# Ontario makes a call, U.S. on hold

By JEFF BUCKSTEIN

The Court of Appeal for Ontario has denied leave to appeal a controversial 2015 Ontario Superior Court of Justice decision which ruled, simultaneously with a U.S. court, that the remaining US$7.3 billion in assets from bankrupt Nortel Networks must be distributed globally on a pro-rata basis.

"Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense and an erosion of creditor recoveries," wrote justices Alexandra Hoy, Robert Blair and Sarah Pepall in *Nortel Networks Corp. (Re)* 2016 ONCA 332.

However, an appeal is still pending in the United States, with unknown consequences internationally if the pro-rata distribution is overturned in that country.

"I think it's a good decision and a timely decision, and an appropriate decision, and it brings the entire proceedings one step closer, hopefully, to its final destination — its conclusion," said Vern Krishna, counsel for TaxChambers LLP in Toronto.

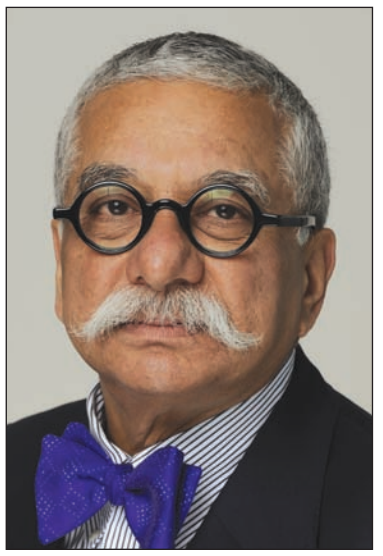
"This has been going on for a very long time. The legal fees have been considerable. And I'm sure people would like to see this resolved in the best possible manner," he added.

Diane Urquhart, an independent financial analyst in Mississauga, Ont., said she was pleased with the Ontario Court of Appeal decision, noting that it halts the escalating costs of the litigation process, at least in Canada. She claimed that "unacceptably high" bankruptcy professional fees of roughly US$1.8 billion have already been paid worldwide, of which US$507 million is attributable to Canada.

Urquhart said that approaches the fees paid with respect to the Lehman Brothers bankruptcy proceedings, which began in 2008 (U.S. news sources have pegged those at more than $2 billion), in spite of Lehman Brothers having had a much higher US$691 billion in global assets compared to Nortel's assets of US$10.5 billion.

"This was and is a very complex resolution of a multi-jurisdictional problem that has extended over many years," said Krishna. "So although the legal fees are without doubt high, we have to understand that they are a function of the complexity and the multi-jurisdictional dimensions of the litigation."

The Ontario Court of Appeal decision stated that since Nortel filed for insolvency protection under the *Companies Creditors' Arrangement Act* (CCAA) protection in January 2009, "well in excess" of U.S. $1 billion has been incurred in costs, and more than 6,800 former employees or pensioners from Nortel have died.



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Urquhart said the legal proceedings that have dragged out for years have left surviving long-term disabled ex-employees from Nortel trying to live on CPP disability income of $15,490 a year.

Monique Jilesen, a partner with the law firm Lenczner Slaght Royce Smith Griffin LLP in Toronto, said the Ontario appeal court's decision is not surprising, given the complexity of the case, and the detailed reasons outlined in the original ruling by Justice Frank Newbould of the Ontario Superior Court of Justice in *Nortel Networks Corp. (Re)* [2015] O.J. No. 2440.

Moreover, the test for leave is a challenging one to meet, she explained, particularly as this involved a case under the CCAA. Cases under the CCAA must pass a high bar and rarely qualify for leave because a new court challenge could seriously impede the existing process that has already been worked out.

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The Court of Appeal noted that the fact this was a liquidation rather than a restructuring under the CCAA did not change the test for the leave, Jilesen added.

"Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties," the judges said in their decision.

The analysis portion of the justices' decision noted the long-term lack of success in trying to come up with a legal solution to satisfy the parties. It even quoted a 2011 decision in *Nortel Networks, Inc.*, 669 F.3d 128, by the U.S. Third Circuit Court of Appeals in which the judge admonished the parties by writing that "attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions made in the courtrooms."

Justices Hoy, Blair and Pepall also said that although there are asymmetric appeal routes in Canada and the U.S., they did not accept that separate appeal proceedings in the U.S. diminish the need to bring the legal proceedings in Canada to a conclusion.

"In our view, any additional step is a barrier to progress," they wrote.

It is possible to appeal to the Supreme Court of Canada, within a 60-day period, said David Ullmann, a partner with Blaney McMurtry LLP in Toronto.

"It would be in the nature of a review of the process, rather than in the nature of the merits of the case. What you're doing is seeing whether the judges have exceeded their authority or didn't properly consider the evidence, or in any other way, the judges made a mistake in how they exercised their jurisdiction. And that's pretty narrow," he explained.

However, the matter is not closed in the U.S. because the original pro-rata distribution decision by Judge Kevin Gross of the United States Bankruptcy Court for the District of Delaware [Chapter 11 Case No. 09-10138 (KG)] was appealed to federal court in Delaware.

In an unusual move, in response to that appeal, Chief Judge Leonard Stark of the United States District Court for the District of Delaware didn't render a decision himself, but rather asked a higher court, the Court of Appeals for the Third Circuit, to hear this case on an expedited basis.

"The issues merit careful consideration — a process this court is not in a position to complete for at least several more months. Moreover, this court is not empowered to provide a final, non-appealable resolution of the issues. Only a higher court can do so," wrote Judge Stark.

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He also deliberated on the human suffering this case has caused as it has moved through the international courts.

"The ongoing global litigation directed to allocation of the escrow funds has caused a massive, ongoing dissipation of the escrow funds — all while tens of thousands of creditors have suffered, lacking access to any portion of the funds," Judge Stark said in his decision.

He noted that nearly 6,000 pensioners had already died without receiving a penny, and that tens of thousands of disabled and retired workers still await any distribution.

"Finally both the Canadian and U.S. appeal courts are recognizing the devastating harm to long-term disabled and other former employees when bankruptcy professionals are permitted to litigate endlessly at fees of up to $1,000 per hour," said Urquhart.

"Current court efforts to expedite the appeals in the Nortel bankruptcy are welcome, but quite frankly they are too late in the eighth year of the proceedings," she added.

If the U.S. decision is overturned on appeal, said Krishna, "it will throw a monkey wrench into the works. I cannot even begin to speculate as to what would happen if the two sides came to different conclusions, because it is unprecedented — meaning we have no guidelines to go with."

But, Krishna noted, that is a risk the two countries took by making this a simultaneous, multi-jurisdictional joint hearing.

"It would be unfortunate if for whatever reason, the U.S. court didn't come to the same result [and then] the whole thing went back to square one," said Jilesen. "They're closer to finality now. But that U.S. piece has to get completed first."

Looking forward, Urquhart wants the Nortel bankruptcy to result in a legacy of procedural reform for future international bankruptcy settlements.

"The Nortel disableds' injustice should not be left as a black mark in Canadian history, where powerful interests trounced the vulnerable and everyone looked the other way," she said.

Law firms for several of the parties involved in this case — Torys LLP representing the U.S. debtors, Gowling WLG International Limited for the Canadian debtors, and McCarthy Tétrault LLP for the Canadian Creditors' Committee, were contacted, but did not wish to comment on this decision.

**"I'm concerned by that. If the U.S. were to come up with a different decision than Canada, that is the worst possible outcome, because then the whole matter is left unresolved. Canada has ruled one way on the principal of pro-rata distribution, with the higher courts having backed this up, and the U.S. [could] potentially reject this in its higher courts."**

*Diane Urquhart, financial analyst*