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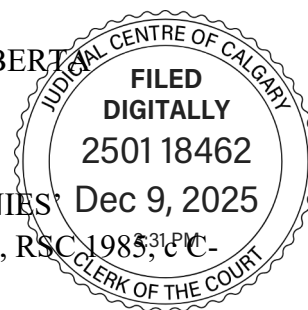
COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c.C-36, as amended



AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA ULC, CANTANA ENERGY GMBH, CNE OIL & GAS, S.R.L, CANACOL ENERGY COLOMBIA S.A.S., SHONA HOLDING GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS S.A.S.

APPLICANTS

CANACOL ENERGY LTD., 2654044 ALBERTA LTD., CANACOL ENERGY ULC, 2498003 ALBERTA ULC, CANTANA ENERGY GMBH, CNE OIL & GAS, S.R.L, CANACOL ENERGY COLOMBIA S.A.S., SHONA HOLDING GMBH, CNE ENERGY S.A.S., and CNE OIL & GAS S.A.S.

DOCUMENT

**SUPPLEMENTAL BOOK OF AUTHORITIES**

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File No. G10088627

## TABLE OF AUTHORITIES

- Tab 1: [UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation](#), 2014
- Tab 2: [Hartford Computer Hardware Inc., Re](#), 2012 ONSC 964.
- Tab 3: [Nortel Networks Corp., Re](#), 2015 ONSC 2987.

Tab

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# UNCITRAL Model Law on Cross-Border Insolvency

## PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

## CHAPTER I. GENERAL PROVISIONS

### *Article 1. Scope of application*

1. This Law applies where:

- (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or
- (c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or

*Article 4. [Competent court or authority]<sup>a</sup>*

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

*Article 5. Authorization of [insert the title of the person or body administering reorganization or liquidation under the law of the enacting State] to act in a foreign State*

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in a foreign State on behalf of a proceeding under [*identify laws of the enacting State relating to insolvency*], as permitted by the applicable foreign law.

*Article 6. Public policy exception*

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

*Article 7. Additional assistance under other laws*

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.

*Article 8. Interpretation*

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

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<sup>a</sup>A state where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials of bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in the State governing the authority of [*insert the title of the government-appointed person or body*].

*Part two*

**GUIDE TO ENACTMENT AND INTERPRETATION  
OF THE UNCITRAL MODEL LAW  
ON CROSS-BORDER INSOLVENCY**

to the debtor or another person of an application for recognition of a foreign proceeding and the time period for giving the notice.

### *B. Recognition*

29. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, when the specified requirements of article 2 concerning the nature of the foreign proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding<sup>14</sup> for the purposes of liquidation or reorganization under the control or supervision of the court) and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that are required by article 15.

30. Article 6 allows recognition to be refused where it would be “manifestly contrary to the public policy” of the State in which recognition is sought. This may be a preliminary question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 101-104). Differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.

31. A foreign proceeding should be recognized as either a main proceeding or a non-main proceeding (article 17, paragraph 2). A main proceeding is one taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding (see paras. 157-160 on timing). In principle, a main proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre of main interests is not defined in the Model Law, but is based on a

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<sup>14</sup>On what constitutes a collective proceeding, see paras. 69-72 below.

Tab

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2012 ONSC 964

Ontario Superior Court of Justice [Commercial List]

Hartford Computer Hardware Inc., Re

2012 CarswellOnt 2143, 2012 ONSC 964, 212 A.C.W.S. (3d) 315, 94 C.B.R. (5th) 20

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

Application of Hartford Computer Hardware, Inc. Under Section 46 of the  
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

And In the Matter of Certain Proceedings Taken in the United States Bankruptcy  
Court for the Northern District of Illinois Eastern Division with Respect to

Re: Hartford Computer Hardware, Inc., Nexicore Services, LLC, Hartford Computer Group, Inc.  
and Hartford Computer Government, Inc., (Collectively, the "Chapter 11 Debtors"), Applicants

Morawetz J.

Heard: February 1, 2012

Judgment: February 1, 2012

Written reasons: February 15, 2012

Docket: CV-11-9514-00CL

Counsel: Kyla Mahar, John Porter for Chapter 11 Debtors  
Adrienne Glen for FTI Consulting Canada, Inc., Information Officer  
Jane Dietrich for Avnet Inc.

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; International

**Related Abridgment Classifications**

**Bankruptcy and insolvency**

[XVII](#) Practice and procedure in courts

[XVII.2](#) Orders

**Bankruptcy and insolvency**

[XIX](#) Companies' Creditors Arrangement Act

[XIX.5](#) Interim financing

**Headnote**

**Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Miscellaneous**

Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under [Companies' Creditors Arrangement Act](#) — U.S. Court made various orders, including final DIP facility order which contained partial "roll up" provision wherein all cash collateral in possession or control of Chapter 11 debtors on or after petition date was deemed to have been remitted to pre-petition secured lender for application to and repayment of pre-petition revolving debt facility with corresponding borrowing under DIP facility — Foreign representative of Chapter 11 debtors brought motion under s. 49 of Act for **recognition** and implementation in Canada of final utilities order, bidding procedures order, and final DIP facility order — Motion granted — Utilities order and bidding procedures order were routine, and it was appropriate to recognize them — **Recognition** of final DIP facility order was necessary for protection of debtor company's property and for interests of creditors — Final DIP facility order was granted by U.S. Court — In circumstances, there was no basis for present court to second guess decision of U.S. Court — Final DIP facility order did not raise any **public policy** issues.

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous**

**Recognition** of orders made in U.S. Chapter 11 proceedings — Chapter 11 proceedings were commenced in U.S. Court by Chapter 11 debtors — Chapter 11 proceeding was recognized as foreign main proceeding under [Companies' Creditors Arrangement Act](#) — U.S. Court made various orders, including final DIP facility order which contained partial "roll up" provision wherein all cash collateral in possession or control of Chapter 11 debtors on or after petition date was deemed to have been remitted to pre-petition secured lender for application to and repayment of pre-petition revolving debt facility with corresponding borrowing under DIP facility — Foreign representative of Chapter 11 debtors brought motion under s. 49 of Act for **recognition** and implementation in Canada of final utilities order, bidding procedures order, and final DIP facility order — Motion granted — Utilities order and bidding procedures order were routine, and it was appropriate to recognize them — **Recognition** of final DIP facility order was necessary for protection of debtor company's property and for interests of creditors — Final DIP facility order was granted by U.S. Court — In circumstances, there was no basis for present court to second guess decision of U.S. Court — Final DIP facility order did not raise any **public policy** issues.

**Table of Authorities**

**Statutes considered:**

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

Generally — referred to

Pt. IV — referred to

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

s. 49 — pursuant to

s. 61(2) — considered

MOTION by foreign representative for **recognition** and implementation in Canada of orders of U.S. Bankruptcy Court made in Chapter 11 proceedings.

**Morawetz J.:**

1 Hartford Computer Hardware, Inc. ("Hartford"), on its own behalf and in its capacity as foreign representative of Chapter 11 Debtors (the "Foreign Representative") brought a motion under *s. 49 of the Companies' Creditors Arrangement Act* (the "*CCAA*") for **recognition** and implementing in Canada the following Orders of the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "U.S. Court") made in the proceedings commenced by the Chapter 11 Debtors:

- (i) the Final Utilities Order;
  - (ii) the Bidding Procedures Order;
  - (iii) the Final DIP Facility Order.
- (collectively, the U.S. Orders")

2 On December 12, 2011, the Chapter 11 Debtors commenced the Chapter 11 proceeding. The following day, I made an order granting certain interim relief to the Chapter 11 Debtors, including a stay of proceedings. On December 15, 2011, the U.S. Court made an order authorizing Hartford to act as the Foreign Representative of the Chapter 11 Debtors. On December 21, 2011, I made two orders, an Initial **Recognition** Order and a Supplemental Order that, among other things:

- (i) declared the Chapter 11 proceedings to be a "foreign main proceeding" pursuant to Part IV of the *CCAA*;
- (ii) recognized Hartford as the Foreign Representative of the Chapter 11 Debtors;
- (iii) appointed FTI as Information Officer in these proceedings;

(iv) granted a stay of proceedings;

(v) recognized and made effective in Canada certain "First Day Orders" of the U.S. Court including an Interim Utilities Order and Interim DIP Facility Order.

3 On January 26, 2012, the U.S. Court made the U.S. Orders.

4 The Foreign Representative is of the view that **recognition** of the U.S. Orders is necessary for the protection of the Chapter 11 Debtors' property and the interest of their creditors.

5 The affidavit of Mr. Mittman and First Report of the Information Officer provide details with respect to the hearings in the U.S. Court on January 26, 2012 which resulted in the U. S. Court granting the U.S. Orders. The Utilities Order and the Bidding Procedures Order are relatively routine in nature and it is, in my view, appropriate to recognize and give effect to these orders.

6 With respect to the Final DIP Facility Order, it is noted that paragraph 6 of this Order contains a partial "roll up" provision wherein all Cash Collateral in the possession or control of Chapter 11 Debtors on December 12, 2011 (the "Petition Date") or coming into their possession after the Petition Date is deemed to have been remitted to the Pre-petition Secured Lender for application to and repayment of the Pre-petition revolving debt facility with a corresponding borrowing under the DIP Facility.

7 In making the Final DIP Facility Order, the Information Officer reports that the U.S. Court found that good cause had been shown for entry of the Final DIP Facility Order, as the Chapter 11 Debtors' ability to continue to use Cash Collateral was necessary to avoid immediate and irreparable harm to the Chapter 11 Debtors and their estates.

8 The granting of the Final DIP Facility Order was supported by the Unsecured Creditors' Committee. Certain objections were filed but the Order was granted after the U.S. Court heard the objections.

9 The Information Officer reports that Canadian unsecured creditors will be treated no less favourably than U.S. unsecured creditors. Further, since a number of Canadian unsecured creditors are employees of the Chapter 11 Debtors, these creditors benefit from certain priority claims which they would not be entitled to under Canadian insolvency proceedings.

10 The Information Officer and Chapter 11 Debtors recognize that in *CCAA* proceedings, a partial "roll up" provision would not be permissible as a result of *s. 11.2 of the CCAA*, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

11 *Section 49 of the CCAA* provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.

12 It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding". The Final DIP Facility Order was granted after a hearing in the U.S. Court. Further, it appears from the affidavit of Mr. Mittman that, as of the end of December 2011, the Chapter 11 Debtors had borrowed \$1 million under the Interim DIP Facility. The Cash Collateral on hand as of the Petition Date was effectively spent in the Chapter 11 Debtors' operations and replaced with advances under the Interim DIP Facility in December 2011 such that all cash in the Chapter 11 Debtors' accounts as of the date of the Final DIP Facility Order were proceeds from the Interim DIP Facility.

13 The Information Officer has reported that, in the circumstances, there will be no material prejudice to Canadian creditors if this court recognizes the Final DIP Facility, and that nothing is being done that is contrary to the applicable provisions of the *CCAA*. The Information Officer is of the view that **recognition** of the Final DIP Facility Order is appropriate in the circumstances.

14 A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

15 Based on the foregoing, I have concluded that **recognition** of the Final DIP Facility Order is necessary for the protection of the debtor company's property and for the interests of the creditors.

16 In making this determination, I have also taken into account the provisions of s. 61(2) of the *CCAA* which is the **public policy** exception. This section reads: "Nothing in this Part prevents the court from refusing to do something that would be contrary to **public policy**".

17 The **public policy** exception has its origins in the UNCITRAL **Model Law** on Cross-Border Insolvency. Article 6 of the **Model Law** provides: "Nothing in this **Law** prevents the court from refusing to take an action governed by this **Law** if the action would be manifestly contrary to the **public policy** of this State". It is also important to note that the Guide to Enactment of the UNCITRAL **Model Law** on Cross-Border Insolvency (paragraphs 86-89) makes specific reference to the fact that the **public policy** exceptions should be interpreted restrictively.

18 I am in agreement with the commentary in the Guide to Enactment to the effect that s. 61(2) should be interpreted restrictively. The Final DIP Facility Order does not, in my view, raise any **public policies** issues.

19 I am satisfied that it is appropriate to grant the requested relief. The motion is granted and an order has been signed in the form requested to give effect to the foregoing.

*Motion granted.*

Tab

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## KeyCite treatment

**Most Negative Treatment:** Check subsequent history and related treatments.

2015 ONSC 2987

Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2015 CarswellOnt 7072, 2015 ONSC 2987, [2015] O.J. No. 2440, 254 A.C.W.S. (3d) 522, 27 C.B.R. (6th) 175

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

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

Newbould J.

Heard: May 12-15, 20-22, 27-30, 2014; June 2, 5, 6, 16-20, 23-24, 2014; September 22-24, 2014

Judgment: May 12, 2015

Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Peter Ruby, Jessica Kimmel, Graham D. Smith, Alan Mark, Julie Rosenthal, Joseph Pasquariello, Jennifer Stam, Ken Coleman, Jacob Pultman, Paul Keller, Laura Hal for Monitor and Canadian Debtors

R. Paul Steep, Elder C. Marques, Byron Shaw, Kenneth T. Rosenberg, Lily Harmer, Max Starnino, Karen Jones, Megan Shortreed, Mark Zigler, Ari Kaplan, Jeff Van Bakel, Barbara Walancik for Canadian Creditors' Committee

Sheila Block, Andrew Gray, Scott A. Bomhof, Avi Luft, James Bromley, Lisa Schweitzer, Jeffrey Rosenthal, Howard Zelbo for U.S. Debtors

Richard Swan, Tom Matz, Jonathan Bell, Gavin H. Finlayson, Kevin J. Zych, Andrew LeBlanc, Nick Bassett for Ad Hoc Group of Bondholders

Matthew P. Gottlieb, Matthew Milne-Smith, James Doris, William Maguire, Neil Oxford, John Whiteoak, Tracy L. Wynne, Derek Adler for EMEA Debtors

Michael E. Barrack, D.J. Miller, John L. Finnigan, Andrea McEwan, Rebecca (Lewis) Kennedy, Michael Shakra, Brian O'Connor Eugene Chang for UKPC

R. Shayne Kukulowicz, Goff Shaw, Abid Qureshi, David H. Botter for U.S. Unsecured Creditors' Committee

Kenneth David Kraft, Karen B. Dine, John Salmas, David Crichlow for Wilmington Trust, National Association, Trustee

Brett Harrison for Bank of New York Mellon, Trustee

John D. Marshall for Law Debenture Trust Company of New York, Trustee

Subject: Contracts; Estates and Trusts; Evidence; Insolvency; Intellectual Property; International; Property

### Related Abridgment Classifications

#### Contracts

[VII Construction and interpretation](#)

[VII.7 Miscellaneous](#)

#### Headnote

##### **Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous**

Distribution of proceeds — Telecommunications corporation with numerous world-wide subsidiaries commenced bankruptcy and insolvency proceedings — At issue was allocation among debtors of proceeds from sale of assets, primarily intellectual property — Master Research and Development Agreement ("MRDA"), which provided for payment of residual profits to certain entities, did not govern allocation — MRDA was driven by transfer pricing concepts, drafted for tax purposes and not intended to deal with rights after company stopped operating — In unique circumstances of case, it was just to allocate proceeds on pro

rata basis — Funds to be directed to each debtor estate based on percentage that claims against that estate bore to total claims against all debtor estates.

### **Contracts --- Construction and interpretation — Miscellaneous**

Telecommunications corporation with numerous world-wide subsidiaries commenced bankruptcy and insolvency proceedings — At issue was allocation among debtors of proceeds from sale of assets, primarily intellectual property — Master Research and Development Agreement ("MRDA"), which provided for payment of residual profits to certain entities, did not govern allocation — MRDA was driven by transfer pricing concepts, drafted for tax purposes and not intended to deal with rights after company stopped operating — In unique circumstances of case, it was just to allocate proceeds on pro rata basis — Funds to be directed to each debtor estate based on percentage that claims against that estate bore to total claims against all debtor estates. The insolvent corporation was a publicly-traded global networking solutions and telecommunications company, with numerous subsidiaries around the world. NNL, a direct subsidiary of the parent corporation, was the Canadian operating company, which in turn owned 100 per cent of the equity in NNI, the U.S. operating company. Because research and development was the primary driver of the corporation's value and profit, the residual profits were paid to entities ("RPEs") pursuant to a Master Research and Development Agreement ("MRDA"), in accordance with a specified sharing method. Under the MRDA, NNL was the legal owner of the corporation's intellectual property ("IP") and each other RPE was granted an exclusive license by NNL to make and sell products in its territory using or embodying the IP and a non-exclusive license to do so in territories not exclusive to an RPE.

The corporation decided to commence bankruptcy and insolvency proceedings. NNL and the other Canadian debtors filed for protection under the [Companies' Creditors Arrangement Act](#). After sales of the corporation's business lines and residual IP, \$7.3 billion ("the lockbox funds") were held in escrow. At issue was how to allocate the lockbox funds among the Canadian, U.S. and Europe, Middle East and Africa ("EMEA") debtors. The differences in the parties' positions arose from the different manner in which each characterized the terms of the MRDA, the interests held by the parties in the IP and the applicability of the terms of the MRDA to the value ascribed to various assets. The trial was held jointly with the U.S. Bankruptcy Court for the District of Delaware, pursuant to a Cross-Border Insolvency Protocol.

**Held:** Order accordingly.

The MRDA did not govern the allocation of the lockbox funds. The U.S. debtors' attempt to parse the language of the grant of license in the MRDA was unpersuasive. There was only one license and its words had to be read harmoniously. When the MRDA was being considered, the company was not in the business of licensing its services to others for the business of others; it was providing a service to its customers to support the technology being acquired by its customers. The MRDA had to be read in that context. Under the MRDA, while the company operated as a going concern business, NNL had all ownership interests of the IP, subject to: (i) the grant to each licensed participant of a non-exclusive right to assert actions and recover damages in their territory; and (ii) the grant of exclusive and non-exclusive licenses to the licensed participants, which were not licenses of all rights, but were subject to field of use restrictions that gave the licensed participants the right to use the IP to make, use or sell products, as defined in the MRDA. This meant products, software or services that were made or sold by, or for, any of the licensed participants. No product that was part of a third party's business, rather than the corporation's business, fell within the definition of "products".

The MRDA was an operating agreement and was never intended to provide an answer to the question of how to allocate among the bankrupt estates the proceeds of the sale of assets following the world-wide insolvency of the corporation. The MRDA and its predecessor agreements were developed for and driven by transfer pricing concepts and drafted for tax purposes. The construct of legal title to the IP being in NNL in return for NNL granting exclusive licenses to the licensed participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while the company operated as a going concern business. The MRDA was intended to apply only to the company while it operated, not to deal with rights after it and its subsidiaries stopped operating their businesses. The position of the EMEA debtors, that the proceeds of sale of the IP assets should be allocated according to a theory of joint ownership of the IP, should also be rejected.

NNL would be unjustly enriched by being entitled to all the proceeds of sale at the expense of the other RPEs who contributed to the creation of the IP, just because the patents were registered in NNL's name. It would also unjustly enrich NNI if it were to be allocated the amount from the IP sales that it claimed based principally on its revenues. NNI was able to sell the company's products based on the research and development and resulting IP performed by other RPEs. This was an unprecedented case in which the intangible assets that were sold were not separately located in any one jurisdiction or owned separately in

different jurisdiction. They were created by all of the RPEs located in different jurisdictions. Research and development was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis. The company's matrix structure allowed it to draw on employees from different functional disciplines worldwide. In these circumstances, it was just to allocate the sale proceeds on a pro rata basis. An allocation of the lockbox funds should be directed to each debtor estate based on the percentage that the claims against that estate bore to the total claims against all of the debtor estates. A pro rata allocation in this case would not constitute an impermissible substantive consolidation, either actual or deemed, nor unduly prejudice bondholders who held bonds with covenants of both NNL and NNI.

### Table of Authorities

#### Cases considered by *Newbould J.*:

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- Baker & Getty Financial Services Inc., Re* (1987), 78 B.R. 139 (U.S. Bankr. N.D. Ohio) — followed
- Beach v. Moffatt* (2005), 2005 CarswellOnt 1693, (sub nom. *Fraser v. Beach*) 252 D.L.R. (4th) 1, 33 R.P.R. (4th) 193, (sub nom. *Fraser v. Beach*) 75 O.R. (3d) 383, (sub nom. *Fraser v. Beach*) 197 O.A.C. 113 (Ont. C.A.) — referred to
- Beaufort Developments (NI) Ltd. v. Gilbert-Ash (NI) Ltd.* (1998), 142 S.J.L.B. 172, 59 Con. L.R. 66, 88 B.L.R. 1, 14 Const. L.J. 280, [1998] N.I. 144, [1999] 1 A.C. 266, [1998] 2 All E.R. 778, [1998] 2 W.L.R. 860, [1998] C.L.C. 830, 148 N.L.J. 869 (Ireland H.L.) — considered
- Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.* (2011), 131 S.Ct. 2188, 98 U.S.P.Q.2d 1761 (U.S. Sup. Ct.) — referred to
- C.I. Covington Fund Inc. v. White* (2000), 22 C.B.R. (4th) 183, 10 B.L.R. (3d) 173, 10 C.P.R. (4th) 49, 2000 CarswellOnt 4680, [2000] O.T.C. 865 (Ont. S.C.J.) — referred to
- C.I. Covington Fund Inc. v. White* (2001), 28 C.B.R. (4th) 177, 17 B.L.R. (3d) 277, 2001 CarswellOnt 3527, 15 C.P.R. (4th) 144, 152 O.A.C. 39, [2001] O.T.C. 356 (Ont. Div. Ct.) — referred to
- Corning, Re* (2005), 419 F.3d 196 (U.S. C.A. 3rd Cir.) — considered
- Counihan v. Allstate Insurance Co.* (1999), 194 F.3d 357 (U.S. C.A. 2nd Cir.) — referred to
- Creston Moly Corp. v. Sattva Capital Corp.* (2014), 2014 SCC 53, 2014 CSC 53, 461 N.R. 335, 25 B.L.R. (5th) 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.*) [2014] 2 S.C.R. 633, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 59 B.C.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1 (S.C.C.) — followed
- Downey v. Ecore International Inc.* (2012), 2012 CarswellOnt 8459, 2012 ONCA 480, 24 C.P.C. (7th) 7, 294 O.A.C. 200 (Ont. C.A.) — followed
- Eli Lilly & Co. v. Novopharm Ltd.* (1998), 227 N.R. 201, 152 F.T.R. 160 (note), 1998 CarswellNat 1061, 1998 CarswellNat 1062, 161 D.L.R. (4th) 1, [1998] 2 S.C.R. 129, 80 C.P.R. (3d) 321 (S.C.C.) — followed
- Elliott v. Wedlake* (1963), [1963] S.C.R. 305, 1963 CarswellOnt 65 (S.C.C.) — referred to
- Elliott Estate, Re* (June 28, 1962), Gibson J.A., Kelly J.A., Roach J.A. (Ont. C.A.) — followed
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TRIAL to determine allocation of proceeds of sale of assets of insolvent corporation in proceedings under *Companies' Creditors Arrangement Act*.

***Newbould J.:***

**Prologue**

1 Until January 14, 2009, Nortel Networks Corporation ("NNC") was a publicly-traded Canadian company and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries, collectively known as the "Nortel Group" or "Nortel". It operated a global networking solutions and telecommunications business.

2 On January 14, 2009 most of the Nortel entities filed for bankruptcy protection. In Canada, the Canadian incorporated entities (the "Canadian Debtors") filed under the *Companies' Creditors Arrangement Act* ("CCAA"). In the United States, most of the U.S. incorporated entities (the "U.S. Debtors") filed under chapter 11 of the *U.S. Bankruptcy Code*. In England, most of the entities incorporated in Europe, the Middle East and Africa (the "EMEA<sup>1</sup> Debtors") were granted administration orders under the *UK Insolvency Act, 1986*.

3 The initial intent of Nortel was to downsize and carry on those portions of its telecommunications business that it thought could be profitable. However that plan quickly evaporated and in June, 2009 Nortel decided to liquidate its assets. It sold its business lines for approximately \$3.285<sup>2</sup> billion of which approximately \$2.85 billion is now available to be allocated. It then sold its residual intellectual property for \$4.5 billion. These amounts totalling \$7.3 billion are held in escrow (the "lockbox funds"). At issue in these proceedings is how to allocate the \$7.3 billion among the Canadian Debtors, the U.S. Debtors and the EMEA Debtors.

4 The trial in this case was unique. It was a joint trial of the Ontario Superior Court of Justice (Commercial List) and the U.S. Bankruptcy Court for the District of Delaware<sup>3</sup>. It arose from the arrangements made by the parties as part of the process of selling assets, and from a Cross-border Insolvency Protocol (the "Protocol"). In short:

- (i) The parties agreed in an Interim Funding and Settlement Agreement before any of the Nortel assets were sold to put the proceeds of sale into escrow and then attempt to agree on a protocol for resolving how the proceeds were to be allocated. If no agreement was reached, the issues were to be tried by the Ontario and U.S. Courts pursuant to the Protocol.

(ii) The parties could not agree on the allocation, nor could they agree on a protocol process. By orders of the Ontario and U.S. Courts, the allocation was directed to be determined in a joint trial pursuant to the Protocol. The EMEA Debtors were held to have attorned to the jurisdiction of these courts in the escrow agreements made with respect to the proceeds of the several sales that had occurred.<sup>4</sup>

5 The Protocol was approved early in the CCAA and chapter 15 proceedings by orders the Ontario and U.S. Courts.<sup>5</sup> This type of protocol has become standard in the last number of years to govern the administration of cross-border insolvency proceedings. The Protocol included it its purposes:

Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in the Insolvency Proceedings:

- (a) harmonize and coordinate activities in the Insolvency Proceedings before the Courts;
- (b) promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;
- (c) honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada, respectively;
- (d) promote international cooperation and respect for comity among the Courts, the Debtors, the Creditors Committee, the Estate Representatives (which include the Chapter 11 Representatives and the Canadian Representatives as such terms are defined below) and other creditors and interested parties in the Insolvency Proceedings;
- (e) facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors' creditors and other interested parties, wherever located; and
- (f) implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

6 The Protocol contained a number of provisions regarding the independence of the Canadian and U.S. Courts and the exclusive jurisdiction of each Court in the determination of matters arising in the Canadian and U.S. proceedings respectively. Included in the Protocol were the following provisions:

7. The approval and implementation of this Protocol shall not divest nor diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction over the subject matter of the U.S. Proceedings and the Canadian Proceedings, respectively...

8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

7 The Protocol provided in paragraph 12 for the harmonization and co-ordination of the administration of the two proceedings in Canada, including the holding of joint hearings of the two Courts and providing for discussions between the two judges. Included were the following:

12. To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Court and the Canadian Court each may coordinate activities and consider whether it is appropriate to defer to the judgment of the other Court. In furtherance of the foregoing:

(a) The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural matter relating to the Insolvency Proceedings.

...

(d) The U.S. Court and the Canadian Court may conduct joint hearings (each a "Joint Hearing") with respect to any cross-border matter or the interpretation or implementation of this Protocol where both the U.S. Court and the Canadian Court consider such a Joint Hearing to be necessary or advisable, or as otherwise provided herein, to, among other things, facilitate or coordinate proper and efficient conduct of the Insolvency Proceedings or the resolution of any particular issue in the Insolvency Proceedings. With respect to any Joint Hearing, unless otherwise ordered, the following procedures will be followed:

(vi) The Judge of the U.S. Court and the Justice of the Canadian Court, shall be entitled to communicate with each other during or after any joint hearing, with or without counsel present, for the purposes of (1) determining whether consistent rulings can be made by both Courts; (2) coordinating the terms upon of the Courts' respective rulings; and (3) addressing any other procedural or administrative matters.

8 A joint hearing was held for this allocation dispute. The court rooms in Toronto and Wilmington were set up electronically so that lawyers and witnesses could and did appear in either courtroom and communicate with a lawyer, witness or the judge in the other courtroom through state of the art telecommunications services.

9 After the evidence was heard, written closing and reply briefs were filed by the parties and oral argument was made. It was agreed that at the conclusion of the case that each Court would release its decision at the same time. This judgment is being released at the same time as the opinion of Judge Gross in Wilmington.

10 Judge Gross in Wilmington and I have communicated with each other in accordance with the Protocol with a view to determining whether consistent rulings can be made by both Courts. We have come to the conclusion that a consistent ruling can and should be made by both Courts. We have come to this conclusion in the exercise of our independent and exclusive jurisdiction in each of our jurisdictions. These insolvency proceedings have now lasted over six years at unimaginable expense and they should if at all possible come to a final resolution. It is in all of the parties' interests for that to occur. Consistent decisions that we both agree with will facilitate such a resolution.

### **Nortel history and its matrix structure**

11 NNC was the successor to a long line of technology companies headquartered in Canada dating back to the founding of Bell Telephone Company of Canada in 1883. Prior to being named Nortel, it was known as Northern Telecom. NNC's principal, direct operating subsidiary, also a Canadian company, was Nortel Networks Limited ("NNL"), which in turn was the direct or indirect parent of operating companies located around the world.<sup>6</sup>

12 From the mid-1980s, Nortel expanded substantially through the continued development of ground-breaking technology. The Nortel Group moved from developing and manufacturing traditional landline phone technology and equipment into digital, wireless and photonic technologies. At the same time, the Nortel Group expanded into Europe, Asia, Africa, the Middle East and Latin America.

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.

227 The total cash on hand in the U.S. Debtors' and Canadian Debtors' Estates as of June 2014 was a little over 25% of the face amount of the outstanding bonds. Without an allocation from the lockbox funds of a sufficient amount to enable NNL and NNI to pay the bonds in full, the bondholders could not be paid in full. The bondholders, however, have no covenants in their bonds requiring the lockbox funds to be allocated in any manner, and specifically, no right to have lockbox funds allocated to NNL or NNI. Nor do NNL or NNI have any such rights. The lockbox funds are not the property of any one of NNL or NNI or any other RPE.

228 The bondholders are like other creditors in this regard. The other creditors of the Canadian Debtors could likewise argue that they will be prejudiced if the argument of the Monitor that all of the IP proceeds should be paid to NNL as the owner of the IP is not accepted. But the prejudice to be considered is not this kind of prejudice, but prejudice to legal rights. Neither the bondholders nor the other creditors of the Canadian Debtors have any legal right to have the lockbox funds allocated in a way that will benefit them.

229 The bondholders with covenants of NNL and NNI contend that their expectations will be disregarded by a pro rata allocation and that it will harm the bond markets if they are not somehow paid in full. I think this argument is overblown in this case and in any event not supported by any evidence of their expectations.

230 The evidence of Peter Currie, the CFO of NNC and NNL from 2005-2007, which is not contested, was that until the early to mid-2000s, Nortel's public debt was issued by NNL without guarantee from any other Nortel entity. In 2006, while Nortel's credit rating was still adversely affected by various factors, NNL issued notes having an aggregate principal amount of US\$2 billion, which notes were conditionally guaranteed by NNI. NNI was a conditional guarantor in large part because at that time it carried certain hard assets on its balance sheet and because Nortel could obtain slightly better debt terms given that NNI was domiciled in the same place as the ultimate lenders, that is, the United States.

231 Thus it is quite clear from the evidence that when Nortel went to the bond market in 2006 and 2007 to raise funds, Nortel believed that it required the covenant of NNI in order to get the financing on terms and at a cost that Nortel wanted. However, prior to the Nortel insolvency in January, 2009, the market place did not differentiate in any material way the bonds that were guaranteed by NNI and the bonds not carrying a NNI guarantee.

232 From June, 2006 to December, 2008, Moody's and DBRS issued nine credit ratings for Nortel that did not distinguish between Nortel bonds guaranteed by NNI and those that were not. The UCC's expert witness Robert Kilimnik<sup>22</sup> agreed on his deposition that if a guarantee is a risk differentiator from DBRS's point of view, and there were a series of bonds with a guarantee and a series of bonds without a guarantee, he would expect them to be rated differently. This is an indication that the market did not differentiate between the NNC bonds guaranteed by NNI from those that were not guaranteed.

233 Another indication is the evidence of the Nortel bond spreads compared to U.S. government bonds contained in Ex. 58. The chart demonstrates that that Nortel bonds that carried an NNI guarantee traded at higher or equal spreads to Nortel bonds that did not carry an NNI guarantee. Mr. Kilimnik, an experienced bond trader, said on his deposition testimony was that bonds with a lower spread are considered less risky in the marketplace and that if guarantees were recognized by creditors as reducing the risk of issuances by the same company, he would have expected to see that expectation reflected in spread comparisons.

234 Mr. Paviter Binning, the Executive Vice-President and CFO of NNC from 2007 to March 2010 and an impressive witness to be sure, agreed with that conclusion of Mr. Kilimnik and testified that the data implied that the market was giving no value to the guarantees. He also testified that in his experience, investors generally looked to the overall quality of the company and that the guarantees were neither here nor there. He agreed that part of the reason why the guarantees may have had no meaning for the market was that the bonds were sub-investment grade in the first place. His evidence, which I accept, means that after the bonds were issued, the guarantees by NNI did not have a material effect on the marketplace.

235 John McConnell, a professor of business (finance) at Purdue University, delivered a report and testified on behalf the unsecured creditor's committee of NNI in response to a report of Leif M. Clark and Jay L. Westbrook, the latter of whom did

not testify at the trial. Professor McConnell's report contained data from the date that the Nortel Group filed for protection on January 14, 2009 to January 2014 which indicated that the bonds not guaranteed by NNI traded at prices below the bonds guaranteed by NNI.

236 I do not see this data as relevant. Counsel for the bondholders in his opening asserted that the expectations of bondholders that are relevant are the expectations pre-petition and not post-petition.

237 If the expectations of those who purchased bonds post-petition were relevant, there was no evidence at all from such purchasers. Professor McConnell spoke to no bondholder and on cross-examination admitted that he had no way of knowing what factors went into the purchase and/or sale of any of the Nortel bonds by any of the current bondholders in the market post-filing. No bondholder testified or gave any evidence of expectations in acquiring bonds.

238 The evidence of Professor McConnell is based entirely on the fact that after the insolvency filings, bonds without a NNI guarantee traded at a lower price than those with a NNI guarantee. There are two points that can be made. The first is that his conclusion is an inference drawn from the trading price of the bonds after the insolvency as to what motivated those purchasers of the bonds after the insolvency. Second, there was no analysis of Professor McConnell that would lead to the conclusion that his inference of bondholder purchaser expectations could apply to purchasers of bonds prior to the onset of insolvency. He said he could not do such an analysis because before insolvency the bonds had different attributes which would not permit him to draw inferences as to the effect of guarantees. Be that as it may, I would not accept the inference drawn by Professor McConnell regarding the effect of the guarantees on a purchaser of bonds. I prefer the evidence of Mr. Binning to which I have referred.<sup>23</sup>

239 Moreover, the evidence is clear that bonds trade on a much different basis after insolvency. Mr. Binning testified that prior to the threat of insolvency, the bonds traded on a yield to maturity basis, meaning that bondholders take all of the payments that would be expected to be made if the bond is held to maturity, and then calculate a percentage yield based upon the price paid for the bonds. Once insolvency or financial distress is anticipated, Mr. Binning testified that bonds trade in the hands of distressed investors who trade not on a yield to maturity basis but in a classic arbitrage market based upon price and expectations of future price and what they think they can make on the bonds during insolvency. He advised the board of Nortel on September 30, 2008, three and a half months before the Nortel filing, that RBC had advised that approximately 50% of the bonds had traded into the hands of distressed investors.

240 Professor McConnell also testified that as new information came into the marketplace about the likely recoveries, that would be reflected in the price of the bonds. That is another way of saying that distressed investors have bet on the future outcome of this case. This is reflected in the volumes and trading prices of the bonds at various times between January 14, 2009 and June, 2014, including (i) in the immediate aftermath of the Filing Date when the bonds were trading at very low prices, (ii) during the prolonged three-day auction resulting in the residual IP sale to Rockstar at the beginning of July 2011 as purchasers placed bets on bond price increases and recoveries following the completion of that sale; and (iii) in reaction to Delaware Bankruptcy Court Judge Walrath's September 2011 decision in *In re Washington Mutual* holding that post-petition interest must be awarded at the federal judgment rate and not at the rates in the various bonds.

241 The bondholders group that at the time of the trial held a majority of the unsecured guaranteed bonds purchased the vast majority of their holdings after the filing date of January 14, 2009 and at a significant discount to par. Certain members purchased when the bonds were trading at as low as 30 cents on the dollar and others received smaller, but still substantial, discounts. This can be seen in exhibits 59 and 60. The vast majority of their collective holdings were acquired in the period between July 31, 2009, at or around the time when Nortel began to liquidate its assets, and July 18, 2011, at or around the time of the Residual IP Sale.

242 The creditor expectations of the current bondholders, who acquired their bonds post-petition, even if known or supported by evidence, is not something I would take into account in this case. I infer from the evidence that any such expectations would have been based on their views as to litigation outcomes and should not be the basis of any decision by the courts.

243 In considering potential prejudice to the bondholders in the event of a pro rata allocation, consideration must be given to what the bondholders would gain. The bonds provide access to the assets of the issuer and guarantor. They do not provide any right to assets of any other entity in the Nortel Group. The 2006, 2007 and 2008 offering memoranda for the guaranteed bonds set out risks associated with the bonds, including the following notice regarding the lack of access to other Nortel entities:

The Issuers' subsidiaries are separate and distinct legal entities and any subsidiary that is not a Guarantor will have no obligation, contingent or otherwise, to pay amounts due under the Notes or the Guarantees or to make any funds available to pay those amounts, whether by dividend, distribution, loan or other payment.

244 The offering memoranda also contained the following risk that investors would face in the event of insolvency of Nortel entities and the lack of access to the assets of those entities:

In the event of a bankruptcy, liquidation or reorganization of any direct or indirect non-guarantor subsidiary of NNC, all of the creditors of that subsidiary (including trade creditors and creditors holding secured or unsecured indebtedness or guarantees issued by that subsidiary) and third parties having the benefit of liens (including statutory liens) against that subsidiary's assets will generally be entitled to payment of their claims from the assets of such non-guarantor subsidiary before any of those assets are made available for distribution to any Issuer that is a shareholder of such subsidiary. As a result, the Notes and the Guarantees are effectively junior to the obligations of non-guarantor subsidiaries.

245 Whereas the investors who acquired their bonds pursuant to the offering memoranda were specifically made aware that in the situation in which Nortel now finds itself, they would not have access to assets of other Nortel entities that had not guaranteed the bonds, the effect of a pro rata allocation is to provide the current bondholders with such access. The lockbox funds represent the proceeds of sale of all of the assets of all of the 38 entities under the IFSA. Creditors holding guarantees have access under a pro rata allocation to not only the assets of the principal obligor and guarantor corporations, but the proceeds of sale of all the assets of the selling debtors. This is access to more pools of assets than that for which the holder of a guarantee bargained.

246 While the current bondholders may have thought, or bet on an outcome, that NNL or NNI would likely achieve a win in this litigation that would provide those two companies with sufficient assets to pay the bonds in full and with post-filing interest, there was no guarantee at all that this would be achieved. The bonds contained no covenants that required the assets of NNL or NNI to be maintained at a certain level and no covenants that required the lockbox funds to be allocated in any manner. Mr. Binning had advised the Nortel board in September, 2008 that there were no maintenance covenants in the bonds, meaning that Nortel did not have to live up to any debt servicing ration. He testified that what the guarantees under these bonds essentially gave the bondholders was access to the assets in Canada and in the US without a great degree of comfort as to what those assets would be from time to time. I accept that evidence.

247 As to the effect of a pro rata allocation on the ability of issuers to issue bonds in the future, Professor McConnell on his cross-examination said that he had no opinion on that subject and that he had not tried to quantify what effect a pro rata allocation would have on the capital markets. Thus there is no evidence that a pro rata allocation in this case will detrimentally affect the capital markets and the ability of issuers to issue bonds in the future. Professor McConnell's statement that he had no opinion on the subject is perhaps not too surprising taken the highly unusual facts surrounding the Nortel insolvency and the difficulty of determining ownership of the IP that was sold.

248 It is said that the \$2 billion claim of NNI against NNL that was approved by both courts is an impediment to a pro rata allocation. I do not think that is the case. The \$2 billion claim will be treated as one of the unsecured liabilities of NNL.

249 The same principles that apply to the US\$ 2 billion claim by NNI against NNL will apply to the admitted claim of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014, and to the claim of the UKPC for £339.75 million recognized in my judgment of December 9, 2014.