

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.

A handwritten signature in blue ink, appearing to read "L M W...". The signature is written in a cursive style and is located in the lower right quadrant of the page.