

# Nortel restructuring saga drags on

BY JIM MIDDLEMISS

For Law Times

Despite 124 monitor reports, litigation filings around the world, and seven years of wrangling, Nortel remains mired in creditor protection with no real end in sight.

That's not to say the restructuring has been a failure.

Rather, "it's been a victim of its own success," observes Mark Zigler, a pensions lawyer at Koskie Minsky LLP who represents the Canadian Creditors' Committee and Nortel employees in Canada.

Jeffrey Carhart, a partner in the insolvency group at Miller Thomson LLP representing a Canadian bank, added the restructuring professionals "were very successful in creating a big pot."

"I was shocked at how much money there was," he says.

However, that has had a downside. Thornton Grout Finnigan LLP partner D.J. Miller, who represents the Nortel United Kingdom pensioners, said "the higher-than-anticipated sale proceeds from the residual IP seems to have had the effect of creating five times the incentive to fight over how the proceeds would be allocated among the various Nortel entities."

What started off as an attempt to restructure the complex tech giant, which at one point had 143 subsidiaries around the world, quickly devolved into a sales process of Nortel's extensive patent portfolio and a windup. The company was simply too integrated and too complicated to restructure as a going concern.

However, it was successfully sold in parts. The restructuring got a big boost from a US\$4.5-billion bid from Rockstar Bidco, LP, which bought a key Nortel patent portfolio. Sales involving business lines generated another US\$2.8 billion available for distribution.

Project Copperhead — as the Nortel restructuring has been dubbed since its infancy — became a cash cow. Now, it could more appropriately be described



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as Project Entrenched Warfare over the US\$7.3 billion in "lock-box funds" generated by the sale of the Nortel assets, and how those should be divided among the various corporate entities, impacting how Nortel's carcass is carved up among creditors and bondholders.

A decision over how allocation would be made was put off early in the case to prevent any stalemate that would impact the ability of financial advisors to maximize assets. When there was no money in the lock-box and the threat of bleeding assets, parties had an incentive to arrive at a consensus earlier in the game.

Instead, the cross-border restructuring has become a three-headed viper and a battle among debtors in the United States, Canada, and Europe, the Middle East and Africa, each one claiming it was entitled to a greater share of the funds. Zigler called it a "three-cornered hat. It takes three parties to resolve anything."

At its peak, Nortel employed 93,000 people.

Many of them are now pensioners caught up in the fracas — about 33,000 of them in the U.K. and 20,000 in Canada. Since the filing in 2009, thousands more have died. Pensioners have effectively become hostages to various Nortel bondholders duking it out over how the proceeds should be split. At times the pensioners have been on opposite sides of the fight because of geography and corporate structures.

The Nortel U.K. pension plan,

for example, was underfunded at the time of filing by about US\$3.2 billion. There are parties that would like to foist such liability on to government shoulders.

Pensioners can take some solace from the historical May 2015 rulings from Ontario Justice Frank Newbould and Judge Kevin Gross of the U.S. Bankruptcy Court for the District of Delaware following a gruelling trial spread out over 24 days. The judges ruled that the lock-box proceeds should be split on a *pro rata* basis, rejecting arguments from various debtor groups, and siding with arguments put forward by the U.K. pensioner group, which was also an alternative argument advocated by the Canadian pensioners.

At the centre of the trial was the interpretation of a Master Research and Development Agreement, which determined how Nortel would divvy up cash among its various entities.

Research and development took place across the globe and drove sales across the spectrum of companies, raising questions around transfer pricing. As well, there were questions over which entity actually owned the IP that was sold, since the bonds attached to certain Nortel companies.

In the end, the judges opted for a *pro rata* distribution, rather than linking funds back to specific entities.

Doing so, Newbould wrote, would "unjustly enrich" Nortel Networks Limited, which held the registered patents, at the ex-

pense of the other Nortel entities. "This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise," said Newbould.

For his part, Judge Gross held that "territorial wrangling significantly diminishes value for stakeholders in a global insolvency involving a highly integrated multinational enterprise whose assets are entangled, and ought not to be condoned or rewarded."

In April, the next round of battle begins in a Delaware court. That's when an appeal of Gross's ruling is slated to be heard.

Meanwhile, in Ontario, lawyers await word from the Ontario Court of Appeal on whether or not it will grant leave to Newbould's ruling. **LT**

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