

COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2017 ONCA 210

DATE: 20170313

DOCKET: M47511

Hoy A.C.J.O., Pepall and Brown JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited

Application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Jennifer Holley and Joseph Greg McAvoy, the moving parties, acting in person

Benjamin Zarnett, Jessica A. Kimmel and Peter B. Kolla, for the responding party, the Monitor, Ernst & Young Inc.

Derrick C. A. Tay and Jennifer Stam, for the responding parties, the Canadian Debtors

Mark Zigler, Susan L. Philpott and Barbara A. Walancik, for the responding parties, the Canadian Former Employees and Disabled Employees through their court appointed Representatives

Janice B. Payne and Thomas J. McRae, for the responding party, the Nortel Canadian Continuing Employees

Paul Mitchell, for the responding party, the EMEA Debtors (other than Nortel Networks S.A.)

Sheila R. Block, Scott A. Bomhof, Andrew D. Gray, Adam M. Slavens and Jeremy R. Opolsky, for the responding parties, Nortel Networks Inc. and the other U.S. Debtors

R. Shayne Kukulowicz, Michael J. Wunder, Ryan C. Jacobs and Geoff B. Shaw, for the responding party, the Official Committee of Unsecured Creditors of Nortel Networks Inc., et al

S. Richard Orzy, Gavin H. Finlayson and Richard B. Swan, for the responding parties, the Ad Hoc Group of Bondholders

Heard: In Writing

Motion for leave to appeal from the order of Justice Frank J. C. Newbould of the Superior Court of Justice, dated January 24, 2017.

#### ENDORSEMENT

[1] The self-represented moving parties, Joseph McAvoy and Jennifer Holley (the "Leave Applicants"), seek leave to appeal the Sanction Order of Newbould J. dated January 24, 2017. The Monitor, the Canadian and US Debtors, Nortel Networks Inc., the Official Committee of Unsecured Creditors, the Ad Hoc Committee of Bondholders, the Nortel Continuing Employees, and the Court-Appointed Representatives of the Former and Disabled Employees of Nortel all oppose the motion.

[2] Leave to appeal is granted sparingly in *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings and only where there are serious and arguable grounds that are of real and significant interest to

the parties. In addressing whether leave should be granted, the court will consider whether:

- a) the proposed appeal is *prima facie* meritorious or frivolous;
- b) the points on the proposed appeal are of significance to the practice;
- c) the points on the proposed appeal are of significance to the action; and
- d) whether the proposed appeal will unduly hinder the progress of the action.

See, *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

[3] We are satisfied that the stringent test for leave is not met in this case. The proposed appeal is not meritorious. As the supervising judge explained in his reasons, the Leave Applicants did not opt-out of the 2009 Representation Order for Disabled Employees (“LTD Rep Order”) and they are bound by the 2010 Employee Settlement Agreement. The supervising judge correctly concluded the Leave Applicants have no right to opt out of the LTD Rep Order at this late stage: at para. 16.

[4] The Leave Applicants are the only long-term disability beneficiaries to oppose the Plan, which has the support of over 99% of Nortel’s unsecured creditors based both on value and on number. This belies the importance of the proposed appeal to the practice or to the action. And, as this court has already

emphasized, further delays in this very protracted litigation are to be avoided: *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at paras. 102-103; *Nortel Networks Corporation (Re)*, 2016 ONCA 749, 41 C.B.R. (6th) 174, at para. 11.

[5] Finally, by order dated February 17, 2017, MacPherson J.A. required all materials on this leave motion to be filed by February 24, 2017, on which date the motion would be submitted to the panel for consideration. On February 27, 2017, the Leave Applicants filed a notice of constitutional question challenging the constitutionality of ss. 6(1) and 11 of the CCAA. Counsel for the Monitor submits the notice should not be considered. We agree. The notice was filed far too late in these proceedings and, as noted, the Leave Applicants are bound by the 2010 Employee Settlement Agreement.

[6] The motion for leave to appeal is dismissed.

*Lucas ACSD*

*St. Repell TA*

*St. Repell TA*