CITATION: Re Nortel Networks Corporation et al, 2016 ONSC 6030
COURT FILE NO.: 09-CL-7950
DATE: 20160926

SUPERIOR COURT OF JUSTICE – ONTARIO
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

BEFORE: Newbould J.

COUNSEL: *Mark Zigler and James Harnum*, for former Nortel employees in Calgary

Lyndon Barnes, Alexander Cobb and Adam Hirsch, for the former directors and officers of NNC and NNL

Jason Wadden and Christopher G. Armstrong for the Monitor

HEARD: September 22, 2016

ENDORSEMENT

[1] One hundred and fifteen former employees who worked in Nortel's Western Innovation Centre in Calgary bring a motion to impose personal liability on the former directors of Nortel

Networks Limited ("NNL") and Nortel Networks Corporation ("NNC") for unpaid amounts under section 119 of the *Canada Business Corporations Act*, which imposes personal liability on directors of a corporation to employees of the corporation for debts not exceeding six months wages for services performed for the corporation.

[2] In May 2008, Nortel announced that it would be shutting down the Western Innovation Centre, with final closure to occur in June 2009. The closure of the Calgary operations was part of a strategy to consolidate Nortel's research and development in lower-cost centers such as Ottawa and China. A plan was put into place to transfer the knowledge and infrastructure in Calgary to other parts of Nortel's global business. It was in the interests of Nortel that the Calgary employees stay on while the transition was taking place.

[3] In connection with the announcement, Nortel advised the claimants that their employment at future dates would be terminated as a result of the closure. Statements were made by management at the time of the announcement and later regarding the severance pay that would be paid upon termination of an employee's employment so long as the employee did not voluntarily resign before being terminated.

[4] The essential argument of the claimants is that the promise of a severance payment at the time it was made amounted to a promise of payment to the claimants for staying with Nortel, akin to a retention payment for continuing to perform services for Nortel, and that the severance payment obligation was to be a payment "for services performed for Nortel" within the meaning of section 119 of the CBCA. As the severance payments were not made as a result of Nortel filing for CCAA protection on January 14, 2009, it is claimed that the directors of NNC and NNL are liable under section 119.

[5] The directors raise three defences, being (i) severance payments are not covered by section 119 as they are to compensate for a loss of a job and not for services performed while employed; (ii) the directors exercised due diligence and thus have a defence under section 123(4) of the CBCA; and (iii) the claimants were employed by Nortel Networks Technology Corporation ("NNTC") and the directors against whom the claims are made were not directors of that corporation.

Liability under section 119 of the CBCA

[6] Section 119 of the CBCA provides:

> 119 (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

[7] A number of leading cases have held that amounts owing as damages for pay in lieu of notice, or amounts owing as termination or severance pay under a statute or contract, do not constitute "debts ... for services performed for the corporation."

[8] In *Crabtree (Succession de) c Barette*, [1993] 1 SCR 1027 which dealt with pay in lieu of notice and a claim against the directors of a failed corporation under section 114(1) of the CBCA, now section 119(1), the Supreme Court of Canada held that such pay is not for services performed for the corporation but rather damages arising from the non-performance of a contractual obligation to give sufficient notice. L'Heureux- Dubé J. for the Court said:

> The term "debts" cannot be dissociated from the context in which it is used. According to the language used by Parliament, the debts must result from "services performed for the corporation". An amount payable in lieu of notice does not flow from services performed for the corporation, but [page1049] rather from the damage arising from non-performance of a contractual obligation to give sufficient notice. The wrongful breach of the employment relationship by the employer is the cause and basis for the amounts awarded by the Superior Court as pay in lieu of notice. It is primarily for this reason that the Ontario Court of Appeal has excluded this type of compensation from the scope of s. 114(1) C.B.C.A. (see *Mesheau v. Campbell*, supra, at p. 157, and *Mills-Hughes v. Raynor* (1988), 47 D.L.R. (4th) 381, at pp. 386-87). In the absence of additional legislative indicia, the performance of services by the employee remains the cornerstone of the directors' personal liability for debts assumed by the corporation. On the pretext of a broad interpretation, this Court cannot add to the text of the provision words which it does not contain. Taking account of the context in which s. 114(1) C.B.C.A. was enacted and the nature of the specific liability which departs from what the law ordinarily prescribes, it seems to me that only one conclusion logically follows.

[9] In *Mills v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), referred to by L'Heureux- Dubé J. in *Crabtree*, a claim against directors under then section 114(1) of the CBCA for severance pay or termination pay under contracts of employment or the *Employment Standards Act* were dismissed. Blair J.A. for the Court said:

> **16** The appellants maintain that the termination and severance payments payable under the statute are debts due to employees for services performed for the corporation for which the directors are liable under s. 114(1) of the Act. The respondents argue that they are not debts for services performed, but rather are claims arising from the termination of employment which are only measured by years of service. Both principle and authority compel the acceptance of the respondents' position.
>
> **17** In *Armstrong v. Coopers & Lybrand Ltd., supra,* Carruthers J. rejected the claims of another group of former Admiral employees for termination and severance pay made against Coopers who, as described above, had taken possession of Admiral's assets as agent for the banks. This court affirmed his judgment that Coopers was not legally liable for this claim and Houlden J.A. said at p. 131 O.R., p. 192 D.L.R., p. 260 C.B.R. (N.S.):
>
> > We agree with the trial judge that these claims do not, in the circumstances of this case, constitute "wages, salaries or other remuneration owing in respect of the period of three months next preceding the making of such order or assignment" under s. 178(6) of the Bank Act.
>
> His reasons apply equally to this case where, in my view, it cannot be said that claims for termination and severance pay are in any sense "debts ... for services performed" under s. 114 of the Act. Rather, they constitute a statutory benefit arising from the termination of employment which is payable in lieu of damages for such termination. Montgomery J. was correct in considering his decision to be analogous to this court's decision in *Mesheau v. Campbell* (1982), 39 O.R. (2d) 702, 141 D.L.R. (3d) 155, where Weatherston J.A. held that a discharged employee of a company could not collect an unsatisfied judgment for damages for wrongful dismissal from directors under s. 114(1) of the Act.

[10] Similarly, in *Brown v. Shearer* 33 C.B.R. (3d) 314 (M.C.A.), a claim against directors under section 119(1) of the CBCA for severance pay was dismissed. Huband J.A. for the Court said:

> **10** I agree entirely with the conclusion of Kennedy J. that the claim for severance pay is not a claim for a debt in respect of "services performed." It is

> unlike salary or vacation pay which relate to work performed over a period of time. The severance pay is in the nature of a payment which MSI was entitled to make at any time to relieve itself of the burden of the employment contract. The amount payable would be precisely the same if MSI had terminated the plaintiff Brown's employment, without cause, on the day after it had begun, or on the day before his contract was about to expire. The amount was unrelated to the quality or duration of his service to the company.
>
> **11** The disposition of this aspect of the claim is consistent with the decision of the Supreme Court of Canada in *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027, in which a claim for damages in lieu of notice, as compensation for wrongful dismissal, was not considered as a debt for the performance of services for the corporation.

[11] The claimants say that while the word severance was used in describing what would be paid to those employees who were going to be terminated, in essence Nortel was anxious to keep them on during the transition and the payments were intended as an inducement to keep them there without resigning before they were to be terminated. Thus the payments were really intended to be a form of retention payments for continuing to work, and thus they were "for services performed for the corporation" within the meaning of section 119. What was said to the Calgary employees must therefore be considered.

[12] In his affidavit, Mr. Darryl Pitchko was at the relevant time the Acting Director of R&D at the Westwinds Innovation Centre. He said that he was told by senior managers at Nortel in Ottawa that Nortel would be using the offer of severance as an incentive for the employees to stay in their positions. Mr. Hanrieder, a former manager in Calgary, said much the same, saying it was discussed informally with various members of management of Nortel that the promise of severance was used to retain employees during the transition period. These statements of course are not evidence of what was told to the employees, and it is what was said to the employees that is relied on by the claimants as being promises made to them.

[13] What the employees were told is in an agreed statement of facts and includes:

> 4. In May 2008, Nortel announced that it would be shutting down the WIC, with final closure to occur in June of 2009 (the "Transition Period"). In connection with such announcement, Nortel advised the Calgary Employees that

the employment of many of them would be terminated as a result of the closure of the WIC.

5. In or around May 2008, a general information presentation was given to senior managers at WIC by Harold Graham, Vice-President of CDMA R&D, with respect to CDMA R&D for Q2 2008. That presentation, a copy of which is attached as Exhibit A, contained a slide regarding the WIC closure with the following information:

- Last week, we announced the next steps in the implementation of the Calgary specialty site transition.

- The changes have significant implications to Calgary employees.

- Carrier Networks R&D is re-forming in Calgary to what we expect to be the end steady state, a research oriented base station design team.

- An R&D team of 20 - 30 engineers is being established to work on next generation technologies for 4G BTS's.

- R&D design implementation and sustaining roles currently performed in Calgary related to BTW Software, BTS Hardware, BTS Global Product Support, Release Management, and BTS Systems/Architecture will be transitioned to Beijing, Guangzhou, or Ottawa by June 30th 2009.

- Work from home will be an option for a small number of Systems/Architecture and Project Management functions.

- Each employee will be given the opportunity to request re-location. A limited number of positions have been identified for relocation (~20%).

- All employees are being asked to support knowledge transfer during the transition between now and June 30th 2009.

- We are committed to providing a fair compensation package to each employee to secure current projects and facilitate the transition of skills and accountabilities.

7. In or around May and June 2008, several information sessions were conducted by the Human Resources Department of the WIC and senior WIC managers to provide the Calgary Employees with information regarding the WIC closure and their roles during the Transition Period.

8. During these sessions, the Calgary Employees were advised that Nortel would pay severance on termination of their employment in accordance with Nortel's past practices. It was also stated that these payments would only be made if the relevant employee worked until his or her stop work date as determined by Nortel; if a Calgary Employee wanted to leave earlier than his or her stop work date, it would be considered a resignation, and no severance would be paid. It was also indicated that the Calgary Employees who would not be offered relocation or a continuing role would be provided with a termination package two to three months prior to their stop work date.

9. These information sessions included the presentation of several PowerPoint presentations, an example of which is attached as Exhibit B. These PowerPoint presentations stated the following:

- *Severance Plan: Purpose/Goal*

  - *Severance determination is in accordance with our past practice and is based on common law, taking into account general market conditions, age and service of the employee*

  - *There are no intentions to make any changes to our severance program in the current round of workforce restructuring recently announced by Mike Z.*

  - *All past practices will be adhered to including a 60 day non-working notice period and the provision of outplacement support*

- *All employees are being asked to support knowledge transfer during the transition between now and June 30th 2009.*

- *We are committed to providing a fair compensation package to each employee to secure current projects and facilitate the transition of skills and accountabilities.*

12. At the time the WIC closure was announced, Nortel stated to the Calgary Employees that it did not intend to modify its current severance practices, which it stated was to provide the following benefits to Canadian employees whose employment was terminated as a result of a restructuring decision:

- a period of 60 days non-working notice;

- complete benefits plan through this 60 day period;

- a lump sum severance amount calculated by reference to an employee's individual circumstances (e.g. age, length of service with Nortel, seniority) and past practice in a particular region or market; and

- access to outplacement transition service.

[14] There is no evidence that the information about severance given by Nortel was ever described to any of the Calgary employees as a payment or bonus for performing work.

[15] Forty-five key employees did receive retention bonuses termed "Project Completion Bonuses". Mr. Pitchko said these were given to address risks with employees they needed to retain for the transition where their severance payouts might not be enough to incent them to remain. Forty-five employees were given these payments under an agreement which contained in part:

> Your skills have been identified as a key part of this organizational transition, and Nortel wishes to retain them through the period of this project....
>
> Recognizing the importance of completing the Calgary R&D transition project, as well as the challenges associated with maintaining focus on your assigned roles during this time, Nortel is offering a special project completion bonus in a lump sum amount equal to [percentage amount] % of your annual base salary...
>
> - ...you must remain continuously and actively employed...

[16] The persons who were given this completion bonus were paid after the CCAA filing under a KERP plan approved by the Court in the CCAA proceedings. They now claim against the directors for the severance payments said to have been promised to them along with the other employees on the basis that the severance payments were also considered to be for the purpose of retaining them.

[17] In the period from May 2008 through December 2008, at least 48 of the Calgary employees who were being terminated met with their managers to discuss the termination of their employment and were subsequently sent letters from Nortel confirming the particulars pertaining to the termination of the their employment, including their stop-work date and entitlements upon the termination of their employment (the "Pre-Filing Termination Letters").

[18] Employees who were not notified of their termination until after the CCAA filing were not provided with a Pre-Filing Termination Letter but there is no evidence or suggestion that had they been notified of their termination before the CCAA filing that they would not have received the same letter. That is, all employees who would be entitled to payment for severance would have been entitled to severance as described in the Pre-Filing Termination Letters. However, in light of the CCAA filing in January of 2009, employees who later received their termination notice were not offered any severance pay.

[19] Each Pre-Filing Termination Letter advised the Calgary employee of his or her termination date and stop work date, and that upon such date they would commence a 60 day non-working notice period until their termination date. Each letter contained a promise to pay a lump sum severance payment (or in some cases bi-weekly payments) in the following terms:

> Conditional upon: (i) your compliance with all terms and conditions of this letter; and (ii) your not obtaining employment with the Corporation, prior to the termination date that would enable you to continue your employment with the Corporation, the Corporation shall, on or immediately following the termination date, pay you a lump sum of $[dollar amount]. This payment ("the termination payment") in addition to the provided period of paid notice is intended to recognize your past service with the Corporation and to compensate you in all respects for the loss of employment. It is inclusive of any severance and/or termination payment to which you may be entitled as a consequence of the termination of your employment under applicable employment standards legislation. (Underling added).
>
> If you recommence employment with the Corporation after the termination date but prior to [a date], you agree that you will return to the Corporation the portion of the termination payment equivalent to your gross weekly/daily salary with the Corporation multiplied by the number of weeks/days during which you were employed with the Corporation prior to [the date].

[20] The Calgary employees say that the nature of what the payment was for is contained in the Pre-Filing Termination Letters that 48 of the employees received and signed before the CCAA filing and that it confirms that the payment is in part for past services provided to Nortel. I do not agree. The letter stated the opposite. I have referred to the provision above, but for ease of reference the relevant part is:

> This payment ("the termination payment") in addition to the provided period of paid notice is intended to recognize your past service with the Corporation and to compensate you in all respects for the loss of employment. (Underling added)

[21] The past service was recognized in that the amount to be paid, as stated in the information provided to the Calgary employees, was a lump sum severance amount calculated by reference to an employee's individual circumstances (e.g. age, length of service with Nortel, seniority) and past practice in a particular region or market. The amount to be paid was to compensate for the loss of employment.

[22] Some of the employees who signed a Pre-Filing Termination Letter had a termination date later than what turned out to be the CCAA filing date of January 14, 2014. They were therefore not paid the amount set out in their Pre-Filing Termination Letter. They filed a claim in the CCAA proceeding for the amount set out in their Pre-Filing Termination Letter but, unlike the other employees who had not received a Pre-Filing Termination Letter, they did not claim any other severance pay in the CCAA claims process, which presumably they might have if they thought that the payment in the Pre-Filing Termination Letter was a retention payment. They must have assumed that the amount in their Pre-Filing Termination Letter was for severance in an amount that they agreed to. The directors contend that this action after the letter was agreed to is evidence that the signers thought the payment agreed to was for severance. I think the contention is valid.

[23] The directors also contend that if the payment had intended to be some form of retention bonus, it would not have made sense to require it to be paid back if the employee after his or her termination date recommenced employment with Nortel. A retention bonus is paid on top of a salary. Just because the employee later recommenced working for Nortel and earned a salary would be no reason to return a retention bonus. The fact that it had to be repaid is an indication that it was not payment for services with Nortel. I think this contention is also valid.

[24] In my view of the evidence, while Nortel was anxious to keep the employees in Calgary at the Western Innovation Centre during the transition and its motivation to tell the employees that they would be paid severance if they stayed until terminated may have been driven by that, that did not change the nature of what the employees were entitled to. It was severance pay to be

paid in accordance with Nortel's past practices and not some new payment to compensate employees for continuing to work at Nortel until their termination date.

[25] I find that the severance payments promised to the Calgary employees were not to be for services performed for Nortel and therefore are not covered by section 119 of the CBCA.

Due diligence defence

[26] The directors rely on a due diligence defence in the event that the payments to be made for severance fall under section 119 of the CBCA.

[27] Section 123(4) of the CBCA contains a due diligence defence, as follows:

> 123 (4) A director is not liable under section 118 or 119, and has complied with his or her duties under subsection 122(2), if the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on
>
> (a) financial statements of the corporation represented to the director by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or
>
> (b) a report of a person whose profession lends credibility to a statement made by the professional person.

[28] In this case, it is claimed by the directors that they relied on legal advice provided to them by Osler as external counsel regarding their legal duties. According to Mr. Manley, one of the directors, the directors were advised by Osler and internal counsel that obligations for termination or severance pay were not a source of personal liability. As well, as Nortel's financial condition worsened in the latter half of 2008, the Nortel board insisted on knowing that Nortel's employee obligations were being fulfilled, as they were well aware of the risk of personal liability if such amounts were unpaid. At the October 2, 2008 board meeting, Nortel's treasurer confirmed to the board that statutory payments, including wages, would continue to be paid. "Statutory payments" referred to obligations for which the Nortel directors were potentially personally liable pursuant to various statutory provisions. I accept Mr. Manley's evidence.

[29] Apart from legal advice, Ernst & Young were retained as restructuring advisors by Nortel. Ernst & Young reported to the Nortel boards that it had identified no exceptions in which employee wage and related obligations were not remitted on or before the date on which they were due, including in respect of any such obligations to employees in Alberta. Mr. Manley stated in his affidavit, which I accept, that it was repeatedly confirmed to the Nortel directors that Nortel was current on its statutory obligations, the nature of which was based on advice received from Nortel's internal and external counsel and from Osler, the independent counsel appointed by the boards of NNC and NNL.

[30] It is argued that the directors did not follow the legal advice received from Osler. In a Osler memorandum presented to the directors on December 18, 2008 the directors were advised not for the first time that directors were liable for services provided to the corporation under section 119 of the CBCA but that the provision had been held not to include damages for wrongful dismissal, termination or severance. The memorandum then went on to state:

> However, there may be instances in which a corporation has entered into contract with employees or collective agreements with unions that might support a claim for these amounts under the CBCA. We understand that the Company is not a party to any collective agreements and is party to relatively few employment agreements with its senior executives. We recommend Company counsel review those agreements to confirm that they do not impose liability on the Board for damages for wrongful dismissal or termination or severance pay.

[31] On his cross-examination. Mr. Manley said he had no idea if there was ever a review of any obligations that might be created for the directors from employment agreements made with the employees in Calgary at the Western Innovation Centre. He said he was unaware of the Pre-Filing Termination Letters signed by some of those employees and thus unaware of any review of them. He said he would have expected that reviewing agreements in accordance with the quoted provision in the memorandum would have fallen within the mandate of Osler as they had been retained as independent counsel to the board in order to protect the directors from personal liability.

[32] This response of Mr. Manley was a reasonable response. The advice in the quoted provision was that company counsel review those agreements, i.e. the relatively few employment

agreements with its senior executives. There is no evidence that company counsel did not consider those agreements.

[33] Regarding the Pre-Filing Termination Letters, it is inconceivable that Nortel counsel did not review them in the circumstances in which Nortel found itself when the letters were drafted and signed. The language in the letters no doubt came from lawyers. Even if it could be said that the senior executives included the Calgary employees who signed a Pre-Filing Termination Letter, the company counsel's conclusion and advice would have been the same as provided generally to the directors, i.e. that severance payments referred to in the letters were not covered by section 119 of the CBCA.

[34] In my view of it, the Nortel directors were entitled to rely upon the legal and restructuring advice they received. They did so in good faith. It was not required of them to second guess the advice given by these leading professional firms. To have done so would likely have been perceived to be not acting prudently. Thus if I had held that the promised severance payments were covered by section 119 of the CCAA, the directors would have had a good due diligence defence.

The employer of the Calgary employees

[35] The directors contend that 77 of the claimants were not employed by NNC or NNC, the corporations of which they were directors, but by NNTC. Thus they contend that they could have no liability under section 119 of the CBCA. They base this argument on the fact that these 77 employees received their pay cheques from NNTC and were issued their T4 slips by NNTC. I do not agree.

[36] Section 119 does not attempt to define who an employee is. It is a question of fact if an employee claiming under that section is an employee of the corporation whose directors are being claimed against. It is not a matter of statutory interpretation or construing the section narrowly, as contended by counsel for the directors.

[37] It is settled law that the true employer must be ascertained on the basis of where effective control over the employee resides. Which particular company in a group may be paying the employee is not determinative of who the employer is. In *Jones v. CAE Industries* (1991), 40 C.C.E.L. 236, a wrongful dismal case adopted and approved in *Downtown Eatery (1993) Ltd. v. Ontario*, (2001), 54 O.R. (3d) 161 (C.A.), Adams J. stated the following:

> The fact that CAE Accurcast "may" have been used as a "payroll" company for a portion of 1987 does not determine the identity of the true employer. The true employer must be ascertained on the basis of where effective control over the employee resides and in this regard control rested with CAE Industries....
>
> I stress again that an employment relationship is not simply a matter of form and technical corporate structure. While CAE Accurcast was the paymaster corporation prior to January 26, 1987, direct control was asserted over Mr. Jones by CAE Industries through Mr. MacKay who was an employee of CAE Industries and not an executive officer of CAE Accurcast.

[38] In this case, it is undoubted that the whole NNTC operation was controlled by NNL, the operating subsidiary of NNC. Nortel's Westwinds Innovation Centre was one of Nortel's research and development facilities, primarily conducting R&D related to Nortel's CDMA business (also known as Carrier Networks).

[39] Mr. Darryl Pitchko was employed by Nortel from 1987 to 2009. At the relevant time he was the Acting Director of R&D at the Westwinds Innovation Centre and the most senior Nortel R&D Nortel executive there from April 2008 until his departure from Nortel in June 2009. In his affidavit he said he was paid by NNTC but took directions from NNL. Mr. Handrieder, another employee in the Westwinds Innovation Centre, said the same thing in his affidavit. This is hardly surprising evidence. In the allocation decision involving Nortel, I described the way in which Nortel operated along business lines in a matrix structure, a matter that was not contested, as follows:

> [13] At the time of its insolvency, Nortel had four main product groups (also known as Lines of Business):
>
> • The "Carrier Networks" segment provided wireless networking solutions that enabled service providers and cable operators to supply mobile voice, data

> and multimedia communications to individuals and enterprises using mobile phone and other wireless devices. The Carrier Networks business also offered products providing local, toll, long distance and international gateway capabilities to telephone service providers as well as providing support to customers transitioning from one network to another....
>
> [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 [which included NNTC], 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.

[40] There is no question but that NNTC played no role in directing the business of R&D at the Westwinds Innovation Centre in Calgary. Effective control over the employees was directed by NNL people in the R&D division responsible for the R&D for the Carrier Networks line of business. During argument counsel for the directors conceded that. Even at the end the instructions to Mr. Pitchko to wind down the Westwinds Innovation Centre came from the Nortel VP of R&D in Ottawa and HR personnel at Nortel in Ottawa.

[41] The boards of NNC and NNL understood that the Calgary employees were Nortel employees over which they had a responsibility. After October 2, 2008 the board of Nortel instituted a practice of having management provide reports confirming that statutory obligations were being paid, which were reviewed at each board meeting. These reports included information regarding NNTC as well as the other subsidiaries of NNL.

[42] Thus, had I held that section 119 covered the severance payments said to have been promised to the Calgary employees of the Westwinds Innovation Centre, I would not have dismissed the claims of those who received their pay cheques from NNT on the basis that the employees were not employees of NNL.

Release

[43] The Pre-Filing Termination Letters signed by 48 Calgary employees contained a sufficiently broad release of NNC, its subsidiaries and affiliates, and its directors and officers that would cover a claim under section 119 of the CBCA made against the directors. The Monitor but not the directors raise this release as a defence for the directors as well. The release provision was as follows:

> In consideration of the foregoing, and by accepting these arrangements, you hereby: release and forever discharge the Corporation, its directors, officers, employees, and representatives of and from all manner of actions, causes of actions, suits, debts, accounts, covenants, contracts, claims, including, without limitation, claims under applicable employment standards and human rights legislation, and demands whatsoever which you have had, now have or which your heirs, executors, administrators, or assigns or any of them, hereafter can, shall or may have against the Corporation, its employees and representatives, for or by reasons of any cause, matter or thing whatsoever in connection with your employment with the Corporation, including without limitation the termination of such employment [...]

[44] It is argued by the Calgary employees that section 119(1) of the CBCA is a public policy provision that is not capable of being contracted out of. I do not accept the argument. A release of a section 119 CBCA claim as part of a negotiated settlement of amounts to be paid to an employee is not contracting out of the statute. If it were otherwise, no corporation could ever settle a claim such as a claim for pay required under provincial statutes such as the Ontario *Employment Standards Act*.

[45] It is argued by the employees that the release is not binding due to a failure of consideration, the release beginning with the words "In consideration of the foregoing...". The Monitor says that the mutual promises in the agreement are sufficient consideration for the

agreement including the release to be binding. I do not intend to deal with this as it is not necessary and to do it justice would require far more than has been provided. A complete failure to pay the amount owing under an agreement is not a completely straightforward issue.

Conclusion

[46] The claim of the Calgary employees under section 119 of the CBCA is dismissed. This is not a case for costs.

Newbould J.

Date: September 26, 2016