

Court File No. CV15-10961-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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 NELSON EDUCATION LTD. AND
NELSON EDUCATION HOLDINGS LTD.**

Applicants

REPLY COMPENDIUM OF THE APPLICANTS

**(Comeback Hearing
returnable May 29, 2015)**

GOODMANS LLP

Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
rchadwick@goodmans.ca
Caroline Descours LSUC#: 58251A
cdescours@goodmans.ca
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants

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A Sale by a Debtor Company that Preserves its Business as a Going Concern is Consistent with the Objectives of the CCAA¹

1. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the case relied on by RBC at paragraph 44 of its factum, has been distinguished on the basis that the debtor in that case had no active business and did not have stakeholder support. In this case, the Applicants have an active, ongoing business, the operations and value of which they are seeking to protect, and have the support of 21 out of 22 of their First Lien Lenders, representing approximately 88% of the obligations under the First Lien Credit Agreement.

Nortel Networks Corp., Re, (2009), 55 C.B.R. (5th) 229 at para. 44 (Ont. S.C.J. [Commercial List]) [*Nortel*]; Reply Compendium of the Applicants, Tab 1.

2. In *Nortel*, the Court held that the “CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.”

¹ Any capitalized terms that are not defined herein shall have the meanings ascribed to them in the Affidavit of Greg Nordal sworn on May 11, 2015 or the Factum of the Applicants dated May 28, 2015, as applicable. .

Nortel at paras. 46-47; Reply Compendium of the Applicants, Tab 1.

3. In *Brainhunter*, the applicants had stated in their application that they intended to solicit a going concern asset sale of the business and that it was unlikely that there would be a plan of arrangement. The Court held that it had the jurisdiction to grant the applicants with CCAA protection in those circumstances.

Brainhunter Inc., Re, 2009 CarswellOnt 7627 at paras. 8-10 (S.C.J. [Commercial List]) [*Brainhunter*]; Reply Compendium of the Applicants, Tab 2.

4. The Court in *Brainhunter* found that “it is well settled in Ontario that a court in a CCAA proceeding may order the sale of a business in the absence of a plan of arrangement being put to stakeholders for a vote. In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) Morawetz J. came to this conclusion after analyzing a number of cases that had made such an order.”

Brainhunter at para. 13 (S.C.J. [Commercial List]) [*Brainhunter*]; Reply Compendium of the Applicants, Tab 2.

5. The Court in *Brainhunter*, also referred to the Ontario Court of Appeal’s decision in *Consumers Packaging Inc., Re*, where the Court of Appeal stated that “[t]he sale of Consumers’ Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers’ business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.”

Brainhunter at para. 12; Reply Compendium of the Applicants, Tab 2.

6. The Court has approved a stay of proceedings in the absence of a plan in several cases, all of which involved the ultimate approval of a sale transaction.

Brainhunter; Reply Compendium of the Applicants, Tab 2.

Armtec Initial Order; Book of Authorities of the Applicants, Tab N.

Cinram Initial Order; Book of Authorities of the Applicants, Tab Q.

Maax Initial Order; Book of Authorities of the Applicants, Tab L.

7. Accordingly, the Applicants submit that the CCAA proceedings commenced by the Applicants on May 12, 2015, the principal objectives of which are (1) to ensure the ongoing operations of the Applicants for the benefit of their many stakeholders, and (2) to complete the sale and transfer of Nelson Education's business as a going concern to a newly incorporated entity to be owned indirectly by the Company's First Lien Lenders pursuant to the Transaction, are consistent with the purposes of the CCAA.

1

Case Name:
Nortel Networks Corp. (Re)

**RE: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,
Applicants
APPLICATION UNDER the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended**

[2009] O.J. No. 3169

55 C.B.R. (5th) 229

2009 CanLII 39492

2009 CarswellOnt 4467

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: June 29, 2009.

Judgment: June 29, 2009.

Released: July 23, 2009.

(59 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --
Application of Act -- Debtor company -- Motion by applicants for approval of bidding procedure
and Sale Agreement allowed -- Applicants had been granted CCAA protection and were involved in
insolvency procedures in four other countries -- Bidding procedures set deadline for entry and
involved auction -- Sale Agreement was for some of applicants' business units -- Neither proposal*

involved formal plan of compromise with creditors or vote, but CCAA was flexible and could be broadly interpreted to ensure objective of preserving business was met -- Proposal was warranted, beneficial and there was no viable alternative.

Motion by the applicants for the approval of their proposed bidding process and Sale Agreement. The applicants had been granted CCAA protection and were involved in insolvency proceedings in four other countries. The Monitor approved of the proposal. The bidding process set a deadline for bids and involved an auction. The Sale Agreement was for some of the applicants' business units. The applicants argued the proposal was the best way to preserve jobs and company value. The purchaser was to assume both assets and liabilities. There was no formal plan for compromise with creditors or vote planned.

HELD: Motion allowed. The CCAA was flexible and could be broadly interpreted to ensure that its objectives of preserving the business were achieved. The proposal was warranted and beneficial and there was no viable alternative. A sealing order was also made with respect to Appendix B, which contained commercially sensitive documents.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4)

Counsel:

Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al.

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor.

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF.

S. Philpott, for the Former Employees.

K. Zych, for Noteholders.

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund.

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors.

Arthur O. Jacques and Tom McRae, for Felske and Sylvain (de facto Continuing Employees' Committee).

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited.

A. Kauffman, for Export Development Canada.

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM.

ENDORSEMENT

G.B. MORAWETZ J.:-

INTRODUCTION

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

BACKGROUND

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

- (a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and
- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.), at paras. 44, 61, leave to appeal refused, [2008] S.C.C.A. No. 337. ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras.

43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 165 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra, Re PSINet, supra, Re Consumers Packaging, supra, Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar Financial Services Ltd. v. Hardrock Paving Co.* (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

36 In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

... we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra*, at paras. 5, 9.

37 Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra*, at para. 3.

39 In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not

feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The 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.

41 Counsel to the Applicants 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. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) 1, (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale ... be distributed to its creditors". 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*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership*, 2009 BCCA 319.

46 At paragraphs 24-26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms

that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoc J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring" ... Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged ...
26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary ...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (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?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) 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 for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted 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. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

G.B. MORAWETZ J.

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2009 CarswellOnt 7627
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 7627, [2009] O.J. No. 5207, 183 A.C.W.S. (3d) 28

**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 Brainhunter Inc., TrekLogic Inc.,
Brainhunter Canada Inc., Brainhunter (Ottawa) Inc. and Protec Employment Services Limited (Applicants)

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Newbould J.

Heard: December 2, 2009
Judgment: December 4, 2009
Docket: 09-8483-00CL

Counsel: Jay A. Swartz, James D. Bunting for Applicants
Grant B. Moffat for Deloitte and Touche Inc.
Edmond Lamek for Toronto-Dominion Bank
Joseph Bellissimo for Roynat Capital Inc.
Daniel R. Dowdall for certain noteholders
Patrick F. Schindler for an unsecured judgment creditor

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Canadian Company, located in Toronto, provided human resources services to clients — Bank was secured creditor of Company and agreed to provide applicants with \$7 million to meet working capital requirements during Companies' Creditors Arrangement Act (CCAA) proceedings — Company made application for protection under s. 18.6 of CCAA — Company intended to solicit going concern asset sale of business, which meant no plan of arrangement filed — Application allowed — Court can allow CCAA protection in cases where company does not file formal plan of compromise or arrangement.

Table of Authorities

Cases considered by *Newbould J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List]) — considered

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

Generally — referred to

s. 3 — referred to

s. 9 — referred to

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 2005, c. 47, s. 128] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.4(4) [en. 1997, c. 12, s. 124] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 36(1) — considered

APPLICATION by company for protection under s. 18.6 of *Companies' Creditors Arrangement Act*.

Newbould J.:

1 On December 2, 2009 after hearing submissions from the parties present, I made an initial order granting CCAA protection to the applicants, with reasons to follow. These are my reasons.

2 There is no question that the Court has jurisdiction to hear the application pursuant to section 9 of the CCAA as the applicants' head offices are located in Toronto, Canada. At the time of the application, Brainhunter Inc. was listed on the TSX. The applicants qualify as debtor companies pursuant to section 3 of the CCAA as the applicants are affiliated companies with total claims against them of more than \$5 million. The applicants are all insolvent.

3 The applicants are in the business of providing human resources with the skill sets to satisfy their clients' needs. The applicants' business operates in large part through umbrella agreements generally referred to as Master Service Agreements. These agreements are entered into by the applicable applicant and each of their respective contract staffing clients.

4 Each time a contract staffing client wishes to retain the services of an individual (each a "Contractor") pursuant to a Master Services Agreement, the client will enter into a sub-agreement referred to as a statement of work in respect of the specific Contractor. The applicable applicant subsequently enters into an agreement with the Contractor to fulfill the statement of work and the Contractor issues invoices to the applicant for the work he or she performs for the client. The applicant then pays the

Contractor and bills the client. Because the applicants receive payment from their clients after they pay their Contractors, the applicants are dependent on having adequate credit facilities available to fund the payments to Contractors until the related invoices from the client can be collected.

5 TD Bank and Roynat are secured creditors with security over all of the assets of the applicants. As at October 31, 2009 there was principal outstanding of \$18.7 million to TD Bank and principal and interest of \$5.9 million owing to Roynat.

6 In addition there are secured subordinated promissory notes secured only on the assets of Brainhunter Inc. The principal and interest outstanding as at October 31, 2009 was \$11.9 million. Most of the material assets of the applicants are not held in Brainhunter Inc., but by the other applicants.

7 TD Bank and the applicants have entered into a debtor-in-possession financing term sheet, pursuant to which the TD Bank has agreed to provide the applicants with \$7 million of DIP financing to enable the applicants to meet their working capital requirements during the CCAA proceedings.

8 This application is in some respects unusual because the applicants state that they intend at the outset to solicit a going concern asset sale of the business, and that it is likely that there will be no plan of arrangement filed. The factum on their behalf states:

5. If protection is granted under the CCAA, the Applicants intend to bring a motion seeking approval of a bid process to solicit going concern asset purchase offers for the Applicants' business, as well as offers to sponsor a plan of arrangement (the "Bid Process"). The Applicants have entered into an agreement to sell substantially all of their assets as a going concern on the understanding that this agreement will serve as a stalking horse bid. The Bid Process will solicit competing offers from prospective investors to bid up the stalking horse bid.

24. Although the proposed Bid Process could result in the filing of a plan of arrangement or plan of compromise, it is more likely to result in the sale of the Applicants' business.

9 The applicants submit that this Court has the jurisdiction to provide them with protection under the CCAA in circumstances such as these where the applicants may not file a formal plan of compromise or arrangement.

10 I agree with the applicants that protection under the CCAA may be granted in these circumstances. I say that for the following reasons.

11 The initial protection is supported by TD Bank and Roynat. It is also supported by the secured noteholders represented by Mr. Dowdall, being a little more than 60% of the noteholders. Mr. Dowdall has other concerns that I will deal with.

12 It is well settled in Ontario that a court in a CCAA proceeding may approve a sale of all or substantially all of the assets of a debtor company as a going concern. In *Consumers Packaging Inc., Re*, 27 C.B.R. (4th) 197 (Ont. C.A.), the Court stated:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

13 Similarly, it is well settled in Ontario that a court in a CCAA proceeding may order the sale of a business in the absence of a plan of arrangement being put to stakeholders for a vote. In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) Morawetz J. came to this conclusion after analyzing a number of cases that had made such an order. See paras 35 to 40 of his reasons for judgment.

14 It seems to me that if at some point in time after an initial CCAA protection order has been made, it appears appropriate to undertake a sales process to sell the business without a plan of arrangement in place, there is no reason why CCAA protection should not initially be granted if at the outset it is thought appropriate to undertake a sales process without a plan of arrangement

in place. It is simply a matter of timing as to when it appears appropriate to pursue a sale of the business without a plan of arrangement in place.

15 *Nortel Networks Corp., Re* was decided before the new CCAA provisions came into force on September 18, 2009. The new relevant provision does not, however, affect the principles accepted by Morawetz J. in that case. Section. 36(1) provides:

36.(1) 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.

16 In *Canwest Global Communications Corp., Re* [2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List])] released November 12, 2009, Pepall J. stated the following regarding s. 36:

The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."

17 The applicants have not yet brought their motion for approval of a sales process, and consideration as to whether such a sales process is appropriate will take place when the motion is heard.¹ The fact that the motion was anticipated at the time of the initial order with no plan of arrangement in sight does not mean however that the initial order should not be made.

18 The applicants seek an order declaring that the Contractors are "critical suppliers", permitting the payment of pre-filing amounts to the contractors and creating a charge that secures the obligations owed to the Contractors.

19 The authorization to pay pre-filing amounts is now codified in section 11.4 of the CCAA. Pursuant to this section, the Court has the discretion to:

(a) declare a person to be a critical supplier, if it is satisfied the person is a supplier of goods or services to the company and the goods or services are critical to the company's continued operations (s. 11.4(1));

(b) make an order requiring the "critical supplier" to supply any goods or services specified by the Court to the company on any terms and conditions that are consistent with the supply relationship or the Court considers appropriate (s. 11.4(2));

(c) grant a charge in favour of a person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order (s. 11.4(3)); and

(d) order the security or charge to rank in priority over the claim of any secured creditor of the company (s. 11.4(4)).

20 The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

21 The applicants submit, and I accept, that an order permitting the payment of pre-filing amounts is necessary to ensure the continued provision of personal services from the Contractors to the applicants and to prevent the potentially significant harm that could follow if such payments are not made. If the Contractors are not paid for services provided before the filing of

the application, there is a substantial risk they will not continue to perform services under the current statements of work. This would result in a default by the applicants to their clients and impact the ability of the applicants to continue as a going concern.

22 As the Contractors are individuals, the applicants did not seek an order requiring the continued supply of personal services. However, they requested a charge to secure payment to the Contractors in order to provide assurances to the Contractors that their relationship will be unaffected during the CCAA proceedings. The amount of the Contractors' charge requested is \$15 million which represents an estimated average of the amount owing to Contractors. The applicants requested that the Contractors' charge rank in priority to all secured lenders other than the TD Bank. Roynat is agreeable to that and the notesholders represented here do not oppose it. Deloitte & Touche Inc, in their capacity as the proposed monitor, in their pre-filing report support the charge as reasonable.

23 I am satisfied that it is appropriate to provide in the initial order that the Contractors are declared to be critical suppliers, that the applicants shall be entitled to pay outstanding and future amounts owing to Contractors and that a Contractors' charge as requested be provided.

24 The applicants also requested other charges, being (i) an administration charge of \$1 million; (ii) a KERP charge of \$290,000 under which the CEO is to be paid a retention bonus of \$50,000 for two months in addition to his salary and 10 key employees will be paid up to \$190,000 if they remain with the company for four months from the date of filing; (iii) a directors and officers charge of \$1.7 million; and (iv) a DIP charge to secure the \$7 million DIP facility being provided by TD Bank.

25 TD Bank and Roynat support these charges and their priority provided for in the initial order. Deloitte & Touche Inc. expressed the view that the proposed charges are necessary and reasonable and will provide the applicants with the opportunity to successfully complete a restructuring.

26 Mr. Dowdall for the noteholders raised a concern with some of these charges. He said that while counsel for the applicants discussed with him in advance the intention to file, he was not made aware of the details and his clients have not had an opportunity to review the information provided in the material filed with the Court. Thus he wishes to reserve his clients' rights with respect to these charges. He has a concern that while typically such concerns when raised at the initial application are met with the response that there is a come-back clause in the initial order, people start relying on the charges and it becomes difficult to oppose them as time passes. I think his concern is a fair one. In this case, however, not only is there a come-back clause with a 7 days notice requirement, but the matter will be before the Court shortly on December 8, 2009 when the motion to approve a sales process will be dealt with. Mr. Dowdall's clients will have had an opportunity to consider their position before then and be able to move to vary the initial order if they so desire.

27 In the circumstances, on the basis of the record before me, the charges appear appropriate and are approved. This is without prejudice, however, to the noteholders right to contest them. Any delay, however, in taking steps to contest them will obviously seriously affect any attack on them.

28 Mr. Schindler represents an unsecured judgment creditor owed approximately \$250,000. His client of course had not seen the material before it was filed, and Mr. Schindler said that he had been intending to ask that the entire matter be adjourned for a week, and that he was asking that the charges not be made for at least a week to provide his client with time to consider whether they are warranted.

29 In exercising the balancing of interests required in a CCAA application, it would be risky indeed to delay the application or these charges at the request of one unsecured creditor. These are standard charges and deemed necessary by the proposed monitor. It should be noted that the sections of the CCAA under which the charges are authorized, being sections 11.2(1), 11.4(1), 11.51(1) and 11.52(1), provide that notice of a request for such charges is to be given to the secured creditors who are likely to be affected by the charge. Notice is not required to be given to unsecured creditors. In the circumstances, I declined the request to delay the charges.

Application allowed.

Footnotes

1 The motion is now scheduled for December 8, 2009

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NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

CCAA Matter	CCAA Filing Date	Monitor Engagement Date	Monitor	Transaction	Reference
<i>Re Maax Corporation et al.</i>	June 12, 2008	December 20, 2007	Alvarez & Marsal Canada ULC	first lien credit bid sale of assets	Tabs L and M
<i>Re Canwest Global Communications Corp.</i>	October 6, 2009	January 29, 2009	FTI Consulting Canada Inc.	third party sale and CCAA Plan	Tab G
<i>Re Allen Vanguard Corporation</i>	December 9, 2009	2 years prior to filing date	Deloitte & Touche Inc.	acquisition transaction	Tabs O and P
<i>Re Angiotech Pharmaceuticals, Inc. et al.</i>	January 28, 2011	August 17, 2010	Alvarez & Marsal Canada Inc.	restructuring plan	Tabs U and V
<i>Re Cinram International Inc. et al.</i>	June 25, 2012	February, 2010	FTI Consulting Canada Inc.	third party sale of assets	Tabs Q and R
<i>Re Cline Mining Corporation et al.</i>	December 3, 2014	April 9, 2014	FTI Consulting Canada Inc.	first lien credit bid pursuant to CCAA Plan	Tabs S and T
<i>Re Armtec Infrastructure Inc.</i>	April 29, 2015	February, 2015	Ernst & Young Inc.	first lien credit bid and sale of assets	Tab N

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT* ACT, R.S.C.
1985, c. C-36, AS AMENDED

Court File No: CV15-10961-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST**

Proceeding commenced at Toronto

**REPLY COMPENDIUM OF THE APPLICANTS
(Comeback Hearing returnable May 29, 2015)**

GOODMANS LLP

Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
rchadwick@goodmans.ca
Caroline Descours LSUC#: 58251A
cdescours@goodmans.ca
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants