

# 2006 BCSECCOM 670

October 24, 2006

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act, ss. 48 and 76 – registration and prospectus requirements - An issuer wants to issue securities under a settlement of pending or proposed class action lawsuits in Canada and the United States - The fairness and terms of the settlement agreement must be approved by a court; the issuer's common shares are listed for trading on the TSX and the NYSE so there is continuous disclosure about Nortel available to investors; the shareholders voluntarily elect to receive the settlement shares or can opt-out of the settlement; the settlement shares will be exempt from registration under the *US Securities Act of 1933*; the resale restrictions are equivalent to subsection 2.6(3) of National Instrument 45-102 *Resale of Securities*

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418. ss. 34(1)(a), 48, 61 and 76  
Multilateral Instrument 45-102 *Resale of Securities*, s. 2.6(3)

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New  
Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the  
Northwest Territories, Nunavut and the Yukon  
(the Jurisdictions)

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of Nortel Networks Corporation  
(Nortel)

## MRRS Decision Document

## Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from Nortel for a decision under the securities legislation of each of the Jurisdictions (the Legislation) that the issuance, delivery and distribution of the Settlement Shares (as defined below) pursuant to the settlement of certain pending and proposed class action lawsuits in

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Canada and the United States (as described below) be exempt from the prospectus requirements (the Prospectus Requirements) and the dealer registration requirements (the Registration Requirements) of the Legislation (the Requested Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission (the OSC) is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 – *Definitions* and in NI 45-102 have the same meanings in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts represented by Nortel:

1. Nortel is a corporation incorporated under the laws of Canada and is a reporting issuer in each of the Jurisdictions where that concept exists.
2. Nortel is also a registrant under the United States *Securities Exchange Act of 1934*, as amended (the Exchange Act).
3. The common shares of Nortel (the Common Shares) are listed on the New York Stock Exchange (NYSE) and the Toronto Stock Exchange (TSX). As at July 25, 2006, 4,335,727,064 Common Shares were issued and outstanding.
4. On February 15, 2001, Nortel publicly announced revised financial guidance for its 2001 fiscal year and for the first quarter of 2001. Subsequent to that announcement, multiple putative class actions on behalf of persons who purchased Common Shares or call options on Common Shares or wrote (sold) put options on Common Shares (collectively, the Nortel Securities) during the period October 24, 2000 through February 15, 2001, inclusive (the Nortel I Class Period), were filed in the United States against Nortel and certain of its then current officers and directors alleging violations of sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder. These actions were subsequently consolidated by order of the United States District Court for the Southern District of New York (the U.S. Court), entered October 16, 2001, under the caption *In re Nortel Networks Corp. Securities Litigation*,

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Consolidated Civil Action No. 01 Civ. 1855 (RMB), and a second amended consolidated class action complaint was filed in that action on January 18, 2002 (the Nortel I U.S. Action). The Nortel I U.S. Action was certified by the U.S. Court as a class action on September 5, 2003.

5. The Nortel I U.S. Action alleged that Nortel, with the participation of the other defendants, made materially false and misleading statements and omissions in Nortel's financial reports, in violation of United States generally accepted accounting principles, and in other public documents disseminated to the investing public by Nortel, thereby artificially inflating the price of the Nortel Securities and damaging persons and entities who purchased Common Shares or call options on Common Shares or wrote (sold) put options on Common Shares during the Nortel I Class Period, including, but not limited to those persons who traded in Nortel Securities on the NYSE and/or TSX (other than Nortel, the other defendants and certain other specifically excluded persons) (the Nortel I U.S. Class).
6. The Nortel I U.S. Action also alleged that during the Nortel I Class Period, Nortel with the participation of the other defendants materially misrepresented Nortel's revenues and earnings in public reports and statements disseminated to the investing public. The Nortel I U.S. Action further alleged that these material misrepresentations resulted in Nortel's issuance of financial statements, and other public statements regarding Nortel's future business prospects, which violated sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder. The Nortel I U.S. Action further alleged that, as a result of Nortel's and the other defendants' materially false and misleading statements, the price of Common Shares was artificially inflated during the Nortel I Class Period, thereby causing damage to members of the Nortel I U.S. Class.
7. Beginning on February 22, 2001, the following separate putative class proceedings were filed in Québec, British Columbia and Ontario, and subsequently certified for settlement purposes as class actions, raising allegations and claims against Nortel (and in the case of the actions in British Columbia and Ontario also against a group of other defendants) under Canadian law similar to those made in the Nortel I U.S. Action on behalf of persons resident in those provinces (and in the case of the Ontario Frohlinger Action (as defined below) also on behalf of persons resident in the other provinces of Canada) who purchased Common Shares or call options on Common Shares or wrote (sold) put options on Common Shares during the Nortel I Class Period (other than Nortel, the other defendants and certain other specifically excluded persons) (the Nortel I Canadian Class, together with the Nortel I U.S. Class, the Nortel I Class):

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- (i) *Association de Protection des Épargnants et Investisseurs du Québec v. Corporation Nortel Networks*, Superior Court of Québec, District of Montréal, No: 500-06-000126-017 (the Québec A.P.E.I.Q. Action);
  - (ii) *Frohlinger v. Nortel Networks Corporation et al.*, Ontario Superior Court of Justice, Court File No. 02-CL-4605 (Ont. Sup. Ct. J.)(the Ontario Frohlinger Action); and
  - (iii) *Jeffery et al. v. Nortel Networks Corporation et al.*, Supreme Court of British Columbia, Vancouver Registry Court File No. S015159 (B.C.S.C.) (the B.C. Jeffery Action, collectively with the Québec A.P.E.I.Q. Action and the Ontario Frohlinger Action, the Nortel I Canadian Actions, and together with the Nortel I U.S. Action, the Nortel I Actions).
8. On March 17, 2004, Nortel publicly announced that it was likely that it would need to revise its previously announced unaudited financial results for the year ended December 31, 2003, and the results reported in certain of its quarterly reports for 2003, and to restate its previously filed financial results for one or more earlier periods. Subsequent to that announcement, multiple putative class actions on behalf of persons who purchased Common Shares or call options on Common Shares or wrote (sold) put options on Common Shares during the period between April 24, 2003 through April 27, 2004, inclusive (the Nortel II Class Period), were filed in the United States against Nortel and certain of its current and former directors and officers alleging violations of sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder. These actions were subsequently consolidated by order of the U.S. Court, entered June 30, 2004, under the caption *In re Nortel Networks Corp. Securities Litigation*, Master File No. 04 Civ. 2115 (LAP), and a consolidated class action complaint and a second amended consolidated class action complaint were filed in that action, respectively on September 10, 2004 and September 16, 2005 (the Nortel II U.S. Action).
9. The Nortel II U.S. Action alleged that Nortel, with the participation of the other defendants, perpetrated a fraud on the investing public by improperly accounting for Nortel's reserve accounts, reversing millions of dollars into income to make the market believe that Nortel had returned to profitability, when, in fact, it had not. The Nortel II U.S. Action further alleged that the members of the audit committee of Nortel's board of directors violated section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by issuing materially false and misleading statements during the Nortel II Class Period in a scheme to artificially inflate the value of Nortel's publicly-traded securities.

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10. In connection with the Settlement (as defined below), Nortel and the other defendants in the Nortel II U.S. Action will stipulate that the class with respect thereto include all persons who purchased Common Shares or call options on Common Shares or wrote (sold) put options on Common Shares during the Nortel II Class Period and who suffered damages thereby, including, but not limited to those persons or entities who traded in Nortel Securities on the NYSE and/or the TSX (other than Nortel, the other defendants and certain other specifically excluded persons) (the Nortel II U.S. Class).
11. Beginning on February 18, 2005, the following separate putative class proceedings were filed in Québec and Ontario, and subsequently certified for settlement purposes as class actions, raising allegations and claims against Nortel and the other defendants under Canadian law similar to those made in the Nortel II U.S. Action on behalf of persons resident in those provinces (and in the case of the Ontario Gallardi Action (as defined below) also on behalf of persons resident in the other provinces of Canada) who purchased Common Shares or call options on Common Shares or wrote (sold) put options on Common Shares during the Nortel II Class Period (other than Nortel, the other defendants and certain other specifically excluded persons (the Nortel II Canadian Class, and together with the Nortel II U.S. Class, the Nortel II Class)):
  - (i) *Skarstedt v. Corporation Nortel Networks*, Superior Court of Québec, District of Montréal, No: 500-06-000277-059 (the Québec Skarstedt Action); and
  - (ii) *Gallardi v. Nortel Networks Corporation et al.*, Ontario Superior Court of Justice, Court File No. 05-CV-285606CP (Ont. Sup. Ct. J.) (the Ontario Gallardi Action, collectively with the Québec Skarstedt Action, the Nortel II Canadian Actions, and together with the Nortel II U.S. Action, the Nortel II Actions).
12. On June 20, 2006, Nortel entered into stipulations and agreements of settlement settling the claims of the plaintiffs against Nortel and the other defendants and releasing and discharging them in respect of each of the Nortel I U.S. Action and the Nortel II U.S. Action (collectively, the U.S. Settlement Agreements). Effective as of the same day, Nortel entered into settlement agreements and confirmations of stipulation and agreement of settlement settling the claims against Nortel and the other defendants and releasing and discharging them in respect of each of the Nortel I Canadian Actions and the Nortel II Canadian Actions by adopting the terms of settlement set forth in the applicable U.S. Settlement Agreements (collectively, the Canadian Settlement Agreements, and together with the U.S. Settlement Agreements, the

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Settlement Agreements and individually, a Settlement Agreement, and the global compromise and settlement of all of the Nortel Actions provided for in the Settlement Agreements, the Settlement). Each Settlement Agreement provides that the settlement contemplated thereunder is conditional on, among other things, the approval of the Settlement by each of the respective courts in the Nortel I Actions and the Nortel II Actions (collectively, the Nortel Actions and, individually, a Nortel Action) (as discussed below).

13. Each Settlement Agreement was entered into by Nortel on the basis that, among other things, it and the other defendants deny any wrongdoing and that such Settlement Agreement shall not constitute an admission or concession on the part of any defendant in respect to any claim, liability or wrongdoing.
14. Subject to the terms of the Settlement Agreements, Nortel and its insurers, as applicable, have agreed to contribute the following to a settlement fund (the Settlement Fund) for distribution to members (collectively, the Class Members) of the Nortel I Class and the Nortel II Class who do not exclude themselves therefrom (collectively, the Nortel Classes) and who submit a timely and valid proof of claim (Authorized Claimants):
  - (i) a cash payment by Nortel in the amount of U.S.\$575,000,000 plus related interest of approximately U.S.\$5,000,000;
  - (ii) the issuance by Nortel of a total of 628,667,750 Common Shares, as such shares may be adjusted prior to the issuance thereof pursuant to the terms of the Settlement Agreements (as described below) (the Settlement Shares), representing approximately 14.5% of the current outstanding Common Shares;
  - (iii) the contribution by Nortel of one-half of any actual recovery it receives in the existing action commenced by it in the Ontario Superior Court of Justice against Frank Dunn, Douglas Beatty and Michael Gollogly, former senior officers of Nortel who were terminated for cause in April 2004, seeking the return of payments made to them under Nortel's bonus plan in 2003; and
  - (iv) the contribution by Nortel's insurers of U.S.\$228,500,000.
15. Under the terms of the Settlement Agreements, until the date or dates of issuance of the Settlement Shares, the Settlement Shares are subject to appropriate adjustments to account for any stock splits, stock consolidations, stock dividends, return of capital, extraordinary distributions, recapitalization, sale of all or substantially all of Nortel's assets or any conversion or exchange

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of the outstanding Common Shares into other shares, securities or property resulting from an amalgamation or merger.

16. At Nortel's annual and special meeting of shareholders held on June 29, 2006, Nortel's shareholders adopted a special resolution approving an amendment to Nortel's restated articles of incorporation to consolidate its issued and outstanding Common Shares on the basis of a ratio within the range of one post-consolidation Common Share for every four pre-consolidation Common Shares to one post-consolidation Common Share for every ten pre-consolidation Common Shares, with the ratio to be selected and implemented by Nortel's board of directors, if at all, any time prior to April 11, 2007 (the Consolidation). If the Consolidation is implemented prior to the issuance of the Settlement Shares, the number of Settlement Shares will be adjusted downward on the basis of the Consolidation ratio selected by Nortel's board of directors.
17. Nortel is also obligated under the Settlement Agreements to adopt certain corporate governance provisions.
18. Lead and representative plaintiffs' counsel (Plaintiffs' Counsel) in respect of the Nortel Actions have made or will make applications before the respective courts for awards from the Settlement Fund:
  - (i) of attorneys' fees in respect of the prosecution of such actions, payable in cash and Settlement Shares in an amount not to exceed, in the case of the Nortel I Action, 9.9% of such portion of the Settlement Fund payable to members of the Nortel I Class and, in the case of the Nortel II Action, 9.65% of such portion of the Settlement Fund payable to members of the Nortel II Class; and
  - (ii) for reimbursement in cash of expenses incurred in the prosecution of such actions.
19. The amount and form of awards of attorneys' fees to Plaintiffs' Counsel from the Settlement Fund will be determined by the applicable courts.
20. Notice of the Settlement to Class Members, both as to the content and manner of notice, has been approved by order of each of the respective courts. The respective court orders require the claims administrator for the Settlement, The Garden City Group, Inc., to send by mail the long form notice and proof of claim form approved by the courts to all Class Members who can be reasonably identified. Publication in various Canadian and U.S. newspapers of

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the approved summary notices of the Settlement has also been ordered by the various courts.

21. Pursuant to the Settlement Agreements, the Settlement Shares must be freely tradable upon receipt by the Authorized Claimants and Plaintiffs' Counsel, subject to (i) the approvals required under U.S. state securities or "blue sky" laws; (ii) such limitations on resale as may be applicable under U.S. securities laws to "affiliates" of Nortel within the meaning of United States federal securities laws; and (iii) such limitations on resale that are substantially equivalent to those set forth in subsection 2.6(3) of National Instrument 45-102 – *Resale of Securities* (NI 45-102). Nortel is also obligated, at the time of issuance and delivery, to list the Settlement Shares on the TSX and the NYSE.
22. Nortel proposes to rely on the exemption from registration set forth in section 3(a)(10) (the Section 3(a)(10) Exemption) under the United States *Securities Act of 1933* (the U.S. Securities Act) to issue, deliver and distribute the Settlement Shares to Authorized Claimants and Plaintiffs' Counsel. The Section 3(a)(10) Exemption exempts from registration under the U.S. Securities Act offers and sales of securities that are exchanged for securities, claims or property interests. The exemption requires, in relevant part, that a court must approve the fairness of the terms and conditions of the exchange to those to whom the securities are to be issued. The reviewing court must hold a hearing before approving the fairness of the transaction, must be expressly authorized by law to hold the fairness hearing and must be advised before the hearing that the issuer will rely on the Section 3(a)(10) Exemption based on the court's approval of the transaction.
23. Prior to the issuance of the Settlement Shares, Nortel intends to make an application to each of the TSX and the NYSE to list the Settlement Shares on such exchanges and provide all notices and obtain all required approvals therefrom to permit the issuance and additional listing of such shares on such stock exchanges (subject, to the extent applicable, to official notice of such issuance).
24. In order for the Settlement to become effective, the Settlement must be approved by the applicable court in which the related Nortel Action is pending. The dates set for such court hearings are as follows:
  - (i) by the U.S. Court in respect of the Nortel I U.S. Action and Nortel II U.S. Action on October 26, 2006;
  - (ii) by the Ontario Superior Court of Justice in respect of the Ontario Frohlinger Action and the Ontario Gallardi Action on November 6, 2006;

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(iii) by the Superior Court of Québec in respect of the Québec A.P.E.I.Q. Action and the Québec Skarstedt Action on November 16, 2006; and

(iv) by the Supreme Court of British Columbia in respect of the B.C. Jeffery Action on November 27, 2006.

25. In order to receive payment from the Settlement Fund, a Class Member must submit a proof of claim form to the applicable court by no later than November 20, 2006. Class Members who do not wish to receive payment from the Settlement Fund, but wish to preserve any right they may have to bring an action against Nortel and the other defendants can request to be excluded from the applicable class (also referred to as “opting out”). The deadline to opt out, as set by the applicable courts, is September 19, 2006. Prior to the opt-out deadline passing and proof of claim process being completed, it is not possible to determine the number or jurisdictions of residency of Authorized Claimants who will be entitled to receive Settlement Shares under terms of the Settlement. However, Nortel believes that it is likely that there will be one or more Authorized Claimants residing in each of the Jurisdictions.
26. Each Authorized Claimant will receive a number of Settlement Shares equivalent to his or her pro rata share of the Settlement Shares calculated by the administrator of the Settlement pursuant to the provisions of the Settlement Agreements.
27. Pursuant to the Settlement Agreements, any balance remaining in the Settlement Fund after distribution as described above will be contributed proportionally to United States and Canadian non-sectarian, not-for-profit organizations designated by Plaintiffs’ Counsel (collectively, the Designated Charities) (including the issuance of any such Settlement Shares by Nortel to such organizations) after notice to the applicable courts and subject to the direction, if any, by such courts. (The Authorized Claimants, Plaintiffs’ Counsel and the Designated Charities are collectively referred to herein as Authorized Recipients).
28. A distribution of securities outside of a Jurisdiction may also be considered to be a distribution of securities in the Jurisdiction depending on the connecting factors of the distribution to the Jurisdiction. Due to Nortel’s connection to the Canadian capital markets and the likelihood that the Settlement Shares issued to Authorized Recipients located outside of the Jurisdictions, if sold through the facilities of the TSX or the NYSE, may “flow back” into Canada, Nortel is seeking relief from the Prospectus Requirements and the Registration Requirements for the issuance, delivery and distribution of all the Settlement

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Shares issued pursuant to the Settlement to ensure compliance with the Legislation.

### **Decision**

29. Each of the Decision Makers is satisfied that the tests contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

30. The decision of the Decision Makers under the Legislation is that:

- (i) the Requested Relief is granted; and
- (ii) the first trade in the Jurisdictions in Settlement Shares acquired pursuant to this decision will be a distribution or primary distribution to the public, as the case may be, unless the conditions in subsection 2.6(3) of NI 45-102 are satisfied.

Susan Wolburgh Jenah  
Ontario Securities Commission

Harold P. Hands  
Ontario Securities Commission