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FRASER MILNER CASGRAIN LLP

ASSET SALES IN THE CCAA

Nortel Networks ("Nortel") brought a motion seeking approval of the sale of various Nortel assets to Nokia Siemens ("Asset Sale Agreement"), and for approval of a Sale Agreement and Bidding Procedures, advanced by Nortel for the purpose of conducting a "stalking horse" bidding process in respect of its Code Division Multiple Access ("CDMA") and Long-Term Evolution Access ("LTE") assets. As of the date of the motion, Nortel had yet to propose a formal plan of compromise or arrangement.

The threshold issue in raised on this motion was whether the CCAA affords the court the jurisdiction to approve a sales process in the absence of a formal plan and a creditor vote. If the question was answered in the affirmative, the secondary issue was whether the court should, in the particular case, grant the motion to sell the assets of Nortel in the manner proposed.

Jurisdiction to authorize a sale under the CCAA in the absence of a plan

Morawetz J concluded that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan, and that it was appropriate in this case to approve the proposed sales process. It is noteworthy that the order by Morawetz J was granted immediately after the Honourable Judge Gross of the United States Bankruptcy Court for the District of Delaware approved the Bidding Procedures in respect of Nortel's Chapter 11 proceedings.

In determining the court had jurisdiction to authorize a sale under the CCAA in the absence of a plan, Morawetz J accepted the statements in previous decisions in Ontario where courts have recognized that they have jurisdiction to approve asset sales absent a plan and vote where such sales were in the best interest of the stakeholders generally. His reasons were as follows:

"[t]he value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern."

Morawetz J was also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding.

Morawetz J distinguished the decision in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*") which questioned whether the court should authorize the sale of substantially all of the debtor's assets in the context of a CCAA proceeding. Morawetz J held that he did not disagree with the decision, but noted that unlike the present case, the debtor in *Cliffs Over Maple Bay* had no active business (i.e. would not survive as a going concern) and did not have the support of its stakeholders.

Factors to authorize a sale under the CCAA in the absence of a plan

Morawetz J then turned to a consideration of whether it was appropriate, in this case, to approve the sales process. Morawetz J accepted the submission by Counsel to the Applicants that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan [at para. 49]:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(d) is there a better viable alternative?

Morawetz J held that Nortel met the above "test", making reference to the following facts: Nortel has been working diligently on a plan to reorganize; Nortel has concluded that it cannot continue to operate successfully within the CCAA framework; unless a sale is undertaken the long-term viability of the business will be in jeopardy; the Sale Agreement continues the business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal; the auction process will serve to ensure Nortel receives the highest possible value for the business; the sale of the business is in the best interests of Nortel and its stakeholders; and, the value of the business is likely to decline over time.

Morawetz J in his decision seems to have adopted the submission by Nortel that the "overarching policy" of the CCAA is to preserve the benefit of a going concern business for "the whole economic community". In his disposition of the motion, Morawetz made particular note that "an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern" [at para. 54].

It will be interesting to consider this case, and the authorities cited in this decision, in view of the amendments to the CCAA which now statutorily provide rules for such transactions. Section 36 of the new legislation provides as follows:

36.(1) **Restriction on disposition of business assets** – A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) **Notice to creditors** – A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) **Factors to be considered** – In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) **Additional factors – related persons** – If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) **Related persons** – For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) **Assets may be disposed of free and clear** – The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) **Restriction – employers** – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

For further information, please contact Dave Mann at 403 268-7097 or David LeGeyt at 403 268-3075, or visit our website www.fmc-law.com/insolvency.