Court File No. CV-17-11846-00CL

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 SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

BOOK OF AUTHORITIES OF THE MONITOR
(Meetings Order Motion)
(returnable February 12, 2019)

February 8, 2019

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TAB 1

Case Name:

ScoZinc Ltd. (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 ScoZinc Limited

[2009] N.S.J. No. 227

2009 NSSC 163

55 C.B.R. (5th) 205

2009 CarswellNS 283

177 A.C.W.S. (3d) 294

Docket: Hfx No. 305549

Registry: Halifax

Nova Scotia Supreme Court
Halifax, Nova Scotia

D.R. Beveridge J.

Heard: May 1, 2009.
Oral judgment: May 1, 2009.
Released: May 20, 2009.

(13 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Proposals -- Meetings of creditors -- Sanction by court -- Motion by ScoZinc for a meeting of creditors under the Companies' Creditors Arrangement Act, for extension of a stay of proceedings, and for approval that notice of the motion be given only to defined creditors allowed -- Court approval of the proposal was not necessary before it was presented to creditors; accordingly, the meeting was ordered -- The extension of the stay was granted -- Given the volume of material involved, only creditors with claims over $100,000 need be given notice of the motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Notice -- Stays -- Motion by ScoZinc for a meeting of creditors under the Companies' Creditors Arrangement Act, for extension of a stay of proceedings, and for

approval that notice of the motion be given only to defined creditors allowed -- Court approval of the proposal was not necessary before it was presented to creditors; accordingly, the meeting was ordered -- The extension of the stay was granted -- Given the volume of material involved, only creditors with claims over $100,000 need be given notice of the motion.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 5, s. 11, s. 11(4), s. 11(6)

Counsel:

John D. Stringer, Q.C. and Ben Durnford, for the applicant.

Robbie MacKeigan, Q.C., for Daniel Rozon.

John McFarlane, Q.C. for Kamatsu.

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1 **D.R. BEVERIDGE J.** (orally):-- ScoZinc brings a motion seeking an order to accomplish three things. The first is for a meeting of the creditors pursuant to ss. 4 and 5 of the *Companies' Creditors Arrangement Act*. The second is a further extension of the stay of proceedings initially ordered by this Court on December 22, 2008 and extended from time to time. The third is approval of notice of this motion being given only to certain defined creditors.

2 The company has filed an affidavit of William Felderhof referred to as his seventh affidavit, sworn April 28, 2009 and the Monitor has filed its sixth report dated April 30, 2009.

3 As part of its submissions the company notes that there is nothing in the *CCAA* which requires the Court to give prior preliminary approval of ScoZinc's proposed plan before it is presented to the creditors. It notes that the jurisprudence establishes that this approval is generally desirable prior to calling a meeting of the creditors. Some, but not all of this jurisprudence was reviewed by MacAdam J. in *Re Federal Gypsum* 2007 NSSC 384.

4 Justice MacAdam in *Re Federal Gypsum* did refer to the two different standards that have been proposed or referred to in cases from Ontario and British Columbia. Some of these cases have expressed the view that the debtor company should establish that the plan has "a reasonable chance" that it would be accepted by the creditors. Other cases have referred to the appropriate test as simply a determination as to whether or not the proposed plan is one that would be "doomed to failure".

5 In a different context, Glube C.J.T.D. (as she then was) in *Fairview Industries* (1991), 11 C.B.R. (3d) 43 cautioned that it would be impractical and extremely costly to continue to prepare a plan when "there is no hope that it would be approved".

6 I think it fair to say that MacAdam J., although not expressly but by necessary implication, preferred the lower standard facing a debtor company in submitting its plan to the Court for a preliminary approval. At para. 12 he wrote:

> [12] In view of the relatively low threshold on the Company in seeking Court approval to have a plan of arrangement submitted to the creditors for a vote, I am satisfied the plan should proceed and the creditors should determine whether they do, or do not accept the plan as finally filed.

7 In my opinion it should not be up to the Court to second guess the probability of success of a proposed plan of arrangement. Businessmen are free to make their own views known before and ultimately at the creditors' meeting. It

seems to me that the Court should only decline to give preliminary approval and refuse to order a meeting if it was of the view that there was no hope that the plan would be approved by the creditors or, if it was approved by the creditors, it would not, for some other reason, be approved by the Court.

8 The Monitor in its sixth report says that the proposed plan is reasonable under the circumstances. This opinion appears to flow from its conclusion that if the plan is rejected and the company forced into receivership or bankruptcy, unsecured creditors will not recover the amount offered in the plan and it is highly unlikely that the secured creditors will recover the amount offered to them. I see no reason to disagree with the opinion offered by the Monitor.

9 Given that opinion and in light of the terms that are set out in the proposed plan I am certainly satisfied that the plan is far from one that is doomed to failure. It is one that should be put to the creditors for their consideration. It is therefore appropriate that I exercise the discretion that is set out in ss. 4 and 5 of the *CCAA* and order a meeting of the creditors on the terms set out in the proposed meeting order.

10 With respect to the extension of the stay of proceedings, as I noted at the outset there had been an initial order of this Court under s. 11 of the *CCAA*. This order was granted on December 22, 2008. It was, as required by the statute, limited to a period of 30 days. It has been extended on two previous occasions. It is now due to expire May 22nd, 2009. The meeting of the creditors is scheduled for May 21, 2009. There is a tentative return date scheduled for May 28, 2009 for the Court to consider sanctioning the plan, should it be approved by the creditors.

11 The test with respect to extending the stay of proceedings has been set out in a number of cases that have considered ss. 11(4) and (6) of the *CCAA*. These were reviewed by me in *Re ScoZinc Ltd.* 2009 NSSC 108. In these circumstances there is no need to review the test and the evidence in support of that test.

12 In light of my conclusion that the company had met the threshold for ordering a meeting of the creditors under ss. 4 and 5 of the *CCAA* the appropriateness of a further extension permitting the company to return to the Court within a very short period of time following that meeting of the creditors is patently obvious. The extension is therefore granted.

13 The last issue is the approval of notice of this motion being given only to certain defined creditors. Given the number of creditors that appeared early on in the proceedings it was somewhat impractical to give notice to each of them with the volumes of materials that would be required to be produced and served. With respect to the prior motions it was required that notice be given to all creditors asserting claims against the debtor company in excess of $100,000.00 and all creditors asserting builders liens. In addition all creditors were apprised of these proceedings by way of the mail out to each and every creditor as required by the *CCAA* leading to filing of proofs of claim. The status of the proceedings, including this motion, have been posted on the Monitor's website. I see no reason to depart from the previous practice and this aspect of the motion is also granted.

D.R. BEVERIDGE J.

TAB 2

Case Name:

Jaguar Mining (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 Jaguar Mining Inc., Applicant

[2014] O.J. No. 214

12 C.B.R. (6th) 290

236 A.C.W.S. (3d) 820

2013 CarswellOnt 18630

Court File No. CV-13-10383-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz R.S.J.

Heard: December 23, 2013.
Judgment: January 16, 2014.

(50 paras.)

Corporations, partnerships and associations law -- Corporations -- Arrangement -- Application to court -- Powers of court -- Approval -- Fair and reasonable -- Application by Jaguar Mining for protection under Companies' Creditors Arrangement Act allowed -- Jaguar was holding company with registered office in Toronto -- Parent company to subsidiaries that carried on active gold mining -- Current liabilities exceeded assets by $40 million -- Recapitalization supported by unsecured creditors -- Jaguar faced liquidity crisis and was insolvent -- Stay of proceedings to Jaguar's subsidiaries was appropriate given Jaguar depended on them for their value generating capacity -- Reasonable and appropriate to grant administration charge and director's charge over Jaguar's property.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --

Application of Act -- Where total claim exceeds $5,000,000 -- Compromises and arrangements -- With unsecured creditors -- Applications -- Initial applications -- Costs of administration -- Application by Jaguar Mining for protection under Companies' Creditors Arrangement Act allowed -- Jaguar was holding company with registered office in Toronto -- Parent company to subsidiaries that carried on active gold mining -- Current liabilities exceeded assets by $40 million -- Recapitalization supported by unsecured creditors -- Jaguar faced liquidity crisis and was insolvent -- Stay of proceedings to Jaguar's subsidiaries was appropriate given Jaguar depended on them for their value generating capacity -- Reasonable and appropriate to grant administration charge and director's charge over Jaguar's property.

Application by Jaguar Mining for protection under the Companies' Creditors Arrangement Act. Jaguar was a holding company with a registered office in Toronto and no active business operations. It was the public parent company to several corporations that carried on active gold mining and exploration in Brazil. Its subsidiaries' assets included properties in the development and production stages. Jaguar's objective was to effect a recapitalization and financing transaction on an expedited basis through a plan of compromise and arrangement to provide a financial foundation for Jaguar and its subsidiaries to continue to work towards its operational and financial goals. The recapitalization was expected to result in the reduction of over $268 million of debt and new liquidity upon exit of $50 million. Jaguar's senior unsecured convertible notes were the primary liabilities affected by the recapitalization. Jaguar had not paid the latest interest payment due on the notes and was in default. Its current liabilities exceeded its assets by $40 million. The recapitalization was supported by an ad hoc committee of noteholders. Jaguar sought an administrative charge and director's charge over its property.

HELD: Application allowed. Jaguar faced a liquidity crisis and was insolvent. It had complied with its obligations under s. 10(2) of the Companies' Creditors Arrangement Act. A stay of proceedings to Jaguar's subsidiaries was appropriate given Jaguar depended on them for their value generating capacity. It was reasonable and appropriate to grant the administration charge and director's charge over Jaguar's property. Engagement letters were approved and sealed given they contained sensitive commercial information, the disclosure of which could be harmful to the parties at issue. An Initial Order, Claims Procedure Order and Meeting Order were granted to assist Jaguar's quick implementation of the recapitalization.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. B.16,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 10(2), s. 11.51, s. 11.52, s. 22(2)

Counsel:

Tony Reyes and Evan Cobb, for the Applicant, Jaguar Mining Inc.

Robert J. Chadwick and Caroline Descours, for the Ad Hoc Committee of Noteholders.

Joseph Bellissimo, for Global Resource Fund, Secured Lender.

Jeremy Dacks, for FTI Consulting Canada Inc., Proposed Monitor.

Robin B. Schwill, for the Special Committee of the Board of Directors.

REASONS

G.B. MORAWETZ R.S.J.:--

ENDORSEMENT

1 On December 23, 2013, I heard the CCAA application of Jaguar Mining Inc. ("Jaguar") and made the following three endorsements:

1. CCAA protection granted. Initial Order signed. Reasons will follow. It is expected that parties will utilize the e-Service Protocol which can be confirmed on comeback motion. Sealing Order of confidential exhibits granted.
2. Meeting Order granted in form submitted.
3. Claims Procedure Order granted in form submitted.

2 These are my reasons.

3 Jaguar sought protection from its creditors under the *Companies' Creditors Arrangement Act* ("CCAA") and requested authorization to commence a process for the approval and implementation of a plan of compromise and arrangement affecting its unsecured creditors.

4 Jaguar also requested certain protections in favour of its wholly-owned subsidiaries that are not applicants (the "Subsidiaries" and, together with the Applicant, the "Jaguar Group").

5 Counsel to Jaguar submits that the principal objective of these proceedings is to effect a recapitalization and financing transaction (the "Recapitalization") on an expedited basis through a plan of compromise and arrangement (the "Plan") to provide a financial foundation for the Jaguar Group going forward and additional liquidity to allow the Jaguar Group to continue to work towards its operational and financial goals. The Recapitalization, if implemented, is expected to result in a reduction of over $268 million of debt and new liquidity upon exit of approximately $50 million.

6 Jaguar's senior unsecured convertible notes (the "Notes") are the primary liabilities affected by the Recapitalization. Any other affected liabilities of Jaguar, which is a holding company with no active business operations, are limited and identifiable.

7 The Recapitalization is supported by an Ad Hoc Committee of Noteholders of the Notes (the "Ad Hoc Committee of Noteholders") and other Consenting Noteholders, who collectively represent approximately 93% of the Notes.

8 The background facts are set out in the affidavit of David M. Petrov sworn December 23, 2013 (the "Petrov Affidavit"), the important points of which are summarized below.

9 Jaguar is a corporation existing under the *Business Corporations Act*, R.S.O. 1990 c. B.16, with a registered office in Toronto, Ontario. Jaguar has assets in Canada.

10 Jaguar is the public parent corporation of other corporations in the Jaguar Group that carry on active gold mining and exploration in Brazil, employing in excess of 1,000 people. Jaguar itself does not carry on active gold mining operations.

11 Jaguar has three wholly-owned Brazilian operating subsidiaries: MCT Mineraçao Ltda. ("MCT"), Mineraçao Serras do Oeste Ltda. ("MSOL") and Mineraçao Turmalina Ltda. ("MTL") (and, together with MCT and MSOL, the "Subsidiaries"), all incorporated in Brazil.

12 The Subsidiaries' assets include properties in the development stage and in the production stage.

13 Jaguar has been the main corporate vehicle through which financing has been raised for the operations of the Jaguar Group. The Subsidiaries have guaranteed repayment of certain funds borrowed by Jaguar.

14 Jaguar has raised debt financing by (a) issuing notes, and (b) borrowing from Renvest Mercantile Bank Corp. Inc., through its global resource fund ("Renvest").

15 In aggregate, Jaguar has issued a principal amount of $268.5 million of Notes through two transactions, known as the "2014 Notes" and the "2016 Notes".

16 Interest is paid semi-annually on the 2014 Notes and the 2016 Notes. Jaguar has not paid the last interest payment due on November 1, 2013. Under the 2014 Notes, the grace period has lapsed and an event of default has occurred.

17 Jaguar is also the borrower under a fully drawn $30 million secured facility (the "Renvest Facility") with Renvest. The obligations under the Renvest Facility are secured by a general security agreement from Jaguar as well as guarantees and collateral security granted by each of the Subsidiaries.

18 Jaguar has identified another potential liability. Mr. Daniel Titcomb, former chief executive officer of Jaguar, and certain other associated parties, have instituted a legal proceeding against Jaguar and certain of its current and former directors that is currently proceeding in the United States Federal Court. Counsel to Jaguar submits that this lawsuit alleges certain employment-related claims and other claims in respect of equity interests in Jaguar that are held by Mr. Titcomb and others. Counsel to Jaguar advises that Jaguar and its board of directors believe this lawsuit to be without merit.

19 Counsel also advises that, aside from the lawsuit and professional service fees incurred by Jaguar, the unsecured liabilities of Jaguar are not material.

20 The Jaguar Group's mines are not low-cost gold producers and the recent decline in the price of gold has negatively impacted the Jaguar Group.

21 Based on current world prices and Jaguar Group's current level of expenditures, the Jaguar Group is expected to cease to have sufficient cash resources to continue operations early in the first quarter of 2014.

22 Counsel also submits that, as a result of Jaguar's event of default under the 2014 Notes, certain remedies have become available, including the possible acceleration of the principal amount and accrued and unpaid interest on the 2014 Notes. As of November 13, 2013, that principal and accrued interest totalled approximately $169.3 million.

23 Jaguar's unaudited consolidated financial statements for the nine months ending September 30, 2013 show that Jaguar had an accumulated deficit of over $317 million and a net loss of over $82 million for the nine months ending September 30, 2013. Jaguar's current liabilities (at book value) exceed Jaguar's current assets (at book value) by approximately $40 million.

24 I accept that Jaguar faces a liquidity crisis and is insolvent.

25 Jaguar has been involved in a strategic review over the past two years. Counsel submits that the efforts of Jaguar and its advisors have shown that a comprehensive restructuring plan involving a debt-to-equity exchange and an investment of new money is the best available alternative to address Jaguar's financial issues.

26 Counsel to Jaguar advises that the board of directors of Jaguar has determined that the Recapitalization is the best available option to Jaguar and, further, that the plan cannot be implemented outside of a CCAA proceeding. Counsel emphasizes that without the protection of the CCAA, Jaguar is exposed to the immediate risk that enforcement steps may be taken under a variety of debt instruments. Further, Jaguar is not in a position to satisfy obligations that may result from such enforcement steps.

27 Jaguar requests a stay of proceedings in favour of non-applicant Subsidiaries contending that,

because of Jaguar's dependence upon its Subsidiaries for their value generating capacity, the commencement of any proceedings or the exercise of rights or remedies against these Subsidiaries would be detrimental to Jaguar's restructuring efforts and would undermine a process that would otherwise benefit Jaguar Group's stakeholders as a whole.

28 Jaguar also seeks a charge on its current and future assets (the "Property") in the maximum amount of $5 million (a $500,000 first-ranking charge (the "Primary Administration Charge") and a $4.5 million fourth-ranking charge (the "Subordinated Administration Charge") (together, the "Administration Charge")). The purpose of the charge is to secure the fees and disbursements incurred in connection with services rendered both before and after the commencement of the CCAA proceedings by various professionals, as well as Canaccord Genuity and Houlihan Lokey, as financial advisors to the Ad Hoc Committee (collectively, the "Financial Advisors").

29 Counsel advises that the Financial Advisors' monthly work fees (but not their success fees) will be secured by the Primary Administration Charge, while the Financial Advisors' success fees will be secured solely by the Subordinated Administration Charge.

30 Counsel further advises that the Proposed Initial Order contemplates the establishment of a charge on Jaguar's Property in the amount of $150,000 (the "Director's Charge") to protect the directors and officers. Counsel further advises that the benefit of the Director's Charge will only be available to the extent that a liability is not covered by existing directors and officers insurance. The directors and officers have indicated that, due to the potential for personal liability, they may not continue their service in this restructuring unless the Initial Order grants the Director's Charge.

31 Counsel to Jaguar further advises that the proposed monitor is of the view that the Director's Charge and the Administration Charge are reasonable in these circumstances.

32 Jaguar is unaware of any secured creditors, other than those who have received notice of the application, who are likely to be affected by the court-ordered charges.

33 In addition to the Initial Order, Jaguar also seeks a Claims Procedure Order and a Meeting Order, submitting that it must complete the Recapitalization on an expedited timeline.

34 Each of the Claims Procedure Order and Meeting Order include a comeback provision.

35 Having reviewed the record and upon hearing submissions, I am satisfied the Applicant is a company to which the CCAA applies. It is insolvent and faces a looming liquidity crisis. The Applicant is subject to claims in excess of $5 million and has assets in Canada. I am also satisfied that the application is properly before me as the Applicant's registered office and certain of its assets are situated in Toronto, Ontario.

36 I am also satisfied that the Applicant has complied with the obligations of s. 10(2) of the CCAA.

37 I am also satisfied that an extension of the stay of proceedings to the Subsidiaries of Jaguar is appropriate in the circumstances. Further, I am also satisfied that it is reasonable and appropriate to grant the Administration Charge and the Director's Charge over the Property of the Applicant. In these circumstances, I am also prepared to approve the Engagement Letters and to seal the terms of the Engagement Letters. In deciding on the sealing provision, I have taken into account that the Engagement Letters contain sensitive commercial information, the disclosure of which could be harmful to the parties at issue. However, as I indicated at the hearing, this issue should be revisited at the comeback hearing.

38 I am also satisfied that Jaguar should be authorized to comply with the pre-filing obligations to the extent provided in the Initial Order.

39 In arriving at the foregoing conclusions, I reviewed the argument submitted by counsel to Jaguar that the stay of proceedings against non-applicants is appropriate. The Jaguar Group operates in a fully integrated manner and depends upon its Subsidiaries for their value generating capacity. Absent a stay of proceedings not only in favour of Jaguar but also in favour of the Subsidiaries, various creditors would be in a position to take enforcement steps which could conceivably lead to a failed restructuring, which would not be in the best interests of Jaguar's stakeholders.

40 The court has jurisdiction to extend the stay in favour of Jaguar's Subsidiaries. See *Lehndorff General Partners Limited (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); *Calpine Canada Energy Limited (Re)*, 2006 ABQB 153, 19 C.B.R. (5th) 187; *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, 3 C.B.R. (6th) 150.

41 The authority to grant the court-ordered Administration Charge and Director's Charge is contained in ss. 11.51 and 11.52 of the CCAA.

42 In granting the Administration Charge, I am satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;
(ii) the amount is appropriate; and
(iii) the charges should extend to all of the proposed beneficiaries.

43 In considering both the amount of the Administration Charge and who should be entitled to its benefit, the following factors can also be considered:

(a) the size and complexity of the business being restructured; and
(b) whether there is an unwarranted duplication of roles.

See *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, 63 C.B.R. (5th) 115.

44 In this case, the proposed restructuring involves the proposed beneficiaries of the charge. I accept that many have played a significant role in the negotiation of the Recapitalization to date and

will continue to play a role in the implementation of the Recapitalization. I am satisfied that there is no unwarranted duplication of roles among those who benefit from the proposed Administration Charge.

45 With respect to the Director's Charge, the court must be satisfied that:

(i) notice has been given to the secured creditors likely to be affected by the charge;
(ii) the amount is appropriate;
(iii) the applicant could not obtain adequate indemnification insurance for the director or officer at a reasonable cost; and
(iv) the charge does not apply in respect of any obligation incurred by a director or officer as a result of the director's or officer's gross negligence or wilful misconduct.

46 A review of the evidence satisfies me that it is appropriate to grant the Director's Charge as requested.

47 Jaguar requested that the Initial Order authorize it to perform certain pre-filing obligations in respect of professional service providers and third parties who provide services in respect of Jaguar's public listing agreement. In the circumstances, I find it to be reasonable that Jaguar be authorized to perform these pre-filing obligations.

48 In view of Jaguar's desire to move quickly to implement the Recapitalization, I have also been persuaded that it is both necessary and appropriate to grant the Claims Procedure Order and the Meeting Order at this time. These are procedural steps in the CCAA process and do not require any assessment by the court as to the fairness and reasonableness of the Plan at this stage.

49 Counsel to Jaguar submits that Jaguar's approach to classification of the affected unsecured creditors is appropriate in these circumstances, citing a commonality of interest. Counsel also references s. 22(2) of the CCAA. For the purposes of today's motion, I am prepared to accept this argument. However, this is an issue that can, if raised, be reviewed at the comeback hearing.

50 In the result, an Initial Order is granted together with a Meeting Order and Claims Procedure Order. All orders have been signed in the form presented.

G.B. MORAWETZ R.S.J.

TAB 3

Case Name:

Arrangement relatif à Bloom Lake

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, QUINTO MINING CORPORATION, 8568391 CANADA LIMITED, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., Petitioners, and THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, BLOOM LAKE RAILWAY COMPANY LIMITED, WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED, Mises-en-cause, and FTI CONSULTING CANADA INC., Monitor, and MICHAEL KEEPER, TERENCE WATT, DAMIEN LEBEL AND NEIL JOHNSON and SYNDICAT DES MÉTALLOS, LOCAL 6254, SYNDICAT DES MÉTALLOS, LOCAL 6285, SYNDICAT DES MÉTALLOS, LOCAL 9996, Objecting parties

[2018] Q.J. No. 3283

2018 QCCS 1657

2018EXP-1363

291 A.C.W.S. (3d) 235

39 C.C.P.B. (2d) 161

EYB 2018-293478

2018 CarswellQue 2860

No.: 500-11-048114-157

Quebec Superior Court
District of Montreal

The Honourable Stephen W. Hamilton J.S.C.

Heard: April 16, 2018.
Judgment: April 20, 2018.
Rectified Judgment: April 25, 2018.

(69 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- The Court concluded that there should be meetings of creditors to consider and vote on the Plan -- The Court dismissed the Union's argument that it had the right to vote on behalf of the unionized employees and retirees pursuant to the principle of exclusive representation -- The Court concluded that it was appropriate to give a deemed proxy -- The Court did not authorize a discretionary deemed proxy. -- Amended Plan Filing and Meetings Order granted.

The CCAA Parties sought the issuance of a Plan Filing and Meetings Order (the Meetings Order) which would, inter alia, authorize the CCAA Parties to file the Joint Plan of Compromise and Arrangement dated April 16, 2018 (the Plan) and convene meetings of their creditors for the purpose of considering and voting on the Plan. The creditors of the CCAA Parties were, for the most part, in agreement that the proposed Meetings Order should be issued. The Representative Employees and the Union asked the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively. The CCAA Parties sought and received Court protection under the Companies' Creditors Arrangement Act. While under Court protection, the CCAA Parties had liquidated all or virtually all of their assets with the result that the Monitor held substantial funds. The employees and retirees were significant creditors of the Wabush CCAA Parties with claims totalling $103.8 million. The Monitor reviewed the Plan and the Meetings Order and it recommended that the proposed Meetings Order be issued.

HELD: Amended Plan Filing and Meetings Order granted. The Court concluded that there should be meetings of creditors to consider and vote on the Plan. It therefore granted the Meetings Order. The Court was not satisfied that the principle of exclusive representation gave the Union the right to vote the employees' and retirees' claims in the CCAA. The Court dismissed the Union's argument that it had the right to vote on behalf of the unionized employees and retirees pursuant to the principle of exclusive representation. A deemed proxy simply ensured that employees and retirees exercised the leverage that they should have, based on their numbers and the value of their claims. The Court concluded that it was appropriate to give a deemed proxy. Counsel for the Representative Employees and for the Union were the appropriate persons to hold the deemed proxies. The Court did not authorize a discretionary deemed proxy. The deemed proxy had to be either a deemed proxy to vote for the Plan or a deemed proxy to vote against it. There should be no amendments to the Plan after May 18, 2018 without the authorization of the Court.

Statutes, Regulations and Rules Cited:

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

Labour Code, s. 69

Counsel:

Bernard Boucher, Natalie Bussière, Emily Hazlett, BLAKE, CASSELS & GRAYDON LLP, For the Petitioners and the Mises-en-cause.

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Andrew J. Hatnay, KOSKIE MINSKY LLP, Mark Meland, FISHMAN FLANZ MELAND PAQUIN LLP, For the Objecting parties Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson.

Daniel Boudreault, PHILION LEBLANC BEAUDRY AVOCATS, For the Objecting parties Syndicat des Métallos Section locale 6254, 6285 et 9996.

Edward Bechard-Torres, IMK LLP, For the Superintendent of Pensions of Newfoundland.

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Louis Robillard, RETRAITE QUÉBEC, For Retraite Québec.

Gerry Apostolatos, LANGLOIS AVOCATS, For Quebec North Shore and Labrador Railway Company Inc.

Gabriel Serena, CAIN LAMARRE, For Ville de Fermont.

Martin Roy, STEIN MONAST, For Ville de Sept-Ïles.

Ouassim Tadlaoui, BORDEN LADNER GERVAIS, For Groupe UNNU-EBC S.E.N.C.

RECTIFIED JUDGMENT ON THE AMENDED MOTION FOR THE ISSUANCE OF A PLAN FILING AND MEETINGS ORDER (#642)*

OVERVIEW

1 The CCAA Parties seek the issuance of a Plan Filing and Meetings Order (the "Meetings Order") which would, *inter alia*, authorize the CCAA Parties to (1) file the Joint Plan of Compromise and Arrangement dated April 16, 2018 (the "Plan") and (2) convene meetings of their creditors for the purpose of considering and voting on the Plan.

2 The creditors of the CCAA Parties are, for the most part, in agreement that the proposed Meetings Order should be issued.

3 The Representative Employees and the Union ask the Court to amend the proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

CONTEXT

4 The CCAA Parties[1] sought and received Court protection under the *Companies' Creditors Arrangement Act*[2] on January 27, 2015 (for the Bloom Lake CCAA Parties) and May 20, 2015 (for the Wabush CCAA Parties). That protection has been extended by the Court on a number of occasions. FTI Consulting Canada Inc. was appointed as Monitor.

5 While under Court protection, the CCAA Parties have liquidated all or virtually all of their assets with the result that the Monitor holds substantial funds. The major remaining assets are (1) the potential preference claim by Cliffs Québec Iron Mining ULC ("CQIM") against various non-filed affiliates ("NFA") arising from the reorganization of CQIM in December 2014 that included a $142 million cash payment by CQIM and the transfer of the Australian subsidiaries of CQIM, and (2) potential preference claims by other CCAA Parties against NFA arising from certain payments in an aggregate amount of approximately US$30.6 million.

6 In March 2018, the Monitor negotiated a settlement of these potential claims. Essentially, the NFA agreed to forego the benefit of any distributions or payments they may otherwise be entitled to receive as secured and unsecured creditors of the CCAA Parties[3] and to make an additional cash contribution of $5 million, in exchange for releases. The Monitor estimates that the overall increase in the aggregate amounts that would be distributed to the third party unsecured creditors of the CCAA Parties as a result of the proposed settlement and the Plan would likely be in the range of approximately $62 million to approximately $100 million.[4]

7 The Monitor consulted with Quebec North Shore and Labrador Railway Company Inc. ("QNS&L"), the largest single third party unsecured creditor of CQIM, which supports the settlement. The Monitor did not consult with any other creditor. The employees and retirees are not creditors of CQIM.

8 Based on this settlement, the CCAA Parties prepared the Plan. It is a joint plan on behalf of all

of the CCAA Parties.[5] Essentially, the Plan distributes the liquidation proceeds and the settlement proceeds allocated to each CCAA Party amongst its third party unsecured creditors on a *pro rata* basis. The Plan proposes the limited substantive consolidation of certain CCAA Parties for the purposes of voting and distributions under the Plan, such that there are five classes of creditors:

a) Unsecured creditors of CQIM and Quinto Mining Corporation;

b) Unsecured creditors of Bloom Lake General Partner Limited ("BLGP") and The Bloom Lake Iron Ore Mine Limited Partnership ("BLLP");

c) Unsecured creditors of Wabush Iron Co. Limited, Wabush Resources Inc. and Wabush Mines;

d) Unsecured creditors of Arnaud Railway Company;

e) Unsecured creditors of Wabush Lake Railway Company Limited.

9 The Plan also provides for broad releases in favour of the NFA, the Monitor and the directors, officer, employees, advisors, legal counsel and agents of the CCAA Parties, the Monitor and the NFA. The Plan does not release the NFA and their directors from class actions instituted in Newfoundland and Labrador on behalf of the employees and retirees.

10 The CCAA Parties seek the issuance of the Meetings Order, which provides, *inter alia*, for:

a) authorizing the filing of the Plan;

b) authorizing the CCAA Parties to convene meetings of the third party unsecured creditors;

c) approval of (i) the notice and documentation to be sent to the third party unsecured creditors in respect of the meetings; and (ii) and the procedure for the conduct of the meetings;

d) the scheduling of a hearing for the sanctioning of the Plan on June 29, 2018;

e) approval of the exclusion of 8568391 and BLRC, which have no pre-filing creditors, and limited substantive consolidation of (i) CQIM and Quinto, (ii) BLGP and BLLP, and (iii) Wabush Iron, Wabush Resources and Wabush Mines for the purposes of voting and distributions under the Plan;

f) approval of the classification of the third party unsecured creditors of each CCAA Party; and

g) other ancillary orders and declarations.

11 The Monitor has recommended that the Motion should be granted and that the proposed Meetings Order should be issued.[6] The third party creditors of the CCAA Parties are, for the most part, in agreement.

12 The issue relates to the voting rights of the 2,400 employees and retirees of the Wabush CCAA parties.[7] On June 22, 2015, Michael Keeper, Terence Watt, Damien Lebel and Neil Johnson (the "Representative Employees") were appointed as representatives for the non-unionized employees and retirees of the Wabush CCAA Parties. The order provided from an opt-out right, but the Court is advised that no non-unionized employee or retiree opted out of representation by the Representative Employees. The Union has acted on behalf of the unionized employees and retirees since the beginning of the CCAA proceedings pursuant to its right and duty to represent its members. There is no express order of the Court appointing it as representative, but the Court did authorize the Union to file proofs of claim on behalf of its members.

13 The employees and retirees are significant creditors of the Wabush CCAA Parties. The employees and retirees have filed 1,089 claims totalling $103.8 million against Wabush Iron, Wabush Resources and Wabush Mines, 449 claims totalling $27.9 million against Arnaud Railway and 393 claims totalling $50.5 million against Wabush Lake Railway, with respect to other post-employment benefits ("OPEBs"), including life insurance and health care.[8] In addition, four claims in the aggregate amount of approximately $3.3 million relate to employee grievances, were filed jointly and severally against Arnaud Railway and Wabush Iron, Wabush Resources and Wabush Mines. 2,376 employees and retirees are members of the Wabush pension plans. The Plan Administrator has filed claims of approximately $56 million in the aggregate against Wabush Iron, Wabush Resources and Wabush Mines, Arnaud Railway and Wabush Lake Railway with respect to the amounts owing to the Wabush pension plans, including the deficit in the plans. The issue of whether those claims are unsecured or benefit from a deemed trust is currently before the Québec Court of Appeal, with a hearing starting June 11, 2018.

POSITION OF THE PARTIES

14 As described above, the Representative Employees and the Union ask the Court to amend the

proposed Meetings Order to give their counsel a deemed proxy to vote in counsel's discretion the claims of the salaried employees and retirees and the unionized employees and retirees respectively, unless the employee or retiree opts out by advising the Monitor that he or she will attend the meeting in person or appoints a different person to act as proxy.

15 The Union also argues that it has the right to vote on behalf of its members and retirees pursuant to its "monopole de représentation".

16 The Pension Plan Administrator [...] and the Superintendent of Pensions of Newfoundland [...] support the amendment.

17 The CCAA Parties, the Monitor and QNS&L, the largest third party unsecured creditor, oppose the amendment.

ISSUES IN DISPUTE

18 The issues that the Court must decide can be summarized as follows:

1. Should it issue the Meetings Order?

2. Does the Union have the right to vote on behalf of its members and retirees?

3. Should the Court give counsel for the Representative Employees and counsel for the Union a discretionary deemed proxy to vote the claims of the employees and retirees, subject only to an opt-out right?

ANALYSIS

1. Issuance of the Meetings Order

19 The standard for issuing a meeting order is low. The Court can refuse to summon a meeting of the creditors if it determines that the plan is contrary to the creditors' interests, lacks economic reality, is unworkable and unrealistic in the circumstances, or is doomed to failure due to a lack of creditor support.[9]

20 The Monitor has reviewed the Plan and the Meetings Order and it recommends that the proposed Meetings Order be issued, based on the following considerations:[10]

* The filing of a joint plan significantly simplifies matters and creates no apparent material prejudice to any creditor;

* The limited substantive consolidation is reasonable and appropriate;

* The Plan provides significant incremental recoveries for the creditors and is in the best interests of all stakeholders;

* The granting of the Meetings Order would provide the forum for the creditors to consider and vote on the Plan;

* There is nothing about the Plan that would render it incapable of being approved by the creditors or sanctioned by the Court;

* The classification of creditors is reasonable and appropriate;

* The Meetings Order provides for reasonable and sufficient notice;

* The deadline for filing proxies is reasonable in the circumstances;

* The provisions of the Meetings Order governing the conduct of the meetings are reasonable and appropriate in the circumstances.

21 Save for the issue of the voting rights of the employees and retirees, the creditors all agree that the Meetings Order should be issued.

22 The Court concludes that there should be meetings of creditors to consider and vote on the Plan. It will grant the Meetings Order.

2. Union's right to vote

23 The Union pleads that it has the right to vote on behalf of the unionized employees and retirees pursuant to its monopoly on representation of its members.

24 The Union points to Section 69 of the Québec *Labour Code*:[11]

> **69.** A certified association may exercise all the recourses which the collective agreement grants to each employee whom it represents without being required to prove that the interested party has assigned his claim.

25 The Supreme Court refers to this as the principle of exclusive representation or the monopoly of representation:

> 41 One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit, in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 L.C.). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 L.C.). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 L.C.).[12]
>
> [Emphasis added]

26 The Union also points to the Newfoundland and Labrador *Labour Relations Act*,[13] which is very relevant given that more than half of the employees reported for work in Labrador. Section 50 provides:

> **50.** Where a trade union or a council of trade unions is certified, under this Act, as the bargaining agent of a unit,
>
> (a) the bargaining agent so certified immediately replaces another bargaining agent of the unit and has exclusive authority to conduct collective bargaining on behalf of employees in the unit and to bind them by a collective agreement until its certification in respect of employees in the unit is revoked;
>
> [...]
>
> [Emphasis added]

27 Even though the language in the Newfoundland and Labrador statute relates only to the negotiation and conclusion of the collective agreement, the Court will assume that the principle of exclusive representation exists and is just as broad under the laws of Newfoundland and Labrador as

it is in Québec.

28 It is clear that the principle of exclusive representation means that an individual employee or retiree does not have the right to file and to pursue a grievance with respect to a breach of the collective agreement.[14]

29 The Court is not satisfied, however, that the principle of exclusive representation gives the Union the right to vote the employees' and retirees' claims in the CCAA.

30 First, the principle of exclusive representation relates to claims under the collective agreement. It does not give the Union the right to vote for the employees and retirees in all circumstances. For example, employees retain the right to vote individually on such important issues as the acceptance of a collective agreement or the decision to strike. The vote on a plan under the CCAA is not the exercise of a claim under the collective agreement. In some cases (although not in the present matter), the vote may determine whether the employer continues its operations and whether the employees keep their jobs.

31 Further, the Union was not able to point to any authority extending the principle of exclusive representation to voting on a proof of claim with the result that the union had the right to vote on behalf of its members without any court authorization. There are a few examples of CCAA proceedings where the court has authorized the union to vote the claims of its members,[15] but no example was given to the Court of any case where the court concluded that the union had the right to vote on behalf of its members without such authorization.

32 Finally, the Court notes that if the right to vote on behalf of the members belongs to the Union pursuant to the principle of exclusive representation, then the proposed opt-out would be a breach of that monopoly and would be invalid.

33 These arguments lead the Court to dismiss the Union's argument that it has the right to vote on behalf of the unionized employees and retirees pursuant to the principle of exclusive representation.

3. Discretionary deemed proxy

34 The Court will analyze the appropriateness of a discretionary deemed proxy by asking several questions.

3.1 Is a deemed proxy appropriate?

35 First, before giving a deemed proxy to anyone, the Court must be satisfied that there is a valid reason to do so.

36 The Representative Employees and the Union plead that the deemed proxy is necessary to ensure that all of the employees and retirees exercise their right to vote. In his affidavit, Michael Keeper, one of the Representative Employees, states the following:

> 24. Individual voting by the 690 Salaried Members, as advocated by the Monitor and CCAA Parties, is completely inappropriate for our large, vulnerable creditor group who are not sophisticated commercial creditors. The Salaried Members are spread across Canada, many in the remote regions. This will make it impossible to reach many of them with the Proposed Plan, all the related documents, and the associated ballot in time to allow them to cast their vote. Many Salaried Members are old and infirmed, living in nursing home facilities, do not have internet access or fax machines, and many cannot understand complex legal documents, such as the Proposed Plan, the court orders, and the Monitor's Reports. For many, they will not understand the nature or consequences of the Proposed Plan and how it affects them, and it is not practical for Representative Counsel nor the Representatives to contact every one of them to provide advice and answer their questions in time to ensure that they are able to make an informed decision as to their rights and how the Proposed Plan impacts them.

37 Nicolas Lapierre, the Union representative responsible for this matter, makes similar comments in his sworn declaration:

> 16. En effet, j'ai lu le Plan et l'ensemble des documents qui l'accompagnent, que je trouve compliqués et difficiles à comprendre;
>
> 17. En raison de cette complexité, plusieurs Membres ne seront pas en mesure de comprendre ce qu'ils doivent faire avec ces documents ou ce qu'ils signifient, d'autant plus que certains de ces travailleurs sont partiellement ou totalement analphabètes, alors que d'autres sont âgés et maladies à un point tel où ils ne sont plus en mesure de s'occuper de leurs affaires par eux-mêmes;
>
> 18. Il y a ainsi de réelles possibilités que les Membres ne soient pas en mesure de voter ou de désigner quelqu'un pour le faire en leur nom, ce qui équivaudrait à les priver de leur droit de vote.

38 The Court considers these concerns to be somewhat overstated. There is nothing exceptional about the Wabush employees and retirees as compared to the employees and retirees of other companies. It should be possible to reach the great majority of them. While some of them may not have access to the internet or a fax machine, the Court doubts that the number is large. While some may not have the capacity to make a decision, there is likely someone who can make a decision on their behalf. The Plan itself is a complicated legal document that uses language which is difficult to understand, but the Monitor's reports are much easier to understand and the parties have the opportunity to include in the package that goes to the creditors a letter explaining matters in even simpler terms. The decision that the employees and retirees have to take is a fairly simple yes or no

decision and the consequences of each decision can be explained.

39 Nevertheless, it remains clear that a number of votes will be lost. Each employee and retiree has the right to vote on the Plan and every vote is important. One of the Court's objectives in this matter is to ensure that each employee and retiree is given the opportunity to vote and the Court's hope is that all will vote. The deemed proxy is a way to achieve that result.

40 In addition to the cases where a deemed proxy was given to the union,[16] the parties point to only three examples of cases where deemed proxies were given to vote on behalf of non-unionized employees and retirees.[17] The CCAA Parties and the Monitor distinguish those cases on the basis that the deemed proxies were to vote in favour of the plan.

41 These examples of deemed proxies confirm that the Court has jurisdiction to give deemed proxies in the present matter. That jurisdiction is not affected by whether the vote is in favour of the plan or against it.

42 The CCAA Parties and the monitor also argue that a deemed proxy gives the proxy holder too much leverage.

43 The Court does not agree. The deemed proxy simply ensures that the employees and retirees exercise the leverage that they should have, based on their numbers and the value of their claims.

44 For all of these reasons, the Court concludes that it is appropriate to give a deemed proxy.

3.2 Who should exercise the deemed proxy?

45 The Representative Employees and the Union argue that their counsel should exercise the deemed proxy.

46 The Court agrees.

47 The Representative Employees were appointed by the Court for the purpose of representing the non-unionized employees and retirees. The Union is given that role by statute. They are the appropriate representatives to exercise the deemed proxies.

48 The Court adopts the following reasoning of Justice Wilton-Siegel in the U.S. Steel CCAA proceedings:

> [15] Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals

> who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.[18]

49 The CCAA Parties and the Monitor argue that there is no commonality of interest in the present matter in that not all of the employees and retirees have both a pension claim and an OPEB claim. They argue that some employees and retirees may want the pension issues pursued rather than the OPEB claims while others may want the opposite, because of their personal circumstances.

50 Those considerations may be relevant in assessing whether it is appropriate for the Representative Employees and the Union to pursue the deemed trust for the pension claims. However, that matter is not before the Court today and that issue was not raised when the matter was before the Court.

51 Moreover, these considerations are of no relevance on the deemed proxy issue: the pension issues are excluded from the Plan and the only issue being raised is whether the settlement with the NFA should have generated more for the unsecured creditors. No employee or retiree has a divergent interest on this issue.

52 The Court therefore concludes that counsel for the Representative Employees and for the Union are the appropriate persons to hold the deemed proxies.

3.3 Should the deemed proxy be discretionary?

53 The Representative Employees and the Union say that they have not yet taken a position on whether they will vote for or against the Plan. They have concerns as to whether the settlement with the NFA is the best deal that could be achieved, but they have not had any discussions with the Monitor or with anyone else. They anticipate, as do the CCAA Parties and the Monitor, that there will be further discussions and negotiations right up until the vote. In that context, the Representative Employees and the Union ask that the proxy holder be allowed to vote the claims in his or her discretion. They argue that an employee or retiree who wants to vote for or against the Plan can opt out of the deemed proxy by attending the meeting, by appointing a different proxy, or by indicating his or her vote on the proxy form.

54 The discretionary deemed proxy is fundamentally undemocratic. The deemed proxy is intended to ensure that all of the employee and retiree claims are voted. But making it discretionary has the effect of taking away the individuals' right to vote or even to know how his or her claim is being voted and giving it to someone else. This is not a good outcome.

55 The opt-out right suggested by counsel for the Representative Employees and the Union does not solve these problems. If negotiations and discussions continue right up to the vote, as the parties seem to anticipate, the employees and retirees will have to decide whether to opt out on the basis of

a Plan that may not the final version and without knowing the final recommendation of the Representative Employees and the Union or the position the proxy holder will take on their behalf if they do not opt out.

56 The CCAA Parties and the Monitor argue that there is no precedent for such a discretionary deemed proxy. They argue that the few examples of deemed proxies all provide that the proxy holder will vote in favour of the plan. They found no examples of deemed proxies to vote against the plan or to vote in the discretion of the proxy holder. The Representative Employees and the Union did not submit any examples either.

57 The Representative Employees and the Union plead that there is no difference between a deemed proxy to vote in favour of the plan and a deemed proxy to vote against it. The Court agrees in principle. In the three examples of deemed proxies to vote in favour of the plan, it appears from the materials that the representatives of the employees participated or were consulted in the preparation of the plan and were prepared to support it. The practical reality is that there are no deemed proxies to vote against a plan because if the employees representatives are consulted before the plan is filed and they are opposed to the plan, the plan will likely be modified before it is filed in order to gain their support.

58 The problem in the present matter is that there were no negotiations or discussions prior to the filing of the Plan and there have been no discussions in the three weeks since the filing of the Plan. Everyone is waiting for this order before they begin serious discussions.

59 That is unfortunate. The negotiations anticipated by the parties will have the effect of depriving the employees and retirees of any real participation in the process. There will be a meeting to explain the Plan to them, but subsequent negotiations will mean that the Plan as explained to them is not the final version of the Plan. If negotiations continue up until the meeting, there will be no time to explain the final version of the Plan to the employees and retirees.

60 In other words, the justification for the discretionary deemed proxy is that the Representative Employees and the Union cannot take a final position on the Plan today and that the Plan may be amended up until the vote. The solution is to give them more time to take a final position and to ensure that the Plan is not amended after they take that final position, not to give them the right to vote the individuals' claims in their discretion.

61 For these reasons, the Court will not authorize a discretionary deemed proxy. The deemed proxy must be either a deemed proxy to vote for the Plan or a deemed proxy to vote against it. The Court will delay the mailing of the Meeting Materials to allow the parties to have the discussions and negotiations that should have taken place before now so that the Representative Employees and the Union can take a final position for or against the Plan.

CONCLUSIONS

62 As a result, the Court will order the following.

63 The date of the meetings will remain June 18, 2018. That is two months from now. There is time for the parties to discuss the current version of the Plan and either satisfy themselves that it is reasonable or negotiate changes to it. The Court will give them one month to do so.

64 The date for mailing the Meeting Materials to the creditors will be pushed back to May 21, 2018 to allow for this month of negotiations. The Meeting Materials will include the final version of the Plan as well as letters from counsel for the Representative Employees and the Union in which they must take a position for or against the Plan. The deemed proxy will be to vote in accordance with that recommendation. That way, the employees and retirees will have the opportunity to make a real choice, based on the final version of the Plan and in full knowledge of how their claim will be voted if they do not execute a proxy.

65 It follows that there can be no amendments to the Plan after May 18, 2018 without the authorization of the Court. Moreover, any amendment authorized after that date will likely involve the postponement of the creditors' meetings scheduled for June 18, 2018.

FOR THESE REASONS, THE COURT:

66 **GRANTS** the Plan Filing and Meetings Order as amended by the Court and annexed to this judgment;

67 **ORDERS** the parties not to amend the Plan after May 18, 2018 without the authorization of the Court;

68 **RESERVES** the right of the parties to make further representations to the Court with respect to the documents to be mailed to the creditors on May 21, 2018;

69 **THE WHOLE, WITHOUT COSTS.**

THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

* * * * *

PLAN FILING AND MEETINGS ORDER

HAVING READ the CCAA Parties' (the "**Petitioners**") *Amended Motion for the Issuance of a Plan Filing and Meetings Order*, and the attached exhibits thereof, and the affidavit in support thereof (the "**Motion**"), the Monitor's Forty-Fourth Report and the submissions of counsels for the Petitioners, the Monitor and other interested parties;

GIVEN the provisions of the Initial Orders granted on January 27, 2015 and May 20, 2015, as subsequently amended, rectified or restated (together, the "**Initial Orders**");

GIVEN the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c-36 (the "**CCAA**").

THE COURT:

1. **GRANTS** the Motion.

Service

2. **DECLARES** that the Petitioners have given sufficient prior notice of the presentation of this Motion to interested parties and that the time for service of the Motion herein be and is hereby abridged.

Definitions

3. **DECLARES** that the capitalized terms not otherwise defined in this Order shall have the meanings ascribed in **Schedule "A"** attached hereto. The following terms shall have the meanings set out below:

3.1 "**Chair**" shall have the meaning ascribed to such term in Paragraph 29;

3.2

"**Creditor Letter**" means the letter (in English and French) sent to Affected Unsecured Creditors in substantially the form of **Schedule "B"** hereto;

3.3 "**Meeting Materials**" shall have the meaning ascribed to such term in Paragraph 8;

3.4

"**Notice of Creditors' Meetings and Sanction Hearing**" means the notice which shall be given to the Affected Unsecured Creditors of the Meetings to be held for the approval of the Plan, and of the Sanction Hearing of the Plan, being substantially in the form of **Schedule "C"** hereto;

3.5

"**Proxy**" means a proxy and instructions to Affected Unsecured Creditors for explaining how to complete same, substantially in the form of **Schedule "D"** hereto;

3.6

"**Resolution**" means the resolution substantially in the form attached as **Schedule "E**"; and

3.7 "**Website**" means http://cfcanada.fticonsulting.com/bloomlake.

Joint Plan of Compromise and Arrangement

4. **ORDERS** that the Joint Plan of Compromise and Arrangement pursuant to the CCAA filed by the Participating CCAA Parties dated April 16, 2018, (as may be amended, supplemented and restated from time to time, the "**Plan**") is hereby accepted for filing, and the Participating CCAA Parties are hereby authorized to seek approval of the Plan from the Affected Unsecured Creditors in the manner set forth herein.

5. **ORDERS** that the Participating CCAA Parties, be, and they are hereby, authorized to file, in accordance with its terms, any amendment, restatement, modification of or supplement to, the Plan (each a "**Plan Modification**") prior to May 18, 2018 pursuant to and in accordance with the terms of the Plan, in which case any such Plan Modification shall, for all purposes, be and be deemed to form part of and be incorporated into the Plan. The Participating CCAA Parties shall [...] include any such Plan Modification[...] in the Meeting Materials. The Participating CCAA Parties may give notice of any such Plan Modification [...] by notice which hall be sufficient if [...] provided to those Persons listed on the service list posted on the Website (as amended from time to time, the "**Service List**"). The Monitor shall post on the Website, as soon as practicable, any such Plan Modification, with notice of such posting forthwith provided to the Service List. Any Plan Modification after May 18, 2018 requires Court authorization, and the Court will determine what notice is required and whether the Meetings scheduled for June 18, 2018 will be postponed.

6. **ORDERS** that after the Meetings (and both prior to and subsequent to the obtaining of the Sanction Order), the Participating CCAA Parties may at any time and from time to time effect a Plan Modification pursuant to and in accordance with the terms of the Plan and with the authorization of the Court. The Monitor shallforthwith post on the Website any such Plan Modification, with notice of such posting forthwith provided to the Service List.

Form of Documents

7. **ORDERS** that the forms of: (i) the Notice of Creditors' Meetings and Sanction Hearing, (ii) the Creditor Letter, (iii) the Proxy, and (iv) the Resolution are each hereby approved, and the Monitor, in consultation with the Participating CCAA Parties, is authorized to make such minor changes to such forms of documents as it consider necessary or desirable to conform the content thereof to the terms of the Plan or this Order or any further Orders of the Court.

Notification Procedures

8. **ORDERS** that the Monitor shall cause to be sent, by regular mail, courier or email a copy of the Notice of Creditors' Meetings and Sanction Hearing, the Creditor Letter, the Proxy, the Resolution, the Plan, and this Order (collectively, with the Report of the Monitor to be filed in connection with the Meetings, the "**Meeting Materials**") as soon as reasonably practicable after the granting of this Order and, in any event, no later than **5:00 p.m.** (Eastern time) on May 21, 2018 to each Affected Unsecured Creditor known to the Monitor as of the date of this Order at the address for such Affected Unsecured Creditor set out in such Affected Unsecured Creditor's Proof of Claim or to such other address that has been provided to the Monitor by such Affected Unsecured Creditor pursuant to Paragraph 34 or 36.

9. **ORDERS** that the Monitor shall (i) forthwith publish on the Website an electronic copy of the Meeting Materials, (ii) send a copy of the Meeting Materials to the Service List, and (iii) provide a copy to any Affected Unsecured Creditor upon written request by such Affected Unsecured Creditor provided that such written request is received by the Monitor no later than three (3) Business Days prior to the Meetings (or any adjournment thereof).

10. **ORDERS** that the Participating CCAA Parties and the Monitor be and they are hereby authorized to provide such supplemental information ("**Additional Information**") to the Meeting Materials as the Participating CCAA Parties may determine, with the consent of the Monitor, and the Additional Information shall be distributed or made available by posting on the Website and served on the Service List, and any such other method of delivery that the Participating CCAA Parties, with the consent of the

Monitor, determine is appropriate.

11. **ORDERS** that the publications and/or delivery referred to in Paragraphs 8, 9 and 10 hereof, shall constitute good and sufficient service of the Meeting Materials on all Persons who may be entitled to receive notice thereof, or of these proceedings, or who may wish to be present in person or represented by proxy at the Meeting in respect of the Unsecured Creditor Class to which each such Person belongs, or who may wish to appear in these proceedings, and no other form of notice or service need be made on such Persons, and no other document or material need be served on such Persons in respect of these proceedings.

12. **ORDERS** that the non-receipt of a copy of the Meeting Materials beyond the reasonable control of the Monitor shall not constitute a breach of this Order and the non-receipt of a copy of the Meeting Materials shall not invalidate any resolution passed or proceedings taken at the Meetings.

Employee Addresses and Information

13. **ORDERS** that the Monitor is hereby authorized to deliver to Employees with Proven or Unresolved Claims a notice that such Employees must provide their Social Insurance Numbers to the Monitor as a condition to receiving any distributions under the Plan.

Limited Substantive Consolidation of certain Participating CCAA Parties

14. **ORDERS** that the following Participating CCAA Parties shall be substantively consolidated for the purposes of voting and distribution on the Plan, and all references in this Order to Participating CCAA Parties shall mean to such Participating CCAA Parties, as so consolidated:

14.1 CQIM and Quinto (together, the "**CQIM/ Quinto Parties**");

14.2 BLGP and BLLP (together, the "**BL Parties**"); and

14.3

Wabush Iron, Wabush Resources and the Wabush Mines (together, the "**Wabush Mines Parties**").

Classes of Unsecured Creditors

15. **ORDERS** that the Affected Unsecured Creditors with respect of each Participating CCAA Party shall be grouped into the following classes for voting (in respect of their Eligible Voting Claims) and distribution purposes (in respect of their Proven Claims) (each an "**Unsecured Creditor Class**" and together the "**Unsecured Creditor Classes**"):

15.1 **CQIM/Quinto Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the CQIM/Quinto Parties;

15.2 **BL Parties Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the BL Parties;

15.3 **Wabush Mines Unsecured Creditor Class**: being Affected Unsecured Creditors of any of the Wabush Mines Parties;

15.4 **Arnaud Unsecured Creditor Class**: being Affected Unsecured Creditors of Arnaud; and

15.5 **Wabush Railway Unsecured Creditor Class**: being Affected Unsecured Creditors of Wabush Railway.

Meetings

16. **DECLARES** that the Participating CCAA Parties are hereby authorized to call, hold and conduct the following Meetings, being understood that there will be a separate Meeting for each Unsecured Creditor Class listed below, in Montréal, Québec, for the purpose of voting upon, with or without variation, the Resolution to approve the Plan:

    1. **Meeting of CQIM/Quinto Unsecured Creditor Class:** June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

2. **Meeting of BL Parties Unsecured Creditor Class**: June 18, 2018 at 9:30 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

3. **Meeting of Wabush Mines Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

4. **Meeting of Arnaud Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

5. **Meeting of Wabush Railway Unsecured Creditor Class**: June 18, 2018 at 11:00 a.m. Montréal time at Norton Rose Fulbright Canada LLP, Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

17. **DECLARES** that the only Persons entitled to notice of, to attend and speak at a Meeting are Eligible Voting Creditors of such Unsecured Creditor Class (or their respective duly appointed Proxy holders and their legal counsel), representatives of the Monitor, the Participating CCAA Parties, all such parties' financial and legal advisors, Salaried Members Representative Counsel, USW Counsel, the Chair (as defined below), the secretary and any scrutineers appointed in accordance with Paragraph 31 hereof. Any other Person may be admitted to the Meetings on invitation of the Participating CCAA Parties or the Monitor.

18. **ORDERS** that any Proxy which any Eligible Voting Creditor wishes to submit in respect of a Meeting (or any adjournment, postponement or other rescheduling thereof) must be substantially in the form attached hereto as **Schedule "D"** (or in such other form acceptable to the Monitor or the Chair).

19. **ORDERS** that any Proxy in respect of a Meeting (or any adjournment, postponement or other rescheduling thereof) must be received by the Monitor in accordance with Paragraph 36 hereof by 5:00 p.m. (Eastern time) June 14, 2018 (the "**Proxy Deadline**"), being two (2) Business Days prior to the date set for the Meetings in Paragraph 16 hereof. The Monitor

is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which a Proxy is completed.

20. **ORDERS** that, in the absence of instruction to vote for or against the approval of the Resolution in a duly signed and returned Proxy that appoints a representative of the Monitor as Proxy holder, the Proxy shall be deemed to include instructions to vote for the approval of the Resolution, provided the Proxy holder does not otherwise revoke the Proxy by written notice to the Monitor delivered so that it is received by the Monitor no later than the Proxy Deadline.

21. **ORDERS** that the quorum required at each Meeting shall be one Eligible Voting Creditor present at each Meeting in person or by Proxy. If the (a) requisite quorum is not present at any Meeting, or (b) any Meeting is adjourned, postponed or rescheduled by the Chair (whether (i) by the request of the Participating CCAA Parties; (ii) by vote of the majority in value of Affected Unsecured Creditors holding Eligible Voting Claims in person or by Proxy at any Meeting; or (iii) otherwise as determined by the Chair), then any such Meetings shall be adjourned, postponed or rescheduled to such time(s) and place(s) as the Chair deems necessary or desirable.

22. **ORDERS** that the Chair, with the consent of the Participating CCAA Parties and the Plan Sponsors, not to be unreasonably withheld, be and he or she is hereby, authorized to adjourn, postpone or otherwise reschedule any Meeting on one or more occasions to such time(s), date(s) and place(s) as the Chair, with the consent of the Participating CCAA Parties and Plan Sponsors, not to be unreasonably withheld, deem necessary or desirable (without the need to first convene any such Meetings for the purpose of any adjournment, postponement or other rescheduling thereof). None of the Participating CCAA Parties, the Chair or the Monitor shall be required to deliver any notice of the adjournment, postponement or rescheduling of the Meeting(s) or adjourned Meeting(s), as applicable, provided that the Monitor shall:

22.1 announce the adjournment, postponement or rescheduling of the applicable Meeting(s) or adjourned Meeting(s) to the participants at the applicable Meeting(s) if the commencement of the Meeting(s) has occurred prior to the adjournment, postpone-

ment or rescheduling;

22.2

post notice of the adjournment, postponement or rescheduling at the originally designated time and location of each of the Meeting(s) or adjourned Meeting(s), as applicable;

22.3 forthwith post notice of the adjournment, postponement or rescheduling on the Website; and

22.4

provide notice of the adjournment, postponement or rescheduling to the Service List forthwith. Any Proxies validly delivered in connection with the Meeting(s) shall be accepted as Proxies in respect of any adjourned, postponed or rescheduled Meeting(s).

23. **DECLARES** that the only Persons entitled to vote at a Meeting shall be Eligible Voting Creditors of such Unsecured Creditor Class or their Proxy holders. Each Eligible Voting Creditor will be entitled to a vote with a value equal to the value in dollars of its Voting Claim, and/or the value in dollars of its Unresolved Voting Claim, if any, as determined in accordance with this Paragraph 23 of this Order.

24. **ORDERS** that the dollar value of an Unresolved Voting Claim for voting purposes at the applicable Meeting shall be: (i) the amount set out in such Creditor's Proof of Claim if no Notice of Allowance or Notice of Revision or Disallowance (in each case as defined in the Amended Claims Procedure Order) has been issued; (ii) the amount set out in the Notice of Revision or Disallowance in respect of such Claim if no Notice of Dispute (as defined in the Amended Claims Procedure Order) has been filed and the time for doing so has not expired; (iii) the amount set out in the Notice of Dispute in respect of such Claim if a Notice of Dispute has been timely filed, in all respects without prejudice to the determination of the dollar value of such Affected Unsecured Claim for distribution purposes in accordance with the Amended Claims Procedure Order; or (iv) the amount as may be agreed to between the Monitor and the Affected Unsecured Creditor, or between the Monitor and the Salaried Members Representative Counsel or the Monitor and the USW Counsel, as applicable.

25. **DECLARES** that in respect of the Eligible Voting Claims of the Salaried Members and the USW Members:

25.1 The Salaried Members Representative Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the Salaried Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any Salaried Member to submit a Proxy to the Monitor, save in respect of any Salaried Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy;

25.2 The USW Counsel shall be deemed to be a Proxy holder in respect of each Eligible Voting Claim related to or arising from the employment of the USW Members and shall be entitled to vote them at a Meeting on their behalf, without the requirement for any USW Member to submit a Proxy to the Monitor, save in respect of any USW Member who, prior to a Meeting, notifies the Monitor by an instrument in writing that he revokes this deemed Proxy; and

25.3 The Salaried Members Representative Counsel and the USW Counsel shall vote each Eligible Voting Claim in accordance with the recommendation made by the Salaried Members Representative Counsel to the Salaried Members and by USW Counsel to the USW Members in the Meeting Materials.

For greater certainty, however, only the Pension Plan Administrator or its designated Proxy may vote the Pension claims.

26. **ORDERS** that a Voting Claim or Unresolved Voting Claim shall not include fractional numbers and shall be rounded down to the nearest whole Canadian dollar amount.

27. **ORDERS** that the Monitor shall keep a separate record of the votes cast by Affected Unsecured Creditors holding Unresolved Voting Claims and shall report to the Court with respect thereto at the Sanction Motion.

28. **ORDERS** that the results of any and all votes conducted at the Meetings shall be binding on all Affected Unsecured Creditors, whether or not any such Affected Unsecured Creditor is present or voting at the Meetings.

29. **ORDERS** that a representative of the Monitor shall preside as the chair of each Meeting (the "**Chair**") and, subject to any further order of this Court, shall decide all matters relating to the conduct of such Meeting. The Participating CCAA Party and any Eligible Voting Creditor may appeal from any decision of the Chair to the Court, within three (3) Business Days of any such decision.

30. **DECLARES** that, at each Meeting, the Chair is authorized to direct a vote on the Resolution to approve the Plan, and any amendments thereto made in accordance with Paragraph 5 of this Order.

31. **ORDERS** that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance at, quorum at and votes cast at each Meeting. Person(s) designated by the Monitor shall act as secretary at each Meeting.

32. **ORDERS** that the Monitor shall be directed to calculate the votes cast at each Meeting called to consider the Plan and report the results in accordance with Paragraph 42 of this Order.

33. **ORDERS** that an Affected Unsecured Creditor that is not an individual may only attend and vote at a Meeting if it has appointed a Proxy holder to attend and act on its behalf at such Meeting.

Notice of Transfers

34. **ORDERS** that, for purposes of voting at a Meeting, if an Affected Unsecured Creditor transfers or assigns all of its Affected Unsecured Claim, then the transferee or assignee shall only be entitled to vote and attend the applicable Meeting if the transferee or assignee delivers evidence satisfactory to the Monitor of its ownership of all of such Affected Unsecured Claim and a written request to the Monitor, not later than 5:00 pm on the date that is seven (7) days prior to the date of the Meeting, or such later time that the Monitor may agree to, that such transferee's or assignee's name be included on the list of Eligible Voting Creditors entitled to vote, either in person or by proxy, the transferor's or assignor's Voting Claim or Unresolved Voting Claim, as applicable, at the

applicable Meeting in lieu of the transferor or assignor.

35. **ORDERS** that if the holder of an Affected Unsecured Claim or any subsequent holder of the whole of an Affected Unsecured Claim who has been acknowledged by the Monitor as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, transfers or assigns the whole of such Claim to more than one Person or part of such Claim to another Person or Persons, such transfer or assignment shall not create a separate Affected Unsecured Claim or Affected Unsecured Claims and such Affected Unsecured Claim shall continue to constitute and be dealt with as a single Claim as if such Claim (or portion of such Claim) had not been transferred or assigned, notwithstanding such transfer or assignment, and the Monitor and the Participating CCAA Parties shall in each such case not be bound to recognize or acknowledge any such transfer or assignment and shall be entitled to give notices to and to otherwise deal with such Affected Unsecured Claim only as a whole and then only to and with the Person last holding such Affected Unsecured Claim in whole as the Affected Unsecured Creditor in respect of such Affected Unsecured Claim, provided such Affected Unsecured Creditor may by notice in writing to the Monitor delivered so that it is received by the Monitor on or before the tenth day prior to any Meeting or distribution in respect of such Affected Unsecured Claim, direct that subsequent dealings in respect of such Affected Unsecured Claim, but only as a whole, shall be with a specified transferee or assignee and in such event, such Affected Unsecured Creditor and such transferee or assignee of the Affected Unsecured Claim shall be bound by any notices given to the transferor or assignor and prior steps taken in respect of such Claim.

Notices and Communications

36. **ORDERS** that any notice or other communication to be given under this Order by an Affected Unsecured Creditor to the Monitor or the Participating CCAA Parties shall be in writing and will be sufficiently given only if given by pre-paid mail, registered mail, e-mail, courier addressed to:

Monitor:	FTI Consulting Canada Inc. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, ON M5K 1G8
	Attention: Nigel Meakin
	E-mail: bloomlake@fticonsulting.com

With a Copy to:	Norton, Rose, Fulbright LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
	Attention: Sylvain Rigaud
	E-mail: sylvain.rigaud@nortonrosefulbright.com

Participating CCAA Parties:	Bloom Lake General Partner Limited *et al* c/o Blake, Cassels & Graydon LLP 199 Bay Street Suite 4000, Commerce Court West Toronto Ontario M5L 1A9
	Attention: Clifford T. Smith, Officer
	E-mail: clifford.smith@CliffsNR.com

With a Copy to:	Blake, Cassels & Graydon LLP 199 Bay Street Suite 4000, Commerce Court West Toronto Ontario M5L 1A9
	Attention: Milly Chow
	E-mail: milly.chow@blakes.com

37. **ORDERS** that any document sent by the Monitor or the Participating

CCAA Parties pursuant to this Order may be sent by e-mail, ordinary mail, registered mail or courier. A Creditor shall be deemed to have received any document sent pursuant to this Order two (2) Business Days after the document is sent by mail and one (1) Business Day after the document is sent by courier or e-mail. Documents shall not be sent by ordinary or registered mail during a postal strike or work stoppage of general application. For greater certainty, the Monitor shall not be deemed to have received any document unless and until such document is actually received by the Monitor at the address noted above.

38. **ORDERS** that, in the event that the day on which any notice or communication required to be delivered pursuant to this Order is not a Business Day, then such notice or communication shall be required to be delivered on the next Business Day.

39. **ORDERS** that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary or registered mail and then not received shall not, absent further Order of this Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or e-mail in accordance with this Order.

40. **ORDERS** that all references to time in this Order shall mean prevailing local time in Montréal, Québec and any references to an event occurring on a Business Day shall mean prior to 5:00 p.m. on the Business Day unless otherwise indicated.

41. **ORDERS** that references to the singular shall include the plural, references to the plural shall include the singular and to any gender shall include the other gender.

Sanction Hearing

42. **ORDERS** that the Monitor shall provide a report to the Court as soon as practicable after the Meetings by no later than June 21, 2018 (the "**Monitor's Report Regarding the Meetings**") with respect to:

42.1 the results of voting at the Meetings;

42.2 whether the Required Majority of each Unsecured Creditor Class has approved the Plan;

42.3 the separate tabulation of the Unresolved Voting Claims as required by Paragraph 27; and

42.4 in its discretion, any other matter relating to the Participating CCAA Parties' motion(s) seeking sanction of the Plan.

43. **ORDERS** that an electronic copy of the Monitor's Report Regarding the Meetings, the Plan, including any Plan Modification, and a copy of the materials filed in respect of the Sanction Motion shall be posted on the Website prior to the Sanction Motion.

44. **ORDERS** that in the event the Plan has been approved by the Required Majority of each Unsecured Creditor Class, the Participating CCAA Parties may seek the sanction of the Plan before this Court on June 29, 2018 (the "**Sanction Motion**"), or such later date as the Monitor may advise the Service List in these proceedings, provided that such later date shall be acceptable to the Participating CCAA Parties, the Parent and the Monitor.

45. **ORDERS** that service of this Order by the CCAA Parties to the parties on the Service List, the delivery of the Meeting Materials in accordance with Paragraph 8 hereof and the posting of the Meeting Materials on the Website in accordance with Paragraph 9 hereof shall constitute good and sufficient service and notice of the Sanction Motion.

46. **ORDERS** that in the event that the Sanction Motion is adjourned, only those Persons appearing on the Service List as of the date of service shall be served with notice of the adjourned date.

47. **ORDERS** that, subject to any further Order of the Court, in the event of any conflict, inconsistency, ambiguity or difference between the provisions of the Plan and this Order, the terms, conditions and provisions of the Plan, as sanctioned, shall govern and be paramount, and any such provision of this Order shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference.

48. **ORDERS** that any person who wishes to oppose the Sanction Motion shall serve upon the parties on the Service List, and file with the Court a copy of the materials to be used to oppose the Sanction Motion by no later than 5:00 p.m. (Eastern time) on June 26, 2018 or, if applicable, four days' prior to any adjourned or rescheduled Sanction Motion.

Monitor's Role

49. **ORDERS** that the Monitor, in addition to its prescribed rights and obligations under (i) the CCAA; (ii) the Initial Orders; and (iii) the Amended Claims Procedure Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order.

50. **ORDERS** that: (i) in carrying out the terms of this Order, the Monitor shall have all the protections given to it by the CCAA, the Initial Orders, the Amended Claims Procedure Order, and any other Order granted in these CCAA Proceedings and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Participating CCAA Parties and any information provided by the Participating CCAA Parties, and any information acquired by the Monitor as a result of carrying out its duties under this Order without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

Aid and Assistance of Other Courts

51. **REQUESTS** the aid and recognition of any court or any judicial,

regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or any court or any judicial, regulatory or administrative body of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

General Provisions

52. **ORDERS** that the Monitor shall use reasonable discretion as to the adequacy of completion and execution of any document completed and executed pursuant to this Order and, where the Monitor is satisfied that any matter to be proven under this Order has been adequately proven, the Monitor may waive strict compliance with the requirements of this Order as to the completion and execution of documents.

53. **DECLARES** that the Monitor may apply to this Court for advice and direction in connection with the discharge or variation of its powers and duties under this Order.

54. **ORDERS** the provisional execution of this Order notwithstanding appeal.

55. **THE WHOLE** without costs.

THE HONOURABLE STEPHEN W. HAMILTON J.S.C.

Mtre Bernard Boucher

Mtre Emily Hazlett

(Blake, Cassels & Graydon LLP)

Attorneys for the CCAA Parties

Date of hearing: April 16, 2018

Schedule A: Definitions

Schedule B: Creditor Letter

Schedule C: Notice of Creditor's Meetings and Sanction Hearing

Schedule D: Proxy Schedule E: Form of Resolution

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Schedule "A" to the Plan
Filing and Meetings Order
Definitions

"**8568391**" means 8568391 Canada Limited;

"**Administration Charges**" means, collectively, the BL Administration Charge and the Wabush Administration Charge in the aggregate amount of the BL Administration Charge and the Wabush Administration Charge, as such amount may be reduced from time to time by further Court Order;

"**Affected Claim**" means any Claim other than an Unaffected Claim;

"**Affected Creditor**" means any Creditor holding an Affected Claim, including a Non-Filed Affiliate holding an Affected Claim and a CCAA Party holding an Affected Claim;

"**Affected Unsecured Claim**" means an Affected Claim that is an Unsecured Claim, including without limitation, any Deficiency Claims;

"**Affected Unsecured Creditor**" means any Affected Creditor holding an Affected Unsecured Claim, including a Non-Filed Affiliate and a CCAA Party holding an Affected Unsecured Claim;

"**Affiliate**" means, with respect to any Person, any other Person who directly or indirectly controls, is controlled by, or is under direct control or indirect common control with, such Person, and includes any Person in like relation to an Affiliate. A Person shall be deemed to "**control**" another Person if such Person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of such other Person, whether through ownership of voting securities, by contract or otherwise, and the term "**controlled**" shall have a similar meaning;

"**Allocation Methodology**" means the methodology for the allocation of proceeds of realizations of the CCAA Parties' assets and the costs of the CCAA Proceedings amongst the CCAA Parties and, to the extent necessary, amongst assets or asset categories, which was approved by an Order of the Court on July 25, 2017 as may be amended upon Final Determination of the Fermont Allocation Appeal;

"**Allocated Value**" means, in respect of any particular asset of a Participating CCAA Party, the amount of the sale proceeds realized from such asset, net of costs allocated to such asset all pursuant to the Allocation Methodology and, in respect of any Secured Claim, the amount of such sale proceeds receivable on account of such Secured Claim after taking into account the priority of such Secured Claims relative to other creditors holding a Lien in such asset;

"**Allowed Claim**" shall have the meaning given to it in the Amended Claims Procedure Order;

"**Amended Claims Procedure Order**" means the Amended Claims Procedure Order dated November 16, 2015, approving and implementing the claims procedure in respect of the CCAA Parties and the Directors and Officers (including all schedules and appendices thereof);

"**Applicable Law**" means any law (including any principle of civil law, common law or equity), statute, order, decree, judgment, rule, regulation, ordinance, or other pronouncement having the effect of law, whether in Canada or any other country or any domestic or foreign province, state, city, county or other political subdivision;

"**Arnaud**" means Arnaud Railway Company;

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

"**BL Administration Charge**" means the charge over the BL Property created by paragraph 45 of the Bloom Lake Initial Order and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BL Directors' Charge**" means the charge over the BL Property of the BL Parties created by paragraph 31 of the Bloom Lake Initial Order, and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn.$2.5 million, as such amount may be reduced from time to time by further Court Order;

"**BLGP**" means Bloom Lake General Partner Limited;

"**BLLP**" means The Bloom Lake Iron Ore Mine Limited Partnership;

"**Bloom Lake CCAA Parties**" means, collectively, BLGP, Quinto, 8568391, CQIM, BLLP, and BLRC;

"**BL Parties**" means BLGP and BLLP;

"**BL Property**" means all current and future assets, rights, undertakings and properties of the Bloom Lake CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**BLRC**" means Bloom Lake Railway Company Limited;

"**Business**" means the direct and indirect operations and activities formerly carried on by the Participating CCAA Parties;

"**Business Day**" means a day, other than a Saturday, a Sunday, or a non-juridical day (as defined in

article 6 of the Code of Civil Procedure, R.S.Q., c. C-25, as amended);

"**Cash**" means cash, certificates of deposit, bank deposits, commercial paper, treasury bills and other cash equivalents;

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

"**CCAA Charges**" means the Administration Charge and the Directors' Charge;

"**CCAA Parties**" means the Wabush CCAA Parties, together with the Bloom Lake CCAA Parties, and **"CCAA Party**" means any one of the CCAA Parties;

"**CCAA Party Pre-Filing Interco Claims**" means Claims of the Participating CCAA Parties against other Participating CCAA Parties as set out in Schedule "H" hereto;

"**CCAA Proceedings**" means the proceedings commenced pursuant to the CCAA by a Court Order issued on January 27, 2015, bearing Court File No. 500-11-048114-157;

"**Claim**" means:

(a) any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any of them), whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on, an event, fact, act or omission which occurred in whole or in part prior to the applicable Filing Date, at law or in equity, by reason of the commission of a tort (intentional or unintentional), any breach of contract, lease or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any breach of extra-contractual obligation, any right of ownership of or title to property, employment, contract or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against any of the Participating CCAA Parties or any of their property or assets, and whether or not any such indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmetered, disputed, legal, equitable, secured (by guarantee, surety or otherwise), unsecured, present, future, known or unknown, and whether or not any such right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable under the BIA had the Participating CCAA Parties (or any one of them) become bankrupt on the

applicable Filing Date, including, for greater certainty, any Tax Claim and any monetary claim in connection with any indebtedness, liability or obligation by reason of a breach of a collective bargaining agreement, including grievances in relation thereto, or by reason of a breach of a legal or statutory duty under any employment legislation or pay equity legislation;

(b) a D&O Claim; and

(c) a Restructuring Claim, provided, however, that Excluded Claims are not Claims, but for greater certainty, a Claim includes any claim arising through subrogation or assignment against any Participating CCAA Party or Director or Officer;

"**Claims Bar Date**" means as provided for in the Amended Claims Procedure Order: (a) in respect of a Claim or D&O Claim, 5:00 p.m. on December 18, 2015, or such other date as may be ordered by the Court; and (b) in respect of a Restructuring Claim, the later of (i) 5:00 p.m. on December 18, 2015 (ii) 5:00 p.m. on the day that is 21 days after either (A) the date that the applicable Notice of Disclaimer or Resiliation becomes effective, (B) the Court Order settling a contestation against such Notice of Disclaimer or Resiliation brought pursuant to Section 32(5)(b) CCAA, or (C) the date of the event giving rise to the Restructuring Claim; or (iii) such other date as may be ordered by the Court;

"**Claims Officer**" means the individual or individuals appointed by the Monitor pursuant to the Amended Claims Procedure Order;

"**CMC Secured Claims**" has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

"**CNR Key Bank Claims**" has the meaning ascribed thereto in the Thirty-Ninth Report dated September 11, 2017 of the Monitor;

"**Conditions Certificates**" means written notice confirming, as applicable, the fulfilment or waiver, to the extent available, of the conditions precedent to implementation of the Plan as set out in Section 11.3 of the Plan;

"**Construction Lien Claim**" means a Claim asserting a Lien over real property of a Participating CCAA Party in respect of goods or services provided to such Participating CCAA Party that improved such real property;

"**Court**" means the Québec Superior Court of Justice (Commercial Division) or any appellate court seized with jurisdiction in the CCAA Proceedings, as the case may be;

"**Court Order**" means any order of the Court;

"**CQIM**" means Cliffs Québec Iron Mining ULC;

"**CQIM/Quinto Parties**" means CQIM and Quinto together;

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Amended Claims Procedure Order, the Plan and the Meetings Order, or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person;

"**D&O Bar Date**" means 5:00 p.m. (prevailing Eastern Time) on December 18, 2015, or such other date as may be ordered by the Court;

"**D&O Claim**" means any right or claim of any Person against one or more of the Directors and/or Officers howsoever arising on or before the D&O Bar Date, for which the Directors and/or Officers, or any of them, are by statute liable to pay in their capacity as Directors and/or Officers or which are secured by way of any one of the Directors' Charges;

"**Deficiency Claim**" means, in respect of a Secured Creditor holding a Proven Secured Claim, the amount by which such Secured Claim exceeds the Allocated Value of the Property secured by its Lien, and for greater certainty, includes, as applicable, the deficiency Claim, if any, of (a) the Pension Plan Administrator arising from any of the Pension Claims being Finally Determined to be a Priority Pension Claim, and (b) the Non-Filed Affiliate Secured Interco Claims;

"**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of any of the Participating CCAA Parties, in such capacity;

"**Directors' Charges**" means, collectively, the BL Directors' Charge and the Wabush Directors' Charge;

"**Eligible Voting Claims**" means a Voting Claim or an Unresolved Voting Claim;

"**Eligible Voting Creditors**" means, subject to Section 4.2(b) of the Plan, Affected Unsecured Creditors holding Voting Claims or Unresolved Voting Claims;

"**Employee**" means a former employee of a Participating CCAA Party other than a Director or Officer;

"**Employee Priority Claims**" means, in respect of a Participating CCAA Party, the following claims of Employees of such Participating CCAA Party:

(a) claims equal to the amounts that such Employees would have been qualified to receive under paragraph 136(1)(d) of the BIA if the Participating CCAA Party had become bankrupt on the Plan Sanction Date, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements;

(b) claims for wages, salaries, commissions or compensation for services rendered by such Employees after the applicable Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the Business during the same period, which for greater certainty, excludes any OPEB, pension contribution, and termination and severance entitlements; and

(c) any amounts in excess of (a) and (b), that the Employees may have been entitled to receive pursuant to the *Wage Earner Protection Program Act* (Canada) if such Participating CCAA Party had become a bankrupt on the Plan Sanction Date, which for greater certainty, excludes OPEB and pension contributions;

"**Excluded Claim**" means, subject to further Court Order, any right or claim of any Person that may be asserted or made in whole or in part against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind which arose in respect of obligations first incurred on or after the applicable Filing Date (other than Restructuring Claims and D&O Claims), and any interest thereon, including any obligation of the Participating CCAA Parties toward creditors who have supplied or shall supply services, utilities, goods or materials, or who have or shall have advanced funds to the Participating CCAA Parties on or after the applicable Filing Date, but only to the extent of their claims in respect of the supply or advance of such services, utilities, goods, materials or funds on or after the applicable Filing Date, and:

(a) any claim secured by any CCAA Charge;

(b) any claim with respect to fees and disbursements incurred by counsel for any CCAA Party, Director, the Monitor, Claims Officer, any financial advisor retained by any of the foregoing, or Representatives' Counsel as approved by the Court to the extent required;

"**Fermont Allocation Appeal**" means the appeal by Ville de Fermont of the judgment of the Court in the CCAA Proceedings approving the Allocation Methodology dated July 25, 2017 under Court File Number 500-09-027026-178;

"**Filing Date**" means January 27, 2015 for the Bloom Lake CCAA Parties, and May 20, 2015 for the Wabush CCAA Parties;

"**Final Determination**" and "**Finally Determined**" as pertains to a Claim, matter or issue, means either:

(a) in respect of a Claim, such Claim has been finally determined as provided for in the Amended Claims Procedure Order;

(b) there has been a Final Order in respect of the matter or issue; or

(c) there has been an agreed settlement of the issue or matter by the relevant parties, which settlement has been approved by a Final Order, as may be required, or as determined by the Monitor, in consultation with the Participating CCAA Parties, to be approved by the Court;

"**Final Order**" means a Court Order, which has not been reversed, modified or vacated, and is not subject to any stay or appeal, and for which any and all applicable appeal periods have expired;

"**Governmental Authority**" means any government, including any federal, provincial, territorial or municipal government, and any government department, body, ministry, agency, tribunal, commission, board, court, bureau or other authority exercising or purporting to exercise executive, legislative, judicial, regulatory or administrative functions of, or pertaining to, government including without limitation any Taxing Authority;

"**Government Priority Claims**" means all claims of Governmental Authorities that are described in section 6(3) of the CCAA;

"**Initial Order**" means, collectively, in respect of the Bloom Lake CCAA Parties, the Bloom Lake Initial Order, and in respect of the Wabush CCAA Parties, the Wabush Initial Order;

"**Liability**" means any indebtedness, obligations and other liabilities of a Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due;

"**Lien**" means any lien, mortgage, charge, security interest, hypothec or deemed trust, arising pursuant to contract, statute or Applicable Law;

"**Meetings**" means the meetings of Affected Unsecured Creditors in the Unsecured Creditor Classes in respect of each Participating CCAA Party called for the purposes of considering and voting in respect of the Plan, which has been set by the Meetings Order to take place at the times, dates and locations as set out in the Meetings Order;

"**Meetings Order**" means this Plan Filing and Meetings Order, including the Schedules hereto, as may be amended or varied from time to time by subsequent Court Order;

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties and not in its personal or corporate capacity;

"**Newfoundland Reference Proceedings**" means the reference proceeding commenced in the Newfoundland Court of Appeal in respect of the Pension Claims as Docket No. 201701H0029, as appealed to the Supreme Court of Canada;

"**Non-Filed Affiliates**" means the Parent, its former and current direct and indirect subsidiaries and its current and former Affiliates who are not petitioners or mises-en-cause in the CCAA Proceedings, and for greater certainty does not include any CCAA Party but does include any subsidiary of a CCAA Party;

"**Non-Filed Affiliate Interco Claims**" means, collectively, the Non-Filed Affiliate Unsecured Interco Claims and the Non-Filed Affiliate Secured Interco Claims;

"**Non-Filed Affiliate Secured Interco Claims**" means, collectively, (a) the CNR Key Bank Claims and (b) the CMC Secured Claims, in each case only to the extent of the Allocated Value of the Property securing such Claims as set out in the Schedule "G" to this Order and to the extent not a Deficiency Claim;

"**Non-Filed Affiliate Unsecured Interco Claims**" means all Claims filed in the CCAA Proceedings by a Non-Filed Affiliate determined in accordance with the Plan (other than Non-Filed Affiliate Secured Claims) as set out in the Schedule "F" to this Order, and for greater certainty, includes any Deficiency Claims held by a Non-Filed Affiliate;

"**Notice of Disclaimer or Resiliation**" means a written notice issued, either pursuant to the provisions of an agreement, under Section 32 of the CCAA or otherwise, on or after the applicable Filing Date of the Participating CCAA Parties, and copied to the Monitor, advising a Person of the restructuring, disclaimer, resiliation, suspension or termination of any contract, employment agreement, lease or other agreement or arrangement of any nature whatsoever, whether written or oral, and whether such restructuring, disclaimer, resiliation, suspension or termination took place or takes place before or after the date of the Amended Claims Procedure Order;

"**Officer**" means any Person who is or was, or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of any of the Participating CCAA Parties;

"**Parent**" means Cleveland-Cliffs Inc.;

"**Participating CCAA Parties**" means the CCAA Parties, other than 8568391 and BLRC, and

"**Participating CCAA Party**" means any of the Participating CCAA Parties;

"**Pension Plan Administrator**" means Morneau Shepell Ltd., the Plan Administrator of the Wabush Pension Plans, or any replacement thereof;

"**Pension Claims**" means Claims with respect to the administration, funding or termination of the Wabush Pension Plans, including any Claim for unpaid normal cost payments, or special/amortization payments or any wind up deficiency and "**Pension Claim**" means any one of them;

"**Pension Priority Proceedings**" means (a) the motion for advice and directions of the Monitor dated September 20, 2016 in respect of priority arguments asserted pursuant to the *Pension Benefits Act* (Newfoundland and Labrador), the *Pension Benefits Standards Act* (Canada) and the *Supplemental Pension Plans Act* (Québec) in connection with the claims arising from any failure of the Wabush CCAA Parties to make certain normal course payments or special payments under the Wabush Pension Plans and for the wind-up deficit under the Wabush Pension Plans currently subject to an appeal of Mr. Justice Hamilton's decision dated September 11, 2017, as may be further appealed, and (b) the Newfoundland Reference Proceedings with regards to the interpretation of the *Pension Benefits Act* (Newfoundland and Labrador) and the applicable pension legislation to members and beneficiaries of the Wabush Pension Plans;

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust (including a real estate investment trust), unincorporated organization, joint venture, government or any agency or instrumentality thereof or any other entity;

"**Plan**" has the meaning given to such term in Paragraph 4;

"**Plan Implementation Date**" means the Business Day on which all of the conditions precedent to the implementation of the Plan have been fulfilled, or, to the extent permitted pursuant to the terms and conditions of the Plan, waived, as evidenced by the Monitor's Plan Implementation Date Certificate to be filed with the Court;

"**Plan Implementation Date Certificate**" means the certificate substantially in the form to be attached to the Sanction Order to be filed by the Monitor with the Court, declaring that all of the conditions precedent to implementation of the Plan have been satisfied or waived;

"**Plan Modification**" shall have the meaning ascribed thereto in the Meetings Order;

"**Plan Sanction Date**" means the date that the Sanction Order issued by the Court;

"**Plan Sponsors**" means the Parent and all other Non-Filed Affiliates;

"**Post-Filing Claims Procedure Order**" means the Post-Filing Claims Procedures Order to be sought by the CCAA Parties, which, *inter alia*, seeks to establish a post-filing claims procedure

with respect to post-filing claims, if any, against the CCAA Parties and their Officers and Directors, as such may be amended, restated or supplemented from time to time;

"**Priority Claims**" means, collectively, the (a) Employee Priority Claim; and (b) Government Priority Claims;

"**Priority Pension Claim**" means a Pension Claim that is Finally Determined to have priority over Secured Claims or Unsecured Claims;

"**Proof of Claim**" means the proof of claim form that was required to be completed by a Creditor setting forth its applicable Claim and filed by the Claims Bar Date, pursuant to the Amended Claims Procedure Order;

"**Property**" means, collectively, the BL Property and the Wabush Property;

"**Proven Affected Unsecured Claim**" means an Affected Unsecured Claim that is a Proven Claim;

"**Proven Claim**" means (a) a Claim of a Creditor, Finally Determined as an Allowed Claim for voting, distribution and payment purposes under the Plan, (b) in the case of the Participating CCAA Parties in respect of their CCAA Party Pre-Filing Interco Claims, and in the case of the Non-Filed Affiliates in respect of their Non-Filed Affiliate Unsecured Interco Claims and Non-Filed Affiliate Secured Interco Claims, as such Claims are declared, solely for the purposes of the Plan, to be Proven Claims pursuant to and in the amounts set out in this Order, and (c) in the case of Employee Priority Claims and Government Priority Claims, as Finally Determined to be a valid post-Filing Date claim against a Participating CCAA Party;

"**Proven Secured Claim**" means a Secured Claim that is a Proven Claim;

"**Quinto"** means Quinto Mining Corporation;

"**Representative Court Order**" means the Court Order dated June 22, 2015, as such order may be amended, supplemented, restated or rectified from time to time;

"**Required Majority**" means, with respect to each Unsecured Creditor Class, a majority in number of Affected Unsecured Creditors who represent at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote approving the Plan (in person, by proxy or by ballot) at the Meeting;

"**Restructuring Claim**" means any right or claim of any Person against the Participating CCAA Parties (or any one of them) in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Participating CCAA Parties (or any one of them) to such Person, arising out of the restructuring, disclaimer, resiliation, termination or breach or suspension, on or after the applicable Filing Date, of any contract, employment agreement, lease or other agreement or arrangement, whether written or oral, and whether such restructuring, disclaimer, resiliation,

termination or breach took place or takes place before or after the date of the Amended Claims Procedure Order, and, for greater certainty, includes any right or claim of an Employee of any of the Participating CCAA Parties arising from a termination of its employment after the applicable Filing Date, *provided, however*, that "**Restructuring Claim**" shall not include an Excluded Claim;

"**Salaried Members**" means, collectively, all salaried/non-Union Employees and retirees of the Wabush CCAA Parties or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses, or group or class of them (excluding any individual who opted out of representation by the Salaried Members Representatives and Salaried Representative Counsel in accordance with the Representative Court Order, if any);

"**Salaried Members Representatives"** means Michael Keeper, Terrence Watt, Damien Lebel and Neil Johnson, in their capacity as Court-appointed representatives of all the Salaried Members of the Wabush CCAA Parties, the whole pursuant to and subject to the terms of the Representative Court Order;

"**Salaried Members Representative Counsel**" means Koskie Minsky LLP and Fishman Flanz Meland Paquin LLP, in their capacity as legal counsel to the Salaried Members Representatives, or any replacement thereof;

"**Salaried Pension Plan**" means the defined benefit plan known as the Contributory Pension Plan for Salaried Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0343558);

"**Sanction Hearing**" means the hearing of the Sanction Motion;

"**Sanction Motion**" means the motion by the Participating CCAA Parties seeking the Sanction Order;

"**Sanction Order**" means the Court Order to be sought by the Participating CCAA Parties from the Court as contemplated under the Plan which, *inter alia*, approves and sanctions the Plan and the transactions contemplated thereunder, pursuant to Section 6(1) of the CCAA, substantially in the form of Schedule "E" to the Plan or otherwise in form and content acceptable to the Participating CCAA Parties, the Monitor and the Parent, in each case, acting reasonably;;

"**Secured Claims**" means Claims held by "secured creditors" as defined in the CCAA, including Construction Lien Claims, to the extent of the Allocated Value of the Property securing such Claim, with the balance of the Claim being a Deficiency Claim, and amounts subject to section 6(6) of the CCAA;

"**Service List**" means the service list in the CCAA Proceedings;

"**Secured Creditors**" means Creditors holding Secured Claims;

"**Stay of Proceedings**" means the stay of proceedings created by the Initial Order as amended and extended by further Court Order from time to time;

"**Tax**" or "**Taxes**" means any and all taxes including all income, sales, use, goods and services, harmonized sales, value added, capital gains, alternative, net worth, transfer, profits, withholding, payroll, employer health, excise, franchise, real property, and personal property taxes and other taxes, customs, duties, fees, levies, imposts and other assessments or similar charges in the nature of a tax, including Canada Pension Plan and provincial pension plan contributions, employment insurance and unemployment insurance payments and workers' compensation premiums, together with any instalments with respect thereto, and any interest, penalties, fines, fees, other charges and additions with respect thereto;

"**Tax Claims**" means any Claim against the Participating CCAA Parties (or any one of them) for any Taxes in respect of any taxation year or period ending on or prior to the applicable Filing Date, and in any case where a taxation year or period commences on or prior to the applicable Filing Date, for any Taxes in respect of or attributable to the portion of the taxation period commencing prior to the applicable Filing Date and up to and including the applicable Filing Date. For greater certainty, a Tax Claim shall include, without limitation, (a) any and all Claims of any Taxing Authority in respect of transfer pricing adjustments and any Canadian or non-resident Tax related thereto, and (b) any Claims against any BL/Wabush Released Party in respect of such Taxes;

"**Taxing Authorities**" means Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, any municipality of Canada, the Canada Revenue Agency, the Canada Border Services Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada (including Revenu Québec) and any political subdivision thereof and any Canadian or foreign government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "**Taxing Authority**" means any one of the Taxing Authorities;

"**Unaffected Claims**" means:

(a) Excluded Claims;

(b) Secured Claims;

(c) amounts payable under Section 6(3), 6(5) and 6(6) of the CCAA;

(d) Priority Claims; and

(e) D&O Claims that are not permitted to be compromised under section 5.1(2) of the CCAA;

"**Union Pension Plan**" means the defined benefit plan known as the Pension Plan Bargaining Unit Employees of Wabush Mines, Cliffs Mining Company, Managing Agent (Canada Revenue Agency registration number 0555201);

"**Unresolved Affected Unsecured Claim**" means an Affected Unsecured Claim that is an Unresolved Claim;

"**Unresolved Claim**" means a Claim, which at the relevant time, in whole or in part: (a) has not been Finally Determined to be a Proven Claim in accordance with the Amended Claims Procedure Order and this Plan; (b) is validly disputed in accordance with the Amended Claims Procedure Order; and/or (c) remains subject to review and for which a Notice of Allowance or Notice of Revision or Disallowance (each as defined in the Amended Claims Procedure Order) has not been issued to the Creditor in accordance with the Amended Claims Procedure Order as at the date of this Plan, in each of the foregoing clauses, including both as to proof and/or quantum, and for greater certainty includes a Non-Filed Affiliate Interco Claim or CCAA Party Pre-Filing Interco Claim in respect of the Wabush CCAA Parties prior to the Final Determination of the Pension Priority Proceedings;

"**Unresolved Voting Claim**" means the amount of the Unresolved Affected Unsecured Claim of an Affected Unsecured Creditor as determined in accordance with the terms of the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Unsecured Claims**" means Claims that are not secured by any Lien;

"**Unsecured Creditor Class**" means each of the CQIM/Quinto Unsecured Creditor Class, BL Parties Unsecured Creditor Class, Wabush Mines Unsecured Creditor Class, Arnaud Unsecured Creditor Class and Wabush Railway Unsecured Creditor Class;

"**USW Counsel**" means Philion Leblanc Beaudry avocats, in their capacity as legal counsel to the United Steelworkers, Locals 6254, 6285 and 9996;

"**USW Members"** means any Employee or retiree who is or was a member of the United Steelworkers, locals 6254, 6285 or 9996, including any successor of such Employees or retirees;

"**Voting Claim**" means the amount of the Affected Unsecured Claim of an Affected Unsecured Creditor as Finally Determined in the manner set out in the Amended Claims Procedure Order entitling such Affected Unsecured Creditor to vote at the applicable Meeting in accordance with the provisions of the Meetings Order, the Plan and the CCAA;

"**Wabush Administration Charge**" means the charge over the Wabush Property created by paragraph 45 of the Wabush Initial Order and having the priority provided in paragraphs 46 and 47 of such Order in the amount of Cdn$1.75 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush CCAA Parties**" means, collectively, Wabush Iron, Wabush Resources, Wabush Mines, Arnaud and Wabush Railway;

"**Wabush Directors' Charge**" means the charge over the Wabush Property created by paragraph 31 of the Wabush Initial Order, and having the priority provided in paragraphs 46 and 47 of such Court Order in the amount of Cdn$2 million, as such amount may be reduced from time to time by further Court Order;

"**Wabush Iron**" means Wabush Iron Co. Limited;

"**Wabush Mines Parties**" means collectively, Wabush Iron, Wabush Resources and Wabush Mines;

"**Wabush Pension Plans**" means, collectively, the Salaried Pension Plan and the Union Pension Plan;

"**Wabush Property**" means all current and future assets, rights, undertakings and properties of the Wabush CCAA Parties, of every nature and kind whatsoever, and wherever situate, including all Cash or other proceeds thereof;

"**Wabush Railway**" means Wabush Lake Railway Company Limited;

"**Wabush Resources**" means Wabush Resources Inc.;

"**Website**" means www.cfcanada.fticonsulting.com/bloomlake.

[LETTERHEAD OF MONITOR]

May _____, 2018

TO: Creditors of Cliffs Québec Iron Mining ULC ("**CQIM**"), Bloom Lake General Partner Limited ("**BLGP**"), The Bloom Lake Iron Ore Mine Limited Partnership ("**BLLP**") and Quinto Mining Corporation ("**Quinto**" and, together with CQIM, BLGP and BLLP, the "**Participating BL CCAA Parties**") and Wabush Iron Co. Limited ("**WICL**"), Wabush Resources Inc. ("**WRI**"), Wabush Mines ("**Wabush Mines**"), Arnaud Railway Company ("**Arnaud**") and Wabush Lake Railway Company Limited ("**Wabush Railway**" and, together with WICL, WRI, Wabush Mines and Arnaud, the "**Wabush CCAA Parties**" and, together with the Participating BL CCAA Parties, as certain of them may be consolidated under the Plan (as defined below), the "**Participating CCAA Parties**").

Dear Sirs/Mesdames:

Proposed Joint Plan of Compromise and Arrangement of the Participating CCAA Parties

Please find attached a Joint Plan of Compromise and Arrangement (as amended, restated or supplemented from time to time in accordance with the provisions thereof, the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") as filed by the Participating CCAA Parties (as defined above) with the Quebec Superior Court on April 16, 2018. Capitalized terms used in this letter not otherwise defined are as defined in Schedule "A" to the Plan.

The Plan seeks to implement the principal terms of a proposed settlement (the "**Settlement**") between the Participating CCAA Parties and Cleveland-Cliffs Inc. (the "**Parent**") and its former and current direct and indirect subsidiaries and affiliates (collectively with the Parent, the "**Non-Filed Affiliates**") as negotiated by FTI Consulting Canada Inc., in its capacity as the independent court-appointed Monitor in the CCAA proceedings (the "**Monitor**") and to distribute remaining assets of the Participating CCAA Parties to their creditors.

If the Plan is approved by the required majorities of creditors and sanctioned by the Court, the Plan will:

- resolve potential claims (collectively, the "**Potential Recovery Claims**") against certain of the Non-Filed Affiliates, without the significant time and expense of litigation and of obtaining payment from defendants in multiple foreign jurisdictions, the whole with an uncertain outcome;

- resolve significant intercompany claims between the CCAA Parties and between the CCAA Parties and certain Non-Filed Affiliates without the significant time and expense that would otherwise be incurred;

- provide significant additional monetary recoveries to third-party creditors which would not be available absent successful litigation in respect of the Potential Recovery Claims; and

- accelerate the payment of interim distributions to third-party creditors.

Pursuant to the Settlement, the Non-Filed Affiliates have agreed to sponsor the Plan by contributing the following to the Participating CCAA Parties' estates for the benefit of Third Party Affected Unsecured Creditors with Proven Claims:

(a) a cash contribution of CDN$5 million, of which CDN$4 million will be

allocated to the CQIM/Quinto Unsecured Creditor Class and CDN$1 million will be allocated amongst unsecured creditors of the other Participating CCAA Parties pro-rata based upon the amount of third party Proven Claims against such other CCAA Parties; and

(b) all of the secured and unsecured distributions to which certain Non-Filed Affiliates would otherwise be entitled, which will be contributed to the CQIM/ Quinto Parties (such Non-Filed Affiliates, being the "**Designated Non-Filed Affiliates**").

While the value of the distributions to be contributed by the Designated Non-Filed Affiliates cannot be calculated with certainty at this time because of various outstanding issues in the CCAA Proceedings, the Monitor estimates that the total incremental amount available to third-party creditors in the event that the Plan is implemented would be in the range of approximately CDN$62 million to CDN$100 million.

The Plan is a single joint Plan that will be subject to approval by each of the Unsecured Creditor Classes, which are:

(a) CQIM/Quinto Unsecured Creditor Class: Affected Unsecured Creditors of CQIM or Quinto;

(b) BL Parties Unsecured Creditor Class: Affected Unsecured Creditors of BLGP or BLLP;

(c) Wabush Mines Parties Unsecured Creditor Class: Affected Unsecured Creditors of WICL, WRI or Wabush Mines;

(d) Arnaud Unsecured Creditor Class: Affected Unsecured Creditors of Arnaud; and

(e) Wabush Railway Unsecured Creditor Class: Affected Unsecured Creditors of Wabush Railway.

Third Party Affected Unsecured Creditors in each as class will be entitled to vote the amount of their Claim proven in accordance with the Claims Procedure Order. To the extent that a Claim or any part of a Claim remains unresolved, the Affected Unsecured Creditor will also be able to vote its Unresolved Claim and such vote shall be tabulated separately from the votes of Affected

Unsecured Creditors with Proven Claims.

Distributions on account of Proven Claims of Affected Unsecured Creditors in each Unsecured Creditor Class will be based on the pro-rata share of the net amounts available in each estate from realizations as determined pursuant to the Allocation Methodology approved by the Court by an Order granted July 25, 2017, as supplemented by the amounts being contributed by the Designated Non-Filed Affiliates. The methodology for calculating the distribution entitlement of individual Affected Unsecured Creditors is the same for each Unsecured Creditor Class.

The Plan provides for customary releases for the Participating CCAA Parties and their respective Directors, Officers, Employees, advisors, legal counsel and agents, the Monitor, FTI and their respective current and former affiliates, directors, officers and employees and all of their respective advisors, legal counsel and agents, and the Non-Filed Affiliates and their respective current and former members, shareholders, directors, officers and employees, advisors, legal counsel and agents. The defendants named in class action proceedings filed in the Supreme Court of Newfoundland and Labrador on behalf of former salaried and union employees are not released from the claims asserted in those class action proceedings. Accordingly, those class action proceedings are not impacted by the Plan.

The Plan does not affect the determination of the Pension Priority Proceedings, which matters are the subject of dispute and must be resolved prior to any distributions to Affected Unsecured Creditors of the Wabush CCAA Parties.

The information provided in this letter is intended to give a high-level overview to help you understand the Plan. You should note, however, that the governing document is the Plan. Accompanying this letter are the following important documents:

- The Plan;
- The Meetings Order, granted April 20, 2018;
  - A Notice of Creditors' Meetings and Sanction Hearing;
- A form of Proxy and instructions for its completion;
- The Monitor's Report on the Plan;
  - A Letter from Salaried Members Representative Counsel; and

* A Letter from USW Counsel.

<u>You should read each of these documents carefully and in their entirety. You may wish to consult financial, tax or other professional advisors regarding the Plan and should not construe the contents of this letter as investment, legal or tax advice.</u>

<u>The Creditors' Meetings will be held on June 18, 2018 in Montreal, Quebec</u>. Details of the Creditors' Meetings and the Sanction Hearing are contained in the Notice of Creditors' Meetings and Sanction Hearing.

Creditors that are corporations, partnerships or trusts wishing to vote on the Plan must submit a properly completed Proxy by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**") appointing a proxy holder to attend and vote at the Creditors' Meeting.

Creditors that are individuals wishing to vote on the Plan may (i) appoint a proxy holder to attend and vote at the Creditor's Meeting by submitting a properly completed Proxy by no later than the Proxy Deadline; or (ii) vote in person at the Creditors' Meeting.

As stated in the Monitor's Report on the Plan, and for the reasons set out therein, the Monitor recommends that creditors vote **FOR** the Plan.

The Salaried Members Representative Counsel (the lawyers representing the salaried/non-Union Employees and retirees of the Wabush CCAA Parties in these proceedings, the "Salaried Members") and the USW Counsel (the lawyers representing the Employees and retirees of the Wabush CCAA Parties that are or were members of United Steelworkers locals 6254, 6285 or 9996, including any successor of such Employees and retirees, the "USW Members") recommend that you vote **FOR/AGAINST** the Plan. You will find enclosed letters from the Salaried Members Representative Counsel and the USW Counsel explaining their reasons.

If you are a Salaried Member and you **AGREE** with the recommendation of the Salaried Members Representative Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the Salaried Members Representative Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "Salaried Members Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the Salaried Members Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you are a USW Member and you **AGREE** with the recommendation of the USW Counsel, you do NOT have to fill out, sign or return any Proxy or any other form to the Monitor since the USW

Counsel have been authorized by the CCAA Court to attend at the Creditors' Meeting and to vote your employee claims on your behalf according to that recommendation (the "USW Deemed Proxy"). If however, you **DISAGREE** with the recommendation, you have the right to opt out of the USW Deemed Proxy by advising the Monitor in writing of your desire to do so and you may vote in person at the Creditors' Meeting in Montreal or you may appoint a different Proxy holder by using the Proxy form.

If you have any questions regarding the Plan, the vote, or matters with respect to the Creditors' Meetings or Sanction Hearing, please contact the Monitor by email at bloomlake@fticonsulting.com or by telephone at 1-844-669-6338 or 416-649-8126.

Yours sincerely,
FTI Consulting Canada Inc., solely in its capacity as Court-Appointed

Monitor of the CCAA Parties

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "Participating CCAA Parties")

NOTICE OF MEETINGS AND SANCTION HEARING

TO: The Affected Unsecured Creditors of the Participating CCAA Parties

Capitalized terms used and not otherwise defined in this Notice are as defined in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as amended, restated and/or supplemented from time to time in accordance with the terms thereof, the "**Plan**").

NOTICE IS HEREBY GIVEN that Meetings of each of the following Unsecured Creditor Classes of the Participating CCAA Parties will be held at the following dates, times and locations:

Unsecured Creditor Class	Meeting Information
Cliffs Québec Iron Mining ULC and Quinto Mining Corporation, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Bloom Lake General Partner Limited and The Bloom Lake Iron Ore Mine Limited Partnership, voting together as one Unsecured Creditor Class	**June 18, 2018 at 9:30 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Iron Co. Limited, Wabush Resources Inc., and Wabush Mines, voting together as one Unsecured Creditor Class	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Arnaud Railway Company	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1
Wabush Lake Railway Company Limited	**June 18, 2018 at 11:00 am** at: Norton Rose Fulbright Canada LLP Suite 2500, 1 Place Ville Marie Montréal, QC H3B 1R1

The purpose of the Meetings is to:

a) consider, and if deemed advisable, to pass, with or without variation, a resolution (the "**Resolution**") approving the Plan; and

b) transact such other business as may properly come before the Meetings or any adjournment or postponement thereof.

The Meetings are being held pursuant to an order (the "**Plan Filing and Meetings Order**") of the Québec Superior Court ("**CCAA Court**") made on April 20, 2018, which establishes the procedures for FTI Consulting Canada Inc. (in such capacity and not in its personal or corporate capacity, the "**Monitor**") to call, hold and conduct the Meetings.

The Plan provides for the compromise of the Affected Claims. The quorum for each Meeting will be one Affected Unsecured Creditor holding a Voting Claim or an Unresolved Voting Claim (each such creditor, an "**Eligible Voting Creditor**") present in person or by proxy.

In order for the Plan to be approved and binding in accordance with the CCAA, the Resolution must be approved by a majority in number of Affected Unsecured Creditors in each Unsecured Creditor Class representing at least two-thirds in value of the Claims of Affected Unsecured Creditors who actually vote (in person or by proxy) on the Resolution at the applicable Meeting (the "**Required Majority**").

All Eligible Voting Creditors will be eligible to attend the applicable Meeting and vote on the Plan. The votes of Eligible Voting Creditors holding Unresolved Voting Claims will be separately tabulated by the Monitor, and Unresolved Claims will be resolved in accordance with the Amended Claims Procedure Order prior to any distribution on account of such Unresolved Claims. Holders of an Unaffected Claim will not be entitled to attend and vote at any Meeting.

Forms and Proxies for Affected Unsecured Creditors

Any Eligible Voting Creditor who is unable to attend the applicable Meeting may vote by proxy. Further, any Eligible Voting Creditor who is not an individual may only attend and vote at the applicable Meeting if a proxyholder has been appointed to act on its behalf at such Meeting. A form of Proxy is included as part of the Meeting Materials being distributed by the Monitor to each Affected Unsecured Creditor.

Proxies, once duly completed, dated and signed, must be sent by email to the Monitor, or if cannot be sent by email, delivered to the Monitor at the address of the Monitor as set out on the Proxy form. Proxies must be received by the Monitor by no later than **5:00 p.m. (Eastern time) June 14, 2018** (the "**Proxy Deadline**").

Notice of Sanction Hearing

NOTICE IS ALSO HEREBY GIVEN that if the Plan is approved by the Required Majority of each Unsecured Creditor Class at the Meetings, the Participating CCAA Parties intend to bring a motion before the CCAA Court on **June 29, 2018 at 9:00 am** (Eastern Time) (the "**Sanction Hearing**"). The motion will be seeking the granting of the Sanction Order sanctioning the Plan under the CCAA and for ancillary relief consequent upon such sanction. Any person wishing to oppose the motion for the Sanction Order must serve upon the parties on the Service List as posted on the Monitor's Website and file with the CCAA Court, a copy of the materials to be used to oppose the Sanction Order by no later than 5:00 pm (Eastern Time) on June 26, 2018.

This Notice is given by the Participating CCAA Parties pursuant to the Plan Filing and Meetings Order. Additional copies of the Meeting Materials, including the Plan, may be obtained from the Monitor's Website (http://cfcanada.fticonsulting.com/bloomlake), or by requesting one from the

Monitor by email at bloomlake@fticonsulting.com.

DATED this _____day of __________, 2018.

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "PARTICIPATING CCAA PARTIES")

PROXY

Before completing this Proxy, please read carefully the accompanying instructions for the proper completion and return of the form.

Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Joint Plan of Compromise and Arrangement of the Participating CCAA Parties dated April 16, 2018 (as may be amended, supplemented and/or restated from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018.

In accordance with the Plan, Proxies may only be filed by Affected Unsecured Creditors having a Voting Claim or an Unresolved Voting Claim ("Eligible Voting Creditors").

PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").

THE UNDERSIGNED ELIGIBLE VOTING CREDITOR hereby revokes all Proxies previously given, if any, and nominates, constitutes, and appoints **Mr. Nigel Meakin** of FTI Consulting Canada Inc., in its capacity as Monitor, or such Person as he, in his sole discretion, may designate or, instead of the foregoing, appoints:

Print Name of Proxy holder if wishing to appoint someone other than Mr. Nigel Meakin

to attend on behalf of and act for the Eligible Voting Creditor at the applicable Meeting(s) to be held in connection with the Plan and at any and all adjournments, postponements or other rescheduling of the Meeting(s), and to vote the dollar value of the Eligible Voting Creditor's Eligible Voting Claim(s) as determined by and accepted for voting purposes in accordance with the Meetings Order and as set out in the Plan as follows:

A. (mark one only):

[] Vote FOR approval of the resolution to accept the Plan; or

[] Vote AGAINST approval of the resolution to accept the Plan.

B. If a box is not marked as a vote FOR or AGAINST approval of the Plan:

a) if Mr. Nigel Meakin or his designate is appointed as proxy holder, this Proxy shall be voted FOR approval of the Plan; or

b) if someone other than Mr. Nigel Meakin or his designate is appointed as proxy holder, the nominee shall vote at his or her discretion and otherwise act for and on behalf of the undersigned Eligible Voting Creditor with respect to any amendments or variations to the matters identified in the notice of the Meeting and in this Plan, and with respect to other matters that may properly presented at Meeting.

Dated this day of ________________, 2018.

Print Name of Eligible Voting Creditor

Signature of Eligible Voting Creditor or, if the Eligible Voting Creditor is a corporation, partnership or trust, signature of an authorized signing officer of the corporation, partnership or trust

Mailing Address of Eligible Voting Creditor

Title of the authorized signing officer of the corporation, partnership or trust, if applicable

Telephone number of the Eligible Voting Creditor or authorized signing officer

Email address of Eligible Voting Creditor

Print Name of Witness, if Eligible Voting Creditor is an individual

Signature of Witness

INSTRUCTIONS FOR COMPLETION OF PROXY

1. This Proxy should be read in conjunction with the Joint Plan of Compromise and Arrangement of the Applicant dated April 16, 2018 (as it may be amended, restated or supplemented from time to time, the "Plan") filed pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") with the Quebec Superior Court (the "CCAA Court") on April 16, 2018 and the Meetings Order. Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan.

2. Each Eligible Voting Creditor has the right to appoint a person (who need not be a Creditor) (a "Proxy holder") to attend, act and vote for and on behalf of such Eligible Voting Creditor and such right may be exercised by inserting the name of the Proxy holder in the blank space provided on the Proxy.

3. If no name has been inserted in the space provided to designate the Proxy holder on the Proxy, the Eligible Voting Creditor will be deemed to have appointed Mr. Nigel Meakin of FTI Consulting Canada Inc., in its capacity as Monitor (or such other Person as he, in his sole discretion, may designate), as the Eligible Voting Creditor's Proxy holder.

4. An Eligible Voting Creditor who has given a Proxy may revoke it by an instrument in writing executed by such Eligible Voting Creditor or by its attorney, duly authorized in writing or, if an Eligible Voting Creditor is not an individual, by an officer or attorney thereof duly authorized, and deposited with the Monitor in each case before the Proxy Deadline.

5. If this Proxy is not dated in the space provided, it shall be deemed to be dated as of the date on which it is received by the Monitor.

6. A valid Proxy from the same Eligible Voting Creditor bearing or deemed to bear a later date than this Proxy will be deemed to revoke this Proxy. If more than one valid Proxy from the same Eligible Voting Creditor and bearing or deemed to bear the same date are received by the Monitor with conflicting instructions, such Proxies shall not be counted for the purposes of the vote.

7. This Proxy confers discretionary authority upon the Proxy holder with respect to amendments or variations to the matters identified in the notice of the Meeting and in the Plan, and with respect to other matters that may properly come before the Meeting.

8. The Proxy holder shall vote the Eligible Voting Claim of the Eligible Voting Creditor in accordance with the direction of the Eligible Voting Creditor appointing him/her on any ballot that may be called for at the applicable Meeting. **IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN, AND MR. NIGEL MEAKIN OR HIS DESIGNATE IS APPOINTED AS PROXY HOLDER, THIS PROXY WILL BE VOTED FOR THE RESOLUTION TO APPROVE THE PLAN, INCLUDING ANY AMENDMENTS, VARIATIONS OR SUPPLEMENTS THERETO. IF AN ELIGIBLE VOTING CREDITOR FAILS TO INDICATE ON THIS PROXY A VOTE FOR OR AGAINST APPROVAL OF THE RESOLUTION TO ACCEPT THE PLAN AND APPOINTS A PROXY HOLDER OTHER THAN MR. NIGEL MEAKIN OR HIS DESIGNATE, THE PROXY HOLDER MAY VOTE ON THE RESOLUTION AS HE OR SHE DETERMINES AT THE APPLICABLE MEETING.**

9. If the Eligible Voting Creditor is an individual, this Proxy must be signed by the Eligible Voting Creditor or by a person duly authorized (by power of attorney) to sign on the Eligible Voting Creditor's behalf. If the Eligible Voting Creditor is a corporation, partnership or trust, this proxy must be signed by a duly authorized officer or attorney of the corporation,

partnership or trust. If you are voting on behalf of a corporation, partnership or trust or on behalf of another individual at a Meeting, you must have been appointed as a proxy holder by a duly completed proxy submitted to the Monitor by the Proxy Deadline. You may be required to provide documentation evidencing your power and authority to sign this Proxy.

10. **PROXIES, ONCE DULY COMPLETED, DATED AND SIGNED, MUST BE SENT BY EMAIL TO THE MONITOR, OR IF CANNOT BE SENT BY EMAIL, DELIVERED TO THE MONITOR BY NO LATER THAN 5:00 P.M. (EASTERN TIME) ON JUNE 14, 2018 (THE "PROXY DEADLINE").**

By email: bloomlake@fticonsulting.com

By mail or courier:

FTI Consulting Canada Inc. Monitor of Bloom Lake General Partners Limited, et al. TD Waterhouse Tower 79 Wellington Street West Suite 2010, P.O. Box 104 Toronto, Ontario M5K 1G8

11. The Applicant and the Monitor are authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which any Proxy is completed and executed, and may waive strict compliance with the requirements in connection with the deadlines imposed by the Meetings Order.

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

AND IN THE MATTER OF A JOINT PLAN OF COMPROMISE OR ARRANGEMENT OF BLOOM LAKE GENERAL PARTNER LIMITED, THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP, QUINTO MINING CORPORATION, CLIFFS QUÉBEC IRON MINING ULC, WABUSH IRON CO. LIMITED, WABUSH RESOURCES INC., WABUSH MINES, ARNAUD RAILWAY COMPANY, WABUSH LAKE RAILWAY COMPANY LIMITED (collectively, the "Participating

CCAA Parties" and each a "Participating CCAA Party")

RESOLUTION OF UNSECURED CREDITOR CLASS

BE IT RESOLVED THAT:

1. the Joint Plan of Compromise and Arrangement dated April 16, 2018 filed by the Participating CCAA Parties under the *Companies' Creditors Arrangement Act*, as may be amended, restated or supplemented from time to time in accordance with its terms (the "**Plan**"), which Plan has been presented to this Meeting, be and is hereby accepted, approved, and authorized;

2. any director or officer of the applicable Participating CCAA Party be and is hereby authorized, empowered and instructed, acting for, and in the name of and on behalf of such Participating CCAA Party, to execute and deliver, or cause to be executed and delivered, all such documents, agreements and instruments and to do or cause to be done all such other acts and things as such director or officer determines to be necessary or desirable in order to carry out the Plan, such determination to be conclusively evidenced by the execution and delivery by such directors or officers of such documents, agreements or instruments or the doing of any such act or thing.

3. notwithstanding that this Resolution has been passed and the Plan has been approved by the Affected Unsecured Creditors and the Court, the directors of the Participating CCAA Parties be and are hereby authorized and empowered to amend the Plan or not proceed to implement the Plan subject to and in accordance with the terms of the Plan.

* The Court rectifies its judgment dated April 20, 2018 (1) to correct in paragraph 16 that the Attorney-General of Canada on behalf of the Office of the Superintendent of Financial Institutions did not take any position on the amendment proposed by the Representative Employees and the Union and (2) to make incidental changes to paragraphs 5, 6 and 8 of the

Plan Filing and Meetings Order annexed to the judgment to make the Order consistent with the judgment.

1 The Petitioners and the Mis-en-cause.

2 R.S.C. 1985, c. C-36 (the "CCAA").

3 The NFA filed secured and unsecured claims in excess of $1 billion against the CCAA Parties.

4 Forty-Third Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 19, 2018.

5 8568391 Canada Limited and Bloom Lake Railway Company Limited ("BLRC"), have no pre-filing creditors and will be dissolved.

6 Forty-Fourth Report to the Court submitted by FTI Consulting Canada Inc., in its Capacity as Monitor, dated March 22, 2018, par. 68.

7 Wabush Iron, Wabush Resources, Wabush Mines, Arnaud Railway and Wabush Lake Railway.

8 The claims against Arnaud Railway and Wabush Lake Railway overlap with the claims against Wabush Mines.

9 *Unique Broadband Systems (Re)*, 2013 ONSC 676, par. 52 and 95; *Kerr Interior Systems Ltd. (Re)*, 2011 ABQB 214, par. 29; *ScoZinc Ltd. (Re)*, 2009 NSSC 163, par. 7-9; *Re Fracmaster Ltd.*, 1999 ABQB 379, par. 24; *Canadian Red Cros Society/la Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC), par. 37.

10 44th Report, *supra* note 6, par. 60-68.

11 CQLR, chapter C-27.

12 *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39, par. 41.

13 RSNL 1990, chapter L-1.

14 *Québec (Procureur général)* c. *Désir*, 2008 QCCA 1755, par. 8.

15 See the meeting orders issued with respect to U.S. Steel Canada Inc., Collins & Aikman Canada Inc., Nortel Networks Corporation, Hollinger Canadian Publishing Holdings Co., Co-op Atlantic and NewPage Port Hawkesbury Corp., and the Frequently Asked Questions with respect to Fraser Papers inc.

16 *Ibid*.

17 See the Nortel, Hollinger and U.S. Steel meeting orders.

18 *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967, par. 15.

TAB 4

Case Name:

U.S. Steel Canada Inc. (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 Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

[2016] O.J. No. 4688

2016 ONCA 662

270 A.C.W.S. (3d) 471

39 C.B.R. (6th) 173

2016 CarswellOnt 14104

402 D.L.R. (4th) 450

61 B.L.R. (5th) 1

Docket: C61331

Ontario Court of Appeal

G.R. Strathy C.J.O., P.D. Lauwers and M.L. Benotto JJ.A.

Heard: March 17, 2016.
Judgment: September 9, 2016.

(105 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeal by former employees of insolvent company from order that court had no jurisdiction to apply American legal doctrine of equitable subordination to subordinate American parent company's claim dismissed -- Employees claimed

parent company ran company into insolvency to further its own interests -- S. 11 of CCAA did not give at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors -- There was no gap in legislative scheme to be filled by equitable subordination through exercise of discretion, common law, court's inherent jurisdiction or by equitable principles.

Appeal by former employees of U.S. Steel Canada Inc (USSC), an insolvent company, from order that court had no jurisdiction to apply the American doctrine of equitable subordination to subordinate the claims of U.S. Steel (USS), the parent company. In September 2014, USSC was granted CCAA protection. The CCAA judge made a claims process order establishing a procedure for resolving creditors' claims against USSC. The order set out a separate procedure for resolving claims of approximately $2.2 billion by USS against USSC, most of which arose from USS's acquisition of USSC's predecessor. The Monitor recommended USS's claims be approved and USS moved for court approval of the claim. Objections were filed by four parties, including objections from unionized, non-unionized and retired employees. Relying on the doctrine of equitable subordination, the employees asked that the USS claims be dismissed or subordinated to the claims of other unsecured creditors. The judge held that he had no jurisdiction under the CCAA to apply the doctrine of equitable subordination. He found that not only was equitable subordination not found in s. 11 of the CCAA, but that it was an intention to exclude equitable subordination as s. 6(8) gave authority to subordinate debt as being in substance equity, but the CCAA did not contain any provision to subordinate a claim based on the conduct of the creditor.

HELD: Appeal dismissed. The issue of equitable subordination was plainly before the CCAA judge in submissions made before and after the hearing. An evidentiary record was unnecessary as the judge was not deciding whether equitable subordination applied to the facts of the case. There was no support for the concept that the phrase "any order" in s. 11 of the CCAA provided an equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The subordination of equity claims in the CCAA was directed towards a specific group, shareholders or those with similar claims. It also has a specific function, consistent with the purpose of the CCAA: to facilitate the arrangement or compromise without shareholders' involvement. There was no gap in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 38, ss. 95-101, s. 183

Bankruptcy Code, s. 105(a)

Bankruptcy Reform Act, 11 U.S.C, s. 501(c)(1)

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 6(8), s. 11, s. 11.8(8), s. 19, s. 19(1), s. 20, s. 22, s. 22.1, s. 36.1

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Appeal From:

On appeal from the order of Justice H. Wilton-Siegel of the Superior Court of Justice, dated August 13, 2015.

Counsel:

Gordon Capern, Kristian Borg-Olivier and Denise Cooney, for the appellant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union"), Appellant.

Andrew Hatnay and Barbara Walancik, for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.

Tamryn Jacobson, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario).

Michael E. Barrack, Jeff Galway and John Mather, for United States Steel Corporation, Respondent.

Sharon Kour, for U.S. Steel Canada Inc.

The judgment of the Court was delivered by

1 **G.R. STRATHY C.J.O.**:-- U.S. Steel Canada Inc. ("USSC") is in *CCAA*[1] protection. Its former employees claim that its American parent, United States Steel Corporation ("USS"), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the *CCAA* judge could apply an American legal doctrine called "equitable subordination" to subordinate USS's claims to the appellant's claims.

2 The *CCAA* judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

FACTUAL BACKGROUND

3 USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in *CCAA* protection at the time, and changed its name to USSC.

4 Seven years later, on September 16, 2014, USSC was again granted *CCAA* protection by order of the Superior Court of Justice (Commercial List).

5 The *CCAA* judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors' claims against USSC.

6 The order set out a separate procedure for resolving claims of approximately $2.2 billion by USS against USSC. Most of the claims arose from USS's acquisition and reorganization of Stelco and from advances of working capital. Those claims were to be determined by the court, rather than by the Monitor.

7 USS filed its proofs of claims. The Monitor recommended they be approved and USS moved for court approval of the claims.

8 Notices of Objection were filed by four parties: (a) the Province of Ontario and the Superintendent of Financial Services in his capacity as administrator of the Pension Benefits Guarantee Fund; (b) the United Steelworkers, Locals 8782 and 1005; (c) Representative Counsel to the Non-USW Active Salaried Employees and Non-USW Salaried Retirees; and (d) Robert Milbourne, a former president of Stelco, and his wife, Sharon Milbourne, both of whom are beneficiaries of a pension agreement with USSC.

9 These objections overlapped to some extent. The *CCAA* judge had to develop a procedure to address the objections. He had to decide whether they should be dealt with within the *CCAA* process, outside it, or not at all.

10 The Province made two allegations. The first was that loans by USS to USSC should be characterized as shareholders' equity, because of the circumstances in which they were made. They should therefore be subordinated to all other claims pursuant to s. 6(8) of the *CCAA*[2] (the "Debt/Equity Objection"). Second, the Province argued that the security for the loans should be invalidated pursuant to provincial and federal fraudulent assignment and fraudulent preference legislation (the "Security Objection"). USS disputed both allegations, but was content to have the issues determined under the Claims Process Order.

11 The Union made objections similar to the Province's, but it added a third based on oppression and breach of fiduciary duty arising out of USS's conduct in relation to the Canadian plants, pensioners, pension plan members and beneficiaries (the "Conduct Objections").

12 The *CCAA* judge described the Conduct Objections as allegations that USS caused USSC to underperform, thereby requiring it to incur significant debt and to be unable to meet its pension obligations. The Union sought, among other things, an order subordinating the USS claims in whole

or in part to its claims.

13 The Milbournes' objections were based on USS's alleged conduct and relied primarily on the doctrine of equitable subordination. They asked that the USS claims be dismissed entirely or subordinated to the claims of the other unsecured creditors.

14 The *CCAA* judge scheduled a motion to establish a litigation plan for USS's motion for approval of its claims against USSC. The parties agreed that the Security Objection and the Debt/Equity Objection could be determined pursuant to the Claims Process Order and within the *CCAA* proceedings.[3]

15 The primary disagreement concerned the procedure and timing for the determination of the other objections. The Union argued that the Conduct Objections should be resolved as part of the Claims Process Order and that an evidentiary record was required to do so. USS and USSC took the position that the Conduct Objections should be litigated outside the *CCAA* claims process.

16 The *CCAA* judge found that some of the claims of the Union and the Milbournes could be approached as third party claims against USS for oppression for the purpose of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and for breach of fiduciary duty. He found that neither the Claims Process Order nor the *CCAA* contemplated that such claims would be addressed by or would be relevant to a plan of arrangement or compromise under the *CCAA*. The third party claims fell outside the claims process unless specifically incorporated into the restructuring plan as approved by the parties or otherwise ordered.

17 The *CCAA*, he said at para. 65, "is directed towards the creation, approval and implementation of a plan of arrangement or compromise proposed between a debtor company and its secured and unsecured creditors". It did not contemplate incorporation of inter-creditor claims into any plan of arrangement or compromise or into the voting process in respect of any proposed plan.

18 He concluded, at para. 84, that under s. 11 the court had authority to order the remaining claims of the Union and the Milbournes, except the claim for equitable subordination, to be "determined by a process within the *CCAA* proceedings, other than the process contemplated by the Claims Process Order, if the Court is of the opinion that, on balance, such action is likely to further the remedial purpose of the *CCAA*." He held that those claims could be determined within the *CCAA* proceedings, rather than in a separate action in the Superior Court, but not under the Claims Process Order. He noted that the court retained jurisdiction to order that the claims be continued outside the *CCAA* if it was determined that pursuing them within the process would no longer further the remedial process of the *CCAA*.

19 He held, however, that he had no jurisdiction under the *CCAA* to apply the doctrine of equitable subordination. Before turning to his reasons, I will explain the doctrine of equitable subordination.

EQUITABLE SUBORDINATION

20 Equitable subordination was developed as an equitable remedy in American insolvency law to subordinate a creditor's claim based on its inequitable conduct. The principles were articulated in *Re Mobile Steel* (1977) 563 F. (2d) 692 (5th Cir.), which set out a three-part test:

a. the claimant must have engaged in some type of inequitable conduct;

b. the misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant; and

c. equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

21 Paragraph 105(a) of the U.S. *Bankruptcy Code* authorizes bankruptcy courts to use equitable principles to alter the provisions of Title 11 or to prevent an abuse of process. One year after *Mobile Steel*, the *Code* was amended to give legislative effect to equitable subordination: *Bankruptcy Reform Act*, 11 U.S.C. s.510(c)(1).

22 The Supreme Court of Canada considered the doctrine on two occasions. In both, the court found it unnecessary to determine whether equitable subordination should be applied, because the underlying facts did not meet the test: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, at p. 609; and *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 77. This court also found it unnecessary to decide the issue in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 14 O.R. (3d) 1 (C.A.).

23 The availability of the doctrine has been considered in various Canadian superior courts at the trial level, in various contexts and with inconclusive results: see *e.g. Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, [2006] O.J. No. 3087 (S.C. [Commercial List]), (in the context of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3); *Christian Brothers of Ireland in Canada (Re)* (2004), 69 O.R. (3d) 507, *(*in the context of the *Winding-up and Restructuring Act*, R.S.C. 1985, C. W-11, as amended).

24 In *AEVO Co. v. D & A Macleod Co*. (1991), 4 O.R. (3d) 368 (Gen. Div.), Chadwick J. rejected the application of equitable subordination in Canadian law, observing, at p. 372, that to introduce the doctrine would create chaos and would lead to challenges to security agreements based on the conduct of the secured creditor. In *I. Waxman & Sons Ltd. (Re)* (2008), 89 O.R. (3d) 427 (S.C.), Pepall J. queried, at para. 33, whether statutory priorities should be upset by a doctrine "divorced from its legal home". This observation was followed, however, with the comment that "a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal

developments."

25 On the other hand, the Newfoundland and Labrador Supreme Court (Trial Division) applied the doctrine in a bankruptcy case in *Oppenheim v. J.J. Lacey Insurance Limited*, 2009 NLTD 148, 291 Nfld. & P.E.I.R. 149.

26 The Supreme Court of Canada's silence on the issue of equitable subordination in *CDIC* and *Indalex* cannot be taken, as the *CCAA* judge appears to have thought, as an outright rejection of the doctrine. In my view, the Supreme Court simply left the issue for another day.

27 It is unnecessary to decide that issue in order to resolve this appeal. The only issue is whether the *CCAA* judge was right in deciding that he had no jurisdiction to grant equitable subordination under the *CCAA*, assuming the remedy is available in Canadian law.

SUBMISSIONS AND ANALYSIS

A. PROCEDURAL OBJECTION

28 The appellant's first submission is procedural. It claims that it was unnecessary for the *CCAA* judge to determine whether he had jurisdiction to grant equitable subordination. The Union essentially says it was blindsided. It says it made no submissions on the doctrine of equitable subordination and the *CCAA* judge did not indicate that he was going to address the issue in the context of the scheduling motion. It was inappropriate and unnecessary for the court to shut the door on a novel and controversial remedy without a full factual record.

29 The respondent acknowledges that equitable subordination was not a central issue in the oral submissions before the *CCAA* judge, but points out that it was raised in some of the factums and memoranda filed before and after the hearing. The *CCAA* judge was required to determine what conduct-based inter-creditor claims would be litigated, either under the Claims Process Order or under the *CCAA*. He was entitled to determine whether he had jurisdiction to grant equitable subordination within the *CCAA*.

30 I do not accept the appellant's submission. The issue of equitable subordination was plainly before the *CCAA* judge in submissions made before and after the hearing. The Milbournes' factum made extensive submissions on equitable subordination and argued that it, along with fiduciary duty and oppression, were "live issues which should be the subject matter of a robust evidentiary record and subject to a fair and thorough due process in this court". The Union's factum suggested that some of USS's unsecured claim could be subordinated to the claims of other creditors "on account of a breach of fiduciary duty, a finding of oppression, or otherwise." USSC's factum argued that the Union's claim for equitable subordination should be rejected and that suitable remedies were available outside the Claims Process. In supplementary written submissions, the Union argued, in response to USSC's submissions, that the determination of the issue of equitable subordination should await an evidentiary record.

31 Moreover, the issue before the *CCAA* judge was not simply scheduling. The motion sought directions on the extent and nature of production and discovery with respect to the various objections. The Union argued that the objections had to be resolved before there could be approval of a plan of restructuring, a sale process or a distribution to creditors. The allegations that USS's claims should be re-characterized, invalidated, disallowed or subordinated had to be resolved and the *CCAA* judge had to determine a process for their resolution. Some might be dealt with under the Claims Process Order and some might be dealt with outside that Order but nevertheless in the *CCAA* proceedings. Some might not be dealt with under the *CCAA* at all.

32 The *CCAA* judge was plainly aware that a determination of the inter-creditor claims could have implications for the approval of any subsequent reorganization, sale of the business or credit bid. It was appropriate for him to consider whether the court had jurisdiction to address those claims and, if so, how and when.

33 An evidentiary record was unnecessary. The *CCAA* judge was not deciding whether equitable subordination applied on the facts of this case. The issue was whether he had jurisdiction to grant equitable subordination under the *CCAA*.

34 I turn now to the question whether the *CCAA* judge correctly held that he had no jurisdiction under the *CCAA* to order equitable subordination of USS's claims.

B. JURISDICTION TO ORDER EQUITABLE SUBORDINATION

35 I will begin by summarizing the *CCAA* judge's reasons on this issue. I will then set out the submissions of the parties, identify the standard of review, describe the methodology I will use and apply that methodology to the legislation.

(1) The *CCAA* judge's reasons

36 The *CCAA* judge noted that although the *CCAA* gives authority to re-characterize debt as equity and to invalidate a preference or assignment, there is no express provision conferring jurisdiction to grant equitable subordination. He was of the view that any jurisdiction to do so would have to be found in s. 11, which provides that "the court ... may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances."

37 He observed that there is no Canadian case law supporting that authority and, when given the occasion to confirm the existence of equitable subordination on two occasions, the Supreme Court of Canada had declined to do so: *Canada Deposit Insurance Corp.*; and *Indalex*. He suggested that one might infer from this that the Supreme Court had rejected the principle of equitable subordination.

38 He found, however, that to the extent the issue remained open, the *CCAA* evidenced an intention to exclude equitable subordination. When Parliament amended the legislation in 2009, it

gave authority under s. 6(8) to subordinate debt as being in substance equity, but it did not enact any provision to subordinate a claim based on the conduct of the creditor. Nor had it drafted s. 36.1, which permitted the court to invalidate preferences and assignments, broadly enough to permit the court to make an order for equitable subordination. These provisions, he said, were "restrictions set out in this Act", limiting the court's broad discretion under s. 11. Parliament's failure to include equitable subordination in the remedies introduced in 2009 must be taken as indicative of an intention to exclude the operation of the doctrine under the *CCAA*. This, he said, was a policy decision the court must respect.

(2) The submissions of the parties

39 The appellant submits the *CCAA* judge had jurisdiction to grant equitable subordination pursuant to s. 11 of the *CCAA* in the absence of express "restrictions" on that jurisdiction. He erred in implying restrictions based on Parliament's failure to amend the legislation.

40 The respondent submits that Canadian courts have all the tools they need to assess, review and, where necessary, subordinate or invalidate creditors' claims in a manner consistent with the underlying legislation, without the need for equitable subordination. Some of these tools are the result of the 2009 amendments to the *BIA* and the *CCAA*. Parliament might have expanded those amendments to incorporate equitable subordination or some other conduct-based remedy, but declined to do so. The court should not invoke a controversial doctrine that Parliament declined to adopt when it had the opportunity to do so.

(3) The standard of review

41 The parties agree that the applicable standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, at para. 8; and *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 40.

(4) Framework for analysis

42 In *Century Services v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 65ff., the Supreme Court of Canada gave guidance on the approach to the scope of statutory remedies under the *CCAA,* and, if need be, under related sources of judicial authority. The court adopted the analysis proposed by Justice Georgina R. Jackson of the Court of Appeal for Saskatchewan and Professor Janis Sarra in an article entitled, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Toronto: Thomson Carswell, 2007), at p. 41. Blair J.A. also approved of this approach in *Metcalfe & Mansfield*, at paras. 48-49.

43 Jackson and Sarra note that the *CCAA* is skeletal legislation and advocate a transparent and consistent methodology as judges define the scope of their jurisdiction under the statute. They

propose that the courts should take a hierarchical view of the powers at their disposal, adopting a broad, liberal and purposive interpretation of the statute and applying the principles of statutory interpretation before turning to other tools such as the common law or the exercise of inherent jurisdiction.

44 At para. 66 of *Century Services*, the Supreme Court held that in most cases, the search for jurisdiction under the *CCAA* should be an exercise in statutory interpretation. The starting point is the "big picture" principles of statutory interpretation.

45 Driedger's modern principle is the crucial tool for construing skeletal legislation such as the *CCAA*. A court must go beyond an examination of the wording of the statute and consider the scheme of the Act, its object or the intention of the legislature and the context of the words in issue:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: Jackson and Sarra, at p. 47; Elmer A. Driedger, *The Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at p. 87, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. See also: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 23, 40.

46 With this in mind, I will apply the framework in *Century Services* to the search for jurisdiction. I turn first to a consideration of the purpose and scheme of the *CCAA*, before considering the language of the statute.

(5) Application of the framework

(i) The purpose of the CCAA

47 There is no dispute about the purpose of the *CCAA*. It describes itself as "An Act to facilitate compromises and arrangements between companies and their creditors". Its purpose is to avoid the devastating social and economic effects of commercial bankruptcies. It permits the debtor to continue to carry on business and allows the court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all": *Century Services*, at para. 77.

48 The *CCAA* has proven to be a flexible and successful tool to enable businesses to avoid bankruptcy. As Professor Sarra notes, "[i]t has been the statute of choice for debtor corporations in every major Canadian restructuring in the past quarter century, including national airlines, major steel and forestry companies, telecommunications companies, major retail chains, real estate and

development groups, and the national blood delivery system": Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed. (Toronto: Carswell, 2013), at p. 1.

49 The *CCAA* achieves its goals through a summary procedure for the compromise or arrangement of creditors' claims against the company. It was described in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36, as:

> a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders.

50 The process has been effective because it is summary, it is practical, it is supervised by an independent expert monitor and it is managed in real time by an experienced commercial judge.

51 *Century Services* is a good example of how the purpose of the *CCAA* informs the exercise of the court's authority. At issue in that case were the reconciliation of another federal statute with the *CCAA* and the scope of a *CCAA* judge's discretion. At para. 70, the orders of the *CCAA* judge were considered squarely within the context of the purpose of the Act:

> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit. [emphasis added]

52 The Supreme Court concluded, at para. 75, that the order advanced the underlying purpose of the *CCAA*.

(ii) The scheme of the CCAA

53 The *CCAA* has been described as "skeletal" or "under-inclusive" legislation, (Jackson and Sarra at p. 48) which grants broad powers to the courts in general terms.

54 The Act has five parts. Part I, entitled "Compromises and Arrangements" permits the court to sanction a compromise or arrangement between a company and its secured or unsecured creditors, or both.

55 The powers of the court are found in Part II, entitled "Jurisdiction of Courts". The statute gives the court jurisdiction to receive applications, order stays, approve debtor-in-possession financing and appoint a monitor, among other things. Proceedings are commenced by an application to the Superior Court. The court generally grants an initial stay, appoints a monitor with authority to repudiate leases and other agreements and authorizes debtor in possession financing. A process is established for the identification and review of creditors' claims by the monitor and to deal with disputed claims, with the ultimate purpose of establishing classes of creditors who will vote, by class, on the compromise or arrangement.

56 One possible outcome is the preparation of a plan of arrangement. Creditors vote by class on the plan at a meeting called for that purpose. A majority by number of creditors in each class, together with two-thirds of the creditors in that class by dollar value, must approve the plan. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court's approval of the plan. If all classes of creditors approve the plan, the court must then approve the plan as a final step.

57 Part III, entitled "General", deals with such issues as the determination of the amount of creditors' claims, classes of creditors, the duties of monitors, the disclaimer of agreements between the company and third parties and preferences and transfers at undervalue.

58 Section 19 identifies "claims" that may be dealt with in a compromise or arrangement. Those are claims provable in bankruptcy that relate to debts or liabilities, present or future, to which the debtor company is subject or may become subject before the compromise or arrangement is sanctioned.[4]

59 The significance of this definition is that the focus of the plan of arrangement is claims against the debtor company that are provable in bankruptcy. The *CCAA* judge identified this significance at para. 59 of his reasons, where he noted that s. 19(1) of the *CCAA* provides, effectively, "that a plan of compromise or arrangement may only deal with claims that relate to debts or liabilities to which a debtor company is subject at the time of commencement of proceedings under the *CCAA*". At para. 61, he noted that neither the Claims Process Order nor the *CCAA* contemplated that inter-creditor claims would be addressed by or be relevant to a plan of arrangement.

60 Section 20 sets out the method for determining the amount of the claim of any secured or unsecured creditors. In most cases, it will be the amount "determined by the court on summary application by the company or by the creditor".

61 Section 22 provides for the establishment of classes of creditors for the purpose of voting on a compromise or arrangement, based on, among other things, the nature of their claims, the nature of

the security in respect of their claims and the remedies available to them in relation to their claims. Creditors may be included in the same class "if their interests or rights are sufficiently similar to give them a commonality of interest".

62 Part IV deals with Cross-Border Insolvencies. Its stated purposes are to give mechanisms to provide for the fair and efficient administration of such insolvencies, to promote cooperation with courts of other jurisdictions, to promote "the rescue of financially troubled businesses to protect investment and preserve employment" and to protect the interests of creditors, of other interested persons and of the debtor company. Part V deals with Administration.

63 The *CCAA* was amended in 2009. The amendments were the product of extensive discussion of the *BIA* and the *CCAA* in the Standing Senate Committee on Banking, Trade and Commerce. The Committee recommended amendments to the legislation, including an expanded power to review, invalidate or subordinate creditors' claims under the *CCAA*.

64 These recommendations were reflected in the 2009 amendments in two respects. First, s. 6(8) provides that a compromise or arrangement will not be approved unless it provides that all other claims are to be paid in full before an equity claim is paid.

65 This provision, coupled with the definition of "equity interest"[5] and "equity claim"[6] in s. 2(1), permits the court to determine whether a creditor's claim is in substance a share, warrant or option. This is the underpinning of the Debt/Equity Objection, an objection based on a disagreement as to the proper characterization of the disputed claims.

66 Section 22.1, also added in 2009, provides that all creditors with equity claims are to be in the same class unless the court otherwise orders, and may not, as members of that class, vote at any meeting unless the court otherwise orders.

67 Second, the 2009 amendments harmonized the rules of reviewable transactions under the *BIA* and the *CCAA*. Creditors in a *CCAA* proceeding are now entitled to invoke the provisions of the *BIA* to invalidate security granted by a debtor corporation to a creditor where a fraudulent preference or transfer at undervalue is established. Section 36.1 of the *CCAA* provides that ss. 38 and 95 to 101 of the *BIA* apply, with any required modifications, in respect of a compromise or arrangement, unless the compromise or arrangement provides otherwise.

68 USS says that the 2009 amendments reflected Parliament's decision concerning the extent of the court's jurisdiction over "reviewable transactions" in *CCAA* proceedings and the extent to which a creditor's claim can be subordinated to other claims as a result of its conduct. It says Parliament might have included jurisdiction to rearrange priorities between creditors, for example through equitable subordination, but it declined to do so.

69 The scheme of the *CCAA* focuses on the determination of the validity of claims of creditors against the company and the determination of classes of claims for the purpose of voting on a

compromise or arrangement. Except as contemplated by ss. 2(1), 6(8), 22.1 and 36.1, the statute does not address either conflicts between creditors or the order of priorities of creditors. Priorities are, however, part of the background against which the plan of compromise or arrangement is negotiated.

70 There is nothing in the record before us to indicate that the issue of equitable subordination was given serious consideration at the time of the 2009 amendments or that those amendments were intended to import other remedies.

(iii) Interpreting the particular provisions before the court

71 I now turn to the words of the statute itself, considered in context and having regard to the scheme of the *CCAA*, the object of the act and the intentions of Parliament.

72 As Blair J.A. put it when deciding whether the *CCAA* granted the court the power to sanction the disputed order in *Metcalfe & Mansfield*, at para. 58, "[w]here in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases?" The question before us is "where (if at all) in the words of the statute is the court (implicitly or explicitly) clothed with authority to make an order for equitable subordination of the USS claims?"

(a) Section 11: "The engine that drives the statutory scheme"

73 The parties focussed their arguments on whether the powers granted by s. 11 include the power to grant the remedy of equitable subordination. In order to inform the scope of s. 11, they urge us to consider the treatment of "equity" claims in s. 6(8) of the *CCAA* and the remedies available under s. 36.1.

74 In *Stelco*, at para. 36, Blair J.A. described s. 11 as "the engine that drives this broad and flexible statutory scheme". Section 11 states, in full:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. [Emphasis added.]

75 Prior to amendment in 2005 (S.C. 2005, c. 47, s. 128), the underlined portion above had read "subject to this Act". In *Century Services*, the Supreme Court, at paras. 67-68, interpreted this amendment as being an endorsement of the broad reading of *CCAA* jurisdiction that had been developed in the jurisprudence.

76 The jurisdiction under s. 11 has two express limitations. First, the court must find that the

order is "appropriate in the circumstances". Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are "restrictions set out in" the *CCAA* that preclude it.

77 As I have noted, the *CCAA* judge held that s. 11 did not confer jurisdiction to apply the doctrine of equitable subordination. The statute could have provided the authority to subordinate claims on this basis, as it did with equity claims, but it did not. He also held that the definition of "equity claim" and the option to bring proceedings under s. 36.1 were "restrictions" within the meaning of s. 11.

78 In my view, the interpretative process should start with the scope of s. 11 before the restrictions are considered in the analysis. The broad powers exercised by *CCAA* judges evolved in the jurisprudence before the concept of "restrictions" was legislated.

79 Moreover, it is inconsistent with the anatomy and history of the *CCAA* to maintain that if Parliament had intended that a *CCAA* judge would have the authority to make a certain type of order, it would have said so. The Supreme Court has made it clear that "[t]he general language of the *CCAA* should not be read as being restricted by the availability of more specific orders": *Century Services*, at para. 70.

80 What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the *CCAA'*s purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

81 The words "may ... make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may ... <u>in furtherance of the purposes of this act</u>, make any order it considers appropriate in the circumstances."

82 There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

83 I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

84 It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the *CCAA* itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders Corp*., 2015 BCCA 426, 81 B.C.L.R. (5th) 102, at para. 34, the British Columbia Court of Appeal observed that "where other provisions of the statute are intended to restrict the powers under

ss. 11 and 11.02 of the statute, they do so in unequivocal terms."

85 The *CCAA* judge found that there were "restrictions set out" in the *CCAA* that prevented the court from applying equitable subordination, namely the definition of "equity claim" in s. 2(1) and the provisions of s. 36.1. Essentially, he found that Parliament could have introduced equitable subordination into the *CCAA* when it amended the legislation in 2009, but declined to do so. "The court must respect that policy decision", he said at para. 53. The respondent supports this interpretation.

86 I agree with the appellant that "equity claim" is not a restriction at all, but a definition. Together with s. 6(8), it codifies what was essentially the law before the 2009 amendments. The purpose of this involvement in the priority of claims is to remove shareholders from the process of arriving at a compromise or arrangement, absent permission of the court. It has nothing to do with any wrongdoing by the person with the equity interest. The only "restriction", if any, would be the lack of flexibility to reverse this statutory subordination, as Pepall J. pointed out in *Nelson Financial Group Ltd. (Re)*, 2010 ONSC 6229, 75 B.L.R. (4th) 302, at para. 34. However, this has to do only with subordination flowing from the characterization of a claim and not equitable subordination.

87 I also agree that the plain meaning of the words "subject to the restrictions set out in this Act" refers to express restrictions, of which there are a number.

(b) Subsection 6(8): Subordination of "equity claims"

88 In the court below, and in the appellant's submissions in this court, there was a blurring of the distinction between the separate concepts of "equity claim" and the doctrine of "equitable subordination". The *CCAA* judge's reasons referred at times to the "subordination claims" of the Union and the Milbournes as including the equitable subordination claims and the claims for oppression and breach of fiduciary duty.

89 As explained earlier, s. 6(8) of the *CCAA* effectively subordinates "equity claims", as defined, to the claims of all other creditors. No compromise or arrangement can be approved unless it provides for other claims to be paid, in full, before equity claims are paid.

90 With the exception of environmental claims, ss. 6(8) and 22.1 are the only provisions of the *CCAA* to deal expressly with priorities between creditors.[7] There is a clear rationale for these provisions. In E. Patrick Shea, *BIA, CCAA & WEPPA: A Guide to the New Bankruptcy & Insolvency Regime* (Markham: LexisNexis Group, 2009), at p. 89, the author explains that "[t]he intention of these amendments is to remove the shareholder/creditor from the reorganization process, unless the court orders that they have a seat at the table."

91 "Equitable subordination", on the other hand, refers to the doctrine at issue here: a form of equitable relief to subordinate the claim of a creditor who has engaged in inequitable conduct. Such

a claim is not an "equity claim", as defined. If it were, it would be subordinated without the need for intervention by the court.

92 Pepall J. dealt with these different principles and distinguished them clearly in *I. Waxman & Sons Ltd.*, a Commercial List decision that predated the 2009 amendments. There, a trustee in bankruptcy brought a motion for advice and directions as to whether a judgment creditor's claim should be allowed. Other creditors argued that his claim was rooted in equity and was not a debt claim. In the alternative, they argued that even if it was a debt claim, it should be subordinated to their claims pursuant to the doctrine of equitable subordination.

93 Pepall J. addressed the argument that the judgment creditor's claim was an equity claim under the heading "Characterization" (paras. 18-26), because the issue was whether his claim was properly characterized as one of equity or debt, with the attendant priority consequences. Next she considered whether, even though she had found that the claim was a debt claim, it should be subordinated pursuant to the doctrine of equitable subordination (paras. 27-35). She noted, at para. 27, that "[a]s its name suggests, the basis for development of the doctrine is the equitable jurisdiction of the court". She held that even if it applied in Canada, which was not established, there was no evidence on which to apply it in that case.

94 By contrast, the *CCAA* judge in this case disposed of these issues under one heading, "The Authority of the Court to Adjudicate Claims for Debt Re-Characterization and for Equitable Subordination", at paras. 38-53. He found, at para. 51, that the absence of any provision in the *CCAA* that would permit the application of equitable subordination was indicative of an intention to exclude the operation of the doctrine.

95 The *CCAA* judge appears to have treated equitable subordination as akin to equity claims as defined in s. 2(1), the subordination of equity claims in s. 6(8) and the remedies under s. 36.1. He found that because equitable subordination is not mentioned in the context of these remedies, Parliament must have intended to exclude it.

96 The distinction between these terms undermines the argument that equitable subordination does not exist because it was not included as part of the definition of (or together with the subordination of) equity claims. Equity claims are subordinated in order to keep shareholders away from the table while the claims of other creditors are being sorted out. Even prior to being explicitly subordinated by statute in 2009, they generally ranked lower than general creditors: *Sino-Forest Corp. (Re)*, 2012 ONCA 816, 114 O.R. (3d) 304, at para. 30. The purpose of the 2009 amendments appears to have been to confirm and clarify the law: see The Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

97 Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

> 36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

98 The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

99 I would not read anything into s. 36.1, one way or the other. Nor would I regard it as a "restriction" set out in the Act within the meaning of s. 11.

(6) Summary

100 The appellant requested "a declaration that the *CCAA* contains no restrictions within the meaning of s. 11 on the court's ability to apply the doctrine of equitable subordination." In my view, this is the wrong inquiry and this is why I reach the same result as the *CCAA* judge, but for different reasons.

101 I would not grant the relief sought because, applying the principles of statutory interpretation, nowhere in the words of the *CCAA* is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise. The *CCAA* does not legislate a scheme of priorities or distribution, because these are to be worked out in each plan of compromise or arrangement. The subordination of "equity claims" is directed towards a specific group, shareholders, or those with similar claims. It also has a specific function, consistent with the purpose of the *CCAA*: to facilitate the arrangement or compromise without shareholders' involvement.

102 The success of the *CCAA* in fulfilling its statutory purpose has been in large measure due to the ability of judges to fashion creative solutions, for which there is no express authority, through the exercise of their jurisdiction under s. 11. As Blair J.A. noted in *Metcalfe and Mansfield*, however, the court's powers are not limitless. They are shaped by the purpose and scheme of the *CCAA*. The appellant has not identified how equitable subordination would further the remedial purpose of the *CCAA*.

103 At this stage of the analysis, I am mindful of the Supreme Court's observation in *Century Services* that in most cases the court's jurisdiction in *CCAA* matters will be found through statutory interpretation. I am also mindful of its observation in *Indalex*, at para. 82, that courts should not use

an equitable remedy to do what they wish Parliament had done through legislation. In my view, there is no "gap" in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court's inherent jurisdiction or by equitable principles.

104 There is no provision in the *CCAA* equivalent to s. 183 of the *BIA* or s.105(a) of the U.S. *Bankruptcy Code.* Section 183 invests the bankruptcy court with "such jurisdiction at law and in equity" as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the *BIA* gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

CONCLUSION

105 For these reasons, I would dismiss the appeal. I would order that counsel may make written submissions as to costs, not to exceed five pages in length, excluding costs outlines. I would assume counsel can agree on a timetable for delivery of all costs submissions within 30 days of the release of these reasons.

G.R. STRATHY C.J.O.
P.D. LAUWERS J.A.:-- I agree.
M.L. BENOTTO J.A.:-- I agree.

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

2 6(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

3 In a subsequent ruling, *U.S. Steel Canada Inc., (Re)*, 2016 ONSC 569, the *CCAA* judge dismissed the Debt/Equity objection, finding that approximately $2 billion of USSC's unsecured claims and $73 million in secured claims were properly characterized as debt rather than equity. He also dismissed the objection that approximately $118 million in secured claims should be invalidated due to lack of consideration or as a fraudulent preference.

4 *CCAA*, s. 2(1): "*claim* means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*." Section 121 of the *BIA* states that claims provable in bankruptcy are those to which the

bankrupt is subject: "121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."

5 "*Equity interest* means (a) in the case of a company other than an income trust, a share in the company -- or a warrant or option or another right to acquire a share in the company -- other than one that is derived from a convertible debt, and (b) in the case of an income trust, a unit in the income trust -- or a warrant or option or another right to acquire a unit in the income trust -- other than one that is derived from a convertible debt."

6 "*Equity claim* means a claim that is in respect of an equity interest, including a claim for, among others, (a) a dividend or similar payment, (b) a return of capital, (c) a redemption or retraction obligation, (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)."

7 Subsection 11.8(8) gives the federal and provincial Crowns priorities for environmental claims against the debtor.

TAB 5

1988 CarswellBC 531
British Columbia Supreme Court

Northland Properties Ltd., Re

1988 CarswellBC 531, [1988] B.C.W.L.D. 2663, [1988] C.L.D. 1460, [1988] B.C.J. No. 1210, 11 A.C.W.S. (3d) 76, 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266, 73 C.B.R. (N.S.) 146

In the Matter of the Company Act, R.S.B.C. 1979, c. 59

AND in the Matter of the Companies' Creditors Arrangement Act R.S.C. 1970, c. C-25

AND in the Matter of Northland Properties Limited, Sandman Inns Ltd., Sandman Four Ltd., Unity Investment Company, Limited, B & W Development Co. (1986) Ltd., T & N Developments Ltd. (Petitioners)

Trainor J.

Heard: June 27-30, 1988
Judgment: July 5, 1988
Docket: Vancouver No. A 880966

Counsel: *R. Clark, R.D. McCrae, R. Ellis* , and *G. Gardner* , for petitioners.
E.C. Chiasson, Q.C., G. Thompson , and *C.S. Bird* , for Bank of Montreal.
N. Kambas , for Excelsior Life Insurance and National Life Insurance.
S. Strukoff , for Metropolitan Trust.
A. Edson , for Touche Ross.
A.C. Zepil , for Guardian Trust.

Subject: Corporate and Commercial; Insolvency

Application for orders appointing interim receiver and consolidation of companies' reorganizations.

Trainor J. **:**

1 There are several motions before me in which both the petitioner companies and the Bank of Montreal ask for orders and directions pursuant to the provisions of the Companies' Creditors Arrangement Act. Not only the rights of the companies and the bank, but those of all creditors will be affected by my rulings and I have also heard submissions of counsel and representatives of other creditors. The submissions of counsel have been lengthy and supported by their review of affidavits and exhibits thereto. The motions of course must be considered in the light of that evidence. It is therefore appropriate to set out something of the background or history of the relationship of the parties involved in these proceedings.

2 The companies are engaged in the business of real estate invest ment and development in western Canada and in the western United States. They collectively own and operate:

3 (a) A chain of 20 hotels and motels in Western Canada known as the "Sandman Inns";

4 (b) Five office buildings in Calgary and Vancouver;

5 (c) An office building in Portland, Oregon;

6 (d) Development land in California;

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7 (e) A number of other smaller office buildings and parcels of land.

8 The Sandman Inns chain of hotels was founded in 1967. All hotels, inns and office buildings, with a couple of exceptions, were constructed by the companies as new facilities. Until 1977, separate companies were incorporated to acquire property in selected communities for the purpose of establishing a hotel, the purpose of separate corporate ownership being to permit the management of each hotel to participate. This policy was changed at that time and the interest of each participating owner was bought out. In his affidavit sworn 27th May 1988, Robert John Gaglardi, who is the president and a director of each of the companies, avers:

> 24. In summary, although legal title to the companies' real estate and other assets is disbursed among the companies, beneficial ownership ultimately resides for the most part in myself and Ralph Beck [the father-in-law of Robert John Gaglardi], albeit in differing proportions. The companies' separate legal existence has been maintained only for the purpose of reflecting the different degrees of beneficial ownership of the companies' assets and as required to satisfy certain lenders including Bank of Montreal (the "bank"). Otherwise, and for all other intents and purposes, and in particular for the purpose of day-to-day management and operations, the companies are treated internally and by others as a single business entity.

9 Mr. Gaglardi further says that the companies' business operations are divided into the hotel division and the office division with no distinction being made on the basis of legal ownership of the property and assets comprising each division. He states:

> 26. By virtue of operating as two divisions without regard to corporate niceties and actual legal ownership, the finances of the companies are inextricably intertwined. As a rule, trade creditors of the hotel division bill their accounts to "Sandman Inns", notwithstanding that a particular hotel may be owned by any one of Sandman Inns, Northland or Sandman Four.
>
> 28. Cheques and other instruments generated from hotel operations are also made payable to Sandman Inns without regard to the corporate entity actually owning the particular hotel to which the income is attributable.
>
> 29. Similarly, the office division operates generally under the name of "Northland Properties" notwithstanding actual legal ownership of each office building. Cheques received from tenants of office properties are as a rule all made out in favour of Northland.
>
> 30. Until recently, the companies collectively maintained a single operating account with the bank in Vancouver, British Columbia. Into this account were deposited all cheques and cash from the hotel and office divisions regardless of their source and without heed to the company which owned the property in respect of which the income was generated. This account was maintained in the name of "Sandman Inns" and no attempt was ever made by the bank or by the companies to allocate revenues, deposits or withdrawals to each company. As to payroll, all cheques are issued by Sandman Inns in relation to both the hotel division and the office division.

10 He further says that the audited financial statements of the companies, with the exception of Northland, are prepared on a consolidated basis only, although he does acknowledge that separate tax returns have been filed each year and that it has been necessary to allocate expenses and revenues for that purpose.

11 On the other hand, I have an affidavit of Mr. Bygott, a manager with the special accounts management unit of the Bank of Montreal, sworn 23rd June 1988, in which he challenges a further statement by Mr. Gaglardi that "the system is incapable of producing separate financial summaries for each company". Mr. Bygott exhibits to his affidavit materials produced on behalf of the companies from which he concludes that it is "quite possible and relatively simple for the companies to determine and set out comprehensive particulars of the debts owed by each of them and the security therefor on an unconsolidated basis".

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12 The companies began to experience financial problems starting in 1981 and 1982 when their revenues declined and interest rates rose sharply. The suspension of payment of interest to the bank led to a number of attempts to restructure the companies' indebtedness. The bank worked closely with the companies in those processes. One of the issues to be resolved between the companies and the bank is the claim by the companies that the bank is liable to them for damages for what has been described in argument as "lender liability". This claim is based on dealings between the companies and the bank and allegations of damage arising from the exercise of control by the bank over the business operations of the companies. That issue may be relevant to a determination of the voting rights of the bank with respect to the plan proposed by the companies under the Companies' Creditors Arrangement Act. Otherwise, that issue is not before me at this time.

13 By the spring of 1988, the financial status of the companies, in general terms, was that they owed slightly less than $200 million and had assets valued at approximately $100 million. The amount owing to the bank, which was included in that general indebtedness, was in the sum of approximately $117 million.

14 Other indebtedness of the companies was roughly as follows:

1. Priority mortgagees $77,000,000

2. General unsecured creditors 2,000,000

3. Property and business taxes 3,700,000

4. Corporation capital tax 300,000

15 The indebtedness to the bank, in its submission, is made up as follows:

1. Series A bonds $45,000,000

2. Series C bonds 2,000,000

3. The Put debt secured by the A bonds, the U.S. trust deeds and the other security 70,000,000

16 In December 1987 the bank authorized the commencement of a receivership action against the companies. Royal Trust Corporation of Canada, acting on behalf of the bank under a trust deed to which the companies were parties, moved in the receivership action for summary judgment against the companies under the trust deed and the appointment of a receiver-manager of the companies. The motions for summary judgment and the request for the appointment of a receiver-manager of the companies were heard by Boyle L.J.S.C. on 1st and 2nd February 1988. The companies sought and obtained an adjournment of the applications until 8th April 1988 to allow them time to obtain evidence confirming the availability of alternate financing. At the time of granting those adjournments, Boyle L.J.S.C. said:

> Although the long history of negotiations and agreements are relevant here, there is no need to detail them. There is some bitterness on the companies' part as a result of what they see as interference by the bank in their operations at consequent cost to the companies but, even if their operation had been ideal day-to-day, their financial distress now would remain acute.
>
> It is enough to say that the bank gave the companies many opportunities to refinance and in no sense sandbagged them unexpectedly with the present proceedings.

17 The hoped-for alternate financing did not materialize. Consequently, on 6th April 1988 the companies filed petitions in the bankruptcy court for the district of Oregon pursuant to c. 11 of the United States Bankruptcy Code acknowledging indebtedness in the amount of $200 million with assets having a value of approximately half that amount.

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18 On 7th April 1988 the companies petitioned this court under the Companies' Creditors Arrangement Act. That Act provides:

> 3. This Act does not apply in respect of a debtor company unless
>
> (*a*) the debtor company has outstanding an issue of secured or unsecured bonds, debentures, debenture stock or other evidences of indebtedness of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee, and
>
> (*b*) the compromise or arrangement that is proposed under section 4 or section 5 in respect of the debtor company includes a compromise or arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

19 I found that the companies in these proceedings were debtor companies which, on the material filed in support of the petition, qualified them to invoke the Companies' Creditors Arrangement Act.

20 The Companies' Creditors Arrangement Act further provides:

> 4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors or class of creditors, and, if the court sodetermines, of the shareholders of such company, to be summoned in such manner as the court directs.
>
> 5. Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of such sections, agree to any compromise or arrangement either as proposed or as altered or modified at such meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and is also binding on the company, and in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy Act or is in course of being wound up under the Winding-up Act, is also binding on the trustee in bankruptcy or liquidator and contributories of the company.
>
> 7. Where an alteration or modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, such meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and such directions may be given as well after as before adjournment of any meeting or meetings, and the court may in its discretion direct that it shall not be necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and a compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.

21 As the initial step with respect to the compromise or arrangement to which reference is made in those sections, I ordered as follows:

> AND THIS COURT FURTHER ORDERS that the Petitioners be and are hereby authorized and permitted to file with this Honourable Court, on or before August 25, 1988, or such other date as may be ordered by this Court,

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a formal plan of compromise or arrangement (the "Reorganization Plan") between the Petitioners and its secured and unsecured creditors ...

AND THIS COURT FURTHER ORDEERS that the Petitioners shall remain in possession of their undertaking, property and assets and shall continue to carry on their business and upon approval of the Reorganization Plan as provided for in the Petition, to implement same according to its terms.

22 The Companies' Creditors Arrangement Act also provides:

11. Notwithstanding anything in the *Bankruptcy Act* or in the *Winding-up Act* , whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on such notice to any other person, or without notice as it may see fit, make an order staying until such time as the court may prescribe or until further order all proceedings taken or that might be taken in respect of such company under the *Bankruptcy Act* and the *Winding-up Act* or either of them, and the court may restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

23 Pursuant to the authority of that section, I ordered as follows:

AND THIS COURT FURTHER ORDERS that all proceedings taken or that might be taken by any of the Petitioners' creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3 and the Winding-up Act, R.S.C. 1970, c. W-10, or either of them, shall be stayed until further order of this Court upon notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person against any of the Petitioners be stayed until further order of this Court upon notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person except with leave of this Court, upon notice to the Petitioners, and subject to such terms as this Court may impose, and that the right of any person to realize upon or otherwise deal with any security held by that person on the undertaking, property and assets of any of the Petitioners be and the same is postponed on such terms and conditions as this Court may deem proper.

24 On 20th June 1988 I heard a motion by counsel on behalf of Guardian Trust Company, one of the priority mortgagees in these proceedings. Because it is fundamental to the motions before me now, I want to repeat a portion of what I said in dealing with the Guardian Trust motion:

With respect to this particular legislation, I would like to refer to what is said by the court in *Meridian Dev. Inc. v. T.D. Bank*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) . At p. 113, Mr. Justice Wachowich said:

This Act, though little used, is one of a number of federal statutes dealing with insolvency. In common with the various other statutes, it envisages the protection of creditors and the orderly administration of the debtor's affairs or assets.

Then he cites authority for that proposition and continues:

In the words of Duff C.J.C. who spoke for the court in *A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75 :

'... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.'

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> The legislation is intended to have wide scope and allows 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.

I adopt that as a statement of the purpose of this legislation and the underlying purpose behind the order which was made on 7th April last.

25 At the time I made that order I was satisfied on the basis of the material filed in support of the petition that the companies should have an opportunity to lay before their creditors a proposal as to how their liabilities could be met and the companies continue in operation. The purpose of this legislation is to keep companies in business if possible. That is the sense in which this legislation is to be distinguished from winding-up or bankruptcy proceedings: *Re Avery Const. Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont.) .

26 There are separate motions before me for consideration and decision at this time. I will consider each in detail but, in summary, they are as follows:

1. Motion by the companies for an order that:

27 (a) Their reorganizations be merged and consolidated for all purposes;

28 (b) The form of proof of claim and its instructions annexed to the motion be approved;

29 (c) They be granted liberty to file a single consolidated reorganization plan;

30 (d) The process for accepting and determining the claims of creditors be as set forth in the instructions to proof of claim;

31 (e) They be granted liberty to constitute preliminary classes of creditors.

2. Motion by the bank:

32 (a) For a "stand still" order;

33 (b) For the appointment of Touche Ross Limited as interim receiver of the companies.

3. Motion by the bank for an order:

34 For directions with respect to the bank's entitlement to vote at any meeting of creditors called in these proceedings.

35 At the time of drafting these reasons for judgment, counsel have not completed their submissions with respect to all of the issues raised in the notices of motion. However, I propose to deal with those matters in respect of which they have confirmed to me that their submissions have been completed.

Motion No. 2 — For a "stand still" order and the appointment of an interim receiver

36 I will not set out all of the detail with respect to the powers and duties sought for Touche Ross Limited as interim receiver of the companies authorizing it to monitor the operations and affairs of the companies. Suffice to say that nothing turns at this time, and in the particular circumstances of this case, on the extent and nature of those powers and duties.

37 The stand still order sought is as follows:

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THIS COURT ORDERS THAT, until further Order of this Honourable Court, the Petitioners, and each of them, be and are hereby enjoined and restrained from:

(a) issuing any further shares, bonds, debentures or other securities, or permitting the transfer of any such instruments or otherwise changing in any way their corporate or share structure;

(b) selling, transferring, or otherwise disposing of or charging, encum bering or otherwise mortgaging any of their assets, save and except leases of office space entered into in the ordinary and usual course of management of office properties;

(c) incurring any debts or obligations whatsoever, except in the ordinary and usual course of business and as necessary to continue business operations in the manner conducted prior to 7th April 1988;

(d) applying any of their cash flow in any manner or for any purpose other than in the ordinary and usual course of business and for the purpose of continuing present business operations; and

(e) entering into or effecting any arrangements or compromises with, or making any payments other than in the ordinary and usual course of business and for the purpose of continuing present business operations to any creditors, including secured creditors, without obtaining an Order of this Honourable Court following proper notice to the parties of record.

38 Consideration of the matters raised in this motion involves a recognition of the fact that there has been in place an order staying any and all proceedings which might be taken by any creditor of the companies since 7th April 1988. Reorganization plans need not be filed until 25th August 1988 and the meetings of creditors are scheduled for 16th September 1988. During the whole of that period there is no order directing the companies to report to their creditors. The operations of the companies continue to be controlled and directed by their boards of directors and there is no mechanism in place to ensure that the rights of the creditors are being properly protected.

39 In the course of submissions, counsel for the companies informed me that he would consent to the stand still order as set out above subject only to some possible minor adjustment of the wording thereof. On that basis, that order will be made. If counsel have a problem with the wording, they may arrange to speak to me.

40 I also understood in the course of submissions that counsel for the companies consented to an order being made obliging the companies to report to the creditors and the court as follows:

Reporting Requirements

Section in:

Credit Agreement	Trust Deed	Item
7.2	6.4	Evidence of maintenance of corporate existence
7.3	-	Evidence of maintenance of federal, provincial and municipal licences, consents and permits
7.4	6.9	Evidence of payment of taxes when due (including 1988 tax rolls).
7.5	6.7	Access to all properties and right to physically inspect.
7.8-7.11	6.18	Evidence of maintenance of

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		adequate insurance coverage, payment of premiums when due and renewal when due (August 1, 1988).
9.1		1987 annual audited financial statements (draft, if necessary).
9.2	-	Quarterly (within 30 days) unaudited financial statements (commencing quarter ended March 31, 1988).
9.3	-	Monthly (within 30 days) unaudited profit/loss, cash flow and variance reports (in the form as traditionally provided, by individual property and combined on a divisional basis).
9.4	-	Bi-weekly (within 5 days) daily revenue summaries for all hotels (in the form of the "Flash Reports" as traditionally provided).
9.5	-	Annual budgets and business plans (combined, divisional and by corporate entity).
8.12	6.6	Evidence of capital expenditures since August 1987 (actual vs. plan vs. budget).
8.12	-	Details of major individual expenditures, greater than $20,000 per corporate entity or $200,000 for all entities combined in the fiscal year.
7.5	6.5	Monthly detailed listing of: -aged payables -aged receivables -reconciliations of bank accounts (including outstanding cheques)
7.16 and 7.13	6.6 and 6.14	Details of any municipal health, fire or work orders over any of the properties, and evidence of compliance.
8.3 and 8.4	6.13	Details of prior mortgages: -current balance outstanding -current status (arrears, if any) -status of renewals as they occur including details of terms.
7.5	6.5	Detailed occupancy/tenancy information for properties: (a) Hotels -occupancy levels by property

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-room rates by property
-commencing March 1988
(b) Commercial
-current rent rolls
-tenant inducements (cash/free
 rent/lease     takeovers/others)
-commitments for tenant improve-
 ments
-leases under negotiations
```

41 A further significant fact to be considered on this motion is that the companies have engaged a firm of chartered accountants to prepare material for the creditors' meetings. In his affidavit sworn 27th June 1988 John Bowles, a partner of Coopers & Lybrand chartered accountants, avers that they:

> ... are currently in the process of preparing for the audit of the 1987 financial statements of the Northland/Sandman Group, which, together with the stub period financial statements for the period January 1, 1988 to July 31, 1988 with a review engagement report will be included with the Petitioners' information circular to be delivered to their creditors in conjunction with their final proposed plan.

42 He further avers that the books and records of the companies have been reviewed for the period 7th April to 31st May 1988 and that Coopers & Lybrand:

> ... have not become aware of anything that would lead us to believe that the Petitioners have not continued to conduct themselves in the normal course of their business and in furtherance of the finalization of their reorganization plan.

43 On the basis of all of that material, it appears that the companies will be reporting and that a firm of chartered accountants are in the process of doing an audit and preparing a full financial statement for the purposes of full consideration of the plan proposed at the creditors' meeting.

44 I am satisfied that I have jurisdiction to appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during this interim period. The cost would be significant, but is not a factor of great weight considering the total indebtedness of the companies. The most significant factor militating against the appointment of a monitor at this time is the evidence that it probably would require at least one month for him to familiarize himself with the corporate structures and finances before he could even begin to assess the financial activities of the companies and report on them. When the material is provided in response to the reporting requirements and the reports from Coopers & Lybrand, the creditors may wish to apply for an order for further or other directions to the companies. In the meantime, however, the motion for the appointment of an interim receiver is refused.

Motion No. 1(a) and (c)

45 The order sought under this motion is under the general heading of consolidation. The particular request is for an order that:

> a) The within reorganizations with respect to Northland Properties Limited, Sandman Inns Ltd., Sandman Four Ltd., Unity Investment Company, Limited, B & W Development Co. (1986) Ltd., and T N Developments Ltd. under the Company Act and the Companies' Creditors Arrangements Act be merged and consolidated for all purposes.

46 In putting forward this motion, the companies assert that they are not seeking to vary their obligations to the creditors at this time. However, the proposal is that the court approve the preparation of a single reorganization plan for presentation to the creditors of all of the companies. The companies say this is realistic and practical because all of the

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businesses of the companies were carried on as a single entity which resulted in the financial affairs of the companies being so interwoven that they have become inseparable. They point as well to the common ownership and management of the companies and to the greater cost involved in the preparation of a separate reorganization plan for each corporation.

47 Counsel for the bank in opposing this motion questions the jurisdiction of the court to make such an order. Consolidation is not specifically authorized under the Companies' Creditors Arrangement Act. The end result of the process which the companies ask that they be given leave to set in motion at this time would be amalgamation of the companies. The companies would appear to be insolvent and that fact is a bar to amalgamation in many jurisdictions in Canada. A company seeking amalgamation as a general rule is required to satisfy the court that its creditors approve of the amalgamation. Of course, that request can be made by the companies. However, I do not think that it would be appropriate for the companies to obtain from the court what might appear to be approval of amalgamation without any reference to the creditors.

48 I appreciate that there is evidence that the companies have, in large part, been run as a single entity. However, as I have pointed out, their assets, income and liabilities have been segregated for the purposes of income tax returns and there is some evidence that separate schedules of assets and liabilities have been filed in the United States bankruptcy proceedings.

49 There is a scarcity of Canadian cases dealing with this subject and none of the ones referred to me has been of assistance. Both counsel have referred to American cases dealing with the somewhat analogous c. 11 bankruptcy proceedings. In *Re Baker and Getty Fin. Services Inc.*, 78 B.R. 139 (Ohio Bankruptcy Court, 1987), the court said:

> The propriety of ordering substantive consolidation is determined by a balancing of interests. The relevant enquiry asks whether "the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition".

The court then went on to list seven factors which had been developed to assist in the balancing of interests. Those factors are:

50 1. Difficulty in segregating assets;

51 2. Presence of consolidated financial statements;

52 3. Profitability of consolidation at a single location;

53 4. Commingling of assets and business functions;

54 5. Unity of interests in ownership;

55 6. Existence of intercorporate loan guarantees; and

56 7. Transfer of assets without observance of corporate formalities.

57 (*Re Vecco Const. Indust. Inc.* , 4 B.R. at 410)

58 I have considered the submissions of counsel with respect to each of those factors. I also refer to *Re Snider Bros.*, 18 B.R. 230 (Mass. Bankruptcy Court, 1982), where the court said at p. 234:

> It must be recognized and affirmatively stated that substantive consolidation, in almost all instances, threatens to prejudice the rights of creditors ... This is so because separate debtors will almost always have different ratios of assets to liabilities. Thus, the creditors of a debtor whose asset-to-liability ratio is higher than that of its affiliated debtor must lose to the extent that the asset-to-liability ratio of the merged estates will be lower. Why then would substantive consolidation ever be permitted?

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> A review of the case law reveals that equity has provided the remedy of consolidation in those instances where it has been shown that the possibility of economic prejudice which would result from continued corporate separateness outweighed the minimal prejudice that consolidation would cause. While several courts have recently attempted to delineate what might be called "the elements of consolidation", *In re Food Fair, Inc.*, 10 B.R. 13 , 124 (Bkrtcy. S.D.N.Y. 1981); *In re Veccon Construction Industries, Inc.*, 4 B.R. 407 , 6 B.C.D. 461, 1 C.B.C. 2d 216 (Bkrtcy. E.D. Va. 1980), I find that the only real criterion is that which I have referred to, namely the economic prejudice of continued debtor separateness versus the economic prejudice of consolidation.

And at p. 238:

> Moreover, the evidence in support of an application to consolidate must do more than show a unity of interest or an intermingling of funds. It must show a harm which has resulted therefrom, *Soviero v. Franklin National Bank of Long Island* , supra, or that prejudice will result from a lack of consolidation, *Chemical Bank New York Trust Co. v. Kheel* , supra. Indeed, consolidation has been denied even though the debtors had always conducted their business on a consolidated basis, with a joint bank account, inter-corporate loans, and joint payroll, because the court was not satisfied that the prior practice of operating as a single unit was necessary or desirable. *In re Coventry Energy Corporation*, 5 B.C.D. 98 (S.D. Ohio 1979). In addition, consolidation was denied in that case despite the absence of objections by any party. Hence, it must be clearly shown that not only are the "elements of consolidation" present in a given bankruptcy setting, but that the court's action is necessary to prevent harm or prejudice, or to effect a benefit generally.

59 I accept the analysis contained in the *Snider* case. It would be improper for the court to interfere with or appear to interfere with the rights of the creditors. In my view, that appearance would be created by making an order that the reorganizations be merged and consolidated for all purposes. The order sought in this part of the motion is refused. Of course that does not mean that the companies are barred from seeking from the creditors their approval of a consolidated plan. I say that consolidation is not appropriate at this time. The creditors may decide to accept a consolidated plan when they have had a full opportunity to consider the reorganization plans submitted to them.

Motion No. 1(b) and (d)

60 The companies move for an order that:

> b) The form of Proof of Claim and its instructions attached hereto as Schedule "A" be approved by this Honourable Court for mailing by the Petitioners to their creditors;
>
> d) The process for accepting and determining the claims of creditors of the Petitioners be as set forth in the Instructions to the Proof of Claim attached hereto.

61 I have reviewed the proof of claim form and the instructions accompanying it. As well, I have considered the submissions of counsel for the companies and the bank. I confirm the ruling which I made on 29th June 1988 that because of the unusual financial arrangements between the companies and the bank, it would be inappropriate to require the bank to attempt to set out its claims on that form. I ruled that the bank should have leave to file a separate individual statement of its claims. That statement must be filed by 6th July 1988. If the companies take objection to the statement, they are entitled to reply by 13th July 1988, following which a date may be obtained from the registrar to appear before me in respect of those differences.

62 I confirm that there are two matters contained in the motions still to be resolved. Counsel have agreed to exchange written submissions following which a date for a further hearing will be arranged if necessary. Those two matters are the companies' motion that they be granted liberty to constitute preliminary classes of creditors and a motion by the bank for an order for directions with respect to the bank's entitlement to vote at any meeting of creditors called in these proceedings.

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Order accordingly.

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TAB 6

Case Name:

Nortel Networks Corp. (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
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2015] O.J. No. 2440

2015 ONSC 2987

2015 CarswellOnt 7072

27 C.B.R. (6th) 175

254 A.C.W.S. (3d) 522

Court File No.: 09-CL-7950

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: May 12-15, 20-22, 27-30, June 2, 5, 6, 16-20, 23, 24 and September 22-24, 2014.
Judgment: May 12, 2015.

(263 paras.)

Counsel:

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

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

Brett Harrison, Counsel for The Bank of New York Mellon, Trustee.

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

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F.J.C. NEWBOULD J.:--

REASONS FOR JUDGMENT

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[1] 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[2] 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[3]. 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.[4]

5 The Protocol was approved early in the CCAA and chapter 15 proceedings by orders the Ontario and U.S. Courts.[5] 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.[6]

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.

* The "Enterprise Solutions" segment provided enterprise communications solutions addressing the headquarters, branch and home office needs of large and small businesses. The Enterprise Solutions segment's offerings included, among other things, Unified Communications, Ethernet routing and multiservice switching, IP and digital telephony (including phones), wireless LANs, security, IP and SIP contact centers, self-service solutions, messaging, conferencing and SIP-based multimedia solutions.

* The Metro Ethernet Networks ("MEN") segment provided carrier-grade Ethernet transport capabilities focused on meeting customers' needs for higher performance and lower cost emerging video-intensive applications. MEN included optical networking, carrier Ethernet switching products and multi-service switching products.

* The "Global Services" segment provided a broad range of services and solutions including network implementation services, network support services, network managed services (which related to the monitoring and

management of customer networks and hosted solutions) and network application services.

14 The Nortel Group consists of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA region, as well as the Caribbean and Latin America and Asia. NNC, the Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

15 One of NNC's direct subsidiaries is NNL, which was the Canadian operating company of the Nortel Group. NNL in turn owns 100% of the equity of each of NNI, which was the Nortel Group's operating company in the United States, NNUK, which was the Nortel Group's operating company in the United Kingdom, NN Ireland, which was the Nortel Group's operating company in Ireland, and 91.17% of the equity of NNSA, which was the Nortel Group's operating company in France.

16 The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.

17 As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

18 R&D was the primary driver of Nortel's value and profit. Together with NNL, the principal companies that performed R&D were NNI, NNUK, NNSA and NN Ireland. These were known as Integrated Entities or, in transfer pricing terms, Residual Profit Entities ("RPEs") due to their participation from 2001 in a residual profit pool in connection with Nortel's transfer pricing arrangements[7]. Other operating companies performed sales and distribution functions and were known as Limited Risk Distributors or Entities ("LREs").

19 R&D was performed at labs around the world. The advanced technology primary research which was intended to develop novel, cutting edge intellectual property technologies was performed mostly in NNL laboratories in Ottawa, which also did R&D for various lines of business. From 2000 to 2009 NNL accounted on average for just under half of all R&D expenditures, more in the

latter years than the earlier years. NNI accounted for 38 to 42% and EMEA accounted for 16 to 20% in the earlier years and 11.7 % from 2005 to 2009. The R&D was shared throughout the Nortel Group as needed by the lines of business and customer needs in the various regions and countries.

20 Because R&D was the primary driver of Nortel's value and profit, the residual profits of Nortel, after payment of fixed rates of return to all Nortel companies for sales and distribution functions, were paid to the RPEs under a Master Research and Development Agreement ("MRDA") in accordance with a residual profit split method ("RPSM") based on each RPE's expenditure on R&D relative to the R&D expenditure of all RPEs.

21 Under the MRDA, NNL was the legal owner of the Nortel intellectual property and each RPE other than NNL was granted an exclusive license by NNL to make and sell Nortel products in its territory using or embodying Nortel intellectual property developed by Nortel companies anywhere in the world and a non-exclusive license to do so in territories that were not exclusive to an RPE. What the ownership rights of NNL were and what the license rights were that were granted in the MRDA are highly contested. Also contested is the role that the MRDA should play in this allocation proceeding.

Bankruptcy filings

22 Beginning around 2001, the burst of the dot-com bubble had a severe effect on the global economy and on the telecommunications industry in particular, including Nortel. Market forces led to a decline in Nortel's revenues and market share, and a decline in customer demand for Nortel's products. Subsequently, Nortel was faced with accounting issues which impacted Nortel's credit rating and its cost of financing and required Nortel to restate its financial statements for the fiscal years 2000 to 2005. The rating downgrades affected Nortel's access to capital markets and cost of financing for some years. The fortunes of Nortel improved for a few years but for various reasons, including the financial meltdown in the fall of 2008, Nortel saw its business decline in the two profitable lines of business that it was operating.

23 In light of the impact of the deteriorating market conditions and weakening customer commitments on Nortel's financial outlook, Nortel made the decision to commence formal bankruptcy and insolvency proceedings in Canada, the U.S. and England (respecting various EMEA entities) on January 14, 2009.

24 On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the *UK Insolvency Act, 1986.* On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's

Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

25 Subsequent to the filing date, certain other Nortel subsidiaries have filed for creditor protection or bankruptcy proceedings in the local jurisdiction in which they are located. Certain solvent indirect subsidiaries of NNUK are not in administration, but are represented in these proceedings by the Joint Administrators with respect to the allocation issues.

Decision to liquidate

26 The initial intent on filing was to attempt to restructure the business and downsize it by focusing on Nortel's legacy CDMA (Code Division Multiple Access) wireless business and a potential business based on LTE (Long-Term Evolution) wireless technology with all other Nortel business lines being sold. However, Nortel's major customers did not support this plan and advised they were not prepared to provide new contracts to Nortel for this purpose. As well, it became clear that it would not be possible for Nortel to obtain the funding that would have been required to restructure around a CDMA business.

27 In June 2009, management and the Debtor Estates collectively determined that the best means to maximize value for its creditors was to sell Nortel's lines of business and other assets and to commence a liquidating insolvency. No party in these proceedings has suggested that it was a viable option to restructure along geographic lines or for a country-specific entity to independently continue in Nortel's business.

Interim Funding and Settlement Agreement ("IFSA")

28 From the petition date of January 14, 2009, NNL incurred significant expenses to preserve the value of the business, including R&D expenses, and it was experiencing negative cash flow. It had not received any transfer pricing payments from its subsidiaries under the MRDA as a result of the insolvency proceedings.

29 It was evident that there would be significant issues among the parties as to whom the proceeds of the sale of Nortel's assets should be paid. The parties appreciated that if determining the allocation of proceeds from Nortel's assets were a precondition to their sale, sales would be substantially delayed, and the value of the assets would depreciate, resulting in less money for all creditors. Avoiding a dispute during the sale processes about how to allocate the proceeds allowed the parties to obtain the highest monetary value for the assets being sold.

30 On June 9, 2009, the US Debtors (excluding NN CALA, which had not yet filed for bankruptcy), the Canadian Debtors and the EMEA Debtors (excluding NNSA, which later acceded to the agreement) entered into the Interim Funding and Settlement Agreement ("IFSA") to address both interim funding of NNL as well as principles under which collaborative sales of Nortel's businesses and assets could take place.

31 The IFSA provided for a payment by NNI to NNL of $157 million in full settlement of any transfer pricing and other claims NNL might have had against NNI for the period from the petition date through September 30, 2009. The parties also agreed:

(a) to cooperate in the anticipated sales of the Nortel Group's assets;

(b) that their execution of sale documentation or the closing of a sale transaction would not be conditioned upon reaching agreement either on allocation of the sale proceeds or on a binding procedure for determining the allocation question;

(c) that the sale proceeds would be deposited into escrow, and that there would be no distribution out of escrow without either the agreement of all of the selling debtors or the determination of any dispute relating thereto by the relevant dispute resolver;

(d) that in order to facilitate the lines of business sales, the U.S. and EMEA Debtors would enter into appropriate license termination agreements which would provide for the termination of the license rights granted by NNL under the MRDA; termination or relinquishment of a license would be deemed a sale with the licensed participants each being deemed a seller; and

(e) that the agreement would not have any impact on the allocation of proceeds to any Debtor from any asset sale and would not prejudice a party's rights to seek its entitlement to the proceeds from any sale.

32 The US and Canadian Courts entered orders approving the IFSA following a joint hearing on June 29, 2009.

33 On December 23, 2009 the Canadian and U.S. Debtors signed a Final Canadian Funding and Settlement Agreement (the "FCFSA") under which NNI agreed to pay NNL $190.8 million in full and final settlement of all claims that NNL might have against NNI. Further, NNL granted NNI an allowed $2 billion unsecured claim in NNL's CCAA proceedings ranking pari passu with other pre-petition unsecured claims against NNL, with such claim not being subject to offset or reduction. This claim had resulted from the tax authorities reviewing requests by the parties for approval of their transfer pricing arrangements. In 2009 NNL and NNI were advised that an agreement between the CRA and IRS sought a reallocation of income from NNL to NNI in the amount of U.S. $2 billion for the tax years ending 2001 to 2005. The tax authorities did not specify on what basis the

$2 billion figure was calculated. The FCFSA, including the $2 billion admitted claim of NNI against NNL, was approved by the Canadian Court on January 21, 2010 and by the U.S. Court on the following day.

Asset sales

34 With the IFSA framework in place, the Debtor Estates embarked on a process that resulted in a series of sales of the various business lines, which occurred from mid-2009 through late 2010, with the last transaction closing in March 2011. The total proceeds were approximately $3.285 billion. There remains approximately $2.85 billion of that amount now available to be allocated.

35 In order to sell the lines of businesses separately, Nortel engaged in a "carve-out process" to identify the bundle of assets, rights and obligations that would have to be conveyed in each sale to enable the lines of business to function on a stand-alone basis.

36 An important aspect of the carve-out process was the identification of which IP rights, principally patent rights, needed to be conveyed. Each prospective purchaser of a business line wished to obtain as many patents as possible as part of each sale transaction and, conversely, the Nortel sellers wanted to ensure that the only patents transferred were those incorporated exclusively or principally in the business line in question so as to retain value within Nortel and not to jeopardize the ability to sell the other business lines that might require rights to the same patents.

37 Ultimately, those patents that were "predominantly used" in any given line of business were transferred to the purchaser of that line of business as part of the transaction. In the end, 2,700 patents were transferred as part of the business line sales.

38 For all other patents that were used in each line of business but not predominantly used, a non-exclusive license was granted to the purchaser for use of those patents in the operations of the particular business line being purchased.

39 By the time that all of the business sales were completed in March 2011, Nortel had no remaining operating businesses. What it did retain was a residual patent portfolio consisting of approximately 7000 patents and patent applications. These were principally patents and patent applications that were not used in any of the lines of business and therefore were not subject to licenses to the business sale purchasers. In addition, the residual IP portfolio included patents used by multiple lines of businesses and licensed to the purchasers of those lines of businesses.

40 On April 4, 2011, after significant negotiations with two prospective purchasers, certain Nortel entities (including NNC, NNL, NNI and NNUK) entered into a stalking horse asset sale agreement with a wholly owned subsidiary of Google Inc. with a purchase price of $900 million.

41 An auction was held at the end of June 2011, and the residual patent portfolio was ultimately sold to Rockstar Bidco, LP, a single purpose entity backed by a consortium of major technology

companies (Apple, Microsoft, Ericsson, Blackberry, Sony and EMC), for $4.5 billion.

Position of the parties

42 In this case the Monitor is acting under what is now referred to as a "super monitor" order of October 3, 2012 in which the Monitor was authorized to exercise any powers which may be exercised by a board of directors of any of the applicants, which includes NNC and NNL. This order occurred after NNC and NNL were left without any board of directors or management and it was necessary for the Monitor to be appointed to advance the interests of NNL and NNC in this CCAA proceeding. While I will refer to the Monitor, I do so in recognition that the Monitor is advancing the position of the Canadian Debtors in this litigation.

43 The intellectual property of Nortel represented by far the largest portion of the assets sold. The Rockstar sale of the residual IP generated $4.5 billion. The lines of business generated $3.285 billion of which approximately $2.85 billion is now available. Intellectual property was a substantial part of the assets of the business lines that were sold, although the experts differed as to its value.

44 The parties and their experts for the most part relied on their interpretation of the MRDA in support of their allocation positions for the proceeds from intellectual property for both the Rockstar sale and the lines of business sales. Two parties, the UKPC (the UK pension claimants, being the trustee of the UK pension plan, and the board of the UK Pension Protection Fund) and the Canadian Creditors Committee[8] contended that the MRDA should not govern the allocation and that a pro rata allocation based on a *pari passu* distribution to all creditors should be used to allocate the lockbox funds.

45 It is necessary therefore to consider the MRDA and whether it should govern the allocation.

The MRDA

46 The parties look to the rights of the various Nortel entities to intellectual property under the MRDA as a central issue in this proceeding. What these rights are is contested. Many of its terms have been excruciatingly parsed. I will first deal with the meaning of the MRDA as an operating agreement. I will then deal with the issue as to whether it applies, or was intended to apply, to the allocation of the Nortel assets after the world-wide insolvency of Nortel.

47 The MRDA and its predecessor Cost Sharing Agreements[9] ("CSA") were developed for and driven by transfer pricing concepts. Transfer pricing is the act of assigning a monetary value, or price, to movements of resources or economic contributions that occur within a multinational enterprise across different taxing jurisdictions. Against the risk that companies attempt to use transfer pricing to increase operating income (and therefore taxable income) in jurisdictions with low income tax rates and correspondingly to decrease operating income in high-tax jurisdictions, tax authorities around the world have instituted regulations governing intercompany transfer pricing. These regulations centre on the arm's length principle. The arm's length principle

necessitates that intercompany transactions be priced in a manner consistent with the way in which similarly situated uncontrolled parties bargaining at arm's length would price the transactions i.e., within an arm's length range.

48 Dr. Eden, a transfer pricing expert who testified on behalf of the U.S. Debtors, well described in her report the way in which transfer pricing agreements are made in light of the fact that governments have developed a dense regulatory framework for transfer pricing due to worries about the potentially negative impacts that transfer pricing can have on government tax and customs duty revenues. The setting of transfer pricing policies for corporate income tax purposes of a multinational enterprise (MNE) is a highly regulated, data-driven and fact-intensive activity dominated by professionals. The establishment of an MNE's transfer pricing policy typically involves not only MNE group in-house staff, but also accountants, economists, lawyers, tax experts and other consultants. Moreover, an MNE's transfer pricing policy may involve the input of revenue authorities through an advance pricing agreement (APA) procedure.

49 All of this applied to Nortel and much evidence was given by tax people as to the process by which the MRDA was made and changed. Evidence was also given by some of them as to their view of the meaning of the agreement, the admissibility of which is contested.

(i) Governing law of the construction of the contract

50 The MRDA is by its terms to be construed in accordance with and governed by the law of Ontario. The same applied to the predecessor CSAs.

51 A number of authorities have been cited. A brief consideration of them is required in light of the various arguments made about the MRDA, particularly as it involves the principles of interpreting commercial contracts, what can be looked at when considering the factual matrix of the agreement and the use of recitals in an agreement in the interpretive process.

52 Winkler C.J.O. articulated the test for construing a commercial contract in *Salah v. Timothy's Coffees of the World Inc.* (2010), 74 B.L.R. (4th) 161 as follows:

> **16** The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court

> finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

53 In *Kentucky Fried Chicken v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.) Goudge J.A. stated the following regarding the interpretation of a commercial agreement at para. 27

> Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. [*City of Toronto v. W.H. Hotel Ltd.* (1966), 56 D.L.R. (2d) 539 at 548 (S.C.C.)]. Rather, the document should be construed in accordance with sound commercial principles and good business sense; [*Scanlon v. Castlepoint Development Corporation et al.* (1992), 11 O.R. (3d) 744 at 770 (Ont.C.A.)]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

54 I take the principles in *Kentucky Fried Chicken* and in *Salah,* the latter adopted by Cronk J.A. in *Downey v. Ecore International Inc.* 2012 ONCA 480 and by Juriansz J.A. in *Ariston Realty Corp. v. Elcarim Inc.* 2014 ONCA 737, as the applicable principles governing this case. See also *Unique Broadband Systems Inc. (Re)* 2014 ONCA 538 at para. 88.[10]

55 The factual matrix of the contract is to be considered. What may be considered was expressed in *Kentucky Fried Chicken* as follows:

> **25** ...While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance. In the famous passage in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989 at 995-96 (H.L.) Lord Wilberforce said this:
>
>> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> **26** The scope of the surrounding circumstances to be considered will vary from case to case but generally will encompass those factors which assist the court "...

> to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract." *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.,* [1980] 1 S.C.R. 888 at 901.

56 More recently, Rothstein J. in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 referred to the use of surrounding circumstances and cautioned as to the extent they can be considered:

> **57** While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc*. (1997), 101 B.C.A.C. 62).

> **58** The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

57 It is clear that the factual matrix that can be considered may not include evidence of the subjective intent of a party or what a party believed a contract to mean. See *Sattva*, *supra*, at para. 59. It may also not include evidence of negotiations or create an ambiguity where none exists in an agreement. See also *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne* (2012), 115 O.R. (3d) 287 in which Feldman J.A. stated:

> **71** While the scope of the factual matrix is broad, it excludes evidence of

> negotiations, except perhaps in the most general terms, and evidence of a contracting party's subjective intentions: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham: LexisNexis, 2012), at p. 27. As the cases above suggest, the factual matrix includes only objective facts known to the parties at or before the date of the agreement, and what is common to both parties: Hall, p. 30. Hall goes on to state that while the factual matrix can "be used to clarify the parties' intentions as expressed in a written agreement, it cannot be used to contradict that intention, create an ambiguity which otherwise does not exist in the written document, or have the effect of making a new agreement": p. 31 (footnotes omitted). Ultimately, the words of the agreement are paramount.

58 The recitals in the MRDA are the subject of debate in this case. A clear statement of how recitals may be used in the interpretation of an agreement can be found in *Elliott Estate (Re)*, 1962 O.J. No. 164 (C.A.); aff'd [1963] S.C.R. 305. In that case, Kelly J.A. stated that a recital could be used only if there is an ambiguity in the operative parts of the agreement and the recital is clear. He stated:

> **11** I turn therefore to consider to what extent the recital may be used to overcome the patent deficiencies of clauses 6 and 7 and in fact of the whole operative parts of the agreement. In the first instance it must be borne in mind that a recital is not a necessary part of a document and its use in the interpretation of the document as a whole is strictly limited.
>
> > "The reciting Part of a Deed is not at all a necessary Part either in Law or Equity. It may be made use of to explain a Doubt of the Intention and Meaning of the Parties but it hath no Effect or Operation. But when it comes to limit the estate, there the Deed is to have its Effect according to what Limitations are therein set forth."
>
> Per Holt, C.J., *Bath and Mountague's Case* (1693) 3 Cas. in Ch. 55 at 101; 22 E.R. 963 at 991. An oft quoted statement of the extent to which reference may be had to recitals is contained in the judgment of Lord Esher, M.R. in *Ex Parte Dawes. In Re Moon*, (1886) 17 Q.B.D. 275 at p. 286:
>
> > "Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals

> and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

> It is to be noted that the qualifying condition for the use of a recital in the interpretation of the operative parts is that there must be ambiguity in the operative parts; in such a case the preferred meaning to be given to the operative words should be that consistent with the intention expressed in the recital, provided that the words of the operative part are by themselves capable of such an interpretation. *MacKenzie v. Duke of Devonshire*, (1896) App. Cas. 400; *Ex Parte Dawes. In Re Moon, Supra*; *In re Sugden's Truts, Sugden v. Walker*, (1917) 2 Ch. 92. It is essential, however, that the construction to be placed upon the operative part in the light of the recital be a construction which the words themselves of the operative part are capable of bearing. Where, however, the operative parts of a document, due to the lack of appropriate words, are incapable of a construction which will fulfil the intention expressed in recitals, the recital may not be used for the purpose of reading into the operative clause a meaning which it is incapable of conveying when considered by itself.

59 It was held in *PUC v. Distribution Inc. v. Brascan Energy Marketing Inc*., 2008 ONCA 176, that an elevation of a recital to a mutual promise or operative provision was an error.

60 *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129 at para. 57, in which Iacobucci J. in discussing the meaning of an agreement referred to the recitals, was referred to in argument. Iacobucci J. did not discuss the principles to be used in considering recitals. *Sistem v. Kyrgyz Republic,* 2012 ONSC 4983, has also been referred to in argument, a decision in which I did not refer to the principles to be used in considering recitals in interpreting contracts. I consider the decision in *Sistem* to be consistent with the principles enunciated by Kelly J.A. in *Elliott Estate.* I do not see either *Eli Lilly* or *Sistem* establishing any different criteria for the use of recitals from *Elliott Estate.*

61 I turn now to the interpretation of the MRDA and the rights accorded in it keeping these interpretive principles in mind.

(ii) Position of the parties

62 The essential differences in allocation positions advanced by the parties flow from the different manner in which each characterizes the terms of the MRDA, the interests held by the parties in Nortel's IP, and the applicability of terms of the MRDA to the value ascribed to various assets.

63 The Monitor, supported by the CCC, contends that under the MRDA, NNL owned the IP and the interests of NNI and the other participants to the MRDA were restricted to certain exclusive and

non-exclusive license rights granted to them by NNL pursuant to the terms of the MRDA. The Monitor says that the license rights were not unlimited, as they did not cover all rights in the IP in question, but rather covered only a subset (albeit a substantial subset) of the IP rights, on certain terms, all of which have valuation implications. In particular, the Monitor says that the license rights granted to NNI and the other licensed participants were not all rights to the IP but were subject to "field of use" restrictions that gave the licensees the right to use the IP to make, use or sell "Products" as defined in the MRDA, which meant products, software or services that were made or sold by, or for, any of the licensees. This meant that the Products must have been created or marketed by or for the Nortel Group. No product that was part of a third party's business rather than the business of Nortel could fall within the definition of Products. While the license gave the licensees the right to sublicense, this could not permit the licensees to sublicense what they did not have.

64 The Monitor's position, supported by the CCC, is that what was sold in the Rockstar sale of IP was the ownership of residual patents and patent applications owned by NNL. The purchasers would not have bought the residual IP to make Nortel products, and that as the license rights held by NNI and the other licensees would not have permitted them to sublicense to the Rockstar consortium the right to use the IP for the Rockstar consortium's own purposes, the proceeds of the Rockstar sale belong to NNL.

65 The position of NNI, supported by the other U.S. interests, asserts that each of NNI and the other licensees held all of the rights and all of the value in the IP in their respective exclusive territories as defined in the MRDA. The U.S. Debtors assert that the license rights NNI held were not subject to any field of use or scope restriction or limitation, resulting in an assertion that all of the economic value in the IP in the exclusive territory belonged to the licensee. They contend that the legal title held in the IP under the MRDA was a purely "bare" legal title with no monetary value. They also rely on a right to sue for damages in the U.S. for infringement of NN Technology by others.

66 The position of the EMEA debtors is that each of the parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to research and development, and that all share in the sale proceeds attributable to IP in those same proportions. The joint ownership is said to arise independent of, but recognized in, the MRDA.

(iii) Analysis

(a) The meaning of the exclusive license

67 The agreement is headed MASTER R&D AGREEMENT. It was entered into on December 22, 2004 with an effective date of January 1, 2001 and states that it confirms and formalizes the operating arrangements of the participants as and from that date. It provided that NNL was the legal owner of the NN Technology (the IP), and it contained grants of licenses from NNL to the other

participants, referred to as the Licensed Participants. Each Licensed Participant was given an exclusive license for its territory and a non-exclusive license for those parts of the world other than Canada and where the Licensed Participants had their exclusive territory. The exclusive territory for NNI was the U.S. and Puerto Rico, for NNUK was the United Kingdom, for NNSA was France and for Nortel Ireland was the Republic of Ireland.

68 At its core, so far as the ownership and licensing of the IP is concerned are articles 4(a) and 5(a) and (b). The original language remained in substance but was amended from time to time. These articles as amended are as follows:

Article 4 -- Legal Title to NN Technology

(a) Except as otherwise specifically agreed, legal title to any and all NN Technology whether now in existence or hereafter acquired, or developed pursuant to the terms of this Agreement, shall be vested in NNL. In consideration therefor, NNL agrees to enter into an Exclusive License and a Non-Exclusive License with each of the Licensed Participants as set forth in Article 5.

Article 5 -- Grant of Exclusive Licenses by NNL

(a) To the extent of its legal right to do so, and subject to the rights of relevant third parties, NNL hereby:

(i) continues to grant to each Licensed Participant an exclusive, royalty-free license, including the right to sublicense, which except as hereinafter provided shall be in perpetuity, rights to make, have made, use, lease, license, offer to sell, and sell Products using or embodying NN Technology in and for the Exclusive Territory designated for that Licensed Participant, and all rights to patents, industrial designs (or equivalent) and copyrights, and applications therefor, and technical know-how, as necessary or appropriate in connection therewith ("Exclusive License"); and

(ii) grants to each Licensed Participant, as of January 1, 2009 (the "Non-Exclusive License Effective Date"), a non-exclusive, royalty-free license, including the right to sublicense, which except as hereinafter provided shall be in perpetuity, rights to make, have made, use, lease, license, offer to sell, and sell Products using or embodying NN Technology in and for the Non-Exclusive Territory, and all rights to patents, industrial

> designs (or equivalent) and copyrights, and applications therefor, and technical know-how, as necessary or appropriate in connection therewith ("Non-Exclusive License").

69 To support their differing interpretations of these provisions, the parties augment to some extent their arguments by reference to other provisions in the MRDA. It will be necessary to deal with these. As can be seen from article 5(i), NNL "continues to grant", a reflection of the fact that prior to the MRDA, the parties were governed by Cost Sharing Agreements (CSAs)[11]. Recitals to the MRDA make this clear:

> WHEREAS legal title to all NN Technology is held in the name of NNL;
>
> WHEREAS each Licensed Participant held and enjoyed equitable and beneficial ownership of certain exclusive rights under NT Technology for a Specified Territory pursuant to the Amended Research and Development Cost Sharing Agreement entered into on January 1, 1992, and it is the intent of NNL and the Licensed Participants that the Licensed Participants continue, as of the effective date of this Agreement, to hold and enjoy such rights;

70 In considering the various interpretations of the MRDA put forward by the parties, it is helpful to compare those provisions with the earlier CSA provisions. Under the CSA, the parties split the costs of R&D by a certain formula. That agreement did not purport to split profits in any way. However, the tax authorities made it clear that they no longer would permit a cost sharing arrangement at Nortel and instead wanted an arrangement whereby profits would be shared among the participants by a residual profit split method (RPSM) that allocated profits according to the amount each participant spent on R&D. Relevant recitals in the MRDA that were not contained in the previous CSA are:

> WHEREAS each Participant bears the full entrepreneurial risks and benefits for the Nortel Networks business;
>
> WHEREAS each Participant has performed, in the past, and intends to continue to perform R&D Activity with respect to the Nortel Products;
>
> WHEREAS each Participant desires to avoid the duplication of R&D Activity;
>
> WHEREAS each Participant believes that it is appropriate that each Participant should benefit from its contribution to R&D activity commensurate with the value of its contribution to that R&D activity in the context of the manner in

which the Nortel Networks business is conducted and that the residual profit split methodology (RPSM) is the best arm's length measure, in the circumstances of NNL and the Participants, of such contributions with reference to such benefits;

WHEREAS this Agreement reflects the Participants' intent and agreement since January 1, 2001 to enter a license arrangement with the Licensed Participants, and the Participants have operated from January 1, 2001 in accordance with the terms set forth herein;

WHEREAS Participants acknowledge that as a result of a collective review by the Canadian Customs and Revenue Agency, the US Internal Revenue Service, and the UK Inland Revenue regarding the application of the RPSM, the calculation of the RPSM as set forth in Amended Schedule A may be amended which amendments would require the consent of the Participants;

71 These recitals and the RPSM method contained in the MRDA were driven by transfer pricing considerations. The language, for example, that each Participant (NNL and the Licensed Participants) bears the full entrepreneurial risks and benefits for the Nortel Networks business was not in the prior CSA and was part of the rationalization adopted to support a RPSM.

72 The MRDA provided in article 2 that each Participant would perform R&D at a level consistent with past practices and share the results of its R&D with the other participants. Article 3 provided payment for the R&D as follows:

Article 3 -- R&D Activity Payments

(a) For and as a consequence of the performance of R&D Activity, each Participant shall be entitled to receive a payment in an amount equal to the allocation determined under the RPSM (the "R&D Allocation") as the measure of the benefit to which it is entitled commensurate with its performance of, and contribution to, R&D Activity.

(b) Each Participant hereby accepts and agrees to make the payment determined under the RPSM in Amended Schedule A[12] as representing such Participant's share of the R&D Allocation.

(c) The R&D Allocation will be computed pursuant Amended Schedule A which sets forth the basis of the RPSM as originally proposed to the Revenue

> Authorities. The Participants understand that the RPSM is the subject of review, discussions and negotiations with the Revenue Authorities. The Participants agree to amend this Agreement and to adjust the RPSM to the extent necessary to reflect any negotiated determination with the Revenue Authorities as to the final R&D Allocation.

73 The U.S. Debtors and EMEA take the position that the legal title that is vested in NNL under article 4 of the MRDA is bare legal title given to NNL for administrative convenience to enable it to administer all NN Technology and that the licensed participants own the equitable and beneficial interest in the NN Technology. It draws on the recital that provides:

> WHEREAS each Licensed Participant held and enjoyed equitable and beneficial ownership of certain exclusive rights under NT Technology[13] for a Specified Territory pursuant to the Amended Research and Development Cost Sharing Agreement entered into on January 1, 1992, and it is the intent of NNL and the Licensed Participants that the Licensed Participants continue, as of the effective date of this Agreement, to hold and enjoy such rights;

74 I do not see this recital as clearly stating that a Licensed Participant has equitable and beneficial ownership of the NT Technology. It states that a Licensed Participant held equitable and beneficial ownership of "certain exclusive rights under NT Technology" and would continue to have such rights. The recital does not say what the "certain exclusive rights" were and it is just as consistent with those rights being license rights rather than ownership rights in the technology. As well, having equitable and beneficial ownership of certain exclusive rights "under NT Technology" would seem to be something different from having equitable and beneficial ownership of certain exclusive rights "of" or "in" the NT Technology.

75 In the CSA referred to in the recital, the language used is as follows:

> **ARTICLE 4**
> **LEGAL TITLE TO**
> **NT TECHNOLOGY**
>
> The Parties hereto acknowledge that, except as otherwise specifically agreed, legal title to all NT Technology whether now in existence or developed pursuant to the terms of this Cost Sharing Agreement, except patents owned by Participant [Northern Telecom Inc., now NNI] on January 1, 1980, shall be vested in Northern Telecom [now NNL]. With respect to patentable inventions and copyrightable property encompassed by NT Technology, Northern Telecom shall have the exclusive right but not the obligation to file and prosecute applications in its name for patent or copyright protection in every country of the world. Participant shall execute or cause to be executed such documents reasonably requested by Northern Telecom as may be necessary or desirable to give effect to

> the foregoing. (Underlining added).

76 The exception in this provision for patents owned by Northern Telecom Inc., now NNI, suggests that the legal title vested in Northern Telecom (now NNL) was ownership rather than bare legal title. Otherwise there would have been no purpose in excluding the patents owned by Northern Telecom Inc. It would not have been necessary.

77 In article 6 of the CSA, dealing with confidential information, it is stated:

> Participant acknowledges that Northern Telecom is the legal owner of the NT Technology developed pursuant to this Cost Sharing Agreement and that the NT Technology is proprietary and constitutes a trade secret. Participant shall hold the NT Technology in confidence and only make use of or disclose it as permitted by this Cost Sharing Agreement.

78 This provision refers to Northern Telecom being the "legal owner". This is consistent with the language of article 4 of the CSA. If, as stated in the recital to the MRDA, it was the intent of NNL and the Licensed Participants that the Licensed Participants would continue under the MRDA to hold and enjoy such rights as they held under the CSA, those rights would not include legal ownership of the NN Technology.

79 NNI also relies on language in Schedule A of the MRDA to assert its beneficial ownership of the NN Technology. It provides in part:

> **Calculation of Arm's Length R&D**
> **Allocation to each Participant**
>
> The purpose of this section is to provide a brief summary of Nortel's transfer pricing policy and to provide clarity as to how each Participant is to be compensated under this Agreement.
>
> The current transfer pricing methodology is the residual profit split method ("RPSM") which was adopted by the Participants at the request of the tax authorities as the most appropriate method for determining the arm's length compensation to each of the Participants for the R&D Activity to be provided pursuant to the Master R&D Agreement. The RPSM acknowledges the fact that the key profit driver in the Nortel business is the development and maintenance of rapidly depreciating intellectual property ("IP").
>
> Accordingly, the R&D Allocation provided to Participants under the RPSM reflects the fact that the Participants bear the full entrepreneurial risk of the

> Nortel business such as the risks attendant with the substantial and continuous development and ownership of the NN Technology. Mathematically, the RPSM accords the Participants all the upside risk in the Nortel business as well as the downside risk. (Underlining added).

80 Schedule A is part of the MRDA. I do not, however, read it as granting rights. The rights are granted in the operative provisions of the MRDA. Schedule A states at the outset that its purpose is to give a brief summary of Nortel's transfer pricing policy and to provide clarity as to how each participant is to be compensated. Schedule A provides in some detail how the residual profit is to be calculated and split amongst the Participants. Stating that Participants bear risks such as risks attendant with the development and ownership of the NN Technology does not state that ownership of the technology is being granted. What the Licensed Participants were granted in the MRDA were license rights.

81 Various dictionary definitions were resorted to in arguing what the meaning of "legal title" to the NN Technology was that was vested in NNL under article 4 of the MRDA. In the end, I do not think it necessary to get into that debate. NNL had ownership of NN Technology to the extent that NN Technology was not licensed to the Licensed Participants. Rights in inventions were assigned by the inventors to NNL and NNL applied for the patents and was named as owner of them. It was NNL who granted licenses to the Licensed Participants. NNUK, for example, did not provide a license to NNI for IP developed by NNUK. It was NNL that did so. Although NNL had the exclusive right to the NN Technology in Canada under the MRDA, the MRDA did not grant any license to NNL. That was recognition that it was NNL that owned the NN Technology.

82 A licensee does not enjoy property rights. Its rights are contractual. A licence is merely a permission to do that which would otherwise amount to trespass. See *Euro-Excellence Inc. v. Kraft Canada Inc*., [2007] S.C.R. 20 at para. 27. A licensee's rights are not necessarily equivalent to those of the patentee; rather, they are limited to, and qualified by, the express terms of the license. See *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 49. It is the determination of what those license rights were that were granted to the Licensed Participants in the MRDA that is important because it is those license rights that were given up by Licensed Participants to permit the business line sales and the sale of the residual IP to Rockstar.

83 The grant of the exclusive license in the MRDA in article 5(i) is:

> ...NNL hereby:
>
> (i) continues to grant to each Licensed Participant an exclusive, royalty-free license, including the right to sublicense, which except as hereinafter provided shall be in perpetuity, rights to make, have made, use, lease, license, offer to sell, and sell Products using or embodying NN Technology in and for the Exclusive Territory designated for that Licensed Participant, and all rights to patents, industrial

designs (or equivalent) and copyrights, and applications therefor, and technical know-how, as necessary or appropriate in connection therewith (Exclusive License") (Underlining added);

84 The license is not a license of NN Technology, but rather a license "to make... and sell Products using or embodying NN Technology". Thus the MRDA definition of "Products" is of central importance and the Monitor says that "Products" is defined to mean products, software or services that were made or sold by, or for, NNL and the Licensed Participants. The Monitor contends that products not made for NNL or the Licensed Participants, such as products that would be made by the Rockstar consortium members or their licensees are not covered by the license.

85 The definition of "Products" at Article 1(g) of the MRDA is:

> "Products" shall mean all products, software and services designed, developed, manufactured or marketed, or proposed to be designed, developed, manufactured or marketed, at any time by, or for, any of the Participants, and all components, parts, sub-assemblies, features, software associated with or incorporated in any of the foregoing, and all improvements, upgrades, updates, enhancements or other derivatives associated with or incorporated in any of the foregoing. (Underlining added).

86 The U.S. Debtors parse the language of the license grant and contend that the Licensed Participants obtained all of the rights to the NN Technology. They break down the grant of the exclusive license into four clauses as follows:

> NNL hereby:
>
> continues to grant to each Licensed Participant an exclusive, royalty-free license, including
>
> the right to sublicense, which except as hereinafter provided shall be in perpetuity,
>
> rights to make, have made, use, lease, license, offer to sell, and sell Products using or embodying NN Technology in and for the Exclusive Territory designated for that Licensed Participant, and
>
> all rights to patents, industrial designs (or equivalent) and copyrights, and applications therefor, and technical know-how, as necessary or appropriate in

> connection therewith ("Exclusive License").

87 The U.S. Debtors stated in their opening brief that the opening grant of an exclusive, royalty-free license in the first clause is not limited by the word "including". They say the word "including" does not create a limitation, that the word "including" follows the words "exclusive, royalty-free license" and thus the words that follow cannot, and do not purport to, limit the broad exclusive licenses granted to the licensed participants under the MRDA. In effect they argue that the opening words before the word "including" created a complete grant of a license without reserve.

88 I cannot accept that argument. The words "continues to grant an exclusive, royalty-free license", on their own, do not say what the license is, or what it is for, or for how long. Given that a licensee's rights are limited to, and qualified by, the express terms of the license (*Eli Lilly & Co* at para. 49), a license grant of uncertain scope, such as proposed by the U.S. Debtors, would have no meaning. Moreover, the words "in and for the Exclusive Territory designated for that Licensed Participant" appear after "including". On the U.S. Debtors' reading of the license, the territorial limitation would only apply to the license to make Products, and would not apply to a broad exclusive license that they say is already created before one gets to the word "including". It would also mean that the words "in perpetuity" which follow the reference to a sublicense would not apply to the broad exclusive license, which is inconsistent with what the U.S. Debtors say is the case.

89 There would be no commercial purpose in the MRDA granting a broad unrestrictive license and then providing more specific grants in the license that are restricted. For example, the third clause restricts the licensee to selling Products, which contains terms of limitation.

90 The U.S. Debtors also contend that the third clause permits NNI or any other Licensed Participant to make or have made for it Products using NN Technology and that the sublicense rights contained in the second clause are not so limited to Products using NN Technology. I cannot accept that contention. A sublicense could not sublicense more than the licensee had under its license and the second clause could not purport to do so. This argument of the U.S. Debtors relies on its argument that the first clause was a broad unrestrictive grant of a license, which argument I cannot accept.

91 The U.S. Debtors contend that the fourth clause is a free-standing or "catch-all" license grant of all rights to patents etc. unconnected to the license to make, use or sell Products. The language of this provision is:

> all rights to patents, industrial designs (or equivalent) and copyrights, and applications therefor, and technical know-how, as necessary or appropriate in connection therewith ("Exclusive License");

92 The U.S. Debtors say that the concluding words "in connection therewith" refer to the preceding words "technical know-how". The contention of the U.S. Debtors is that this last clause is like the first clause, being a separate grant not limited by the right to make, use or sell Products. The

Monitor says that these all of these words in the clause relate to the license to make, use or sell Products and that the words "in connection therewith" do not relate only to the reference to technical know-how.

93 I must say that I find it difficult to accept that the concluding words "in connection therewith" modify only the words "technical know-how". There would be no need for a comma after the words technical know-how". Those words, even if only applicable to the last clause, could apply equally to "industrial designs (or equivalent)" and "applications therefor".

94 I do not find persuasive at all the attempt of the U.S. Debtors to parse the language of the grant of license as they have done. On their reading, there are several different grants of license. Yet at the end of the paragraph are the words "Exclusive License" in parenthesis. There is only one license and the words should be read together harmoniously.

95 The U.S. Debtors make the point that what they refer to as the last clause in the license grant would be superfluous on the reading of the Monitor. That is because the definition of Products and NN Technology includes patents and the other things contained in that last clause. The U.S. Debtors say that because in interpreting a contract one should strive to give meaning to all of its terms, the last clause should be read as providing rights different from the rights to make, use or sell Products. While this argument on its face has a certain attractiveness, I do not think it right in this case.

96 The grant of license rights in article 5 is one grant. It does not in the paragraph expressly spell out the definition of Product or NN Technology. The draftsman may have thought it prudent to include the final clause. The words "in connection therewith" must be given some meaning and I do not accept the meaning given to them by the U.S. Debtors. I read the words as relating to the grant of a license to make, use and sell Products employing NN Technology, which in my view was the intent of the entire license granted in clause 5(i).

97 The Monitor refers to a statement of Lord Hoffman, no stranger to contract interpretation and a legal giant of his day, in *Beaufort Developments (NI) Ltd. v. Gilbert-Ash NI Ltd,* [1999] A.C. 266 at 274 (H.L.) that arguments of redundancy should be treated with caution. He stated:

> I think, my Lords, that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the draftsmanship is clumsy; more often the cause is a lawyer's desire to be certain that every conceivable point has been covered. One has only to read the covenants in a traditional lease to realise that draftsmen lack inhibition about using too many words.

98 In *Long v Delta Catalytic Industrial Services Inc.*, [1998] 6 W.W.R. 792, Fruman J. (as she then was) said much the same thing:

> Some might argue that this interpretation makes the provision redundant...That may well be the case, but it won't be the first time that a repetitive provision has been inserted into an agreement.

99 Redundancy could also be laid at the feet of the U.S. Debtors in their interpretation of the license grant. If their reading is correct, all of the second, third and fourth clauses would be redundant as the first clause was an unrestricted grant of a license. I think in this case redundancy arguments are just that, arguments that do not deal with the commercial purpose of the agreement.

100 An addendum to the MRDA dated December 14, 2007 with effect from January 1, 2006 was made to adopt changes to the terms of the MRDA that had been reflected in the financial statements of the Participants. The first two recitals of this addendum stated:

> Whereas each Participant holds and enjoys equitable and beneficial ownership of NN Technology as defined in the Prior Agreement,
>
> Whereas this Addendum continues each Participant's rights and obligations in the NN Technology,

101 The reason for this addendum was stated in the third recital

> Whereas given changes in the Nortel business, NNL and certain other Participants are seeking governmental approval of modifications to the RPSM.

102 This was the first of two addenda that changed the way of calculating the residual profit split each year from an amortized 30% spend of each Participant each year on R&D to a five year rolling average spend by each Participant on R&D. The operative parts of this addendum did not change the operative terms of the prior MRDA relating to the licence rights granted to the participants. I do not read the first two recitals that "each Participant holds and enjoys equitable and beneficial ownership of NN Technology as defined in the Prior Agreement" and the addendum "continues each Participant's rights ... in the NN Technology" as changing anything with respect to those rights in the prior MRDA. It is how the prior MRDA defines the rights of the participants that is important.

103 Confidentiality provisions are contained in the MRDA. The Monitor contends that because under article 6(a) the licensed participants owe a duty of confidentiality to NNL regarding the NN Technology but NNL does not owe such a duty to the Licensed Participants is an indication of the ownership by NNL of the NN Technology. The U.S. Debtors contend that because exceptions to the duty of confidentiality in article 6(d) give the right to the Licensed Participants to communicate to suppliers, customers and third persons licensing rights to use the NN Technology that they must have been given the authority to license to such third parties.

104 I think too much is made by each side of these confidentiality provisions. There is something perhaps in each side's argument, but I would not read article 6 as expanding on or limiting the ownership or license rights of the NN Technology. That was not its purpose. Regarding article 6(d)(iii), it begs the question as to whom the rights were given to license to third parties, and in light of the evidence of sub-licensing prior to the MRDA, to which I will refer in dealing with surrounding circumstances or the factual matrix, it is clear that NNL was a party to all such sub-licensing and NNI alone never sub-licensed.

105 The U.S. debtors contend that what was intended by IPCo comfortably falls within the definition of a Product and that therefore what was sold to Rockstar embodied rights that NNI had. They contend:

> IPCo was a licensing service business that the Participants proposed to be developed and indeed were actively developing, and which indisputably embodied the entirety of the Patent Portfolio sold to Rockstar, fits comfortably within the plain meaning of a "service" and thus the definition of "Products".

106 I do not agree. IPCo was considered for a time after the insolvency filings in January 2009. It could not be considered to have been part of the operating arrangements of Nortel while it carried on its business or intended to be governed by the MRDA. IPCo was not intended to be a "licensing service" business. The evidence of Sharon Hamilton, which I accept, is that the proposed business of IPCo was to use threatened or actual litigation against technology companies making their own products which arguably used or embodied NN Technology, in an attempt to encourage them to take and pay for a license to NN Technology. That was not a business contemplated in any meaningful way at any time that the MRDA or its predecessor was negotiated or signed.

107 The economic analysis prepared by Horst Frisch in 2002 as part of its work in devising the RPSM for the MRDA referred to Nortel customers choosing Nortel products and services because Nortel is committed to using its R&D resources in providing full pro-active service and support to its customers. A functional analysis for the years 2000 to 2004 sent by Nortel to the tax authorities in 2004 said the same thing. It also stated:

> "Nortel's networking solutions generally bring together diverse networking products from its various product families, and related services, to create either a customized or "off the shelf" solution for customers. Nortel's business consists of the design, development, manufacture, assembly, marketing, sale, licensing, servicing and support of these networking solutions".

108 The definition of Products in the MRDA is:

> "**Products**" shall mean all products, software and services designed, developed, manufactured or marketed, or proposed to be designed, developed, manufactured or marketed, at any time by, or for, any of the Participants, and all components,

> parts, sub-assemblies, features, software associated with or incorporated in any of the foregoing, and all improvements, upgrades, updates, enhancements or other derivatives associated with or incorporated in any of the foregoing.

109 Taken this definition, the license to NNI and the other participants was to "make, use..., license...sell" Products using or embodying NN Technology by, or for, the Participants. The Monitor contends that giving someone else (i.e. not any of the Participants) the right to use or embody NN Technology in their own products are not "services" within the Products definition in the MRDA. The Monitor contends that on the U.S. Debtors' reading of the word "services" in the MRDA, NNI could have provided a "service" to competitors of Nortel by permitting them to use in the U.S. the entirety of Nortel's patent pool to make their own products to compete with Nortel. The plain reading of the MRDA and common sense are contrary to this interpretation.

110 I agree with the Monitor's interpretation of the MRDA. At the time the MRDA was being considered, Nortel was not in a 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 must be read in that context. What was contemplated for a relatively short period of time after the world wide insolvency of the Nortel Group was simply not in the cards prior to that time.

(b) The right to sue for infringement

111 The U.S. Debtors contend that the right to sue is central to their rights as exclusive licensee in the U.S. The right to sue is contained under Article 4 which is headed Legal Title to NN Technology. The right is not contained in the exclusive or non-exclusive licenses under article 5. I cannot read this right to sue as being part of the licenses granted to the licensed participants in article 5. Articles 4 (a) and (e) are relevant, and provide:

> (a) Except as otherwise specifically agreed, legal title to any and all NN Technology whether now in existence or hereafter acquired, or developed pursuant to the terms of this Agreement, shall be vested in NNL. In consideration therefor, NNL agrees to enter into an Exclusive License and a Non-Exclusive License with each of the Licensed Participants as set forth in Article 5.
>
> (e) Licensed Participants have the right to assert actions and recover damages or other remedies in their respective Territories for infringement or misappropriation of NN Technology by others.

112 This right was not contained in the prior CSA. It first appeared in the MRDA.

113 This right in sub-article 4 (e) does not state that the Licensed Participants have the exclusive right to bring action in their territories. The exclusive rights which the Licensed Participants have

are contained in the exclusive license rights in article 5. There is no provision in the MRDA that precluded NNL from suing for patent infringement in a territory in which Licensed Participants had exclusive license rights. Indeed, the limited practice in the U.S. before the MRDA was signed was that both NNL and NNI were named as plaintiffs in infringement actions. To the extent those actions can be considered to be part of the factual matrix, it explains why the right to sue granted to NNI was not an exclusive right.

114 The right to sue for damages given to the Licensed Participants in their exclusive territories would obviously require a Licensed Participant to establish that it had been damaged. If the suit involved a breach of rights which the Licensed Participant had under its license, damages could presumably be proven. However, if the suit involved a breach of rights which the Licensed Participant did not have under its license, damages could not be proven.

115 If a Licensed Participant were the only plaintiff, which does not appear to have ever been the case, presumably it would be open to a defendant to contend that the Licensed Participant had not suffered any damages as what was being done by the defendant was not something that the Licensed Participants could have done under its license. That defence would not likely be run if both NNL and the Licensed Participant such as NNI were plaintiffs.

116 The Licensed Participants were not given any right to sue for damages for patent infringement in non-exclusive territories. This right was held by NNL.

(iv) Surrounding circumstances or the factual matrix

117 What may be looked at in constructing an agreement is objective evidence of the background facts at the time of the execution of the contract. It may not include evidence of the subjective intent of a party or what a party believed a contract to mean. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

118 There is an issue regarding the timing of the evidence that may be looked at. The exclusive licence to the Licensed Participants was contained in the 1985 CSA between Northern Telecom Limited [now NNL] and Northern Telecom Inc. [now NNI] signed in December 1984 and continued with no substantive changes in the 1992 CSA and in the MRDA and its later addenda. I would not, however, limit the time of the surrounding circumstances to the time that the CSAs were signed. The MRDA was made on December 22, 2004 effective January 1, 2001. Thereafter, while there were a number of changes to the MRDA in various addenda, no changes of substance were made to the operative provisions regarding the rights of the participants in NN Technology. I think the surrounding circumstances to the time of the signing of the MRDA in December 2004 can be looked at. Although there were some modifications to the MRDA after that, none involved any substantive change to the rights of NNL or to the exclusive licenses given to the Licensed Participants.

119 There was a great deal of evidence led by the U.S. and EMEA interests as to the subjective views of the witnesses, mostly tax personnel, regarding the rights of the parties under the CSA or MRDA or what the witnesses understood the language to mean, or in one case as to the witness's understanding of what others understood the documents to mean. Apart from the latter being inadmissible hearsay, all of this evidence was not admissible as it amounted to subjective views as to the meaning of an agreement. Nor was it admissible under the factual matrix rule permitting objective surrounding circumstances at the time of the execution of the agreement to be considered, and I do not consider it[14]. For example, what Mr. Henderson thought about the rights under the CSA license, that he copied from an earlier version of the CSA, or what others thought the MRDA meant or what they thought the intent of it was is not to be taken into account. See *Sattva*, *supra*, at para. 59.

120 I think it right to point out that not all of the evidence was one way. For example, the evidence of Angela De Wilton, the director of Intellectual Property in the Nortel IP law group and the director of IP strategy, was that Nortel was the owner of the patents and not just for administrative reasons. This evidence, elicited on cross-examination, also suffers from it being her subjective view of the rights of the parties under the MRDA. There were other witnesses who said much the same thing, such as Mr. Binning, the Executive Vice-President and CFO of NNC and NNL from November, 2007 to March, 2010 who said on his cross-examination that he understood that NNL owned the IP. This evidence suffers from the same problem of being a subjective view of the rights of the parties. The point is that that not all witnesses agreed with the subjective views of other witnesses.

121 There was also some evidence led of a prior draft of the MRDA and the views of an outside tax lawyer at Oslers who acted for NNL as to the particular draft language. This evidence is also inadmissible as being a prior draft and as constituting that particular lawyer's subjective views as to what the MRDA should contain.

122 A great deal of evidence, including evidence of statements made to tax authorities, had to do with economic theories of transfer pricing. As the transfer pricing principles changed from a cost sharing approach to a residual profit sharing approach, the economic theories and statements to tax authorities changed. One thing that did not change from the CSA approach to the RPSM approach was the language of the license grant from NNL to the other participants. It is that language that must be considered.

(a) 1996 APA

123 The 1992 CSA between Northern Telecom Limited (now NNL) and Northern Telecom Inc. (now NNI) was made with effect from January 1, 1992 but was not drafted until 1996 after the negotiations with the CCRA in Canada and the IRS is the U.S. in the advance pricing agreement process, so as to reflect the terms of the APA made with each of those tax authorities.

124 The U.S. Debtors say that the APA makes clear that NNI was entitled to all of the benefits of

the NN Technology in the U.S., including all sub-licensing rights. I think they draw too long a bow. The APA between Northern Telecom and the CCRA was an agreement which by its terms was to "establish a cost sharing methodology which will result in the allocation of expenses to NNI by [NNL] for R&D done by [NNL] and its subsidiaries...which will constitute reasonable amounts in the circumstances for the purposes of section 69 of the Income Tax Act". The concern of the tax authorities was that the costs of R&D be properly allocated between NNL and NNI. The purpose of the APA was not to agree how the income of NNL and NNI was to be shared or allocated, but how to apply R&D expenditures to whatever the income was for each of NNL and NNI.

125 Article 1.1 of the APA stated that the allocation of R&D expenses was to be determined in accordance with the cost sharing methodology described in appendix A. Appendix A is headed Cost Sharing Methodology. It contains detailed formulae to determine how R&D is to be allocated. At the outset, it has a section headed Understandings. The first understanding is that all benefit derived from R&D expenses is recognized either in the selling of a finished product to an unrelated customer or from the licensing of the technology resulting from the R&D expense (the "Benefit") within a defined geographical market by a Cost Sharing Participant ("CSP"). It goes on to state that "[NNL], as a CSP, "is entitled to all Benefits in all geographical markets except for the part(s) thereof granted to another CSP" and "NNI is also a CSP and its geographical market is the united States of America and the Commonwealth of Puerto Rico".

126 This statement that NNL is entitled to all Benefits in all geographical markets except for the part(s) thereof granted to another CSP is somewhat unclear. It could refer to all Benefits except for parts thereof granted to another CSP, or to all geographical markets except for those parts granted to another CSP. The former would seem to make sense because there would be no purpose in stating that NNL was entitled to all benefits in all geographical markets except those granted to another CSP as the following sentence states that the geographical market of NNI is the U.S. and Puerto Rico. If as I read it the understanding was that NNL was entitled to all benefits except for those granted to a CSP, the document begs the question as to what benefits were granted to NNI, which is the issue in this case.

127 It is understandable, as Mr. Henderson testified, that the parties needed to wait until the APA was settled with the tax authorities before the 1992 CSA was settled as the APA stated that it was to apply to the taxation years 1992 to 1999. That does not mean, however, that the parties needed to know how revenue was to be allocated by the APA. The purpose of the APA was to obtain an agreement from the revenue authorities how to allocate R&D costs, not revenues. This is borne out by Mr. Henderson's admissions on cross-examination that the 1992 CSA just adopted the license language of the 1985 CSA and that all operative provisions were the same.

(b) Sub-licences

128 Both sides refer to the evidence of sub-licensing as refuting the case of the other. In this I think they are incorrect. Not a great deal is clear from this evidence.

129 The reply closing argument of the U.S. Debtors contains a list of "Sublicenses Involving NNI". None were made only by NNI. Many were made by NNL and NNI and others were made by NNL on behalf of itself and its subsidiaries.

130 The sublicenses made by NNL and NNI recited that NNL has granted to NNI "certain rights to license said patents" in the U.S. In the body of the agreement it provides that NNL and NNI "to the extent of their legal right to do so" grants a license to the licensee for the countries and jurisdictions in which Nortel now or in the future holds the Nortel patent. What rights had been licensed to NNI is not stated in the sublicense. Some sublicenses provided that the royalties were payable to NNI, with NNI having the right to direct some or all of the payments to NNL. Others, being a majority of them, provided for the royalties to be payable to NNL with NNL having the right to direct some or all of the payments to NNI. In the case of cross-license agreements, the royalties were payable to NNL and there was no provision for NNL to direct some or all of the payments to NNI.

131 In agreements made by Nortel, defined as NNL on behalf of itself and its subsidiaries, regarding U.S. patents, it was stated that Nortel was the owner of the patents and that Nortel granted world-wide license rights for the patents. Other agreements involving other patents made by Nortel, also defined as NNL on behalf of itself and its subsidiaries, recited that Nortel was the owner of the patents. The effect of the language in this form of agreement is that the patents are owned by Nortel on behalf itself and its subsidiaries, which supports the position of EMEA that all patents were jointly owned by the MREs.

132 The U.S. Debtors point to some evidence of certain Nortel tax personnel to explain the forms of sublicensing agreements used by Nortel. One is an e-mail exchange in 2002 involving two different views from two different tax persons, in which subjective views as to what the license in the CSAs from NNL to the other participants meant and what the theory of the sublicensing agreements was. The other is an e-mail in 2000 from someone professing not to be an expert in tax and passing on his understanding of what the tax people's view was. Apart from the latter being hearsay and inadmissible, this e-mail evidence contains subjective views of the extent of the license in the CSAs from Nortel to the other participants in the CSAs and is inadmissible.

133 Nortel's IP team prepared a presentation after the sale of the business lines in connection with the stalking horse bid process for the residual intellectual property. The presentation reviewed the history of Nortel's portfolio including its past licensing activities. It stated that Nortel previously had a small licensing group which was not a core focus of the company. There were virtually no assertions against major players, customers or partners and they focused on smaller companies with limited ability to fight back. They had earned approximately $37 million per year in royalty income. The licensing operations ceased in 2007 for budgetary reasons but in 2008 Nortel made a decision to restart the licensing organization. Mr. Binning, the Executive Vice-President and CFO of NNC and NNL from November 2007 to March 10, 2010 said that during that time Nortel was not in the license business. I take it from this evidence that for a business as large as the Nortel business, it

would appear that sublicensing was an insignificant business for Nortel prior to its bankruptcy.

134 If one follows the money from the sublicenses, the evidence is that the royalties were split on the basis of the MRDA participant's contributions to R&D. The royalties were incorporated into the RPSM calculations even although they were not mentioned in Schedule A to the MRDA. Why this was done was not made clear by Mr. Stephens who gave the evidence of this happening. With one exception, we were not pointed to any evidence as to what was done with any royalties received prior to 2006, which is perhaps a more germane period as being prior to the signing of the MRDA. In 2004 a settlement of $35 million with Foundary Networks, Inc. was split on the basis of the RPSM.

135 In sum, there were no sublicenses when the license was granted by NNL to NNI at the time of the 1985 CSA. There were a number after that which do not indicate any clear pattern of what sublicense rights either NNL or the other participants were recognized to have. Sublicensing was a very insignificant part of the Nortel business prior to its insolvency.

(c) Representations to tax authorities

136 I have already discussed the 1996 APA process.

137 In connection with the switch from a CSA approach to a RPSM approach, Horst Frisch, a leading firm of transfer pricing economists, was retained to advise Nortel. Horst Frisch prepared a report dated March 14, 2002 titled Economic Analysis of Nortel Networks' Intercompany Transactions and this report was given to the tax authorities.

138 The U.S. interests point to a statement at page 10 of the report that stated from an economic standpoint, each participant could be considered to "own" the NT Technology. The paragraph in question made clear that what was being discussed was the situation under the CSA that existed up to the end of 1999. It stated:

> Prior to 2000 Nortel shared it global R&D expenses pursuant to its R&D cost sharing arrangement ("R&D CSA"), which dates back to the mid-1970's (with several amendments). Under the arrangement, each cost sharing participant ("CSP") had the right to use the intangible property developed pursuant to the R&D cost sharing arrangement (i.e., the NT Technology") in its respective market. From an economic standpoint, each R&D cost sharing participant could be considered to "own" the NT technology as it related to its specific region.

139 What is meant by "from an economic standpoint" each participant could be considered to "own" the NT technology as it related to its specific region is not clear. The OECD Guidelines and transfer pricing regulations in the U.S. and Canada all define intangible property to include licenses or rights to use assets. The statement of Horst Frisch that each participant had the right to use the IP and from an economic standpoint could be considered to "own" the NT technology could well have

referred to owning the license rights held by each participant rather than referring to the underlying NT technology. The U.S. Debtors in their opening brief acknowledged case law to the effect that the rights an exclusive licensee holds are referred to as beneficial ownership.

140 Horst Frisch was clearly not talking about legal rights, nor were they discussing particular language in the CSA. Even had they purported to give their views as to what legal rights the parties had under the CSA or the MRDA, which they were not, those views would not have been admissible. Horst Frisch was discussing economic theory.

141 A few pages further in the report, when Horst Frisch were discussing what would occur under the RPSM method of allocating profits under the MRDA, they stated that the economic theory underlying the CSA was not applicable to the RPSM of allocating profits. The report stated:

> As noted above, under the prior R&D CSA the CSP which ultimately made the sale to a third party in its exclusive territory was deemed to have economic ownership of the NT Technology since the third party sale attracted an R&D allocation under the CSA.
>
> In the absence of the R&D CSA, with the two exceptions noted above, each old CSP will incur R&D expense which should entitle it to share in Nortel's global profits or losses. We have not attempted to attach these R&D expenses to the manufacturing or the distribution operation of the old CSPs since there will no longer be a formula by which global R&D expenses are shared (i.e., a third party sale will not attract an R&D allocation so it is not reasonable to assume that only the selling entity will continue to own the valuable intangibles). The amount of R&D performed is not necessarily correlated with third party sales or manufacturing activity. Rather, each entity will perform and pay for its own R&D expenses, and has the ability to sell Nortel products worldwide and share in global profits or losses.

142 What Horst Frisch were saying was that the economic theory of the participant in a third party sale in its territory "owning" the intangibles would not apply to such a sale under the MRDA. Perhaps implicitly they were saying that the economic "ownership" of the intangibles would be owned by all of the participants in accordance with their R&D spend under the MRDA, although this is not expressly stated. If so, from an economic point of view, it would be more consistent with the position of EMEA rather than the U.S. or Canadian interests.[15]

143 After the APAs were applied for in 2002, the tax authorities visited various Nortel sites. They then posed a number of questions. In September 2003 Nortel send a 45 page response to these questions. One of the questions was to update the authorities on any developments since the APA submission was made and whether any changes to the proposed transfer pricing methodology were anticipated. One of the responses of Nortel had to do with restructuring charges. The U.S. interests

point to a statement that the residual entities are the owners of the intangible property. The context is important to see what was being said. Included was the following:

> In 2000 and later years, the telecommunications industry experienced a decline in demand unlike any other substantial industry in modem history. For that reason, there does not appear to be any precedent for analyzing the above issues. Accordingly, a reliance on basic economic principles was deemed necessary.
>
> In an arm's length situation, it was determined that the residual entities would agree to reimburse the distribution entities for a portion of their restructuring charges rather than have those entities become insolvent and forced into receivership. Generally, the underlying economic rationale for this argument is this: the residual entities, as the owners of the intangible property, as well as the manufacturers of the tangible goods, would recognize that its distribution network is critically necessary for their long-term survival. Should members of the distribution network become insolvent/cease operations, the residual entities' ability to offer their products for sale may be severely impacted. Therefore, it is in their best economic interests to ensure that a strong global distribution network exists.

144 This is a discussion of economic theory. It cannot be construed as a discussion of legal principles or the meaning of the MRDA. The reference to being owners of the intangible property could well be a reference to license rights rather than the underlying intangibles, as license rights are intangible property.

145 Dr. Timothy Reichert, a transfer pricing expert called by the Monitor, made the following statement about economic ownership as considered in transfer pricing, a statement not contradicted by any witness:

> A central concept in transfer pricing is that of "economic ownership" (referred to, alternatively, as "beneficial ownership," and simply "ownership"). Economic ownership is not a reference to ownership in a legal sense, but rather refers to a party's right to benefit from an income stream attributable to a defined undertaking or activity.

146 This statement cannot be disregarded. An economic right to an income stream attributable to a defined undertaking or activity requires one to know what is the defined undertaking or activity. The economic statements made to the taxing authorities did not purport to define the precise limits to the license granted by NNL to the participants under either the CSA or the MRDA. As seen, the statements made to the taxing authorities did not at all make clear what rights were being referred to and in particular, whether the "economic or beneficial ownership" was in the underlying NN Technology or in the license rights to that technology. They cannot be taken as statements that

under the MRDA the licensees legally owned the NN Technology.

147 To the contrary, Mr. Weisz, the Leader of International Tax at NNI who was involved in Nortel's transfer pricing policies, and who was asked by Mr. Dolittle, the VP of Tax for Nortel to become involved in the APA process that had stalled, told the IRS during that process that it was NNL that was the legal owner of the IP.

148 It must also be recognized that the APA process with the tax authorities was to arrive at an agreement with them regarding the Nortel operating business. It was an operating business with profits and losses that the tax authorities were interested in. This was the case both for the APA processes for both the CSA and MRDA. There were no discussions with the tax authorities as to what would happen on the insolvency of the entire business of Nortel. The discussion of the economic theory of economic or beneficial ownership must be considered in that light. They were not discussing such a theory in so far as it might apply to the situation of a cessation of business as occurred with Nortel.

149 The issue in this case has to do with the breadth of the licenses granted to the Licensed Participants and whether that included the right to sublicense the residual patent portfolio that was eventually sold to Rockstar. However at the time of the APA processes, sublicensing was a miniscule part of the business of Nortel and not surprisingly I have been pointed to no presentation to the tax authorities that discussed this issue. It was not on the Nortel radar.

150 The MRDA was provided to the tax authorities. They also had the prior CSA. The U.S. interests do not say that NNI rights were obtained other than in the CSA and then the MRDA. The tax authorities had these agreements and were able to read them, and were in as good a position as anyone to form their own view of what the agreements did or did not do. It cannot be suggested that the tax authorities did not understand transfer pricing. It was their business to know it.

151 There is evidence relied on by the EMEA debtors to support their position that the proceeds of the sale of the residual IP should be allocated in accordance with the relative expenditure on R&D by NNL and the licensed participants. After the APS application was filed by Nortel with the tax authorities in 2002, planning for a June 19, 2002 joint meeting with the three tax authorities took place in earnest, including the preparation of answers to questions Nortel anticipated might be raised by the tax authorities. In preparation for the meeting, Nortel engaged advisors from Deloitte & Touche LLP, KPMG LLP, Horst Frisch, and Sutherland Asbill & Brennan LLP to assist. Mr. O'Connor of Deloitte's prepared the following answer to an anticipated question regarding the sale of any IPCo, an answer that was circulated and agreed before the meeting:

> [Q:] How does Nortel propose to account for any future sale of intellectual property developed prior to or during the term of the APA? Which entities are considered the legal owner of IP and which are considered the economic owners?

> [A:] Proceeds from the sale of IP will be allocated to residual profit split participants on the basis of their economic ownership of the IP -- that is, on the basis of their share of total R&D capital stock in the year of sale.

152 The document was taken to the joint meeting. There is no evidence one way or the other as to whether the question was asked. While the question does not deal with what would happen if all of the Nortel IP was sold on a world-wide insolvency of Nortel, it is evidence that at the time of the APA process, Nortel was prepared to say that any sale of IP would be split in accordance with the RPSM in the year of the sale.

(d) Avoiding permanent establishment status in the U.S.

153 The U.S. interests contend that it was important to NNI not to be considered a U.S. resident for U.S. tax purposes and thus not have "permanent establishment" in the U.S. It is contended that it was this concern that drove separate legal entities to be set up for each country and for the license to be exclusive to the Participants for their territory so that the Participants would be the only ones dealing with customers in that territory.

154 Taken that as the situation, I do not see that it gets very far. There is no question that the exclusive license gave NNI the exclusive right to sell Nortel products in the U.S. The important issue in this case is what rights NNI had to sub-license and whether it was restricted to Nortel "Products" as defined in the MRDA. Sub-licensing was a miniscule part of the business of Nortel and there is no evidence at all that sublicensing issues drove the setting up of companies in different jurisdictions.

(e) Patent litigation

155 I have previously referred to the patent litigation that had taken place prior to the MRDA. Both NNL and NNI were plaintiffs in the actions in the U.S. Why that was so does not really matter. It explains why the right given to licensed participants to sue in their territories for damages for patent infringement was not an exclusive right.

156 As to what was done with the proceeds of patent litigation, there was a settlement in October, 2004 of an action commenced by NNL and NNI against Foundary Networks, Inc. $35 million was paid for past infringement and for future royalties under a license agreement. The entire payment was treated as royalty income and allocated to NNL and the Licensed Participants in accordance with the RPSM in the MRDA.

(f) Conclusion of factual matrix evidence

157 I do not consider the surrounding circumstance or factual matrix evidence to provide much clear assistance in construing the meaning of the terms in the MRDA. Even if it did, I would be required to be guided by the dictates of *Sattva* that while the surrounding circumstances will be

considered in interpreting a contract and the goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract, they must never be allowed to overwhelm the words of the contract and the interpretation of a contract must always be grounded in the text. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

(v) Commercial reasonableness

158 The U.S. interests and EMEA say that the Monitor's interpretation of the MRDA is commercially unreasonable. They contend that no party at arm's length would agree to spend large amounts to develop patents but only one party would be entitled to all of the proceeds from the sale of those patents.

159 It must be remembered that the MRDA and its predecessor CSA were drafted to come to terms with the tax authorities. The parties to the negotiations were Nortel on the one hand and the tax authorities on the other. The resulting CSA and then MRDA were operating agreements premised on cost sharing under the CSA and profit or loss sharing under the MRDA. The tax authorities were interested in the tax that each Nortel entity would pay each year. The tax authorities dealt in only limited periods of time. The 1992 CSA was settled with the tax authorities only in 1996, yet in 1999 they made it clear they wanted Nortel to abandon the CSA agreement and instead change to a RPS method of transfer pricing.

160 Nortel and the tax authorities were not negotiating on what would happen if Nortel stopped operating or in the event of a world-wide insolvency of Nortel. More particularly, they were not negotiating on how the proceeds of the sale of the entire Nortel world-wide patent portfolio would be allocated amongst the various Nortel companies in the event of the insolvency of Nortel. That was not discussed. This is not surprising because, as Dr. Eden testified, transfer pricing rules were developed only in connection with ongoing entities for purposes of determining their corporate tax.

161 The issue of commercial reasonableness must be considered in the context of who was involved in the preparation of the MRDA. It was not the technology people. Mr. Brian McFadden, the Chief Technology Officer of Nortel at the time the MRDA was drafted and signed, was not consulted about its terms and never heard of the MRDA while at Nortel. Ms. Angela de Wilton, the Nortel Director of Intellectual Property had no recollection of ever seeing the MRDA. In order to make the argument that it would have been commercially unreasonable for a Nortel company to agree to do R&D leading to patents and not be paid for the patents on the sale of the business, one would think that the people responsible for the R&D would have at least known of the agreement and its terms. The fact that they did not indicates that a trade-off of R&D for future receipts on a sale of the business was not on the radar screen at all so far as the operating people were concerned. The language of the MRDA was all tax driven.

162 So far as what was on the radar of the tax people at Nortel at the time the terms of the

MRDA were settled, in so far as the quid pro quo for doing R&D was concerned, the MRDA expressly provided in Article 2(c) that any compensation for R&D was to be based solely on the RPSM allocation. It stated:

> (c) All costs incurred directly or indirectly by each Participant for R&D Activity shall be borne exclusively by it. Any reimbursement for costs including any other compensation shall be provided to such Participant for its R&D Activity solely as provided in Article 3 below.

163 Article 3 that the annual sharing of profits or losses under the residual profit split method was what was to be received for each participants R&D that year. It stated:

Article 3 -- R&D Activity Payments

> (a) For and as a consequence of the performance of R&D Activity, each Participant shall be entitled to receive a payment in an amount equal to the allocation determined under the RPSM (the "R&D Allocation") as the measure of the benefit to which it is entitled commensurate with its performance of, and contribution to, R&D Activity.

164 In the context of what the parties were dealing with in the MRDA, I do not see how it can be said that it was commercially unreasonable for them to agree that in return for doing R&D each year, they would share only in the profits or losses in accordance with the RPSM allocation. That is all they had in mind. While Nortel had suffered losses by 2004 when the MRDA was signed, there is no evidence that Nortel expected to have only losses in the future. To the contrary, the operating people at Nortel expected that Nortel would return to profitability.

165 Mr. Henderson testified that a bankruptcy or insolvency of Nortel was not in their minds at the time the RPSM in the MRDA was created. The fact that they did not consider or provide what was to happen to the proceeds if all of the IP was sold after a world-wide insolvency does not make the agreement commercially unreasonable. The time for considering whether an agreement properly interpreted is commercially reasonable or unreasonable is surely the time when it was agreed, not in hindsight.

166 The U.S. Debtors called Dr. Catherine Tucker, a transfer pricing expert, whose evidence was to the effect that under the Monitor's interpretation of the MRDA, the Licensed Participants would lack appropriate incentives to undertake expensive and speculative R&D for the next potential generation of products. I do not think her evidence helpful. It is really an inadmissible subjective view as to how the MRDA license should be interpreted.

167 There is no basis for Professor Tucker's assumption that the MRDA was intended to create incentives for the Licensed Participants to make forward-looking innovations. The fact that Mr. McFadden, the Chief Technology Officer of Nortel at the time of the MRDA, was not consulted

about the MRDA and knew nothing about it belies any such assumption. Professor Tucker's assumption also ignores the way in which R&D was carried out at Nortel.

168 The majority of Nortel R&D was directed by the various Business Lines, which had to prepare annual R&D plans for approval. The remaining R&D, the advanced technology research (the "leap from one S-curve to the next" that Professor Tucker describes), was coordinated by the Chief Technology Officer. The evidence of Mr. McFadden was that all advanced technology programs were based in Ottawa and were operated by NNL. While product development R&D groups within each of Nortel's lines of business reported directly to the heads of their business units, the advanced technology programs personnel within each line of business reported directly to the CTO's office at NNL. The R&D was not the bailiwick of any Licensed Participant.

(vi) Conclusions on the meaning of the MRDA

169 I interpret the MRDA, and find, that under it, and while Nortel operated as a going concern business, NNL had all ownership interests of the NN Technology subject to grants, being (i) the grant to each Licensed Participant of a non-exclusive right to assert actions and recover damages in their territory under article 4(e) and (ii) the grant of exclusive and non-exclusive licenses to the Licensed Participants under article 5(a).

170 The licenses under article 5(a) were not licenses of all rights to the NN Technology but were subject to field of use restrictions that gave the Licensed Participants the right to use the NN Technology to make, use or sell Products as defined in the MRDA, which meant products, software or services that were made or sold by, or for, any of the Licensed Participants. The Products must have been created or marketed by or for the Nortel Group. No product that was part of a third party's business rather than the business of Nortel fell within the definition of Products. The business considered by IPCo was not covered by the licenses. The Licensed Participants' rights to sublicense were subject to these restrictions.

Applicability of the MRDA to the allocation issues

171 Nortel Networks UK Pension Trust Limited and the Board of the UK Pension Protection Fund (the "UKPC") contend that the MRDA was never intended to provide an answer to the question of how to allocate among the bankrupt estates the proceeds of the sale of the Nortel Group's assets following the world-wide insolvency of Nortel.

172 I agree. The MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profit or losses were occurring. The MRDA provided in its opening line that it was an agreement "confirming and formalizing the operating arrangements" of the parties.

173 There is a provision in schedule A to the MRDA added in the third addendum effective January 1, 2006 but signed by the parties late in late December 2008 or early January 2009 that

indicates that sales of property were not intended to be dealt with under the MRDA. That schedule A provided that in dealing with the calculations of the Nortel earnings/losses to be used in the RPSM calculation, there was to be deducted "gain/loss on the sale of business". A gain or loss would normally be taken into account on the particular company's statement of profit and loss and the Participants decided they did not want any such gain or loss to influence the calculation of profits or losses for the purposes of calculating the allocation of profits or losses in the RPSM calculation. Mr. Orlando testified that the sale of a business was seen to be a non-operating activity. This provision is an indication that the MRDA was not intended to deal with the sale of any assets, let alone the world-wide assets of the Nortel Group.

174 The MRDA and its predecessor Cost Sharing Agreements ("CSAs") were developed for and driven by transfer pricing concepts. They were drafted to come to terms with the tax authorities. The MRDA expressly provided in a recital that the calculation of the RPSM might have to be adjusted as a result of its review by the tax authorities. The MRDA was drafted by tax lawyers and tax advisors. The primary external counsel involved, and lead drafter of the MRDA, Giovanna Sparagna, testified that the MRDA is "primarily focused on transfer pricing," which is "part of tax law," and it is "primarily [a] tax law document[]." The MRDA was signed on behalf of NNL by John Doolittle, Nortel's Vice-President of Tax. All parties acknowledge that the MRDA was a tax-driven document designed to implement Nortel's transfer pricing policies.

175 Following the insolvency proceedings on January 14, 2009, no transfer pricing payments were made under the MRDA. The two special cash payments made by NNI to NNL were made under different agreements, being the IFSA dated June 9, 2009 and the FCFSA dated December 23, 2009.

176 Dr. Eden, who testified on behalf of the U.S. Debtors, testified that transfer pricing was only for ongoing businesses. She also testified that she saw the MRDA as a transfer pricing document and that the RPSM method contained in it was only used for corporate income tax purposes. She and other transfer pricing experts such as Dr. Richard Cooper, Dr. Steven Felgran and Dr. Timothy Reichert testified to the effect that transfer pricing does not address entitlement to the proceeds of the sale of assets on insolvency.

177 I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.

178 It can perhaps be argued that under article 9 of the MRDA the rights of NNL under article 4 and of the Licensed Participants under article 5 continued on the expiry or termination of the agreement, indicating a purpose other than tax that survives the insolvency of the Nortel enterprise. I would not construe those provisions that way.

179 The relevant provisions of article 9 of the MRDA provide:

Article 9 -- Duration and Continuing Rights and Obligations

(a) This Agreement shall be effective from January 1, 2001 until December 31, 2004, provided however that this Agreement will automatically renew for additional and unlimited one-year terms until terminated by the mutual written consent of all Participants.

(b) Upon the expiry or termination of this Agreement as provided herein, each Licensed Participant shall be deemed to have acquired a fully paid up license permitting it to continue to exercise the rights granted to it herein, and, in particular, the rights granted to it in Article 5 as though this Agreement had continued.

(c) The provisions of Article 4 (Legal Title to NN Technology) with respect to NN Technology acquired or developed pursuant to this Agreement from the Effective Date of this Agreement up to and including its expiry or termination date, Article 6 (relating to confidentiality) and Article 7 (relating to liability) shall survive notwithstanding the expiry of this Agreement, or any termination of this Agreement for any cause whatsoever.

180 Under article 9, the MRDA automatically renewed after 2004 unless terminated by mutual consent of all parties to it. If terminated, the Licensed Participants were to be deemed to have acquired a fully paid up license "permitting it to continue to exercise the rights granted to it herein... as though this Agreement had continued". This provision by its terms contemplated the business of the Licensed Participants continuing to operate. It did not contemplate a situation in which all of the Licensed Participants liquidated their assets and went out of business.

181 The CSAs contained a similar provision regarding the rights of the Licensed Participants on termination to a fully paid up license. At the end of 1999, the tax authorities did not want to renew the APAs and they encouraged Nortel to adopt a RPSM. In December, 2001, Nortel's CSAs for R&D were terminated effective January 1, 2001. In spite of the termination of these agreements, Nortel continued to operate and it was only on December 22, 2004 after negotiations with the tax authorities that the MRDA was executed with an effective date of January 1, 2001. The MRDA stated that it confirmed and formalized the operating arrangements of the Participants as and from that date. That is, the license rights under the CSAs continued to be used in accordance with the terms of the CSAs, and Nortel's tax advisors told that to the tax authorities on April 26, 2004. This was contemporaneous with the MRDA being settled.

182 One can see from this that the purpose of continuing rights under article 9 of the MRDA after a termination was to permit the Participants to continue operating, during which a new agreement

would have to be negotiated. Nortel was a multi-national enterprise that had to live with tax authorities where it operated and could not live without a transfer pricing agreement of some kind. As previously discussed, there was no thought at the time of the MRDA being settled that Nortel was not going to return to profitability.

183 Article 11(a) of the MRDA provided that any Participant that was not a party to an APA with the tax authorities could elect to withdraw from the MRDA. Article 11(c)(iv) of the MRDA provided that it was a defaulting event if one of the Participants became insolvent, in which case the Participant automatically was terminated from participation in the agreement. A fourth addendum was made to the MRDA effective December 31, 2008 and signed in early January 2009. It was headed Standstill Provision and provided that in the event of an occurrence of an event described at Section (sic) 11(c)(iv), i.e. if a Participant became insolvent, (i) no Participant effected by such insolvency shall be automatically terminated from participating in the agreement, (ii) no Participant shall elect to withdraw from the agreement under Article 11(a), and (iii) NNL would have the right in its sole discretion to terminate participation in the MRDA of any Participant affected by such event, i.e. of a defaulting Participant by reason of its insolvency.

184 This provision did not contain provisions expressed to apply in the event of a world-wide insolvency of all of the Nortel companies. It contained provisions of a standstill nature dealing with a situation in which one Participant became insolvent. It was obviously designed to prevent a Participant from declaring insolvency and then trying to take positions contrary to other Participants and to prevent the other Participants in such an event trying to take positions contrary to other Participants. I do not read this provision as an indication that in the event of a world-wide insolvency of all of the Nortel companies with no operations, the agreement was to continue to govern the affairs of a non-operating enterprise. Had that been the parties' intention, they could have said so in the addendum. They did not.

185 I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology 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 Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

EMEA position on ownership of the Nortel IP

186 The EMEA Debtors' position is different from the position of the Canadian and U.S. Debtors. They say that the Participants, or RPEs, have joint ownership of all Nortel IP under common law principles by reason of the IP belonging to the RPEs that employed the inventors. They say that the MRDA recognizes that joint ownership and that the joint ownership should be the basis for allocating the proceeds of the sale of the Nortel residual IP.

187 The basic premise of the EMEA Debtors' argument is that the Participants or RPEs were joint owners of all Nortel IP by reason of law. They argue that under Canadian law, the inventor is the first owner of an invention and is the legal title holder entitled to apply for any related patent. However, where the inventor is employed to invent, as the Nortel Group's researchers were, then the employer by operation of law beneficially owns any resulting IP. While the employee inventor who is listed on the patent application holds legal title, the employer is the beneficial owner. Given the integrated nature of Nortel and its R&D created in multiple jurisdictions, the EMEA Debtors argue that each participant beneficially owned not the IP created in its jurisdiction, but rather a share of the indivisible pool of the Nortel Group's IP.

188 Canadian and U.K. law appears to support the principle that where an employee creates an invention as part of his or her employment, the employer is the beneficial owner of the patent.[16] U.S. law is otherwise. Under U.S. law, unless there is agreement to the contrary, it is the inventor and not the employer who is the owner of his or her invention until he or she assigns it[17].

189 All Nortel employees, whether employed by NNL or a subsidiary, were required to assign directly or indirectly to NNL any intellectual property which they generated during the course of their employment. At least 98% of the patents and patent applications sold to Rockstar had been assigned by the inventors to NNL.

190 The EMEA Debtors say that while the inventors assigned their rights to NNL, the subsidiaries that employed the inventors did not. Thus they say that NNUK, the employer of inventors in the U.K., continued to have beneficial ownership of the patents for inventions created by its employees. I do not accept that. NNUK was required under article 4 (b) of the MRDA to execute such documents as NNL reasonably required to give effect to article 4 (a), which provided for legal title to NN Technology to be vested in NNL. In light of that obligation, NNUK is in no position now to say that the assignment of the IP from its employees to NNL was ineffective.

191 This argument of the EMEA Debtors would not apply to NNI in the U.S. as under U.S. law NNI did not have any such common law rights to IP developed by its employees who assigned their rights to NNL. Nor would it apply to patents invented by employees of NNL who assigned their rights to NNL. The EMEA Debtors' argument, if accepted, would mean that NNUK would only have rights to the IP developed by its employees and would have no joint ownership interest in the IP developed by employees of NNL, NNI, NNSA or Nortel.

192 I cannot accept the joint ownership theory of the Nortel IP or use that theory as a basis for allocating the proceeds of sale of the Nortel IP assets.

Appropriate method to allocate the proceeds of sale

193 While the Monitor on behalf of the Canadian Debtors and the U.S. Debtors take diametrically different views as to their rights under the MRDA, they each look to the MRDA and the rights they say were given to them as the basis of their allocation positions. I have not accepted

their position that they obtained rights under the MRDA that determine their right to the proceeds of the sale of Nortel's assets.

194 Nor have I accepted the position of the EMEA Debtors that the RPEs have joint ownership of all Nortel IP under common law principles recognized in the MRDA and that such joint ownership should be the basis for allocating the proceeds of the sale of the Nortel residual IP.

195 Without the MRDA to govern the allocation, and without the joint ownership theory of the EMEA Debtors, the issue becomes one of deciding what metric should be used to allocate the proceeds of sale.

196 In so far as the IP is concerned, while the patents were registered in the name of NNL, I would not for that reason hold that NNL is entitled to the proceeds of the IP sales. The patents and application rights to apply for patents were held in the name of IP for administrative purposes. It was best practices in a multi-national enterprise to have all patents assigned to one company, in this case to NNL, as explained by Ms. Anderson and Ms. De Walton, and made management of the portfolio much easier. While these witnesses expressed subjective views that it was NNL who owned the patents, these views are not determinative, as acknowledged in the Monitor's reply brief at paras 65-66.

197 This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

198 Canadian law permits recovery for unjust enrichment whenever a plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

199 U.S. law provides that unjust enrichment occurs where a party obtains a benefit which, under the circumstances and in light of the relationship between the parties, it would be inequitable to retain: *Counihan v. Allstate Ins. Co.*, 194 F.3d 357, 361 (2d Cir. 1999). It requires the retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. It is not available if there is a contract that governs the relationship between the parties that gives rise to the claim: *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891(Del. Ch. 2009).

200 On either test, I find that NNL would be unjustly enriched by being entitled to all of the proceeds of the sale of Nortel IP at the expense of the other RPEs who contributed to the creation of that IP just because the patents were registered in NNL's name. It would be inequitable. There would be no juristic reason for the enrichment as the MRDA as I have interpreted it does not deal

with the allocation rights of the parties in this world-wide insolvency of Nortel.

201 It would also unjustly enrich NNI if it were to be allocated the amount from the IP sales that it claims based principally on its revenues, which is the basis of the claim by the U.S. Debtors. NNI was able to sell Nortel products based on the R&D and resulting IP performed by other RPEs.

202 This is an unprecedented case involving insolvencies of many corporations and bankrupt estates in different jurisdictions. The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions. They were created by all of the RPEs located in different jurisdictions. Nortel was organized along global product lines and global R&D projects pursuant to a horizontally integrated matrix structure and no one entity or region was able to provide the full line of Nortel products and services. R&D took place in various labs around the world in a collaborative fashion. R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis. The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements does not mean that Nortel operated a separate business in each country. It did not.

203 Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide (*e.g.* sales, R&D, operations, finance, general and administrative, etc.), regardless of region or country according to need. Individuals could be part of a team with horizontal responsibility without removing them from their respective position vertically (or departmentally) within the Nortel group.[18]

204 In these circumstances, what principles should be applied to determine the allocation of the proceeds of the asset sales? In my view, doing what is just in the unique circumstances of this case should govern the allocation.

205 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> **65** I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G.R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J.P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given

> an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
>
> **67** The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.
>
> **68** In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

206 This Court has a broad inherent jurisdiction to make orders as required to fill in gaps or lacunae not covered by specific provisions in the CCAA. As a superior court of general jurisdiction, the Superior Court of Justice has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters. See *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.*, [1972] 2 O.R.280 (C.A.) at para. 9. See also *TCR Holding Corp. v. Ontario*, 2010 ONCA 233 at para. 26, *Beach v. Moffatt* (2005), 75 O.R. (3d) 383 (C.A.) at para. 8, *J.M. v. W.B.* (2004), 71 O.R. (3d) 171 (C.A.) at para. 43 and *McVan General Contracting Ltd. v. Arthur* (2002), 61 O.R. (3d) 240 (C.A.) at para. 56.

207 In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 57-61, it was recognized by the Supreme Court and stated by Justice Deschamps that the CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted, that the incremental exercise of judicial discretion with respect to the CCAA has been adapted and has evolved to meet contemporary business and social needs and that when large companies encounter difficulty and reorganizations become increasingly complex, CCAA courts have been called upon to innovate accordingly.

208 In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation.[19] The costs have well exceeded $1 billion. A global solution in this

unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction.

209 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (C.A.) at para. 25, per Blair J.A., *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.), at para. 16 per Morawetz J. and my comments in *Nortel Networks Corp. (Re)* (2014), 121 O.R. (3d) 228 at para.12. A pro rata allocation in this case goes partway towards such a result.

210 According to the various protocols, the task in this proceeding is to determine the amount that is to be allocated to each of the Canadian, U.S. and EMEA Debtors' Estates. I do not read the protocols or the IFSA as precluding a pro rata allocation. While payment to the Selling Debtors is to be made from the $7.3 billion in the lockbox funds, neither the protocols nor the IFSA determine how the allocation is to be made.

211 Directing a pro rata allocation will constitute an allocation as required. Once the lockbox funds have been allocated, it will be up to each Nortel Estate acting under the supervision of its presiding court to administer claims in accordance with its applicable law. A pro rata allocation can be achieved by directing an allocation of the lockbox funds to each Debtor Estate based on the percentage that the claims against that Estate bear to the total claims against all of the Debtor Estates.

212 It is argued that a pro rata allocation would constitute an impermissible substantive consolidation of the Estates, or as put by the U.S. Debtors, an impermissible "global substantive consolidation". I do not agree. A pro rata allocation in this case would not constitute a substantive consolidation and, even if it did, it would in my view be permissible within established case law.

213 In a liquidation or reorganization of a corporate group, the doctrine of substantive consolidation has emerged in order to provide a mechanism whereby the court may treat the separate legal entities belonging to the corporate group as one. In particular, substantive consolidation allows for the combination of the assets and liabilities of two or more members of the group, extinguishes inter-company debt and creates a single fund from which all claims against the consolidated debtors are satisfied. In effect, under substantive consolidation, claims of creditors against separate debtors instantly become claims against a single entity.

214 A pro rata allocation in this case would not constitute a substantive consolidation, either actual or deemed, for a number of reasons. First, and most importantly, the lockbox funds are largely due to the sale of IP and no one Debtor Estate has any right to these funds. It cannot be said that these funds in whole or in part belonged to any one Estate or that they constituted separate assets of two or more Estates that would be combined. Put another way, there would be no "wealth transfer" as advocated by the bondholders. The IFSA, made on behalf of 38 Nortel debtor entities in Canada, the U.S. and EMEA, recognized that the funds would be put into a single fund

undifferentiated as to the Debtor Estates and then allocated to them on some basis to be agreed or determined in this litigation. Second, the various entities in the various Estates are not being treated as one entity and the creditors of each entity will not become creditors of a single entity. Each entity remains separate and with its own creditors and its own cash on hand and will be administered separately. The inter-company claims are not eliminated.

215 Even if it could be said that a pro rata allocation involved substantive consolidation, which it cannot, I do not see case law precluding it in the unique circumstances of this case international case. Even in domestic cases, CCAA plans involving substantive consolidation are not unknown.

216 In Canada, neither the CCAA nor the BIA contains express provisions authorizing substantive consolidation. Similarly, the U.S. Bankruptcy Code does not explicitly permit substantive consolidation. However, courts in both jurisdictions have rendered consolidating orders on the basis of their equitable jurisdiction. See *See* M. MacNaughton and M. Azoumanidis, *Substantive Consolidation in the Insolvency of Corporate Groups: A Comparative Analysis, Annual Review of Insolvency Law, 2007*, J. Sarra, ed. (Carswell: 2008).[20]

217 In *Rescue! The Companies' Creditors Arrangement Act*, by Dr. Janis Sarra, Carswell 2007, the grounds for permitting substantive consolidation were described as follows at page 242:

> The court will allow a consolidated plan of arrangement or compromise to be filed for two or more related companies in appropriate circumstances. For example, in *PSINet Ltd*. the Court allowed consolidation of proceedings for four companies that were intertwined and essentially operated as one business. The Court found the filing of a consolidated plan avoided complex issues regarding the allocation of the proceeds realized from the sale of the assets, and that although consolidation by its nature would benefit some creditors and prejudice others, the prejudice had been ameliorated by concessions made by the parent corporation, which was also the major creditor. Other cases of consolidated proceedings such as Philip Services Canadian Airlines, Air Canada and Stelco, all proceeded without issues in respect of consolidation.
>
> Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

218 In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. 3d 24, Justice Farley held that a consolidated plan was appropriate, noting that there was significant intertwining of the debtor companies, including multiple instances of inter-company debt, cross-default provisions and

guarantees and the existence and operation of a centralized cash-management system. All of these features were present in Nortel.

219 In *Re PSINet Ltd.* (2002), 33 C.B.R. 4th 284, Justice Farley noted that a plan of arrangement based on substantive consolidation avoided the "complex and likely litigious issues" that could result from the allocation of the proceeds of the sale of substantially all of the debtor companies' assets. He also noted that the consolidated plan reflected the intertwined nature of the debtors and their operation. In that case, Farley J. stated that the overall effect of a consolidation was required:

> In the circumstances of this case, the filing of a consolidated plan is appropriate given the intertwining elements discussed above. See *Northland Properties Ltd., Re*, 69 C.B.R. (N.S.) 266 (B.C.S.C.), affirmed (B.C.C.A.), *supra*, at p. 202; *Lehndorff General Partner Ltd., Re*, 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 31. While consolidation by its very nature will benefit some creditors and prejudice others, it is appropriate to look at the overall general effect.

220 In *Northland Properties*, a case involving a proposed plan for several companies that operated as a single entity, Justice Trainor considered the tests for permitting a substantive consolidation. He looked to U.S. law for guidance and began his analysis by adopting the balancing test articulated in *Re Baker and Getty Fin. Services Inc.,* U.S. Bankruptcy Court, N.D. Ohio (1987) 78 B.R. 139:

> The propriety of ordering substantive consolidation is determined by a balancing of interests. The relevant enquiry asks whether "the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition".

221 Trainor J. then went on to list seven factors which had been developed to assist in the balancing of interests. Those factors were:

1. difficulty in segregating assets;

2. presence of consolidated financial statements;

3. profitability of consolidation at a single location;

4. commingling of assets and business functions;

5. unity of interests in ownership;

6. existence of intercorporate loan guarantees; and

7. transfer of assets without observance of corporate formalities.

222 In considering these factors, it is clear beyond peradventure that Nortel has had significant difficulty in determining the ownership of its principle assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio. This amount constitutes over 80% of the total assets of all of the Nortel entities[21]. This issue has taken several years of litigation and untoward costs in the parties attempting to establish an entitlement to it. As the MRDA does not govern how the sales proceeds are to be allocated, there is no one right way to separate them. It cannot be said that there is no question which entity is entitled to the sale proceeds or in what amount. It is clear that these assets are in the language of Dr. Janis Serra "so intertwined that it is difficult to separate them for purposes of dealing with different entities".

223 Moreover, the evidence in this case is clear and uncontested that Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activates that were global in scope.

224 When consolidation occurs, some creditors may be prejudiced if they would have had a greater recovery of so many cents on the dollar against their debtor if there had been no consolidation. Conversely, other creditors may be benefitted by consolidation if they would have had a lesser recovery against their debtor if there had been no consolidation. In this case, even if a pro rata allocation amounted to a consolidation, the issue would be moot because it cannot be said that without consolidation one class of creditors, including the bondholders, would necessarily have had a greater recovery than with consolidation. The reason for this is that there has been no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale.

225 The bondholders who hold bonds with covenants of both NNL and NNI contend that they would be unduly prejudiced by a pro rata allocation of the lockbox funds as they are entitled to look to both NNL and NNI for payment of their claims and if one of these companies did not have sufficient funds to pay the bonds in full, they could look to the other. I agree that they are entitled to claim against both companies and this will be recognized in the pro rata allocation that will be ordered.

226 The bondholders have the legal right to be paid in full on their bonds. But so do all of the

other creditors. Like the pensioners and other creditors, the bondholders are not secured. Because of a shortfall in funds, all of these creditors cannot be paid in full. The issue is how the pain is to be shared.

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[22] 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.[23]

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 asserts 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 GDP339.75 million recognized in my judgment of December 9, 2014.

Appropriate pro rata allocation method

250 The allocation each Debtor Estate will be entitled to receive from the lockbox funds is the percentage that all accepted claims against that Estate bear to the total claims against all Debtor Estates.

251 In determining what the claims against a Debtor Estates are, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once. The one that is known is the bondholder claim for $4 billion, referred to as the claim on cross-over bonds. All but one of such bond issues was issued by NNC or NNL and guaranteed by NNI. One bond issue for $150 million was issued by NNCC, a subsidiary of NNI, and guaranteed by NNL[24]. The claims on the bonds in determining the claims are to be made on the Debtor Estate of the issuer. If a claim on a guaranteed bond is not paid in full by the issuer Debtor Estate, a claim for the shortfall can be recognized by the Debtor Estate that guaranteed the bond, but that shortfall claim will not be taken into account in determining the claims against the Debtor Estates.

252 One of the known claims is the claim of the UKPC for the approximately GDP2.2 billion deficit in the NNUK pension plan. If the UKPC makes a claim for this amount against NNUK and also against other EMEA Debtors, those claims against the other EMEA Debtors will not be taken into account in determining the claims against the Debtor Estates. The claim may be taken into account only once in the pro rata allocation.

253 I understand that for the Canadian Debtors and the U.S. Debtors, the claims for the most part are generally known although there are some claims still unresolved, such as the SNMPRI claim. The U.K. Administrator has not yet instituted a claims procedure, apparently awaiting a determination of this allocation proceeding. In my view, the process should be undertaken now and I expect this will happen.

254 Interim distributions have been proposed. In my view, this would be especially important for the predominantly elderly pensioner population and disabled employees who have endured hardship as a result of the loss of their benefits but also for other creditors who have waited more than five years for a distribution on their claims. An interim distribution should be made if possible.

255 Briefs should now be filed by those parties supporting an interim distribution with full details of what is requested. Opposing briefs would of course be required. The procedures and timing could be discussed at a 9:30 am appointment.

Allocation on a basis other than pro rata

256 The evidence on this subject was complex and varied dramatically from party to party. To wit:

(a) The Monitor on behalf of the Canadian Debtors contended for an allocation of $6.034 billion to the Canadian Debtors, $1.001 billion to the U.S. Debtors and $300.7 million to the EMEA Debtors.[25]

(b) The U.S. Debtors contended for an allocation of $0.77 billion to the Canadian Debtors, $5.3 billion to the U.S. Debtors and $1.23 billion to the EMEA Debtors.

(c) The EMEA Debtors contended for an allocation of $2.32 billion to the Canadian Debtors, $3.636 billion to the U.S. Debtors and $1.325 billion to the EMEA Debtors.

257 I have given consideration to the valuation issues. To a great extent, they are dependent on the various interpretations of the MRDA asserted by the parties. For that reason I would not use any of the valuations for the purpose of the pro rata allocation as I have found that the MRDA does not govern the allocation. However, my views and findings on the valuations are set out in Appendix A for the business line sales and Appendix B for the residual IP sale to Rockstar.

Conclusion

258 A judgment is to go that the lockbox funds are to be allocated on a pro rata allocation basis

with the following principles to govern:

(1) Each Debtor Estate is to be allocated that percentage of the lockbox funds that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates.

(2) In determining what the claims are against the Debtor Estates, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once in accordance with these reasons for judgment. Claims on bonds are to be made on the Debtor Estate of the issuer. A claim for any shortfall can be recognized by the Debtor Estate that guaranteed the bond, but that shortfall claim will not be taken into account in determining the claims against the Debtor Estates. If the UKPC makes a claim against more than one Debtor Estate, such additional claims will not be taken into account in determining the claims against the Debtor Estates.

(3) Intercompany claims against a Debtor Estate are to be included in the determination of the claims against that Estate.

(4) Cash on hand in any Debtor Estate will not be taken into account in the pro rata allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

(5) An interim distribution may be allowed upon further submissions. Briefs in favour of and opposed to an interim distribution are to be filed on a time-line to be considered at a 9:30 am appointment.

(6) Proposed schedules for expediting any remaining claims procedures are to be provided without delay.

Epilogue

259 I cannot leave these reasons without commenting on the persons who made this unique case possible.

260 First, to the technical staff who provided the facilities to permit this trial to be conducted in two different countries at the same time, I say it was a job more than well done. It was outstanding and we are indebted to you all. Judge Gross and I have no idea how it was all set up and operated,

but I know he is as grateful for the facilities as I am. Thank you.

261 Second, to the reporters and their staff, it was also a job more than well done. Apart from the instantaneous real time reporting that permitted all parties to see the evidence as it was being given, we were blessed with draft transcripts being electronically sent to us shortly after the evidence concluded each day and final transcripts later that evening.

262 Third, to the lawyers. We were blessed with outstanding counsel on both sides of the border. In a case such as this with the amount at stake, one can understand the pressures on counsel and how those pressures could get in the way of a smooth preparation and presentation of the case. From what I could see, all acted in a professional manner that does them credit. Without that, the case could not have proceeded as well as it did. Their staff should also be congratulated for the smooth way in which the case was electronically presented. It was a marvel.

263 Finally, I want to thank Judge Gross for his courtesies and good humour. It has been a pleasure to work with him. Without such a good relationship and the trust that we developed for each other, this trial and its conclusion would not have been possible.

F.J.C. NEWBOULD J.

* * * * *

APPENDIX A

Allocation of the proceeds of the line of business sales

[1] The experts for the various parties differ on the way that the proceeds of the sales of the LOB should be allocated amongst the Canadian estate, the U.S. estate and the EMEA estate.

[2] Mr. Kinrich, the valuer called by the U.S. Debtors, did not value the various assets sold and attempt to allocate them by any particular method. Rather he allocated the entire sale proceeds by taking the revenues of each company whose businesses were sold and allocating to each company (and the group they were in) the percentage of its revenues to the total revenues of all companies whose businesses were sold. His resulting allocation was 11.9% or $340 million to the Canadian Debtors, 18% or $510 million to the EMEA debtors and 70% or $1.99 billion to the U.S. Debtors.

[3] Mr. Malackowski called by the EMEA debtors valued the IP rights sold by using a revenue or license valuation method. His valuation of the IP sold in the business sales was $765.2 million.

[4] Mr. Huffard called by the EMEA debtors then allocated the various kinds of assets sold. He valued the tangible assets that were sold at $118 million and allocated this amount to the companies that sold them. He allocated the IP that was sold and valued by Mr. Malackowski at $765.2 million by a contribution approach which allocated the IP according to the amount of R&D expenditures of each of the RPEs. He attributed the balance of the LOB sale proceeds as "customer related assets

and goodwill" and allocated them on the basis of the percentage of revenues generated by each entity in 2008. Mr. Huffard did not give a separate total figure in his report for the allocation of the LOB sale proceeds.

[5] Mr. Green called by the Canadian Debtors dealt with each kind of the various assets sold. He allocated the tangible assets sold by giving to the companies that sold them their book value, which he calculated to be $534.19 million. He valued the workforces sold by their cost that the selling companies would incur to replace them at $255.33 million and allocated those costs to the companies. He allocated the IP and customer relations by valuing what the licensed participants gave up to enable the sales on the basis that their license rights were limited to the "Products" "by or for the Participants" as defined in the MRDA, and allocated the balance of the sale proceeds to NNL as the "owner" of the IP. His resulting allocation was 54.8% or $1.58 billion to the Canadian Debtors, 10.4% or $300.97 million to the EMEA debtors and 34.7% or $1001.5 billion to the U.S. Debtors.

(i) Mr. Kinrich

[6] Mr. Kinrich's view is that the RPEs that were licensed participants had all license and sublicense rights as owners. Assuming that to be the case for this analysis, I have some concerns with his analysis. Mr. Kinrich allocated all of the assets sold in the business sales on a revenue basis. He stated in his report that the value of the sold assets is reflected in the revenue generated by each entity that sold the assets. That is, value he said was reflected in revenue figures.

[7] Mr. Kinrich himself in his report said that financial economists agree that a discounted cash flow analysis is the preferred technique for asset valuation and that one of the requirements is to have projected future cash flows less costs. In his report he did not say why he had not done such an analysis when dealing with the business sales. At trial he relied on texts to support his use of a revenue approach in firms with losses, one of which is *Valuing Small Businesses and Professional Practices*, which suggests gross revenue multiples may be used in restricted situations, being to approximate a range of possible values with a minimum effort, conclude an estimate of value when other data are unavailable or inadequate or as one indicator of value used in conjunction with more rigorous valuation methods. The text also said that for companies with losses or erratic earnings, multiples of price to revenue for other comparative companies may give some indication of how others asses the future of the industry or profession. But that is not what Mr. Kinrich did. He did not look at revenue multiples from the sale of any comparable companies. I viewed his attempt to bolster his revenue approach by resort at trial to texts to be an attempt at *ex post facto* rationalization. It would have been a little more persuasive if these rationales has been provided in his report, particularly as in his report he did a sensitivity check based on gross margin (revenue less cost of goods sold) and contribution margin (revenue less selling, general and administrative expenses).

[8] Mr. Kinrich said at trial that he did not have available forecasts that would divide income

streams by territory but that is beside the point so far as a gross revenue valuation is concerned. The issue is whether it would have been preferable to take costs into account in his revenue approach to allocation.

[9] Because the U.S. market had the highest revenues, it follows that using a revenue approach as Mr. Kinrich did will result in the high allocation of the business sale proceeds to the U.S. (70%) and a low allocation to Canada (11.9%). However, because revenue does not consider costs, this result ignores the way in which Nortel operated as a matrix structure and the reliance by all operating areas, including the U.S., on IP generated by R&D elsewhere. The 2009 revenue that Mr. Kinrich used in his analysis to compare revenues, the basis of which was assumed license rights under the MRDA, was subject to the obligation in the MRDA to make payments pursuant to the RPSM measured by R&D expenditures of each RPE. Mr. Kinrich did not take into account.

[10] Mr. Kinrich acknowledged on his cross-examination that while he assumed that the set of license rights as he saw them would continue in the future to exist, he gave no effect to sharing obligations that might arise under the MRDA, his reason being that he understood that the sharing provisions did not apply to sales proceeds. That in my view was no answer. What he undertook was to determine the relative value surrendered by each of the selling entities, including the RPEs. To determine the value of rights of each of the RPEs without taking into account the RPSM sharing obligations failed to properly determine relative values among the RPEs. I accept the opinion of others, including Dr. Bazelon and Mr. Green, on the point. The various businesses in Nortel historically operated on varied operating margins.

[11] Mr. Green pointed out, with reference to texts including those that Mr. Kinrich referred to at trial, that a disadvantage of focusing on revenues is that it can lull one into assigning high values to firms generating high revenue growth while losing money and that the method assumes that the businesses are equally profitable. His view was that a revenue based allocation was inappropriate in a matrix structure such as Nortel with interrelated operating businesses in which certain entities bore disproportionate shares of expenses like R&D which would be ignored.

[12] EMEA and the UKPC contend that Mr. Kinrich should not have used 2009 revenue figures as 2009 was an anomalous year for Nortel. Nortel filed for insolvency protection in January 2009 and from then on was operating under the supervision of courts in Canada, the US, the UK, and elsewhere. Throughout 2009, Nortel was actively engaged in selling its businesses, signing seven out of eight of its sale agreements in that year. All of this affected its ability to generate revenues. Four of the business sales were concluded before the year's end. Because of these dispositions, complete financials for 2009 were not even available for certain businesses and revenues had to be estimated based upon performance prior to the sale closing date.

[13] Dr. Bazelon's evidence was that NNI's share of global revenue plateaued by 2008 at about 65% but in 2009 it increased by about 4%. In my view, EMEA and the UKPC have a valid point. 2009 was not a typical year for Nortel. While NNI contends that 2009 resembles the weighted average

over the years 2001 to 2008, but that ignores the steadily declining trend from NNI having 74% in 2001 to about 65% in 2008. Using 2009 for his revenue analysis was overly aggressive. The effect was to shift about 4%, or $100 million, from EMEA to the U.S. Debtors.

(ii) Mr. Malackowski and Mr. Huffard

[14] The allocation of the proceeds of the LOB sales on behalf of the EMEA Debtors is based on the evidence of Mr. Malackowski who valued the IP sold at $765.2 million and on the evidence of Mr. Huffard who allocated all of the sales proceeds using different methods for each type of asset sold. There are problems with the EMEA allocation.

[15] Mr. Malackowski used a discounted cash flow analysis to value the IP. He said there was a defensive component and a synergistic component to the IP. To measure the defensive component, he took the revenue forecasts of Nortel in the "deal books", market derived growth rates, and royalty rates from an IPCo model. For a discount rate he used an average of weighted average cost of capital rates of the industry in which the Nortel business operated. To measure the synergistic component, he used revenues of a hypothetical market participant for each line of business sold, market derived growth rates, and royalty rates derived from what he said was the implied rate paid by Ericcson as a member of the Rockstar consortium. He added 15% to the discount rate used in his defensive component.

[16] Mr. Malackowski's valuation of the IP sold at $765.2 million, if accepted, means that the IP represented roughly 25 % of the total sales proceeds of $3.1 billion. Yet, the evidence is overwhelming that IP created by Nortel's R&D was the driver of the profitability of the business. Even Mr. Huffard view was that within Nortel, IP was considered the driver of revenue in each of the businesses and purchasers of the businesses would have considered the acquisition of IP as a critical aspect. Mr. Britven, an expert called by the CCC, arrived at figures based on the purchase price allocations made by the purchasers that stated what the purchasers considered the fair value of the various acquired assets to be. Those figures put the percentage of the IP of the total business sale proceeds at 40%.

[17] In his rebuttal report, Mr. Malackowski in an attempt to show the size of what he considered to be a windfall if the position of Mr. Green were accepted, said that all of the Nortel the IP in total in the hands of Nortel could be worth $10.4 billion, of which he allocated $3.761 to the business sales and $6.6 billion to the residual sale to Rockstar. His reason for this extra value in his report was that some of the residual IP sold to Rockstar was encumbered by the non-exclusive licenses given to the purchasers of the lines of business. Rockstar paid $4.5 billion. If Mr. Malackowski's figures are right, it means that the non-exclusive licenses given to the purchasers of the lines of business reduced the value of the residual IP sold to Rockstar from $6.6 billion to $4.5 billion, or by $2.1 billion. That reduction in value to Rockstar attributed to the non-exclusive licenses granted in the business sales means that those non-exclusive licenses were worth $2.1 billion, and it does not make sense that Mr. Malackowski valued both the outright licenses and the non-exclusive licenses given

to the purchasers of the lines of business at only $765.2 billion.

[18] The Monitor points out that the royalty rates used by Mr. Malackowski in establishing revenues to be valued were taken from the IPCo litigation light model and that within that litigation light model he chose the lowest of three rates. He did not use any Nortel intercompany-stated royalty rates. The Monitor suggests that is an explanation why the IP valuation of Mr. Malackowski is too low. For certain the royalty rates charged directly affect the revenues and thus the value obtained by a DCF method of valuation. Whether it is the only reason for the low valuation is another matter. There are many inputs in a valuation.

[19] Mr. Huffard was the expert called by EMEA to opine on the allocation to be made of each component of the business sales. The Monitor is critical of his qualifications. Mr. Huffard is an investment banker with considerable experience advising distressed companies who has "led valuation analyses" for companies and their assets. He holds a Master of Management degree from Kellogg Graduate School of Management at Northwestern University. Mr. Huffard is not accredited as a valuator and said that in the field of investment banking that is typical.

[20] I must say that Mr. Huffard was not forthcoming in his evidence about his experience. When asked if he had done any valuations or the allocating of assets in connection with intellectual property companies, he said several times that he had trouble understanding what an intellectual property company was and asked if Nortel was an intellectual property company. Yet when asked on his deposition whether he had done any valuations or the allocating of assets in connection with intellectual property companies, he answered "Not in connection with intellectual property companies." I think it fair to consider this answer in dealing with his evidence.

[21] Mr. Huffard believed that there were three classes of assets to be valued and examined in the business sales. The first is net tangible assets. The second is the IP. The third is customer-related assets and goodwill not otherwise encompassed in goodwill. Mr. Huffard did not do any valuation exercise for his third class. Rather he just took the balance of the purchase price and allocated it. The values attributed to the first two classes therefore directly affected the value of his third class.

[21] For the tangible assets, Mr. Huffard took the book values of the assets, which consisted of accounts receivable and prepaid expenses, inventory and fixed assets. This book value in his report totalled $403 million. At trial, in his demonstrative exhibit, his total was $361 million. Why the difference was not explained. From the book values, Mr. Huffard deducted liabilities assumed by the purchasers of the lines of business, the largest of which was deferred revenue. He viewed the assumed liabilities as a fourth asset class that resulted in an increase in the purchase price from the buyer's perspective and a reduction from the seller's perspective. They had to be deducted from the assets and he did this the tangible asset class. This resulted in net tangible assets in his report of $124 million, being $39 million for Canada, a negative $27 million for EMEA, $106 million for the U.S. and $6 million for Asia and the Caribbean. At trial, his demonstrative showed the net tangible assets at $118 million with the same net figures for Canada, EMEA and the U.S. as in his report.

How this occurred on the different book values in his report and in his demonstrative was not explained.

[22] For the allocation of the IP, Mr. Huffard took Mr. Malackowski's figure of $765.2 billion. He allocated them amongst the RPEs using Mr. Malackowski's contribution approach using historical R&D spending from 1992 to 2008. His view was that the portions of the sale proceeds attributable to IP were, in effect, a capitalization of future revenues that would otherwise have been shared among the RPEs in accordance with the RPS methodology. This resulted in 40.8% or $312.2 million being allocated to Canada, 42.6% or $326 million being allocated to the U.S. and 16.5% or $126.2 million being allocated to EMEA. In his demonstrative at trial, these percentages were rounded, with 41% to Canada, 43% to the U.S. and 16% to EMEA.

[23] Mr. Huffard then included the balance of the sale proceeds of $2.198 billion into his third class of customer-related assets and goodwill. He did no analyses of the value of either the customer-related assets or of the goodwill and allocated them based on the revenue generated by each entity in fiscal year 2008. He said he did not use net revenues to allocate among the entities because in his view cash flows are influenced by transfer pricing and inter-company arrangements for tax purposes. Based on the revenues alone, he allocated 9.2% or $202 million to Canada, 62.6% or $1.375 million to the U.S., 18.6% or $155 million to EMEA, 2.6% or $57 million to the Caribbean and 7.1% or $155 million to Asia.

[25] While Mr. Huffard did not provide a total for the business sales allocation, by adding up the different classes, his total allocation to Canada was $553.2 million to Canada, $1.807 billion to the U.S. and $254.2 million to EMEA. This is somewhat less than the $2.85 billion available from the business sales proceeds.

[26] As Mr. Huffard did not undertake any valuation of his third residual category, his conclusion of the amount to be included in it is dependent upon the amount of his tangible asset valuation and Mr. Malackowski's IP valuation. If Mr. Mr. Malackowski's IP valuation is too low, then the amount in this residual class allocated by Mr. Huffard will be too high.

[27] There are problems with allocating this residual class entirely by revenues of each company or groupings of companies. Mr. Huffard described it as the value of customer-related assets and goodwill not otherwise associated with IP. He acknowledged that these assets, like any other assets, have their value fundamentally related to their ability to generate profits, and that while Nortel operated the businesses, it was not revenue that allocated those values but the RPS method of sharing profits after revenues and costs were calculated. This is the same criticism made of Mr. Kinrich in using a revenue tool to allocate the sales proceeds rather than a profitability tool.

[28] Mr. Huffard acknowledged that in circumstance where, because of decisions made and cost-effectiveness and historic reasons, sales and customer support was done in a country which had low domestic revenues, his revenue allocation method for the customer-related assets and goodwill category was not going to compensate that country because it had low revenues. This circumstance

was commonplace in Nortel with its matrix structure, with customer support carried out in one country for sales in another. He acknowledged if a large percentage of the workforce is in a place like Canada, which does R&D and which does sales support and supports the global organization but doesn't have a large native revenue stream, he was allocating the value of that workforce to the other entities where there is a revenue stream and not to Canada.

(iii) Mr. Green

[29] Mr. Green valued different asset classes differently. He first valued tangible assets by taking their book value and allocating them to the companies which owned them. This was the same method used by Mr. Huffard. However, different from Mr. Huffard, he did not deduct any deferred liabilities from the tangible asset amount. His evidence was that deferred liabilities are essentially amounts that would be due that are related to projects that have already been billed and perhaps paid for and so they didn't offset the physical assets, the tangible assets such as the accounts receivable, the other things that were sold. He pointed out that by his not deducting deferred liabilities, it was to the relative benefit to the U.S. Debtors because they had the highest deferred revenues and, accordingly, deducting the liabilities would most significantly decrease the U.S. Debtors' share of the value of net tangible assets. He also pointed out in his rebuttal report that not all liabilities recorded on the books of Nortel were assumed by the purchasers and for those that were it was not possible to determine on which entity's books those liabilities were recorded. I accept this position of Mr. Green in not deducting assumed liabilities in valuing and allocating the tangible assets on the basis of book values recorded on each entity's books.

[30] Mr. Green's value for the tangible assets was $534.19 million, and he allocated $121.74 million to the Canadian Debtors, $317.59 million to the U.S. Debtors and $94.86 million to the EMEA Debtors.

[31] Mr. Green next valued the workforce in the lines of businesses that were transferred to purchasers. His opinion was that generally speaking, the cost approach is applied to the valuation of an assembled or in-place workforce. He valued the workforce by calculating the cost to replace the work force. He concluded that the total value of the work force was $255.33 million and he allocated $78.68 million to the Canadian Debtors, $134.74 million to the U.S. Debtors and $41.91 million to the EMEA Debtors.

[32] In the sale of the Enterprise business, several corporate entities owned by NNI were sold. Mr. Green valued these assets based on contemporaneous fair market valuations done at the time these businesses were sold. There is no evidence that these assets had a value other than as set out by Mr. Green. Mr. Green made an allocation to NNI of proceeds attributable to the sale of its subsidiaries in the amount of $110,970,000. No other valuer dealt with this asset.

[33] Mr. Green was of the view that once the tangible assets and the workforce were valued, the balance of the business sale proceeds was attributable to IP, the primary driver of Nortel's value, and customer relationships. He valued and allocated the IP and customer relationships sold in the

business sales by valuing the license rights of NNI and the EMEA RPEs surrendered by them to permit the sales to take place on the basis that their licenses were restricted to Products by or for the Participants as defined in the MRDA and as contended by the Monitor. The balance he attributed to NNL as the owner of the IP.

[34] Mr. Green performed a DCF valuation. He projected revenues and expenses for each business sold and for this to project the future revenues of the Nortel businesses he used forecasts prepared by Nortel that were referred to as "Retained by Nortel" forecasts. They projected the revenues that would have been earned and the expenses that would have been incurred, if the operating businesses had been retained by Nortel. After calculating the operating profits of each business sold, Mr. Green aggregated those profits and applied the RPSM on the assumption that the MRDA would have remained in place, using the capital stock percentage for the first quarter of 2010, which covered a rolling average from 2005 to 2009. He applied a discount rate of 12% for the operating profits derived from existing technology and 30% for operating profits to be derived from yet to be invented technology and thus more risky. He concluded that the value of the license rights surrendered by NNI was $438.2 million and by the EMEA RPEs was $164.2 million. The balance of his residual amount, being $1.379 billion was allocated to NNL.

[35] Mr. Green's resulting allocation was 54.8% or $1.58 billion to the Canadian Debtors, 10.4% or $300.97 million to the EMEA debtors and 34.7% or $1001.5 billion to the U.S. Debtors.

[36] EMEA and the U.S. Debtors contend that a basic problem with Mr. Green's analysis is his conclusion or assumption that NNL was the owner of the IP and entitled to its residual value after deducting the license rights of EMEA and NNI which he limited to Nortel Products by or for the Participants. This is a basic legal issue.

[37] EMEA argues that customer relationships were very important to Nortel and that they should have been valued and allocated separately from IP and not included in Mr. Green's residual category. Mr. Green's explanation for not doing so was that customer intangibles represented historical relationships in which customer files and ongoing agreements exist, the value of which was represented in his revenue figures that he used and were thus subsumed in the IP license rights which he valued. He said that a separate valuation of customer relationships would be duplicative of the values of the license rights surrendered because it would be based on the same revenues and profits as used in the license rights valuation.

[38] Mr. Malackowski argued that the MRDA did not transfer customer relationships to NNL. This does not strike me as a valuation concept and one can argue, as the Monitor does, that NN Technology was owned by NNL and it included all intangibles.

[39] This is a valuation issue. There is no question that customer relationships were important to Nortel. However that is not the issue. The issue is how to value them. Mr. Berenblut was of the opinion that customer relations were co-mingled with IP rights because the value to use them depended on the ability to sell Nortel products and that their value would be included in the value of

rights to sell Nortel products. Dr. Bazelon, an EMEA expert, agreed on cross-examination that goodwill and customer relationships are entangled with the IP and take their value from the IP, at least in part. Brian McFadden, the Chief Technology Officer at Nortel for some time, said that R&D was crucial in initiating relationships with and developing sales from customers for Nortel products. I accept Mr. Green's opinion that no separate valuation needed to be made for customer relationships.

[40] It is also argued that Mr. Green should have separately valued and allocated goodwill. Mr. Huffard included goodwill in his residual class, although he did not attempt to value it. Mr. Britven, called by the CCC, included a value for goodwill in his business sales analysis. He took what the purchasers had allocated in their PPAs as goodwill, and referred to it as Purchaser Goodwill.

[41] Mr. Green's response to this is that Nortel wrote off all of its acquired goodwill at the end of 2008. This indicated that, at the time, Nortel management did not believe it would be able to realize the value of the goodwill from these acquisitions in the future. As for its own "internal goodwill," Nortel was suffering losses from its operations and was not generating positive cash flows. Thus, from an accounting and finance perspective, Nortel had no goodwill from its own operations. By classifying the residual value as goodwill, Mr. Huffard accounted for an asset that did not exist within Nortel and was not transferred to the buyers. By applying the buyer's perspective, Mr. Huffard failed to answer the question of how to allocate the sales proceeds according to the value of the interests each of the Debtors transferred and rights each of them relinquished.

[42] There is actually support for Mr. Green's position in Mr. Britven's report in which he included a value for goodwill taken from the purchasers' PPAs. These purchaser allocations are done by purchasers for accounting purposes and usually are driven in part at least by tax considerations. Mr. Britven said that Nortel wrote off the value of substantially all of the goodwill that it had on its balance sheet. He said that Nortel did not have sufficient value to support any significant goodwill value and that the goodwill in the business sales related to the attributes of the buyer, not the attributes of Nortel. He said that any goodwill recognized by purchasers in their PPAs did not reflect amounts that could have been realized by the licensed participants through the continued operations of their lines of business.

[43] I agree with Mr. Green's approach to goodwill and accept his opinion that there was no goodwill value in the Nortel businesses that were sold.

[44] Regarding the DCF method used by Mr. Green to value the U.S. and EMEA license rights, Mr. Kinrich was critical of the revenue forecasts used by Mr. Green and stated that he had not followed the International Financial Reporting Standards which state that in measuring value in use, an entity shall base cash flow projections on reasonable and supportable assumptions that represent management's best estimate of the range of economic conditions that will exist over the useful life of the asset.

[45] This IFRS material was not put to Mr. Green on his cross-examination, which it should have

been for this argument to be made. However, I do not think the criticism is justified. Mr. Green used projections made by Nortel. He used projections referred to as a "Retained by Nortel" scenario which projected what revenues and expenses would be either retained by Nortel or spun-out on its own as a stand-alone company. He declined to use Nortel's "Safe Hands" projections for several reasons that he explained, including the fact that they forecasted the businesses in the hands of a well-capitalized third party who could invest adequate capital in the business and who could earn greater profits than if they remained in Nortel's hands. Mr. Green did no DCF analysis as he allocated the business sales solely on revenues.

[46] Mr. Kinrich was also critical of Mr. Green for not including a terminal value in his DCF valuation. Mr. Green's explanation for this on his deposition was that in his present value analysis, at year nine the present value factors were close to zero. So even if there were a terminal value, it would be virtually of no value in a present value computation. In his report, he said he thought that to include potential profits after nine years was too speculative. There is no competing DCF valuation to indicate what Mr. Green did was wrong.

[47] Mr. Green's analysis in part is dependent on the interpretation of the MRDA advanced by the Monitor on behalf of the Canadian Debtors. One cannot quarrel with the logic of it if that interpretation were to govern the allocation.

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APPENDIX B

Residual IP proceeds allocation

[1] The residual IP was sold to Rockstar for $4.5 billion. After payment of a break fee and expense reimbursement to Google, the remaining net proceeds held for allocation amount to $4.45 billion.

[2] There is differing expert opinion as to how to allocate the proceeds of the Rockstar sale amongst the Canadian debtors, the U.S. debtors and the EMEA debtors.

[3] Mr. Green allocated the proceeds on the basis of his interpretation of the MRDA under which it was NNL that owned all of the patent rights that were sold to Rockstar.

[4] Mr. Kinrich for the U.S. debtors allocated the proceeds on a revenue approach on the basis that each Participant owned all of the economic rights to the patent rights sold to Rockstar in their exclusive jurisdictions and that their revenue streams that they gave up should be valued. Mr. Green as an alternative analysis for the Canadian debtors and Mr. Malackowsi as an alternative analysis for the EMEA debtors prepared valuations correcting what they saw as errors by Mr. Kinrich.

[5] Mr. Malackowski allocated the proceeds on a contribution basis by calculating what he saw as the contributions by each of the Participants to R&D over the life of the patents that were sold to

Rockstar.

(i) Mr. Kinrich's license approach to value

[6] Mr. Kinrich assumed that each of NNL, NNI and the EMEA debtors owned all of the economic benefits of the residual IP. He allocated all of the Rockstar proceeds to NNL, NNI and EMEA by taking what he said would be the revenue earned in each of those three geographical areas and then doing what he said was a discounted cash flow analysis ("DCF") on those revenue streams. I have held that the Licensed Participants did not own all of the economic benefits of the residual IP. However, on the assumption that they did, I will consider Mr. Kinrich's analysis.

[7] Mr. Kinrich obtained his revenue streams by taking one of the IPCo revenue model assumptions. He then apportioned the net revenues after costs and taxes to each of the three geographical areas by using those countries' relative telecom infrastructure expenditures for six of the eight IPCo franchises that Nortel had and apportioning all of the net revenues after costs and taxes for two of the franchises (PC and Internet advertising) to the U.S. He then applied a discount rate to those net cash flows allocated to each country.

[8] I have considerable difficulty with a number of aspects of Mr. Kinrich's analysis. If the value of the net cash flows as stated by Mr. Kinrich is overstated, the overstated amount would belong to NNL, as the amount of the sales proceeds from the Rockstar transaction would represent more than the value of the net cash flows, which on Mr. Kinrich's assumption is what the Licensed Participants gave up in the Rockstar sale. The expert evidence called by the Monitor is exactly to that effect, contending that Rockstar paid more than the value of the cash flow projections from the IPCo model for other motives.

[9] Nortel had no material business licensing its IP or monetizing its technology by suing others, either before or after filing for protection from creditors in early 2009. Mr. John Veschi had been hired in July 2008 to take responsibility for Nortel's IP group and to look at options for licensing its IP.

[10] Development of the IPCo option was led by Mr. Veschi after the insolvency filings. The premise of IPCo was that the residual patents would be monetized by the threat of patent infringement litigation and, if necessary, actual infringement proceedings against various technology companies in an attempt to force such companies to pay royalties to IPCo. It was considered important that IPCo not carry on any telecommunications or other technology business, because, if it did, it would be vulnerable to counterclaims for alleged infringement being brought by the targets of its infringement litigation, which would undercut its revenue generating ability.

[11] Over the course of 2009 and 2010, Mr. Veschi and his team, assisted by Lazard Frères & Co, Nortel's financial advisor, and Global IPCo, a law firm specializing in patent sales, prepared several versions of a preliminary financial model, in an attempt to forecast the operating profit that could be earned by IPCo so that the potential economic benefits could be weighed against value expected to

be received on a sale of the portfolio.

[12] The various versions of the preliminary financial model had three sub-models, with differing assumptions relating to how much litigation IPCo would pursue. The scenarios were dubbed "Harvest" (assuming very little litigation), "Litigation Light" and "Litigation Heavy". More litigation resulted in greater forecast revenues, at greater forecast cost. Assumptions regarding litigation success of 60 percent, 70 percent and 100 percent were used. A wide variety of assumed net cash flows were used and a variety of discount rates to value the cash flows were used.

[13] There is a difference in the evidence of Sharon Hamilton, a partner of Ernst & Young, the Monitor, and Mr. John Ray, the principal officer of NNI, as to how reliable the IPCo forecasts were. Ms. Hamilton was of the view that the projected cash flows were largely guesswork, given that Nortel had little experience in licensing and there were no good precedents about the estimated cash flow. Mr. Ray was more confident of the forecasts taken the work that went into them.

[14] What is clear is that there were a number of different models. Version 1 was presented on March 10 2010, version 2 on April 27, 2010, version 2.2 on May 6, 2010, version 3 undated, version 3.1 on October 25, 2010 and version 4 on November 18, 2010. Each version had different cash flow forecasts.

[15] I think it fair to conclude that the forecasts were not considered to be in any way certain. There were many permutations and combinations, and at no time did Nortel agree that any one forecast was the appropriate one. The process never got that far before the decision was made not to operate IPCo but rather to sell the residual IP.

[16] Mr. Kinrich chose to use version 3.1, although he did not explain why. Version 3.1 had the highest cash flows of all versions. It is noteworthy that the latest version 4 had projected cash flow forecasts of approximately half of what was projected in the earlier version 3.1 used by Mr. Kinrich.

[17] Mr. Green, an expert valuer called by the Monitor, points out that version 3.1 itself was not a finalized document or accepted by Nortel or its advisors. Within it there were a number of scenarios and options still being explored. The unreliability of the forecasts in the various models can be seen by the wide disparity in discount rates used. Lazard used discounts of 25, 35 and 45% to value the various projected cash flows. These are very high discounts, as more than one expert testified, and indicated a high risk to the cash flows being achieved. Mr. Kinrich used much lower discount rates of 12% and 15%, which I will come back to, which did not reflect the risks in the IPCo forecasts and which caused a higher valuation of the cash flows than would be the case if the discounts used by Lazard in the IPCo models were used.

[18] While there were multiple scenarios in the version 3.1 model, Mr. Kinrich used only the most aggressive case that maximized revenue. Mr. Green's view is that there is inadequate explanation by Mr. Kinrich why the specific scenarios of Version 3.1 were selected for the analysis as opposed to other lower cash flow scenarios or the later Version 4 model with lower cash flows and as the

analysis is unsupported, it makes the valuation unreliable. I must say that in reviewing the details of Mr. Kinrich's report it is not at all apparent what his justification was for using the cash flows that he did. It leaves an open question as to the reliability of what Mr. Kinrich was doing.

[19] The value allocated to each of the debtors by Mr. Kinrich is based on the attribution to the geographic regions of the debtors of the projected operating cash flows in the IPCo model chosen by Mr. Kinrich. Those cash flows projected royalty payments on a regional level, namely North America, EMEA and China.

[20] The IPCo model estimated North American licensing revenue based on sales in Canada and the U.S. Mr. Kinrich apportioned the revenue to Canada and the U.S. using those countries' relative telecom infrastructure expenditures, saying that relative telecom expenditures were a reasonable basis on which to estimate relative market size and were consistent with the structure of the IPCo model that used market size as the driver of royalty revenues. He did the same thing for EMEA as the IPCo model estimated EMEA revenue based on sales in France, Germany and the U.K.

[21] Global IPCo, the IPCo law firm retained to assist in preparing the models, stated early on in their work that they had no opinion regarding the territorial split of patents or patent-related revenue. There was certainly no agreement by any of the Nortel entities as to how the projected IPCo cash flows would be split territorially.

[22] Mr. Kinrich then deducted costs from the revenue streams including a number of litigation costs. It is not possible from looking at his report to know exactly what level of litigation costs was assumed by him.

[23] After calculating the net cash flows for each country, Mr. Kinrich then said he did a discounted cash flow calculation to arrive at a valuation for each country. In my view, Mr. Kinrich did not carry out a valid DCF valuation. The discount rate he used was not appropriate and was not derived by any conventional valuation approach.

[24] Mr. Kinrich acknowledged in his evidence that a DCF analysis requires knowledge about the cash flows over time and requires a discount rate to take those cash flows over time and convert them to present value. He acknowledged in his report that typically a discount rate is derived from the cost of capital (the cost of debt and equity split on some basis), referred to by valuators as the weighted average cost of capital. However, he did not do this. Instead he said that the value of the residual IP was known from the $4.5 billion paid for it by Rockstar and by taking his projected cash flows that he used from the IPCo model, he could back into (or reverse-engineer) a discount rate, being 12.2% when China is not included and 15% when China is included.

[25] This analysis proceeds on the assumption that the amount paid by Rockstar was based on the revenues taken by Mr. Kinrich from the particular IPCo model that he used. However, neither Mr. Kinrich nor anyone else knew what revenue streams were used by Rockstar to base their purchase price on or indeed, if Rockstar based their purchase price solely on anticipated revenues they could

earn from the patent portfolio they acquired. Without knowing that, it is not possible to say that the Rockstar purchase was based on a discount rate of 12.2% or 15%. A discount rate, as Mr. Kinrich conceded, should reflect the risk of the cash flows being achieved, but without knowing what cash flows Rockstar based its purchase price on, saying the Rockstar purchase reflected a certain discount rate is artificial. Rockstar did not even know what the various IPCo cash flow models were.

[26] Mr. Green, Mr. Berenblut and Dr. Cox and Mr. Malackowski, all expert valuers, were critical of the method used by Mr. Kinrich to arrive at his discount rates of 12.2% and 15%. I accept their criticism. These discount rates were much lower than the rates used by Lazard in the IPCo models, including the very net cash flow model used by Mr. Kinrich, of 25% to 45%. Mr. Berenblut testified that he would expect the range of discount rates to be between 30% and 70%, recognizing the fact that this was a contemplated rather than an established business and recognizing the risks associated with it.

[27] Mr. Malackowski used a discount rate of 30% in his analysis of the potential revenue from the residual IP portfolio. He derived that rate by examining risk-adjusted hurdle rates associated with implementation of technology-based IP. These rates account for a buyer's required rate of return or the associated risk of commercializing a technology.

[28] Mr. Kinrich in his report stated that the inferred rates of 12.2% and 15% that he obtained were consistent with discount rates observed in the market place at the time, being the median weighted average cost of capital for communication equipment companies. However, even Mr. Kinrich noted in his report that IPCo would not have been a communications equipment manufacturer. There was no analysis by Mr. Kinrich to lead to a conclusion that the cost of capital for a start-up litigation and licensing business would be comparable to an established communications equipment manufacturer. Messrs. Berenblut and Cox in their reply report stated:

> The Kinrich Report's use of discount rates for established publicly traded companies in the communications industry as benchmarks for its selection of discount rates for its valuation of a yet-to-be established business to exploit the Residual IP is not supportable. A discount rate of 30 percent or more for this type of business is consistent with our understanding and experience and is also consistent with the discount rates used in the IP Co Model. The academic literature reports venture capital discount rates in the range of 30 to 70 percent.

[29] I accept the criticism of Messrs. Green, Berenblut and Malackowski that the discount rates obtained by Mr. Kinrich were too low. Had Mr. Kinrich used higher rates such as those used by Lazard in the IPCo models, or the rate used by Mr. Malackowski, the value of the revenues given up by the Licensed Participants, assuming they belonged to the Licensed Participants, would have been far less than opined by Mr. Kinrich.

[30] Mr. Green calculated the values from the IPCo models using the discount rates used by Lazard

in the models. Taking the most optimistic cash flows from the IP Co. model, the lowest discount rate used by Nortel and its advisors, and a litigation success rate of 100%, the maximum DCF value of IP Co. is only $2.7 billion, compared to the $4.5 billion paid by Rockstar. Messrs. Berenblut and Cox calculated that if a 30 percent discount rate is used to discount the cash flows used by Mr. Kinrich, the resulting net present value of the expected cash flows from the IP Co Model is $1.8 billion. They think this figure is overstated because of the range of values for all of the various scenarios in the IPCo models with various discounts of 25 to 45% and litigation strategies and assumed success rates of the litigation strategies from 60 to 75 to 100%. That range went from $424 million to $2.7 billion. Mr. Green put the range of values in the IPCo models from $400 million to $2.7 billion.

[31] The report of Messrs. Berenblut and Cox explains why Rockstar would be likely to have paid more for the residual IP than Nortel could have made from it, that is, on the theory that the Licensed Participants owned all of the benefits sold to Rockstar, more than what the Licensed Participants gave up in the Rockstar transaction. The defensive value of the residual IP to the members of the Rockstar consortium made the residual IP far more valuable to Rockstar than it was in the hands of Nortel.

[32] As explained by them, Rockstar obtained ownership of the residual IP and each of the members of the consortium (including Apple, Microsoft, Ericsson and Blackberry) received a license to the residual IP. The structure enabled Rockstar to exercise all rights of ownership of the residual IP against third parties, while providing the individual consortium members with the defensive benefits to prevent others from suing them for patent infringement. As a single company, Nortel was less likely to be able to derive defensive benefits equal to the combined and cumulative defensive benefits that could be gained by several large companies with extensive product and service lines that ranged well beyond what Nortel offered. Several members participating in the Rockstar portfolio are more likely to find patents contained in the Residual IP that will be useful to responses to litigation. Furthermore, as a company in financial difficulty, Nortel was less likely to be an attractive target for patent litigation and therefore less in need of patents to assert in response.

[33] Mr. Green also made the same this point. He stated that the members of the Rockstar consortium purchased the residual IP portfolio, at least in part, as a defensive measure. It was his experience that having access to a large patent portfolio can help protect a large technology firm from lawsuits from other large companies. Access to a large patent portfolio, like the residual IPCo portfolio, can act as a deterrent because potential opposing parties must factor in the probability of a counter-suit. The defensive value of access to a significant patent portfolio is valuable to purchasers like the Rockstar consortium members, but would not be relevant to an entity like IPCo which intended to pursue an offensive licensing and litigation strategy, but had no operating business in the technology sector as all such businesses had been sold. The defensive value of such a portfolio to large companies is not measured exclusively by the present value of the cash flows from licensing.

[34] Dr. Catherine Tucker, an economist called by the U.S. Debtors with considerable technology experience, stated the same thing. In her report she said that patents are not just used in litigation to assert rights to a particular technology or domain. There is also the important role of a patent being used in a counter-suit should the company itself be sued for patent infringement. She referred to Kent Walker, Google's General Counsel, who wrote at the time of the Rockstar bid that it was supposed to create a disincentive for others to sue Google. This defensive attribute, of course, would not have been available to IPCo if it decided to operate a patent licensing business as it would not have been in a product producing business that would be vulnerable to patent suits.

[35] Mr. Green also expressed the view that the identity of the bidders themselves in the residual IP auction also illustrates that the basis on which value of the residual IP portfolio was determined is not consistent with that in the Kinrich report. The bidders included Google, Apple, Microsoft, Ericsson and other large technology companies with worldwide operations rather than companies whose primary business model was patent licensing and litigation. If the value of the residual IP sale was closely related to the cash flows from a licensing/litigation strategy, one would expect licensing/litigation businesses to have been bidders in the auction. Instead, the bidders in the auction were operating technology companies, which suggests that the value of the residual IP was determined in the market on some strategic basis in addition to the value of the IP in a licensing/litigation business.

[36] I accept the evidence of Messrs. Berenblut and Cox and Mr. Green that the approach of Mr. Kinrich of allocating proceeds based on cash flows from a licensing /litigation business model such as the IPCo models is inappropriate and that what Rockstar paid for was more than the value of the potential revenues from the business that was being considered by IPCo. That is, it was more than what the Licensed Participants gave up in the Rockstar sale, assuming it was theirs to give up.

[37] The U.S. Debtors contend that it is wrong to say that Rockstar paid more than the value of what the Licensed Participants gave up when they terminated their licenses in anticipation of the Rockstar sale and to say that the extra value belongs to NNL as the owner of the NN Technology. They say that NNL could not transfer its rights without the consent of NNI and the EMEA Licensed Participants, just as NNI and the EMEA Licensed Participants required the consent of NNL to do so. They say that all parties consented to the transfer of their MRDA interests as part of the Rockstar sale, effectively agreeing to the assignment of their rights under article 14(e) of the MRDA which permitted an assignment of a party's rights under the MRDA only with the consent of all of the other parties.

[38] I do not accept that contention. The MRDA did provide in article 14(a) that the MRDA could not be assigned by any licensed participant without the consent of the other Licensed Participants. But neither the MRDA nor the licenses of the Licensed Participants were assigned to Rockstar. Rockstar would not have taken an assignment of the MRDA with its obligations and duties amongst the participants. I accept the evidence of Mr. Britven, an expert valuer and the national intellectual property consulting practice leader with Duff & Phelps in Houston, that no third party would want

to step into the shoes of a Licensed Participant by taking a transfer of the MRDA with its obligations to share profits and transfer ownership of patents to NNL, among other things. Even Mr. Ray eventually admitted that there was no transfer of license rights to Rockstar.

[39] What occurred was a sale of the residual IP to Rockstar with NNI and the EMEA debtors terminating their licenses under the MRDA as a condition precedent to the sale. What is at issue is the value of those licenses that were terminated. If the value of what could be earned from the licenses was less than Rockstar paid for the residual IP, the difference would belong to NNL, the legal owner of that IP.

[40] Mr. Green did an alternative valuation on the assumption, with which he disagreed, that IPCo would have operated on a stand-alone business and that the licenses surrendered by U.S. Debtors and EMEA debtors would have included the rights to the residual IP portfolio. He used version 3.1 of the IPCo model, as Mr. Kinrich had, but made some changes. He used the three discount rates that had been used by Lazard in the various IPCo models and used the three assumptions in the IPCo models as to the anticipated success in litigation against infringing third parties. He also deducted from the revenue streams going out to 2020 the RPS percentages for 2010 under the MRDA on the theory that if the Licensed Participants had rights under their licenses to earn the revenues proposed in the IPCo models, those licenses came with an obligation to make RPS adjustments in favour of the other Licensed Participants. Any gain on the sale above the DCF valuations on the revenue streams was allocated to Canada.

[41] If one assumed the median discount rate (of 35%) and the median litigation success rate (of 70%), and excluding the revenues from China, then Mr. Kinrich's allocation of the Rockstar Sale proceeds, as adjusted by Mr. Green, would be as follows. Also shown is the allocation advocated by Mr. Kinrich.

	Adjusted Kinrich Allocation of Rockstar Sale Proceeds	Kinrich's Actual Proposed Allocation of Rockstar Sale Proceeds
Canada	$4,003.06 million	$430 million
U.S.	$346.12 million	$3,310 million
EMEA	$105.19 million	$710 million
Total	$4,454.37 million	

[42] If revenues from China were included, the results would be an allocation of $3905.44 million to Canada, $420.99 million to the U.S. and $127.94 million to EMEA.

[43] The U.S. Debtors contend that Mr. Green was wrong to apply the RPSM to the value of the cash flows. They say firstly that the MRDA expressly provided in the third addendum signed in December 2008 that it does not apply to the sale of a business. What that amendment provided was that the operating income or loss used to calculate the RPSM was to exclude "gain/loss on the sale of business". That is not a reference to the proceeds of the sale of a business, but rather a reference to the gain or loss, presumably capital gain or loss, recognized on a sale of a business. That makes sense because the RPSM was dealing with the split of profits or losses from operating earnings to be allocated to the participants under the MRDA. Ordinarily the gain or loss on the sale of capital assets would be recognized in an earnings statement but the parties to the MRDA did not want that taken into account in the RPSM.

[44] However, what Mr. Green was valuing in this analysis was the annual profits that would be earned by the Licensed Participants from operating IPCo in the future, assuming the Licensed Participants had the right to do so under their licenses. He was assuming that the profits would be split in accordance with the RPSM in the MRDA. I agree with the theory that if one is to value the benefits that could have been earned by the Licensed Participants if they had operated IPCo, which is what the U.S. Debtors say they would have done but for the Rockstar sale, the Licensed

Participants would have been subject to some profit split.

[45] The U.S. debtors point out that what the profit split would be is a matter of conjecture and that it is not possible to assume, as Mr. Green did, that it would be the same in the future. The RPSM under the MRDA was based on the amount of R&D spend each year by Nortel and the Licensed Participants. After Nortel became insolvent, the R&D expenditures essentially stopped after 2009 and there is no evidence of what R&D would have been undertaken if IPCo had been run as a business by Nortel.

[46] Certainly there would have had to be some transfer pricing in place if Nortel had run IPCo as a business. What the parties would have worked out is unknown. The tax authorities would certainly have been interested in the transfer pricing associated with the running of the IPCo had that occurred and it does not mean that the parties would not have had to agree on a profit split of some sort. They would have been required to do so.

[47] It is perhaps fair to be critical of Mr. Green for assuming the transfer pricing would continue to be the same under an IPCo business run by Nortel as it had been before. It is also fair, however, to ask that if the U.S. debtors contend, as they do, that they are entitled to be paid for what they gave up in the Rockstar sale and that the present value of the anticipated net cash flows is what they gave up, one may have expected them to lead some transfer pricing evidence as to what transfer pricing would have been appropriate.

[48] The assumption that the transfer pricing that the parties would have worked out in the event that Nortel operated IPCo would have been the same as provided in the MRDA has some logic to it. The residual IP was created by R&D conducted by the parties, at least in part, during the MRDA that split profits on the basis of the R&D expenditures of NNL and the Licensed Participants. R&D was the driver of the profitability of Nortel and the RPSM was chosen at the request of the tax authorities as the most appropriate method for determining the compensation to each of the participants for the R&D performed by them. The profits to be earned from operating IPCo could perhaps be seen to be an extension of the results of the R&D that had been spent.

[49] The lack of transfer pricing evidence and analysis on the point, however, as to how the profits would be split in an IPCo business casts some doubt on the accuracy of Mr. Green's alternative analysis. It is not a basis, however, to reject it out of hand as contended by the U.S. debtors.

[50] Mr. Malackowski's preferred allocation approach is a contributions approach based on R&D expenditures made by each of the participants to the MRDA. He prepared an alternative revenue or licensed based allocation which contained dramatically different results from his contributions approach. His revenue approach allocated 33.6% of the Rockstar sale proceeds to the EMEA debtors versus 17.6% using his contribution approach. It allocated 11% to the Canadian debtors versus 39.5% using his contribution approach and it allocated 55.4% to the U.S. debtors versus 42.9% using his contribution approach.

[51] For his revenue or license approach, Mr. Malackowski used the data generated as a result of his valuation methodology to allocate the proceeds of the Residual IP Sale. He valued the Residual IP Portfolio by determining what revenues were expected to be generated by a worldwide licensing strategy in specific geographic territories and allocating the values to those territories. He estimated global revenues for the business areas in which the technology was used, royalty rates, licensing expenses, tax and discount rates. Mr. Malackowski concluded that the value of the residual IP was $3.570 billion, approximately one billion less than actually paid by Rockstar. He then "reconciled" this value with the actual purchase price of $4.5 billion by increasing pro rata the values he had calculated for each business franchise.

[52] For the exclusive territories of Canada, United States, Britain, Ireland and France, he allocated all of the value for those territories to each of the countries. For the rest of the world ("ROW") he allocated 20% to each of the countries. It was this latter allocation of ROW that was the main cause of the increase in the allocation to EMEA as it had what he called "three seats at the table of five".

[53] I have difficulty with Mr. Malackowski's revenue or license model of allocating the Rockstar sale proceeds. The first is that there is no explanation by Mr. Malackowski why his market based valuation was $1 billion less than the actual sale proceeds. Rather than simply grossing his value up to "reconcile" it with the actual proceeds, it seems to me that his valuation was an indication that Rockstar paid for more than what could be achieved in revenues from the acquired IP portfolio. Mr. Green expressed the opinion that the adjustment was inappropriate and unsupported by valuation principles, and assumed that Rockstar just used different royalty or revenue assumptions. I accept that criticism.

[54] Mr. Green also expressed other criticisms of Mr. Malackowski's calculations, all of which appear logical and which I accept. For example:

(i) Mr. Malackowski assumed all revenues for a country should be included in the royalty base, whereas he should have considered that only revenues from products and not services on which no patent royalty would likely be available.

(ii) Mr. Malackowski assumed that revenues from all licensees will begin to be earned in 2011 i.e. he assumed that all licensing efforts against dozens of targets across multiple jurisdictions would be 100% successful within a few months of the portfolio being sold. Mr. Green's view is that his assumption is hard to credit and is inconsistent with the fact that the royalty rates selected by Mr. Malackowski are the IPCo "litigation light" rates, which would, by definition, require at least some form of enforcement action, which would necessarily delay the receipt of royalty payments.

(iii) Mr. Malackowski assumed increasing royalties through 2022 without

considering that the patents and technologies are wasting assets and many are likely to expire before the end of the period used by Mr. Malackowski.

(iv) Mr. Malackowski deducted costs of 20% of royalty revenues, stating that he based the rate on the observed financial performance of sophisticated non-practicing entities such as Acacia Research Group. Mr. Green reviewed Acacia's public filings and those of other licensing entities and have found a significant discrepancy between their reported costs and those that the Malackowski Report asserts are representative. The Acacia public filings disclosed that the company's costs of operation from 2005 through 2012 have ranged from 112% of revenue in 2005 to a low of 52% of revenue in 2012. Other licensing entities, such as Interdigital and Rambus, report operating costs from 2005 to 2012 ranging from a low of 28% of revenues to as much as 164% of revenues.

[55] These errors lead to the conclusion that Mr. Malackowski's valuation of $3.570 billion of the residual IP sold to Rockstar was likely overstated, indicating an even greater discrepancy between his value and the actual sale price. It also indicates issues with the territorial split of the revenues. The assumption of Mr. Malackowski that the entire sale proceeds were based on revenue forecasts by Rockstar, permitting him to simply increase his $3.570 billion value by another $1 billion without analyses ignores the likelihood that Rockstar paid what it did in part as a defensive move for its participants to protect their operating businesses, which Nortel no longer had. I do not have confidence in using Mr. Malackowski's analysis to allocate the proceeds of the Rockstar sale on a license or revenue basis.

[56] In the end, I also cannot accept Mr. Kinrich's calculation of the amounts from the Rockstar sale to be allocated to NNL, NNI and EMEA. Assuming the Licensed Participants had a right to the value of the residual IP that Nortel could have achieved, and looking at the various scenarios in the IPCo models, I would recalculate those values and allocate the proceeds by adjusting the calculations of Mr. Kinrich and averaging them with the calculations of Mr. Green in his alternative approach.

[57] I would take the mid-point between the low value of $400 million to $2.7 billion, or $1.5 billion using the discount rates of Mr. Green and Messrs. Berenblut and Cox. Using the same split as Mr. Kinrich, on the assumption that value would not be realized in China, would result in an allocation of 9.3% or $139.5 million to the Canadian debtors, 14% or $210 million to EMEA and 76.7% or $1.15 billion to the U.S. debtors. The balance of the $4.45 billion, or $2.9 billion, would be allocated to Canada. On the assumption that value could be realized in China, the resulting allocation would be 11.1% or $166.5 million to the Canadian debtors, 22% or $330 million to EMEA and 66.9% or $1.0 billion to the U.S. debtors. The balance of the $4.45 billion, or $2.9 billion, would be allocated to the Canadian debtors.

[58] I would then average these allocations with the allocations arrived at by Mr. Green in his alternative analysis, set out in paragraphs 358 and 359 above, which were based on the median discount rates and litigation success rates used in the IPCo models.

[59] The results of that allocation, assuming the revenues from China are included, would be an allocation to Canada of $3,485.97 million, to EMEA of $228.97 million and to the U.S. of $710.5 million, or a total of $4,425.44 million. I would round these figures up on a pro rate basis to arrive at the proceeds available of $4,454.37.

[60] The results of that allocation, assuming the revenues from China are not included, would be an allocation to Canada of $3,521.28 million, to EMEA of $157.6 million and to the U.S. of $748.06, or a total of $4,426.94 million. I would round these figures up on a pro rate basis to arrive at the proceeds available of $4,454.37.

[61] The U.S interests assert that on a license or revenue analysis, very little revenue should be attributed to China. They assert that the IPCo models included both a "China in" and "China out" option. I must say I have carefully looked at the IPCo model 3.1 used by Mr. Kinrich and I cannot find a China out option. On cross-examination of Mr. Malackowski, who thinks China revenues should be included, it was put to him that the IPCo model had a "toggle" for China, which I take to be a sheet with revenues for China.

[62] In any event, Mr. Kinrich testified that he at first took the mid-point of the particular China forecasts he used after doing an economic literature search on patent value and speaking with Mr. Zenkich, who told him that the market would pay little to nothing for a China patent, he reduced his revenues for China downward more towards the US in some qualitative fashion. He reduced then by 75%. Mr. Zenkich, an expert in valuing patents, testified that in 2009-2010 participants in the market for patent portfolios assigned little to no value to Chinese patents.

[63] The thinking of Nortel's patent people changed over time. In December 2000, Angela Anderson, Director, Intellectual Property Law in the U.K stated that China was a sizeable and growing market accessible at moderate cost. She said that the target filing % (3% of cases) would be higher but for enforcement issues. "Show the flag, but don't over-invest." She testified that at that time, it was clear that China was going to become more of a potential marketplace for Nortel products. In addition, the patent system was starting to look like a real patent system, so it made sense to start using the patent system in China at that time.

[64] By 2006, Nortel intended to file far more patents in China. The plan was to file up to 30% of the top patents in China and in 18 months' time raise this to up to 50%, selecting those having the highest commercial potential. In the IPCo model of May, 2010 that included revenues from China, it stated that early 2010 modelling did not include China in its royalty base but the new plan included China but only in the years 2015 to 2020. It stated that 80% of its patents and 70 % of the applications in China were for wireless 4G technology. The logic of waiting until 2015 was the time for 4G market maturity. EMEA contends, and I have no reason to question it, that the assumptions

in the IPCo model regarding China were conservative.

[65] Mr. Malackowski's view was that in doing a revenue or license approach, it would be wrong to exclude China revenues. His reasoning was that Nortel had decided to file high interest patents in China, that patent protection was improving in China and had improved over the past five to ten years and that China was a very important and large market. He has had experience in China. His firm has a partner in Shenzhen for addressing the work they do in China.

[66] Mr. Zenkich testified that the basis for his conclusion that no one would pay anything for a Chinese patent was based on his business of being a patent broker. He testified that when his clients had large patent portfolios, there was no interest expressed in the Chinese patents that were part of those portfolios. Similarly, they were never asked by clients who looked to purchase patents to identify Chinese assets for purchase. I take this to be no evidence of knowledge of values that could be achieved for a Chinese patent, but only that Mr. Zenkich had no knowledge of a client being interested in in a Chinese patent. Included in material referred to in his report was a 2011 report entitled "China's Emerging Patent Trading Market" that referred to a patent auction in China in 2010 which sold 38 lots and the intention of the seller to hold another auction in 2011. The article also referred to efforts being made to set up an exchange in China with the support of governments that would facilitate transactions. That article was contradictory of the view expressed by Mr. Zenkich.

[67] Mr. Zenkich referred to a 2012 publication by the U.S. Patent Office that referred to comments it had received to the effect that there were difficulties with enforcing Chinese patents. That is certainly anecdotal evidence of statements made by others, and it cannot be belittled. How accurate are all of the statements is perhaps a matter of some debate. For example, a comment by one person as to the cap on damages in China was shown during the evidence to be incorrect. While Mr. Zenkich had stated in his report his belief that that significant interest in patent granting activity in China over the last ten years has increased the risk that patents may be challenged as invalid, even if granted, he acknowledged on cross-examination that he had no experience in trying to enforce patents in China and that his company had no experience in trying to enforce a patent anywhere in the world. He also acknowledged that he did not independently conduct surveys or seek out patent data of this kind of activity and that he was unable to identify a single instance where a Chinese patent was found invalid and its US or European counterpart was not. One of the documents cited by Mr. Zenkich in his report was a publication by a Beijing law firm of October 2009 that stated that the major cities, in particular Beijing, Shanghai and Guangzhou, can be considered as a reliable forum for patent infringement actions. Mr. Zenkich chose instead to rely on the U.S. Patent Office document that contained comments regarding the difficulty of enforcing patents in China.

[68] I am afraid that I cannot put a great deal of reliance on Mr. Zenkich's evidence of the unreliability of the Chinese patent system. I accept he may be of the view that it is unreliable, but his view was not supported by any cogent, reliable and admissible evidence. The views of Mr. Kinrich are also not supported by any cogent evidence. He appears to have largely relied on Mr.

Zenkich.

[69] In my view, if a license or revenue approach to value is to be used to value the residual IP, it should include revenues from China that were used in the IPCo model, mainly for the reasons expressed by Mr. Malackowski and the fact that the projections were somewhat conservative.

[70] The conclusion I come to, if an allocation of the proceeds of the Rockstar sale were to be based on a license or revenue approach, would be an allocation to Canada of $3,485.97 million, to EMEA of $228.97 million and to the U.S. of $710.495 million, or a total of $4,425.435 million. I would round these figures up slightly on a pro rate basis to equate to the proceeds available of $4,454.37.

(ii) Mr. Malackowski's contribution approach to value

[71] The EMEA debtors contend that the allocation of the proceeds of the Rockstar sale should be made on the basis of the contribution to R&D made by each of the RPE entities that created the residual IP sold to Rockstar. They contend that the contributions by each RPE to measure this should not be the contributions made during the five year look-back period used to allocate the residual profits under the MRDA but rather the contributions made during the period of time that the residual IP that was sold to Rockstar was invented. Based on the evidence of Mr. Malackowski, they say the look-back period should be from 1991 to 2006[26].

[72] There are two fundamental issues that have been raised to the calculations if the contribution approach to allocation is to be used. The Canadian Debtors contend that there is no basis to use a contribution approach to allocate the proceeds of the Rockstar sale or the business line sales. They say that if a contribution approach is nevertheless used, the look-back period for looking at R&D contributions should be the five year look-back period under the MRDA from 2005 to 2009. The U.S. Debtors also disagree that a contribution approach should be used to allocate the Rockstar and business line sale, but contend that if a contribution approach is used, they agree with the EMEA debtors as to the length of look-back period but contend that all R&D spending must be taken into account. They contend that what must be taken into account is not only the R&D costs incurred by each RPE in their own exclusive territory, but also all transfer pricing adjustments made by an RPE, particularly the adjustments made under the CSA agreements prior to the MRDA coming into force.

[73] Mr. Malackowski said in his report that to measure contribution, ideally, the contributions of the RPE's labs to the development of the patented technologies could be fully and accurately determined by interviewing all of the firm's R&D staff, and by reviewing all the documentation related to the firm's research (e.g. lab notebooks, invention disclosures, meeting minutes, research presentations etc.). This approach was not possible for Nortel's IP due to the size of the portfolio, the limitations on time and the availability of information. Mr. Malackowski did not have access to lab notebooks and R&D staff. Moreover, as R&D was organized across the Nortel Group and carried out in a highly coordinated and integrated manner across the various RPEs, it was even more difficult to separate out the distinct contributions of the various RPEs. In these circumstances he said he had to select a proxy data that reasonably reflected the research efforts of the various RPE's

labs.

[74] Mr. Malackowski chose to measure contributions to the development of the IP by measuring each RPE's spending on R&D. He stated that in a large organization, where R&D funding supports a large number of R&D personnel and results in a large number of patents over time, this funding can be valid and indeed the most accurate proxy measurement for determining the contribution of each research group to the development of IP. He stated that it is common practice to regard each dollar spent on R&D as fungible for the purposes of measuring relative contribution to R&D in a group, as Nortel did under the RPSM.

[75] Mr. Malackowski stated that in his experience, in large IP portfolios the vast majority of the value of the portfolio is usually derived from a minority of the patents. This is due in part to the fact that technology IP can be overlapping and duplicative. Value is often derived from a relatively small number of patents that are essential to industry standard technology or that cover an essential process or solution to a common problem. Mr. Malackowski expressed the view that the patents that were categorized as high interest by Global IP likely represented the vast majority of the value of the residual patent portfolio. Approximately 37% of the total residual patent portfolio was identified as high interest.

[76] The evidence was that it generally took one year for Nortel R&D spending to result in a patent application for an invention. He therefore thought it appropriate to determine contribution to the creation of Nortel's IP by measuring R&D spending starting the year before the filing of the earliest unexpired patent categorized by Global IP as high interest, i.e. in 1991. He stated that the most logical end point was in 2006, the year before the last high interest patent was filed. He provided calculations for four look back periods produced by two different start points and end points. His two start points were 1991, reflecting the year before the earliest unexpired high interest patent in the residual patent portfolio, and 2001. His two end points were 2006, representing the year before the last high interest patent in the residual patent portfolio, and 2008, representing the last year of ordinary course operations[27]. 2001 was the start of the MRDA.

[77] By looking at the expenditures on R&D for this period from 1991 to 2006, Mr. Malackowski allocated 39.5% or $1.777 billion to Canada, 42.9% or $1.930 billion to U.S. and 17.6% or $793 million to EMEA. For the period 1991 to 2008, he allocated 40.6% or $1.827 billion to Canada, 43% or $1.935 billion to U.S. and 16.4% or $738 million to EMEA.

[78] The effect of using the longer look-back period substantially reduces the amount allocated to Canada, the reason being that the R&D expenditures from 2005 to 2009 during the five year RPSM were proportionally done more by Canada than EMEA and the U.S. The percentages from 2005 to 2009 were 49.5 for Canada, 38.8 for the U.S. and 11.7 for EMEA.

[79] Mr. Malackowski's report contains discussion why he looked at a long period back to 1991 to measure R&D spending. He said that old patents maybe more valuable than recently filed ones. He said that technologies are adopted by the market slowly over time and do not realize their full value

until later in the life of the patent. He did recognize that newer patents will have longer life before they expire and they may have favour due to technological obsolescence, but pointed out that there is risk in newer technologies that they may not be accepted by the market. Based on these considerations he concluded that he should take into account R&D spending from the year before the first high interest patent.

[80] Mr. Malackowski did not consider what Nortel's thinking was about the life to its technology. In the first version of the MRDA the R&D spending used to split residual profits was calculated using an amortized 30% rate, with expenditures from any one year declining by 30% in the following years. In Nortel's response to questions from the tax authorities in 2003 in connection with its request for an APA for that MRDA, Nortel stated:

> It is difficult to ascertain the exact useful life of R&D developed at Nortel; however, Nortel's analyses indicated that a 30% amortization was conservative yet reasonable. Numerous sources suggest that the useful life of telecommunications R&D is short; however, there is no one definitive external source that explicitly determines that a 30% amortization rate is correct.

[81] The tax authorities did query this response in a question that referred to information from Nortel that it said seemed to suggest that the useful life of R&D is equivalent to product useful life. "However, isn't it the case that benefits from R&D may persist beyond product useful life? For instance, value may result from further developing the intangible."

[82] In preparation for APA negotiations with the tax authorities, Gilles Fortier, NNL's taxation manager for transfer pricing, circulated a document among Nortel tax executives dated May 10, 2002 summarizing the "key drivers" for Nortel, on the one hand, and the tax authorities, on the other, with regard to the APA. The position of the tax authorities was stated to be that the life of Nortel's intellectual property was 7-10 years or more whereas Nortel was suggesting 4-7 years. This position of Nortel was consistent with using a 30% amortization rate for R&D spending in allocating profits under the CSA. Nortel wanted a shorter period because using a longer period would increase the profits in NNI for tax purposes that Nortel did not want. Canada had a lower tax rate due to its generous research and development policies.

[83] A later application by NNL and NNI for an APA with the tax authorities for the years 2007 to 2011, in which a straight five year R&D expenditure would be used to allocate profits, indicated that NNL and NNI thought that the useful life of the Nortel intangibles was estimated to be approximately five years with a gestation lag of one year. Included in the APA request was the following:

> The economic life of technology is difficult to measure because as long as the technology is being sold, it is also being continuously updated and enhanced. Indeed, software and hardware development in the telecommunications industry is widely understood to be an iterative process, because of the tendency to

> superimpose improvements upon older versions of the technology. Therefore, any discussion of product useful life must consider when an individual product was originated, how to apportion the impact of successive improvements, and when the product was completely superseded.
>
> Nortel's telecommunications technology consists of hardware and software, and it continues to grow and change as demand for bandwidth and functionality grows. As a result, there has been an evolution in the commercial and economic life span of technologies from longer to shorter cycles.
>
> Nortel's Chief Technology Office estimated that a dollar spent on R&D typically has a shelf life of about five years, and additionally, the time from when the investment in the R&D is made to the time when revenue can be generated from the investment ranges from about 6 to 12 months.
>
> Recognizing the difficulties inherent in estimating the useful life, based on information obtained in our discussion with Nortel management, and our review of the R&D policy documents, the useful life of the Nortel intangibles is estimated to be approximately five years with a gestation lag of one year.

[84] The evidence from Mr. Malackowski's report is that 99% of the high-interest patents sold to Rockstar had an invention date prior to 2006 and the bulk were from 1995 to 2004. This is considerable evidence that what Nortel was telling the tax authorities did not turn out to be the case. This is not to suggest that Nortel did not believe what it was representing to the tax authorities, or perhaps more appropriately put, that Nortel's transfer pricing tax people did not think that a legitimate tax case could be asserted supporting its 30% declining amortization calculation in the first MRDA and then its five year look-back period in the second version of the MRDA. It is clear, however, that Nortel expected negotiations with the tax authorities would take place that could alter the 30% amortization rate and the later five year flat rate, and the MRDA expressly contemplated that in Schedule A. It cannot be said that Nortel as an enterprise conclusively concluded that its profit allocation keys of 30% or five years were necessarily correct. It was a tax position prepared by Nortel and its advisors.

[85] If a contribution theory is to be used to measure the value of what the parties gave up, I think it inevitable that a longer look-back period would be appropriate. The market has indicated that. However, I would lengthen the time to be taken into account. One of the weaknesses of using a contribution approach is that not every dollar spent results in valuable technology. The theory then must be that what one loses in the corners is gained in the straights. That being the case, I see no reason to disregard the R&D expenditures in 2007 to 2009. They were real and cannot be said to

have contributed to the residual IP sold to Rockstar[28]. The fact that Rockstar has started out by enforcing earlier patents does not mean that later patents or patent applications will not be of value or that Rockstar did not pay anything for them.

[86] I would take the R&D expenditures from 1991 to 2009. The data is available from exhibit B.1.7.1 of Mr. Malackowski's report. The resulting percentage of expenditures is 40.93% for Canada, 42.87% for the U.S. and 16.2% for EMEA.

[87] The U.S. Debtors contend that because under the CSA agreement NNI was required to allocate transfer payments to other RPEs, those payments should be included in what is considered to have been contributed to R&D. They rely on upon the opinion of Laureen Ryan, a forensic accountant who went through the transfer pricing worksheets and calculated $4.4 billion allocated to other RPEs under the CSA agreement. On her figures, the percentages for R&D expenditures for 1989 to 2000 would be 21% for Canada, 6% for EMEA and 73% for the U.S.

[88] There is a problem with Ms. Ryan's evidence. The first is that she did no cash analysis to determine if NNI actually paid out any cash to any other RPE as part of its transfer pricing requirements under the CSA and later MRDA. There is no evidence in the record that anything allocated to any party was actually transferred by way of cash and Ms. Ryan conceded that she could not say if anything was actually paid. She did speak to her general understanding that money was transferred by NNI to NNL but I take that to be hearsay evidence and not any cogent evidence that any funds were transferred in fact. Just as important, there was no evidence as to how cash transferred from NNI or any other RPE was actually used. Cash was moved throughout the Nortel Group as required, but what those requirements were at any time is not a matter of record or available evidence. Ms. Ryan also conceded that she was not able to say where any of the money came from to actually do the R&D spending, whether from customers, governments, shareholders or other Nortel entities.

[89] While Ms. Ryan in her report and evidence calculated what she said were allocations for R&D made by NNI to the other RPEs under the MRDA, the U.S. Debtors made no argument in their closing briefs that these payments should be attributed to NNI. One problem with the evidence on this point is that Ms. Ryan assumed that the RPEs used transfer pricing adjustments for only for only two types of expenses: direct R&D spending figures, and sales, general, and administrative costs. Ms. Ryan pro-rated the intercompany funding between those two expenses. That assumption was obviously incorrect because, as Ms. Ryan conceded, it ignores very significant additional costs incurred by the RPEs, including restructuring costs, costs of revenues, manufacturing, and distribution. The very need for an assumption to be made was because Nortel never kept records of what transferred cash from one Nortel company to another was used for. Ms. Ryan also erred in failing to deduct the $2 billion settlement with the IRS and CRA regarding the $2 billion that was deemed to be a dividend paid by NNI to NNL. She also failed to take into account the sale of Nortel's UMTS business to Alcatel.

[90] As stated above, Mr. Malackowski thought that ideally to determine contribution to R&D by any particular RPE, he would need to have access to lab notebooks and other records and to Nortel R&D personnel. As he did not have that he had to select a proxy data that reasonably reflected the research efforts of the various RPE's labs. He chose to measure contributions to the development of the IP by measuring each RPE's spending on R&D. He testified that this would be reflective of the types of activities that we know lead directly to the inventive process. It is the engineering time and the related expenses that result in the innovation. He testified that a transfer pricing adjustment is an allocation that is done for other purposes, specifically tax efficiency, not for recording the matching between the inventive nature of contribution and results, and he viewed it as inappropriate.

[91] Ms. Ryan is a specialist in accounting and forensic investigations. I prefer the evidence of Mr. Malackowski on this point that for his contribution analysis, it is not appropriate to add to any RPE's contribution amounts that were allocated from that RPE under the transfer pricing regimes in the CSA or MRDA.

[92] Mr. Malackowski did an "inventorship" analysis in his reply report of the countries in which the inventors of the residual patent portfolio resided. He stated that while he did not consider inventorship to be the appropriate basis for allocation, it was a useful metric for testing the allocations of the various parties.

[93] The results of Mr. Malackowski's analysis indicated that for the high interest patents, 46.3% were from Canada, 33% from the U.S., 18.7% from EMEA and 2.6% from ROW. For the entire portfolio, 51.9% were from Canada, 27.4% were from the U.S., 17.7% were from EMEA and 2.9% were from ROW. Using the percentages for the entire residual patent portfolio, which is what was sold, and allocating ROW equally to the others, would give Canada 52.9% of $4.45 billion or $2.35 billion, U.S. 28.4% or $1.26 billion and EMEA 18.7% or $832 million.

[94] Mr. Britven, an expert called by the Monitor, while of the opinion that a contribution allocation theory was not correct, also did an inventor based analysis. That analysis allocated 51.3% to Canada, 28.9% to the U.S., 18.2% to EMEA and 1.6% to others. That is very close to the figures from Mr. Malackowski's inventorship analysis

[95] I conclude that if the contribution allocation theory asserted by the EMEA debtors is accepted, the percentage allocation of the residual IP sold to Rockstar of $4.45 billion is 40.93% or $1.82 billion for Canada, 42.87% or $1.92 billion for the U.S. and 16.2% or $720 million for EMEA to be rounded down pro rate to get a total of $4.45 billion.

(iii) Mr. Green's approach

[96] Mr. Green allocated virtually all of the proceeds of the Rockstar sale to Canada.[29] There were two categories of patents involved in the sale:

1. patents that had been used in several business lines and in respect of which

non-exclusive licenses had been granted to the business line purchasers; and

2. the remaining patents, which had not been used in any Nortel business.

[97] For the group of patents identified in (1) i.e. patents that had been used in several business lines and in respect of which non-exclusive licenses had been granted to the business line purchasers, the value of the U.S. and EMEA Debtors' licenses with respect to those patents (which is the value that they would have earned had they continued to operate the businesses) was determined by Mr. Green and allocated to them as part of his allocation of the business line sale proceeds.

[98] With respect to those patents described in (2) that were not used in any of Nortel's operating businesses, Mr. Green considered whether there was any evidence that the U.S. and EMEA Debtors had any prospect of generating earnings through the exercise of their license rights in connection with those patents. He concluded that they did not because the U.S. and EMEA Debtors' license rights were limited to the right to make Products -- i.e. products made or designed (or proposed to be made or designed) by or for a Participant, embodying or using the Nortel IP. This was consistent with the position taken by the Monitor in this case. Thus he allocated none of the proceeds of the Rockstar sale to the U.S. and EMEA Debtors and all of the proceeds to Canada.

[99] Mr. Green's valuation is a straight result of the interpretation put on the MRDA by the Monitor. One cannot quarrel with the logic of it if that interpretation were to govern the allocation.

1 EMEA is an acronym for 19 Nortel subsidiaries in Europe, the Middle East and Africa.

2 All reference to dollars is to U.S. currency.[3] Judge Kevin Gross is the U.S. bankruptcy judge.

3 Judge Kevin Gross is the U.S. bankruptcy judge.

4 See *Nortel Networks Corp. (Re),* (2013), 2 C.B.R. (6th) 1;aff'd (2013), 5 C.B.R. (6th) 254 (Ont. C.A.); 2013 WL 1385271; aff'd 737 F.3d 265.

5 A later Allocation Protocol which set out procedural matters to govern the allocation hearing was made and approved by orders of both Courts in May, 2013.

6 Unless otherwise indicated, statements of fact in these reasons are findings of fact.

7 Nortel Networks Australia was also a RPE until December 31, 2007.

8 This was an alternative argument for the CCC to its first argument that the MRDA should govern the allocation.

9 There were different CSAs for different types of costs. The relevant CSAs were the R&D CSAs that provided for the sharing of costs of the R&D carried out by the Nortel entities doing R&D. NNL made a separate CSA with each of those entities.

10 I prefer this test to that articulated in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (C.A.), in which it was said that interpreting a contract that accords with sound commercial principles is limited to situations in which there is some ambiguity. I do not think that is correct and it is not what other cases of appellate authority have stated. See my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc*. (2011), 83 C.B.R. (5th) 106 at para. 13 and *Oncap L.P. v. Computershare Trust Co. of Canada* (2011), 94 B.L.R. (4th) 314 at paras. 21 to 24. See also Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed. (Markham Ont.:LexisNexis 2012 at p. 46 fn. 191.

11 There was a separate R&D CSA made with each participant. They were the same. Reference during argument was to the CSA made between Northern Telecom Limited [now NNL] and Northern Telecom Inc. [now NNI], and I refer to it in these reasons.

12 The amended Schedule A was effective January 1, 2006 and reflected a change in the calculation of the amount spent on R&D by each participant.

13 The NN Technology in the MRDA was called the NT Technology in the CSA as the parties at the time of the CSA in 1992 were Northern Telecom, later changed to Nortel Networks.

14 Rulings on admissibility of evidence were left for decision to be made after argument at the conclusion of the trial.

15 At page 30 of the report, Horst Frisch, in referring to intercompany transactions between participants under a RPSM allocation, state-"The old CSPs possess and will continue to possess valuable intangible property." What property is being referred to is not stated. It could be a reference to license rights.

16 *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 paras. 38-39 (S.C.J. (Commercial List)), *aff'd* [2001] O.J. No. 3918 (Div. Ct.). *G.D. Searle & Co. v. Novopharm Ltd.*, [2007] F.C.J. No. 625 (C.A.), *leave to appeal to SCC refused* [2007] S.C.C.A. No. 340 . *Patchett v. Sterling Engineering Coy. Ltd.* (1955), 72 R.P.C. 50 (H.L.). This has now been codified in section 39 of the *Patents Act 1977* (U.K.), c. 37.

17 *Board of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 98 USPQ (2d) 1761 (2011) at p. 2195-2196, quoting *United States v. Dubilier Condenser Corp.*, 289 U.S. 178 (1933) at p. 189.

18 See the affidavit of Peter Currie sworn April 11, 2014 for a full description of Nortel's matrix structure and operations.

19 Early in these proceedings, on the motion in 2009 to approve the IFSA, counsel to the U.S. Debtors stated in its written brief that NNL owned the IP. The report of the administrators for the EMEA Debtors of June 14, 2009 stated that all IP rights belonged to NNL. Once the size of the sale proceeds became known, these positions of the U.S. Debtors and EMEA Debtors changed.

20 In *In re Owens Corning*, 419 F. 3d 196 at 205 (3rd Cir. 2005) the U.S. Court of Appeals observed that substantive consolidation "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities, (save for inter-entity liabilities which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor."

21 The projected cash on hand in all of the Nortel entities as of June 30, 2014 after payment of secured creditors was $1.525 billion, being $343 million in the Canadian Debtors, $744 million in the U.S. Debtors and $438 million in the EMEA Debtors. See schedule 5 of the Britven report, ex. 45.

22 Mr. Kilimnik prepared an expert report on which he was deposed prior to the trial. At the opening of the trial, counsel for the ad hoc group of bondholders said that Mr. Kilimnik would be called as a witness. However, on the day before he was scheduled to testify, his report was withdrawn by the bondholders and he was not called as a witness at the trial.

23 I also prefer the evidence of Mr. Kilimnik and Mr. Binning as to the data in exhibit 58 that compared Nortel bond spreads to government yields and what could be drawn from it. Professor McConnell said he could not draw an inference from the data but also said that he was not contradicting Mr. Binning.

24 There was one series of bonds for $200 million issued by NNL with a NNC guarantee but no guarantee by NNI.

25 The CCC contended for an "ownership" allocation very similar to the Monitor, being $5.805 billion to the Canadian Debtors, $1.009 billion to the U.S. Debtors and $488 million to the EMEA Debtors.

26 For the IP sold in the business line sales, EMEA says that the look-back period should be from 1991 to 2008, two years longer than for the Rockstar sale.

27 Mr. Malackowski said he did not think it appropriate to look at 2009 R&D expenditures post-filing as he understood that little basic research was being performed during this time given that R&D spending was cut dramatically and none of the patents designated as high interest by Global IP were filed during this time period. The R&D expenditures in 2008 were $1.458 billion and in 2009 were $1.076 billion. Mr. Malackowski also said an appropriate look-back period for the business sales would be 2001 to 2008.

28 The Canadian expenditure in 2009 was not just to preserve the business lines as asserted by EMEA. Canada spent $564 million in 2009 on R&D, far more than the $180 million spent on the CDMA and LTE businesses.

29 He allocated $426,097 to the U.S. representing the value of the workforce transferred to Rockstar, being very few people.

TAB 7

Case Name:

Redstone Investment Corp. (Re)

RE: IN THE MATTER OF the Receiver of Redstone Investment Corporation and Redstone Capital Coropration AND IN THE MATTER OF a Motion Pursuant to Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

[2016] O.J. No. 5205

2016 ONSC 4453

2016 CarswellOnt 15863

271 A.C.W.S. (3d) 248

40 C.B.R. (6th) 181

Court File No.: CV-14-10495-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

October 5, 2016.

(92 paras.)

Counsel:

Ian Aversa and *Jeremy Nemers*, for Grant Thornton Limited., in its capacity as Receiver and Manager of Redstone Investment Corporation, Redstone Capital Corporation and 1710814 Ontario Inc. o/a Redstone Management Services.

Justin Fogarty and *Pavle Masic*, for RIC Investors.

Grant Moffat and *Kyla Mahar*, for RCC Investors.

Harvey Chaiton and *Doug Bourassa*, for RMS Investors.

ENDORSEMENT

G.B. MORAWETZ R.S.J.:--

Introduction

1 This motion seeks a determination of whether the estates of three corporate entities -- Redstone Investment Corporation ("RIC"), Redstone Capital Corporation ("RCC"), and 1710814 Ontario Inc. o/a Redstone Management Services ("RMS") -- should be substantively consolidated.

2 The motion was brought by Grant Thornton Limited in its capacity as court-appointed receiver ("GTL" or the "Receiver") of the property, assets and undertakings of RIC, RCC, and RMS (collectively "Redstone").

3 To facilitate the determination of this issue, Newbould J. granted an order, which, among other things, appointed representative counsel ("RIC Representative Counsel") to represent the interests of parties who hold promissory notes issued by RIC (the "RIC Investors"), representative counsel ("RCC Representative Counsel") to represent the interests of all parties who hold bonds issued by RCC (the "RCC Investors"), and representative counsel ("RMS Representative Counsel") to represent the interests of all parties who invested money with RMS ("RMS Investors").

4 The order of Newbould J. provides that any RIC Investor, RCC Investor, and RMS Investor who is not represented by their respective Representative Counsel will nonetheless be bound by the decision made in respect of this motion.

5 In the absence of substantive consolidation of RIC, RCC, and RMS, the RCC Investors have priority for any receivership funds over the RIC Investors by virtue of an inter-corporate agreement under which RCC is a secured creditor of RIC.

6 The RIC and RMS Investors argue in favour of substantive consolidation; the RCC Investors oppose substantive consolidation; the Receiver put forward an independent legal opinion that it is unlikely substantive consolidation would be ordered in this case.

What is Substantive Consolidation?

7 Under a substantive consolidation, a number of affiliated legal entities, typically corporations, are treated as if they were one entity, resulting in the assets of the various debtors being pooled to create a common fund out of which claims of creditors of all the debtors are jointly satisfied. See:

Janis Sarra, *"Corporate Group Insolvencies: Seeing the Forest and the Trees"* (2008) 24 B.F.L.R. 63, at. p. 8.

8 The authority for substantive consolidation of bankrupt estates in Canada lies under the equitable jurisdiction of the Superior Court of Justice granted by s. 183(1) of the *Bankruptcy and Insolvency Act* ("BIA"). See: *A. & F. Baillargeon Express Inc. (Trustee of) (Re)*, [1993] Q.J. No. 884 ("Baillargeon"), at para. 23); *Nortel Networks Corporation (Re)*, 2015 ONSC 2987, at para. 216 and *Bacic v. Millennium Education & Research Charitable Foundation,* 2014 ONSC 5875.

Background

Procedural History

9 On March 24, 2014, RIC and RCC commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), with GTL appointed as Monitor.

10 On August 8, 2014, the CCAA proceedings were converted to receivership proceedings and GTL was appointed as Receiver of the property, assets and undertakings of RIC and RCC.

11 On August 12, 2014, the Receiver assigned RIC and RCC into bankruptcy. GTL was appointed trustee in bankruptcy of each estate.

12 On September 17, 2014, the receivership proceedings were expanded, on motion by the Receiver, to include RMS.

13 A *Mareva* injunction has been in place since April 4, 2014, restraining RMS and Mr. Edmond Chin-Ho So, the founder of the Redstone group of companies, from encumbering the assets of RMS (the "Mareva Order").

Redstone Incorporation and Ownership Structure

14 RMS was incorporated on September 19, 2006, and it is wholly-owned by Mr. So. RMS was used to process loans until the establishment of RIC. Starting March 14, 2012, RMS provided administrative services to RIC and RCC through a Management Services Agreement (the "MSA"). The services provided to RIC included seeking out borrowers, reviewing suitability for investment, carrying out due diligence, and maintaining a register of outstanding RIC Notes.

15 RIC was incorporated in Ontario on September 25, 2009, and is also extra-provincially registered in Alberta. RIC was wholly-owned by Mr. So until January 28, 2014, when he transferred 60% of the shares to Mr. Eric Hansen. RIC carried on business as a commercial lender to Canadian small to medium-sized businesses and entrepreneurs seeking capital on a short-term basis. Loans ranged from $250,000 to $2,000,000 and were payable within 30 days to one year. RIC financed its lending activities by way of a continuous offering of unsecured promissory notes ("RIC Notes") distributed under exemptions from the prospectus requirement.

16 RCC was incorporated on December 15, 2011, for the purpose of raising registered funds that would be transferred to RIC. RCC is owned 40% by Mr. So and 60% by Target Capital Inc. ("TCI"). RCC ownership was set up with TCI in voting control so that investments in RCC would qualify as a "deferred plan investment" under Canadian income tax legislation, making it eligible for registered savings plans.

17 RCC raised capital through a continuous offering of unsecured fixed rate bonds ("RCC Bonds") under the same exemptions from the prospectus requirement as the RIC Notes. RCC would then transfer the capital it obtained from investors to RIC so that RIC could use the amounts to fund new loans to third parties.

Leadership and Business Operations of Redstone

18 Mr. So created the Redstone group of companies with the aim of providing short-term high-interest loans to small and medium-sized Canadian companies. Borrowing clients came to RIC directly, through a referral, or from a bank or accounting firm. After conducting due diligence consisting of an assessment of their financial position and financing needs, loans would be arranged.

19 Mr. So is an experienced and educated participant in securities' markets. His formal education includes completion of three and a half years of a Bachelor of Commerce program at the King's University in Alberta. Upon leaving university, he joined a boutique corporate finance firm, Harris Brown, where he started as a research analyst and ultimately moved into the role of Manager of Finance and Administration. Throughout his employment, he researched target companies, worked in debt lending, and liaised with clients looking for debt or equity financing.

20 Mr. So was the president and chief executive officer ("CEO") of RIC and RCC until January 28, 2014, when he resigned from these roles following his incarceration for unrelated criminal charges. At that time, Mr. Hansen -- who had been a consultant providing marketing and investor relations to the Redstone companies since the summer of 2011 -- became the sole director and officer of RIC and RCC, until his own resignation on August 8, 2014, when Redstone entered receivership.

21 RIC and RCC shared the same registered office, located at 101 Duncan Mill Road, Suite 400, Toronto, Ontario. Though it had another registered office, RMS used Duncan Mill Road as its principal address.

22 Mr. So had sole signing authority for transfers between the three Redstone entities, though he contends that Mr. Chris Shaule and Mr. Karim Habib, both of whom had acted under him as portfolio analysts for the Redstone companies under contract, did as well. Mr. Shaule was responsible for maintaining the books and records of RIC and RCC. Mr. So himself maintained the books and records of RMS.

23 Mr. Hansen, together with Mr. Shaule and Mr. Habib, engaged in a review of the Redstone companies' financial position starting January 2014. Various financial irregularities came to light, so the Redstone companies and GTL on March 17, 2014, with a view to potentially acting as a court-appointed monitor in a CCAA filing.

The RCC -- RIC Loan Agreement and General Security Agreement

24 To facilitate the transfer of funds, RCC and RIC entered into a loan agreement dated January 23, 2012 (the "Loan Agreement"), which provided for a loan between $250,000 and $25,000,000 that would be drawn upon with RCC's pre-approval. The agreement was signed by Mr. So on behalf of both companies. RCC lent RIC approximately $14.5 million under the agreement.

25 As part of this lending arrangement, RIC granted RCC a security interest over all of its property via a General Security Agreement (the "GSA").

26 Mr. So explained on cross-examination that, though he now understands that RCC is the first-ranking secured creditor of RIC due to the GSA, he did not appreciate that the GSA would have this effect until Redstone commenced proceedings under the CCAA in March 2014. This is a point to which I will return later in these reasons.

27 On March 14, 2014, in anticipation of the CCAA proceedings, Mr. Hansen performed a search under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA") over each of RIC and RCC. The RIC search revealed that RIC had no secured creditors other than TD Bank. The RCC search showed a registration in favour of RIC. Mr. Hansen caused the discharge of the RIC entry against RCC and filed a registration against RIC in RCC's favour. This registration was made prior to the CCAA proceedings.

Redstone Offerings

<u>The Subscription Process</u>

28 RIC Notes and RCC Bonds were issued under a continuous offering made pursuant to exemptions from the prospectus requirement of securities legislation in British Columbia, Alberta, and Ontario. Both RIC and RCC obtained investors under Offering Memoranda ("OM") -- documents provided to investors in exempt distributions that set out the business of the company, including liabilities and risk factors. Neither RIC nor RCC are registered in any capacity with securities regulatory authorities.

29 As part of the subscription process, investors acknowledged receipt of the OM and were advised of the risky nature of the investment in the form of a Subscription Agreement delivered to RIC[1] or RCC,[2] depending on the product to which the investors subscribed (i.e., RIC Notes or RCC Bonds). The investors also provided a Representation Letter, in which the investor set out how they qualified for the exemption used to make the purchase. In addition, RCC Investors provided a

specific release for TCI. The Subscription Agreement provides, among other information, that "the Subscriber has received and reviewed the Offering Memorandum" in connection with the purchase of the notes.

30 Each one of the RIC and RCC OM contain a section describing risk factors -- "ITEM 8 -- RISK FACTORS" -- that includes the following statements, respectively:

> The purchase of the [RIC Notes] offered hereby is suitable only for sophisticated investors of adequate financial means who can bear the risk of loss associated with an investment in the Company and who have no need for liquidity in this investment. Prospective investors should give careful consideration to the following risk factors in evaluating the merits and suitability of an investment in the Company. The following does not purport to be a comprehensive summary of all the risks associated with an investment in the Company. Rather, the following are only certain particular risks to which the Company is subject. Management urges prospective investors to discuss such risks and other potential risks in detail with their professional advisors prior to making an investment decision.

> The purchase of [RCC Bonds] pursuant to this Offering should only be made after consulting with independent and qualified sources of investment and tax advice. Investment in the Bonds at this time is highly speculative. The Corporation's business involves a high degree of risk, which even a combination of experience, knowledge and careful evaluation may not be able to overcome. Purchasers of Bonds must rely on the ability, expertise, judgement [*sic*], discretion, integrity and good faith of the management of the Corporation. This Offering is suitable for investors who are willing to rely solely upon the management of the Corporation and who could afford a total loss of their investment.

The RIC Offerings

31 RIC issued seven OMs between 2010 and 2013 for the purpose of obtaining investments and one non-offering OM to amend a prior memorandum for deficient disclosure of the Loan Agreement.

32 The four OMs issued prior to the Loan Agreement advised that RIC may subsequently enter loans that could supersede the RIC Notes. These OMs state, "The [Notes] are unsecured, and as a result (i) are subordinate to any secured debt which the Company now has or may hereafter incur, and (ii) purchasers will have no direct recourse to the assets of the Company or any other collateral."

33 However, the April 2012 OM failed to disclose the Loan Agreement entered earlier that year

as a material contract. The non-disclosure contravened the requirements for a distribution under the s. 2.9 OM exemption that had been used to make distributions in Alberta and British Columbia. This led the securities regulators of those two provinces to issue deficiency letters to RIC with respect to the April 2012 OM, as well as make cease trade orders.

34 RIC settled with the securities regulators by issuing a non-offering OM on August 30, 2012 (the "Rescission OM"), which included and disclosed the RCC Loan and gave RIC Investors who subscribed under distributions based on the April 2012 OM the opportunity to rescind their investments. One investor accepted the rescission offer and the investment was repaid. The correction brought RIC in compliance with the s. 2.9 requirements. The cease trade orders were revoked by both the Alberta and British Columbia securities commissions in October 2012.[3]

35 The amended April 2012 OM and the two subsequent OMs disclose the Loan Agreement and the GSA under material contracts. They also outlined risks related to the notes, including that "[t]he present and after acquired personal property of the Company is secured in favour of RCC pursuant to the terms of the RCC Loan Agreement."

36 Since its inception, RIC has issued 925 notes raising $65,474,000. As of February 28, 2014, approximately $23,340,145 of this is outstanding to RIC Investors.

The RCC Offerings

37 RCC issued two OMs, one in 2012 and the other in 2013.[4] The Loan Agreement is discussed in both OMs: the 2012 OM indicates that RCC intends to enter a loan agreement with RIC and the 2013 OM indicates the agreement has been executed.

38 Both OMs include a summary of loan terms and advise of the risks pertaining to the loan. They indicate that the loan would "be secured by way of a General Security Agreement securing all present and after acquired personal property of RIC in favour of [RCC]." In terms of investment risk with respect to RIC, the OMs indicate that "[a] return on investment for a Subscriber under this Offering is dependent upon RIC's ability to meet its obligations of principal and interest pursuant to the RIC Loan." Further, the risks section explains that "[t]here is no assurance or guarantee that [RCC] will be repaid the RIC Loan in accordance with its terms, if at all, and any failure of RIC pursuant to its payment obligations will directly affect the ability of [RCC] to pay interest and redeem the Bonds."

39 The 2013 RCC OM appends the RIC OM issued March 1, 2013, and advises RCC Investors to review it as it details the risk factors that pertain to RIC's business.

40 Since its inception, RCC has issued 710 bonds raising $16,486,000. All of the bonds were issued after the Loan Agreement was executed. As of February 28, 2014, approximately $16,317,602 of this is outstanding to RCC Investors.

41 It is of note, though perhaps not of consequence, that the RIC and RCC OMs which reference the Loan Agreement misstate the minimum loan amount as $150,000, when the agreement actually provides that the minimum loan amount is $250,000.

Receivership: Redstone Assets and Claims

42 Each of RIC, RCC, and RMS maintained separate financial records and bank accounts. Transfers between the companies have been consistently recorded in their respective books. The Receiver undertook an examination of each company's assets.

43 The assets of RIC as of February 28, 2014, consist of its lending portfolio, which includes 35 accounts with loans totaling approximately $24,648,000. The loans are generally secured against the assets of the borrowers and personal guarantees from their respective shareholders. The sole material asset of RCC is its loan to RIC, which totals $14,260,116. According to the Receiver's investigation, RIC and RCC are owed $8,344,714 by RMS.[5]

44 The claims against each corporation and the Receiver's realizations for each estate as of June 2015 are as follows:

Entity	*Claims accepted*	*Total claim amount*	*Estate amount*
RIC	501	$23,434,146	$16,886,899
RCC	683	$15,849,360	$273,129
RMS	9	$9,854,219	$169,279

45 After disbursements, the Receiver holds $13,776,924. If the priority of RCC Investors is recognized, they would recover approximately 86% of their claims, and the other investors would obtain minimal, if any, recovery. If the Redstone estates are consolidated and the funds divided equally, each investor would recover approximately 28% of their claim.

Law and Argument

46 The RIC and RMS Investors ask me to exercise my equitable discretion and substantively consolidate the estates. The RCC Investors oppose consolidation. Before turning to the parties' interpretation of the facts and their respective arguments, I provide a brief overview of the law surrounding substantive consolidation in Canada and the United States, followed by a description of each party's characterization of the key facts.

47 In determining the appropriateness of substantive consolidation, all counsel referenced *Northland Properties Ltd. (Re)* [1988] B.C.J. No. 1210, affir'd *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* [1989] B.C.J. No. 63 (C.A.), where the court stated that in determining whether to impose substantive consolidation, the court must balance the economic prejudice to the creditors resulting from continuing corporate separateness against the economic prejudice caused by consolidation. To establish that substantive consolidation is warranted, it must be shown that the "elements of consolidation" are present, and that the consolidation would prevent a harm or prejudice or would effect a benefit generally. The "elements of consolidation" adopted in *Northland* from United States case law were as follows:

(i) difficulty in segregating assets;

(ii) presence of consolidated financial statements;

(iii) profitability of consolidation at a single location;

(iv) co-mingling of assets and business functions;

(v) unity of interests in ownership;

(vi) existence of inter-corporate loan guarantees; and

(vii) transfer of assets without observing corporate formalities.

Substantive Consolidation in the United States: Three Approaches to Assessing What is Just and Equitable in the Circumstances

48 A brief overview is included to contextualize the approach Canadian courts have adopted thus far, given the relatively limited treatment of this concept in Canada, before addressing the parties' arguments on the application of substantive consolidation to their dispute.

49 In the United States, the determination is made under the courts' equitable jurisdiction, similar to Canada. American courts have taken divergent approaches that has led to the articulation of several tests, the first regarding retaining flexibility but recently indicating that orders should be limited to very specific circumstances.

50 The power of U.S. courts to order substantive consolidation is derived not from explicit statutory provisions but rather from the Bankruptcy Court's general powers in s. 105(a) of the

Bankruptcy Code "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the *Bankruptcy Code*]". Substantive consolidation has been recognized by the Supreme Court as a power under this section in *Sampsell v. Imperial Paper and Color Corp.*[6] Given its foundation upon an equitable basis, in determining whether to order substantive consolidation courts are guided by what is just and equitable in the circumstances. Three leading approaches led to the evolution of this determination.

First Approach:

Three-Part Test

51 In *In re Auto-Train Corp., Inc.,*[7] the Court of Appeals for the District of Columbia Circuit moved away from relying on a list of factors to ascertain whether there has been an abuse of the corporate form and instead adopted a three-part test for determining whether or not to grant a substantive consolidation request:

1. Is there a substantial identity between the entities to be consolidated?[8]
2. Is consolidation necessary to avoid some harm or to realize some benefit?
3. If a creditor objects and demonstrates that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation, will the demonstrated benefits of consolidation heavily outweigh the harm to the objecting creditor?

Second Approach: Two-Part Test with a Focus on Reliance

52 In *In re Augie/Restivo Baking Co., Ltd.*,[9] the Court of Appeals for the Second Circuit departed from previous cases where determinations were made without regard for creditor reliance and were only based on corporate veil principles pertaining to respecting corporate separateness,[10] and instead set a two-part approach with a focus on reliance:

1. Have creditors dealt with the entities as a single economic unit rather than relying on their separate identities in extending credit?
2. Are the affairs of the debtors so entangled that consolidation will benefit all creditors?

Third Approach: Stricter Focus on Prepetition and Postpetition Consequences of Consolidation

53 In *In re Owens Corning*,[11] the Third Circuit elected to set out a stricter approach, rejecting

Auto-Train as creating "a threshold not sufficiently egregious and too imprecise for easy measure" and disapproving of the checklist approach used in assessing corporate separateness, holding instead that substantive consolidation is appropriate only when an applicant proves either that:

1. Prepetition, the entities for whom consolidation is sought disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity, or

2. Postpetition, their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

54 Interestingly, all three approaches referenced above focus on the administrative costs of separating the entities with consequent detrimental effect on all creditors. In the case at bar, this is not a factor as the assets are held separately and the books and records, although they may not be pristine, are such that the Receiver can identify the creditors of each entity.

55 I now return to the investors' key positions on this issue in the context of Redstone's receivership.

Credibility, Relevance and Findings of Facts

<u>RIC Investors</u>

56 In support of their submission that consolidation is appropriate, counsel for the RIC Investors contends that the Redstone companies operated as a single entity that shared business functions, resources, personnel, and cash flow, and whose assets are intermingled due to inaccurate recordkeeping. RIC Representative Counsel further highlights the following facts:

* Redstone operates a centralized cash management system, with no protocol of any kind regarding the movement of monies between RCC, RIC or RMS -- even though the companies have separate bank accounts, the funds flowed between entities to serve operational needs without having any rules, policies or regulations in place in respect of recording inter-company transfers;

* Evidence by Redstone staff that they saw no distinction between how funds were advanced between RCC and RIC or RMS and RIC, and that they treated the companies interchangeably;

* Redstone personnel discovered millions of dollars of unexplained

transactions, bearing the hallmark of fraudulent activity;

* The Receiver discovered an error in the RCC accounting ledger -- namely, RCC bond purchases between June and September 2012 totalling $713,722 that were not recorded in the RCC accounting ledger, but the funds from which were paid to RCC and then transferred to RIC -- that renders unreliable the Receiver's assertion in its Fourth Report that "transfers between bank accounts were recorded in great detail in the books of records of each of RIC and RCC";

* According to the terms of the MSA, all expenses were to be borne by RMS, but in practice RIC generally held the bulk of cash and covered expenses incurred for the benefit of all three companies, such as fees for any market dealers involved in facilitating the sale of RIC Notes or RCC Bonds, accounting and legal fees or salaries for staff;

* Mr. So's evidence that only in 2013 were attempts made to improve recordkeeping within Redstone. Further, the records before late 2013 are not accurate and make it impossible to know the true inter-company balances;

* The RMS books were never subject to an audit, and though Mr. So employed "auditors" in respect of RIC and RCC, no evidence has been produced as to the quality or assurance level of the audits, nor are any reports or working notes included in the record;

* Mr. So's evidence that he viewed the companies as a single entity, which is how he represented them to investors, and he in fact intended, in late 2013, to amalgamate RIC and RCC and wind down RMS, as a part of which the RIC Notes and RCC Bonds would be exchanged for a new and identical security;

* The representations by Mr. So and Redstone personnel to the Exempt Market Dealers (EMD) who promoted Redstone products were that investments in each company would be treated equally. The marketing materials for RIC and RCC distributed to investors were virtually identical, both describing the same investment terms, interest rates, and risks, and

both failing to reference any priority for RCC Investors;

* Evidence of investors that they were led to believe RIC, RCC and RMS were interchangeable, and most investors were never informed of the Loan Agreement and GSA.

RMS Investors

57 Counsel to RMS Investors supports the position of the RIC Investors. In particular, RMS points to evidence by RMS and RIC Investors that they were led to believe there was no distinction between RIC and RMS or RIC and RCC. Further, RMS notes that there is no evidence that the RCC Investors relied on their priority position in making their purchases. Counsel also points to the evidence of various Redstone investors and others, who swore they made investments in Redstone and were led to believe that there was no distinction between RIC and RMS. Additionally, some of these investors swore that they were not told that RCC had a priority position and that they either did not receive an OM or only received one after the investments were made. Further, RMS Representative Counsel highlights the following evidence:

* Mr. Farouk Haji, whose affidavit detailed the process an Exempt Market Dealing Representative is required to follow prior to a client undertaking a new trade in an exempt market product, did not discuss whether he advised any clients of the priority position of RCC over RIC;

* There is no evidence from any RCC Investor that they relied on the priority position in making their investments;

* Ms. Cynthia Lewis' second investment in RIC, made in February 2011 in the amount of $540,000, was not treated in accordance with the OM in place at the time: she was first assigned RIC security against the ultimate borrower that was discharged in 2011 without her knowledge, and when her promissory note from RIC matured and rolled over in the February 16, 2012, after having already rolled over a number of times, the replacement note was issued by RMS rather than RIC but the language of the note nonetheless required interest payments from RIC. Ms. Lewis advises that Mr. So explained the rollover to RMS as due to RMS being for "friends and family";

* Mr. Chad MacDonald received a promissory note from RMS and RMS agreed to assign him a portion of the security it obtained from the ultimate

borrower, Green Dot Finance Inc. However, the Green Dot loan, which formed the security for the investment and which appeared to be an asset of RIC, was sold for full face value to Maple Brook.

RCC Investors

58 RCC Representative Counsel contends that consolidation would unduly prejudice the RCC Investors' interests as this is not a case where corporate formalities were not maintained or the liabilities were not readily identifiable. They point to the following in support of this position:

* The creditor pools of RIC and RCC are different, the creditors invested in each entity based on distinct OMs prepared on a single-entity basis, and the creditors of each entity are identifiable;

* RIC, RCC and RMS each maintained separate bank accounts. The evidence available to the Receiver and its consultants indicated that Mr. So did not treat each of these as one bank account. Transfers between bank accounts were recorded with great detail in the books and records of RIC and RCC;

* On cross-examination, Mr. So's evidence was that he assumed inter-company transfers were recorded in the books of the respective corporations as either receivables or payables. In addition, he advised staff to make best efforts to ensure the transactions pertaining to an entity stay within that entity and be processed through the correct account. He also advised them to record inter-company transfers where necessary. It was his belief and/or hope that this was undertaken properly;

* The assets of each Redstone corporation are different and identifiable. RIC's assets as of February 28, 2014, consisted of its lending portfolio which included 35 accounts with loans totaling approximately $24.648 million. The loans were all secured against the assets of the underlying borrower, and typically were supported by personal guarantees from shareholders where the borrower was a corporation. RCC's sole material asset is the loan receivable from RIC, on a secured basis in the amount of $14,260,116. The assets of RMS are identified by Mr. So in his sworn affidavit as several loan receivables, office furniture and the like, which he valued at $4,706,510. The assets and liabilities of RMS have been the subject of a forensic review undertaken by GTL in its capacity as Monitor and Receiver;

* RIC and RCC had separate audited and unaudited financial statements and did not prepare consolidated financial statements. The most recent audited financial statements for RIC and RCC were dated August 31, 2012. RMS also maintained separate financial records;

* Note 6 of the audited and unaudited financial statements of RCC attached to the RCC 2013 OM states that the loan from RCC to RIC is secured by way of a GSA on all present and after-acquired property of RIC.

Mr. So's Evidence on Cross-Examination

59 As articulated above, counsel to RCC relies on the evidence of Mr. So to support its position. I have reviewed the affidavits and the transcript of Mr. So's cross-examination and have come to the conclusion that his evidence is unreliable and should be disregarded.

60 In many cases, the answers provided by Mr. So on cross-examination belie the fact that he is highly educated and very experienced in the financial field. Mr. So was asked about the inter-company transfers between each of RMS, RIC and RCC. Mr. So answered that when such inter-corporate transfers occur, there would be an appropriate entry, whether a receivable or payable, in the relevant books and records of those companies.

61 Mr. So was also asked about the Cease Trade Order that related to RCC and RIC. He was asked how the issue was resolved. Mr. So answered as follows:

> While Craig Betham took ... you know, reformatted both OMs for us. And one of the things at that time was that ... the original RCC OM was a separate OM that was created. Then, what the regulators wanted us to do, because these two companies are basically the same company, or related companies, they wanted us to do a wrapper, a wrap-around OM, so that the RIC OM had to be included in the RCC OM. That was done. Then, the second thing was we had to offer rights of rescission to all investors that invested in the previous OM, so that they had the proper information to decide if they were going to rescind or remain in the company. And then once those two things were done, we were restored back into good standing with the regulators.

62 In addition, Mr. So was asked whether he had certain friends and family who are RIC Investors. He answered in the affirmative. He also understood that if the RIC Investors were successful on this substantive consolidation initiative, it would be reflected in the ultimate distribution to the investors.

63 Mr. So was asked questions with respect to the GSA provided by RIC to RCC, executed January 23, 2012.

> Question 518: Can you tell me, in your own words, what you think this document purports to do?
>
> Answer: I remember that this was when we created Redstone Capital. It was what ... I believe the lawyers, for Craig Skauge ... I can't remember who at that time had told us that it was to be put in place in order to make RCC RSP eligible or something of that sort, that there had to be a securities agreement in place into RIC. But one of the things that I wanted to add, was that I had always spoken to him about, that this was, is in *pari passu* with all RIC Investors...
>
> Question 528: So it's your evidence today that starting from your years at Harris Brown and subsequently your years at Redstone, where your primary function was to lend money to entities to take security for those loans, that you did not understand what this general security agreement did?
>
> Answer: I understood that RCC was taking a GSA at RIC. Yes, I understood that.
>
> Question 529: So we'll start again. When you executed this document in January 2012.

Answer: Yes.

> Question 530: [D]id you understand that the effect of this document would be to grant a security interest in and to RCC, with respect to RIC's assets?
>
> Answer: I understood that it would be granting a security interest. Yes I did...

Question 531: Okay.

> Answer: My understanding ... and which is why all marketing material, and the

way that Redstone has always been presented to all investors and EMDss, was that everything was *pari passu*. The only difference between RCC and RIC was RCC was registered funds and RIC were non-registered.

Question 532: I understand that, but I guess. I just want to make sure I understood what you're saying to me. We have established that you understand what a general security agreement is.

Answer: Yes.

Question 533: And what a general security agreement does? And the effect of a general security agreement.

Answer: Yes.

Question 534: And you agree that this document has the effect of a typical general security agreement?

Answer: Yes.

Question 535: And you agree that you have executed this document.

Answer: Yes.

Question 536: But you're telling me that you always had the impression that RIC and RCC would be treated on a *pari passu* basis. I have a hard time how that holds together.

Answer: Well because that's what I had spoken to the lawyers about when we were creating the RCC OM and everything. That it was ... everyone was always

> to be *pari passu*. And we were never told differently and that is. Mr. Hansen was even involved in that, when we were creating RCC. I never once told that RCC has a priority over RIC. ...

64 The foregoing interchange establishes, in my view, that Mr. So's evidence is completely unreliable. It is inconceivable that an individual with a background education in commerce and finance, followed by a lengthy career in the financial industry, could make the statements that Mr. So did. He understands the effect of a GSA, which is that one party is granted security over its assets in favour of another party (the secured party). This is a fundamental and elementary financing concept. I fail to understand how Mr. So can appreciate the effect of a GSA in situations where a Redstone entity is lending money to a borrower, yet fail to understand the effects of the same type of agreement when granted by RIC in favour of RCC. It is impossible to reconcile these positions.

65 I find that Mr. So's attempt to explain this anomaly arose *ex post facto*. Mr. So arrived at his *pari passu* understanding not at the time of granting the security, but subsequent to the collapse of Redstone and the initiation of these proceedings in an attempt to justify that the three entities in question should be consolidated for distribution purposes. The fact that substantive consolidation, if granted, favours his family and friends, cannot be overlooked.

66 I am satisfied that Mr. So knew that RCC was created in order that it could attract eligible funds for registered investors; that RIC was a separate entity from RCC; that RIC granted a security agreement in favour of RCC; and that the effect of granting such a security agreement resulted in RCC being a secured party holding a security interest in the assets of RIC and, therefore, having priority over RCC.

67 The evidence of Mr. So is replete with contradictions. I find his evidence to be unreliable in all respects, such that I have disregarded it in its entirety. Obviously, this finding is extremely detrimental to the position put forth by counsel on behalf of both RIC Investors and RMS Investors, to the extent they rely on the evidence of Mr. So.

Investor State of Mind

68 Counsel for the RMS Investors also pointed to evidence of a number of RMS and RIC Investors who claimed they were led to believe that there was no distinction between RIC and RMS or RIC and RCC, and further that there was no evidence that RCC Investors relied on their priority position in making their purchases. In support of this argument, the RMS Investors highlighted the evidence of Cynthia Lewis, Chad MacDonald, Nick DeCesare, Robert Dodd, Dario Mirabella and Ronald Smithers. In my view, the evidence of these individuals carries little weight.

69 Their evidence has to be discounted because it is subjective evidence provided today about their state of mind and knowledge at the time they made the investment a number of years ago. Their evidence is also at odds with the language contained in the loan agreement and OMs. The evidence is suspect as these parties are aware that it is in their best financial interest to take the

position that they were led to believe there was no distinction between RIC, RMS and RCC. Indeed, it would be surprising if they did not take such a position. Investors in RIC and RMS stand to receive nominal distribution unless there is substantive consolidation. This is in contrast to a projected distribution of 28% if there is substantive consolidation.

70 A review of the authorities also convinces me that their evidence is of very limited utility and is largely irrelevant. The "elements of consolidation" adopted from U.S. case law were referenced in Northland, supra. Absent from this list, and for good reason, is the knowledge or state of mind of the investor or creditor at the time that investments were made or credit was advanced.

71 In my view, a creditor's motivation for investing is not relevant to any of the considerations set out in the test for substantial consolidation. I considered this issue in a preliminary motion, indexed as *Redstone Investment Corporation*, 2016 ONSC 513, at paras. 11 - 15:

> [11] RCC Representative Counsel submits that the evidence in the Bach Affidavit is relevant as it shows Mr. Bach's motivation for investing in RCC and the actual prejudice he will suffer in the event of substantive consolidation.
>
> [12] The test for substantive consolidation was recently summarized in *Bacic v. Millennium Educational and Research Charitable Foundation*, 2014 ONSC 5875, 19 C.B.R. (6th) 286 at para 113.
>
>> It requires the balancing of interest of the affected parties and an assessment whether creditors will suffer greater prejudice in the absence of consolidation and the debtors or any objecting creditors will suffer from its imposition. Regard must be had to the:
>>
>> a) Difficulty in segregating assets;
>>
>> b) Presence of consolidated Financial Statements;
>>
>> c) Profitability of consolidation at a single location;
>>
>> d) Commingling of assets and business functions;
>>
>> e) Unity of interests in ownerships;

f) Existence of intercorporate loan guarantees; and,

g) Transfer of assets without observance of corporate formalities.

> in order to assess the overall effect of the consolidation. (*Atlantic Yarns Inc., Re*, 2008 NBQB 144; *Northland Properties Ltd., Re*, [1988] B.C.J. No. 1210 (B.C.S.C.), affirmed in *Northland Properties Ltd., Re*, [1989] B.C.J. No. 63 (B.C.C.A.) and *PSINET Ltd, Re* (2002), 33 C.B.R. (4th) 284 (Ont. S.C. [Commercial List]).

[13] In *PSINET*, supra, Farley J. held, at para. 11 that consolidation by its very nature will benefit some creditors and prejudice others and, as a result, it is appropriate to look at the overall general effect. This approach was affirmed in *Atlantic Yarns*, supra. In *J.P. Capital Corp.*, Re (1995), 31 CBR (3d) 102 (Ont. S.C.) Chadwick J. expressed concern about the consolidation of actions without knowing the effect it will have on all creditors. Chadwick J. wrote, "Although expediency is an appropriate consideration, it should not be done at the possible prejudice or at the expense of any particular creditor." In considering the relevance of *JP Capital* to this matter, I note that the *J.P. Capital* involved an "extremely complex bankruptcy" touching on a number of companies and assets, the parties were in the midst of cross-examination, and there were issues raised with respect to the actual corporate structure of the various companies and the tracing of the assets in relationship to the parties (para.17)."

[14] In my view, Mr. Bach's motivation for investing in RCC is not relevant to any of the considerations set out in the test for substantive consolidation. As a result, in determining the overall general prejudice to both sets of creditors, it seems to me that if the evidence is not relevant, refusing leave cannot be prejudicial to Mr. Bach, as an individual creditor. The second part of the Rule 39.02(2) is not applicable as no cross-examination took place and since I have determined that the content of the affidavit is not relevant to the determination of the Substantive Consolidation Hearing, the fourth part of the test need not be considered.

[15] Accordingly, since I have concluded that the Bach Affidavit does not meet the relevance criteria of the Rule 39.02(2) test, the motion seeking leave to

> deliver the Bach Affidavit as evidence in the Substantive Consolidation Hearing is dismissed.

72 There is a great danger to placing any weight on the state of mind of the investor or creditor in the substantive consolidation analysis. Human nature is such that individuals would be far more likely to recite or recall a fact situation, which, if acceptable, puts them in a better financial position. All that is required would be for the individual to take the position that a number of the RIC Investors and RMS Investors are taking in these proceedings, namely, that they did not know that RCC had priority. This presupposes that the investors did not read the governing documents. It presupposes that the EMDs either did not read the governing documents or did not advise the Investors of the contents of the governing documents.

73 To recognize state of mind would result in an unacceptable level of commercial uncertainty where written contracts could be overridden by parties who voluntarily choose not to read the governing documents.

74 Counsel acknowledges that the consolidation of bankrupt estates was recently authorized in *Bacic, supra* and *D'Addario v. Ernst & Young Inc.*, 2014 ABQB 474. In both cases, the assets of the corporations, business functions and financial statements were all co-mingled. However, in deciding to consolidate the estates, the court in each decision explicitly noted that consolidation would not be to the prejudice or expense of a particular creditor. In particular, the court in *D'Addario* found that "no creditor would benefit from consolidation at the expense of any other". That is clearly not so in this case. The projected distribution for RCC Investors would be reduced from 86% to 28%.

Legal Argument

75 Counsel to RMS Investors referenced the text of Dr. Janis Sarra, *Rescue: The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Carswell, 2013), where the author explains the process to be followed in assessing whether to consolidate estates:

> Generally, the courts will determine whether to consolidate proceedings by assessing whether the benefits will outweigh the prejudice to particular creditors if the proceedings are to be consolidated. In particular, the court will examine whether the assets and liabilities are so intertwined that it is difficult to separate them for purposes of dealing with different entities. The court will also consider whether consolidation is fair and reasonable in the circumstances of the case.

76 Based on the jurisprudence canvassed above, there are two related streams of case law in Canada on the issue of substantive consolidation in either a restructuring or a bankruptcy situation: First, the *Northland* line of cases involving analysis of: (i) the elements of consolidation; and (ii) whether consolidation would prevent a harm or prejudice or would effect a benefit generally. Second, there is a more ad hoc approach involving fact-based analysis guided by the equities.

77 In this case, the essential effect of consolidation would be to avoid the priority arrangement purportedly created by the loan documents, resulting in moderate recoveries to the investors in each of the Redstone entities. Absent consolidation, RCC Investors will receive a projected 86% recovery. RCC Investors and RMS Investors would receive a nominal recovery at best.

78 The following general principles respecting the doctrine of substantive consolidation represent a summary of Canadian case law:

(i) Are the elements of consolidation present, such as the intertwining of corporate functions and other commonalities across the group?

(ii) Do the benefits of consolidation outweigh the prejudice to particular creditors?

(iii) Is consolidation fair and reasonable in the circumstances?

79 Based on the foregoing -- and knowing that the evidence of Mr. So carries no weight and that the evidence of the investors is of very limited import -- the analysis of the *Northland* factors supports maintaining the status quo.

(i) Difficulty in Segregating Assets

80 The assets of each of RIC, RCC and RMS are easily identifiable, are not difficult to segregate, and have been segregated as is demonstrated by the Receiver's Statement of Receipts and Disbursements.

(ii) Presence of Consolidated Financial Statements

81 RIC, RCC and RMS did not prepare consolidated financial statements. All financial statements, audited and unaudited, were prepared on an entity-by-entity basis. The financial statements of RIC and RCC were audited. This factor supports maintaining the status quo.

(iii) Co-mingling of Assets and Business Functions

82 The only material asset of RCC is the secured inter-company receivable from RIC, which is not co-mingled with any assets of RIC or RMS. To the extent that any business functions were co-mingled, this can be explained by the MSA between RMS and RIC and the terms of the OMs that confirm that RIC was liable for all costs incurred by RCC relating to RCC's Offering. As such, this factor supports maintaining the status quo.

(iv) Unity of Interests in Ownership

83 There is no unity of interest in ownership. RIC, RCC and RMS have different ownership

structures. RIC is owned 60% by Mr. So and 40% by Mr. Hansen. RCC is owned 60% by TCI and 40% by Mr. So. RMS is wholly-owned by Mr. So.

(v) Existence of Inter-Corporate Loan Guarantees

84 There are no inter-corporate loan guarantees of any third party financing. This factor supports maintaining the status quo.

(vi) Transfer of Assets Without Observance of Corporate Formalities

85 While there is evidence of transfers of assets without observance of corporate formalities, the preponderance of evidence relates to transfers from RIC/RCC to RMS. Prior to the CCAA filing, it was determined that RMS received significant unauthorized cash transfers from RIC estimated to be approximately $8.5 million. The Receiver completed an investigation and prepared an analysis relating to the source and uses of funds relating to RMS. As a result of the analysis, the Receiver determined that there is a total of approximately $8.3 million due from RMS to RIC and RCC. As such, in my view, this factor supports maintaining the status quo.

Prejudice to Creditors

86 In addition to a review of the factors set out above, the court will consider the relative prejudice to creditors that will result from substantive consolidation. In this case, substantive consolidation eliminates the secured inter-company receivable, while it is the only material asset of RCC. The result is, therefore, from an objective standpoint, extremely prejudicial to the RCC Investors as their recoveries (based on available information in the Receiver's Fourth Report) would go from 86% in a status quo scenario to 28% in a substantively consolidated estates scenario. Conversely, the RIC Investors and RMS Investors benefit from the consolidation from effectively no recovery in a status quo scenario to a 28% recovery in a substantively consolidated scenario.

87 Investors in RCC and RIC took calculated risks based upon OMs that disclosed the RCC GSA and RIC loan. The RIC Investors acknowledge that these were risky investments and that they may not recover their investments. Now, facing the very risk they previously acknowledged, the RIC Investors seek to ameliorate the prospect of a negligible recovery against RIC to the prejudice of RCC Investors.

88 As Trainer J. explained in *Northland*, "it would be improper for the court to interfere with or appear to interfere with the rights of the creditors," and that such an appearance would be created if the estates are ordered merged for all purposes. This caution rings true in this case. To order substantive consolidation would require me to ignore written contracts and rely on subjective *ex post facto* evidence.

Conclusion

89 Substantive consolidation is an equitable remedy. The primary aim of this extraordinary remedy is to ensure the equitable treatment of all creditors. It is recognized that as consolidation effectively redistributes wealth among creditors of the related entities, individuals will invariably realize asymmetric losses or gains (see: M. MacNaughton and M. Arzoumanidis, *"Substantive Consolidation in the Insolvency of Corporate Groups: A Comparative Analysis*" (2007), ANNREVINSOLV 16, at p. 3).

90 In this case, I have concluded that it is not appropriate to invoke this extraordinary remedy. The assets are held separately and audited financial statements exist for RIC and RCC. The governing loan documents clearly set out that the corporations are separate and that the obligations of RIC to RCC are subject to a GSA. Referencing *Northland,* the "elements of consolidation" are not present. Furthermore, there would also be significant financial prejudice to creditors of RCC if substantive consolidation were ordered.

91 In the result, an order shall issue that the three corporate entities are not be to substantially consolidated.

Costs

92 The parties have previously provided costs outlines to the court, which should be incorporated into a draft order for my review.

G.B. MORAWETZ R.S.J.

1 The RIC OMs state that the subscription documents have to be delivered to RIC at its Duncan Mill Road address for all except subscriptions under RIC's first two OMs: the July 8, 2010 OM directs that forms be sent to Harris Brown & Partners Ltd. as RIC's agent, and the January 20, 2011 OM directs that forms be sent to Sterling Grace as RIC's agent. On February 20, 2014, the registration of Sterling Grace was suspended by the Ontario Securities Commission for several failures, including with respect to acting as an exempt market dealer facilitating subscriptions to Redstone Investment Corporation.

2 The RCC OMs state that the subscription documents be sent to RCC at its Duncan Mill Road address.

3 The cease trade orders were issued on June 7, 2012 in BC and June 15, 2012 in Alberta. The orders were fully revoked on October 4, 2012 in BC and October 10, 2012 in Alberta.

4 The RCC OMs are dated April 3, 2012 and March 1, 2013.

5 As a result of the *Mareva* order, the Monitor undertook a forensic review of two of RMS's bank accounts at the TD Bank. RMS also maintains an account with National Bank. The Receiver also completed an investigation and prepared completed an analysis relating to the sources and use of funds relating to RMS. As a result of this analysis, the Receiver determined that there was a total of $8,344,714 due from RMS to RIC and RCC.

6 313 U.S. 215 (1941).

7 810 F.2d 270, Bankr. L. Rep (CCH) P 71618 (D.C. Cir. 1987). This test has been adopted by the D.C. Circuit and the Eleventh Circuit: see Eastgroup Properties v. Southern Motel Assn'n, Ltd., 935 F.2d 245, 249, Bankr. L. Rep (CCH) P 74055 (11th Cir. 1991). The necessity of consolidation requirement follows from Snider Brothers Inc., Re, 18 B.R. 230 (U.S. Mass., 1982) and the balancing of interests element flows from Baker & Getty Financial Services Inc., Re, 78 B.R. 139 (U.S. Bankr. N.D. Ohio, 1987).

8 This is a typical *alter ego* inquiry made in corporate veil cases and generally involves consideration of the seven factors set out in In re Vecco Construction Industries, Inc., 4 B.R. 407 (Bankr. E.D. Va. 1980): 1. Difficulty in segregating assets; 2. Presence of consolidated financial statements; 3. Profitability of consolidation of a single location; 4. Comingling of assets and business functions; 5. Unity of interests in ownership; 6. Existence of inter-corporate loan guarantees; and 7. Transfers of assets without observance of corporate formalities.

9 860 F.2d 515, Bankr. L. Rep. (CCH) P 72482 (2d Cir. 1988). This test has been adopted by the Second and Ninth Circuits and followed by the Fourth Circuit.

10 For example, in Soviero v. Franklin National Bank of Long Island, 328 F. 2d 446 (2d Cir. 1964), the Second Circuit Court of Appeals focused the inquiry on corporate veil-based principles and specifically looked to whether there was an abuse of the corporate form or structure, including whether the companies at issue operated a single business, had the same directors, shareholders, and staff, or shared accounting records. In Chemical Bank New York Trust Co. v. Kheel, 369 F. 2d 845 (2nd Cir. 1966), the court found that substantive consolidation can be authorized where the finances of the entities are hopelessly entangled despite a creditor's reliance on the separate credit of the debtor companies.

11 419 F.3d 195, Bankr. L. Rep. (CCH) P 80343 (3d Cir. 2005).

TAB 8

Indexed as:

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.

[1988] A.J. No. 1226

[1989] 2 W.W.R. 566

64 Alta. L.R. (2d) 139

72 C.B.R. (N.S.) 20

Action No. 8801-14453

Alberta Court of Queen's Bench
Judicial District of Calgary

Forsyth J.

December 22, 1988.

Counsel:

J.J. Marshall, Q.C., J.A. Legge, for Norcen Energy Resources Limited and Prairie Oil Royalties Company, Ltd.
E.D. Tavender, Q.C., D. Lloyd, R. Wigham, R.C. Dixon, for Oakwood Petroleums Ltd.
B. Tait, B.D. Newton, for the Bank of Montreal.
B. O'Leary, M.R. Russo, A. Pettie, A.Z. Breitman for Sceptre Resources Limited.
L. Robinson, for the Royal Bank of Canada.
P.T. McCarthy, T. Warner, for the HongKong Bank of Canada.
R. Gregory, P. Jull, for Bank America, Canada.
R.C. Pittman, B.J. Roth, for Esso Resources.
W. Corbett, for Canadian Co-operative Society and Saskatchewan Co-operative Society.
T.L. Czechowskyj, for National Bank.
J.G. Hanley, H.J.R. Clarke, for A.B.C. noteholders.
V.P. Lalonde, L.R. Duncan, for Innovex Equities Corporation.
I. Kerr, for Alberta Securities.
G.K. Randall, Q.C., for the Director C.B.C.A.

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1 **FORSYTH J.**:-- On 12th December 1988 Oakwood Petroleums Limited ("Oakwood") filed with the court a plan of arrangement ("the plan") made pursuant to the Companies' Creditors Arrangement Act (Canada), R.S.C. 1970, c. C-25 ("C.C.A.A."), as amended, ss. 185 and 185.1 of the Canada Business Corporations Act, S.C. 1974-75-76 as amended, and s. 186 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15, as amended.

2 On 16th December 1988 Oakwood brought an application before me for an order which would, inter alia, approve the classification of creditors and shareholders proposed in the plan. I would note that the classifications requested are made pursuant to ss. 4, 5 and 6 of the C.C.A.A. for the purpose of holding a vote within each class to approve the plan.

3 Since my concern primarily is with the secured creditors of Oakwood, I shall set out, in part, the sections of the C.C.A.A. relevant to the court's authority with respect to compromises with secured creditors:

> 5. Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may . . . order a meeting of such creditors or class of creditors . . .
> 6. Where a majority in numbers representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings . . . held pursuant to sections 4 and 5 . . . agree to any compromise or arrangement . . . [it] may be sanctioned by the court, and if so sanctioned is binding on all the creditors . . .

4 The plan filed with the court envisions five separate classes of creditors and shareholders. They are as follows:

(i) The secured creditors;
(ii) The unsecured creditors;
(iii) The preferred shareholders of Oakwood;
(iv) The common shareholders and holders of class A non-voting shares of Oakwood;
(v) The shareholders of New York Oils Ltd.

5 With the exception of the proposed class comprising the secured creditors of Oakwood, there has been for the moment no objection to the proposed groupings. I add here that shareholders of course have not yet had notice of the proposal with respect to voting percentages and classes with respect to their particular interests. With that caveat, and leaving aside the proposed single class of secured creditors, I am satisfied that the other classes suggested are appropriate and they are approved.

6 I turn now to the proposed one class of secured creditors. The membership of and proposed scheme of voting within the secured creditors class is dependent upon the value of each creditor's security as determined by Sceptre Resources Ltd. ("Sceptre"), the purchaser under the plan.

7 As a result of those valuations, the membership of that class was determined to include: the Bank of Montreal, the A.B.C. noteholders, the Royal Bank of Canada, the National Bank of Canada and the HongKong Bank of Canada and the Bank of America Canada. Within the class, each secured creditor will receive one vote for each dollar of "security value". The valuations made by Sceptre represent what it considers to be a fair value for the securities.

8 Any dispute over the amount of money each creditor is to receive for its security will be determined at a subsequent fairness hearing where approval of the plan will be sought. Further, it should be noted that all counsel have agreed that, on the facts of this case, any errors made in the valuations would not result in any significant shift of voting power within the proposed class so as to alter the outcome of any vote. Therefore, the valuations made by Sceptre do not appear to be a major issue before me at this time insofar as voting is concerned.

9 The issue with which I am concerned arises from the objection raised by two of Oakwood's secured creditors, namely, HongKong Bank and Bank of America Canada, that they are grouped together with the other secured creditors. They have brought applications before me seeking leave to realize upon their security or, in the alternative, to be constituted a separate and exclusive class of creditors and to be entitled to vote as such at any meeting convened pursuant to the plan.

10 The very narrow issue which I must address concerns the propriety of classifying all the secured creditors of the company into one group. Counsel for Oakwood and Sceptre have attempted to justify their classifications by reference to the "commonality of interests test" described in Sovereign Life Assur. Co. v. Dodd [1892] 2 Q.B. 573. That test received the approval of the Alberta Court of Appeal in Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, where Kerans J.A., on behalf of the court, stated:

> We agree that the basic rule for the creation of groups for the consideration of fundamental corporate changes was expressed by Lord Esher in Sovereign Life Assur. Co. v. Dodd, [supra] when he said, speaking about creditors:
>
> ". . . if we find a different state of facts existing among different creditors which may differently affect their minds and their judgments, they must be divided into different classes."

11 In the case of Sovereign Life Assur. Co., Bowen L.J. went on to state at p. 583 that the class:

> . . . must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common

interest.

12 Counsel also made reference to two other "tests" which they argued must be complied with - the "minority veto test" and the "bona fide lack of oppression test". The former, it is argued, holds that the classes must not be so numerous as to give a veto power to an otherwise insignificant minority. In support of this test, they cite my judgment in Amoco Can. Petroleum Co. v. Dome Petroleum Ltd., Calgary No. 8701-20108, 28th January 1988 (not yet reported).

13 I would restrict my comments on the applicability of this test to the fact that, in the Amoco case, I was dealing with "a very small minority group of [shareholders] near the bottom of the chain of priorities". Such is not the case here.

14 In support of the "bona fide lack of oppression test", counsel cite Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co., [1891] 1 Ch. 213, where Lindley L.J. stated at p. 239:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent . . .

15 Whether this test is properly considered at this stage, that is, whether the issue is the constitution of a membership of a class, is not necessary for me to decide as there have been no allegations by the HongKong Bank or Bank of America as to a lack of bona fides.

16 What I am left with, then, is the application to the facts of this case of the "commonality of interests test" while keeping in mind that the proposed plan of arrangement arises under the C.C.A.A.

17 Sceptre and Oakwood have argued that the secured creditors' interests are sufficiently common that they can be grouped together as one class. That class is comprised of six institutional lenders (I would note that the A.B.C. noteholders are actually a group of ten lenders) who have each taken first charges as security on assets upon which they have the right to realize in order to recover their claims. The same method of valuation was applied to each secured claim in order to determine the security value under the plan.

18 On the other hand, HongKong Bank and Bank of America have argued that their interests are distinguishable from the secured creditors class as a whole and from other secured creditors on an individual basis. While they have identified a number of individually distinguishing features of their interests vis-à-vis those of other secured parties (which I will address later), they have put forth the proposition that since each creditor has taken separate security on different assets, the necessary commonality of interests is not present. The rationale offered is that the different assets may give rise to a different state of facts which could alter the creditors' view as to the propriety of participating in the plan. For example, it was suggested that the relative ease of marketability of a

distinct asset as opposed to the other assets granted as security could lead that secured creditor to choose to disapprove of the proposed plan. Similarly, the realization potential of assets may also lead to distinctions in the interests of the secured creditors and consequently bear upon their desire to participate in the plan.

19 In support of this proposition, the HongKong Bank and Bank of America draw from comments made by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association - Ontario Continuing Legal Education, 5th April 1983, at p. 15, and by Stanley E. Edwards in an earlier article, "Reorganizations under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 603. Both authors gave credence to this "identity of interest" proposition that secured creditors should not be members of the same class "unless their security is on the same or substantially the same property and in equal priority". They also made reference to a case decided under c. 11 of the Bankruptcy Code of the United States of America which, while not applying that proposition in that given set of facts, accepted it as a "general rule". That authority is Re Palisades-on-the-Desplaines; Seidel v. Palisades-on-the-Desplaines 89 F. 2d. 214 at 217-18 (1937, Ill.).

20 Basically, in putting forth that proposition, the HongKong Bank and Bank of America are asserting that they have made advances to Oakwood on the strength of certain security which they identified as sufficient and desirable security and which they alone have the right to realize upon. Of course, the logical extension of that argument is that in the facts of this case each secured creditor must itself comprise a class of creditors. While counsel for the HongKong Bank and Bank of America suggested it was not necessary to do so in this case, as they are the only secured creditors opposed to the classification put forth, in principle such would have to be the case if I were to accept their proposition.

21 To put the issue in another light, what I must decide is whether the holding of distinct security by each creditor necessitates a separate class of creditor for each, or whether notwithstanding this factor that they each share, nevertheless this factor does not override the grouping into one class of creditors. In my opinion, this decision cannot be made without considering the underlying purpose of the C.C.A.A.

22 In Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. Calgary No. 8801-14453, 17th November 1988, after canvassing the few authorities on point, I concluded that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations. In referring to the case authority Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., [1934] S.C.R. 659, I stated at pp. 24 and 25:

> It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:

> "Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency proceedings' with the object of preventing a declaration of bankruptcy and the sale of these assets. If the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part, provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation . . ."

23 I went on to note:

> The C.C.A.A. is an Act designed to continue, rather than liquidate companies . . . The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term an Act designed to promote the continuation of an insolvent company. [emphasis added]

24 In this regard, I would make extensive reference to the article by Mr. Robertson, Q.C., where, in discussing the classification of creditors under the C.C.A.A. and after stating the proposition referred to by counsel for the HongKong Bank and Bank of America, he states at p. 16 in his article:

> An initial, almost instinctive, response that differences in claims and property subject to security automatically means segregation into different classes does not necessarily make economic or legal sense in the context of an act such as the C.C.A.A.

25 And later at pp. 19 and 20, in commenting on the article by Mr. Edwards, he states:

> However, if the trend of Edwards' suggestions that secured creditors can only be classed together when they held security of the same priority, that perhaps classes should be sub-divided into further groups according to whether or not a member of the class also holds some other security or form of interest in the debtor company, the multiplicity of discrete classes or sub-classes classes might be so compounded as to defeat the object of the act. As Edwards himself says, the subdivision of voting groups and the counting of angels on the heads of pins must top somewhere and some forms of differences must surely be disregarded.

26 In summarizing his discussion, he states on pp. 20-21:

> From the foregoing one can perceive at least two potentially conflicting approaches to the issue of classification. On the one hand there is the concept that members of a class ought to have the same "interest" in the company, ought to be only creditors entitled to look to the same "source" or "fund" for payment, and ought to encompass all of the creditors who do have such an identity of legal rights. On the other hand, there is recognition that the legislative intent is to facilitate reorganization, that excessive fragmentation of classes may be counter-productive and that some degree of difference between claims should not preclude creditors being put in the same class.
>
> It is fundamental to any imposed plan or reorganization that strict legal rights are going to be altered and that such alteration may be imposed against the will of at least some creditors. When one considers the complexity and magnitude of contemporary large business organizations, and the potential consequences of their failure it may be that the courts will be compelled to focus less on whether there is any identity of legal rights and rather focus on whether or not those constituting the class are persons, to use Lord Esher's phrase, "whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest". . .
>
> If the plan of reorganization is such that the creditors' particular priorities and securities are preserved, especially in the event of ultimate failure, it may be that the courts will, for example in an apt case decide that creditors who have basically made the same kinds of loans against the same kind of security, even though on different terms and against different particular secured assets, do have a sufficient similarity of interest to warrant being put into one class and being made subject to the will of the required majority of that class. [emphasis added]

27 These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the "identity of interest" proposition as a starting point in the classification of creditors necessarily results in a "multiplicity of discrete classes" which would make any reorganization difficult, if not impossible, to achieve.

28 In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the HongKong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors.

29 I turn now to the other factors which the HongKong Bank and Bank of America submit distinguishes them on individual bases from other creditors of Oakwood. The HongKong Bank and Bank of America argue that the values used by Sceptre are significantly understated. With respect to the Bank of Montreal, it is alleged that that bank actually holds security valued close to, if not in excess of, the outstanding amount of its loans when compared to the HongKong Bank and Bank of America whose security, those banks allege, is approximately equal to the amount of its loans. It is submitted that a plan which understates the value of assets results in the oversecured party being more inclined to support a plan under which they will receive, without the difficulties of realization, close to full payments of their loans.

30 The problem with this argument is that it is a throwback to the "identity of interest" proposition. Differing security positions and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender, with the possible exception of the A.B.C. noteholders who could be lumped with the HongKong Bank or Bank of America, as their percentage realization under the proposed plan is approximately equal to that of the HongKong Bank and Bank of America.

31 Further, the HongKong Bank and Bank of America also submit that since the Royal Bank and National Bank of Canada are so much more undersecured on their loans, they too have a distinct interest in participating in the plan which is not shared by themselves. The sum total of their submissions would seem to be that, since oversecured and undersecured lenders have a greater incentive to participate, it is only those lenders, such as themselves with just the right amount of security, that do not share that common interest. Frankly, it appears to me that these arguments are drawn from the fact that they are the only secured creditors of Oakwood who would prefer to retain their right to realize upon their security, as opposed to participating in the plan. I do not wish to suggest that they should be chided for taking such a position, but surely expressed approval or disapproval of the plan is not a valid reason to create different classes of creditors. Further, as I have already clearly stated, the C.C.A.A. can validly be used to alter or remove the rights of creditors.

32 Finally, I wish to address the argument that, since Sceptre has made arrangements with the Royal Bank of Canada relating to the purchase of Oakwood, it has an interest not shared by the other secured creditors. The Royal Bank's position as a principal lender in the reorganization is separate from its status as a secured creditor of Oakwood and arises from a separate business decision. In the absence of any allegation that the Royal Bank will not act bona fide in considering the benefit of the plan of the secured creditors as a class, the HongKong Bank and Bank of America cannot be heard to criticize the Royal Bank's presence in the same class.

33 In light of my conclusions, the result is that I approve the proposed classification of secured creditors into one class.

34 There is one further comment I wish to make with respect to the valuations made by Sceptre for the purposes of the vote calculations. I assume that Sceptre will be relying on those valuations at

any fairness hearing, assuming this matter proceeds. I would simply observe that the onus is of course on Sceptre to establish that the valuations relied on and set forth in their plan in fact represent fair value under all the circumstances.

35 It has been obvious during the course of the hearing of this phase of the application that at least two of the secured creditors, to whom reference has been made, are not satisfied that that is the case, and in the event evidence is led by them in an effort to establish that the values proposed do not represent the fair value, the onus will be on Sceptre and Oakwood to establish the contrary. Underlying my comments above are of course the court's concern of ensuring that approval of any plan proposed does not result in unfair confiscation of the property of any secured creditors. In that regard, the underlying value of the assets of each individual secured creditor on the facts of this case would appear to be of prime importance.

FORSYTH J.

TAB 9

Court File No. 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 1ST DAY
	)	
JUSTICE NEWBOULD	)	OF DECEMBER, 2016

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, c. C-36, AS AMENDED

PLAN FILING AND MEETING ORDER

THIS MOTION, made by Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Ltd. (collectively, the "**Canadian Debtors**") jointly with Ernst & Young Inc. in its capacity as monitor of the Canadian Debtors (the "**Monitor**" and together with the Canadian Debtors, the "**Moving Parties**") for an order, *inter alia*, (a) accepting the filing of the Plan, (b) authorizing the classification of creditors for purposes of voting on the Plan, (c) authorizing and directing the Monitor to call, hold and conduct a meeting of Affected Unsecured

Creditors to consider and vote on a resolution to approve the Plan, (d) authorizing and directing the mailing and distribution of the Meeting Materials, (e) approving the procedures to be followed with respect to the meeting of Affected Unsecured Creditors, and (f) setting a date for the hearing of the Moving Parties' motion for Court approval of the Plan, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the One Hundred and Thirty Third report of the Monitor dated November 23, 2016 (the "**One Hundred and Thirty Third Report**"), the responding Motion Record of the UKPI (defined below), and on hearing the submissions of counsel for the Monitor and those other parties present, no other parties appearing for the other parties served with the Motion Record, although duly served as appears from the affidavit of service, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion, the Motion Record and the One Hundred and Thirty Third Report is hereby abridged and validated such that this Motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

DEFINITIONS

2. THIS COURT ORDERS that for the purposes of this Meeting Order, in addition to the terms defined elsewhere in this Meeting Order or in the Plan, the following terms shall have the following meanings:

(a) "**1988 Bondholder**" means a holder of one or more 1988 Bonds on the Voting Record Date including any Beneficial Bondholder holding 1988 Bonds;

(b) "**1988 Bondholder Claim**" means a Voting Claim by a 1988 Bondholder in respect of 1988 Bonds;

(c) "**1988 Bonds**" has the meaning given to it in subparagraph 2(bbbbb)(iii);

(d) "**Affected Claim**" means an Affected Claim under the Plan;

(e) "**Affected Creditor**" means an Affected Creditor under the Plan;

(f) "**Affected Unsecured Claim**" means any Affected Claim that is not a Director/Officer Claim or an Equity Claim;

(g) "**Affected Unsecured Creditor**" means any holder of an Affected Unsecured Claim, but only with respect to and to the extent of such Affected Unsecured Claim;

(h) "**Affected Unsecured Creditors Class**" has the meaning given to it in paragraph 10;

(i) "**Beneficial Bondholder**" means a beneficial owner of any Bonds as at the Voting Record Date;

(j) "**Bondholder**" means, as at the Voting Record Date, a registered or beneficial holder of a Bond, as the context requires, in such capacity;

(k) "**Bondholder Claim**" means a Claim held by a Bondholder in respect of the Bonds;

(l) "**Bondholder Claim Amount**" has the meaning given to it in paragraph 44;

(m) "**Bondholder Mailing Materials**" has the meaning given to it in paragraph 21;

(n) "**Bondholder Meeting Materials**" has the meaning given to it in subparagraph 2(iii)(vi);

(o) "**Bondholder Proxy**" means a proxy substantially in the form of Schedule "**C-3**", to be completed by Beneficial Bondholders in accordance with the terms of this Meeting Order and the Instructions to Bondholders;

(p) "**Bonds**" means the Crossover Bonds, 1988 Bonds and NNCC Bonds and any bond, notes or debenture issued in substitution or replacement thereof and "**Bond**" means any one of them;

(q) "**Business Day**" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in both Toronto, Ontario, Canada and New York, New York, U.S.A.;

(r) "**Canadian Debtors**" has the meaning given to it in the preamble;

(s) "**Canadian Pension Claims**" has the meaning given to it in the Plan;

(t) "**Canadian Registered Pension Plans**" has the meaning given to it in the Plan;

(u) "**CCAA Court**" means the Ontario Superior Court of Justice (Commercial List);

(v) "**CCAA Proceedings**" means these proceedings commenced by the Canadian Debtors pursuant to the CCAA;

(w) "**Chair**" has the meaning given to it in paragraph 31;

(x) "**Claim**" has the meaning given to it in the applicable Claims Orders but shall not include a Director/Officer Claim;

(y) "**Claims Orders**" means, as the context requires, any or all of the following Orders of the CCAA Court: the Claims Procedure Order, the Compensation Claims Procedure Order, the Claims Resolution Order, the Order approving the Cross-Border Claims Protocol dated September 16, 2010; the EMEA Claims Procedure Order dated January 14, 2011, the Intercompany Claims Procedure Order dated July 27, 2012, the Order dated September 29, 2016 in respect of Claims against the New Applicants; and the Post-Filing Claims Bar Date Order;

(z) "**Claims Procedure Order**" means the Claims Procedure Order made by the CCAA Court dated July 30, 2009, as amended and restated on October 7, 2009;

(aa) "**Claims Resolution Order**" means the Claims Resolution Order dated September 16, 2010;

(bb) "**Compensation Claims**" has the meaning given to it in the Compensation Claims Procedure Order;

(cc) "**Compensation Claims Procedure Order**" means the Compensation Claims Procedure Order of the CCAA Court dated October 6, 2011, including the Compensation Claims Methodology Order of the CCAA Court dated October 6, 2011;

(dd) "**Compensation Creditor**" means a Creditor who is a holder of a Compensation Claim and who, as of the date of this Meeting Order, continues to be represented by a Representative and Representative Counsel pursuant to the Representation Orders or by Unifor;

(ee) "**Compensation Creditor Mailing Materials**" has the meaning given to it in paragraph 15;

(ff) "**Compensation Creditor Meeting Materials**" has the meaning given to it in subparagraph 2(iii)(vii);

(gg) "**Crossover Bondholder Claim**" means a Voting Claim of a Crossover Bondholder in respect of Crossover Bonds, the aggregate amount of all Crossover Bondholder Claims being US$3,940,750,260;

(hh) "**Crossover Bondholder**" means a holder of one or more Crossover Bonds on the Voting Record Date including any Beneficial Bondholder holding Crossover Bonds;

(ii) "**Crossover Bonds**" has the meaning given to it in subparagraph 2(bbbbb)(ii);

(jj) "**Depository**" means The Depository Trust Company or agency of similar nature;

(kk) "**Directors**" means all former directors (or their estates) of the Canadian Debtors, in such capacity, and "**Director**" means any one of them;

(ll) "**Directors / Officer Claim**" means any right or claim of any Person howsoever arising against one or more of the Directors or Officers for which any Director or Officer of a Canadian Debtor is alleged to be by statute or otherwise by law liable to pay in his or her capacity as a Director or Officer, whether or not such right or

claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any claim, matter, action, cause or chose in action, whether existing at present or commenced in the future, and shall include any "Director/Officer Claim" (as such term is defined in the Claims Procedure Order without reference to the exclusion of any claims in such definition);

(mm) "**Duplicative Voting Claim**" means a Voting Claim that, absent substantive consolidation under this Meeting Order and the Plan, would have been a Voting Claim against more than one of the Canadian Debtors based on the same underlying debt or obligation;

(nn) "**Epiq**" means Epiq Bankruptcy Solutions, LLC;

(oo) "**Equity Claim**" means a Claim that is in respect of an Equity Interest, including a claim for, among others: (i) a dividend or similar payment; (ii) a return of capital; (iii) a redemption or retraction obligation; (iv) a monetary loss resulting from the ownership, purchase or sale of an Equity Interest or from the rescission or, in Quebec, annulment, of a purchase or sale of an Equity Interest, or (v) contribution or indemnity in respect of a claim referred to in any of the foregoing (i) through (iv);

(pp) "**Equity Claimant**" means any Person with an Equity Claim or holding an Equity Interest, but only in such capacity;

(qq) "**Equity Interest**" means a share of a Canadian Debtor, or a warrant or option or another right to acquire a share in a Canadian Debtor, including the common shares of NNC and the preferred shares of NNL;

(rr) "**Indenture Trustees**" means the indenture trustees (or their successors and assigns) under the Trust Indentures;

(ss) "**Information Circular**" means the information circular dated November 30, 2016 in respect of the Plan, as the same may be amended, supplemented or restated from time to time;

(tt) "**Intercompany Claims**" means a Claim by a Nortel Group entity (including by any administrator, liquidator, receiver, trustee, office holder or similar official appointed in respect thereof) against a Canadian Debtor, including those unsecured intercompany claims against the Canadian Debtors set out in Schedule "C" to the Plan;

(uu) "**Initial Order**" means initial order dated January 14, 2009, as amended and restated from time to time;

(vv) "**Instructions**" means the Instructions to Bondholders and Instructions to Ordinary Creditors;

(ww) "**Instructions to Bondholders**" means, as the context requires, the Instructions to Participant Holders or Instructions to Beneficial Bondholders;

(xx) "**Instructions to Ordinary Creditors**" means the instructions substantially in the form attached as Schedule "**B-1**" hereto;

(yy) "**Instructions to Participant Holders**" means the instructions to Participant Holders substantially in the form attached as Schedule "**C-1**" hereto;

(zz) "**Instructions to Beneficial Bondholders**" means the instructions to Beneficial Bondholders substantially in the form attached as Schedule "**C-2**" hereto;

(aaa) "**Latest Known Address**" means, with respect to any Creditor, the address on file with the Canadian Debtors or the Monitor as of the date of this Meeting Order as the primary address for contact for such Creditor and shall not include any secondary or additional addresses that may have been provided by such Creditor;

(bbb) "**Letter to Compensation Creditors**" means the form of letter to be sent to Compensation Creditors substantially in the form attached as Schedule "**A-3**" hereto;

(ccc) "**Letter to Ordinary Creditors and Bondholders**" means the form of letter to be sent to Ordinary Creditors and Bondholders substantially in the form attached as Schedule "**A-2**" hereto;

(ddd) "**Mailing Agent**" means Broadridge Financial Solutions, Inc. and any other mailing agent used by any Participant Holder to distribute materials to Beneficial Bondholders;

(eee) "**Mailing Date**" means the date to be selected by the Monitor on which the Monitor shall make the mailings contemplated by paragraphs 13, 21 and 24 of this Meeting Order, which date shall be within seven (7) Business Days of the date of this Meeting Order;

(fff) "**Master Authentication Form**" means the form of master authentication form to be submitted by Participant Holders to Epiq attaching the Beneficial Bondholder Proxies received by Participant Holders and validating the holdings of such Beneficial Bondholders, substantially in the form attached as Schedule "**C-4**" hereto;

(ggg) "**Meeting**" means the meeting of the Affected Unsecured Creditors Class, and any extension or adjournment thereof, that is called and conducted in accordance with this Meeting Order for the purpose of considering and voting on the Plan;

(hhh) "**Meeting Date**" means the date and time for the Meeting to be selected by the Monitor, which date shall be on or about January 17, 2017 (unless extended in accordance with the terms of this Meeting Order);

(iii) "**Meeting Materials**" means:

(i) the Publication Notice;

(ii) the Plan;

(iii) the Information Circular;

(iv) the Meeting Order and any endorsement or reasons;

(v) as it relates to Ordinary Creditors, the Letter to Ordinary Creditors and Bondholders, a blank form of the Voting Proxy and Instructions to Ordinary Creditors (together with the documents set out in (i) through (iv) above, the "**Ordinary Creditor Meeting Materials**");

(vi) as it relates to Bondholders, the Letter to Ordinary Creditors and Bondholders and (A) with respect to Beneficial Bondholders, a blank form of Bondholder Proxy and Instructions to Beneficial Bondholders, and (B) with respect to Participant Holders, a blank form of Master Authentication Form and Instructions to Participant Holders (together with the documents set out in (i) through (iv) above, the "**Bondholder Meeting Materials**");

(vii) as it relates to Compensation Creditors, the Letter to Compensation Creditors (together with the documents set out in (i) through (iv) above, the "**Compensation Creditor Meeting Materials**");

(jjj) "**Meeting Order**" means this Meeting Order, as it may be amended by any further Order of the CCAA Court;

(kkk) "**Monitor**" has the meaning given to it in the preamble;

(lll) "**Monitor's Powers Orders**" means the following orders of the CCAA Court: (i) the Initial Order; (ii) the Claims Orders; (iii) the Order dated August 14, 2009; (iv) the Order (Monitor's Expansion of Power Order #2) dated October 3, 2014; (v) the New Applicants Order; and (vi) this Meeting Order;

(mmm) "**Monitor's Website**" means the website maintained by the Monitor in respect of the CCAA Proceedings at the following address: www.ey.com/ca/nortel;

(nnn) "**Moving Parties**" has the meaning given to it in the preamble;

(ooo) "**New Applicants**" means Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Ltd;

(ppp) "**New Applicants Order**" means the Order of the CCAA Court dated March 18, 2016 in Court File No. CV-16-11312-00CL;

(qqq) "**New Restructuring Claim**" means a Restructuring Claim (as defined in the Claim Procedure Order) arising after the Mailing Date;

(rrr) "**NNC**" means Nortel Networks Corporation;

(sss) "**NNCC Bondholder**" means a Registered, Unregistered or Beneficial Bondholder holding one or more NNCC Bonds;

(ttt) "**NNCC Bondholder Claim**" means a Voting Claim of a NNCC Bondholder in respect of NNCC Bonds, the aggregate amount all NNCC Bondholder Claims being US$150,951,562;

(uuu) "**NNCC Bonds**" has the meaning given to it in subsection 2(bbbbb)(iv);

(vvv) "**NNI Unsecured Claim**" means the allowed unsecured Voting Claim of Nortel Networks Inc. against Nortel Networks Limited in the amount of US$2.0 billion pursuant to the Final Canadian Funding and Settlement Agreement dated as of December 23, 2009 and approved by an Order of the CCAA Court dated January 21, 2010;

(www) "**NNL**" means Nortel Networks Limited;

(xxx) "**NNUK Claim**" means the Proven NNUK Claim and, the Contingent Additional NNUK Claim (as both terms are defined in the Plan);

(yyy) "**Notice to Affected Unsecured Creditors**" means the notice to Affected Unsecured Creditors substantially in the form attached as Schedule "**A-1**" hereto;

(zzz) "**Officers**" means all former officers (or their estates) of the Canadian Debtors, in such capacity, and "**Officer**" means any one of them;

(aaaa) "**One Hundred and Thirty First Report**" means the one hundred and thirty-first report of the Monitor dated November 4, 2016;

(bbbb) "**Ordinary Creditor**" means a Creditor with an Ordinary Creditor Claim, other than Compensation Creditors;

(cccc) "**Ordinary Creditor Claim**" means an Affected Unsecured Claim that is not a Bondholder Claim and, for greater certainty, includes the UKPI Claim, NNUK Claim, Canadian Pension Claims, Compensation Claims, Intercompany Claims and NNI Unsecured Claim;

(dddd) "**Ordinary Creditor Mailing Materials**" has the meaning given to it in paragraph 13;

(eeee) "**Ordinary Creditor Meeting Materials**" has the meaning given to it in subparagraph 2(iii)(v);

(ffff) "**Participant Holder**" means a Person whose name appears on any of the Participant Holders Lists as at the Voting Record Date but who is not a Beneficial Bondholder;

(gggg) "**Participant Holders List**" means the list of Participant Holders to be provided by the Depositories in accordance with the terms of this Meeting Order;

(hhhh) "**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, union, joint venture, government or any agency, officer or instrumentality thereof or any other entity;

(iiii) "**Plan**" means the plan of compromise and arrangement dated November 30, 2016 filed by the Moving Parties, as such plan of compromise and arrangement may be amended, supplemented or restated from time to time in accordance with the terms hereof;

(jjjj) "**Post-Filing Claims**" has the meaning given to it in the Post-Filing Claims Bar Date Order;

(kkkk) "**Post-Filing Claims Bar Date Order**" means the Order of the CCAA Court dated December 1, 2016 calling for Post-Filing Claims;

(llll) "**Proof of Claim**" means the "Proof of Claim" referred to in any of the Claims Orders, as applicable;

(mmmm) "**Proven Affected Unsecured Claim**" means a Proven Affected Unsecured Claim under the Plan;

(nnnn) "**Proxy**" means a Voting Proxy or Bondholder Proxy, as applicable;

(oooo) "**Publication Notice**" means the notice to Affected Unsecured Creditors substantially in the form attached as Schedule "**A-1**" hereto to be published in accordance with paragraph 11;

(pppp) "**Registered Bondholder**" means a Bondholder who is the legal owner or holder of one or more Bonds and whose name appears on a Registered Bondholder List;

(qqqq) "**Representation Orders**" means, collectively: (i) the Order of the CCAA Court dated May 27, 2009 appointing Koskie Minsky LLP as counsel for former employees, including pensioners, of the Canadian Debtors; (ii) the Order of the CCAA Court dated July 22, 2009 appointing Nelligan O'Brien Payne, LLP and Shibley Righton LLP as counsel for all Canadian non-unionized employees of the Canadian Debtors whose employment with the Canadian Debtors continued throughout the CCAA Proceedings; (iii) the Order of the CCAA Court dated July 30, 2009 appointing Koskie Minsky LLP as counsel for LTD Beneficiaries (as defined therein) receiving or entitled to receive disability income benefits by or through the Canadian Debtors;

(rrrr) "**Representatives**" means the Court appointed representatives appointed pursuant to the Representation Orders;

(ssss) "**Representative Counsel**" means the Court appointed representative counsel appointed pursuant to the Representation Orders;

(tttt) "**Required Majority**" means, with respect to the Affected Unsecured Creditors Class, a majority in number of Affected Unsecured Creditors holding Voting Claims representing at least two thirds in value of the Voting Claims of Affected Unsecured Creditors, in each case who are entitled to vote at the Meeting in accordance with the this Meeting Order and who are present and voting in Person or by proxy on the resolution approving the Plan at the Meeting;

(uuuu) "**Sanction Hearing**" has the meaning given to it in paragraph 60;

(vvvv) "**Sanction Hearing Date**" means the date to be selected by the Monitor for the Sanction Hearing, which is targeted to be scheduled on or about January 24, 2017 (or such other date on or after the Meeting Date as may be set by the Monitor or the CCAA Court);

(wwww) "**Sanction Order**" has the meaning given to it in the Plan;

(xxxx) "**Scrutineers**" has the meaning given to it in paragraph 32;

(yyyy) "**Secretary**" has the meaning given to it in paragraph 32;

(zzzz) "**Service List**" means the service list maintained for the CCAA Proceedings posted on the Monitor's Website;

(aaaaa) "**Settlement and Support Agreement**" means that certain settlement and plans support agreement dated as of October 12, 2016 entered into by and among the Settlement Parties (as defined in the Plan), together with all Annexes thereto, in each case, as amended, supplemented or otherwise modified from time to time in accordance with the terms thereof;

(bbbbb) "**Trust Indentures**" means collectively:

(i) the Indenture dated as of March 28, 2007 governing the 1.75% Convertible Senior Bonds due 2012 and the 2.125% Convertible Senior Bonds due 2014 (the "**2007 Bonds**") issued by Nortel Networks Corporation and guaranteed by Nortel Networks Limited and Nortel Networks Inc.;

(ii) the Indenture dated as of July 5, 2006, as supplemented by the First Supplemental Indenture dated as of July 5, 2006, the Second Supplemental Indenture dated as of May 1, 2007, and the Third Supplemental Indenture dated as of May 28, 2008, governing the Floating Rate Senior Bonds due 2011, the 10.125% Senior Bonds due 2013 and the 10.750% Senior Bonds due 2016 (together with the 2007 Bonds, the "**Crossover Bonds**") issued by Nortel Networks Limited and guaranteed by Nortel Networks Corporation and Nortel Networks Inc.;

(iii) the Indenture dated as of November 30, 1988, governing the 6.875% Bonds due 2023 (the "**1988 Bonds**") issued by Northern Telecom Limited (now Nortel Networks Limited); and

(iv) the Indenture dated as of February 15, 1996, governing the 7.875% Bonds due 2026 (the "**NNCC Bonds**") issued by Northern Telecom Capital Corporation (now Nortel Networks Capital Corporation) and guaranteed by Northern Telecom Limited (now NNL);

(ccccc) "**UKPI**" means the Nortel Networks UK Ltd Pension Trust Limited and the Board of the Pension Protection Fund;

(ddddd) "**UKPI Claim**" means UKPI's allowed Voting Claim in the amount of £339.75 million (being US $494,879,850 when converted in accordance with the Plan and paragraph 71 of this Meeting Order);

(eeeee) "**Unaffected Claim**" means any Unaffected Claim under the Plan;

(fffff) "**Unresolved Claim**" means an Affected Unsecured Claim which by the date of the Meeting in whole or in part: (i) has not been finally determined to be a Voting Claim; (ii) is validly disputed in accordance with the Claims Orders; and/or (iii) remains subject to review and/or resolution in accordance with the Claims Orders, including both as to proof and/or quantum, but shall not include the Contingent Additional NNUK Claim, which is a Voting Claim;

(ggggg) **"U.S. Bankruptcy Court"** means the United States Bankruptcy Court for the District of Delaware;

(hhhhh) **"Voting Claim"** means an Affected Unsecured Claim to the extent that such Affected Unsecured Claim has been accepted by the Monitor solely for the purpose of voting on the Plan (which acceptance for the purpose of voting shall have no effect on whether such Claim is a Proven Affected Unsecured Claim for purposes of the Plan), in each case in accordance with the provisions of the Claims Orders or any other Order, as applicable;

(iiiii) **"Voting Proxy"** means a proxy substantially in the form attached as Schedule "**B-2**" hereto, to be submitted to the Monitor by any Ordinary Creditor or Representative who wishes to vote by proxy at the Meeting; and

(jjjjj) **"Voting Record Date"** means November 21, 2016.

3. THIS COURT ORDERS that all references to time herein shall mean local time in Toronto, Ontario, Canada, and any reference to an event occurring on a Business Day shall mean prior to 4:00 P.M. on such Business Day unless otherwise indicated herein.

4. THIS COURT ORDERS that all references to the word "including" or "includes" shall mean "including without limitation" or "includes without limitation", as the case may be.

5. THIS COURT ORDERS that, unless the context otherwise requires, words importing the singular shall include the plural and *vice versa*, and words importing any gender shall include all genders.

THE PLAN

6. THIS COURT ORDERS that the Plan is hereby accepted for filing, and the Monitor is hereby authorized and directed to call and hold a meeting of Affected Unsecured Creditors to vote on the Plan in the manner set forth herein.

7. THIS COURT ORDERS that the Moving Parties may, at any time and from time to time prior to or at the Meeting, amend, restate, modify and/or supplement the Plan, subject to the terms of the Plan, provided that:

(a) the Monitor or the Chair shall communicate the details of any such amendments, restatements, modifications and/or supplements to Affected Unsecured Creditors present at the Meeting prior to any vote being taken at the Meeting;

(b) the Monitor shall provide notice to the Service List of any such amendments, restatements, modifications and/or supplements and shall forthwith file a copy thereof with the CCAA Court and in any event prior to the Sanction Hearing; and

(c) the Monitor shall post an electronic copy of any such amendments, restatements, modifications and/or supplements on the Monitor's Website prior to the Sanction Hearing.

FORMS OF DOCUMENTS

8. THIS COURT ORDERS that the following documents be and are hereby approved:

(a) Notices:

(i) Publication Notice (Schedule "**A-1**");

(ii) Letter to Ordinary Creditors and Bondholders (Schedule "**A-2**");

(iii) Letter to Compensation Creditors (Schedule "**A-3**");

(b) Ordinary Creditors:

(i) Instructions to Ordinary Creditors (Schedule "**B-1**");

(ii) form of Voting Proxy (Schedule "**B-2**");

(c) Bondholders:

(i) Instructions to Participant Holders (Schedule "**C-1**");

(ii) Instructions to Beneficial Bondholders (Schedule "**C-2**");

(iii) form of Bondholder Proxy (Schedule "**C-3**"); and

(iv) form of Master Authentication Form (Schedule "**C-4**").

9. THIS COURT ORDERS that the Monitor may (i) make any changes to the Meeting Materials as are necessary or desirable to conform the content thereof to the terms of the Plan or this Meeting Order, and (ii) at any time and from time to time prior to or at the Meeting, amend, restate, modify and/or supplement any of such materials, subject to the terms of the Plan, provided that:

(a) the Monitor or the Chair shall communicate the details of any such amendments, restatements, modifications and/or supplements to Affected Unsecured Creditors present at the Meeting prior to any vote being taken at the Meeting;

(b) the Monitor shall provide notice to the Service List of any such amendments, restatements, modifications and/or supplements and shall forthwith file a copy thereof with the CCAA Court and in any event prior to the Sanction Hearing; and

(c) the Monitor shall post an electronic copy of any such amendments, restatements, modifications and/or supplements on the Monitor's Website prior to the Sanction Hearing.

CLASSIFICATION OF CREDITORS

10. THIS COURT ORDERS that the only class of creditors for the purposes of considering and voting on the Plan shall be the "**Affected Unsecured Creditors Class**".

PUBLICATION OF NOTICE

11. THIS COURT ORDERS that the Monitor shall, as soon as practical, cause the Notice to Affected Unsecured Creditors to be published in English in The Globe and Mail (National and Local Edition), The Wall Street Journal (Global Edition), Ottawa Citizen and Calgary Herald and in French in Le Journal de Montreal.

12. THIS COURT ORDERS that the Monitor shall, no later than three (3) Business Days following the date of this Meeting Order, post an electronic copy of the Meeting Materials in

English and in French on the Monitor's Website under the heading "Plan and Other Creditor Meeting Documents" and serve the Meeting Materials on the Service List.

NOTICE TO ORDINARY CREDITORS

13. THIS COURT ORDERS that the Monitor shall, on the Mailing Date, deliver the Publication Notice, Letter to Ordinary Creditors and Bondholders, Information Circular, Instructions to Ordinary Creditors and a blank form of Voting Proxy (the "**Ordinary Creditor Mailing Materials**") by pre-paid first class mail, courier, personal delivery or email to each Ordinary Creditor with a Voting Claim and/or an Unresolved Claim and to the Representatives at the Latest Known Address provided, however, that (i) with respect to the NNUK Claim, Canadian Pension Claims, NNI Unsecured Claim and UKPI Claim, the Monitor may deliver the Ordinary Creditor Mailing Materials to counsel appearing on the Service List for such Affected Unsecured Creditors; and (ii) with respect to any other Intercompany Claim that is a Voting Claim, the Monitor may deliver the Ordinary Creditor Mailing Materials to any last known officer, director or administrator of such Intercompany Creditor.

14. THIS COURT ORDERS that in addition to the Ordinary Creditor Mailing Materials, upon request of any Ordinary Creditor, the Monitor shall provide hard copies of any of the other Ordinary Creditor Meeting Materials to such Ordinary Creditor. The Monitor shall also provide French translations of the Ordinary Creditor Meeting Materials upon request.

NOTICE TO COMPENSATION CREDITORS

15. THIS COURT ORDERS that the Monitor shall, on the Mailing Date, deliver (a) the Publication Notice and Letter to Compensation Creditors (the "**Compensation Creditors Mailing Materials**") by pre-paid first class mail, courier, personal delivery or email to each Compensation Creditor at the Compensation Creditor's Latest Known Address; and (b) a blank form of Voting Proxy and Instructions to Ordinary Creditors to Representative Counsel and counsel for Unifor by email. Compensation Creditor Mailing Materials shall be provided in English or French depending on the language preference previously indicated by Compensation Creditors and on file with the Monitor. On request, the Monitor will provide the Compensation Creditor Meeting Materials in the other language.

16. THIS COURT ORDERS that in addition to the Compensation Creditor Mailing Materials, upon request of any Compensation Creditor, the Monitor shall provide hard copies of any of the other Compensation Creditor Meeting Materials to such Compensation Creditor. The Monitor shall also provide French translations of the Compensation Creditor Meeting Materials upon request.

17. THIS COURT ORDERS that votes by Compensation Creditors shall be effected through: (a) the Compensation Creditors' respective Representatives, who are hereby authorized and empowered to vote on behalf of each of the Compensation Creditors whom they currently represent pursuant to the Representation Orders; and (b) Unifor for the Compensation Creditors it represents. The Representatives and Unifor shall each be entitled to submit a single Voting Proxy and shall not be required to submit individual proxies or ballots in respect of individual Compensation Claims.

NOTICE TO BONDHOLDERS

18. THIS COURT ORDERS that the Monitor and the Canadian Debtors' retention of Epiq to act as the Monitor's agent in connection with the mailing and solicitation process in connection with Bondholder Claims be and is hereby approved.

19. THIS COURT ODERS that, without limiting the generality of paragraphs 18 or 69, for the purposes of paragraphs 20 through 29, 54 and 64, references to the Monitor shall be deemed to mean "the Monitor or Epiq".

Indenture Trustees and Registered Bondholders

20. THIS COURT ORDERS that, to the extent such information has not been obtained prior to the date of this Meeting Order:

(a) as soon as possible after the date of the Meeting Order and in any event no later than two (2) Business Days following the date of the Meeting Order each of the Indenture Trustees shall confirm to the Monitor in writing (in accordance with paragraph 65) that the only Registered Bondholders are one or more Depositories (and identify and provide contact information for the applicable Depository); and

(b) immediately thereafter, the Monitor shall request Participant Holders Lists in respect of the Bonds from the Depositories and as soon as practicable thereafter, each Depository shall provide all relevant Participant Holders Lists to the Monitor as at the Voting Record Date. In each case, any Participant Holder List so provided shall list the Participant Holders as at the Voting Record Date and their respective addresses and telephone numbers, fax numbers and email addresses, to the extent available.

21. THIS COURT ORDERS that on the Mailing Date (or such later date where the Monitor does not have requisite information) the Monitor shall deliver the Publication Notice, Letter to Ordinary Creditors and Bondholders, Information Circular, Instructions to Bondholders and blank form of Bondholder Proxy (the "**Bondholder Mailing Materials**") by pre-paid first class mail, courier, personal delivery or email to the Depositories.

22. THIS COURT ORDERS that to the extent that an Indenture Trustee or a Depository has a standard process for providing notice of the entry of this Meeting Order to its Participant Holders, it shall post notice of the mailing to its Participant Holders.

Participant Holders and Beneficial Bondholders

23. THIS COURT ORDERS that each Participant Holder or any Mailing Agent shall advise the Monitor as to the number of hard copies of the Bondholder Mailing Materials required by each Participant Holder and such information shall be provided within two (2) Business Days of the date of the request is made.

24. THIS COURT ORDERS that on the Mailing Date (or such later date where the Monitor does not have the requisite information), the Monitor shall provide to each Participant Holder the Bondholder Mailing Materials in electronic form or, where such Participant Holder has advised it requires hard copies, the number of hard copies of the Bondholder Mailing Materials so advised by such Participant Holder and shall subsequently provide each Participant Holder with a blank form of the Master Authentication Form and Instructions to Participant Holders, all to be sent by way of pre-paid first class mail, courier or personal delivery.

25. THIS COURT ORDERS that, within five (5) Business Days of any Participant Holder's receipt of the Bondholder Mailing Materials from the Monitor pursuant to paragraph 24, such Participant Holder shall:

(a) deliver to each Beneficial Bondholder that has an account (directly or through an agent or custodian) with such Participant Holder, the Bondholder Mailing Materials; and

(b) request that such Beneficial Bondholders complete one or more Bondholder Proxies (one per CUSIP and per Participant Holder) and return such Bondholder Proxy or Proxies to their Participant Holder with sufficient time to allow such Participant Holder to complete and return one or more Master Authentication Forms by the deadline set out in paragraph 26 below.

26. THIS COURT ORDERS upon receipt of the Bondholder Proxies from Beneficial Bondholders, each Participant Holder shall complete and sign one or more Master Authentication Forms (one per CUSIP) in respect of all Bondholder Proxies it receives from Beneficial Bondholders and deliver such Master Authentication Form or Forms to the return address indicated in the Instructions to Participant Holders. To the extent that a Participant Holder receives further Bondholder Proxies after a Master Authentication Form is submitted, a Participant Holder may submit one or more Master Authentication Forms in respect of such further Bondholder Proxies. All Master Authentication Forms must be received at least four (4) Business Days prior to the Meeting. To the extent a Participant Holder submits multiple Master Authentication Forms in respect of the same Bondholder Proxy, the last dated, timely received, validly executed Master Authentication Form shall be deemed to supersede any previously submitted Master Authentication Forms.

27. THIS COURT ORDERS that where: (a) a Participant Holder or its Mailing Agent has a standard practice for distributing meeting materials to Beneficial Bondholders and for gathering information and proxies or voting instructions from Beneficial Bondholders; (b) the Participant Holder has discussed such standard practice in advance with the Monitor; and (c) such standard practice is acceptable to the Monitor; such Participant Holder or its agent may, in lieu of following the procedure set out in paragraphs 25 and 26 above, follow such standard practice provided that

all applicable Bondholder Proxies, Master Authentication Forms and Instructions are delivered in accordance with the terms of this Meeting Order.

28. THIS COURT ORDERS that to the extent a Beneficial Bondholder holds Bonds through multiple Participant Holders, it must submit one or more Bondholder Proxies (one per CUSIP and per Participant Holder) to each Participant Holder through which it holds Bonds.

NOTICE, SERVICE AND DELIVERY

29. THIS COURT ORDERS that the Monitor's fulfillment of the notice, delivery and Monitor's Website posting requirements set out in this Meeting Order shall constitute good and sufficient notice, service and delivery thereof on all Persons who may be entitled to receive notice, service or delivery thereof or who may wish to be present or vote (in person or by proxy) at the Meeting, and that no other form of notice, service or delivery need be given or made on such Persons and no other document or material need be served on such Persons.

CONDUCT OF MEETING AND DELIVERY OF PROXIES

30. THIS COURT ORDERS that the Monitor is hereby authorized and directed to call, hold and conduct the Meeting on the Meeting Date at The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario), (or such other venue as may be determined by the Monitor), for the purpose of seeking approval of the Plan by the Affected Unsecured Creditors with Voting Claims at the Meeting in the manner set forth herein. In the event that the Meeting Date is extended after the Mailing Date, the Monitor shall post notice of the extension of the Meeting Date on the Monitor's Website and provide notice of the extension of the Meeting Date to the Service List.

31. THIS COURT ORDERS that Murray McDonald or another representative of the Monitor, designated by the Monitor, shall preside as the chair of the Meeting (the "**Chair**") and, subject to this Meeting Order or any further Order of the Court, shall decide all matters relating to the conduct of the Meeting.

32. THIS COURT ORDERS that the Monitor may appoint scrutineers for the supervision and tabulation of the attendance, quorum, and votes cast at the Meeting (the "**Scrutineers**"). A Person designated by the Monitor shall act as secretary of the Meeting (the "**Secretary**").

33. THIS COURT ORDERS that the quorum required at the Meeting shall be one (1) Affected Unsecured Creditor with a Voting Claim present at the Meeting (in person or by proxy).

34. THIS COURT ORDERS that the Chair shall be entitled to adjourn and further adjourn the Meeting at the Meeting or at any adjourned Meeting or change the venue for the Meeting. In the event of any adjournment or change of venue described in this paragraph, no Person shall be required to deliver any notice of the adjournment of the Meeting or adjourned Meeting or change of venue, provided that the Monitor shall: (a) announce the adjournment at the Meeting, adjourned Meeting or change of venue, as applicable; (b) post notice of any adjournment (or further adjournment), or if the venue is changed within one (1) Business Day of the Meeting Date of the Meeting, at the location where the Meeting was scheduled to be held at the time the Meeting was scheduled to start; (c) forthwith post notice of the adjournment or change of venue on the Monitor's Website; and (d) provide notice of the adjournment or change of venue to the Service List forthwith. Subject to the terms of the Plan, Proxies validly delivered in connection with the Meeting shall be accepted as Proxies in respect of any adjourned Meeting.

35. THIS COURT ORDERS that the only Persons entitled to attend and speak at the Meeting are: (a) the Affected Unsecured Creditors entitled to vote at the Meeting (or, if applicable, any Person holding a valid Proxy or on behalf of one or more such Affected Unsecured Creditors); (b) the Chair, the Scrutineers and the Secretary; (c) the Monitor; (d) the Representatives; (e) the Indenture Trustees; and (f) Canadian Debtors' legal counsel and any legal counsel or financial advisors to any of the foregoing Persons in (a) through (e) above. Any other Person may only be admitted to the Meeting on invitation of the Chair.

36. THIS COURT ORDERS that the Monitor may waive in writing the time limits imposed on Affected Unsecured Creditors as set out in this Meeting Order (including the schedules hereto), generally or in individual circumstances, if the Monitor deems it advisable to do so.

ASSIGNMENT OF AFFECTED CLAIMS PRIOR TO THE MEETING

37. THIS COURT ORDERS that, subject to any restrictions contained in Applicable Laws and subject further to the terms of the Plan, the Claims Orders and the Settlement and Support Agreement, an Ordinary Creditor or Compensation Creditor may transfer or assign the whole of

its Voting Claim prior to the Meeting (or any adjournment thereof), provided that the Monitor shall not be obliged to deal with any transferee or assignee thereof as an Affected Unsecured Creditor in respect of such Voting Claim, including allowing such transferee or assignee to attend or vote at the Meeting, unless and until actual notice of the transfer or assignment, together with satisfactory evidence of such transfer or assignment, has been received and acknowledged by the Monitor, which receipt and acknowledgment must have occurred on or before 4 p.m. (Toronto time) on the date that is seven (7) days prior to the date of the Meeting (or any adjournment thereof), failing which the original transferor shall have all applicable rights as the "Ordinary Creditor" or "Compensation Creditor" as the case may be with respect to such Voting Claim as if no transfer of the Voting Claim had occurred. If such receipt and acknowledgment by the Monitor have occurred on or before 4 p.m. (Toronto time) on the date that is seven (7) days prior to the date of the Meeting (or any adjournment thereof): (a) the transferor of the applicable Voting Claim shall no longer constitute an Affected Unsecured Creditor in respect of such Voting Claim; and (b) the transferee or assignee of the applicable Voting Claim shall, for all purposes in accordance with this Meeting Order, constitute an Ordinary Creditor or Compensation Creditor as the case may be in respect of such Voting Claim, and shall be bound by any and all notices previously given to the transferor or assignor in respect thereof, the voting process set out in this Meeting Order applicable to such Ordinary Creditor Claim, and any Proxy duly submitted to the Monitor in accordance with this Meeting Order. For greater certainty, the Monitor shall not recognize partial transfers or assignments of Ordinary Creditor Claims.

38. THIS COURT ORDERS that only those Beneficial Bondholders that have beneficial ownership of one or more Bonds as at the Voting Record Date shall be entitled to vote at the Meeting (whether in person or by proxy). Nothing in this Meeting Order restricts the Beneficial Bondholders from transferring or assigning such Bonds prior to or after the Voting Record Date, provided that if such transfer or assignment occurs after the Voting Record Date, only the original Beneficial Bondholder of such Bonds as at the Voting Record Date (and not any transferee) shall be treated as a Beneficial Bondholder for purposes of this Meeting Order and the Meeting, provided, however, that the Settlement and Support Agreement shall continue to apply to the transferee of any Beneficial Bondholder bound thereby.

VOTING PROCEDURE

39. THIS COURT ORDERS that at the Meeting, the Chair shall direct a vote, by written Proxy, on a resolution to approve the Plan and any amendments thereto.

Persons Entitled to Vote

40. THIS COURT ORDERS that, subject to paragraphs 57 - 58, the only Persons entitled to vote at the Meeting (whether in person or by proxy) are:

(a) Beneficial Bondholders with Voting Claims that have beneficial ownership of one or more Bonds as at the Voting Record Date (or any such Beneficial Bondholder's validly appointed holder of its Bondholder Proxy) whose holdings have been validated by such Beneficial Bondholder's Participant Holder or Participant Holders or a Master Authentication Form;

(b) Ordinary Creditors with Voting Claims as at the Voting Record Date including, without limitation, the holders of all Intercompany Claims (including the NNI Unsecured Claim and the NNUK Claim) that are Voting Claims (or any such Ordinary Creditor's validly appointed holder of its Voting Proxy);

(c) Representatives, on behalf of all Compensation Creditors with Voting Claims as at the Voting Record Date;

(d) Unifor, on behalf of Compensation Creditors that it currently represents with Voting Claims as at the Voting Record Date; and

(e) Morneau Shepell Ltd., in its capacity as administrator of the Canadian Registered Pension Plans, in respect of the Canadian Pension Claims.

41. THIS COURT ORDERS that Unaffected Creditors (in such capacity) and Equity Claimants (in such capacity) shall not, and shall have no right to, attend the Meeting or vote on the Plan.

42. THIS COURT ORDERS that each Ordinary Creditor with a Voting Claim shall be entitled to one (1) vote as a member of the Affected Unsecured Creditors Class, which vote shall have a value equal to the dollar value of such Ordinary Creditor's Voting Claim. For the avoidance of doubt, the Voting Claim amounts in respect of the NNI Unsecured Claim, NNUK Claim and the other Intercompany Claims listed in Schedule "C" to the Plan, UKPI Claim, and Canadian Pension Claims shall be the dollar amounts ascribed to them in the Plan.

43. THIS COURT ORDERS that each Beneficial Bondholder with a Voting Claim shall be entitled to one vote as a member of the Affected Unsecured Creditors Class, which vote shall have a value equal to such Beneficial Bondholder's Bondholder Claim Amount. For greater certainty, with respect to voting by Beneficial Bondholders, only the Beneficial Bondholders, and not Depositories or Participant Holders (unless any such Depository or Participant Bondholder is itself a Beneficial Bondholder or such Depository or Participant Holder is voting as proxy holder for one or more Beneficial Bondholders), shall be entitled to vote on the Plan as provided for in this Meeting Order.

44. THIS COURT ORDERS that for the purposes of this Meeting Order, a Beneficial Bondholder's "**Bondholder Claim Amount**" shall be the total of such Beneficial Bondholder's:

(a) pro rata share of the aggregate amount of the 1988 Bondholder Claims, if any; plus

(b) pro rata share of the aggregate amount of the Crossover Bondholder Claims, if any; plus

(c) pro rata share of the aggregate amount of the NNCC Bondholder Claims, if any.

45. THIS COURT ORDERS that for greater certainty, the aggregate amount of the Bondholder Claims for voting purposes shall be as follows:

(a) 1988 Bondholder Claims: US$205,079,861;

(b) Crossover Bondholder Claims: US$3,940,750,260; and

(c) NNCC Bondholder Claims: US$150,951,562.

46. THIS COURT ORDERS that the Representatives and Unifor shall be entitled to vote on behalf of their applicable Compensation Creditors, which votes shall constitute, in number, the number of individuals that each Representative or Unifor represents as indicated on the Voting

Proxy and shall have a dollar value equal to the aggregate value of such Compensation Claims voted.

47. THIS COURT ORDERS that any Proxies or votes received from Compensation Creditors which are not submitted by a Representative or Unifor shall be disregarded by the Monitor and shall be considered a nullity with no force and effect. For greater certainty, the Monitor shall have no obligation to record or report on any such Proxies or votes.

Calculation of Votes

48. THIS COURT ORDERS that notwithstanding any other provision of this Meeting Order, an Affected Unsecured Creditor holding a Voting Claim or Voting Claims regardless of whether such Voting Claim or Voting Claims is held against more than one Canadian Debtor, whether directly, by way of guarantee or otherwise shall have only one (1) vote in respect of the Plan without duplication, and including, without limitation:

(a) any transferee(s) of multiple Voting Claims shall have one (1) vote in an amount equal to the aggregate of all of the Voting Claims assigned to such transferee (other than any Compensation Claim which is subject to the vote of the Representatives);

(b) regardless of the number of Bondholder Proxies that are submitted by any one Beneficial Bondholder, each Beneficial Bondholder shall have one (1) vote in an amount equal to such Beneficial Bondholders' Bondholder Claim Amount;

(c) holders of Duplicative Voting Claims shall only be entitled to one (1) Voting Claim in an amount equal to the largest of such Duplicative Voting Claims; and

(d) holders of Voting Claims against more than one Canadian Debtor which Voting Claims are based on separate and distinct underlying debts shall have one (1) Voting Claim equal to the aggregate amount of all such separate and distinct Voting Claims.

49. THIS COURT ORDERS that for the purpose of calculating the two-thirds majority in value of Voting Claims, the aggregate amount of Voting Claims held by all Affected Unsecured Creditors that vote in favour of the Plan (in person or by proxy) shall be divided by the aggregate

amount of all Voting Claims held by all Affected Unsecured Creditors that vote on the Plan (in person or by proxy). For greater certainty, an Affected Unsecured Creditor having Voting Claims against more than one Canadian Debtor shall only be entitled to one vote in respect of such Voting Claims at the Meeting and the Monitor shall have no obligation to tabulate or report on votes with respect to the Canadian Debtors individually.

50. THIS COURT ORDERS that, for purposes of tabulating the votes cast on any matter that may come before the Meeting, the Chair shall be entitled to rely on any vote cast by a holder of a Voting Proxy or a Bondholder Proxy that has been duly submitted to the Monitor in the manner set forth in this Meeting Order.

Submission of Proxies and Voting At the Meeting

51. THIS COURT ORDERS that regardless of whether an Affected Unsecured Creditor wishes to attend the Meeting in person or submit its Proxy in advance of the Meeting, any Affected Unsecured Creditor that is entitled to vote on the Plan, must, in accordance with applicable Instructions:

(a) duly complete and sign the applicable Proxy;

(b) identify himself, herself or another individual in the applicable Proxy as the Person with the power to attend and vote at the Meeting on behalf of such Affected Unsecured Creditor; and

(c) submit its Proxy to the Monitor by:

(i) delivering its Proxy to the Monitor in accordance with paragraph 65, on the date set out in the applicable Instructions, which shall be the date that is three (3) Business Days prior to the scheduled Meeting; or

(ii) where the Affected Unsecured Creditor has not submitted its Proxy at least three (3) Business Days in advance of the Meeting, attend the Meeting in Person (or through a nominee) and submit the Proxy to the Monitor at the Meeting at the time specified by the Chair at the Meeting.

52. THIS COURT ORDERS that in order to be effective, and in addition to the criteria in paragraphs 51(a) and 51(b) above, any Bondholder Proxy must:

(a) be in respect of single CUSIP;

(b) state the applicable account number or numbers of the account or accounts maintained by the applicable Beneficial Bondholder with such Participant Holder;

(c) state the principal amount of Bonds for such CUSIP number that such Beneficial Bondholder holds in each such account or accounts;

(d) acknowledge that the Beneficial Bondholder has read the Bondholder Meeting Materials; and

(e) authorize the Participant Holder to provide a copy of the Bondholder's Proxy to Epiq and the Monitor.

53. THIS COURT ORDERS all Master Authentication Forms must:

(a) be in respect of a single CUSIP;

(b) state the name and account number of the Beneficial Bondholder whose Proxies it is authenticating, and the principal amount of such Bonds for such CUSIP number (excluding any accrued interest or Post-Filing Date Interest); and

(c) attach copies of all relevant Bondholder's Proxies for which the Participant Holder is authenticating the holdings.

54. THIS COURT ORDERS that notwithstanding paragraph 51(c), all Beneficial Bondholders wishing to vote either in person or by proxy must have submitted its Bondholder Proxy to its Participant Holder and such Participant Holder must have submitted a Master Authentication Form in respect of such Bondholder Proxy so that it is received by Epiq at least four (4) Business Days prior to the Meeting.

55. THIS COURT ORDERS that if there is any dispute as to the principal amount of Bonds held by any Beneficial Bondholder, the Monitor will request the Participant Holder, if any, who

maintains book entry records or other records evidencing such Beneficial Bondholder's ownership of Bonds, to confirm to the Monitor the information provided by such Beneficial Bondholder and such Participant Holder shall provide such requested information forthwith. If any such dispute is not resolved by such Beneficial Bondholder and the Monitor by the date of the Meeting (or any adjournment thereof), the Monitor shall tabulate the vote for or against the Plan in respect of the disputed principal amount of such Beneficial Bondholder's Bonds separately. If: (a) any such dispute remains unresolved as of the date of the Sanction Hearing; and (b) the approval or non-approval of the Plan would be affected by the vote cast in respect of such disputed principal amount of Bonds, then such result shall be reported to the Court at the Sanction Hearing and, if necessary, the Monitor may make a request to the Court for directions.

56. THIS COURT ORDERS that notwithstanding anything in paragraphs 51 - 55 or any minor error or omission in any Proxy that is submitted to the Monitor, the Chair shall have the discretion to accept for voting purposes any Proxy submitted to the Monitor in accordance with the Meeting Order.

VOTING OF UNRESOLVED CLAIMS

57. THIS COURT ORDERS that except as otherwise provided for herein or as may otherwise be ordered by the CCAA Court at the Sanction Hearing, the dollar value of any Unresolved Claims for voting purposes at the Meeting shall be as follows:

(a) Unresolved Claims that are liquidated in whole or in part:

(i) for which no notice of disallowance or statement of defence has been issued: the face value of the Affected Unsecured Claim, as filed; or

(ii) for which a notice of disallowance or statement of defence has been issued: the greater of US$1.00 and the amount allowed by the Monitor in the notice of disallowance or set out in the statement of defence or, where there is a decision of a Claims Officer (as defined in the Claims Resolution Order) or Order of the CCAA Court, the amount of the Affected Unsecured Claim as set out in such decision or Order; or

(b) Unresolved Claims that are unliquidated in their entirety: US$1.00

58. THIS COURT ORDERS that the Monitor shall keep a separate record of votes cast by Affected Unsecured Creditors with Unresolved Claims and shall report to the Court with respect thereto at the Sanction Hearing. If approval or non-approval of the Plan by Affected Unsecured Creditors could be altered by the votes cast in respect of Unresolved Claims: (a) such result shall be reported to the Court as soon as reasonably practicable after the Meeting; (b) if a deferral of the Sanction Hearing is deemed to be necessary or advisable by the Monitor, the Monitor shall request an appropriate deferral of the Sanction Hearing; and (c) the Monitor may make a request to the Court for directions.

NEW RESTRUCTURING CLAIMS

59. THIS COURT ORDERS that the Monitor shall, no later than three (3) Business Days following the receipt of a Proof of Claim from any Person asserting a New Restructuring Claim, deliver the Ordinary Creditor Meeting Materials by pre-paid first class mail, courier, personal delivery or email to such Person at the Latest Known Address set out in any such Proof of Claim.

PLAN SANCTION

60. THIS COURT ORDERS that the Monitor shall report to the Court the results of any votes taken at the Meeting as soon as reasonably practicable after the Meeting (or any adjournment thereof). If the Plan is approved by the Required Majority, the Moving Parties may apply to the Court at 10 a.m. on the Sanction Hearing Date for the Sanction Order (the "**Sanction Hearing**").

61. THIS COURT ORDERS that service of this Meeting Order by the Moving Parties to the parties on the Service List shall constitute good and sufficient service of notice of the Sanction Hearing on all Persons entitled to receive such service and no other form of notice or service need be made and no other materials need be served in respect of the Sanction Hearing, except that any party shall also serve the Service List with any additional materials that it intends to use in support of the Sanction Hearing.

APPROVAL OF THE PLAN

62. THIS COURT ORDERS that the Plan must receive an affirmative vote from the Required Majority in order to be approved by the Affected Unsecured Creditors.

63. THIS COURT ORDERS that the result of any vote at the Meeting shall be binding on all Affected Unsecured Creditors, regardless of whether such Affected Unsecured Creditor was present at or voted at the Meeting.

SERVICE AND NOTICE

64. THIS COURT ORDERS that any delivery of any documents, packages, notices or otherwise contemplated by this Meeting Order by the Monitor shall be by way of pre-paid first class mail, courier, personal delivery, facsimile or e-mail to such Persons (or any director, officer or known representative) and that any such service or notice by courier, personal delivery, facsimile or e-mail shall be deemed to be received on the next Business Day following the date of forwarding thereof, or if sent by pre-paid first class mail, on the fourth Business Day after mailing.

65. THIS COURT ORDERS that any notice or other communication to be given under this Meeting Order by any Person to the Monitor shall be in writing in substantially the form, if any, provided for in this Meeting Order and will be sufficiently given only if delivered by courier, personal delivery, facsimile or e-mail addressed to:

Ernst & Young Inc.
Court Appointed Monitor of Nortel Networks Corporation & others
222 Bay Street, Suite 2400
Toronto, Ontario M5K 1J7

Attention: Nortel Monitor
Telephone: 1.866.942.7177 or 416.943.4439
Facsimile: 416.943.2808
Email: nortel.monitor@ca.ey.com

66. THIS COURT ORDERS that any such notice or other communication by any such Person shall be deemed received only upon actual receipt thereof during normal business hours on a Business Day.

MONITOR'S ROLE

67. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA or any Order made in these CCAA Proceedings including the Monitor's Powers Orders and the New Applicants Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Meeting Order.

68. THIS COURT ORDERS that: (i) in carrying out the terms of this Meeting Order, the Monitor shall have all the protections given to it by the CCAA, the Monitor's Powers Orders and the New Applicants Order, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Meeting Order, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Canadian Debtors and any information provided by the Canadian Debtors without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

69. THIS COURT ORDERS that the Monitor and the Canadian Debtors are hereby authorized to retain such agents as they deem to be advisable to assist them in connection with calling and conducting the Meeting, including with respect to the distribution of Meeting Materials, the identification of the applicable Affected Unsecured Creditors, and the solicitation of proxies from Persons entitled to vote at the Meeting.

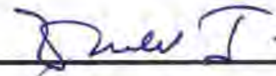
MISCELLANEOUS

70. THIS COURT ORDERS that nothing in this Meeting Order (including the acceptance or determination of any Claim, or any part thereof, as a Voting Claim in accordance with this Meeting Order) has any impact on the status of Voting Claims as Proven Affected Unsecured Claims for purposes of the Plan and, for greater certainty, to the extent that any Voting Claim is also a Proven Affected Unsecured Claim pursuant to any Order of the CCAA Court, agreement (including under the Settlement and Support Agreement) or otherwise, reference to such Proven Affected Unsecured Claims as "Voting Claims" herein shall not alter the status of such Claims as Proven Affected Unsecured Claims.

71. THIS COURT ORDERS that, for the purposes of this Meeting Order (including the calculation of the Required Majority), all Voting Claims shall be deemed to be denominated in U.S. dollars using the exchange rate specified on Schedule "D" to the Plan. Any Voting Claims that are not denominated in U.S. dollars or Canadian dollars shall be deemed to be converted first to Canadian dollars at the applicable F/X rate and then converted to U.S. dollars pursuant to Schedule "D" to the Plan.

72. THIS COURT ORDERS that the Moving Parties may from time to time apply to the CCAA Court for advice and directions in the discharge of their powers and duties hereunder.

73. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, the United Kingdom or elsewhere, to give effect to this Order and to assist the Canadian Debtors, the Monitor and their respective agents in carrying out the terms of this Meeting Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Canadian Debtors and to the Monitor, as an officer of this CCAA Court, as may be necessary or desirable to give effect to this Meeting Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Canadian Debtors and the Monitor and their respective agents in carrying out the terms of this Meeting Order.



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SCHEDULE "A-1" – PUBLICATION NOTICE

NOTICE TO AFFECTED UNSECURED CREDITORS

OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED (THE "CANADIAN DEBTORS")

NOTICE IS HEREBY GIVEN that a Plan of Compromise and Arrangement (as amended from time to time, the "**Plan**") has been filed with the Ontario Superior Court of Justice (Commercial List) (the "**CCAA Court**") in respect of the Canadian Debtors pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

TAKE NOTE THAT THESE MATERIALS relate to the CANADIAN CCAA PROCEEDINGS ONLY and do not apply to any other restructuring proceeding including the Chapter 11 Proceedings of Nortel Networks Inc. and the other U.S. Debtors. If you have claims in both the Canadian and U.S. proceedings, you MUST vote your claims in respect of the Canadian Debtors in this CCAA Proceeding in order for your vote to count with respect to the Canadian Plan and must comply with the applicable procedures in the U.S. Debtors' cases for your claim in respect of the U.S. Debtors. A vote in the U.S. Proceedings will not be recognized in the Canadian CCAA Proceedings and *vice versa.*

A copy of the Plan and the Information Circular (the "**Information Circular**") are available at www.ey.com/ca/nortel (the "**Monitor's Website**") under the section entitled "Plan and Other Creditor Meeting Documents". If you wish to receive a printed copy of the Plan or the Information Circular please contact the Monitor at the contact information below.

NOTICE IS ALSO HEREBY GIVEN that a meeting of Affected Unsecured Creditors (the "**Meeting**") will be held at **1 p.m.** on **Tuesday, January 17, 2017** (or such other date as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)**, for the purpose of considering and, if thought advisable, passing, with or without variation, a resolution to approve the Plan (the full text of which resolution is set out in Schedule "A" to the Information Circular) and to transact such other business as may properly come before the Meeting (or any adjournment thereof). The Meeting is being held pursuant to the Order of the Court made on December 1, 2016 (the "**Meeting Order**"). A copy of the Meeting Order is available on the Monitor's Website under the Section "Plan and Other Creditor Meeting Documents". Capitalized terms used but not otherwise defined in this notice have the meaning ascribed to them in the Meeting Order, Information Circular or Plan.

The Plan must receive an affirmative vote of the Required Majority in order to be approved by the Affected Unsecured Creditors. The Required Majority is a majority in number of Affected

Unsecured Creditors with Voting Claims, and two-thirds in value of the Voting Claims held by such Affected Unsecured Creditors, in each case who vote (in person or by proxy) on the Plan at the Meeting. The Plan must also be sanctioned by a final order of the CCAA Court (the "**Sanction Order**") pursuant to the CCAA. Notice is also hereby given that, if the Plan is approved by the Required Majority at the Meeting, the Sanction Order will be sought in an application before the CCAA Court at 10:00 AM on January 24, 2017, (or such other date or time as may be set by the CCAA Court), to seek approval of the Plan. If the Plan is approved by the Required Majority and sanctioned by the CCAA Court, then, subject to the satisfaction or waiver of the conditions to effectiveness and implementation of the Plan, all Persons referred to in the Plan (including the Affected Unsecured Creditors) will receive the treatment set out in the Plan.

AMENDMENTS TO THE PLAN

The Canadian Debtors and Monitor may, at any time and from time to time prior to or at the Meeting, amend, restate, modify and/or supplement the Plan, subject to the terms of the Plan, provided that: (i) the Monitor or the Chair shall communicate the details of any such amendment, restatement and/or supplement to all Affected Unsecured Creditors present at the Meeting prior to any vote being taken at the Meeting; (ii) the Monitor shall provide notice to the Service List of any such amendment, restatement and/or supplement and shall file a copy thereof with the CCAA Court prior to the Sanction Hearing; and (iii) the Monitor shall post an electronic copy of any such amendment, restatement and/or supplement on the Monitor's Website prior to the Sanction Hearing.

COMPLETION OF PROXIES

Any Affected Unsecured Creditor who is entitled to vote at the Meeting and that wishes to vote by proxy or in Person at the Meeting must complete, sign and return the applicable form of proxy included in its creditor package and deliver its proxy to the Monitor in accordance with applicable Instructions.

Compensation Creditors

IF YOU ARE A COMPENSATION CREDITOR COVERED BY THE REPRESENTATION ORDERS OR REPRESENTED BY UNIFOR, A REPRESENTATIVE OR UNIFOR WILL BE VOTING ON YOUR BEHALF AND WILL BE VOTING IN FAVOUR OF THE PLAN. YOU SHOULD NOT SUBMIT A SEPARATE PROXY.

Participant Holders and Beneficial Bondholders

IF YOU ARE A PARTICIPANT HOLDER OR BENEFICIAL BONDHOLDER, YOU MUST CLOSELY FOLLOW THE INSTRUCTIONS FOR THE COMPLETION AND RETURN OF BONDHOLDER PROXIES AND MASTER AUTHENTICATION FORMS.

The Monitor's contact information is:

Ernst & Young Inc.
Court Appointed Monitor of Nortel Networks Corporation & others

222 Bay Street, Suite 2400
Toronto, Ontario M5K 1J7

Attention: Nortel Monitor
Telephone: 1.866.942.7177 or 416.943.4439
Facsimile: 416.943.2808
Email: nortel.monitor@ca.ey.com

This notice is given by the Monitor pursuant to the Meeting Order.

Si vous avez besoin d'une copie du plan ou de l'un des documents relatifs à l'assemblée des créanciers en français, veuillez consulter le site Web du contrôleur ou communiquer avec le contrôleur à l'adresse figurant ci-dessus.

SCHEDULE "A-2" LETTER TO ORDINARY CREDITORS AND BONDHOLDERS

December ____, 2016

Dear Ordinary Creditors and Bondholders:

Re: Meeting of Affected Unsecured Creditors of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (the "**Canadian Debtors**") to vote on the Plan of Compromise and Arrangement pursuant to the *Companies' Creditors Arrangement Act* (the "**Plan**")

We enclose in this package the following documents for your review and consideration:

1. Publication Notice;
2. Information Circular; and
3. blank form of applicable Proxy and instructions for voting.

TAKE NOTE THAT THESE MATERIALS relate to the CANADIAN CCAA PROCEEDINGS ONLY and do not apply to any other restructuring proceeding including the Chapter 11 Proceedings of Nortel Networks Inc. and the other U.S. Debtors. If you have claims in both the Canadian and U.S. proceedings, you MUST vote your claims in respect of the Canadian Debtors in this CCAA Proceeding in order for your vote to count with respect to the Canadian Plan and must comply with the applicable procedures in the U.S. Debtors' cases for your claim in respect of the U.S. Debtors. A vote in the U.S. Proceedings will not be recognized in the Canadian CCAA Proceedings and *vice versa*.

Please take note that these materials as well as the other Meeting Materials are also available at www.ey.com/ca/nortel under the section entitled "Plan and Other Creditor Meeting Documents".

You are entitled to attend the Meeting of Affected Unsecured Creditors (the "**Meeting**") of Canadian Debtors as defined in the Meeting Order dated December 1, 2016. The Meeting will be held **at 1 p.m. (Toronto time) on Tuesday, January 17, 2017 at The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario**). At the Meeting, you will be asked to consider a resolution to approve the Plan.

ORDINARY CREDITORS

Please follow the enclosed "Instructions to Ordinary Creditors" and complete the enclosed form of proxy and submit it to the Monitor as soon as possible but no later than **4:00 p.m. (Toronto time) on January 11, 2017.** Should you plan on attending the Meeting, you may also submit your proxy at that time.

BONDHOLDERS

Please follow the enclosed "Instructions to Beneficial Bondholders" and complete the enclosed form of proxy and submit to each of your Participant Holder(s) through which you hold Bonds no later than the deadline set out by your Participant Holder(s). Please submit one Proxy per CUSIP, per Participant Holder.

The Participant Holder(s) will provide Epiq Bankruptcy Solutions, LLC (the Monitor's agent) with a summary of voting Proxies received from their clients and copies of your proxies.

You may attend and vote at the Meeting in person but you must have previously had holdings validated by all Participant Holders through which you hold Bonds in order for your vote to count.

Expected Recovery Range

The current estimated range of recovery per U.S. dollar is approximately 41.5 cents to 45 cents. The estimated range of recovery per Canadian dollar is CA 45 cents to 49 cents, assuming an exchange rate of approximately US $1.00 = CA $1.337650.

Pursuant to the Plan, holders of proven affected unsecured claims will receive distributions in U.S. dollars, unless such claim is predominantly denominated in Canadian dollars (i.e. more than 50% of a claim is in Canadian dollars), in which case creditors will be paid in Canadian dollars. The initial distribution is currently anticipated to be made during April 2017.

Plan Approval

The Plan must be approved by a majority of creditors voting representing at least two thirds in value of the votes cast by proven affected unsecured creditors, voting as a single class, present in person or represented by proxy at the Meeting. Effectiveness of the Plan is subject to the approval of the Ontario Superior Court of Justice (Commercial List), expiration or final resolution of any appeals taken and confirmation of U.S. Plans by the U.S. Bankruptcy Court.

Additional Information

For additional information with respect to the Plan, see the section in the accompanying Information Circular entitled *"Summary Information"* (pages 5 - 10). These pages contain important information relating to the distributions under the Plan.

The accompanying Information Circular contains a detailed description of the Plan, as well as certain *pro forma* information. It also includes certain risk factors relating to the implementation of the Plan.

Please give this material your careful consideration and, if you require assistance, consult your financial, tax or other professional advisors.

Si vous avez besoin d'une copie du plan ou de l'un des documents relatifs à l'assemblée des créanciers en français, veuillez consulter le site Web du contrôleur ou communiquer avec le contrôleur à l'adresse figurant ci-dessus.

Sincerely,

ERNST & YOUNG INC., solely in its capacity as Monitor in the CCAA Proceedings of the Canadian Debtors and not in its personal capacity.

SCHEDULE "A-3" – LETTER TO COMPENSATION CREDITORS

December ______, 2016

Dear Compensation Creditor,

Re: Meeting of Affected Unsecured Creditors of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (the "**Canadian Debtors**") to vote on the Plan of Compromise and Arrangement pursuant to the *Companies' Creditors Arrangement Act* (the "**Plan**")

We enclose in this package the Publication Notice for your review and consideration, in the language of your choice as indicated on file with the Monitor.

Please take note that the other Meeting Materials are available at www.ey.com/ca/nortel (the "**Monitor's Website**") in both English and French under the section entitled "Plan and Other Creditor Meeting Documents".

The purpose of these materials is to provide you with information relating to the Plan and the Meeting of Affected Unsecured Creditors of the Canadian Debtors (the "**Meeting**"). **YOU ARE NOT REQUIRED TO ATTEND THE MEETING OR CAST A VOTE. AS EXPLAINED BELOW, YOUR REPRESENTATIVES OR UNION WILL VOTE ON YOUR BEHALF.**

Expected Recovery Range

Pursuant to the Plan, holders of Compensation Creditor Claims will receive distributions in U.S. dollars, unless such claim is predominantly denominated in Canadian dollars (i.e. more than 50% of a claim is in Canadian dollars), in which case creditors will be paid in Canadian dollars. The current estimated recovery range per U.S. dollar of claim is approximately 41.5 cents to 45 cents. The estimated range of recovery per Canadian dollar of claim is CA 45 cents to 49 cents, assuming an exchange rate of approximately US $1.00 = CA $1.337650. The initial distribution is currently anticipated to be made during April 2017.

Certain Issues Affecting Amount and Timing of Distributions

Further to previous court orders issued in the CCAA Proceedings,

- Compensation Creditor Claims will be reduced by the amount of any payments received by creditors from the Health and Welfare Trust (HWT).
- Compensation Creditor distributions will be reduced by the amount of any payments received by creditors through the employee hardship process.

Compensation Creditors with reductions for HWT payments or payments received through the employee hardship process will be provided these amounts on their distribution statement.

Distributions to Compensation Creditors will not be made until the Monitor receives a confirmation regarding employment insurance ("**EI Confirmation**") from Employment and Social Development Canada (ESDC), pursuant to the *Employment Insurance Act*. These Compensation Creditors may therefore receive their initial distributions after the target date of April 2017 and such distributions will be subject to standard source deductions and deductions on account of any employment insurance overpayment received. The amount of any employment insurance overpayment deduction will be determined by ESDC and, in any event, all deductions will be shown on a distribution statement.

If your address on file with the Monitor on the Distribution Record Date is not a Canadian address, you will be treated as a non-resident of Canada for purposes of any applicable non-resident withholding tax. You will not receive a gross-up for any amounts deducted or withheld.

Voting

Pursuant to certain Representation Orders made in these CCAA Proceedings, Kent Felske, Dany Sylvain, Donald Sproule, David Archibald, Michael Campbell and Sue Kennedy (the "**Representatives**") were appointed as representatives of all current and former non Union represented employees of the Canadian Debtors with the authority to represent you in these CCAA Proceedings. Copies of the Representation Orders can be found on the Monitor's Website under the section entitled "Employees, Former Employee and Disabled Employee Representative Orders".

If you are a member of Unifor (formerly CAW, the "**Union**") or retained the Union to represent you in the CCAA Proceedings, your Union representative will be voting on your behalf at the meeting.

Your Representatives or Union representative continue to represent you in the CCAA Proceedings and will be voting on your behalf at the Meeting. **As such, you are not required to vote or submit a proxy to the Monitor or to your Representatives.**

The Representatives and Unifor are parties to the Settlement and Support Agreement dated as of October 12, 2016 and **will be voting in favour of the Plan.**

The Meeting is to be held at **1 p.m.** on **Tuesday, January 17, 2017** (or such other date and time as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)**. Although you are welcome to attend the Meeting to observe, your Representatives will vote on your behalf in favour of the Plan.

Plan Approval

The Plan must be approved by a majority of creditors voting and representing at least two thirds in value of the votes cast by proven affected unsecured creditors, voting as a single class and present in person or represented by proxy at the Meeting. Effectiveness of the Plan is subject to the approval of the Ontario Superior Court of Justice (Commercial List), expiration or final resolution of any appeals taken and confirmation of U.S. Plans by the U.S. Bankruptcy Court.

Additional Information

For additional information with respect to the Plan, see the section in the Information Circular (available on the Monitor's Website under "Plan and Other Creditor Meeting Documents") entitled *"Summary Information"* (pages 5 - 10). These pages contain important information relating to distributions under the Plan.

Please give this material your careful consideration and, if you require assistance, consult your Court-appointed Representative Counsel or other financial or tax advisors.

Si vous avez besoin d'une copie du plan ou de l'un des documents relatifs à l'assemblée des créanciers en français, veuillez consulter le site Web du contrôleur ou communiquer avec le contrôleur à l'adresse figurant ci-dessus.

Sincerely,

ERNST & YOUNG INC., solely in its capacity as Monitor in the CCAA Proceedings of the Canadian Debtors and not in its personal capacity

SCHEDULE "B-1" - INSTRUCTIONS TO ORDINARY CREDITORS

■, 2016

TO: ORDINARY CREDITORS OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED (THE "CANADIAN DEBTORS")

Re: Meeting of Affected Unsecured Creditors of the Canadian Debtors to vote on the Plan of Compromise and Arrangement pursuant to the *Companies' Creditors Arrangement Act* (the "Plan")

TAKE NOTE THAT THESE MATERIALS relate to the CANADIAN CCAA PROCEEDINGS ONLY and do not apply to any other restructuring proceeding including the Chapter 11 Proceedings of Nortel Networks Inc. and the other U.S. Debtors. If you have claims in both the Canadian and U.S. proceedings, you MUST vote your claims in respect of the Canadian Debtors in this CCAA Proceeding in order for your vote to count with respect to the Canadian Plan and must comply with the applicable procedures in the U.S. Debtors' cases for your claim in respect of the U.S. Debtors. A vote in the U.S. Proceedings will not be recognized in the Canadian CCAA Proceedings and *vice versa*.

All of the Meeting Materials, including the Meeting Order, the Plan and the Information Circular are available at www.ey.com/ca/nortel under the section entitled "Plan and Other Creditor Meeting Documents". If you require a copy of any other of the Meeting Materials please contact the Monitor at the below address and a copy will be provided to you.

The purpose of these materials is to enable you to consider the Plan and vote to accept or reject the resolution to approve the Plan at the Meeting of Affected Unsecured Creditors of the Canadian Debtors to be held at **1 p.m.** on **Tuesday, January 17, 2017** (or such other date as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)**, (the "**Meeting**").

PROXIES

Ordinary Creditors who wish to vote must complete the enclosed Proxy and provide it to the Monitor by (a) email; (b) courier or personal delivery; or (c) facsimile transmission all at the contact information below, so that it is received by the Monitor no later than **4:00 p.m. (Toronto time) on January 11, 2017,** or else such Person (or its nominee) must attend the Meeting and submit the completed proxy to the Monitor at the Meeting at the time specified by the Chair.

FURTHER INFORMATION

If you have any questions regarding the process or any of the enclosed forms, please contact Ernst & Young Inc. at the following address:

Ernst & Young Inc.
Court Appointed Monitor of Nortel Networks Corporation & others
222 Bay Street, Suite 2400
Toronto, Ontario M5K 1J7

Attention:	Nortel Monitor
Telephone:	1.866.942.7177 or 416.943.4439
Facsimile:	416.943.2808
Email:	nortel.monitor@ca.ey.com

Si vous avez besoin d'une copie du plan ou de l'un des documents relatifs à l'assemblée des créanciers en français, veuillez consulter le site Web du contrôleur ou communiquer avec le contrôleur à l'adresse figurant ci-dessus.

SCHEDULE "B-2" – ORDINARY CREDITORS' VOTING PROXY

MEETING OF AFFECTED UNSECURED CREDITORS OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED (THE "CANADIAN DEBTORS")

to be held pursuant to an Order of the Ontario Superior Court of Justice (the "**Meeting Order**") in connection with the Plan of Compromise and Arrangement (the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) in respect of the Canadian Debtors at **1 p.m.** on **Tuesday, January 17, 2017** (or such other date as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)** and any adjournment thereof.

Before completing this Proxy, please read carefully the Instructions accompanying this Proxy for information respecting the proper completion and return of this Proxy.

IN ORDER TO VOTE ON THE PLAN, THIS PROXY MUST BE COMPLETED AND SIGNED BY THE ORDINARY CREDITOR AND PROVIDED TO THE MONITOR, ERNST & YOUNG INC., PRIOR TO 4:00 P.M. TORONTO TIME ON JANUARY 11, 2017 OR DELIVERED TO THE MONITOR IN PERSON OR THROUGH ITS NOMINEE AT THE MEETING AT THE TIME SPECIFIED BY THE CHAIR

THE UNDERSIGNED ORDINARY CREDITOR hereby revokes all proxies previously given and nominates, constitutes and appoints ______________________ (must be an individual – corporations may not be appointed as proxies) or, if no Person is named, Murray McDonald, President of Ernst & Young Inc., the Canadian Monitor (or his designee), as nominee of the Ordinary Creditor, with power of substitution, to attend on behalf of and act for the Ordinary Creditor at the Meeting of Affected Unsecured Creditors of the Canadian Debtors to be held in connection with the Plan and at any and all adjournments thereof, and to vote the Ordinary Creditor's Claim as follows:

A. (mark one only)

- ☐ VOTE FOR approval of the Plan; or
- ☐ VOTE AGAINST approval of the Plan;

-and-

B. vote at the nominee's discretion and otherwise act for and on behalf of the undersigned Ordinary Creditor with respect to any amendments or variations to the Plan and to any other matters that may come before the Meeting of the Ordinary Creditors of the Canadian Debtors or any adjournment thereof

If you submit a proxy but do not indicate your vote in part "A" above: (a) if Murray McDonald (or his designee) is your nominee, he will vote this proxy FOR approval of the Plan; and (b) if you have named another individual as your nominee and that person does not vote in person at the meeting, your proxy will be deemed to vote FOR approval of the Plan.

Date:	
Ordinary Creditor Name (**please print legibly**):	
Phone Number:	
Email Address:	
Mailing Address:	

Signature of Ordinary Creditor or, if a corporation, signature of an authorized signing officer of the corporation and such officer's name and title:	

INSTRUCTIONS FOR COMPLETION OF VOTING PROXY

1. Each Ordinary Creditor has the right to appoint an individual (who need not be an Ordinary Creditor) to attend, act and vote on the Ordinary Creditor's behalf. Such right may be exercised by inserting in the space provided the name of the Person to be appointed. An individual Ordinary Creditor wishing to attend and vote in person at the Meeting of Affected Unsecured Creditors of the Canadian Debtors should insert his or her name in the space provided. **If no name has been inserted in the space provided, the Ordinary Creditor will be deemed to have appointed Murray McDonald, President of Ernst & Young Inc. the Canadian Monitor (or his designee) as the Ordinary Creditor's proxyholder**.

2. **If you submit a proxy but do not indicate your vote in part "A" of the Proxy: (a) if Murray McDonald (or his designee) is your nominee, he will vote this proxy FOR approval of the Plan; and (b) if you have named another individual as your nominee and that person does not vote in person at the meeting, your proxy will be deemed to vote FOR approval of the Plan.**

3. If this Proxy is not dated in the space provided, it will be deemed to bear the date on which it is received by the Monitor.

4. This Proxy must be signed by the Ordinary Creditor or by the Ordinary Creditor's attorney duly authorized in writing or, if the Ordinary Creditor is a corporation, by a duly authorized officer or attorney of the corporation specifying the title of such officer or attorney.

5. Valid proxies bearing or deemed to bear a later date will revoke this Proxy. If more than one valid proxy for the same Ordinary Creditor and bearing or deemed to bear the same date are received with conflicting instructions, such proxies will be treated as disputed proxies and will not be counted.

6. Unless you plan to vote in Person at the meeting, you must complete the Voting Proxy and provide it to the Monitor by (a) email; (b) courier or personal delivery; or (c) facsimile transmission all at the contact information below, so that it is received by the Monitor no later than 4:00 p.m. (Toronto time) on January 11, 2017:

   Ernst & Young Inc.
   Court Appointed Monitor of Nortel Networks Corporation & others
   222 Bay Street, Suite 2400
   Toronto, Ontario M5K 1J7

   Attention: Nortel Monitor
   Telephone: 1.866.942.7177 or 416.943.4439
   Facsimile: 416.943.2808
   Email: nortel.monitor@ca.ey.com

SCHEDULE "C-1" - INSTRUCTIONS TO PARTICIPANT HOLDERS

URGENT – IMMEDIATE ACTION REQUIRED

■, 2016

TO: ALL PARTICIPANT HOLDERS IN RESPECT OF THE FOLLOWING BONDS ISSUED OR GUARANTEED BY NORTEL NETWORKS CORPORATION AND NORTEL NETWORKS LIMITED:

(i) US$1,000,000,000 LIBOR + 4.250% FLOATING RATE NOTES DUE 2011 (CUSIP NO. 656569AH3; 656569AK6) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(ii) US$550,000,000 10.125% FIXED RATE NOTES DUE 2013 (CUSIP NO. 656569AG5) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iii) US$1,125,000,000 10.75% FIXED RATE NOTES DUE 2016 (CUSIP NO. 656569AD2) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iv) US$575,000,000 1.75% CONVERTIBLE SENIOR NOTES DUE 2012 (CUSIP NO. 656568AC6; 656568AF9) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(v) US$575,000,000 2.125% CONVERTIBLE SENIOR NOTES DUE 2014 (CUSIP NO. 656568AD4; 656568AE2) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(vi) US$150,000,000 7.875% NOTES DUE 2026 (CUSIP NO. 665810AB3) PURSUANT TO AN INDENTURE DATED AS OF FEBRUARY 15, 1996, AS AMENDED

(vii) US$200,000,000 6.875% UNSECURED SENIOR NOTES DUE 2023 (CUSIP NO. 665815AH9) PURSUANT TO AN INDENTURE DATED AS OF NOVEMBER 30, 1988, AS AMENDED

(collectively, the "**Bonds**")

Re: Meeting of Affected Unsecured Creditors of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (the "**Canadian Debtors**") to vote on the Plan of Compromise and Arrangement pursuant to the *Companies' Creditors Arrangement Act* (the "**Plan**")

TAKE NOTE THAT THESE MATERIALS relate to the <u>CANADIAN CCAA PROCEEDINGS ONLY</u> and do not apply to any other restructuring proceeding including the Chapter 11 Proceedings of Nortel Networks Inc. and the other U.S. Debtors. If you have claims in both the Canadian and U.S. proceedings, you <u>MUST</u> vote your claims in respect of the Canadian Debtors in this CCAA Proceeding in order for your vote to count with respect to the Canadian Plan and must comply with the applicable procedures in the U.S. Debtors' cases for your claim in respect of the U.S. Debtors. A vote in the U.S. Proceedings will not be recognized in the Canadian CCAA Proceedings and *vice versa*.

<u>ALL MASTER AUTHENTICATION FORMS MUST BE RECEIVED BY EPIQ BANKRUPTCY SOLUTIONS, LLC ("EPIQ") PRIOR TO THE DEADLINE OF 4:00 P.M. ON JANUARY 10, 2017 (THE "DEADLINE")</u>

PROOF OF CLAIM

THE TOTAL AMOUNT OF ALL THE BONDHOLDER CLAIMS HAS BEEN FILED BY THE INDENTURE TRUSTEES. YOU DO NOT HAVE TO PROVIDE A PROOF OF CLAIM.

PROXY INSTRUCTIONS

According to the records of the Depository or the applicable Indenture Trustee, you are the holder or custodian (the "**Participant Holder**") on behalf of a beneficial holder of Bonds.

We enclose Bondholder Mailing Materials to be forwarded by you or your agent to each of the Beneficial Bondholders recorded in your account records or book entry records. Shortly, we will also be providing you a form of Master Authentication Form to be used by you or your agent to validate the holdings of your Beneficial Bondholders and to be completed and returned to Epiq prior to the Deadline. Please direct any questions you may have on the mailing requirements or the Master Authentication Forms to Epiq at the contact information below.

THE BONDHOLDER MAILING MATERIALS ARE TIME SENSITIVE. PURSUANT TO THE ORDER OF THE CCAA COURT DATED DECEMBER 1, 2016, MUST BE FORWARDED TO EACH OF THE BENEFICIAL BONDHOLDERS TOGETHER WITH THE BONDHOLDER PROXY FOR THAT BENEFICIAL BONDHOLDER WITHOUT DELAY AND NO LATER THAN FIVE (5) BUSINESS DAYS FROM YOUR RECEIPT OF THE BONDHOLDER MAILING MATERIALS.

Please instruct Beneficial Bondholders to return completed Bondholders Proxies to you to allow sufficient time as may be required by you to complete and submit one or more Master Authentication Forms by the Deadline. Upon receipt of such completed Bondholder Proxies, you must complete Master Authentication Forms (one per CUSIP) validating the holdings of such Beneficial Bondholders and attaching copies of the Bondholder Proxies received by you. All Master Authentication Forms must be received by Epiq no later than **4 p.m. (Eastern Time) on January 10, 2017.**

By completing and signing the Bondholder Proxy, the Beneficial Bondholder acknowledges and agrees that it has read the Plan and other Bondholder Meeting Materials and authorizes its Participant Holder to provide a copy of the Bondholder Proxy to Epiq and the Monitor.

If you have a standard practice for distributing meeting materials to Beneficial Bondholders and for gathering information and proxies or voting instructions from Beneficial Bondholders that differs from the process described above, please contact Epiq immediately to determine whether you are able to use such standard practice as an alternative to the process described above. Epiq may be contacted via email at tabulation@epiqsystems.com with a reference "Nortel Canada" in the subject line.

All Master Authentication Forms should be returned by (a) mail; (b) courier; or (c) personal delivery to:

Epiq Bankruptcy Solutions, LLC
Attn: Nortel Networks Corporation
Master Authentication Form Processing
777 Third Avenue, 12th Floor
New York, NY 10017

Canadian CCAA Proceedings Only

You can also view copies of documents relating to this process on the following Monitor's Website www.ey.com/ca/nortel in the section entitled "Plan and Other Creditor Meeting Documents".

Si vous avez besoin d'une copie du plan ou de l'un des documents relatifs à l'assemblée des créanciers en français, veuillez consulter le site Web du contrôleur ou communiquer avec le contrôleur à l'adresse figurant ci-dessus.

SCHEDULE "C-2" - INSTRUCTIONS TO BENEFICIAL BONDHOLDERS

URGENT – IMMEDIATE ACTION REQUIRED

■, 2016

TO: ALL BENEFICIAL BONDHOLDERS IN RESPECT OF THE FOLLOWING BONDS ISSUED OR GUARANTEED BY NORTEL NETWORKS CORPORATION AND NORTEL NETWORKS LIMITED:

(i) US$1,000,000,000 LIBOR + 4.250% FLOATING RATE NOTES DUE 2011 (CUSIP NO. 656569AH3; 656569AK6) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(ii) US$550,000,000 10.125% FIXED RATE NOTES DUE 2013 (CUSIP NO. 656569AG5) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iii) US$1,125,000,000 10.75% FIXED RATE NOTES DUE 2016 (CUSIP NO. 656569AD2) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iv) US$575,000,000 1.75% CONVERTIBLE SENIOR NOTES DUE 2012 (CUSIP NO. 656568AC6; 656568AF9) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(v) US$575,000,000 2.125% CONVERTIBLE SENIOR NOTES DUE 2014 (CUSIP NO. 656568AD4; 656568AE2) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(vi) US$150,000,000 7.875% NOTES DUE 2026 (CUSIP NO. 665810AB3) PURSUANT TO AN INDENTURE DATED AS OF FEBRUARY 15, 1996, AS AMENDED

(vii) US$200,000,000 6.875% UNSECURED SENIOR NOTES DUE 2023 (CUSIP NO. 665815AH9) PURSUANT TO AN INDENTURE DATED AS OF NOVEMBER 30, 1988, AS AMENDED

(collectively, the "**Bonds**")

Re: Meeting of Affected Unsecured Creditors of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation, Nortel Networks Technology Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (the "**Canadian Debtors**") to vote on the Plan of Compromise and Arrangement pursuant to the *Companies' Creditors Arrangement Act* (the "**Plan**")

TAKE NOTE THAT THESE MATERIALS relate to the <u>CANADIAN CCAA PROCEEDINGS ONLY</u> and do not apply to any other restructuring proceeding including the Chapter 11 Proceedings of Nortel Networks Inc. and the other U.S. Debtors. If you have claims in both the Canadian and U.S. proceedings, you <u>MUST</u> vote your claims in respect of the Canadian Debtors in this CCAA Proceeding in order for your vote to count with respect to the Canadian Plan and must comply with the applicable procedures in the U.S. Debtors' cases for your claim in respect of the U.S. Debtors. A vote in the U.S. Proceedings will not be recognized in the Canadian CCAA Proceedings and *vice versa*.

Please take note that the Meeting Materials are available at www.ey.com/ca/nortel in the section entitled "Plan and Other Creditor Meeting Documents".

The purpose of these materials is to provide Beneficial Bondholders (i.e., those who own Bonds beneficially themselves and do not hold such Bonds for the benefit of another person) with the documents required to enable them to consider the Plan and to cast their vote to accept or reject the resolution to approve the Plan at the meeting of the Affected Unsecured Creditors to be held at **1 p.m.** on **Tuesday, January 17, 2017** (or such other date as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)**, (the "**Meeting**").

PROOF OF CLAIM

THE TOTAL AMOUNT OF ALL THE BONDHOLDER CLAIMS HAS BEEN FILED BY THE INDENTURE TRUSTEES. THEREFORE, YOU DO NOT HAVE TO PROVIDE A PROOF OF CLAIM.

PROXY INSTRUCTIONS

Proxies are only to be filed by Beneficial Bondholders (or their nominee). If you are a trust company, depository, broker, book entry system, agent, custodian or any other entity that holds bonds for another Person, please refer to the Instructions to Participant Holders or contact Epiq or Ernst & Young Inc. for the information applicable to you.

IF YOU ARE A BENEFICIAL BONDHOLDER AND YOU WISH TO VOTE ON THE PLAN, YOU MUST COMPLETE THE ENCLOSED BONDHOLDER PROXY IN ACCORDANCE WITH THE INSTRUCTIONS SET OUT THEREIN AND RETURN IT TO YOUR PARTICIPANT HOLDER PRIOR TO THE DEADLINE REQUIRED BY YOUR PARTICIPANT HOLDER.

IF YOU ARE A BENEFICIAL BONDHOLDER AND HAVE SIGNED A CREDITOR JOINDER TO THE SETTLEMENT AND SUPPORT AGREEMENT DATED OCTOBER 12, 2016, YOU ARE OBLIGATED TO VOTE IN FAVOUR OF THE PLAN. IF YOU APPOINT A PROXY OR OTHER NOMINEE OR REPRESENTATIVE TO VOTE ON YOUR BEHALF, YOU MUST INSTRUCT SUCH PROXYHOLDER OR NOMINEE TO VOTE IN FAVOUR OF THE PLAN.

INSTRUCTIONS FOR BENEFICIAL BONDHOLDERS

If you are a Beneficial Bondholder and you wish to vote at the Meeting, you must complete the enclosed Bondholder Proxy and return it to your Participant Holder in the manner you are instructed to by your Participant Holder. **Whether you vote in person or by proxy you must return your completed Bondholder Proxy to your Participant Holder and your Participant Holder must submit a Master Authentication Form validating your holdings and attaching a copy of your Bondholder Proxy by the deadline of 4:00 p.m. on January 10, 2017 (please note this is not the date by which you must have completed your Bondholder Proxy, but the date Master Authentication Forms must be delivered to Epiq after you send back your Bondholder Proxies to your Participant Holder).**

You must:

1. complete a separate Bondholder Proxy for each CUSIP and each Participant Holder through which you hold Bonds;

2. provide a copy of your completed Bondholder Proxy to each Participant Holder through which you hold Bonds no later than the deadline set out by your Participant Holder so that it may submit a

Master Authentication Form by 4:00 p.m. (Toronto time) on January 10, 2017 (please note this is not the date by which you must have completed your Bondholder Proxy, but the date Master Authentication Forms must be delivered to Epiq after you send back your Bondholder Proxies to your Participant Holder); and

3. authorize your Participant Holder to provide a copy of your Bondholder Proxy to Epiq or the Monitor.

If no name is indicated in your Proxy, Murray McDonald, President of Ernst & Young Inc., the Canadian Monitor (or his designee) will be named as your proxyholder. If you do not indicate your vote and Murray McDonald (or his designee) is your proxyholder, he will vote FOR approval of the Plan. If you have named another individual as your nominee and have not indicated a vote, unless your nominee votes in person at the Meeting your proxy will be voted FOR approval of the Plan.

In completing and signing your Bondholder Proxy you will be acknowledging that you have read the Canadian Plan and other Bondholder Meeting Materials.

Si vous avez besoin d'une copie du plan ou de l'un des documents relatifs à l'assemblée des créanciers en français, veuillez consulter le site Web du contrôleur ou communiquer avec le contrôleur à l'adresse figurant ci-dessus.

SCHEDULE "C-3" - BONDHOLDER PROXY

For Use by Beneficial Bondholders of the following Bonds Issued or Guaranteed by Nortel Networks Corporation or Nortel Networks Limited:

(i) US$1,000,000,000 LIBOR + 4.250% FLOATING RATE NOTES DUE 2011 (CUSIP NO. 656569AH3; 656569AK6) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(ii) US$550,000,000 10.125% FIXED RATE NOTES DUE 2013 (CUSIP NO. 656569AG5) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iii) US$1,125,000,000 10.75% FIXED RATE NOTES DUE 2016 (CUSIP NO. 656569AD2) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iv) US$575,000,000 1.75% CONVERTIBLE SENIOR NOTES DUE 2012 (CUSIP NO. 656568AC6; 656568AF9) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(v) US$575,000,000 2.125% CONVERTIBLE SENIOR NOTES DUE 2014 (CUSIP NO. 656568AD4; 656568AE2) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(vi) US$150,000,000 7.875% NOTES DUE 2026 (CUSIP NO. 665810AB3) PURSUANT TO AN INDENTURE DATED AS OF FEBRUARY 15, 1996, AS AMENDED

(vii) US$200,000,000 6.875% UNSECURED SENIOR NOTES DUE 2023 (CUSIP NO. 665815AH9) PURSUANT TO AN INDENTURE DATED AS OF NOVEMBER 30, 1988, AS AMENDED

(collectively, the "**Bonds**")

MEETING OF AFFECTED UNSECURED CREDITORS OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED (THE "CANADIAN DEBTORS")

to be held pursuant to an Order of the Ontario Superior Court of Justice (the "**Meeting Order**") in connection with the Plan of Compromise and Arrangement (the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) in respect of the Canadian Debtors at **1 p.m.** on **Tuesday, January 17, 2017** (or such other date as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)** and any adjournment thereof.

Before completing this Proxy, please read carefully the instructions accompanying this Proxy for information respecting the proper completion and return of this Proxy.

A BENEFICIAL BONDHOLDER MUST COMPLETE AND SIGN ONE OR MORE PROXIES (ONE FOR EACH CUSIP AND/OR PARTICIPANT HOLDER) AND RETURN SUCH PROXY TO EACH PARTICIPANT HOLDER THROUGH WHICH IT HOLDS BONDS NO LATER THAN THE DATE SPECIFIED BY EACH SUCH PARTICIPANT HOLDER.

Principal Amount Held by Beneficial Bondholder as of November 21, 2016.

$ ____________________

THE UNDERSIGNED BENEFICIAL BONDHOLDER hereby revokes all proxies previously given and nominates, constitutes and appoints ______________________________ or, if no Person is named, Murray McDonald, President of Ernst & Young, Inc., the Canadian Monitor (or his designee), as nominee of the Beneficial Bondholder, with power of substitution, to attend on behalf of and act for the Beneficial Bondholder at the Meeting of Affected Unsecured Creditors of the Canadian Debtors be held in connection with the Plan and at any and all adjournments thereof, and to vote the Beneficial Bondholder's Claims in respect of the Bonds beneficially owned by it as follows:

A. (mark one only)

- ☐ VOTE FOR approval of the Plan; or
- ☐ VOTE AGAINST approval of the Plan;

-and-

B. vote at the nominee's discretion and otherwise act for and on behalf of the undersigned Beneficial Bondholder with respect to any amendments or variations to the Plan and to any other matters that may come before the Meeting of the Affected Unsecured Creditors of the Canadian Debtors or any adjournment thereof

If you submit a proxy but do not indicate your vote in part "A" above: (a) if Murray McDonald (or his designee) is your nominee, he will vote this proxy FOR approval of the Plan; and (b) if you have named another individual as your nominee and that person does not vote in person at the meeting, your proxy will be deemed to vote FOR approval of the Plan.

You will receive a separate Proxy for each account you hold. Please complete and return each Proxy you receive.

The Beneficial Bondholder hereby acknowledges and agrees that it has read the Plan and other Bondholder Meeting Materials and authorizes its Participant Holder to provide a copy of this Bondholder Proxy to Epiq and the Monitor.

Date:	
Beneficial Bondholder Name: **(please print legibly)**	
Phone Number:	
Email Address:	
Mailing Address:	
Signature of Beneficial Bondholder or, if a corporation, signature of an authorized signing officer of the corporation and such officer's name and title:	

DELIVERY

Completed Bondholder Proxies must be returned to each relevant Participant Holder as directed by such Participant Holder and by the deadline specified by the applicable Participant Holder.

INSTRUCTIONS FOR COMPLETION OF PROXY

1. Each Beneficial Bondholder has the right to appoint an individual (who need not be a Bondholder) to attend, act and vote for and on the Beneficial Bondholder's behalf and such right may be exercised by inserting the name of the Person to be appointed. A Beneficial Bondholder wishing to have a representative attend and vote in Person at the Meeting of Affected Unsecured Creditors of the Canadian Debtors should insert such individual representative's name in the space provided. **If no name has been inserted in the space provided, the Beneficial Bondholder will be deemed to have appointed Murray McDonald, President of Ernst & Young Inc., the Canadian Monitor (or his designee) as the Beneficial Bondholder's proxyholder.**

2. If you submit a proxy but do not indicate your vote in part "A" of the Proxy: (a) if Murray McDonald (or his designee) is your nominee, he will vote this proxy FOR approval of the Plan; and (b) if you have named another individual as your nominee and that person does not vote in person at the meeting, your proxy will be deemed to vote FOR approval of the Plan.

3. If this Proxy is not dated in the space provided, it will be deemed to bear the date on which it is received by the Monitor.

4. This Proxy must be signed by the Beneficial Bondholder of the applicable Bonds or by his or her attorney duly authorized in writing or, if the Beneficial Bondholder is a corporation, by a duly authorized officer or attorney of the corporation specifying the title of such officer or attorney.

5. Separate Proxies must be completed for each CUSIP and for each Participant Holder through whom your Bonds are held. Completed Proxies must be returned to the applicable Participant Holder. Participant Holders will be required to submit Master Authentication Forms validating the holdings of such Beneficial Bondholders and attaching copies of all Proxies to Epiq.

6. Valid proxies bearing or deemed to bear a later date will revoke this Proxy. If more than one valid proxy for the same Beneficial Bondholder in respect of the same Bonds and bearing or deemed to bear the same date are received with conflicting instructions, such proxies will be treated as disputed proxies and will not be counted.

SCHEDULE "C-4" – MASTER AUTHENTICATION FORM

For Use by Participant Holders validating the holdings of Beneficial Bondholder holding the following Bonds Issued or Guaranteed by Nortel Networks Corporation or Nortel Networks Limited:

(i) US$1,000,000,000 LIBOR + 4.250% FLOATING RATE NOTES DUE 2011 (CUSIP NO. 656569AH3; 656569AK6) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(ii) US$550,000,000 10.125% FIXED RATE NOTES DUE 2013 (CUSIP NO. 656569AG5) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iii) US$1,125,000,000 10.75% FIXED RATE NOTES DUE 2016 (CUSIP NO. 656569AD2) PURSUANT TO AN INDENTURE DATED AS OF JULY 5, 2006, AS AMENDED

(iv) US$575,000,000 1.75% CONVERTIBLE SENIOR NOTES DUE 2012 (CUSIP NO. 656568AC6; 656568AF9) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(v) US$575,000,000 2.125% CONVERTIBLE SENIOR NOTES DUE 2014 (CUSIP NO. 656568AD4; 656568AE2) PURSUANT TO AN INDENTURE DATED AS OF MARCH 28, 2007, AS AMENDED

(vi) US$150,000,000 7.875% NOTES DUE 2026 (CUSIP NO. 665810AB3) PURSUANT TO AN INDENTURE DATED AS OF FEBRUARY 15, 1996, AS AMENDED

(vii) US$200,000,000 6.875% UNSECURED SENIOR NOTES DUE 2023 (CUSIP NO. 665815AH9) PURSUANT TO AN INDENTURE DATED AS OF NOVEMBER 30, 1988, AS AMENDED

(collectively, the "**Bonds**")

MEETING OF AFFECTED UNSECURED CREDITORS OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED (THE "CANADIAN DEBTORS")

to be held pursuant to an Order of the Ontario Superior Court of Justice (the "**Meeting Order**") in connection with the Plan of Compromise and Arrangement (the "**Plan**") under the *Companies' Creditors Arrangement Act* (Canada) in respect of the Canadian Debtors at **1 p.m.** on **Tuesday, January 17, 2017,** (or such other date as may be set and announced in accordance with the Meeting Order) at **The International Centre Conference Centre (6900 Airport Road, Mississauga, Ontario)** and any adjournment thereof.

Before completing this Master Authentication Form, please carefully read the accompanying instructions for information respecting the proper completion and return of this Master Authentication Forms.

THIS MASTER AUTHENTICATION FORM MUST BE COMPLETED AND SIGNED IN ACCORDANCE WITH THE INSTRUCTIONS. PURSUANT TO THE ORDER OF THE CCAA COURT DATED DECEMBER 1, 2016, YOU MUST ATTACH COPIES OF ALL BONDHOLDER PROXIES RELEVANT TO THE MASTER AUTHENTICATION FORM AND IT MUST BE PROVIDED TO EPIQ BANKRUPTCY SOLUTIONS, LLC PRIOR TO **4:00 P.M. EASTERN TIME ON JANUARY 10, 2017.**

USE ONE MASTER AUTHENTICATION FORM PER CUSIP. PLEASE CHECK A BOX BELOW TO INDICATE TO WHICH CUSIP THIS MASTER AUTHENTICATION FORM PERTAINS

❑	656568AC6	❑	656569AG5
❑	656568AD4	❑	656569AH3
❑	656568AE2	❑	656569AK6
❑	656568AF9	❑	665810AB3
❑	656569AD2	❑	665815AH9

PART I: Principal Amount of Bonds as at November 21, 2016 (the "Voting Record Date"):

Beneficial Bondholder Name	Account #	Principal Amount of Bonds at Voting Record Date

(If additional space is required, please attach extra pages)

Copies of all Proxies received and reflected above (or on the attached extra pages) are attached to this Master Authentication Form.

PART II: PARTICIPANT HOLDER CERTIFICATION AND INFORMATION

The undersigned certifies that as of the Voting Record Date (listed above), the principal value of the holdings of the Beneficial Bondholders listed above (or on the attached extra pages) is true and accurate.

Date Submitted: ____________, 2016 Participant No. ________________

Print Name of Participant Holder (**please print legibly**): ____________________________

Signature: ____

Authorized Participant Holder Employee Contact (Print Name): ____________________________

Title: ____________________________

Tel. No.: ________________________ Fax No.: ______________________

E-Mail: ____

MEDALLION STAMP BELOW:

DELIVERY

Completed Master Authentication Forms should be sent to:

Epiq Bankruptcy Solutions, LLC
Attn: Nortel Networks Corporation
Master Authentication Form Processing
777 Third Avenue, 12th Floor
New York, NY 10017

Master Authentication Forms may be delivered by mail, courier or personal delivery, all at the contact information above, and must be received by Epiq **no later than 4:00 p.m. (Eastern Time) on January 10, 2017.**

IF YOU HAVE ANY QUESTIONS REGARDING THIS FORM OR THE PROCEDURES, PLEASE CONTACT THE MONITOR'S AGENT BY EMAIL AT TABULATION@EPIQSYSTEMS.COM AND REFERENCE "NORTEL CANADA" IN THE SUBJECT LINE.

INSTRUCTIONS FOR COMPLETION OF MASTER AUTHENTICATION FORMS

1. **You must use a separate Master Authentication Form for each CUSIP.**

2. Each Participant Holder providing a Master Authentication Form must complete Parts I and II of the Master Authentication Form and provide all information requested therein. Please take notice of the following:

   A. Part I relates to Bonds for which you have received Proxies from Beneficial Bondholders; and

   B. Part II is your certification – you must complete this section and sign it.

3. You must attach copies of each Bondholder Proxy to the Master Authentication Form. **If you receive further Proxies after you have submitted a Master Authentication Form, you may submit one or more further Master Authentication Forms as long as all Master Authentication Forms are received by the Deadline (defined below).**

4. If this Master Authentication Form is not dated in the space provided, it will be deemed to bear the date on which it is received by Epiq.

5. The Participant Holder must complete the Master Authentication Form, sign, and certify in order for it to be valid.

6. Master Authentication Forms (including the attached Bondholder Proxies) may be delivered to Epiq at the address below, and must be received by Epiq **no later than 4:00 p.m. (Eastern Time) on January 10, 2017 (the "Deadline").**

Epiq Bankruptcy Solutions, LLC
Attn: Nortel Networks Corporation
Master Authentication Form Processing
777 Third Avenue, 12th Floor
New York, NY 10017

IF YOU HAVE ANY QUESTIONS REGARDING THIS FORM OR THE PROCEDURES, PLEASE CONTACT THE MONITOR'S AGENT BY EMAIL AT TABULATION@EPIQSYSTEMS.COM AND REFERENCE "NORTEL CANADA" IN THE SUBJECT LINE.

Court File No.: 09-CL-7950

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto, Ontario Canada

PLAN FILING AND MEETING ORDER
(Returnable December 1, 2016)

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Toronto, Ontario M5H 2S7

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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 SEARS CANADA INC., et al.

Court File No.: CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES OF THE MONITOR
(Meetings Order Motion)
(returnable February 12, 2019)

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Lawyers to the Monitor, FTI Consulting Canada Inc.