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• NORTEL — ONTARIO COURT OF APPEAL AFFIRMS NON-PAYMENT OF TERMINATION AND SEVERANCE •

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It is not a new concept that debtors in proceedings under the *Companies' Creditors Arrangement Act*¹ ("CCAA") "pay as they go," paying for post-filing goods and services only as they are required.

Nevertheless, a group of former Nortel employees and a Nortel union (CAW-Canada) challenged Nortel's failure to pay certain amounts owed to employees during the CCAA, including termination and severance and other amounts due to former employees. Denied relief by Mr. Justice Morawetz this past spring,² the groups appealed. The Ontario Court of Appeal³ recently upheld the lower court decision.

The Court of Appeal rejected the union's argument that Nortel's obligation to make payments to former employees could not be severed from the collective agreements, but must be considered as part of the compensation for the post-filing services of current employees. The Court confirmed that even if the triggering event is post-filing, the key factor is whether the employee performed post-filing services: if so, he or she must be compensated for such current service.

The former employees questioned whether the Court could exercise its discretion under the CCAA to excuse Nortel as employer from paying pre-filing termination and severance obligations as otherwise required by the provincial *Employment Standards Act, 2000*.⁴

Where provincial and federal statutory provisions are in conflict and cannot both be complied with, the constitutional doctrine of paramouncy will apply

such that the federal law will "trump" the conflicting provincial legislation. The former employees argued that the federal CCAA and the provincial employment minimum standards laws did not conflict, but could operate together.

The Court of Appeal adopted an expanded view of paramouncy, holding that the doctrine can also be triggered when a provincial law is *incompatible* with the purpose of the federal law, where complying with the provincial requirements would have the effect of *frustrating the purpose* of the federal law and therefore the intent of Parliament.

The Court reiterated that the CCAA stay is intended to allow an employer company to freeze its debt obligations in order to facilitate restructuring, for the benefit of all stakeholders. It held that this objective would be frustrated if the stay did not apply to statutory termination and severance obligations, because Nortel did not have sufficient funding to pay these amounts and also to maintain operations. The Court was not swayed by the argument that this proceeding was no longer a restructuring, but had become a going-concern liquidation.

The former employees sought leave to appeal to the Supreme Court of Canada, arguing that the paramouncy doctrine had been misapplied. However, their application was dismissed on March 25, 2010.⁵

The result of this decision is consistent with a number of cases in the Ontario courts over the past few months, which have addressed employees' pre-insolvency obligations such as termination and sev-

erance,⁶ pre-filing supplemental pension benefits,⁷ and special payments under a pension plan.⁸

[*Editor's note:* Deborah S. Grieve is a partner with Cassels Brock & Blackwell LLP, where she practises exclusively in the area of bankruptcy and insolvency law. Ms. Grieve has extensive experience in corporate restructuring and insolvency matters, including significant domestic and cross-border proceedings. She is one of few practitioners certified by the Law Society of Upper Canada as a Specialist in Bankruptcy and Insolvency Law. The author is grateful for the assistance of Christopher Sansom, student-at-law.]

¹ R.S.C. 1985, c. C-36.

- ² *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558, [2009] 55 C.B.R. (5th) 68, 75 C.C.P.B. 233 (Ont. S.C.J.).
- ³ *Nortel Networks Corp. (Re)*, [2009] O.J. No. 4967, 2009 ONCA 833, 256 O.A.C. 131, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, [2010] CLLC para. 210-005.
- ⁴ S.O. 2000, c. 41.
- ⁵ *Sproule v. Nortel Networks Corp.*, [2009] S.C.C.A. No. 531, [2009] S.C.C.A. No. 531.
- ⁶ *Windsor Machine & Stamping Ltd. (Re)*, [2009] O.J. No. 3195 (Ont. S.C.J.).
- ⁷ *Indalex Limited. (Re)*, [2009] O.J. No. 3165, [2009] 55 C.B.R. (5th) 64 (Ont. S.C.J.).
- ⁸ *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188, [2009] 55 C.B.R. (5th) 217, 76 C.C.P.B. 254 (Ont. S.C.J.).