The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants 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 (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c.41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments

Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

[11] The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

[12] In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

[13] On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

[14] Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

[15] The Initial Order provides:

(a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;

(b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;

(c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);

(d) for a stay of proceedings against Nortel;

(e) for a suspension of rights and remedies vis-à-vis Nortel;

(f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);

(g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services

supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

[16] The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

[17] The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

[18] The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

[19] Section 11.3 of the CCAA provides:

> No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

[20] In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

[21] The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smokey River Coal Ltd. (Re)* 2001 ABCA 209 to support its proposition.

[22] The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

[23] The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would

undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

[24] The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

[25] The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

[26] The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

[27] The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

[28] Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

[29] Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

[30] Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

[31] Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60.

[32] In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

[33] Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp. (Re)*, (1992) B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

> ...if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re), supra*).

[34] The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

(a) the ability to stay past debts; and

(b) the ability to require the continuance of present obligations to the debtor.

[35] The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)* (2004), A.J. No. 331).

[36] Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

[37] Counsel to the Applicants also relies on the following statement from *Mirant, supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay

> severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

[38] Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Syndicat nationale de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* (2003) Q.J. No. 264 (C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

[39] Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

[40] The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 – 58:

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

[41] In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *Syndicat des employées et employés de CFAP-TV (TQS-Quebec), section locale 3946 du Syndicat canadien de la function publique c. TQS inc.*, 2008 QCCA 1429 at paras. 26-27:

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.

> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

[42] Collectively, RAP payment and TRA payments entail obligations of over $22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

[43] In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

[44] The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

[45] The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

[46] More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

[47] The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp. (Re),* (1992) B.C.J. No. 3070, aff'd by (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd.* v. *Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

[48] The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodwards Limited (Re)*, (1993), 17 C.B.R. (3d) 236 (S.C.).

[49] The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

[50] The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

[51] In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

(a) The Applicants are not in a position to honour their obligations to all creditors.

(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.

(c) The Applicants are in default of certain obligations under the Collective Agreements.

(d) The Applicants are in default of certain obligations owed to the Former Employees.

[52] It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

[53] There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

[54] However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

[55] Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to

unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

[56] The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

[57] In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

[58] The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

[59] However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

[60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

[61] In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

[62] What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

[63] It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

[64] Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

[65] No cases were cited in support of this interpretation.

[66] I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services,...provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

[67] The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[68] The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

[69] The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

[70] The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau et al v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Desener v. Myles,* [1963] S. J. No. 31 (Q.B.); *Hiesinger v. Bonice* [1984] A. J. No. 281; *Werchola v. KC5 Amusement Holdings Ltd.* 2002 SKQB 339 to support its position.

[71] The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

[72] As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive

jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

[73] However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

[74] There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Re: Pacific National Lease Holding Corp.* (1992) 15 C.B.R. (3d) 265 (B.C.C.A.), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> ...
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

[75] The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60 – 62, the court said under the heading Recapitulation (in translation):

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements).

> Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

[76] The issue of severance pay benefits was also referenced in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331 at paras. 11 and 15. The application of the Union was rejected:

> ...The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> ...
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise – and thereby be paid in full – such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

[77] At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt

debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

[78] In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

[79] The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

(i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA;

(iii) the plan is fair and reasonable. *Re: Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

[80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

[81] It follows that the motion of the Union is dismissed.

[82] The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

[83] The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

[84] Both parties cited *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* [1993] 2 S.C.R. 230 in support of their respective positions.

[85] In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

[86] The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

[87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

[88] In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

[89] This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

MORAWETZ J.

DATE: **June 18, 2009**

TAB 4

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-35, 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

Court of Appeal File No. M37770
Superior Court File No. 09-CL-7950

JRT OF APPEAL FOR ONTARIO
ORE O'CONNOR A.C.J.O GOUDGE J.A BLAIR J.A.
E AUG 26 2009
POSITION OF MOTION

Leave to appeal granted - Costs of motion reserved to panel hearing the appeal.

ACTU

See endorsement in M37771.

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

MOVING PARTIES' MOTION RECORD
(Motion for Leave to Appeal)

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Lawyers for Former Employees of Nortel

Court File No. M37770

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation	**National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 and George Borosh et al.**
Respondents (Responding Parties)	*Appellants (Moving Parties)*

COURT OF APPEAL FOR ONTARIO
BEFORE O'CONNOR A.C.J.O. GOUDGE J.A. BLAIR J.A.
DATE AUG 26 2009
DISPOSITION OF MOTION

Leave to appeal granted. Costs of the motion reserved to the panel hearing the appeal.

D. O'Connor A.C.J.O.
Goudge J.A.
R.A. Blair J.A.

The appeal is to be heard on October 1st at 9:30. Together with the appeal in relation to M37770.

The appellants have 2 hours to argue and the respondents have 2 hours. If the parties are unable to agree upon a timetable for filing materials, they may speak to Justice Goudge.

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at

TORONTO

MOTION RECORD – MOVING PARTIES
(Leave to Appeal) – Volume 1

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TAB 5

Court of Appeal File No. M37770
Superior Court File No. 09-CL-7950

COURT OF APPEAL FOR ONTARIO

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

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

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

-and-

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents on Appeal

NOTICE OF APPEAL

THE FORMER EMPLOYEES OF NORTEL APPEAL to the Court of Appeal for Ontario from the Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List), dated June 18, 2009, made at Toronto, Ontario.

THE APPELLANTS ASK that the Order be set aside and judgment be granted as follows:

1. An Order abridging the time for service of the Notice of Appeal, Appeal Book and Compendium and other materials relating to this appeal, validating such service and dispensing with any further service such that the appeal is properly returnable October 1, 2009;

2. An Order varying the Initial Order of Morawetz J., dated January 14, 2009 (the "Initial Order"), by requiring the Applicants (Respondents on Appeal) to make payment of termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plan in accordance with the *Ontario Employment Standards Act, 2000*, R.S.O. 2000, c. 41 (the "ESA") and other applicable provincial employment legislation; and

3. Such further and other relief as the lawyers for the Appellants may request and this Appellate Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. On January 14, 2009, Nortel Networks Corporation and certain of its subsidiaries ("Nortel") applied for and were granted protection from creditors under the CCAA pursuant to the Initial Order of Morawetz J.;

2. Nortel's CCAA restructuring efforts have proceeded rapidly. Based on the occurrences of the company's CCAA proceedings to date, it appears that Nortel is engaged in a CCAA liquidation proceeding;

3. Nortel's restructuring during both the pre-filing and post-filing periods has resulted in termination of the employment of many Former Employees;

4. Since the date of the Initial Order, Nortel has failed to abide by the provisions of the ESA and other applicable provincial employment legislation. Nortel has not made payments owing to

Former Employees in respect of termination pay, severance pay and amounts equivalent to the continuation of the benefit plan during the notice period, which are required by provincial employment law;

5. By motion heard on April 21, 2009, the Former Employees of Nortel sought an Order requiring Nortel to make payment to Former Employees in respect of amounts owing under the ESA and other applicable provincial employment standards legislation. On that date the CAW-Canada and George Borosh et al. moved for similar relief in relation to payments owed in accordance with collective agreements;

6. Both motions were dismissed by Orders of the Ontario Superior Court of Justice (Commercial List) dated June 18, 2009.

Relationship Between the CCAA and the ESA

7. The ESA and other comparable provincial employment legislation provide basic minimum employment standards which an employer is not able to unilaterally alter or contract out of. All employers and employees are bound by the minimum standards of the ESA;

8. Provincial laws continue to apply during CCAA proceedings. The Supreme Court of Canada has held that provincial laws in federally regulated bankruptcy and insolvency proceedings continue to apply until such time as the doctrine of paramountcy is triggered. The ESA and similar laws in provinces outside of Ontario continue to apply during CCAA proceedings unless there is a conflict between the provisions of the provincial legislation and the provisions of the federal CCAA;

9. There is no conflict between the applicable federal and provincial legislation in the given circumstances. The CCAA does not grant the presiding judge the discretion to ignore provincial legislation;

10. Section 11 of the CCAA provides the Court with broad and unspecified power to make orders in respect of CCAA proceedings. The discretion vested in the CCAA judge is not unfettered and must be guided by the scheme and objects of the CCAA;

11. The Court's discretionary powers, even if applicable here, should not be used to override provincial minimum employment standards legislation;

12. Morawetz J. erred in law and exceeded his jurisdiction by allowing the Court's exercise of a discretionary power under federal legislation to override provincial legislation where there is no conflict between the provisions of the provincial and federal statutes;

13. Section 11 of the CCAA;

14. Sections 5, 11, 54, 57, 58, 61, 63, 64 and 65, among others, of the ESA; and

15. The applicable provisions of other provincial employment standards legislation.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

16. By motion dated June 26, 2009 the Appellants sought leave to appeal the final Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List), in accordance with sections 13 and 14 of the CCAA and Rule 61.03.1 of the *Rules of Civil Procedure* (Ontario);

17. The Court of Appeal for Ontario has jurisdiction to hear appeals from final orders of the Ontario Superior Court of Justice pursuant to section 6(1)(b) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43;

18. By Order dated July 22, 2009 this Appellate Court ordered relief that the underlying motion for leave to appeal be heard in writing on an expedited basis in accordance with the time lines previously agreed upon by the lawyers for the Moving and Responding Parties, and further ordered that if leave to appeal be granted, the appeal shall be heard on an expedited basis;

19. Leave to appeal was granted by Order of the Court of Appeal for Ontario by Endorsement dated August 26, 2009, with the appeal to be heard together with the related appeal in Court File No. M37771 on October 1, 2009 at 9:30 a.m.; and

20. Rule 61 of the *Rules of Civil Procedure* (Ontario), R.R.O. 1990, O. Reg. 194.

September 3, 2009

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Lawyers for Former Employees of Nortel

TO: ATTACHED SERVICE LIST

TAB 6

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

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF the *Companies' Creditors Arrangement Act,* R.S.C. 985, 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

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals *27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915*

George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Moving Parties
(Appellants on Appeal)

- and -

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, The Informal Nortel Note Holder Group, the Official Committee of Unsecured Creditors, Ernst & Young Inc in its role as Monitor

Responding Parties
(Respondents on Appeal)

NOTICE OF APPEAL

THE CAW-CANADA AND GEORGE BOROSH ET AL. APPEAL to the Court of Appeal for Ontario from the Order of Mr. Justice Morawetz dated June 18, 2009, made at Toronto.

THE APPELLANT ASKS that the Order be set aside and the following Orders be granted:

1. **AN ORDER** abridging the time for service of the Notice of Appeal, Appeal Record and other materials relating to this appeal, validating service of such materials and dispensing with service of such materials on interested parties not served so that the appeal is properly returnable October 1, 2009;

2. **AN ORDER** directing Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation ("Nortel"), or any of them, to recommence certain periodic and lump-sum payments which they, or any of them, are obligated to make pursuant to the collective agreement to which they are a party with the CAW-Canada;

3. **AN ORDER** that Nortel pay to those entitled persons, the payments which should have been made to them under a collective agreement with the CAW-Canada since January 14, 2009;

4. **AN ORDER** granting the CAW-Canada its cost on this appeal and on the leave to appeal motion against any party opposing the relief requested;

5. **AN ORDER** for such further and other relief as counsel may request and this Honourable Appellate Court deems just.

THE GROUNDS OF APPEAL are as follows:

6. The CAW-Canada and its Locals 1530 and 1535 are the certified collective bargaining agent for certain employees of Nortel and a collective agreement exists between the CAW-Canada (also the "Union") and Nortel.

7. On January 14, 2008, Nortel's application under the *CCAA* was granted (the "Initial Order").

8. Since the granting of the Initial Order, Nortel has failed to abide by the Collective Agreement between itself and the CAW-Canada, in that Nortel has failed to make certain payments to eligible individuals in accordance with the terms of the Collective Agreement.

9. By Notice of Motion dated April 1, 2009, the Union sought an order compelling the Applicants to recommence these payments. The Motion was heard before Justice Morawetz on April 21, 2009.

10. On June 18, 2009, the Superior Court of Justice released its decision denying the motion (the "Decision"). An order relating to the decision was issued and entered August 14, 2009.

11. The Decision is in error for the following reasons:

    a. It errs in law in that it relies upon common law principles of contractual relations between employer and employee which do not exist when a collective agreement exists between a bargaining agent and the employer;

    b. It errs in law in that neither the *CCAA* nor judicial discretion authorizes the Court to make an order which alters the terms and conditions of a collective agreement;

    c. It effectively permits the Employer to routinely violate the collective agreement by non-payment of compensation while the Union has no right to respond by withdrawing services when met with such action;

    d. It effectively denies the Union the full measure of its bargain with the Employer;

    e. It fundamentally affects the rights of a vulnerable group of individuals and permits the Employer to negatively impact those individuals during its restructuring process.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

12. The Decision was a final order of the Ontario Superior Court of Justice.

13. The Court of Appeal for Ontario has jurisdiction to hear appeals from final orders of the Ontario Superior Court of Justice pursuant to *The Courts of Justice Act*, c. C.43, s. 6(1)(b) and is not precluded by s. 19(1)(a) of that *Act*.

14. Leave to appeal the Decision was required.

15. Leave to Appeal was granted by order of the Court of Appeal for Ontario, dated August 26, 2009.

16. Rule 61 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194

Dated: September 3, 2009

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TO THE ATTACHED SERVICE 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
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Court of Appeal File No. M37813
Superior Court File No: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

MOTION RECORD
(Motion by Retirees for Extension of Time to File Further Materials - Returnable October 22, 2009)

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