Nortel walks from millions in clean-up costs.

Law Times Magazine

June 2012 Issue

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In a surprising decision made in March the Ontario Superior Court allowed Nortel Networks Corp. to walk away from clean-up costs that are estimated at $18-million —a burden that will now be placed on taxpayers if remedial work is undertaken on the company's behalf.

In Nortel Networks Corporation (Re), [2012] ONSC 1213, the Ministry of the Environment (MOE) sought to hold the company responsible for the remediation of previously owned and/or currently owned properties that have been contaminated by hazardous substances, particularly, chlorinated solvents. In the 1990s, Nortel disposed of the majority of its land holdings in Ontario, during which time it identified environmental impacts in soil and groundwater at five manufacturing sites in Brampton, Brockville, Kingston, Belleville, and London.

A number of motions were put forth by Nortel in relation to these environmental issues and the primary motion sought authorization and direction to cease the performance of any remediation at, or in relation to the impacted sites. Nortel argued that its responsibility to remediate contaminated properties should not be prioritized over other obligations that resulted from its reorganization under the Companies' Creditors Arrangement Act (CCAA) in January, 2009.

The MOE, however, argued that Nortel, as a former or current owner of the contaminated properties, should be subject to certain performance-based regulatory obligations under the Canadian Environmental Protection Act (EPA). It also noted that these obligations have not been advanced to the status of "claims" and therefore, should not be pursuant to the stay under s. 11 of the CCAA.

For many, it came as no surprise that Nortel became insolvent and was seeking to restructure under the CCAA in 2009. At the time, Nortel was granted the typical stay of proceedings that prohibited creditors from taking legal action in pursuit of the collection of debts.

Under the EPA, orders that require remediation can be issued against both current and former owners of, and people responsible for, the property in question. As a result of the MOE orders that were put forth, the case was taken to the Superior Court before Justice Geoffrey Morawetz, who had to determine whether the orders were subject to the stay.
Prior to the CCAA process being initiated, Nortel was conducting some contractual and voluntary remedial activities, such as investigation, remediation, monitoring and risk

assessment at the impacted sites, even though it no longer owned many of them (except for a part interest in the one site in London).

Since the late 1990s, Nortel advises that it had invested $30.2-million on these remediation efforts, and that further work requested in the MOE orders would cost at least an additional $18-million, which would prioritize environmental liabilities over all other unsecured claims.

When the decision was made on March 9, Justice Morawetz pointed out the fact that it is “necessary to emphasize: insolvency statutes such as the CCAA and the BIA do not mesh very well with environmental legislation” (Nortel Networks Corporation (Re), 2012 ONSC 1213, para. 101). The insolvency statutes are drafted in such a way that companies with on-going operations must comply with environmental legislation. The environmental liabilities of those like Nortel, which are no longer operating, are dealt with by way of charge over the property. However, in this situation, Nortel no longer holds an interest in the sites in question so there is no property to charge which means that the MOE is left to file a claim primarily as an unsecured creditor.

As a result, the decision was made that the MOE orders, which require Nortel to perform environmental clean-up work, do not take priority ahead of other obligations. This is because complying with the orders would require the company to expend significant funds; therefore, the environmental liabilities were found to amount to a financial obligation and were subject to the stay according to the CCAA proceedings. It was noted that the orders would be more properly addressed as a claim in the CCAA process. Justice Morawetz concluded “that any money expended by Nortel in respect of MOE obligations is money that is directed away from creditors participating in the insolvency proceedings. The same insolvency considerations ought to apply regardless of who received the money.”

Overall, this is a major blow to the MOE and as expected they are proceeding with an appeal. This is not only because authorization was given to Nortel to cease performing any remediation at or in relation to the impacted sites, but that the company was also released from all contractual obligations to carry out remediation requirements.

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